UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

MONROE RE, LLC and CT YA SERVICES, LLC, d/b/a NEWPORT ACADEMY,	:	Civil Action
	:	
	:	Case No. 3:21-cv-00078 (MPS)
Plaintiffs,	:	
v.	:	
TOWN OF FAIRFIELD, CONNECTICUT and BRENDA L. KUPCHICK, individually and in her official capacity as First Selectwoman of the Town of Fairfield,	:	
Defendants.	:	March 15, 2021

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Pursuant to Fed.R.Civ.P. 12(b)(6) and Local Rule 7, Defendants Town of Fairfield and Brenda L. Kupchick submit this Memorandum in support of their Motion to Dismiss all counts of Plaintiffs' Complaint for failure to state claims on which relief may be granted and on grounds of qualified immunity.

I. INTRODUCTION

Plaintiffs CT YA Services, LLC d/b/a Newport Academy and Monroe RE, LLC (jointly referred to herein as "Newport Academy") claim that the Defendants have engaged in unlawful discrimination with respect to housing. Newport Academy plans to operate two for-profit "residential treatment centers" in Fairfield, Connecticut. It has purchased two properties in Fairfield to support those residential treatment centers. Defendant Town of Fairfield (the "Town") advised Newport Academy that it could not begin conducting business at those locations without first complying with a special permit application process.

Recasting a legitimate land use issue as a discrimination issue, Newport Academy commenced this action, naming as defendants the Town and its First Selectwoman, Brenda L. Kupchick ("Kupchick"), against whom Newport Academy seeks relief in both her individual and official capacities. Newport Academy specifically alleges violations of the Fair Housing Act, 42 U.S.C. § 3601, *et seq.* ("FHA") (Count One); the Americans with Disabilities Act, 42 U.S.C. § 12131, *et seq.* ('ADA") (Count Two); Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, *et seq.* ("Rehabilitation Act") (Count Three); and Connecticut General Statutes § 46a-64c (Count Four).

Each of Newport Academy's claims must be dismissed for failure to state a viable claim for relief.

Counts One and Four fail to state plausible claims for relief because the treatment centers Newport Academy intends to operate are not "dwellings" for purposes of the FHA. As that statute, and a corresponding Connecticut housing statute, do not apply given the allegations of the Complaint, Counts One and Four must be dismissed.

Counts Two and Three fail to state plausible claims for relief because the Complaint does not include factual allegations supporting the conclusory allegation that Newport Academy's prospective clients are "disabled" as defined by the applicable statutes.

Finally, even if the Court were to find any of the Complaint's claims for relief viable, the claims against Defendant Kupchick -- whether in her official or individual capacities -- cannot stand. Kupchick is entitled to qualified immunity as to the claims against her in her individual capacity. Moreover, individuals in any capacity are not subject to suit for most purposes under either the Rehabilitation Act or the ADA. Finally,

even if individuals are subject to suit, the claims against Kupchick in her official capacity are wholly redundant and unnecessary.

Accordingly, the Defendants respectfully move the Court to dismiss all claims for relief asserted in the Complaint against both Defendants.

II. FACTUAL ALLEGATIONS

Newport Academy operates a national network of treatment facilities for youth, its mission being "to provide teens and their families with the highest-quality care and treatment for trauma, mental health issues, eating disorders, and substance abuse." https://www.newportacademy.com/about/why-choose-newport-academy/. Exhibit A at 1.[1] It runs "15 programs located at eight different facilities … across the country." Id. at 16. Newport Academy operates three types of facilities: (a) residential treatment centers located in Southern California (Los Angeles area); Northern California (San Francisco Bay area); Washington (Seattle area); Virginia (Washington, D.C. area); and Connecticut; (b) outpatient treatment centers located in Northern California (San Rafael area); Darien, Connecticut; Malvern Pennsylvania; and Rockville, Maryland; and (c) day schools located in Darien, Connecticut; Costa Mesa, California; San Rafael, California; Rockville, Maryland; and Malvern Pennsylvania. Id. at 19-24, 37, 43, 57-63, 66-72.

[1] Excerpts from Newport Academy's current website are attached hereto as Exhibit A. In deciding a motion to dismiss, this Court may take judicial notice of information Newport Academy provides on its website. See Timm v. Faucher, 2017 WL 1230846 at * 1, n.1 (D. Conn. March 31, 2017); see also Casio v. Vineyard Vines, LLC, 2021 WL 466039 at * 5 (E.D.N.Y. Feb. 9, 2021) ("[C]ourts in this circuit have found that 'for purposes of a 12(b)(6) motion to dismiss, a court may take judicial notice of information publicly announced on a party's website, as long as the website's authenticity is not in dispute and it is capable of accurate and ready determination.'") (quoting Wells Fargo Bank, N.A. v. Wrights Mill Holdings, LLC, 127 F. Supp. 3d 156, 167 (S.D.N.Y. 2015) (citations and internal marks omitted)).

Newport Academy's clients have "different requirements and a different background. Some have unresolved trauma and/or substance abuse issues. Many have tried therapeutic programs for young adults in the past and they failed to make a difference. Others have simply lost focus or become overwhelmed by the pressures of growing up." Id. at 85.

At its residential treatment centers for teenagers and young adults, Newport Academy offers its clients a variety of therapeutic and educational services. Id. at 27-30, 47-50. Individual treatment teams consist of eight experts, including "medical staff, clinicians, counselors, and experiential therapy practitioners." Id. at 17. During their stay, clients are assigned bedrooms (two persons per room) and have the opportunity to engage in various activities. Id. at 28, 48, 78, 83, 87, 92. Meals are prepared by an on-site chef. Id. at 28, 48. Weekend visits by clients' family members are encouraged. Id. at 18. While Newport Academy's website does not disclose the cost of its services, it notes that "[a] large majority" of its fees for services "are covered by insurance." Id. at 15; see also id. at 9-14 (insurance coverage and financing information).

In January 2019, Newport Academy purchased two single-family homes in a residential district in the Town of Fairfield. Complaint (Doc. 1) at ¶ 22. Newport Academy sought and received from the Town's Planning Director a certification of zoning compliance ostensibly for the purpose of "group home" occupancy. Id. at ¶ 23. It then spent approximately $200,000 to renovate the two homes in an attempt to comply with standards for "group homes." Id. at ¶ 24.

In May 2019, some Fairfield residents organized a group, Neighbors for Neighborhood Preservation ("NNP"), to oppose Newport Academy's group homes.

Since that time, NNP and its allies have worked to prevent Newport Academy from opening the group homes, including by seeking to influence Defendants to support their positions. Id. at ¶¶ 25, 26.

On May 24, 2019, Newport Academy filed an application with the Connecticut Office of Health Strategy ("OHS") for a Certificate of Need ("CON") to operate its group homes. Id. at ¶ 27. On June 10, 2019, NNP and its allies held a "town hall" meeting attended by 200 people, including the then-First Selectman and the then-Town Attorney, who advised attendees that the Town's ability to limit or regulate group homes was constrained by federal and state civil rights laws. Id. at ¶ 28. Following that meeting, Town officials sought and received a legal opinion concerning the limits imposed by federal and state civil rights laws on the Town's ability to regulate group homes. Id. at ¶¶ 30, 31.

On July 9, 2019, several neighbors of the homes Newport Academy purchased filed petitions with the Town's Zoning Board of Appeals ("ZBA") seeking to overturn the Town's issuance of building permits for the two homes. Id. at 32. On September 18, 2019, the ZBA affirmed the issuance of building permits for both homes. Id. at ¶ 33. In October 2019, neighbors of the Newport Academy homes appealed the ZBA's decisions to Superior Court. Newport Academy intervened in those cases to protect its rights with respect to the homes it purchased. Id. at ¶ 35.

Shortly after Kupchick's election on November 5, 2019, the Town responded to community pressure and reviewed anew some of the legal issues implicated by Plaintiffs' actions and the Town reviewed the opposition to Newport Academy's plans. Id. at ¶¶ 35, 36. Kupchick stated that she viewed Newport Academy's group homes as

"a medical facility, a business, and I don't believe businesses should be operating in residential areas in our town," while suggesting it would be more appropriate for the Newport Academy "to locate space in a commercial zone." Id. at ¶¶ 37-39.

Newport Academy alleges that its prospective clients are young adults with disabilities (including anxiety, depression, trauma, and other mental health disorders) who require intensive treatment in tranquil neighborhood settings, such as the large single-family homes on large lots that Newport Academy acquired, and that Fairfield's commercial zones are entirely incompatible with the therapeutic needs of Newport Academy's prospective clients. Id. at ¶¶ 40-42. It alleges that Defendants' statements and actions exclude Newport Academy and its prospective clients from desirable residential neighborhoods in the Town of Fairfield, limiting them to incompatible commercial zones lacking in the kind of housing and supportive atmosphere necessary for their recovery. Id. at ¶43.

On July 7, 2020, OHS found that Newport Academy demonstrated a need for its two group homes, and authorized Newport Academy to open and operate both group homes in Fairfield, under the category Mental Health Residential Living Center ("MHRLC"), provided it obtained licenses from the Connecticut Department of Public Health ("DPH"). Id. at ¶¶ 45, 46.

To secure DPH licenses, Newport Academy must show "evidence of compliance with local zoning ordinances and local building codes," and Newport Academy alleges it has met the requirements for issuance of the Certificates of Occupancy, and that Defendants have wrongly "refused to issue those Certificates for Newport Academy's group homes." Id. at ¶¶ 47, 48.

On November 5, 2020, the Town's Town Attorney advised Newport Academy that Certificates of Occupancy "will not be issued" because Newport Academy had received OHS approval as a MHRLC rather than as a group home, and that, as MHLRCs, Newport Academy's group homes "do[ ] not qualify as protected Group Home[ ] under the Fair Housing Act," Newport Academy "will therefore need to submit an application for a Special Exception … in order to be in compliance with Fairfield zoning regulations and receive [Certificates of Occupancy]" for the group homes. Id. at ¶¶ 50-51. Newport Academy claims by doing so, the Defendants have provided shifting rationales for withholding the Certificates of Occupancy. Id. at ¶ 52.

Since 2015, the Town has approved and welcomed at least two other similarly-situated group homes for adult women with MHRLC licenses operated by Center for Discovery, a for-profit entity, and located in the same greater neighborhood of Fairfield where Newport Academy proposes to establish its group homes. Id. at ¶54.

From 2015 to the present, Center for Discovery clients have received treatment for an average stay of 45 days, similar to the stay anticipated for Newport Academy's prospective clients. The Town and its elected officials did not oppose the Center for Discovery's application CON process; suggest that the Center for Discovery "locate space in a commercial zone"; object that the Center for Discovery group homes were operated by a for-profit entity, or that its clients' average stays were 45 days; require the Center for Discovery to go through a Special Exception process; or delay the issuance of Certificates of Occupancy for those homes. The Town instead welcomed the Center for Discovery. Id. at ¶¶ 55-59.

Newport Academy alleges that the Defendants' actions are willful and intentional; have violated the statutes referenced in the Complaint; and have caused damage to Newport Academy and its prospective clients. Id. at ¶¶ 60-84.

III. LEGAL STANDARD

When deciding a motion to dismiss pursuant to Rule 12(b)(6), the court must accept the material facts alleged in the complaint as true, draw all reasonable inferences in favor of the plaintiffs, and decide whether it is plausible that plaintiffs have a valid claim for relief. Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555–56 (2007).

Under Twombly, "[f]actual allegations must be enough to raise a right to relief above the speculative level," and assert a cause of action with enough heft to show entitlement to relief and "enough facts to state a claim to relief that is plausible on its face." 550 U.S. at 555, 570; see also Iqbal, 556 U.S. at 679 ("While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations."). The plausibility standard set forth in Twombly and Iqbal obligates plaintiffs to "provide the grounds of his entitlement to relief" through more than "labels and conclusions, and a formulaic recitation of the elements of a cause of action." Twombly, 550 U.S. at 555 (quotation marks omitted).

In deciding a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the court must determine whether the plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face." Id. at 570. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 at 678. "[T]hreadbare recitals of the

elements of a cause of action, supported by mere conclusory statements, do not suffice" to survive a motion to dismiss. Mastafa v. Chevron Corp., 770 F.3d 170, 177 (2d Cir. 2014). The court may consider any documents attached to, incorporated in by reference, or otherwise heavily relied upon in the complaint when deciding the motion. Chambers v. Time Warner, Inc., 282 F.3d 147, 152-53 (2d Cir. 2002).

IV. ARGUMENT

A. Counts One and Four Fail to State Claims for Relief Because Newport Academy's Proposed Residential Treatment Centers are Not "Dwellings" Subject to the Fair Housing Act

Counts One and Four of the Complaint do not state claims for relief because they fail to plausibly allege that Newport Academy's proposed staffed treatment facilities are "dwellings" within the meaning of the FHA.

(1) The Fair Housing Act is Designed to Protect the Rights of the Disabled to Live Where They Choose and to Enjoy Their Homes the Same as those Not Suffering from Disabilities.

Congress passed the Fair Housing Act in 1968 with the express purpose of remedying housing discrimination. See Otero v. N.Y. City Hous. Auth., 484 F.2d 1122, 1133 (2d Cir. 1973). The original statute prohibited only discrimination based on race, color, religion, or national origin. The Fair Housing Amendments Act of 1988 extended the protections embodied in the FHA to persons with disabilities. Under the FHA, as amended in 1988, it is unlawful "to discriminate in the sale or rental or otherwise make unavailable or deny a dwelling to any buyer or renter because of a handicap of: (A) that buyer or renter, (B) a person residing in or intending to reside in that dwelling." 42 U.S.C. § 3604(f)(1). The FHA also makes it unlawful "to discriminate against any person

in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of (A) that person; or (B) a person residing in or intending to reside in that dwelling." 42 U.S.C. § 3604(f)(2).

The declared purpose of the Fair Housing Act is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601. The 1988 Fair Housing Amendments Act, which extended the protection of the federal fair housing laws to persons with disabilities, "is worded as a broad mandate to eliminate discrimination against and equalize housing opportunities for disabled individuals." Bronk v. Ineichen, 54 F.3d 425, 428 (7th Cir.1995). The statute clearly focuses on protecting the rights of disabled persons with respect to the neighborhoods in which they would be able to call home, and to enjoy those homes on par with those who are not disabled. It did not engraft onto the public an obligation to allow commercial medical facilities into residential neighborhoods without appropriate review.

(2) Judicial Evaluation of "Dwellings" Within the Meaning of the FHA.

The FHA defines a "dwelling" as:

> any building, structure, or portion thereof which is occupied as, or designed or intended for occupancy as, a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building, structure, or portion thereof.

42 U.S.C. § 3602(b). The FHA does not define the word "residence,"; however, "[m]ost courts that have considered the scope of the term have relied on the definition used in United States v. Hughes Memorial Home, 396 F.Supp. 544 (W.D.Va.1975), which is 'a

temporary or permanent dwelling place, abode, or habitation to which one intends to return as distinguished from the place of temporary sojourn or transient visit.'" Hunter on behalf of A.H. v. District of Columbia, 64 F.Supp.3d 158, 174 (D.D.C.2014) (quoting Hughes Memorial Home, 396 F.Supp. at 549).

Neither the Supreme Court nor the Second Circuit has analyzed the specific issue raised in this motion; that is, what constitutes a "dwelling" under the FHA.[2] Courts considering the question have found that structures used by transient guests are not "dwellings" under the FHA.[3] On the other side of the spectrum, courts have found more lengthier, more permanent living arrangements to be "dwellings" subject to the FHA.[4]

Applying the statutory language and different iterations of multi-factorial tests, courts have reached various, often conflicting, conclusions as to what types of structures or housing arrangements properly are considered "dwellings" under the FHA. For example, in Turning Point, Inc. v. City of Caldwell, 74 F.3d 941 (9th Cir.1996), Jenkins v. N.Y.C. Dep't of Homeless Servs., 643 F.Supp.2d 507 (S.D.N.Y.2009), aff'd

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[2] In Robinson v. 12 Lofts Realty, Inc., 610 F.2d 1032 (2d Cir.1979), its only occasion to address the issue, the Second Circuit stated, without discussion, that the FHA definition of "dwelling" in 42 U.S.C. § 3602(b) "clearly applies to cooperative apartment buildings."

[3] See, e.g., The Tara Circle, Inc. v. Bifano, No. 95-CIV. 6522 (DLC), 1997 WL 399683 (S.D.N.Y. 1997) (dormitory / office space used for 21 days in 18-month period); Patel v. Holley House Motels, 483 F. Supp. 374, 381 (S.D. Ala. 1979) (hotel); Schneider v. County of Will, 190 F.Supp.2d 1082, 1086–87 (N.D. Ill. 2002) (bed and breakfast).

[4] See, e.g., United States v. University of Nebraska at Kearney, 940 F. Supp. 2d 974 (D. Neb. 2013) (student dormitory housing); Lauer Farms, Inc. v. Waushara County Bd. of Adjustment, 986 F. Supp. 544 (E.D. Wis. 1997) (housing for migrant farm workers); Louisiana Acorn Fair Hous. v. Quarter House, 952 F. Supp. 352 (E.D.La. 1997) (timeshare units); Villegas v. Sandy Farms, Inc., 929 F. Supp. 1324, 1327 (D.Or. 1996) (migrant worker housing); Hovsons, Inc. v. Township of Brick, 89 F.3d 1096, 1102 (3d Cir. 1996) (nursing home for handicapped elderly people); United States v. Massachusetts Indus. Fin. Agency, 910 F. Supp. 21, 26 (D.Mass. 1996) (residential school for emotionally disturbed adolescents); United States v. Columbus Country Club, 915 F.2d 877, 881 (3d Cir. 1990) (summer bungalows run by a country club); Baxter v. City of Belleville, 720 F. Supp. 720, 731 (S.D.Ill. 1989) (an AIDS hospice); United States v. Hughes Memorial Home, 396 F. Supp. 544, 549 (W.D.Va. 1975) (children's home).

on other grounds, 391 F. App'x 81 (2d Cir. 2010), and Woods v. Foster, 884 F.Supp. 1169, 1174 (N.D.Ill.1995), homeless shelters were held to be "dwellings," while homeless shelters were found not covered by the FHA in Intermountain Fair Housing Council v. Boise Rescue Mission Ministries, 717 F. Supp.2d 1101 (D. Idaho 2010), aff'd on other grounds, 657 F.3d 988 (9th Cir. 2011), and Smith v. The Salvation Army, 2015 WL 5008261 (W.D. Pa. Aug. 20, 2015).

Courts in this Circuit have used different tests in deciding whether a particular structure should be considered a "dwelling" for FHA purposes. For example, in Connecticut Hosp. v. City of New London, 129 F.Supp.2d 123 (2001), Magistrate Judge Fitzsimmons focused on the following aspects of the structure:

> In making a determination that a temporary residence is a dwelling under the FHA, courts have considered various factors such as the intent of the person to return to the residence, the length of time one expects to remain at that location, the absence of an alternative place of residence, the nature of the occupancy, and the relationship between the resident and the owner of the property.

Id. at 134.

Other courts within this Circuit have used the following two-part test in determining whether a structure qualifies as a dwelling: (1) whether the structure is intended or designed for occupants who intend to remain for any significant period of time; and (2) whether those occupants would view the structure as a place to return to during that period. See Germain v. M & T Bank Corp., 111 F.Supp.3d 506, 523 (S.D.N.Y. 2015) (citing Lakeside Resort Enterprises, LP v. Board of Supervisors of Palmyra Tp., 455 F.3d 154, 158 (3d Cir. 2006)).

The test applied by courts in this Circuit tends to focus on whether those who use the structure actually view the structure, and treat the structure, as their home:

> [I]t is clear that in determining whether a particular building is a dwelling or residence, the focus is on whether the individuals that are subject to discrimination use or intend to use the building as a dwelling or residence. See [Hovsons, Inc. v. Township of Brick, 89 F.3d 1096, 1102 (3d Cir. 1996)] at 1102 (holding that "to the handicapped elderly persons who would reside there ... [the nursing home] would be their home, very often for the rest of their lives."); [Jenkins v. N.Y.C. Dep't of Homeless Servs., 643 F.Supp.2d 507 (S.D.N.Y. 2009)] at 518 (explaining that the "homeless shelter to which [the plaintiff] was denied entry could fall well within the definition of dwelling under the FHA" because the plaintiff "intend[ed] to stay at the shelter as long as he [could], ... and [he had] no other home to go to"); [The Tara Circle, Inc. v. Bifano, 1997 WL 399683 (S.D.N.Y. July 15, 1997)] at *16 (holding that a dormitory was not a residence because the plaintiff used the dormitory on four separate occasions for four to seven days between a period of about a year and a half). In other words, **the determination of whether a particular building is a dwelling or residence within the meaning of the FHA does not turn on fixed classifications of the building** -- e.g., a homeless shelter is or is not a residence, or a dormitory is or is not a residence -- **but instead courts analyze the function of a specific building for a particular plaintiff alleging discrimination under the Act**. This analysis comports with the purpose of the FHA, which, as noted above, is "to provide, within constitutional limitations, for fair housing throughout the United States." 42 U.S.C. § 3601; see also Short v. Manhattan Apartments, Inc., 916 F.Supp.2d 375, 392 (S.D.N.Y. 2012) (same).

Germain, 111 F.Supp.3d at 523-24 (emphasis added).

As this summary attests, while permanency is not required, courts often conclude that a structure is a "dwelling" in large part based on the occupant's lack of options or freedom of choice to call another place "home." See Hovsons, Inc. v. Township of Brick, 89 F.3d 1096, 1102 (3d Cir.1996) (nursing home for the elderly; "[t]o the handicapped elderly persons who would reside there, Holiday Village would be their home, very often for the rest of their lives."); Villegas v. Sandy Farms, Inc., 929 F. Supp. 1324, 1328 (D. Or. 1996) (cabins used by migrant workers; "[l]ike the occupants of a

homeless shelter, during the farmworkers' employment by defendant, the cabins are their homes."); Woods v. Foster, 884 F.Supp. 1169, 1174 (N.D.Ill.1995) (homeless shelter; "the people who live in the Shelter have nowhere else to 'return to,' the Shelter is their residence in the sense that they live there and not in any other place."); Baxter v. City of Belleville, 720 F. Supp. 720, 730 (S.D.Ill.1989) (AIDS Hospice; "the facility is to be a home for HIV victims in need of a place to live ..., [t]hus, the premises may be considered a dwelling.").

Length of stay also is a significant factor in determining whether a structure is considered a "dwelling." In Cohen v. Township of Cheltenham, Pennsylvania, 174 F. Supp. 2d 307 (E.D. Pa. 2001), for example, the court found that a group home for neglected and abused children constituted a "dwelling" under the FHA. With respect to the question of whether the group home residents would stay for a "significant time period," the court stated:

> The Court notes that the Third Circuit has not identified a minimum time period to meet its definition of "significant." At one extreme, the residents of the nursing home in Hovsons would reside there for the remainder of their lives. At the other extreme, Columbus Country Club involved individuals who occupied summer homes for, at the most, five months at a time—albeit repetitively for many years. The Court concludes that no "magic number" is required. Rather, the analysis appears to be a flexible one that takes all factors into consideration. **The fact that it was anticipated that the residents of plaintiffs' proposed home would reside there for up to nine or ten months, when considered in tandem with the other characteristics of the home, satisfies the Court that the "significant" time period standard has been met**.

Id. at 323, n. 11 (citing Hovsons, Inc. v. Township of Brick, 89 F.3d 1096 (3d Cir.1996), and United States v. Columbus Country Club, 915 F.2d 877 (3d Cir.1990)) (emphasis added).

(3) Count One Fails to State a Claim for Relief Under the FHA Because it Does Not Include Factual Allegations Sufficient to Establish that the Proposed Facilities are "Dwellings."

Connecticut Hospital v. City of New London, 129 F.Supp.2d 123 (2001) represents the most exhaustive analysis of the FHA "dwelling" issue in this Circuit. Connecticut Hospital involved three group homes for recovering drug and alcohol abusers who lived together while receiving outpatient treatment for their illnesses. Magistrate Judge Fitzsimmons rejected the defendants' claim "that the group homes [were] rehabilitative facilities or counseling centers as opposed to residences" because no "treatment or counseling" occurred in the homes. Id. at 132. The court instead concluded that the group homes were "dwellings." The court found that the residents of the group homes were not "transient guests" based on testimony that they were "constructively homeless," and actually resided at the group homes while going about their lives and undergoing treatment at another location. Id. at 134-35.

Application of the factors Magistrate Judge Fitzsimmons adopted in Connecticut Hospital, 129 F.Supp.2d at 134, supports the conclusion that Newport Academy's proposed facilities do not qualify as dwellings:

(a) "the intent of the person to return to the residence"

The Complaint is silent on this factor, but given the representations in Newport Academy's website, it is reasonable to assume that its prospective clients are not allowed freedom of movement (i.e., they cannot come and go as they please) while receiving treatment Newport Academy facilities. The nature of the services provided and references to alternative living arrangements clearly indicates that residents will not return to these facilities following the conclusion of their treatment. Thus, "intent to

return" seems inapplicable as the clients would not have the option of leaving the facilities in the first instance. [5]

(b) "the length of time one expects to remain at that location"

Newport Academy expects its prospective clients to receive treatment at its homes for an average of only 45 days. Complaint at ¶ 55.

(c) "the absence of an alternative place of residence"

The Complaint includes no express allegations on this factor, but it alleges that Newport Academy's prospective clients require treatment other than in their "home settings" and "family settings." Complaint at ¶¶ 1, 21. Given these allegations and the additional statements in Newport Academy's website, it is reasonable to assume that its young adult clients reside elsewhere, whether with their parents or otherwise.

(d) "the nature of the occupancy"

The proposed short-term "occupancy" of Newport Academy clients is solely to provide temporary housing while clients participate in a therapeutic treatment program. Complaint at ¶¶ 1, 21.

(e) "the relationship between the resident and the owner of the property"

The relationship between the owner (Newport Academy) and the prospective residents (young adult clients) is entirely commercial in nature.

[5] It might be more appropriate under these circumstances to consider this factor not in terms of "intent to return," but rather, in terms of "intent to remain." See Garcia v. Condarco, 114 F. Supp. 2d 1158, 1163 n.10 (N.M. 2000) (finding children's detention center not a "dwelling" under the FHA given the absence of the residents' freedom of choice to come and go, and noting, "[a]lthough the cases always refer to an intent to return, … with respect to some structures falling within the meaning of "dwelling" under the FHA, i.e., nursing home, AIDS hospice, and children's home, it is more appropriate to speak of an intent to remain, rather than an intent to return.").

Applying the standards set forth above, the Complaint fails to plausibly allege that the properties at issue are "dwellings" within the meaning of the FHA. The Complaint simply assumes the FHA applies here because Newport Academy decided to purchase two residential structures and use them as treatment centers. The Complaint, however, includes only two allegations bearing on whether the two purchased structures constitute "dwellings" subject to the FHA: (1) Newport Academy has been prevented from "opening and … [operating] two small group homes for young adults with anxiety, depression, trauma and other mental health conditions necessitating the kinds of therapeutic interventions unavailable in their home settings," Complaint at ¶ 1; and (2) Newport Academy clients would be expected to stay at the treatment facilities for an average of 45 days. Id. at ¶ 55.

The Complaint fails to allege that Newport Academy's prospective clients "intend to remain in the [subject properties] for any significant period of time" or otherwise would consider it a residence for themselves. To the contrary, the prospective clients will be at the facilities as an alternative to their "home settings." Complaint at ¶ 1.

The Complaint's allegations indicate that the use of the Newport Academy properties will be more akin to short-term lodging for transient guests, which do not qualify as dwellings under the FHA, than to long-term living arrangements at a place the occupant would consider to be his or her "home," for which the FHA provides protection.

The facts alleged in the Complaint further demonstrate that Newport Academy's prospective clients will use the structures in question only for purposes of receiving treatment, only for a short period of time, and without any intention to make the

structure a home. The clients would not be able to come and go as they please. Nor would they stay at the facilities for a substantial period of time.

The factual allegations of the Complaint (and the lack of the factual allegations in the Complaint) distinguishes Newport Academy's proposed venture from those in Connecticut Hospital. Here, clients will receive treatment in the facility. Here, the clients have and maintain other primary homes from which they came and to which they will return following treatment. Here, the clients will stay for a relatively brief period of time solely for the purpose of treatment (45 days). The clients will receive meals prepared by a chef and (presumably) will not receive mail. Clients will not live on their own, but under the direction of Newport Academy staff members. The facts alleged in this case distinguish it from decisions such as drug and alcohol group homes where persons with similar problems reside for the primary purpose of having a place to live. [6] Here, the

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[6] Newport Academy no doubt will attempt to compare its mental health treatment facilities to the drug and alcohol rehabilitation centers at issue in two cases from other Circuits, Lakeside Resort Enterprises, LP v. Board of Supervisors of Palmyra Tp., 455 F.3d 154 (3rd Cir. 2006); cert. denied, 549 U.S. 1180 (2007), and Schwarz v. City of Treasure Island, 544 F.3d 1201, 1216 (11th Cir. 2008).

In Lakeside Resort, the plaintiff filed suit following the denial of an application to operate a drug and alcohol treatment center. The Third Circuit held that the facility qualified as a "dwelling" because it contemplated client stays of 30-plus days, and during the stays, expected clients to treat the facility as their home, including by enjoying communal meals and receiving mail there. On these grounds, the Third Circuit found the facility housed persons for a sufficient time period, under circumstances in which persons "viewed it as their home during that time." 455 F.3d at 158-60.

In Schwarz, the Eleventh Circuit held that halfway houses providing outpatient services for recovering substance abusers qualified as "dwellings" for FHA purposes. The Schwartz court discussed both Lakeside Resort and Connecticut Hospital in its decision. 544 F.3d at 1215. The halfway house residents in Schwarz stayed an average of six to ten weeks (and some as long as five months); executed leases for their occupancy; and (among other attributes of shared living) prepared their own meals and cleaned and maintained the premises. Id. at 1207. Like the group homes in Connecticut Hospital, the halfway house tenants in Schwarz did not receive treatment in the houses. Id. at 1206. No counselors remained in the houses during the tenants' stays; the tenants retained sole responsibility for their daily activities. Id. at 1207.

Not only are these decisions not binding on this Court, they provide little in the way of useful analysis. For the reasons discussed above, the proposed Newport Academy facilities do not satisfy the dwelling analysis used in this Circuit.

clients live elsewhere and come to receive medical treatment, similar to a hospital. These facts do not support classification as a "dwelling" under the FHA.

Where, as here, essential allegations of "dwelling" status are absent, an FHA claim is subject to dismissal. See Weisenberg v. Town Board of Shelter Island, 404 F.Supp.3d 720, 729 (E.D.N.Y. 2019) (claim that property used as vacation rentals were "dwellings" under the FHA not plausible given absence of allegations that the structures were intended for use as actual residences, and because the complaint was "bereft of any allegations that any short-term tenants treat the vacation rentals as homes or intend to return to them.").

In light of the foregoing, the Defendants submit that Newport Academy has not stated a plausible claim for relief under the FHA for the simple reason that the properties at issue, and on which Newport Academy intends to conduct business, are not "dwellings" subject to protection under the FHA.

(4) Count Four Should Be Dismissed Given Count One's Failure to State a Claim for Relief.

Count Four asserts a claim for discriminatory housing practices under Conn. Gen. Stat. § 46a–64c, which makes it unlawful "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a learning disability or physical or mental disability of: (i) Such buyer or renter; (ii) a person residing in or intending to reside in such dwelling after it is so sold, rented, or made available; or (iii) any person associated with such buyer or renter." Conn. Gen. Stat. § 46a–64c(a)(6)(A). Connecticut courts rely on federal court interpretations of the FHA as a guide, and when claims under the FHA are subject to dismissal, so too are

corresponding claims under the Connecticut statute. See, e.g., McNeil v. Yale University, 436 F.Supp.3d 489, 523 (2020). Because the FHA claim in Count One fails to state a claim for relief, the corresponding state law claim in Count Four likewise should be dismissed.

B. Counts Two and Three Fail to State Claims for Relief Because They Lack Essential Allegations of Disability of Impairment Substantially Limiting Major Life Activities

Claims under Title II of the ADA and Section 504 of the Rehabilitation Act are subject to an identical analysis and each is considered under the same standard. Loeffler v. Staten Island Univ. Hosp., 582 F.3d 268, 286 (2d Cir. 2009).

Title II of the ADA provides, in relevant part, that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." Harris v. Mills, 572 F.3d 66, 73 (2d Cir. 2009) (quoting 42 U.S.C. § 12132). "Similarly, the Rehabilitation Act requires that specified 'otherwise qualified' disabled individuals receive reasonable accommodations from programs receiving federal financial assistance." Harris, 572 F.3d at 73 (quoting 29 U.S.C. § 794(a)).

To state a claim under the ADA, the plaintiff must allege that he or she (1) is a qualified individual with a disability; (2) the defendants are subject to the statutes; and (3) the plaintiff was denied the opportunity to participate in or benefit from defendants' services, programs, or activities, or were otherwise discriminated against by defendants, by reason of the plaintiff's disabilities. Henrietta D. v. Bloomberg, 331 F.3d 262, 272 (2d

Cir. 2003); Mary Jo C v. New York State and Local Retirement System, 707 F.3d 144,153 (2d Cir. 2013). "These requirements apply with equal force to … Rehabilitation Act claims." Hargrave v. Vermont, 340 F.3d 27, 34-35 (2d Cir. 2003).

A "disability" is defined in the ADA as "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment[.]" 42 U.S.C. § 12102(1). Thus, to assert an ADA claim, a plaintiff must allege "that he has a physical or mental impairment" and "that such impairment substantially limits one or more of [his] major life activities." Andino v. Fischer, 698 F. Supp. 2d 362, 378 (S.D.N.Y. 2010) (internal quotation marks and citations omitted). "Major life activities" are further defined to include "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." 42 U.S.C. § 12102(2).

The Complaint in this case does not include any factual allegations that could qualify Newport Academy's prospective clients as "disabled" within the meaning of the ADA and the Rehabilitation Act, or that could establish that Newport Academy was discriminated against because of a "disability." Newport Academy alleges only in conclusory fashion that its prospective clients generally suffer from "mental health disorders," Complaint at ¶ 6; "mental health disabilities," Complaint at ¶ 62; "mental illnesses," Complaint at ¶ 69; and somewhat more specifically, "anxiety, depression, trauma," and other "mental health conditions" or "mental health disorders," Complaint at ¶¶ 1, 3, 21, 41. These conclusory allegations are insufficient to state a plausible claim for relief under either the ADA or the Rehabilitation Act. Not only does the Complaint fail

to include factual allegations regarding the manner in which general mental disorders, disabilities, or illnesses may limit prospective clients' major life activities, any such allegations would be conclusory given Newport Academy's acknowledgment that its clients may be addressing only issues of coping and focus. See, e.g., Ex. A at 85.

In Wiltz v. New York University, 1:18-cv-00123 (GHW) (SDA), 2019 WL 721658 at ** 7-8 (S.D.N.Y Feb. 1, 2019), the plaintiff alleged that he suffered from depression, anxiety and stress. The court found these conclusory allegations insufficient to sustain an ADA claim because they did not include sufficient facts to show how his depression, anxiety or stress limited any major life activities. The Second Circuit and courts in this Circuit have dismissed ADA claims for the same reason. See, e.g., Tylicki v. St. Onge, 297 Fed.Appx. 65, 67 (2d Cir. Oct.28, 2008) (affirming dismissal of complaint that did not adequately plead a disability under the ADA where it contained no allegations describing how plaintiff's alleged mental condition substantially limited a major life activity); Lewis v. Southern Connecticut State University, 3:19-cv-11 (AWT), 2020 WL 3619546 at * 4 (D. Conn. July 2, 2020) (dismissing ADA and Rehabilitation Act claims where plaintiff's allegations of panic disorder and agoraphobia were not supported by "additional facts that plausibly suggest that such mental illnesses substantially limited one or more of his major life activities."); Schlosser v. Walker, 3:20-cv-433 (WIG), 2020 WL 7324679 at * 3 (D. Conn. Dec. 11, 2020) (dismissing ADA and Rehabilitation Act claims based solely on conclusory allegation that plaintiff suffers from "a serious mental illness"); Freund v. County of Nassau, CV-15-6180, 2017 WL 750480 at * 4 (E.D.N.Y Feb. 24, 2017) (dismissing ADA claims given plaintiff's failure to allege that major life activities were substantially limited by reason of his disability).

Because the allegations in the Complaint do not plausibly state a claim for relief under either the ADA or the Rehabilitation Act, Counts Two and Three should be dismissed.

C. All Claims for Relief Against Defendant Kupchick Should be Dismissed

In each Count of the Complaint, Newport Academy seeks relief against Kupchick both individually and in her official capacity as the Town's First Selectwoman. Complaint at ¶ 15. The claims against Kupchick should be dismissed in full and with prejudice.

(1) Defendant Kupchick is Entitled to Qualified Immunity on All Claims Against Her in Her Individual Capacity.

Government officials performing discretionary functions generally are afforded qualified immunity, which "shields" them "from civil suits for damages 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.' " Higazy v. Templeton, 505 F.3d 161, 169 (2d Cir. 2007) (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)).

Qualified immunity is not only a defense, it is "an entitlement not to stand trial" or "face the other burdens of litigation." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985). The doctrine of qualified immunity balances two sets of competing public interests: (1) the importance of vindicating citizens' constitutional rights, providing compensation for the violation of those rights, and deterring government officials from such violations; and (2) the "substantial social costs" of permitting damages suits against government officials, "including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." Ziglar v. Abbasi, ––– U.S. –––, 137 S. Ct. 1843, 1866, 198 L.Ed.2d 290 (2017).

A defendant is entitled to qualified immunity 'if either (a) the defendant's action did not violate clearly established law, or (b) it was objectively reasonable for the defendant to believe that his action did not violate such law.' " Anderson v. Recore, 317 F.3d 194, 197 (2d Cir. 2003) (quoting Johnson v. Newburgh Enlarged Sch. Dist., 239 F.3d 246, 250 (2d Cir. 2001)). "A right is clearly established if (1) the law is defined with reasonable clarity, (2) the Supreme Court or the Second Circuit has recognized the right, and (3) 'a reasonable defendant [would] have understood from the existing law that [his] conduct was unlawful.' " Id. (quoting Young v. County of Fulton, 160 F.3d 899, 903 (2d Cir. 1998)). "The question is not what a lawyer would learn or intuit from researching case law, but what a reasonable person in the defendant's position should know about the constitutionality of the conduct." McCullough v. Wyandanch Union Free Sch., 187 F.3d 272, 278 (2d Cir. 1999).

The Second Circuit has not spoken directly on qualified immunity under the FHA, but other Circuit Courts of Appeals and courts in this Circuit have held that both municipal and state actors may claim qualified immunity under the FHA. See Altamira–Rojas v. City of Richmond, 184 F.Supp.3d 290, 294 (2016) (noting that "[e]very court of appeals that has addressed the question has concluded that qualified immunity applies to claims under the FHA," and citing decisions from six Circuit Courts of Appeal); see also G.B. v. DiPace, 1:14-CV-0500 (DNH/CFH), 2019 WL 1385840, at ** 6-8 (N.D.N.Y. Mar. 27, 2019) (granting summary judgment on FHA claims against state agency personnel on qualified immunity grounds). Moreover, "[t]he qualified immunity defense is available for ADA and Rehabilitation Act claims." Roberts v. City of Omaha, 723 F.3d 966, 972 (8th Cir. 2013).

Kupchick is entitled to qualified immunity on all four Counts of the Complaint because the actions she allegedly engaged in did not violate clearly established law. It is reasonable to conclude that, once Newport Academy provided notice of its true intention for use of the properties, additional zoning approvals for such medical facilities would be required. Because it was objectively reasonable for Kupchick to believe this, the alleged actions she engaged in did not in fact violate the law.

Given the lack of governing Supreme Court or Second Circuit precedent, not to mention the diverse approaches taken by (and results reached by) both appellate and district courts addressing the "dwelling" issue at the time of the events alleged in the Complaint, it was in no sense "clearly established" that Newport Academy possessed any disability-based statutory rights or claims under the FHA, the ADA, the Rehabilitation Act, or Connecticut General Statutes § 46a-64c, much less rights or claims of which reasonable people would have known for purposes claims of which reasonable people would have known for purposes of qualified immunity. Indeed, it was objectively reasonable for Kupchick to believe that her acts in suggesting alternative residential locations for Newport Academy's facilities were completely lawful. The claims against Kupchick in her individual capacity, therefore, should be dismissed on grounds of qualified immunity.

(2) The Claims Against Defendant Kupchick in Counts Two and Three Must be Dismissed Because She is Not Subject to Liability in Either Her Official or Individual Capacities.

The claims asserted against Kupchick in Counts Two and Three must be dismissed on alternative grounds: these statutes do not permit suits against individual defendants in an individual capacity. Garcia v. S.U.N.Y. Health Sciences Center, 280 F.3d 98, 107 (2d Cir. 2001) ("[N]either Title II of the ADA nor § 504 of the Rehabilitation Act provides for individual capacity suits against state officials." (citations omitted)). [7]

Whether sued in a personal or representative capacity, Kupchick is not subject to suit under Title II of the ADA. Plaintiffs may, however, proceed against the individual defendants in their official capacities to the extent they seek prospective injunctive relief. See Harris v. Mills, 572 F.3d 66, 72 (2d Cir. 2009) ("Rehabilitation Act suits for prospective injunctive relief may, … proceed against individual officers in their official capacity."). Accordingly, Newport Academy's only viable claim against Kupchick would be one seeking prospective injunctive relief under the Rehabilitation Act.

However, even if it otherwise would be proper to permit a claim to proceed against Kupchick only in her official capacity, and for prospective injunctive relief only, the claim nevertheless is subject to dismissal as duplicative and redundant as it seeks the same relief as the same claim asserted against the Town. See, e.g., Lopez v. New York City Department of Education, 17-CV-9205 (RA), 2020 WL 4340947 at * 14, n.9 (S.D.N.Y. July 8, 2020) (dismissing with prejudice ADA and Rehabilitation claims

[7] Courts in this Circuit routinely dismiss claims against public officials in this context. See, e.g., Perros v. County of Nassau, 238 F. Supp. 3d 395, 402 n.3 (E.D.N.Y. 2017) ("[I]t is well-established that there is no individual liability under the ADA or the Rehabilitation Act, whether the individual is sued in their official or individual capacity."); Cohn v. KeySpan Corp., 713 F.Supp.2d 143, 154 (E.D.N.Y. 2010) ("Individuals may not be sued in their individual or personal capacity under the ADA or Rehabilitation Act."); Maus v. Wappingers Cent. Sch. Dist., 688 F.Supp.2d 282, 302 n.10 (S.D.N.Y. 2010) ("[I]ndividuals cannot be named as defendants in ADA or Rehabilitation Act suits in their official or representative capacities.").

against individual defendants in both their "individual" or "official" capacities as "wholly redundant" to plaintiff's claims against state agency); Logerfo v. City of New York, 17-cv-00010 (JMA) (AYS), 2020 WL 2307649 at * 7 (E.D.N.Y May 8, 2020) (dismissing ADA and Rehabilitation Act claims against individuals in their official capacities as duplicative and redundant of claims against governmental entities); Walsh v. Coleman, 3:19-cv-980 (JAM), 2019 WL 6529825 at * 9 (D. Conn., Dec. 4, 2019) (dismissing claims against individual in official capacity for prospective injunctive relief under the ADA and the Rehabilitation Act as redundant); Fowler v. Department of Correction, 3:180cv001635 (JAM), 2019 WL 2176304 at * 3 (D. Conn. May 20, 2019) ("[T]to the extent that Fowler seeks to proceed under the ADA and Rehabilitation Act against any individuals in their official capacities, I will dismiss these official-capacity claims as redundant in light of Fowler's claim against the DOC."); Gallagher v. Town of Fairfield, No. 3:10-cv-1270 (CFD), 2011 WL 3563160 (D. Conn. Aug. 15, 2011) (dismissing ADA and Rehabilitation Act claims against individual defendants in their official capacities as duplicative of claims asserted against town).

In light of the foregoing, all claims for relief against Kupchick in her individual and official capacities should be dismissed with prejudice.

V. CONCLUSION

This case does not involve proposed group homes for disabled residents; it involves proposed inpatient treatment centers for disabled clients. This case does not arise out of the efforts of a group of people with disabilities to locate suitable communal living arrangements on a permanent or even a semi-permanent basis; it arises out of a mental health services provider's search for locations in which to conduct business.

For the reasons set forth above, the Defendants respectfully submit that the Complaint fails to state viable claims for relief under any of the statutes on which liability is premised in Counts One through Four, and further that Defendant Kupchick is not amenable to suit in either her personal or official capacities.

Accordingly, the Defendants respectfully move the Court to dismiss all Counts of Plaintiffs' Complaint with prejudice.

Respectfully submitted,

DEFENDANTS
TOWN OF FAIRFIELD AND
BRENDA L. KUPCHICK

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CERTIFICATION

I hereby certify that a copy of the foregoing Memorandum of Law in Support of Motion to Dismiss was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the court's CM/ECF System.

Dated at Southport, Connecticut this 15th day of March, 2021.

/s/ *Douglas J. Varga*
Douglas J. Varga (ct18885)