UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

FRANCES J. AMATO et al.,

Plaintiffs,

1:17-cv-1280 (GLS/TWD)

v.

ANTHONY MCGINTY et al.,

Defendants.

SUMMARY ORDER

In its prior Summary Order, the court allowed plaintiffs Frances Amato, Alana Orr, and Gina Funk to amend their complaint to cure deficiencies with their ADA claims seeking non-monetary, prospective relief against defendants Judge Anthony McGinty and Judge Marianne Mizel.[1] (Dkt. No. 47 at 8-12.) On November 26, 2018, plaintiffs filed an amended complaint. (Am. Compl., Dkt. No. 50.) Pending is defendants' motion to dismiss, (Dkt. No. 56), which is granted in part and denied in part for the

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[1] The court presumes the parties' familiarity with the factual and procedural background of this action. (Dkt. No. 47 at 1-3.) Likewise, the court has previously outlined the legal standards applicable at this stage. (*Id.* at 3-4.)

following reasons.[2]

Title II of the ADA provides 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." 42

[2] Also pending is plaintiffs' letter motion requesting "an opportunity and sufficient time to amend [their] [response] to fix . . . defects." (Dkt. No. 70.) In light of their *pro se* status, the court has already granted plaintiffs two "final" extensions to respond to the pending motion to dismiss. (Dkt. Nos. 63 at 1, 66.) The court emphasized that its previous Text Only Order was to be "the FINAL EXTENSION granted absent extraordinary circumstances." (Dkt. No. 66.) Plaintiffs eventually filed a response on April 10, 2019, (Dkt. No. 67), which defendants replied to on April 17, 2019, (Dkt.No. 69). Thereafter, the court received plaintiffs' pending request. (Dkt. No. 70.) In sum, plaintiffs assert that responding to the pending motion was a "hardship" due to their "disabilities," which resulted in "some clerical errors" and the omission of "some critical facts." (*Id.*) It is not apparent what "critical facts" plaintiffs refer to, but, at this stage, the only facts properly before the court are those well-pleaded facts within the confines of the amended complaint. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.") (internal quotation marks and citation omitted). Not only does the court accept those facts as true, but it also draws all reasonable inferences in plaintiffs' favor. *See Charles v. Orange County*, 925 F.3d 73, 81 (2d Cir. 2019). Given that this matter is fully-briefed, any further extensions at this stage would disturb the balance of the briefing schedule and unnecessarily prolong these proceedings at the expense of judicial resources. As such, plaintiffs' motion, (Dkt. No. 70), is denied. Funk and Orr have also moved for the appointment of counsel. (Dkt. No. 72.) That motion will be addressed by Magistrate Judge Thérèse Wiley Dancks in due course as it pertains to Orr.

U.S.C. § 12132. To plead an ADA claim, a plaintiff must allege: "(1) that [s]he is a qualified individual with a disability; (2) that [s]he was excluded from participation in a public entity's services, programs or activities or was otherwise discriminated against by a public entity; and (3) that such exclusion or discrimination was due to [her] disability." *Fulton v. Goord*, 591 F.3d 37, 43 (2d Cir. 2009) (internal quotation marks and citation omitted). "A qualified individual can base a discrimination claim on any of three available theories: (1) intentional discrimination (disparate treatment); (2) disparate impact; and (3) failure to make a reasonable accommodation." *Id.* at 43 (internal quotation marks and citation omitted).

Plaintiffs' ADA claims appear to rest on the theory that defendants failed to make a reasonable accommodation for their post-traumatic stress disorder (PTSD) during child custody proceedings.[3] (Am. Compl. ¶¶ 4-6, 14, 30, 49.) Defendants do not address whether they are proper

[3] All of plaintiffs' claims, except for their ADA claims seeking prospective injunctive relief, were previously dismissed with prejudice. (Dkt. No. 47 at 10-11, 12.) Therefore, to the extent plaintiffs now purport to advance claims under Title III of the ADA and Section 504 of the Rehabilitation Act, (Am. Compl. ¶ 58), those claims are dismissed.

defendants[4] or whether plaintiffs are qualified individuals.[5] Instead, they contend only that plaintiffs did not seek specific accommodations related to their disability and "failed to allege that they were mistreated or discriminated against because of their disability." (Dkt. No. 56, Attach. 2 at

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[4] To the extent that plaintiffs assert claims against defendants in their individual capacities, (Am. Compl. ¶¶ 7-8), those claims fail as a matter of law because the ADA does not provide for liability against defendants in their individual capacities. *See Garcia v. SUNY Health Scis. Ctr. of Brooklyn*, 280 F.3d 98, 107 (2d Cir. 2001). It is a closer call as to whether plaintiffs have alleged viable claims against defendants in their official capacities. "Title II coverage . . . includes activities of the . . . judicial branches of State and local governments." 28 C.F.R. pt. 35, App'x B, § 35.102. In its previous decision, the court assumed for the sake of argument that defendants were subject to the ADA. (Dkt. No. 47 at 9.) However, Title II of the ADA pertains only to a "public entity," which includes State or local governments and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1)(A)-(B). It is questionable whether defendants, even when sued in their official capacities, are public entities. *See Santiago v. Garcia*, 70 F. Supp. 2d 84, 89 (D. P.R. 1999) (holding state court judge sued in official capacity was not "public entity" under Title II); *but see Shollenberger v. N.Y. State Unified Court Sys.*, 18 CV 9736, 2019 WL 2717211, at *5 (S.D.N.Y. June 28, 2019) (allowing ADA claims seeking prospective injunctive relief to proceed against Chief Judge of the State of New York and Chief Administrator of the New York State Unified Court System because "a plaintiff need only allege the defendant[s] ha[ve] responsibility for the alleged conduct and the ability to redress the alleged violations"). Crucially, defendants do not raise this issue.

[5] Defendants assert that plaintiffs "have . . . alleged in a conclusory fashion that they are qualified individuals with disabilities under the ADA," (Dkt. No. 56, Attach. 2 at 8), but they do not develop this argument.

7-9; Dkt. No. 69 at 3-4.)

First, a plaintiff bringing an ADA claim under a failure to accommodate theory must allege facts from which it can be reasonably inferred that defendants were aware of his or her need for accommodation. *See Brown v. County of Nassau*, 736 F. Supp. 2d 602, 618 (E.D.N.Y. 2010); *accord Robertson v. Las Animas Cty. Sheriff's Dep't*, 500 F.3d 1185, 1196 (10th Cir. 2007); *cf. Graves v. Finch Pruyn & Co.*, 457 F.3d 181, 184-85 (2d Cir. 2006) (holding Title I of the ADA generally requires plaintiff to request an accommodation).

> Whether the public entity's knowledge derives from an individual's request for an accommodation or an individual's obvious need for an accommodation, the critical component of the entity's knowledge is that it is aware not just that the individual is disabled, but that the individual's disability affects h[er] ability to receive the benefits of the entity's services.

Brown, 736 F. Supp. 2d at 619 (quoting *Robertson*, 500 F.3d at 1197 n.10).

Here, Amato alleges that her PTSD was "exacerbated whenever [she] was forced to attend a court hearing," (Am. Compl. ¶ 12), and "[d]efendants refused every accommodation requested by [her]," (*id.* ¶ 18). But she stops short of alleging what accommodation she requested from

any defendant. (*Id.* ¶¶ 9-20.) Amato merely alleges in conclusory fashion that defendants knew of her disability and need for accommodation. (*Id.* ¶ 14.) Similarly, Funk alleges that "[d]ue to the courts [sic] actions she was and is unable to conduct herself as expected in the litigation," (*id.* ¶ 50), but she too fails to allege what accommodation she requested from any defendant, (*id.* ¶¶ 39-53). Like Amato, Funk merely alleges in conclusory fashion that defendants knew of her disability and need for accommodation. (*Id.* ¶ 49.) Because the court is "'not . . . bound to accept conclusory allegations or legal conclusions masquerading as factual conclusions,'" *In re Facebook, Inc.*, 797 F.3d 148, 159 (2d Cir. 2015) (quoting *Faber v. Met. Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011)), it agrees with defendants that Amato and Funk fail to state an ADA claim, (Dkt. No. 56, Attach. 2 at 8, 9). As such, the claims of Amato and Funk are dismissed.[6] *See Brown*, 736 F. Supp. 2d at 619.

As for Orr, defendants are incorrect that "[she] fails to allege any specific accommodation she sought from either defendants which was denied." (Dkt. No. 56, Attach. 2 at 9.) To the contrary, Orr alleges that she

[6] Likewise, to the extent that Amato attempts to state a retaliation claim under the ADA, (Am. Compl. ¶ 17), it is dismissed as conclusory. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007).

requested an audio recording of the proceedings "as an accommodation for her concentration problems due to her PTSD," which was denied by Judge McGinty. (Am. Compl. ¶ 37.) It can also be reasonably inferred that Judge Mizel knew about Orr's PTSD based on a mental health evaluation, (*id.* ¶ 34), and denied her requests for "adequate counsel," "to have all parties evaluated by a custody evaluator," for the court "[to] adopt[] the recommendations of mental health professionals," (*id.* ¶ 36), as well as for "an adjournment of trial in order to give her time to prepare," (*id.* ¶ 38). Moreover—contrary to defendants' argument that "Orr's claims are bereft of any specific allegations stemming from her PTSD," (Dkt. No. 56, Attach. 2 at 8)—she alleges that "[her] disabilities . . . prevented her providing testimony without appearing defensive," caused her to be "unable to connect to her feelings about losing custody," caused her to be "unable to concentrate during the proceedings," and "caused her to feel attacked during the litigation," (*id.* ¶ 33).

Defendants also argue that Orr fails to state a claim because she "makes no allegation that [d]efendants took action against her *because* of her disability." (Dkt. No. 56, Attach. 2 at 9.) The court agrees that the amended complaint is completely devoid of allegations that defendants'

conduct was based on Orr's PTSD. (Am. Compl. ¶¶ 21-38.) As such, to the extent that Orr attempts to advance ADA claims under an intentional discrimination theory, they are dismissed. *See, e.g.*, *Byng v. Delta Recovery Servs., LLC*, No. 6:13–cv–733, 2013 WL 3897485, at *9 (N.D.N.Y. July 29, 2013) ("Plaintiff has failed to allege . . . that [d]efendants' alleged conduct was in any way caused by, or related to, [p]laintiff's alleged disability."); *Bobrowsky v. Yonkers Courthouse*, 777 F. Supp. 2d 692, 716 (S.D.N.Y. 2011) ("[T]he [c]omplaint is completely devoid of facts, or even allegations, that any purported mistreatment was motivated by discriminatory animus or ill will based on [plaintiff's] disability."). However, defendants' suggestion that this also mandates dismissal of Orr's reasonable accommodation claim misses the mark.

> The [reasonable accommodation] theory would be entirely redundant if it required proof that the defendants' actions were motivated by animus towards the [disabled]. Indeed for the reasonable accommodation theory to be meaningful, it must be a theory of liability for cases where we assume there is a valid reason behind the actions of the [defendant], but the [defendant] is liable nonetheless if it failed to reasonably accommodate the [disability] of the plaintiff.

Good Shepherd Manor Found., Inc. v. City of Momence, 323 F.3d 557, 562 (7th Cir. 2003).

Of course, Orr must still "demonstrate that a denial of benefits occur[ed] . . . because of [her] disability." *Henrietta D. v. Bloomberg*, 331 F.3d 261, 278 (2d Cir. 2003) (internal quotation marks and citations omitted). But in order to succeed on a failure to accommodate theory—as opposed to an intentional discrimination theory—Orr does not need to allege that defendants made the decision to deny her requests *because* of her PTSD. *See id.* at 276. "Quite simply, the demonstration that a disability makes it difficult for a plaintiff to access benefits that are available to both those with and without disabilities is sufficient to sustain a claim for a reasonable accommodation." *Id.* at 277.

Defendants make no other arguments that warrant dismissal of Orr's claims.[7] Nevertheless, the court remains skeptical about their ultimate

[7] Defendants' argument that plaintiffs' claims are barred by absolute judicial immunity, (Dkt. No. 56, Attach. 2 at 2-7), is meritless, given that such immunity does not apply to claims seeking prospective injunctive relief. *See Pulliam v. Allen*, 466 U.S. 522, 536-543 (1984); *McKeown v. N.Y. State Comm'n on Judicial Conduct*, 377 F. App'x 121, 124 (2d Cir. 2010). As already explained, the ADA allows plaintiffs to seek such injunctive relief. (Dkt. No. 47 at 8 (citing *Harris v. Mills*, 572 F.3d 66, 72 (2d. Cir. 2009)).) Defendants' reliance on *Brooks*, and the cases cited therein, is misplaced. (Dkt. No. 47 at 3-5.) In *Brooks*, the plaintiff did not seek injunctive relief that could be properly characterized as prospective in nature. (*See Brooks v. Onondaga Cty. Dep't of Children & Family Servs.*, 5:17-CV-1186, Am. Compl., Dkt. No. 9 at 8.) Thus, when the court ruled that judicial immunity extended to plaintiff's ADA claims against a

viability.

Although it is clear that Title II protects a qualified individual's "fundamental right of access to the courts," *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004), it is less clear that Orr has plausibly alleged that defendants infringed her right of access to Family Court. In sum, it appears that Orr labels all unfavorable decisions in the underlying child custody proceedings as failures to reasonably accommodate her PTSD. (Am. Compl. ¶¶ 21-38.) She even goes so far as to argue that "[d]efendants could have accommodated [her] . . . disabilities by returning custody to [her]."[8] (Dkt. No. 67 at 19.) Based on this logic, it appears that

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defendant judge, it expressed no opinion on whether such immunity bars ADA claims to the extent that they seek injunctive relief. *See Brooks v. Onondaga Cty. Dep't of Children & Family Servs.*, 5:17-CV-1186, 2018 WL 2108282, at *4-5 (N.D.N.Y. Apr. 9, 2018) (collecting same cases cited by defendants).

[8] Amato and Funk make similarly off-base arguments: "[Judge] McGinty could have acknowledged that . . . Amato was the primary caregiver in her child's life and not severed their bond," (Dkt. No. 67 at 17), and "[d]efendants could have accommodated . . . Funk's . . . disabilities by returning custody to [her]," (*id.* at 22). Even if the ADA were designed to remedy such conduct, such claims seek direct review of decisions issued by state court judges and, as defendants suggest, would be barred by the *Rooker-Feldman* doctrine. (Dkt. No. 56, Attach. 2 at 9-11); *see Dist. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983) ("[A] United States District Court has no authority to review final judgments of a state court in judicial

"what [plaintiff] ultimately seeks to challenge is not illegal discrimination against the disabled, but the substance of services provided to h[er]." *Doe v. Pfrommer*, 148 F.3d 73, 84 (2d Cir. 1998); *see Felix v. N.Y.C. Transit Auth.*, 324 F.3d 102, 107 (2d Cir. 2003) ("The ADA mandates reasonable accommodation of people with disabilities in order to put them on an even playing field with the non-disabled; it does not authorize a preference for disabled people generally.") (internal citation omitted); *Woods v. City of Utica*, 902 F. Supp. 2d 273, 280 (N.D.N.Y. 2012) ("A reasonable accommodation is one that gives the disabled person 'meaningful access' to the services sought.") (internal citation omitted). In the courtroom context, "meaningful access" has been held to be consistent with the due process principle that, within the limits of practicability, all individuals must be afforded a meaningful opportunity to be heard. *See Lane*, 541 U.S. at 532-33; *cf. Tenenbaum v. Williams*, 193 F.3d 581, 593 (2d Cir. 1999) ("As a general rule . . . before parents may be deprived of the care, custody or management of their children without their consent, due process—ordinarily a court proceeding resulting in an order permitting removal—must be accorded to them.") (internal citations omitted).

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proceedings.").

Here, the amended complaint is devoid of any material impediments to Orr's ability to receive meaningful access to the opportunity, benefit, or services offered by Family Court. That is, Despite Orr's PTSD and the denial of her requests, Orr was able to "engage[] in custody litigation," (Am. Compl. ¶ 22), including "[a] trial on child custody," (*id.* ¶ 24). She was able to appear before multiple family court judges and assert allegations against her child's father, including allegations of child abuse. (*Id.* ¶ 24.) A fact-finding proceeding was held. (*Id.* ¶ 25.) After Judge McGinty entered an order giving joint legal custody to her child's father and maternal grandparents, Orr was able to file a petition for modification of custody and present evidence. (*Id.* ¶¶ 26-28.) She was able to provide testimony at the proceedings. (*Id.* ¶ 33.) Although she complains that Judge Mizel "refused to assign adequate representation to [her]," Orr alleges that an attorney was previously assigned to her. (*Id.* ¶ 37.) Additionally, Orr does not allege that she was not permitted a reasonable amount of time to prepare for proceedings nor provide any specifics about the nature of the adjournment requested (*i.e.*, when it was requested and how long of an adjournment was sought). (*Id.* ¶ 38.) As such, it does not appear that Orr's PTSD excluded her from accessing the process due from Family

Court. *See Aron v. Becker*, 48 F. Supp. 3d 347, 378 (N.D.N.Y. 2014) (dismissing ADA claim "[b]ecause the allegations in the [c]omplaint indicate that [p]laintiff could reasonably access the public opportunity or benefit in issue").

But all of that is academic given defendants' failure to raise these arguments so as to give Orr an opportunity to address them. Accordingly, this portion of defendants' motion is denied.

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that plaintiffs' motion for an extension of time to fix defects in their response (Dkt. No 70) is **DENIED**; and it is further

ORDERED that defendants' motion to dismiss (Dkt. No 56) is **GRANTED IN PART and DENIED IN PART** as follows:

DENIED as it relates to Orr's failure to accommodate claims pursuant to Title II of the ADA seeking prospective injunctive relief against defendants in their official capacities; and

GRANTED in all other respects; and it is further

ORDERED that the Clerk terminate plaintiffs Amato and Funk as parties to this action; and it is further

ORDERED that the parties contact Magistrate Judge Thérèse Wiley

Dancks to schedule further proceedings in accordance with this Summary Order; and it is further

ORDERED that the Clerk provide a copy of this Summary Order to the parties.

IT IS SO ORDERED.

August 7, 2019
Albany, New York

Gary L. Sharpe
U.S. District Judge