

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MICAH FIALKA-FELDMAN,

Plaintiff,

v.

HONORABLE PATRICK J. DUGGAN

No. 08-14922

OAKLAND UNIVERSITY BOARD OF
TRUSTEES, ET AL,

Defendants.
_____ /

HEARING ON MOTIONS

Detroit, Michigan -- Thursday, December 17, 2009

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Hearing on Motions
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Detroit, Michigan
Thursday, December 17, 2009
2:45 p.m.

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THE CLERK: Civil action number 08-14922,
Fialka-Feldman versus Oakland County Board of Trustees,
Et Al.

THE COURT: All right. Identify yourselves, for
the record, please.

MR. DAVIS: Chris Davis, for the plaintiff, Your
Honor, from Michigan Protection Advocacy Service, on
behalf of the plaintiff.

MR. BOONIN: Robert Boonin, of Butzel Long, on
behalf of defendants.

THE COURT: This is Defendant's Motion?

MR. BOONIN: Pardon me?

THE COURT: This is Defendant's Motion.

MR. BOONIN: Cross motions, Your Honor, whichever
way.

THE COURT: Whatever you want to handle it, I
don't care. Let's go with defendant's first and you
go.

MOTION TO DISMISS DISPARATE IMPACT CLAIM

ARGUMENT BY MR. BOONIN

MR. BOONIN: Thank you, Your Honor, and good

1 afternoon.

2 I do believe that the plaintiff has agreed to
3 dismiss counts one and six regarding disparate impact.
4 It's my understanding of their response, they did not
5 respond directly to our motion on that.

6 **THE COURT:** Hold on. You agree?

7 **RESPONSE BY MR. DAVIS**

8 **MR. DAVIS:** That is correct. The disparate impact
9 claims, we agree to default dismissal at this time.

10 **MOTION FOR SUMMARY JUDGMENT**

11 **ARGUMENT BY MR. BOONIN**

12 **MR. BOONIN:** So, that's two out of six. I'll then
13 therefore focus on the remainder of the complaint.

14 Your Honor, I know that you've studied the briefs.
15 What this case is not about, this case is not about an
16 accommodation of a handicap or a disability.

17 This case is, instead, an attempt for the
18 plaintiff to be allowed to live in the University's
19 dorms, despite the fact that he does not meet the
20 eligibility requirements to reside in those dorms.

21 He wants a preference allowed to him over all
22 other non-degree pursuing students because of his
23 disability. He wants this Court to legislate that his
24 vision of inclusion is better public policy.

25 He wants to fundamentally alter the nature and

1 purposes of the dorms provided by the University. None
2 of these quests are permitted or authorized by the Fair
3 Housing Act, by Section 504 or by the Americans with
4 Disabilities Act.

5 This is a case that boils down to his claims for
6 accommodation and disparate treatment. Those claims
7 fail because he is not otherwise qualified with or
8 without an accommodation. That's the extent of the
9 analysis that's required for this Court to grant our
10 motion.

11 Now, let's understand what's really involved here.
12 Plaintiff is admitted to only one program at Oakland
13 University, the OPTIONS Program. And that's a pilot
14 program for persons with cognitive impairments.
15 There's no dispute about that.

16 And there's no dispute that he's not been admitted
17 into the regular academic program. There is absolutely
18 no dispute on those critical issues.

19 **THE COURT:** Excuse me, why has he not been in the
20 regular program?

21 **MR. BOONIN:** He never applied.

22 **THE COURT:** Well, do you really believe he could
23 participate in a regular program?

24 **MR. BOONIN:** Well, we don't know that. One of the
25 OPTIONS, former OPTIONS participants did apply and did

1 get admitted. But it's not necessarily because of
2 one's disability that they're not able to get in.
3 There is essays that one has to write. There's tests
4 that they have to take. There are many, many
5 non-disabled people who are not eligible for admission
6 at the University.

7 **THE COURT:** What if his inability to get into the
8 regular program is because of his disability?

9 **MR. BOONIN:** Well, we're going to have to lead to
10 that conclusion. We know that he's not a student. And
11 presumably it is his disability that is an apparent for
12 him to pursue it; but that does not conclusively mean
13 that if he weren't disabled, that he would be in the
14 University, we do not know that.

15 The point is, though, he has never even applied to
16 be in the University to try to compete on that
17 platform. So, there's no dispute about the fact that
18 he's not been admitted to that program.

19 Thus, his rights under the Fair Housing Act, under
20 Section 504, and under the ADA, are only with regard to
21 the right to the program to which he's been admitted,
22 and that's the OPTIONS Program.

23 There's no dispute the housing benefit, that the
24 University provides for some people, is not a part of
25 the OPTIONS Program. He's only entitled to the

1 benefits and the perks of the OPTIONS Program.

2 The only aspect of the proposal for the OPTIONS
3 that was approved by the dean and submitted to the
4 Provost and processed by the University, was that there
5 was -- a certain curriculum was going to be provided to
6 the participants and a certain fee would be charged.
7 There's nothing in the proposal that was approved. The
8 part of the proposal that was approved that discusses
9 housing.

10 Yet, the plaintiff seeks to have this benefit,
11 which is not a part of the OPTIONS Program and which is
12 not available to other non-degree pursuing students.
13 For this reason, and this reason alone, his claims
14 fail.

15 None of the laws at issue here require the
16 University to make available services not available to
17 OPTIONS participants, it's as clear as that. This
18 includes housing, but it also includes other services
19 to which he's not entitled. He's not entitled to
20 financial aid. He's not entitled to student
21 employment. Use of the academic skill center. Use of
22 the student technology center, those are just a few.

23 Seeking a benefit of a program to which you're not
24 admitted into is an admirable goal, perhaps, but it's
25 not a legal requirement.

1 It reminds me of just what my daughter went
2 through. She was a student at the University of
3 Michigan. She went there for undergraduate school and
4 graduate school. She was not allowed to live in the
5 law quad. She was not a part of the law school
6 program. The law quad is reserved for law students.
7 She was only entitled to live in the dorms to which
8 students like her were permitted to live as part of her
9 program. She can enjoy those programs to which she was
10 a part of.

11 OPTIONS participants at this University are the
12 same. They can only enjoy the benefits of the programs
13 that they're a part of. Housing is not available to
14 them, under the terms of their program, just as it's
15 not available to most other non-degree pursuing people
16 at the University.

17 Plaintiff attempts to twist around this reality by
18 saying that he's a student. There are certainly many
19 types of students at the University; but not all
20 students are entitled to the same benefits. It depends
21 on the program that they're in.

22 Housing, again, is reserved for those enrolled
23 students who are pursuing degrees. That has been the
24 practice at the University for so long as anyone can
25 remember. The reason has been consistently presented

1 throughout this case.

2 As Vice President Snyder testified, and she is
3 here today, housing is designed to facilitate a
4 student's quest for a degree to make that happen.
5 That's the purpose of housing. It's an intracal part
6 of the academic program to facilitate, to make the
7 degree-seeking quest successful.

8 The dorms do have special --

9 **THE COURT:** Why might it not help in the academic,
10 attempted academic achievements of the OPTIONS Program?
11 Why do they have to be seeking a degree for it to help,
12 for the housing to help?

13 **MR. BOONIN:** The focus of a housing program is to
14 work with the students that have the common denominator
15 of seeking a degree.

16 The focus of RA's, resident advisers, are trained
17 to handle, are students who are dealing with, "How are
18 they going to deal with the professor? How do they
19 deal with the fact they're not doing well in class?
20 What kind of study aides are available to them to
21 counsel them?" The dorms are not set up to deal with
22 people that don't have that common interest in mind.

23 There are special dorms for freshmen, so that we
24 can deal with the common issues unique to freshmen and
25 to help them stay in school, be successful their

1 freshman year so that they become sophomores, juniors
2 and seniors and finish that degree. There are special
3 dorms for business students. There are special dorms
4 for nursing students. There are special dorms for
5 honor students because it's all part of the fundamental
6 part of the academic program to help them get a degree.

7 If Mr. Fialka-Feldman were in the dorms, then we
8 would have someone who does not have that common
9 purpose. The RA's are not trained to deal with those
10 issues and does not have the common, even though he may
11 wish to share that common purpose, in reality, he does
12 not have the common motivation factors, "Am I going to
13 graduate? Am I going to get a good grade? Am I going
14 to succeed in the Academic environment?" That's what
15 the dorms are set up to do. They're set up to support
16 the academic environment.

17 OPTIONS students just don't have that. OPTIONS
18 students don't have to get grades. OPTIONS students
19 don't carry a GPA. OPTIONS students don't get credit
20 for their participation. The goal of that program is
21 totally different from the goal of the other academic
22 program.

23 **THE COURT:** Are you suggesting that an RA might
24 have difficulties dealing with an individual OPTIONS
25 student?

1 **MR. BOONIN:** Well, I'm saying the RA is not there
2 to deal with people who are not pursuing degrees.

3 **THE COURT:** I understand that. But if someone
4 were placed there, don't you think the RA can deal with
5 that in a just situation?

6 **MR. BOONIN:** Well, I don't know. The RA certainly
7 is not trained to do that, to deal with any special
8 needs. But we never get to that issue if the person is
9 not a student.

10 The law does not require us to waive a rule for
11 participation. It requires us to modify a rule, if
12 it's necessary, for participation. But it's not the
13 handicap that we're accommodating here, it's his
14 non-student status that he's seeking for us to
15 accommodate.

16 The plaintiff is just not a part of the academic
17 program. He doesn't get that GPA. He doesn't have the
18 common interest as I've already said. The exclusion is
19 not, the exclusion from the dorms is not because of the
20 disability. The exclusion is only because he doesn't
21 have the degree-bearing commonality in place.

22 We have plenty of disabled students in the dorms.
23 We have plenty of disabled students in the University.
24 We accommodate those, but they have to otherwise meet
25 the criteria to be a student. Once you meet the

1 criteria of being a student, then we have to
2 accommodate it so that they can be successful in their
3 student quest. But they still have to meet that
4 threshold, under the law, in order for them to be in
5 the dorms. Plaintiff is just not in that category.

6 If he were admitted into the regular program, then
7 the University would certainly accommodate whatever it
8 needed to accommodate so that he could be successful.
9 But first he'd have to meet that first criteria: He
10 has to be a student. If he's a student, then we have
11 an obligation to accommodate our programs to make it
12 successful so long as it's a reasonable accommodation.

13 Because he's not in the program, he can't maintain
14 his claims of disparate treatment. He doesn't meet the
15 threshold of a prima facie case, in this case, for the
16 stated reasons. And he also cannot overcome the
17 pretext. But again, I don't think the Court ever needs
18 to get that far in the analysis.

19 A reasonable jury cannot find that he met the
20 eligibility requirements for housing, even though it's
21 not really, necessarily a jury issue under the Fair
22 Housing Act, since that could be tried directly to the
23 Court.

24 But the Court need not reach the accommodation
25 issue, which is the other issue. We have the disparate

1 treatment and we have the accommodation issue. The
2 Court need not reach the accommodation issue because
3 he's not trying to meet the eligibility requirements,
4 which is the standard in Zukle, he wants the
5 eligibility requirements waived. That's not a
6 reasonable accommodation.

7 His accommodation request fails for a number of
8 reasons. But perhaps the most obvious is that his
9 requests are not for an accommodation of his
10 disability, it's only for a wavier, an accommodation of
11 his student or non-student status. He's expressly
12 asked the University to waive that requirement. To
13 waive the requirement that he need to be one pursuing a
14 degree.

15 This case is really a repeat of what occurred in
16 Schanz, in the Eastern District of Michigan; in Wilson,
17 in the Tenth Circuit; and the Salute case in the Second
18 Circuit.

19 And all of these cases bluntly hold that such an
20 accommodation is not required under the law. In Schanz
21 it was a disabled person who wanted certain
22 creditworthiness rules to be waived by a landlord.

23 The Court said that it was his economic status
24 that he wanted to accommodate and not his disability.
25 And that he was trying to transform his financial

1 status into a handicap. "Accommodations are required
2 if they are only needed due to the handicap", the Court
3 held. If the accommodation would be needed absent, the
4 handicap, then it's not reasonable. That's what we
5 have here.

6 In Wilson, the housing in each building was only
7 made available to students, one for males and one for
8 females. The Plaintiffs were not students and
9 therefore their claims failed. "Discrimination on the
10 basis of student versus non-student status--", the
11 Court held, "--was not even actionable."

12 In Salute, Salute versus Stafford Greens, the
13 issue is whether a landlord had to allow Section Eight
14 Housing, so that those who were poor, due to their
15 handicaps, not able to go to school, due to your
16 handicap, those who were poor, due to their handicaps,
17 could have access to housing.

18 The Court of Appeals held, at page 301, that the
19 Fair Housing Act is to accommodate handicaps, not the
20 alleviation of economic disadvantages which may be
21 correlated with having handicaps. "The Fair Housing
22 Act does not elevate the rights of the handicapped poor
23 over the rights of the non-handicapped poor", the Court
24 said.

25 Here the plaintiff is asking this Court to hold

1 that the Fair Housing Act is to alleviate plaintiff's
2 student status. That's not accommodating a disability.
3 It's improper to ask this Court to elevate his rights,
4 as a disabled, continued education student, over
5 non-disabled continued education students.

6 I think the Sixth Circuit explained this issue
7 well in its decision just earlier this year in Sutton
8 versus Piper. "Accommodation is an issue--", the Court
9 held, " --when the rule in question, if left
10 unmodified, hurts handicapped people by reason, if
11 there are any, rather than by virtue of what they have
12 in common with other people, such as limited amount of
13 money to spend on housing", which was the issue there.
14 An owner only has to only lower the barriers to housing
15 that are created by the disability itself.

16 Here, it's Plaintiff's status of not being a
17 degree-pursuing student that's blocking his request.
18 Many people, who are not disabled, are not students
19 pursuing a degree; therefore his claim should fail.

20 This is also the lesson from the Supreme Court,
21 the U.S. Supreme Court, Alexander versus Choate, which
22 regarded the claim about the number of allowable days
23 someone could stay in a hospital under a Medicaid
24 Program.

25 There the state capped the number of days to 14

1 days. Rejecting the argument and allowing the State to
2 set the rule as to the maximum number of days someone
3 could get, both handicapped and non-handicapped people.

4 At 14 days the Court said, "Section 504 does not
5 require the State to alter its definition of the
6 benefit, simply to meet the reality that handicapped
7 have greater medical needs. The rule leaves both
8 handicapped and non-handicapped people with identical
9 access."

10 That's the rule at Oakland University. Both
11 non-handicapped and non-students and handicapped
12 non-students, are treated the same. Once you are a
13 student, if you are a handicap, then you are given the
14 accommodation.

15 So, in this case, Oakland "U" should not have to
16 open its dorms to OPTIONS students simply because they
17 can't meet the admission requirements. That's a wavier
18 of the admission requirements.

19 Oakland "U" is instead allowed to set the criteria
20 for who lives in the dorms. And if one meets those
21 requirements, those criteria, then it must consider
22 accommodations to make it possible for that person to
23 live in the dorms. And as the Court held on Davis, a
24 grantee, such as the University, can always preserve
25 the integrity of its program.

1 Therefore, plaintiff's request of this Court would
2 really give him a privilege or a preference over
3 non-disabled persons and that's not what the statute
4 allows. None of these statutes allow that.

5 If he gets his way, then the dorms would have to
6 be open to all students, whether they're pursuing a
7 degree or not. Anyone who wishes to claim that a
8 handicap prevents them from being a regular student and
9 so on.

10 If it were just his disability that was barring
11 him from campus housing, then all other persons who
12 were students at the University, who were not disabled,
13 would be able to live in the dorms.

14 **THE COURT:** Why do you say that? Why?

15 **MR. BOONIN:** If it were just his disability, if
16 the University's policy was to discriminate against the
17 plaintiff, and that's the only reason we have the
18 policy, then presumably all other continuing education
19 students will be eligible to live in the dorms. He's
20 being treated just like they are being treated.

21 **THE COURT:** I'm not following you. If the Court
22 were to determine, in this situation, that this
23 individual, that the University should be required to
24 waive his policy to accommodate this disabled person,
25 are you suggesting that might somehow open the

1 floodgates to non-disabled people coming in?

2 **MR. BOONIN:** Well, that means any disabled person
3 could ask to go into the dorms and have the student
4 requirement waived, when we have all the other people,
5 who are not disabled, not able to go into the dorms.

6 My point is is that if we were discriminating
7 against just people with disabilities, people because
8 of their disable status, then all these other people
9 would be allowed to be in the dorms and they're not
10 allowed to be in the dorms.

11 **THE COURT:** You stated a few minutes ago, simply
12 because he can't meet the admission's requirement, do
13 you dispute the fact that he can't meet the admission
14 requirements because of the disability?

15 **MR. BOONIN:** Your Honor, I understand that most
16 individuals with his disability would find that to be
17 challenging. I do know that an OPTIONS participant did
18 leave the OPTIONS Program and was admitted into the
19 University and if that person went to live in the
20 dorms, then they can be accommodated if they need an
21 accommodation to live in the dorms.

22 I just don't know because it is a student status.
23 We -- it's not just because of his disability that he's
24 not there, it's because he's not a part of the academic
25 program that he's not in-housing.

1 **THE COURT:** Maybe he's not a part of the academic
2 program because of his disability.

3 **MR. BOONIN:** But that elevates his disability
4 status, his student status to his disability status and
5 that's not what the Courts say what we're supposed to
6 do because there's a lot of people who are not eligible
7 for that benefit.

8 If you take it -- this is the in-spite-of argument
9 under the regulations. You know, the 504 deals with
10 this in its explanation. They say, "If you take away
11 the disability, is he qualified?" We don't know that.
12 What is needed for him to be a student with an
13 accommodation under those -- it says, "Will a person be
14 able to meet the standards of the program?"

15 He can't meet the standards of the program with an
16 accommodation because the standard is that you be a
17 student. And the law says we don't have to waive our
18 standards, we just have to make it possible for him to
19 succeed in the program and he can't show that he can
20 succeed in the program of being a student with or
21 without an accommodation.

22 **THE COURT:** Well, if it were clear to you and the
23 Court that the only reason he can't get in the regular
24 program is because of his disability and you'll
25 acknowledge that if he's in the regular program, he'd

1 be entitled to housing.

2 **MR. BOONIN:** But the thing is, "An accommodation",
3 does not make him a student, and that's the question.
4 The accommodation is not making him an eligible student
5 where you're getting grades and all that.

6 **THE COURT:** I understand that, but so what? So
7 what? If the Court were to order it to be waived for
8 this individual, how would that adversely affect the
9 University's program to allow this one individual in?
10 Based on, assuming I conclude there's a legitimate
11 reason for it, how would that affect?

12 **MR. BOONIN:** I'm sorry, based on what?

13 **THE COURT:** Let's assume that I come to the
14 conclusion that his disability is a significant reason
15 why he's not in the dorm, how would admitting him
16 adversely affect the University?

17 **MR. BOONIN:** Well, it would alter the nature of
18 that program because --

19 **THE COURT:** Because of one student?

20 **MR. BOONIN:** Well, again, it would be anyone with
21 a handicap who's not able to qualify to be a student
22 would be allowed in.

23 **THE COURT:** Not true. You know, we take
24 handicapped individuals individually. And you'll have
25 to admit that handicapped people are often given

1 preferences at work. They're allowed to do this or
2 that that the other employees aren't, to accommodate
3 their disability.

4 **MR. BOONIN:** To be successful in that program, but
5 he's not in that program.

6 **THE COURT:** Well, what's, "That program", that
7 you're talking about?

8 **MR. BOONIN:** Well, the regular academic program
9 because he's only in the OPTIONS Program.

10 **THE COURT:** And if I'm satisfied that he's not in
11 that is because of the disability, and if he were in
12 that program, he would be in the housing, why wouldn't
13 that lead to a conclusion that the disability is
14 precluding him from getting the housing?

15 **MR. BOONIN:** Well, that's just like the Court in
16 Schanz to say you, "Well, just because have your
17 disability, you can't get a job that would meet the
18 credit requirements", it elevates the disability -- the
19 economic status to a disability status and that's not
20 what the Court said you're supposed to do.

21 The accommodation is supposed to make you
22 successful in the program that you're trying to get
23 into, not to waive those requirements.

24 The HUD regulations talk about, you know, waiving
25 the requirements of the, "No pet policies." Now, if a

1 blind person, with a seeing-eye dog needs to live in
2 that apartment, you must waive it because without that,
3 the person can't live in there, but the person is
4 otherwise qualified. The accommodation doesn't upset
5 the qualification requirements.

6 If a person has a dog and they're deaf and unless
7 the dog is a hearing dog, "Sorry, that's not related to
8 your disability." That's what the HUD regulations call
9 for.

10 Even Congress has recognized that housing is not
11 an obligation for programs such as the OPTIONS Program.
12 As stated in our brief, the recent amendments to the
13 Higher Education Act provides grants to schools to
14 pilot these kinds of programs.

15 And that's what the OPTION Program is. It's a
16 brand new program. It's a pilot program. And the
17 school is trying to undertake it. Congress has said,
18 "You can have a pilot program and you may or may not
19 have housing in that program."

20 There's three ways that you can qualify for
21 grants, having housing is one of the criteria. You can
22 do that or you can do two other things, but you do not
23 have to have housing.

24 In fact, you do not have to have a program that
25 doesn't give -- that you could have a program that

1 would require the person to earn credit and to be
2 admitted, you can do that. They're very flexible about
3 it.

4 But Congress has said these types of programs, and
5 this really fits it perfectly, these types of programs
6 do not have to provide housing in order to qualify.

7 If Congress is saying that it's optional to the
8 University and it's up to the academic officials to
9 determine what's appropriate in the academic program
10 and they'll yield to that judgment, they just start
11 giving them an incentive to try something out; then I
12 don't think it would be proper for the plaintiffs to
13 ask this Court to do something that Congress
14 specifically says is within the school's discretion.

15 So, what is he really asking for? He's not only
16 asking that this Court change the housing rules, he's
17 also asking this Court to change the OPTIONS Program by
18 adding a housing component to that program. There's
19 not a need to do so. There's not a requirement to do
20 so. He can still enjoy all of the benefits of the
21 housing program -- of the OPTIONS Program, without
22 housing.

23 This Court should not redesign the housing program
24 or the OPTIONS Program, but that's what he's asking
25 this Court to do. For those reasons, we believe that

1 Summary Judgment is appropriate.

2 He's not qualified as a student. There's not a
3 reasonable accommodation that's available to them,
4 under the law. And for those reasons, we believe we're
5 entitled to Summary Judgment.

6 **THE COURT:** Thank you.

7 Response.

8 **RESPONSE BY MR. DAVIS**

9 **MR. DAVIS:** Thank you, Your Honor, both in
10 response and also presenting our own Summary Judgment
11 Motion, in this matter.

12 First of all, I'd like to thank the Court for
13 hearing this matter as quickly as it did. Micah's
14 final semester at Oakland University is going to start
15 in January of this year and I want to thank the Court
16 for hearing this matter as quickly as it did.

17 I think the defense counsel has, kind of, muddled
18 the analysis between the reasonable accommodation claim
19 and the disparate treatment claims.

20 Under reasonable accommodation analysis. First of
21 all, there is a cause for reasonable accommodation for
22 failure to reasonably accommodate a person with a
23 disability pursuant to Southeastern Community College
24 versus Davis, a (1979) case by the Supreme Court.

25 The cases relied upon by the defendant are

1 primarily Fair Housing cases, rather than reasonable
2 accommodation -- or rather than Rehab Act cases, Your
3 Honor.

4 Under Southeastern Community College, there's a
5 two-part test to determine whether it's a reasonable
6 accommodation or not. And one of the requested
7 accommodations fundamentally alters the program or
8 creates an undue burden on the program.

9 Here, this accommodation request would not
10 fundamentally alter the housing program, in this case.
11 The housing program primarily is to provide housing for
12 the students at the University. And Micah is a student
13 at the University.

14 Their own advertisements emphasize the fact that
15 the O.U. Program is to build relationships, home
16 socialization skills. It's for the convenience of the
17 students to develop independence, living-independent
18 skills. The person making a transition from living at
19 home with their parents to being adults living on their
20 own.

21 These are the purposes behind the housing program.
22 And there are certainly educational benefits to it
23 also. But the primary purpose of a program will not be
24 altered by admitting Micah into this program.

25 If this Court did an individualized analysis of

1 the situation, as is required by the Arline case and
2 the Wong case that we cited in our brief, if the Court
3 does an individualized analysis of the matter, the
4 undisputed facts, in this case, show that Micah takes
5 12 credits a semester.

6 He and his family pay tuition at the same rate as
7 undergraduate students. He is willing and able to pay
8 all housing program fees or cafeteria plan fees.
9 There's no request here to modify the economic nature
10 of the cost.

11 **THE COURT:** I assume there is a cost related to
12 the housing?

13 **MR. DAVIS:** There is a cost related to the
14 housing.

15 **THE COURT:** Supposing an individual contends that,
16 "I'm denied the housing part of it because I can't
17 afford it. And the reason I can't afford it is because
18 I'm disabled. And I'll bring in an expert who will
19 say, 'But for his disability, he could earn sufficient
20 funds to pay the cost of the housing.

21 **MR. DAVIS:** I think in that situation, Your Honor,
22 if it could be shown and proof could be presented but
23 for his disability, then I would believe the
24 accommodation would be appropriate.

25 I think part of the major problem in Schanz was

1 that you couldn't show the connection between the
2 disability and the economic hardship. And a good
3 example of this is actually the Fair Housing case that
4 we cited in our brief. It was the case of -- it's a
5 Ninth Circuit case. It's M & B Associates versus --
6 I'm drawing a blank. But I did cite it in my brief,
7 it's M & B Associates.

8 In this case, the Court was able to show, it's a
9 Ninth Circuit case. And it showed that this
10 individual, before he became disabled, had a perfect
11 credit history. Once he became disabled, his credit
12 history went to pieces and he was denied admissions
13 into housing.

14 In that case the Court, Ninth Circuit found, I'm
15 sorry if I said Sixth Circuit, it was the Ninth
16 Circuit. The Court found that there was a clear
17 connection between the disability and the financial
18 problems that this individual was having and a
19 reasonable accommodation was legitimate in that
20 circumstance.

21 **THE COURT:** What was the accommodation?

22 **MR. DAVIS:** That he would be allowed into housing,
23 I believe, with a co-signer and the credit score of his
24 would be waived.

25 **THE COURT:** They didn't say that he could come in

1 at no cost because of his inability to earned money,
2 did they?

3 **MR. DAVIS:** No, that was not the circumstance. It
4 was the credit history. He was having problems getting
5 credit history in that particular case. So, I would
6 say if there was a, "But for" situation, yes, an
7 accommodation would be merited in that circumstance.

8 Here, again, the undisputed facts of this case is
9 that he is capable of paying the housing fees. He's
10 not seeking any additional accommodations. He's
11 capable of living on his own or with a roommate, if
12 assigned a roommate, at the housing. We've submitted
13 an independent living assessment to support that, Your
14 Honor.

15 Instead of looking at an individual assessment,
16 the defendant attempts to shift the analysis and look
17 at what would happen if rules were waived for everybody
18 in continuing education.

19 First of all, I want to clear up one statement
20 that's been made and that's that all continuing
21 education students are barred from housing, that's not
22 true. English as a Second Language students are
23 allowed into housing at Oakland University.

24 Now, defendants contend that they have to be
25 matriculating students at their other post-university;

1 otherwise, they're not allowed in. But we've shown,
2 through an affidavit of at least one former student at
3 Oakland University, that she was not a matriculating
4 student at any University when she was admitted into
5 housing at Oakland University. She was a continuing
6 education student.

7 They've made numerous exceptions to this rule.
8 They try to portray this as a bright-line rule but
9 they've admitted in their own brief, and I point this
10 out on page eight of my response brief, that this rule
11 is not a bright-line rule, there's numerous exceptions
12 to this rule.

13 They allow in students from the English is a
14 Second Language Program. They allow students in
15 through Summer Camp Programs. Hospital Programs. They
16 allow students from Cooley Law School there, who aren't
17 even taking classes at Oakland University, but are
18 taking classes at Cooley down the street. Now, they
19 may be matriculating students, but they are not even
20 students of the University.

21 They have reciprocity agreements with other
22 Universities that allow students in there. Again, not
23 their own students, students at other Universities.
24 And they also allow individuals in from journalism
25 programs also. All of these are non-matriculating

1 students -- I'm sorry, some of them are
2 non-matriculating students. Some of them are not even
3 students of the University. So, this is not a
4 bright-line rule as they are trying to portray it here.

5 I also want to address the issue of the preference
6 that they're alleging here. We are not seeking a
7 preference for Micah, he is seeking his place in line
8 for housing.

9 The testimony shown in the depositions, they
10 traditionally have in the winter -- I'm sorry, in the
11 fall term, they're usually full, with a waiting list.
12 It's a first-come, first-serve situation. He's
13 requesting his place in line.

14 In the winter term, usually starting in January,
15 they have extra space through attrition. They usually
16 use up the waiting list, plus they have extra space in
17 housing. He's not being asked to jump ahead of anybody
18 in line, he's asking for his place in line. He needs
19 an accommodation that would allow him equal opportunity
20 to access housing at Oakland University.

21 Granted, it would be a different treatment, but
22 it's not preferential treatment. A good example of
23 this is a case that we did not cite in our brief and
24 that's, U.S. Airways, Incorporated versus Barnette,
25 this is a Supreme Court case of (2002). The cite to it

1 is 535 U.S. 391.

2 That was a case that involved -- it was an 88
3 Title I case on reasonable accommodation where an
4 individual with a disability was seeking, as an
5 accommodation, to access another job, but he was denied
6 that requested accommodation.

7 The Supreme Court said, "There are going to be
8 times--", every case is looked at individually and the
9 specific facts, do an individualized assessment and,
10 "--there are going to be times where preference is
11 appropriate." They found, in this case, different
12 treatment is appropriate.

13 But in this case, jumping him ahead of other
14 persons in the seniority line was preferential
15 treatment and they denied the accommodation request,
16 finding it wasn't reasonable.

17 Any accommodation does involve some different
18 treatment, but that doesn't necessarily make it
19 "preference treatment." "Preference is a practical
20 advantage given to one over other persons." That's a
21 common understanding of the word "Preference" from
22 Dictionary.com that I looked at today. That's what a
23 preference is.

24 He is simply seeking his place in line by having
25 this accommodation provided to him. Congress has

1 recognized that accommodations are absolutely
2 necessary, in many instances, in order to afford a
3 person with a disability equal opportunity.

4 And it furthers the national goal of any exclusion
5 of persons with disabilities and their exclusion from
6 the mainstream in society. And this is a national goal
7 that has been expressed by Congress consistently over
8 40 years of numerous acts of legislation.

9 I also want to point to the fact they have
10 suggested there may be some undue burden to the
11 University if this accommodation is granted.

12 The only way that any undue burden is alleged by
13 defendants is when they compare the situation to
14 completely waiving the rule and allowing all continuing
15 education students in, then they might have to build
16 housing then.

17 But the case law, under the Rehab Act, clearly
18 shows you do an individual assessment and you look at
19 Micah and what his presence in this dorm would do and
20 whether it would fundamentally alter the program.

21 Now, is it possible that other students with
22 disabilities may apply for this wavier as an
23 accommodation? Yes. But in the OPTIONS Program
24 there's only nine other students. This is not going to
25 lead to an overwhelming of the University or a

1 fundamental alteration of the program either.

2 They have put forward suggesting, without any
3 analysis, mere speculation about the fact that their
4 presence would take away from the educational aspect of
5 the program.

6 They've never presented any evidence, and there's
7 no evidence in the record, and this is undisputed, that
8 Micah's presence would take away from that academic
9 nature of the program, even if the Court were to find
10 that housing was an academic program in and of itself.
11 And that's why they tried to shift the burden away from
12 individual analysis to this broader analysis.

13 Finally, I'm going to move on to the disparate
14 treatment claims. We've brought three disparate
15 treatment claims under the Rehabilitation Act of 1973,
16 Title II of the Americans with Disability Act, as well
17 as the Fair Housing Act.

18 First of all, he is a student at the University.
19 He is an admitted student into the OPTIONS Program, a
20 program of the University. He has all the attributes
21 of a student.

22 He's enrolled in classes, which he actively
23 participates in. He studies. He pays tuition at the
24 same rate of other undergraduate students. He takes
25 quizzes and tests. He attends full time, taking 12 to

1 15 credit hours per semester, depending on the
2 semester.

3 The other thing, they've admitted he's a student.
4 They've issued him a student ID. They've issued him a
5 student number, which they call Grizzly numbers or "G"
6 numbers. This is important because when looking at the
7 original contract of Micah or application/contract that
8 Micah signed, it said, "He must be an enrolled
9 student."

10 Micah was treated differently from other students
11 similarly situated. If you look at their own policies
12 and procedures, which we submitted in our reply brief,
13 when they process these applications, they look at
14 whether the student has a grizzly number. That's how
15 they verify whether he's an enrolled student or not.
16 And he had a grizzly number.

17 Yet, they do not check, I think it's important to
18 point out, according to these policies and procedures,
19 they do not check to see what program they're in, what
20 degree they're seeking, what their grade point average
21 is or whether they're even taking classes or not.
22 These things are not verified or checked.

23 He has a grizzly number, which would indicate that
24 he's a student at the University. Micah's original
25 denial letter denied him because he wasn't a student

1 and he wasn't enrolled for the winter. Both of which
2 were factually wrong. So, he did meet the enrollment,
3 the requirements for admission under that contract for
4 the '07/'08 school year.

5 Now, the defendant -- the plaintiff must also show
6 why was he treated differently. There must be a
7 discriminatory purpose behind it.

8 In this case, the misperception expressed by the
9 defendant, Vice President Snyder, these are statements
10 to Howell, to Professor Howell. These are undisputed
11 statements. They've submitted no affidavits disputing
12 these statements where she said, "His inability to
13 read--", which relates to his disability, she said
14 that, "--these programs", referring to the OPTIONS
15 program, "--always fail."

16 She feared how other students would treat him.
17 Rather than dealing with how other students might treat
18 him, she feared how they might treat him as a reason to
19 deny him access.

20 She said that he could not care for himself, even
21 though where that statement come or on what basis is, I
22 do not know and it is not said. And he couldn't deal
23 with an emergency situation. Again, nowhere is this
24 evidence provided.

25 And it goes back to the misperceptions about the

1 ability or inability of persons with disabilities.

2 **THE COURT:** With respect to your disparate
3 treatment claim, it's my understanding that the Court
4 have stated, and I quote, Jones v City of Monroe, 341
5 F.3d 477, that, "The plaintiff must demonstrate a prima
6 facie case of discrimination by establishing, number
7 one, he has a disability; two, that he's otherwise
8 qualified; and three, that he is being excluded from
9 participation in and being denied the benefits of or
10 being subject to discrimination solely because of his
11 handicap."

12 You don't contend here that he's being
13 discriminated against solely because of his handicap,
14 do you?

15 **MR. DAVIS:** I think it's uncontested. It's a
16 motivating factor. And they've presented nothing that
17 would support their reason for turning -- for their
18 different treatment of him.

19 I mean, they've proffered a reason, but without
20 any backing up of it or supporting it. They have to do
21 more than just bring forth a reason. It has to be -- a
22 reasonable conclusion has to be drawn from their facts
23 or it has to be supported by some evidence.

24 **THE COURT:** Well, they denied him because he's not
25 a student.

1 **MR. DAVIS:** He is a student.

2 **THE COURT:** I mean, a matriculating student. They
3 denied it because he doesn't fit their criteria for
4 housing students, that's a legitimate reason, isn't it?
5 Forget the handicap, for a moment.

6 **MR. DAVIS:** Right.

7 **THE COURT:** That would be legitimate. If some
8 other student, not handicap, say, "Boy, I'd like to
9 live in that housing, very convenient to my work and
10 other things", they'd have a right to deny him,
11 wouldn't they?

12 **MR. DAVIS:** If that was their rule in October or
13 November of 2007, maybe. But that was not their rule
14 in October of 2007. That's not nowhere in their
15 application.

16 **THE COURT:** Well, what's the rule now?

17 **MR. DAVIS:** The rule now that they put forward is
18 they must be a matriculating student, they must have a
19 certain grade point average and they must carry a
20 minimal number of credits, though the number is
21 escaping me, at the moment.

22 **THE COURT:** You're asking me now to enter an order
23 compelling them, for the future, to admit him. And
24 therefore don't you think I should apply their current
25 criteria?

1 **MR. DAVIS:** Two reasons on that. First of all, I
2 believe the reasonable accommodation would allow
3 perspective relief, if the Court were to find that.

4 **THE COURT:** I'm not on the reasonable
5 accommodation.

6 **MR. DAVIS:** Correct, Your Honor.

7 But under this, if we can show that this new rule
8 is a mere pretext to cover up their discriminatory
9 action, I would think that there would be problems with
10 them being allowed to enforce that.

11 **THE COURT:** How are you going to show that?

12 **MR. DAVIS:** The way we would show that it's
13 pretext is this, Your Honor. First of all, the
14 closeness in time of what happened. Micah submitted
15 his application on November 1st, 2007 and they did not
16 have a matriculating student requirement in there.

17 On November 8th, Associate Dean Wiggins sent an
18 email to the Plaintiff's father, as well as his
19 counselor, Kim Dembrosky, as well as Lee VanAmberg, the
20 head of the OPTIONS Program. And he says in that
21 email, and I've quoted it in the brief, "This very
22 clearly demonstrates that this was a considered
23 decision. That the question of enrolled credits was
24 resolved. That the total number of CEU's--", which I'm
25 assuming is Continuing Education Units, "--showed that

1 he was enrolled in classes and that Micah was a
2 registered student."

3 Seven days after that, on November 14th, Roxanne
4 Fisher, from the Housing Department, sent an email
5 saying, "You're all set." Now, defendants have tried
6 to portray this as saying, "Well, that meant we've got
7 all the application materials."

8 But if you look at that email, Your Honor, it's
9 very detailed about, "If you use a microwave or not.
10 What the sign-in date was. Whether he would get his
11 room assignment."

12 If this was simply saying, "We got your
13 application and we don't need any more material to
14 process it", you would think that that email would say,
15 "We've got your application. You're all set for that.
16 We'll notify you of our decision."

17 It wouldn't go into what things you can move into
18 your dorm and what date you're to move in. The email
19 was very specific. And to see it as anything other
20 than an acceptance of his application, an approval of
21 his application, would require a stretch of the
22 imagination.

23 Coming after the Wiggin's email, it showed that
24 this was a considered decision because they also
25 proffered the fact that or trying to allege that Ms.

1 Fisher looked at the "G" number, approved him, and
2 somehow accidentally it slipped through. But the email
3 from Wiggins, seven days before Fisher's email show
4 that this was a considered decision. And they have not
5 countered that by any other evidence.

6 Secondly -- or thirdly, Maten went and checked
7 with Snyder regarding denying Micah's application.
8 Snyder is the Vice President at the University, she
9 certainly doesn't get involved in approving every
10 single application that comes through the housing
11 department. The fact that she was even involved in
12 this shows that he was being treated differently than
13 other persons.

14 Again, the Maten denial letter, no mention of
15 matriculating student in the original denial letter. I
16 think it's very important to look at that fact. And
17 that's not in dispute.

18 They changed the application in March of 2008.
19 And in their own brief they said that it was supposed
20 to be effective for the 2008/2009 school year. He was
21 denied in October of 2007, the winter, January of 2007.

22 This means they were retroactively applying a new
23 policy that wasn't even in effect yet to Micah's
24 application, which was submitted almost a year earlier.

25 I believe these things show that this is a

1 made-up, after-the-fact reason that's being provided to
2 cover the real reason that he was denied, which was
3 because of his disability as is shown by the undisputed
4 statements in the Howell affidavit that we submitted,
5 Your Honor.

6 I think we've shown that he was a qualified
7 student for housing under the contract he signed in
8 2007/2008. We've shown that the reason he was turned
9 down was because of his disability. We've shown that
10 they've come back under the McDonnell Douglas burden
11 shifting analysis they've proffered, on its face,
12 appears to be a legitimate reason.

13 And I believe that the timeline and the emails and
14 the way things have happened show that this was a
15 pretext to cover their actions. There's also one other
16 important point I wanted to make.

17 Vice President Snyder met with Micah in May of
18 2008 and his parents in August of 2008. Both Vice
19 President Snyder and Defendant Lionel Maten. In both
20 those instances, they portrayed the March, 2008, as if
21 that was Micah's -- the same application Micah signed.
22 It wasn't. It had undergone extensive changes and
23 extensive rule changes and requirement changes.

24 The fact that they were misrepresenting that fact
25 in these meetings I think is further evidence of a

1 pretext, Your Honor.

2 Do you have any questions?

3 **THE COURT:** Any response?

4 **MR. BOONIN:** Yes, Your Honor.

5 **THE COURT:** Before you start addressing, how do
6 you respond to brother counsel's statement that the
7 University has made, quote, "Exceptions", unquote.
8 That is, they've had non-matriculating students
9 permitted to live in the housing?

10 **RESPONSE BY MR. BOONIN**

11 **MR. BOONIN:** Well, Your Honor, the identification
12 of this individual didn't come out until about a week
13 ago. And you know the University has scoured its
14 records and could not find any exceptions. And it took
15 until last week for the plaintiff to come up with a
16 name.

17 But it's only one ESL student, an ESL student who
18 was admitted full time into the University under an F-1
19 visa and who was pursuing a degree. And that's still
20 the common thread is that during the academic years,
21 during the academic term, the only people that are in
22 those dorms are people pursuing degrees.

23 And there's no question that this was her intent
24 and she was here under an F-1 visa. I do have the
25 documents and I said in my reply that I'll bring those

1 documents. I do have the documents that will show that
2 she was here on an F-1 visa. And to be an F-1 visa,
3 you must be full-time enrolled in a program that
4 results in a degree, a certificate, or a diploma.

5 **THE COURT:** He indicated that there are a number
6 of students, I thought he said, that were at other
7 Universities --

8 **MR. BOONIN:** Yes, that's true. People with
9 Cooley, there's a special contract and this has always
10 been the policy at the University.

11 They still have that common denominator that
12 they're pursuing a degree. They're all there with the
13 same burden or responsibility or goal of, "Why are we
14 here? We're here because we want to get a degree and
15 we want to succeed." And if you don't, by the way,
16 follow the rules, you're going to be kicked out of this
17 University and you may lose your opportunity to get a
18 degree.

19 A continuing education student normally doesn't
20 have that incentive. Doesn't have that ramification
21 should they violate a rule.

22 **THE COURT:** Did the University change its policy
23 after 2007?

24 **MR. BOONIN:** Not with respect to the enrollment
25 status, Your Honor, that's absolutely a

1 misrepresentation of what the University has done.

2 That's not what any of the testimony supports.

3 Certainly the language did change and the language
4 did become clear. But the effect of that language is
5 the same.

6 If he used the 2007 contract application for
7 housing today, he would still be denied because under
8 the University's definition of what an enrolled student
9 is, how the University interprets what the term
10 "Enrolled" means, means that you have to be in a
11 degree-granting program. And that's the way they've
12 always applied that rule. That's the way they've
13 always applied that term.

14 And they routinely change the application form. I
15 think it was three of the last five years the housing
16 contract has changed in many ways. There were a half
17 of dozen other ways that the application form changed
18 in 2008 as part of their standard process. They tweak
19 it all the time.

20 But the bottom line is that under either the
21 original form or the new form, he still does not meet
22 that enrollment requirement.

23 I think the University is entitled to say, "When
24 we use enrollment--", as long as they're consistent
25 about it and there's no evidence that they're not

1 consistent about it, "--when we use enrollment, that
2 means you're pursuing a degree. You're a person that
3 we could count when we submit things to the federal
4 government. We follow that as the guidance for what we
5 need, in this context, of enrollment."

6 There's no evidence that we've treated people
7 otherwise. In fact, the evidence is is that when a
8 disabled student applies and becomes enrolled, we do
9 accommodate that person.

10 **THE COURT:** All right. You've answered the
11 question. Now is your time for any rebuttal you want
12 to give based on brother counsel's argument?

13 **MR. BOONIN:** Well, that was going to be one of the
14 points and I'm glad you brought that out because I
15 think that enrollment often becomes a term of art. But
16 this isn't a contract case, this is, "What did we mean
17 or what was our policy at the time?"

18 And in terms of enrollment, we did not change that
19 policy. We just are now requiring students to have a
20 higher level of commitment because it's part of the
21 goal of the University to make being in the dorms a way
22 to facilitate that degree. So, we want to make sure
23 people are taking a lot of credits in order to do it.

24 Now, it was said that the plaintiff has all the
25 attributes of a student. And I just disagree with

1 that. He doesn't have all the attributes of the
2 students.

3 Yes, he does pay a fee. And yes, he does attend
4 classes. Some of those classes are special learning
5 skills classes that are not, you know, a part of the
6 regular academic program. And then he can audit other
7 classes and attend them. And whatever he does in those
8 classes and attend them. And whatever he does in those
9 classes, whatever he arranges with the teacher, he
10 doesn't have to do anything, he doesn't get a grade.

11 But it doesn't have the attributes of being
12 admitted into the University. Doesn't have the
13 attribute of a grade point average. Doesn't have the
14 attribute of earning credits and those are huge
15 distinctions. The statement that having the "G" number
16 is indicia of student status is really an
17 overstatement.

18 Many people, and I do have an affidavit from the
19 University, if the Court would allow me to present it.
20 But many people at the University have grizzly numbers.
21 The employees have grizzly numbers. The vendors have
22 grizzly number. Donors have grizzly numbers and
23 students have grizzly numbers.

24 The housing clerk used the grizzly number as her
25 first check to see, "Are you real?" Are you connected,

1 somehow, to the University. The testimony is that that
2 housing clerk doesn't make the final decision. She
3 makes the preliminary decision, that's Roxanne Fisher.

4 She made the preliminary decision that, "Yes,
5 looks like your application is complete." And as she
6 stated in her affidavit, the body of that email, the
7 information that she gives, she didn't set what the
8 date is. She said, "You'll be learning later what your
9 rights are, what the obligations are, what your move-in
10 date would be."

11 But there was still more to be checked. And sure
12 enough, it got to the attention of the housing
13 director, Mr. Maten and he did not go to the Vice
14 President Snyder for approval. She was not in the
15 approval set. He wanted to know, "Did we change the
16 rules? Are the OPTIONS participants now enrolled
17 students?" That would make a difference to him because
18 his contact with them would that they weren't, did that
19 change?

20 Or did the University change it's rule allowing
21 non-enrolled students to be in there. You know, "Am I
22 still doing the right thing because I'm about to reject
23 this application, but would that be right?"

24 And she says, "Well, you know, the rule hasn't
25 changed." And they checked and they found out that the

1 OPTIONS students were still classified as continuing
2 education students. So, that statement, I believe,
3 needed to be responded to and was inaccurate and not
4 supported by the record.

5 The fact there's nothing in the record that
6 supports the claim that the grizzly numbers is the key
7 to the dorms. It was just -- the deposition testimony
8 is is that that's what Roxanne Fischer did.

9 Then we get to the statement of Dean Wiggins made
10 in an email to plaintiff's father and to MORC. And if
11 you look at the email he's saying, "This is what I
12 found out after talking to a secretary in the housing
13 department." Well, that would be hearsay as to what he
14 found out.

15 But certainly the secretary of the Housing
16 Department doesn't speak for what the housing policies
17 are. And neither does Dean Wiggins speak for what the
18 Housing Department policies are. He can't set that.
19 He admitted that in his deposition, that's not his
20 role. He was trying to facilitate this process for the
21 family, but he was unsuccessful.

22 But his statements as to what the housing policies
23 are no more significant than if the Secretary of
24 Agriculture makes a statement as to what the Department
25 of Defense's policy is in Iraq. It's just not the

1 policy of the U.S. Government when that kind of
2 statement is made.

3 As to the individualized analysis. The Courts
4 have said that you only have to have individualize
5 analysis if it's to accommodate a disability. And we
6 still hadn't gotten to that. We don't have to
7 accommodate a disability because there's no
8 accommodation that makes him a student. And he wants
9 to be a student without having the requirements of a
10 the student.

11 Now, if we had to bend the rule so that he had to
12 take more tests or so that he could reapply or do
13 something to accommodate a disability, so that he could
14 meet the qualifications of being a student, we would
15 have had to do that.

16 If his disability made it impossible for him to
17 live in the housing because he was blind or needed a
18 wheelchair roll-in shower, we would have to accommodate
19 that. But he's not asked for an accommodation of his
20 disability, he has asked us to waive his student status
21 and that's inappropriate.

22 We really don't know how the plaintiff would
23 succeed if he were in housing. But he wasn't denied
24 the housing because of his disability. If he were a
25 student, we would have granted him the housing.

1 That, I think, in and of itself shows that it's
2 not his handicapped status or his disability status
3 that is motivating the University, it's the student
4 status that was motivating the University.

5 Disabled students are constantly, often given
6 generous accommodations because that's appropriate for
7 them to succeed in the program.

8 There is also a statement, and we touched on this,
9 that were numerous exceptions, and one was the ESL
10 student. That's one person we've been able to find in
11 decades of records.

12 "A", if it were, if that person slipped in, I
13 don't think there's no mistake, changes the fact that
14 this is what our policies is and what our intentions
15 are. But this person does, in reality, and again, I
16 can show the Court documents to this effect, was here
17 on an F-1 visa.

18 And if you're here on an F-1 visa, just so that
19 you could see, if you look at the regulations under
20 that, and that's 8 CFR 214.2, (F)(1) and (F)(6), that
21 it says, "You must be enrolled full-time in a course of
22 study that culminates in a degree, diploma or
23 certificate." And that's who we thought we had and
24 what we thought we had.

25 And actually if you look at the affidavit

1 submitted, the affidavit that's yet to be notarized.
2 But if you look at the affidavit that's been submitted,
3 it just says that, "Prior to being accepted, I wasn't a
4 student." Well, that's the case with any high school
5 student. She doesn't talk about her housing commitment
6 and when she got accepted at the Turkish University,
7 that we reported to what her status was at the
8 University. We have a document to that. And I can
9 show the Court a document to that where we reported to,
10 in September, to the Turkish University as to what her
11 status was at our University.

12 But there are other exceptions that were pointed
13 out, though those exceptions don't make a difference
14 because the reality is, and this is the distortion that
15 I think has been presented. That during the academic
16 year, it's only the people that are pursuing degrees
17 that are in the dorms that intermingled with other, you
18 know, that's the core of the dorms.

19 Do we have summer camp programs? Sure. High
20 school students come in. It's not a university
21 program, necessarily, it could be a university program
22 or some outside program. They put their summer campers
23 in our dorms for a week at a time.

24 But that's not part of the academic program and
25 we're not contesting that it is. You know, if he would

1 qualify for one of those summer programs and wanted to
2 attend the dorms in the summer, absolutely, that's not
3 a concern of ours.

4 The Residential Journalism Program, as we said in
5 our affidavit, it called a Residential Journalism
6 Program, but it's a day camp. It's not an overnight
7 camp. There's no living in the dorms for that program.
8 Residential journalism campers do not live in the
9 dorms, it's a one- or two-week program that they come
10 to school.

11 And given these are high school kids. Again, it's
12 not part of the regular academic program, and we're not
13 suggesting that it is. But again, that's not a fact
14 that I think is appropriately making a difference in
15 the outcome of this case.

16 Then we get to the issues of Dr. Snyder's
17 statements. And Dr. Snyder has said over and over
18 again that the core purpose of the dorms is move
19 someone through the pipeline toward a degree. That's
20 what it's been.

21 Did she make those statements? Well, we certainly
22 don't have the affidavit. She denies making all those
23 statements. But some of those statements were made in
24 2003, 2004, before the OPTIONS Program was even stated.

25 If you look at the timeline and all the records,

1 it's clear these predated the making of a movie, which
2 he made when he was still in the transitions program in
3 2006, before the OPTIONS program was even a concept.

4 But those statements, in and of themselves, are
5 some stray remarks. Could event reflect a personal
6 opinion. But doesn't change the fact how she's has
7 administered, how the University has administered the
8 housing program. The rules have always been the same,
9 you must be pursuing in a degree in order to be in the
10 housing program.

11 And under her leadership we've seen that there are
12 a number of people, with disabilities, in housing,
13 people with reading and writing disabilities, who are
14 in housing and who are in the University. And that's
15 all under her leadership. She's the one that helps
16 facilitate the accommodations for these individuals
17 when they're in the program.

18 And then finally, I'm going to say finally, but it
19 may not be, don't hold me to that. But I want to
20 address this issue of the pretext based on the timing
21 of this changeable contract.

22 We never said that the new contract is made
23 retroactively. As I said, under the new contract or
24 the old contract, he's not qualified under either
25 contract to be in there.

1 When they met -- when the parents met, when the
2 plaintiff met with the Vice President, they asked for a
3 copy of the contract. They were given a copy of the
4 contract that was in effect at that time. There was no
5 indication that there was anything other than that
6 explanation. And that contract explains it just as
7 well as the old contract, at least in the opinion of
8 the University. It does not at all indicate any kind
9 of effort on the part of the University to discriminate
10 on the basis of a disability.

11 And I do want to say too that the statement by
12 Sharon Howell, we believe, contains a lot of hearsay.
13 But again, it's not enough, in the Court's opinion --
14 I'm just trying to find the name of the decision that
15 we cited in our case.

16 Said that those kinds of statements, it was one of
17 the Michigan cases, City of Taylor case, that those
18 kinds of statements by officials, when you look at it
19 in the overall context, aren't enough to establish
20 pretext. You have to look at the overall context. And
21 the overall context is that the rule has been
22 consistent forever.

23 And Dr. Snyder's and the Housing Department's
24 interpretation of those rules have been consistent or
25 intended to be consistent forever. You must look at it

1 in that overall context.

2 In fact, if you look at the context of her
3 statement to the board of trustees, it was that she
4 believed, in her professional judgment, that it was the
5 inability to fully engage in the academic life that was
6 critical to her decision.

7 **THE COURT:** I think you're starting to cover
8 ground you've already covered.

9 **MR. BOONIN:** I think I'm virtually done. Just
10 want to double check my notes. I think I am done, Your
11 Honor, if you have any further questions?

12 **THE COURT:** All right. Court will take the matter
13 under advisement -- I'm sorry, did you have something?

14 **MR. DAVIS:** I did, yes, just a few.

15 **THE COURT:** Go ahead. Sure.

16 **RESPONSE BY MR. DAVIS**

17 **MR. DAVIS:** Concerning the ESL students. They
18 originally said, "We do not admit continuing education
19 students." We showed they do admit ESL students. Then
20 they fell back and said, "We only allow matriculating
21 students." Then we produced a student that was not a
22 matriculating student. Now, they're falling back
23 further and saying, "Well, that's one exception." So,
24 it keeps changing.

25 On the changing of the policy, we've already

1 pointed out, it's not just our assertion for policy and
2 procedure manual, but I also pointed out that the
3 application that Micah signed contained nothing about
4 what program or what his grade point average is or how
5 many credits he was taking. It just asked for his
6 grizzly number, that's the only thing you could ask
7 for.

8 Also, the Higher Education Opportunity Act, which
9 they say somehow implies no right to housing, it
10 doesn't say that they don't have a right to housing, it
11 says they will reward programs that has housing as a
12 component.

13 For example, when this program was originally put
14 together in an email, the second email that Mr. Wiggins
15 sent to Kim Dembrosky, he laid out a curriculum for the
16 OPTIONS Program that was rejected later.

17 But originally it included classes on living
18 independently and would require them to be in-housing.
19 Those types of programs would get a reward under the
20 Higher Education Opportunities Act. That doesn't mean
21 that the Higher Education Act mandates that they are
22 entitled to the housing.

23 I'd also point out that the Higher Education Act,
24 and we pointed this out in our brief, has made
25 financial aid available to students starting in the

1 fall of 2010, specifically pell grants.

2 Also, the counting question about the IPEDS
3 definition. They said that that's their definition.
4 That's the standard they go by. But they admit that
5 they let students in from Cooley, they can't be counted
6 under their count. They're not even taking classes at
7 Oakland University.

8 They allow students that are enrolled at other
9 Universities to take some classes there and enroll in
10 housing. There's no indication that they're included
11 in the account.

12 The IPEDS definition is a reporting definition to
13 the Federal Government. It has nothing to do about
14 eligibility standards and housing.

15 And I think that's the points I wanted to cover,
16 Your Honor.

17 **THE COURT:** All right. Court will take the matter
18 under advisement. Court is in recess.

19 **MR. BOONIN:** Your Honor, would you like the
20 affidavit?

21 **THE COURT:** I don't know that I need more
22 information. If you want to file something, make sure
23 -- you know, I don't like it coming in at this late
24 date. But if you want to, submit it right away because
25 I want to decide. So, whatever you're going to file,

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make sure the other side sees it.

MR. BOONIN: You prefer that I file
electronically?

THE COURT: Sure.

(Whereupon proceedings concluded at 3:56 p.m.)

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C E R T I F I C A T I O N

I, Nefertiti A. Matthews, official court reporter for the United States District Court, Eastern District of Michigan, Southern Division, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a correct transcript of the proceedings in the above-entitled cause on the date hereinbefore set forth.

I do further certify that the foregoing transcript has been prepared by me or under my direction.

Date: February 2, 2010

s:/Nefertiti A. Matthews
Nefertiti A. Matthews,
Official Court Reporter

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