UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

ALANA ORR,

Plaintiff,

-against- 17-CV-1280

ANTHONY MCGINTY, GLS/TWD

Defendant.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT PURSUANT TO FRCP 56

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PRELIMINARY STATEMENT

This memorandum of law is submitted on behalf of the Defendant, Ulster Family Court Judge Anthony McGinty, in support of his motion, pursuant to Fed. R. Civ. P. 56, seeking summary judgment and dismissal of the remaining cause of action, with prejudice.

Plaintiff commenced this action against Defendant Anthony McGinty on November 21, 2017, seeking primarily to nullify family court and custody determinations issued by Defendant in Plaintiff's Ulster Family Court matter. (Dkt. No. 103, pp 1; Dkt. No. 1.) Despite multiple opportunities to replead, this Court has dismissed all causes of action with prejudice, except for a single claim seeking non-monetary prospective injunctive relief under Title II of the Americans with Disabilities Act (hereafter "ADA"). Defendant is entitled to Summary Judgment in this matter because Plaintiff has failed to establish an ongoing prima facie violation under Title II of the ADA, and therefore, the Complaint must be dismissed in its entirety.

STATEMENT OF FACTS

Defendant respectfully refers the Court to Defendant's accompanying statement of material facts, Pursuant to Rule 56.1(a) of the Local Rules of this Court, and fully incorporates the contents herein by reference.

PROCEDURAL HISTORY

The Court recounted the lengthy procedural history of this matter in its March 5, 2021 Amended Decision and Order denying Plaintiff's omnibus motion and its December 17, 2021 Order denying *inter alia* Plaintiff's renewed motion to amend the complaint. (Dkt. Nos. 103, 142.) This procedural history is incorporated herein by reference.

The Court, while dismissing all other claims in the original complaint with prejudice, allowed Plaintiff (and the now-terminated plaintiffs) to amend their pleadings to cure deficiencies with their ADA claims seeking non-monetary, prospective relief against Defendant McGinty.

(Dkt. No. 47 at 8-12). On November 26, 2018, Plaintiff filed an Amended Complaint (Dkt. No. 50), which is the current operative pleading in this case.

The only remaining claim in this action is Plaintiff's allegation that Defendant denied her request for audio recordings of family court proceedings as an accommodation of her disability (Post-Traumatic Stress Disorder, hereafter "PTSD"), in violation of Title II of the ADA. The only possible relief to which Plaintiff could be entitled at the conclusion of this suit is a prospective injunction, effectively directing Defendant to provide Plaintiff with the accommodation she requested – the audio recordings of family court proceedings.

This Court has already dismissed Plaintiff's related ADA-based claims under the Doctrines of Judicial and Sovereign Immunity.[1] Defendant is now entitled to Summary Judgment in this matter because Plaintiff has failed to establish an ongoing prima facie violation under Title II of the ADA, and therefore, the Complaint must be dismissed in its entirety.

Even if Plaintiff established an ongoing *prima facie* violation of the ADA, which she has not, she is not entitled to the prospective injunctive relief she seeks, or to an order reversing or nullifying orders previously issued by the Ulster County Family Court or divesting the family court or Defendant-Judge of jurisdiction in the underlying family court proceedings.

STANDARD OF REVIEW

Rule 56 of the Federal Rules of Civil Procedure permits a party to move for summary judgment, which shall be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law…" Fed. R. Civ. P. 56(a). "[S]ummary judgment is appropriate where there exists no genuine issue of material fact and,

1 "While claims against defendants in their official capacities pursuant to 42 U.S.C. §1982 were properly dismissed pursuant to the Eleventh Amendment's sovereign immunity standard (Dkt. No. 47 at 4), claims against the defendant judges in their individual capacity were properly dismissed pursuant to the doctrine of judicial immunity. (Dkt. No 47 at 5.)" See, Dkt. 103.

based on the undisputed facts, the moving party is entitled to judgment as a matter of law." *D'Amico v. City of N.Y.*, 132 F.3d 145, 149 (2d Cir. 1998), *cert. denied*, 524 U.S. 911. "[W]ith respect to a properly supported summary judgment motion, the party opposing summary judgment may not rest upon the mere allegations or denials of the adverse party's pleading, but … must set forth specific facts showing that there is a genuine issue for trial." *Globalnet Fin.com, Inc. v. Frank Crystal & Co.*, 449 F.3d 377, 382 (2d Cir. 2006) (internal quotation marks omitted).

"Even where a complaint or affidavit contains specific assertions, the allegations "may still be deemed conclusory if they are (1) largely unsubstantiated by any other direct evidence and (2) so replete with inconsistencies and improbabilities that no reasonable juror would undertake the suspension of disbelief necessary to credit the allegations made in the complaint." *Alexander v. Fischer*, 2015 U.S. Dist. LEXIS 170776, at *46-47 (N.D.N.Y. Dec. 21, 2015) (internal quotation marks and alterations omitted) (Baxter, M.J.), adopted, 2016 U.S. Dist. LEXIS 41790 (N.D.N.Y. Mar. 30, 2016). Bald assertions or conjecture unsupported by evidence are insufficient to overcome a motion for summary judgment. *Carey v. Crescenzi*, 923 F.2d 18, 21 (2d Cir. 1991).

As set forth herein, Plaintiff has failed to raise genuine issues of fact as to her claims against Defendant.

ARGUMENT

POINT I

PLAINTIFF IS NOT ENTITLED TO PROSPECTIVE INJUNCTIVE RELIEF

A. § 1983 Relief

Section 1983 (42 USCS § 1983), which authorizes redress for violations of constitutional and statutory rights, is not itself a source of substantive rights, but rather a method for vindicating federal rights elsewhere conferred by those parts of United States Constitution and federal statutes

that it describes. *See Baker v. McCollan*, 443 U.S. 137 (1979). The 1996 Congressional amendments to § 1983 provides that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable." *McKeown v NY State Commn. on Jud. Conduct*, 377 F App'x 121, 124 (2d Cir 2010); *Montero v. Travis*, 171 F.3d 757, 761 (2d Cir. 1999) (*quoting* Federal Courts Improvement Act of 1996, Pub. L. No. 104-317, § 309(c), 110 Stat. 3847, 3853 (1996)). (*See,* Dkt. No. 73 fn 7.)

Eleventh Amendment immunity extends to suits against state officials in their official capacities. *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 (1989) ("[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." (internal citation and citations omitted)). *Brandon v. Holt*, 469 U.S. 464, 471-472 (1985) (". . . a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents, provided … the public entity received notice and an opportunity to respond").

This Court has already dismissed Plaintiff's related ADA-based claims under the Doctrines of Judicial and Sovereign Immunity (*see*, Dkt. No. 103) and permitted Plaintiff to file an amended complaint to cure the deficiencies in her ADA claim seeking only non-monetary prospective injunctive relief against Defendant McGinty. As noted by this Court, "as a general matter, judges are not absolutely immune from suits for prospective injunctive relief." *Mireles v. Waco,* 502 U.S. 9, 10 n.1 (1991) (per curiam). However, in order for Plaintiff to be entitled to such relief, she must demonstrate an ongoing violation under Title II of the ADA, which, as discussed below, she has not, and therefore Defendant should be granted summary judgment.

B. Ex parte Young Doctrine

Pursuant to *Ex parte Young*, 209 U.S. 123 (1908), a plaintiff may avoid the Eleventh Amendment bar to suit and proceed against individual state officers, as opposed to the state, in their official capacities, provided that her complaint (a)"alleges an ongoing violation of federal law" and (b) "seeks relief properly characterized as prospective". *Torres v NY State Dept. of Corr. & Community Supervision*, 2020 US Dist. LEXIS 233044, at *7-8 (N.D.N.Y. Dec. 11, 2020) (quoting *In re Deposit Ins. Agency*, 482 F.3d 612, 618 (2d Cir. 2007) (internal quotation marks and citation omitted); *citing Hill v. LaClair,* 2020 US Dist. LEXIS 82942 (N.D.N.Y. May 11, 2020) (citing *Ex parte Young*, 209 U.S. 123 (1908)); *see CSX Transp., Inc. v. N.Y. State Office of Real Prop. Servs.*, 306 F.3d 87, 99 (2d Cir. 2002) ("Ex parte Young allows for jurisdiction over the Individual Defendants inasmuch as it is in the performance of their duties that there may be an ongoing violation of federal law").

The *Ex parte Young* exception "rests on the premise -- less delicately called a 'fiction' -- that when a federal court commands a state official to do nothing more than refrain from violating federal law, he is not the State for sovereign-immunity purposes." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011) (internal citation omitted); *Sutton v. Stony Brook Univ.*, 2020 US Dist. LEXIS 206999, at *28-29 (E.D.N.Y. Nov. 4, 2020).

The *Ex parte Young* exception to sovereign immunity "only authorizes suits against officials with authority to provide the requested relief." *Siani v. State Univ. of N.Y. at Farmingdale*, 7 F. Supp. 3d 304, 317 (E.D.N.Y. 2014) (citations omitted). Thus, for the exception to apply, a plaintiff must allege that "the defendant has responsibility for the alleged conduct and the ability to redress the alleged violations." *Shollenberger v. N.Y. State Unified Court Sys.*, No. 18-CV-9736, 2019 U.S. Dist. LEXIS 108742 (S.D.N.Y. June 28, 2019) (*citing CSX Transp., Inc. v. N.Y. State*

Office of Real Prop. Servs., 306 F.3d at 99). Such claims must be brought against the individual with responsibility for the alleged conduct and the ability to redress the alleged violations. *Hill v. LaClair*, 2020 US Dist. LEXIS 82942, at *12, n 4 [N.D.N.Y. May 11, 2020), *citing Santiago v. New York State Dep't of Corr. Serv.*, 945 F.2d 25, 32 (2d Cir. 1991) (holding that such claims cannot be brought directly against the state, or a state agency, but only against state officials in their official capacities).

Here, Plaintiff sought relief barring Defendant from continuing his "illegal acts," (Dkt. 50), unsupported by any allegations regarding Defendant's ability to redress the alleged violations as related to her ADA claims. *See Sutton v. Stony Brook Univ.*, 2020 US Dist LEXIS 206999, at *30 ("With regard to Defendant Galante, Plaintiff fails to allege that she is in a position to grant her the relief sought. Instead, Plaintiff argues that '[t]his court can remedy the claims, enter an Order to readmit, and award a degree-diploma by estoppel.' (Pl.'s Opp. at 2)"; *see Soloviev v Goldstein*, 104 F Supp 3d 232, 245 (E.D.N.Y. 2015) (finding that the plaintiff's claims against individual state officers in their official capacities did not fall under the *Ex parte Young* exception because plaintiffs failed to "allege[] that the [i]ndividual CUNY [d]efendants have the responsibility or capacity to provide him with the prospective relief he seeks, i.e. to reinstate him").

The inquiry into whether suit lies under *Ex parte Young* does not include an analysis of the merits of the claim. *See Verizon Maryland Inc. v. PSC,* 535 U.S. 635, 646 (2002) ("An allegation of an ongoing violation of federal law . . . is ordinarily sufficient") (internal citations omitted); however, as discussed below, Plaintiff has failed to establish an ongoing *prima facie* violation under Title II of the ADA, and thus, she is not entitled to prospective injunctive relief, regardless of the *Ex parte Young* exception.

POINT II

PLAINTIFF HAS FAILED TO ESTABLISH A PRIMA FACIE VIOLATION UNDER TITLE II OF THE ADA

Plaintiff's claim must be dismissed because Plaintiff has failed to establish an ongoing *prima facie* violation under Title II of the ADA. *See Harris v. Mills*, 572 F.3d 66, 73 (2d Cir. 2009) (Dkt. Nos. 47 pp 8; 73 fn 7) (Prospective injunctive relief under Title II of the ADA is only appropriate where a Plaintiff has established an ongoing prima facie violation under Title II of the ADA).

Title II of the Americans with Disabilities Act ("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 subject to discrimination by any such entity." 42 U.S.C. § 12132. Title II of the ADA "proscribes discrimination against the disabled in access to public services." *Harris*, 572 F.3d at 73, *citing Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 84-85 (2d Cir.), *corrected*, 511 F.3d 238 (2d Cir. 2004). In short, Title II of the ADA prohibits discrimination against qualified disabled individuals by requiring that they receive "reasonable accommodations" that permit them to have access to and take a meaningful part in public services and public accommodations. *See Henrietta D. v. Bloomberg*, 331 F.3d 261, 273 (2d Cir. 2003); *Felix v. New York City Transit Auth.,* 324 F.3d 102, 104 (2d Cir. 2003) (quoting 42 U.S.C. § 12112(b)(5)(A)) ("The statute defines 'discriminate' to include 'not making reasonable accommodations [available to a qualified person with a disability] unless [the provider of the service] can demonstrate that the accommodation would impose an undue hardship on [its operations].'"); *Powell v Natl. Bd. of Med. Examiners*, 364 F3d 79, 85 (2d Cir 2004).

In order for a plaintiff to establish a *prima facie* violation under Title II of the ADA, she

must demonstrate (1) that she is a qualified individual with a disability; (2) that the defendant is subject to the Act; and (3) that she was denied the opportunity to participate in or benefit from defendant's services, programs, or activities, or was otherwise discriminated against by defendant, by reason of her disability. *Harris,* 572 F3d at 73-74; *see also Fulton v. Goord*, 591 F.3d 37, 43 (2d Cir. 2009).

As previously indicated by this Court, Plaintiff's ADA claim rests on a theory that Defendant failed to make a reasonable accommodation for Plaintiff's post-traumatic stress disorder (PTSD) by way of providing audio recordings of child custody proceedings. *See,* Dkt. No. 73 pp. 3, 8 (explicitly dismissing any claims under the theory of intentional discrimination (disparate treatment)); Dkt. No. 50 ¶¶ 4-6, 14, 30, 49.

However, Plaintiff's claim should be dismissed because she has failed to establish an ongoing *prima facie* violation under Title II of the ADA, *to wit*, she has failed to establish: (1) that she is a qualified individual with a disability under the definition of 42 U.S.C. § 12102; (2) that Defendant is a public entity that is subject to the ADA; (3) that she has been denied meaningful access to the Ulster County Family Court due to her disability; and (4) that her requested accommodation was necessary for her meaningful access to the Ulster County Family Court. Therefore, Plaintiff's remaining claim in this action and her request for prospective injunctive relief should be denied, and the Complaint dismissed in its entirety.

A. <u>Plaintiff has not established that she is a "qualified individual with a disability".</u>

First, Plaintiff has failed to establish that she is a "qualified individual with a disability" under Title II of the ADA. *See Harris v Mills*, 572 F3d at 74, *citing Powell*, 364 F.3d at 84-85; see also 42 U.S.C. § 12131 ("The term 'qualified individual with a disability' means an individual with a disability who, with or without reasonable modifications to rules, policies, or practices . . .

meets the essential eligibility requirements for [the relevant benefit]." (emphasis added)).

Specifically, Plaintiff has not established that she meets the elements of the ADA's definition of "disability" pursuant to 42 U.S.C. § 12102. *See Benyi v. New York*, 2021 US Dist. LEXIS 72086, at *25-28 (N.D.N.Y. Mar. 23, 2021), *citing Burdick v. Town of Schroeppel,* 16-CV-1393, 2017 U.S. Dist. LEXIS 13859 (N.D.N.Y. Jan. 31, 2017) (Dancks, M.J.); *citing Hale v. King*, 642 F.3d 492, 500 (5th Cir. 2011) (To establish a disability under 42 U.S.C. § 12102, a plaintiff must allege either: (1) under Subsection A that she has a mental or physical impairment that substantially limits a major life activity; or (2) under Subsection B that she has a record of an injury or impairment and that the impairment substantially limited a major life activity; or (3) under Subsection C that either a covered entity mistakenly believes that a she has a physical impairment that substantially limits one or more major life activities, or a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities.)

"Major life activities are generally those activities that are of central importance to daily life." *Cody v. Cty. of Nassau*, 577 F. Supp. 2d 623, 638 (E.D.N.Y. 2008). Major life activities under the ADA include, but are not limited to, caring for oneself, eating, sleeping, concentrating, thinking, working, and neurological functions. 42 U.S.C. § 12102(2)(A)-(B). "To constitute a disability, an impairment must not merely affect a major life activity, it must substantially limit that activity." *Id.* "Thus a plaintiff who showed that . . . he had an impairment and that the impairment affected a major life activity would nonetheless be ineligible to prevail under the ADA if the limitation of the major life activity was not substantial." *Prindle v. City of Norwich*, 2018 US Dist. LEXIS 50280, at *22 (N.D.N.Y. Mar. 27, 2018) (internal quotation marks omitted).

Here, Plaintiff asserts that she has PTSD (with a past record of PTSD) but has not established that her PTSD substantially limits any major life activity. *See Benyi*, 2021 US Dist.

LEXIS 72086, at *25-28; *citing Schlosser v. Walker*, 20-CV-0433, 2020 U.S. Dist. LEXIS 233085 (D. Conn. Dec. 11, 2020) (holding that the plaintiff's allegation that he suffers from "a serious mental illness" was insufficient to allege that he was a qualified individual pursuant to the ADA). Here, Plaintiff claims 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." (Dkt. No. 50 ¶ 33). Plaintiff testified that when she is having a PTSD episode (which may be triggered, for example, by asking questions about her abuse) she has difficulty focusing and answering questions. (Declaration of Kasey K. Hildonen, Exhibit A, Plaintiff Alana Orr's Examination Before Trial transcript dated August 5, 2021, (hereafter "Plaintiff EBT") pp. 69, 85). However, Plaintiff has not established that the limitation to her ability to focus due to PTSD is substantial; to the contrary, in this litigation, Plaintiff sat through approximately four hours of direct examination, in which she was able to recount exact dates related to her filing of petitions, details regarding appearances in custody litigation, and articulate her assertions of abuse by her former partner (Plaintiff EBT pp. 24, 35; *see generally,* Exhibit "A") Furthermore, her claim that "every single time" she was in a family court proceeding she had a PTSD episode and was not able to represent herself (*id.*) is sharply contradicted by her lengthy procedural history in the Ulster Family Court. As was previously noted by this Court (Dkt. No. 73 pp. 12), Plaintiff was able to "engage[] in custody litigation," (Dkt. No. 50 ¶ 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.) She was able to provide testimony at the proceedings. (*Id.* ¶ 33.)

Plaintiff has failed to establish a disability under 42 U.S.C. § 12102(1)(C) for Complex

post-traumatic stress disorder ("CPTSD"), because she has not established that either a covered entity mistakenly believes that she has a physical impairment that substantially limits one or more major life activities, or a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. *See Hale v. King*, 642 F.3d 492, 500 (5th Cir. 2011) (Plaintiff EBT pp. 127, ll. 2-5) ("I don't make diagnosis, but I think all that ADA requires is that you regard it as having such a disability, and I do regard myself as having this disability.")

Plaintiff has therefore failed to establish that she is a "qualified individual with a disability" under Title II of the ADA, and her claim should be dismissed.

B. Defendant is not a public entity.

Further, the Defendant is not a public entity within the meaning of Title II of the ADA. 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).

The term "public entity" is defined to include "any department, agency, special purpose district, or other instrumentality of a State or States or local government[.]" 42 U.S.C. § 12131(1)(B). The United States Department of Justice has clarified, by regulation, that "a public entity should operate each service, program, or activity so that the service, program, or activity, when viewed in its entirety, is readily accessible to and useable by individuals with disabilities." 28 C.F.R. § 35.150(a). *See Sabin v. Camp*, 2013 US Dist. LEXIS 28689, at *9-11 (N.D.N.Y. Feb. 5, 2013).

In its August 7, 2019 Summary Order, this Court questioned whether Defendant was, in fact, a public entity:

> 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.
>
> Dkt. No. 73 fn. 4.

As suggested by this Court, *Santiago* supports that Defendant McGinty is not a "public entity" under Title II. See *Badillo Santiago v. Garcia*, 70 F Supp 2d at 89 ("Plaintiff has not been able to controvert defendant's argument that he is not a 'public entity' within the meaning of Title II of the ADA, and that as such, he cannot be held liable under the statute. We agree that the claims against Judge Berrios Jimenez cannot be maintained under the ADA as he is not a 'public entity' within the meaning of the statute").

While the court in *Shollenberger* allowed ADA claims seeking prospective injunctive relief to proceed against the Chief Judge of the State of New York and the Chief Administrator of the New York State Unified Court System, the Court - noting such issues were not raised by defendants - did not make a finding as to whether defendants were "public entities" under the ADA. *Shollenberger v. N.Y. State Unified Court Sys.*, 2019 US Dist. LEXIS 108742, at *14 [S.D.N.Y. June 28, 2019) ("The individual defendants do not dispute plaintiff properly alleges an ongoing violation of federal law. Nor do they challenge whether plaintiff properly seeks prospective injunctive relief or whether the individual defendants can redress the alleged violation").

The Amended Complaint makes no allegation that plausibly suggest that, for example, Defendant McGinty is being sued in his official capacity as a conduit for suing the Office of Court Administration as a public entity. *See, Sabin v. Camp*, 2013 US Dist. LEXIS 28689, at *14 (N.D.N.Y. Feb. 5, 2013); Dkt. No. 50. Unlike the defendants in *Shollenberger,* Defendant McGinty is not the Chief Judge of the State of New York and Chief Administrator of the New York State Unified Court System. Even assuming for the sake of argument that Plaintiff can plausibly suggest that Defendant McGinty is being sued in his official capacity as a conduit for the Office of Court Administration ("OCA"), this raises the issue of whether the Eleventh Amendment bars such claim, which is only brought under a theory of failure to accommodate. *See,* Dkt. No. 73 pp. 3, 8; Dkt. No. 50 ¶¶ 4-6, 14, 30, 49

Here, there is no allegation, nor record evidence, that a public entity (i.e. OCA) was motivated by discriminatory animus or ill will in denying Plaintiff's request for recordings; regardless, this Court already explicitly dismissed any claims under the theory of intentional discrimination (disparate treatment). *See* Dkt. No. 73 pp. 8.

And, indeed, there is no record evidence that Defendant McGinty made an independent determination on Plaintiff's request for audio recordings. As such, if the Defendant is deemed to stand in the shoes of the public entity (OCA), the action should be dismissed on Eleventh Amendment immunity grounds. *Garcia v. SUNY Health Sciences Ctr. of Brooklyn*, 280 F.3d 98, 112 (2d Cir. 2001) (Title II ADA claims may not be brought against the State in federal court unless the alleged "Title II violation was motivated by either discriminatory animus or ill will due to disability"); *Zahran v. State of New York Department of Education*, 306 F.Supp.2d 204, 210 (N.D.N.Y. 2004) (merely alleging that a failure to accommodate a disability discriminates on the

basis of disability does not allege animus or ill will sufficient to abrogate the State's Eleventh Amendment immunity).

C. Plaintiff has not established that she was denied the opportunity to participate in or benefit from Defendant's services, programs, or activities because of her disability.

Although Title II protects a qualified individual's "fundamental right of access to the courts," *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004), Plaintiff has not established that Defendant continues to infringe upon her right of access to the Ulster County 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").

"Meaningful access" to family court 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* Dkt. No. 73 pp. 11, *citing 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).

In its decision dated October 23, 2018, this Court granted Plaintiff (and those plaintiffs who have since been terminated from this matter) leave to amend the Complaint to cure the deficiencies in their ADA claims. In outlining those deficiencies, the Court stated that in their original pleading, Plaintiffs had failed to "identify how plaintiff mothers' disabilities denied them participation in court proceedings or how their disabilities could be accommodated to allow such participation." (Dkt. No. 47, 10.)

Despite having had an opportunity to amend the Complaint, Plaintiff still failed to cure the deficiencies outlined by the Court in its October 28, 2018 decision. This Court has already noted, which Defendant incorporates herein by reference, that Plaintiff has failed to demonstrate material impediments to her ability to meaningfully access the Ulster Family Court:

> 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 factfinding 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.)
>
> (Dkt. No. 73 pp. 12)

Even assuming, *arguendo*, that this Court found that, in some way, Plaintiff was being denied meaningful access to the Ulster County Family Court, Plaintiff has failed to "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). (Dkt. No. 73 pp. 9). In fact, Plaintiff has asserted several alternative reasons why she has not gotten "justice" in family court, including ineffective assistance of counsel. (Plaintiff EBT pp. 12 ll. 24-25, pp. 13 ll. 2-6.)

D. <u>Plaintiff has not established how her requested accommodation is necessary for her meaningful participation in court proceedings</u>.

"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." *Felix v. New York City Transit Auth.,* 324 F.3d 102, 107 (2d Cir. 2003) (internal citation omitted). "A reasonable accommodation is one that gives the disabled person 'meaningful access' to the services sought." *Woods v. City of Utica*, 902 F. Supp. 2d 273, 280 (N.D.N.Y. 2012) (internal citation omitted). As discussed above, Plaintiff has failed to demonstrate material impediments to her ability to meaningfully access the Ulster Family Court. However, even assuming, *arguendo*, that Plaintiff established that she is being denied meaningful access to the Ulster County Family Court, and that her denial of benefits is occurring because of her disability, she has failed to establish how her requested accommodation is necessary for her meaningful participation in court proceedings.

As indicated by this Court, "[i]n 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].'[] (Dkt. No. 67 at 19.) Based on this logic, it appears that 'what [plaintiff] ultimately seeks to challenge is not illegal discrimination against the disabled, but the substance of services provided to h[er].'" (Dkt. No. 73 pp. 10-11 *citing Doe v. Pfrommer*, 148 F.3d 73, 84 (2d Cir. 1998).)

At the conclusion of discovery, it is evident that Plaintiff's only denied request that could possibly be attributed to Defendant McGinty in his official capacity, was Plaintiff's request for audio recordings of her family court proceedings. (Plaintiff EBT pp. 53-54; 67; 89.) And even this assertion would require this Court to accept, *arguendo*, Plaintiff's broadly construed assertion that Defendant McGinty denied her request for audio recordings, rather than the Clerk of the Court in accordance with Third Judicial District policy and provisions of the Family Court Act and CPLR). However, a public entity need not provide a requested or preferred accommodation, and the chosen

accommodation need not be "perfect." *Dean v. Univ. at Buffalo Sch. of Med. & Biomedical Scis.*, 804 F.3d 178, 189 (2d Cir. 2015).

"[A] public entity need not employ any and all means to make services accessible; the ADA [] require[s] only reasonable modifications that would not fundamentally alter the nature of the service provided or impose an undue financial or administrative burden." *Martinez v. Cuomo*, 459 F Supp 3d 517, 523 (S.D.N.Y. 2020) (internal quotations omitted) (*citing Lane,* 541 U.S. 509, 531—32 (2004); *see also Henrietta D.*, 331 F.3d at 281; *see also McElwee v County of Orange,* 700 F3d 635, 641 (2d Cir. 2012) (an accommodation that "would impose an undue hardship on a program's operation or 'would fundamentally alter the nature of the service, program, or activity,'" need not be provided by a public entity).

The relief Plaintiff has previously sought, official audio recordings of the underlying family court matter (rather than written transcripts made available to her), is contrary to Third Judicial District policy and the limitations under Family Court Act §166, which protect against the public dissemination of sensitive family court records. *Matter of G.R.,* 60 Misc 3d 196 (Fam Ct 2018). ("Family Court Act §166 authorizes the Court in its discretion to permit the inspection of any "papers or records", however, such records are limited to 'pleadings, legal papers formally filed in a proceeding, findings, decisions, and orders that are subject to the provisions of CPLR 8002, transcribed minutes of any hearing held in the proceeding' (Uniform Rules for Family Court 22 NYCRR 205.5).")

Written transcripts of her Ulster County Family Court proceedings were and continue to be made available to Plaintiff in accordance with Judiciary Law §§ 300, 301. (Plaintiff EBT pp. 67.)

Plaintiff has not established why an audio recording is necessary for her meaningful access to the court, as opposed to a written transcript, other than Plaintiff's mere speculation that somehow the transcriptions cannot be trusted. (*See* Plaintiff EBT pp. 67-68; 69; 78; 87) (asserting that she requested the audio recordings to avoid the cost of written transcripts and because she does not trust the veracity of the written transcripts she has received.) Here, there is a reasonable accommodation available to Plaintiff – written transcripts of proceedings. *See, Kearney v New York*, 144 Misc 2d 201, 202 (Sup Ct, Kings County 1989). ("A court stenographer is an officer of the court, and is under a statutory duty to take full stenographic notes of the proceedings of the court. (Judiciary Law §§ 290, 295.) Indeed, it has been held that since a court stenographer is bound by the strictures of article 9 of the Judiciary Law, the accuracy of the transcript of the stenographic notes is ensured. Moreover, since the original stenographic notes taken by a stenographer are part of the proceedings in the cause of action before the court, pursuant to Judiciary Law § 292, the transcript of the stenographic notes should, accordingly, be given judicial credence as a literal court record. *Citing Conklin v. Rogers,* 98 A.D.2d 918, 471 N.Y.S.2d 356 (N.Y. App. Div. 3d Dep't 1983); *People v. Hull*, 13 Misc 2d 969, 970 (1958). Plaintiff cannot reasonably argue that written transcripts do not offer the same accommodation – an opportunity to review past Court proceedings – as the audio recordings she seeks. Plaintiff's assertion regarding the "veracity" of the written transcripts she has received from the Ulster County Family Court is based on no more than speculation. (Plaintiff EBT pp. 68-69.) Mere speculation is insufficient to establish that she was denied "meaningful access" to the Courts. *McPherson v. N.Y. City Dep't of Educ.*, 457 F.3d 211, 215 (2d Cir. 2006) (speculation alone is insufficient to defeat a summary judgment motion).

Thus, Plaintiff has failed to establish an ongoing *prima facie* violation under Title II of the ADA, and therefore Defendant should be granted summary judgment. *See Harris v. Mills*, 572 F3d 66, 73 (2d Cir 2009) (Dkt. Nos. 47 pp 8; 73 fn 7.) (Prospective injunctive relief under Title II of the ADA is only appropriate where a Plaintiff has established an ongoing prima facie violation under Title II of the ADA.)

POINT III

THIS COURT LACKS JURISDICTION OVER DOMESTIC RELATIONS MATTERS, INCLUDING CHILD CUSTODY

As Judge D'Agostino explained in dismissing the prior *Amato v. McGinty* matter, "[t]he domestic relations exception to federal jurisdiction divests federal courts of jurisdiction in matters involving divorce, alimony, and child custody." *Amato v. McGinty,* 2017 U.S. Dist. LEXIS 150198, *13 (N.D.N.Y. Sep. 15, 2017) (citing *Marshall v. Marshall*, 547 U.S. 293 (2006) (citations omitted); *Hernstadt v. Hernstadt*, 373 F.2d 316, 317 (2d Cir. 1967) ("[I]t has been uniformly held that federal courts do not adjudicate cases involving the custody of minors")); *see also Barber v. Barber*, 62 U.S. 582 (1858); *Ankenbrandt v. Richards*, 504 U.S. 689 (1992)). "[T]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States. So strong is our deference to state law in this area that we have recognized a 'domestic relations exception' that 'divests the federal courts of power to issue divorce, alimony, and child custody decrees.'" *Ashmore v. New York*, 2012 U.S. Dist. LEXIS 87291, *4 – 6 (E.D.N.Y. 2012); citing, *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004) (quoting *In re Burrus*, 136 U.S. 586, 593-94 (1890); *Ankenbrandt v. Richards*, 504 U.S. 689, 703 (1992)) (internal citations omitted); see also *McArthur v. Bell*, 788 F. Supp. 706, 709 (E.D.N.Y. 1992) (dismissing 42 U.S.C. § 1983 action for lack of subject matter jurisdiction even where the plaintiff did not ask the federal court "to alter the state court's child

support modification determination," because merely deciding his constitutional allegations would require the court "to re-examine and re-interpret all the evidence brought before the state court in the domestic relations proceedings," which is contrary to the role of a federal court); *Neustein v. Orbach*, 732 F. Supp. 333, 339 (E.D.N.Y. 1990) (dismissing § 1983 action seeking to overturn state-court custody decision based on alleged denial of opportunity to confront witnesses, holding that "[i]f, . . . in resolving the issues presented, the federal court becomes embroiled in factual disputes concerning custody and visitation matters, the action must be dismissed").

Here, as in the prior *Amato* matter, although Plaintiff attempts to assert a federal claim under the ADA against Judge McGinty, the crux of her argument arises out of the decisions and orders issued by the Defendant-Judge in a domestic relations matters, specifically a child custody case. The very injunctive relief sought here is an effort to nullify family court and custody determinations issued by Defendant in Plaintiff's Ulster Family Court matter, or in the very least influence family court and custody determinations issued by Defendant prospectively. (Dkt. No. 103, pp 1; Dkt. No. 1.) This court does not have jurisdiction over such matters and Plaintiff's Complaint should be dismissed in its entirety.

POINT IV

PLAINTIFF'S CLAIMS ARE BARRED BY THE ROOKER-FELDMAN DOCTRINE

"[T]he *Rooker-Feldman* doctrine . . . deprives federal courts of jurisdiction over 'cases brought by state-court losers complaining of injuries caused by state-court judgments rendered before the district court proceedings commenced and inviting district court review and rejection of those judgments.'" *Muka v. Murphy*, 358 Fed. App'x. 239 (2d Cir. 2009) (quoting *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280, 284 (2005)).

"Under the *Rooker-Feldman* doctrine, federal district courts lack jurisdiction over cases [which] essentially amount to appeals of state court judgments." *Vossbrink v. Accredited Home Lenders*, Inc., 777 F.3d 423, 426 (2d Cir. 2014). "The *Rooker-Feldman* doctrine is applied if '(1) the federal-court plaintiff lost in state court; (2) the plaintiff complains of injuries caused by a state court judgment; (3) the plaintiff invites review and rejection of the judgment; and (4) the state judgment was rendered before the district court proceedings commenced.'" *Neroni v. Zayas*, 2015 U.S. App. LEXIS 17640 (2d Cir. 2016) (quoting *Vossbrink*, 777 F.3d at 426).

Where Plaintiff's "constitutional claims effectively require review of state decisions" they are likewise barred by the Rooker-Feldman doctrine. *McKeown v. Murphy*, 377 Fed Appx. 121, 2010 U.S. App. LEXIS 10056 at 123 (2d Cir. 2010).

Here, Plaintiff alleges that she and her child were injured as a result of family court decisions issued by Judge McGinty. Plaintiff's instant federal district court action, which seeks to relitigate the claims before the Ulster County Family Court, is barred by the *Rooker-Feldman* doctrine because: (1) Plaintiff views herself as the loser in the state court proceedings; (2) Plaintiff claims she has been injured because of the state court decisions; (3) Plaintiff is inviting this Court to review and reject the state court decisions; and (4) the orders Plaintiff challenged were issued before she commenced this federal court action. The federal district court is not an appellate court vested with jurisdiction to review the proceedings of a state court. The proper means to challenge the state court determinations is by appeal in state court to the Appellate Division—Third Department, not through an action in the Northern District of New York. Plaintiff's claims are, therefore, barred by the *Rooker-Feldman* doctrine, and should be dismissed.

POINT V
THE RELIEF REQUESTED BY PLAINTIFF IS BARRED BY THE YOUNGER ABSTENTION DOCTRINE

By this action, Plaintiff asks this Court to police ongoing state court proceedings and interject in Judge McGinty's oversight of those proceedings, essentially divesting the Ulster County Family Court of jurisdiction over Plaintiff's family court proceedings. Even assuming *arguendo* that said proceedings were still ongoing[2], this United States District Court lacks jurisdiction under the *Younger* abstention doctrine. *Krupp v. Todd*, 214 U.S. Dist. LEXIS 116016 *9 (N.D.N.Y. 2014).

Pursuant to *Younger v. Harris,* 401 U.S. 37, 43-45 (1971), a federal district court is without jurisdiction under the abstention doctrine if there is an ongoing state court proceeding, where an important state interest is implicated, and the plaintiff has an avenue open for review of the constitutionality her claims in state court. "*Younger* abstention derives from the recognition that a pending state proceeding, in all but unusual cases, would provide the federal plaintiff with the necessary vehicle for vindicating his constitutional rights, and, in that circumstance, the restraining of an ongoing [state proceeding] would entail an unseemly failure to give effect to the principle that state courts have the solemn responsibility, equally with the federal courts to guard, enforce, and protect every right granted or secured by the Constitution of the United States." *Canny v. Ray*, 1991 U.S. Dist. LEXIS 17994, *7 (N.D.N.Y. 1991) (citing *Temple of Lost Sheep Inc. v. Abrams*, 930 F.2d 178, 183 (2d Cir. 1991). "In *Christ The King Regional High School v. Culvert*, 815 F.2d 219 (2d Cir.), *cert. denied*, 484 U.S. 830 (1987), the Second Circuit adopted a three-prong test for determining the applicability of *Younger* abstention. In order for the court to properly invoke *Younger* in any given situation, each of the following questions requires an affirmative response:

2 They are now concluded – see McGinty Declaration, ¶¶ 3 – 4.

(1) is there an ongoing state proceeding; (2) is an important state interest implicated; and (3) does the plaintiff have an avenue open for review of constitutional claims in the state court?" *Id.* *8 (citing *Ohio Civil Rights Comm'n v. Dayton Christian Schools*, 477 U.S. 619 (1986).

Here, Plaintiff asks this Court to interfere in ongoing proceedings before the Ulster County Family Court. As discussed above, "[c]ourts in this circuit have repeatedly recognized that questions of family relationships, especially those involving custody and child abuse, are traditionally an area of state concern." *Canny*, 191 U.S. Dist. LEXIS 17994 *9 (quoting *Neustein v. Orbach*, 732 F. Supp. 333 (E.D.N.Y. 1990); see also *Reinhardt v. Commonwealth of Mass. Dep't of Social Servs.*, 715 F. Supp. 1253, 1258 n.7 (S.D.N.Y. 1989)). "Thus, there can be no dispute that the Family Court's proper disposition of child neglect and child custody proceedings is a significant state interest to all concerned." *Id.* *10. As further explained in *Canny*, state courts are bound by the United States Constitution and can therefore consider the constitutional questions before them in family court proceedings. *Id.* Therefore, Plaintiff's request for prospective injunctive relief should be denied.

POINT VI
THE RELIEF REQUESTED BY PLAINTIFF IS MOOT

In the matter captioned *Matthew Kehoe v. Alana Orr*, Ulster County Family Court File No. 26387, an Order from the last proceeding was entered on January 18, 2022, based upon the December 2, 2021 Decision on Docket No's: V-3637-13/19BA, V-3637-13/19BC, V-3637-13/20BE, V-3637-13/20BF, V-3637-13/20BO, V-3637-l 3/20BH, V-3637-13/20B1, V-3637-13/21BJ. (Declaration of Defendant Hon. Anthony McGinty (hereafter "McGinty Declaration"), January 13, 2022, ¶ 2). As of this date, there are no outstanding petitions in the matter captioned *Matthew Kehoe v. Alana Orr*, Ulster County Family Court File No. 26387. *Id.* ¶ 3. As of this date, there remain no outstanding petitions involving Plaintiff in Ulster County Family Court, over

which Defendant is presiding. *Id.* ¶ 4. Thus, the relief sought by Plaintiff - prospective injunctive relief to obtain recordings related to those now-concluded proceedings - is moot.

CONCLUSION

By reason of the foregoing, Defendant respectfully requests that this Court issue an order granting summary judgment in favor of Defendant and against Plaintiff, and dismissing Plaintiff's Complaint in its entirety and with prejudice.

Dated: Albany, New York
January 31, 2022

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