App A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Deborah S. Hunt
Clerk

100 EAST FIFTH STREET, ROOM 540
POTTER STEWART U.S. COURTHOUSE
CINCINNATI, OHIO 45202-3988

Tel. (513) 564-7000
www.ca6.uscourts.gov

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Mr. Cooper David Bowen
Mr. Eric Adam Munas
Ms. Pamela J. Sears
Hamilton County Prosecutor's Office
230 E. Ninth Street
Suite 4000
Cincinnati, OH 45202

Mr. Brandon Bowie
1608 Brentnell Avenue
Columbus, OH 43219

Ms. Lindsay M. Upton
Ms. Lisa M. Zaring
Montgomery Jonson
600 Vine Street
Suite 2650
Cincinnati, OH 45202

Re: Case No. 20-3743, *Brandon Bowie v. Hamilton County Juvenile Court, et al*
Originating Case No. : 1:18-cv-00395

Dear Counsel and Mr. Bowie,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Ryan E. Orme
Case Manager
Direct Dial No. 513-564-7079

cc: Mr. Richard W. Nagel

Enclosure

Mandate to issue

NOT RECOMMENDED FOR PUBLICATION

No. 20-3743

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRANDON BOWIE, Plaintiff-Appellant, v. HAMILTON COUNTY JUVENILE COURT, et al., Defendants-Appellees.	)	ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO

ORDER

Before: DAUGHTREY, McKEAGUE, and THAPAR, Circuit Judges.

Brandon Bowie, a pro se Ohio resident, appeals the district court's judgment dismissing his complaint brought pursuant to the Americans with Disabilities Act (ADA), 42 U.S.C. § 12132, and the Rehabilitation Act (RA), 29 U.S.C. § 794. This case has been referred to a panel of the court that, upon examination, unanimously agrees that oral argument is not needed. *See* Fed. R. App. P. 34(a).

Bowie's complaint originated in child-visitation proceedings before the Hamilton County Juvenile Court in Cincinnati. Bowie claimed that he has a neurological condition that makes it difficult for him to travel from his home in Columbus to Cincinnati and that the Juvenile Court had allowed him to appear at various hearings via telephone. The Juvenile Court declined to grant him permission to do so, however, for a hearing on June 20, 2017, which involved a contempt motion filed by the mothers of Bowie's children and various filings made by Bowie. After Bowie's counsel presented Bowie's motion to appear telephonically on the morning of the hearing, Magistrate Judge Catherine Kelley indicated that conducting the hearing via telephone would

"interfere with the ability of the court to properly observe and assess the credibility of Mr. Bowie." Bowie claimed that his inability to appear remotely led Magistrate Kelley to dismiss his motions and prevented him from presenting evidence on his own behalf, although Magistrate Kelley did grant his motion to waive appearance at the hearing and he was represented by counsel. Judge Sylvia Hendon set a hearing to consider Bowie's objections to Magistrate Kelley's decision. After Bowie was granted permission to appear via telephone, Judge Hendon ultimately found him guilty of contempt for violating a visitation order.

Bowie then filed his original federal complaint claiming that the Juvenile Court violated the ADA by failing to accommodate his request to appear telephonically at the June 20, 2017, hearing. The Juvenile Court moved to dismiss, and Bowie moved to amend his complaint to add as defendants Hamilton County, the Hamilton County Board of Commissioners, Judge Hendon, and Magistrate Kelley. A magistrate judge initially recommended that the complaint be dismissed in its entirety, but the district court dismissed only the Hamilton County Board of Commissioners and Judge Hendon and Magistrate Kelley in their individual capacities and allowed Bowie to file a second amended complaint. The second amended complaint asserted that the defendants had violated the ADA and RA by failing to allow him to participate in judicial proceedings via telephone in accommodation of his neurological condition. He therefore sought a declaration that the defendants had violated the ADA and RA, an injunction ordering the defendants to comply with the requirements of those laws and allow him to appear in that court via telephone, and damages in the amount of $125,000.

The defendants moved for judgment on the pleadings, and the magistrate judge recommended the complaint's dismissal because the pleadings did not establish that Bowie had been discriminated against on the basis of his disability. Over Bowie's objections, the district court adopted the report and recommendation and granted the defendants' motion for judgment on the pleadings.

On appeal, Bowie argues that his ADA and RA claims should be allowed to proceed against the Hamilton County Juvenile Court and Hamilton County because they are entities capable of

being sued, relying on Judge Michael R. Barrett's initial order allowing him to file his second amended complaint.[1] He argues that the defendants violated his rights under the ADA and RA by not allowing him to appear telephonically at the June 20, 2017, hearing. He also asserts that the defendants should have at least granted him a continuance so that he could appear personally or provided him with a grievance procedure to pursue. Lastly, he argues that default judgment should be granted against Judge Hendon and Magistrate Kelley for failing to answer the second amended complaint. Bowie does not challenge Judge Barrett's dismissal of Judge Hendon and Magistrate Kelley in their individual capacities or the Hamilton County Board of Commissioners, and any claims against those defendants are therefore abandoned on appeal. *See Radvansky v. City of Olmsted Falls*, 395 F.3d 291, 310-11 (6th Cir. 2005).

We review de novo an order granting a motion for judgment on the pleadings under Federal Rule of Civil Procedure 12(c), applying the same standard of review for the grant of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *Jackson v. City of Cleveland*, 925 F.3d 793, 806 (6th Cir. 2019), *cert. denied*, 140 S. Ct. 855 (2020). In determining whether a complaint states a claim, a court must construe the complaint in a light most favorable to the plaintiff, accept all the factual allegations as true, and determine whether the complaint contains "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007); *see also Wesley v. Campbell*, 779 F.3d 421, 428 (6th Cir. 2015).

The ADA and the RA prohibit public entities from excluding a disabled individual from or denying him or her the benefits of services, programs, or activities on account of the individual's disability. 42 U.S.C. § 12132; 29 U.S.C. § 794. To establish a prima facie case of discrimination under Title II, a plaintiff must show:

> that he (1) is disabled under the statutes, (2) is "otherwise qualified" for participation in [a state or local government] program, and (3) "is being excluded from participation in, denied the benefits of, or subjected to discrimination" because of his disability or handicap, and (4) (for the Rehabilitation Act) that the program receives federal financial assistance.

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[1] This case was administratively reassigned to Judge Matthew W. McFarland on January 3, 2020.

Gohl v. Livonia Pub. Sch. Dist., 836 F.3d 672, 682 (6th Cir. 2016) (quoting *G.C. v. Owensboro Pub. Schs.*, 711 F.3d 623, 635 (6th Cir. 2013)). "Title II requires only 'reasonable modifications that would not fundamentally alter the nature of the service provided,' not 'to employ any and all means to make judicial services accessible to persons with disabilities.'" *Bedford v. Michigan*, 722 F. App'x 515, 519 (6th Cir. 2018) (quoting *Tennessee v. Lane*, 541 U.S. 509, 531-32 (2004)).

The magistrate judge's determination, as adopted by the district court, was that Bowie failed to state a claim under the ADA or RA because he did not adequately plead that the Juvenile Court had denied him access to the court because of his disability. According to the docket entry for Magistrate Kelley's decision,[2] the motion to appear telephonically was denied because it "would interfere with the ability of the court to properly observe and assess the credibility of Mr. Bowie." Although Bowie stated that he had been granted permission to appear telephonically previously, he has not called into question Magistrate Kelley's need for Bowie's personal presence in order to evaluate his credibility at the June 2017 hearing, particularly on an issue as serious and fact-intensive as being in contempt of the Juvenile Court's visitation order. It was also not reasonable for Bowie to assume that a motion filed the morning of the hearing would be granted simply because other similar motions had been granted in the past. Magistrate Kelley instead granted Bowie's motion to waive his appearance, and he was represented by counsel at the hearing. Bowie was then able to file objections to Magistrate Kelley's determination and was allowed to appear telephonically before Judge Hendon. These facts do not show that Bowie was excluded from participation in the court proceedings because of his disability. This conclusion is reinforced by Bowie's insistence on appeal that he should have been granted a continuance so that he could make arrangements to attend personally, thus signaling that his claimed disability, though making attendance difficult, did not make it impossible for him to attend the court proceedings in Cincinnati when absolutely necessary. Because Bowie did not adequately plead a claim under the ADA or RA, we need not consider the defendants' various counterarguments. And Bowie cannot

[2] The parties did not dispute the district court's taking judicial notice of the attachments to the parties' pleadings.

bring a claim under Title II of the ADA simply because the Juvenile Court lacked a designated coordinator or a grievance procedure. *See Tucker v. Tennessee*, 539 F.3d 526, 532 (6th Cir. 2008); *Dillery v. City of Sandusky*, 398 F.3d 562, 568 (6th Cir. 2005).

Bowie also argues that default judgment should have been granted against Magistrate Kelley and Judge Hendon for failing to answer the complaint. They filed an answer on April 18, 2019, however, and this argument lacks merit.

Accordingly, we **AFFIRM** the district court's judgment.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

20-3743

Mr. Brandon Bowie
1608 Brentnell Avenue
Columbus, OH 43219

App B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Brandon Bowie,

Plaintiff,

v.

Case No.: 1:18-cv-395

Judge Michael R. Barrett

Hamilton County
Juvenile Court,

Defendant.

OPINION & ORDER

This matter is before the Court on the Magistrate Judge's January 9, 2019 Report and Recommendation ("R&R"). (Doc. 25). The parties were given proper notice pursuant to Federal Rule of Civil Procedure 72(b), including notice that the parties would waive further appeal if they failed to file objections to the R&R in a timely manner. *See United States v. Walters*, 638 F.2d 947, 949-950 (6th Cir. 1981). Plaintiff filed Objections (Doc. 26) and Supplemental Information (Doc. 27). Defendant responded to Plaintiff's Objections (Doc. 28) and Plaintiff filed a Reply (Doc. 29).

This Court shall consider objections to a magistrate judge's order on a nondispositive matter and "shall modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a). When objections to a magistrate judge's report and recommendation are received on a dispositive matter, the assigned district judge "must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). After review, the district judge "may accept, reject, or modify the

recommended decision; receive further evidence; or return the matter to the magistrate judge with instructions." *Id.*; *see also* 28 U.S.C. § 636(b)(1).

In her January 9, 2019 R&R, the Magistrate Judge recommends that Defendant's Motion to Dismiss (Doc. 13) be granted, Plaintiff's Motion to Amend (Doc. 16) be denied; all remaining pending motions (Docs. 2, 9, 18) be denied as moot; and this case be closed.

I. BACKGROUND

Plaintiff's claims arise out of his child support case pending in Hamilton County Juvenile Court. Plaintiff lives in Columbus, Ohio. (Doc. 16-1). According to his proposed Second Amended Complaint, Plaintiff has a neurological condition which makes it difficult for him to travel from Columbus to Cincinnati. (Doc. 16-1, ¶ 14). A hearing was scheduled in his child support case for June 20, 2017. (Doc. 16-1, ¶¶ 18-19). Plaintiff requested to participate in the hearing by telephone or video conference. (Doc. 16-1, ¶ 18). Plaintiff's request was supported by letters from his doctor. (See Doc. 27). Plaintiff had previously been permitted to appear at a hearing by telephone. (Doc. 16-1, ¶ 18). However, on the day of the hearing, Magistrate Catherine Kelly denied Plaintiff's request to participate in the hearing by telephone with no prior notice. (Doc. 16-1, ¶ 19). Plaintiff's counsel, who was present at the hearing, requested a continuance, but Magistrate Kelly denied that request. (Doc. 16-1, ¶ 19). Magistrate Kelly's decision was later upheld by Judge Sylvia Hendon. (Doc. 16-1, ¶¶ 20-21). Plaintiff claims that allowing him to participate by phone was a reasonable accommodation of his disability. (Doc. 16-1, ¶ 25). Plaintiff further claims that the

failure to provide him with this accommodation resulted in him being denied access to the court. (Doc. 16-1, ¶ 25).

In his proposed Second Amended Complaint, Plaintiff seeks injunctive relief and compensatory damages under Title II of the Americans with Disabilities Act of 1990 ("ADA"), which provides: "[N]o qualified individual with a disability shall, by reason of such disability, be excluded from participation or denied the benefits of the services, programs or activities of a public entity." 42 U.S.C. § 12132. Plaintiff also brings a claim under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, which prohibits entities receiving federal funds from discriminating against individuals with disabilities. Initially, Plaintiff named the Hamilton County Juvenile Court as the sole defendant. In his proposed Second Amended Complaint, Plaintiff seeks to add the following parties: Hamilton County, Ohio, Hamilton County Ohio Board of Commissioners, Hamilton County Judge Sylvia Hendon and Hamilton County Magistrate Catherine Kelly.

II. ANALYSIS

A. Motion to Dismiss

Dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) is "appropriate when a plaintiff fails to state a claim upon which relief can be granted." When evaluating a motion to dismiss under the rule, a district court assumes the factual allegations in the complaint are true and "'draw[s] all reasonable inferences in favor of the plaintiff.'" *Bassett v. Nat'l Collegiate Athletic Ass'n*, 528 F.3d 426, 430 (6th Cir. 2008) (quoting *Directv, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007)).

Pleadings and documents filed by *pro se* litigants are to be "liberally construed," and a "*pro se* complaint, however inartfully pleaded, must be held to a less stringent standard than formal pleadings drafted by lawyers." *Erickson v. Pardus*, 551 U.S. 89, 94 (2007) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). However, "the lenient treatment generally accorded to *pro se* litigants has limits." *Pilgrim v. Littlefield*, 92 F.3d 413, 416 (6th Cir. 1996) (citing *Jourdan v. Jabe*, 951 F.2d 108, 110 (6th Cir. 1991)). The basic pleading essentials are not abrogated in *pro se* cases. *Wells v. Brown*, 891 F.2d 591, 594 (6th Cir. 1989). A *pro se* complaint must still "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Barnett v. Luttrell*, 484 Fed. Appx. 784, 786 (6th Cir. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 677, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009)) (internal quotations and emphasis omitted).

Plaintiff has clarified that he is not seeking relief in a pending child support case, but is instead seeking assistance in receiving ADA accommodations. The Court notes that the Supreme Court has explained that Title II of the ADA creates an "affirmative obligation to accommodate persons with disabilities in the administration of justice." *Tennessee v. Lane*, 541 U.S. 509, 533, 124 S. Ct. 1978, 1994, 158 L. Ed. 2d 820 (2004).

The Magistrate Judge explained that the Hamilton County Juvenile Court is not a legal entity capable of being sued. "Absent express statutory authority, a court can neither sue nor be sued in its own right." *Burton v. Hamilton Cty. Juvenile Court*, No. 1:04-CV-00368, 2006 WL 91600, at *5 (S.D. Ohio Jan. 11, 2006) (quoting *Malone v. Court of Common Pleas of Cuyahoga County*, 45 Ohio St.2d 245, 248, 344 N.E.2d 126

1976)); *see also Stewart v. Lucas Cty. Juvenile Court*, Case No. 3:08cv1603, 2009 WL 3242053, at *6 (N.D. Ohio Oct. 2, 2009) (holding that the Lucas County Juvenile Court cannot be sued in its own right).

However, one federal district court has recently concluded that Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act provide the "express statutory authority" necessary to sue the domestic relations division of an Ohio court of common pleas. *Jaegly v. Lucas Cty. Bd. of Commissioners*, No. 16-CV-1982, 2017 WL 6042237, at *4 (N.D. Ohio Dec. 6, 2017). In addition, the Sixth Circuit has held that Title II of the ADA validly abrogated Eleventh Amendment sovereign immunity in cases where it is used to enforce Due Process rather than Equal Protection guarantees. *Popovich v. Cuyahoga County Court of Common Pleas, Domestic Relations Division*, 276 F.3d 808, 813-16, 817 (6th Cir.) (en banc), *cert. denied*, 537 U.S. 812 (2002) (remanding case against state court for retrial because "refusal of the state court to provide plaintiff with closed captioned translation of the proceeding, or other forms of hearing assistance, may constitute an unreasonable exclusion of plaintiff from participation in the proceeding under principles of due process of law."); *see also Mingus v. Butler*, 591 F.3d 474, 483 (6th Cir. 2010) (Eleventh Amendment immunity abrogated as long as ADA claim seeks only the level of review to which the plaintiff would otherwise be entitled (i.e., "rational basis" review in a disability case) because doing so would not "creat[e] a higher standard of liability" for the defendant). In addition, the Sixth Circuit has held that Ohio has waived Eleventh Amendment immunity against Rehabilitation Act claims. *Robinson v. Univ. of Akron Sch. of Law*, 307 F.3d 409, 411 (6th Cir. 2002) (citing *Nihiser v. Ohio Environmental Protection Agency*, 269 F.3d 626,

628-29 (6th Cir. 2001)). Therefore, to the extent that Defendant Hamilton County Juvenile Court seeks to dismiss the claims against it, Defendant Hamilton County Juvenile Court's Motion to Dismiss is DENIED.

B. Motion to Amend

Federal Rule of Civil Procedure 15(a) provides that a "party may amend its pleading once as a matter of course within: (A) 21 days after serving it, or (B) if the pleading is one to which a responsive pleading is required, 21 days after service of a responsive pleading or 21 days after service of a motion under Rule 12(b), (e), or (f), whichever is earlier." Fed. R. Civ. P. 15(a)(1)(A)-(B). In all other cases, "a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed. R. Civ. P. 15(a)(2). However, "[t]he court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Leave should be granted unless there is "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of amendment." *Foman v. Davis*, 371 U.S. 178, 182, 83 S.Ct. 227, 9 L.Ed.2d 222 (1962). "A proposed amendment is futile if the amendment could not withstand a Rule 12(b)(6) motion to dismiss." *Rose v. Hartford Underwriters Ins. Co.*, 203 F.3d 417, 420 (6th Cir. 2000) (citing *Thiokol Corp. v. Dep't of Treasury, Revenue Div.*, 987 F.2d 376, 382-83 (6th Cir. 1993)).

The Magistrate Judge explained that Plaintiff could not amend his complaint to add Hamilton County, Ohio as a party because Hamilton County is a geographic location and as such is not *sui juris*.

Capacity to be sued in the federal district courts is governed by Federal Rule of Civil Procedure 17(b), which provides that the capacity of an entity such as a county or county agency to be sued is determined "by the law of the state where the court is located." However, as this Court has explained: "It is Eleventh Amendment immunity that determines whether Hamilton County can be sued under the federal laws." *Smith v. Grady*, 960 F. Supp. 2d 735, 743-44 (S.D. Ohio 2013). This Court has concluded that Hamilton County is not entitled to sovereign immunity under the Eleventh Amendment, and therefore it may be sued in this Court under the ADA regardless of its ability to sue or be sued under state law. *Id.* at 744; *see also Jaegly v. Lucas Cnty. Bd. of Commissioners*, No. 16-CV-1982, 2017 WL 4310634, at *3 (N.D. Ohio Sept. 28, 2017), *adhered to on reconsideration*, No. 16-CV-1982, 2017 WL 6042237 (N.D. Ohio Dec. 6, 2017) (finding Rule (17)(b)(3) does not bar suit against Lucas County in federal court under Title II of the ADA and the Rehabilitation Act); *Horen v. Lucas Cnty., Ohio*, No. 3:11CV1110, 2011 WL 4842391, at *2 (N.D. Ohio Oct. 12, 2011) (allowing suit against the county under the ADA and Rehabilitation Act). Therefore, Plaintiff's amendment to the Complaint adding Hamilton County as a party is not futile. Plaintiff's Motion to Amend is GRANTED to the extent it seeks to bring claims under the ADA and the Rehabilitation Act against Hamilton County.

The Magistrate Judge also found that the Hamilton County Board of Commissioners is not a proper defendant in this matter. Ohio Revised Code § 305.12 states, in part: "The board of county commissioners may sue and be sued, and plead and be impleaded, in any court." However, as the Magistrate Judge explained, the county commissioners' authority over a county juvenile court is limited to supplying a

facility and setting the budget of a juvenile court pursuant to Ohio Revised Code §§ 2151.09 and 2151.10. Plaintiff does not allege that the Commissioners have authority to set policy regarding the manner in which hearings were held, including whether parties are permitted to appear by telephone or video conference. Instead, Plaintiff argues that the Commissioners should have an ADA and Rehabilitation Act compliance system in place, which would include training, a designated coordinator and a grievance procedure. However, to bring a claim under Title II of the ADA, "the plaintiff must show that the discrimination was *intentionally* directed toward him or her in particular." *Tucker v. Tennessee*, 539 F.3d 526, 532 (6th Cir. 2008) (emphasis in original). "Acts and omissions which have a disparate impact on disabled persons in general are not specific acts of intentional discrimination against the plaintiff in particular." *Dillery v. City of Sandusky*, 398 F.3d 562, 568 (6th Cir. 2005). Therefore, claims under Title II of the ADA cannot be based on theories of recovery such as failure to train or failure to supervise, since these failures are necessarily not directed at a particular disabled individual.

Finally, the Magistrate Judge found that Judge Hendon and Magistrate Kelly are entitled to absolute immunity from lawsuits involving money damages. The Magistrate Judge also found that to the extent Plaintiff is seeking declaratory and injunctive relief, those claims are barred by the doctrine outlined in *Younger v. Harris*, 401 U.S. 37 (1971). Plaintiff argues that Judge Hendon and Magistrate Kelly are not immune because they acted with "deliberate indifference" and Plaintiff seeks injunctive relief against Judge Hendon and Magistrate Kelly in their official capacity.

Judicial officers are entitled to absolute immunity from damage claims arising out of acts performed in the exercise of their official functions. *Neitzke v. Williams*, 490 U.S. 319, 325, 109 S.Ct. 1827, 104 L.Ed.2d 338 (1989). Plaintiff has alleged that Judge Hendon and Magistrate Kelly failed to provide him a reasonable accommodation by permitting him to testify by telephone of video conference. The Court notes that these acts on the part of Judge Hendon or Magistrate Kelly were performed in the exercise of their official functions, and therefore Judge Hendon and Magistrate Kelly are immune from Plaintiff's claim for damages.

In addition, "Title II of the ADA does not ... provide for suit against a public official acting in his individual capacity." *Everson v. Leis*, 556 F.3d 484, 501 n. 7 (6th Cir. 2009). However, the Sixth Circuit has held that the Eleventh Amendment does not bar an ADA Title II claim for prospective relief against state officials in their official capacities. *Carten v. Kent State Univ.*, 282 F.3d 391, 396–97 (6th Cir. 2002). Therefore, to the extent that Plaintiff seeks to add a claim for prospective injunctive relief under Title II of the ADA against Judge Hendon and Magistrate Kelly in their official capacity, those claims are not futile. Plaintiff's Motion to Amend is GRANTED to the extent it seeks to bring these claims.

C. Remaining Motions

Plaintiff filed a Motion for Temporary Restraining Order (Doc. 2), which was later amended (Doc. 9). Plaintiff seeks the following injunctive relief:

> a temporary restraining order or a preliminary injunction or a permanent injunction (whichever the court deems) enjoining defendant, Hamilton County Juvenile Court, (Judge Sylvia Hendon, Magistrate Catherine Kelly and Attorney James Hartke) from engaging in or performing any of the following acts: such as threats of incarceration, forcing Mr. Bowie to sign US passport for his minor children for them to take a trip out of the country

> against his will, discontinue forcing Mr. Bowie to appear in person at hearings instead of reasonably accommodating him which is non-compliant with the American Disability Act. There needs to be ADA training, an ADA Coordinator (an appointed employee) and grievance policy in place on the court's website.

(Doc. 9, PAGEID# 296).

In deciding whether to issue injunctive relief, one of the factors this Court must consider whether there is the threat of irreparable harm to Plaintiff. *Cooper v. Honeywell, Int'l, Inc.* 884 F. 3d 612, 615 (6th Cir. 2018). The harm alleged must be "actual and imminent," not "speculative or unsubstantiated." *Abney v. Amgen, Inc.*, 443 F. 3d 540, 552 (6th Cir. 2006). Plaintiff has not alleged harm that is actual or imminent, such as harm which would result from a hearing scheduled in the immediate future. Therefore, the Court concludes that Plaintiff has not established that he would suffer irreparable harm absent an injunction. Accordingly, Plaintiff's Amended Motion for Temporary Restraining Order (Doc. 9) is DENIED.

Plaintiff also requests that this Court to appoint an attorney. (Doc. 18). Counsel may be appointed for indigent parties in civil cases, but such an appointment is at the discretion of the Court. *Lavado v. Keohane*, 992 F.2d 601, 604 (6th Cir. 1993). An attorney will be appointed for indigent parties in a civil suit only when justified by exceptional circumstances. *Id.* In evaluating a matter for "exceptional circumstances," a court should consider: (1) the probable merit of the claims, (2) the nature of the case, (3) the complexity of the legal and factual issues raised, and (4) the ability of the litigant to represent him or herself. *Lince v. Youngert*, 136 Fed.Appx. 779, 782 (6th Cir. 2005). The Court finds that such circumstances do not exist here. Plaintiff has brought two similar statutory claims based on a single incident. Plaintiff appears to have the ability

to represent himself. The Court notes that Plaintiff has filed timely pleadings which cite appropriate caselaw and make cogent legal arguments. Therefore, Plaintiff's Motion for Appointment of Counsel (Doc. 18) is DENIED.

III. CONCLUSION

Based on the foregoing, the Magistrate Judge's January 9, 2019 R&R (Doc. 25) is **ADOPTED in PART**. Accordingly, it is hereby **ORDERED** that:

1. Defendant's Motion to Dismiss (Doc. 13) is DENIED,
2. Plaintiff's Motion to Amend (Doc. 16) is DENIED in PART and GRANTED in PART;
3. Motion for Temporary Restraining Order (Doc. 2) is DENIED as MOOT;
4. Plaintiff's Amended Motion for Temporary Restraining Order (Doc. 9) is DENIED; and
5. Plaintiff's Motion for Appointment of Counsel (Doc. 18) is DENIED.
6. Plaintiff shall file his Second ~~Amended Complaint~~ in conformity with this Order within **fourteen (14) days** of entry of this Order.

IT IS SO ORDERED.

/s/ Michael R. Barrett
JUDGE MICHAEL R. BARRETT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

BRANDON BOWIE,

Plaintiff,

vs.

HAMILTON COUNTY JUVENILE COURT

Defendants.

Case No. 1:18-cv-395

Barrett, J.
Bowman, M.J.

REPORT AND RECOMMENDATION

Plaintiff Bowie initially originated this action in the Columbus Division of the Southern District of Ohio, and this matter was subsequently transferred to the proper division in Cincinnati. (Doc. 3). Thereafter, the undersigned issued a Report and Recommendation that the complaint be dismissed with prejudice for failure to state a claim. (Doc. 6). Plaintiff then objected to the Report and Recommendation and was allowed to proceed with an Amended Complaint. (See Doc. 10, Order Withdrawing Report and Recommendations). This civil action is before the Court on Defendant's motion to dismiss (Doc. 13) and the parties' responsive memoranda. (Docs. 17, 21). Also before the Court is Plaintiff's motion to amend. (Doc. 16). The motions will be addressed in turn.

I. Background and Facts

Plaintiff's complaint purports to bring claims under the American with Disabilities Act of 1964 ("ADA"). However, the allegations contained in the complaint complain about the results of his pending child support case and the actions of the judge and counsel. Plaintiff alleges that due to his disability it is very difficult for him to travel from Columbus

to Cincinnati to appear in person for hearings in Juvenile Court. (Doc.1-3). Plaintiff's complaint asks this court to rule in his favor in the child support case, declare that Defendant's actions violation the ADA and enjoin Defendant from further discriminatory contuct. Plaintiff also seeks $125,000.00 in compensatory damages.

II. Analysis

1. Motion to Dismiss

Plaintiff Bowie sued the Hamilton County Juvenile Court as the single named party in his complaint. Federal Rule of Civil Procedure 17(b)(3) provides that the "law of the state where the court is located" governs whether a court or other governmental entity can sue or be sued. Thus, this Court must look to the law of the state of Ohio to determine whether the Hamilton County Juvenile Court is an entity capable of being sued. The Ohio Supreme Court has concluded that Ohio courts are not sui juris. In other words, "[a]bsent express statutory authority, a court can neither sue nor be sued in its own right." *Malone v. Court of Common Pleas of Cuyahoga County*, 45 Ohio St.2d 245, 248, 344 N.E.2d 126 (1976)(quoting *State ex rel. Cleveland Municipal Court v. Cleveland City Council,* 34 Ohio St.2d 120, 121, 296 N.E.2d 544 (1973)). Here, Plaintiff has not cited any authority, nor is this Court aware of any, contrary to the Ohio Supreme Court's conclusion in *Malone.* Therefore, the Hamilton County Juvenile Court is not a legal entity capable of being sued. Accordingly, Defendant's motion to dismiss (Doc. 13) is well-taken and should be granted.

2. Motion to Amend

Plaintiff seeks to amend his complaint to add additional defendants: Hamilton County, Ohio, Hamilton County Ohio Board of Commissioners, Hamilton County Judge Sylvia Hendon and Hamilton County Magistrate Catherine Kelly. Plaintiff's proposed

amendments are not well taken.

"Under Rule 15(a)(1), a party may amend the complaint once as a matter of course before being served with a responsive pleading." *Broyles v. Correctional Medical Serv.*, Inc., 2009 WL 3154241 (6th Cir.2009); *see Pertuso v. Ford Motor Credit Co.*, 233 F.3d 417, 421 (6th Cir.2000). The Sixth Circuit has described this Rule as giving plaintiffs an "absolute right to amend." *Pertuso*, 233 F.3d at 421.

However, where a responsive pleading has been filed, "a party may amend its pleading only with the opposing party's written consent or the court's leave." Fed.R.Civ.P. 15(a)(2). Although the "court should freely give leave when justice so requires," Fed.R.Civ.P. 15(a)(2), provides that leave to amend may be denied for: (1) undue delay, (2) lack of notice to the opposing party, (3) bad faith, (4) repeated failure to cure in prior amendments, (5) prejudice to the opposing party, or (6) futility of the amendments. *Foman v. Davis*, 371 U.S. 178, 182 (1962); *Perkins v. American Elec. Power Fuel Supply, Inc.*, 246 F.3d 593, 605 (6th Cir.2001). "Amendment of a complaint is futile when the proposed amendment would not permit the complaint to survive a motion to dismiss." *Miller v. Calhoun Cnty.*, 408 F.3d 803, 817 (6th Cir.2005). To survive a motion to dismiss, a Complaint must contain sufficient factual allegations to state a claim that is plausible. *Ashcroft v. Iqbal,* 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Here, Plaintiff's proposed amendments are futile because they fail to state a claim upon which relief may be granted by this Court

Notably, Hamilton County, Ohio is a geographic location and as such is not sui juris. *See McGuire v. Ameritech Services, Inc.*, 253 F. Supp. 988, 1015 (S.D. Ohio 2003). Similarly, the Hamilton County Board of Commissioners is not a proper defendant in this

matter. It is well-settled that county officials and entities do not have any authority unless the Ohio General Assembly affirmatively grants it. *Geauga Cty. Bd. of Commrs. v. Munn Rd. Sand & Gravel* (1993), 67 Ohio St.3d 579, 583, 621 N.E.2d 696.

Thus, any grant of authority "must be in clear and certain terms," and the presumption against authority requires the grant to be strictly construed. *Geauga Cty. Bd. of Commrs.*, 67 Ohio St.3d at 583, 621 N.E.2d 696. Thus, in the absence of a specific statutory grant of authority, a board of county commissioners is powerless to take any action. O.R.C. Chapter 2151 makes it very clear that the county commissioners have no operational control of a county juvenile court other than the supply of a facility and setting of a budget pursuant to O.R.C. 2151.09 and R.C. 2151.10. Absent any statutory authority, the Hamilton County Board of Commissioners has no role or authority to determine policies and procedures of the Juvenile Court or the Judges and Magistrates presiding over said Court. Accordingly, any such claims asserted by Plaintiff would be futile.

Last, Judge Hendon and Magistrate Kelly are absolutely immune from lawsuits involving money damages. See *Mireles v. Waco*, 502 U.S. 9, 9–10 (1991)(per curiam); *Mann v. Conlin*, 22 F.3d 100, 103 (6th Cir.1994) ("A judge performing his judicial functions is absolutely immune from suit seeking money damages."). Additionally, to the extent Plaintiff is seeking declaratory and/or injunctive relief, such claims are also barred by the doctrine outlined in *Younger v. Harris*, 401 U.S. 37 (1971). Absent extraordinary circumstances not present here, federal courts should not interfere with pending state proceedings in order to entertain constitutional challenges to the state proceedings. *Younger v. Harris*, 401 U.S. 37 (1971). Under the *Younger* doctrine, the federal court must abstain where "(1) state proceedings are pending; (2) the state proceedings involve an

important state interest; and (3) the state proceeding will afford the plaintiff an adequate opportunity to raise his constitutional claims." *Kelm v. Hyatt*, 44 F.3d 415, 419 (6th Cir. 1995) (citing *Nilsson v. Ruppert, Bronson & Chicarelli Co.*, 888 F.2d 452, 454 (6th Cir. 1989)); see also *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619, 106 S.Ct. 2718 (1986) (applying the abstention defined in Younger, a criminal case, to civil proceedings and cases); *Middlesex County Ethics Comm. v. Garden State Bar Ass'n*, 457 U.S. 423, 102 S.Ct. 2515 (1982) (same).

Here, as noted by Defendant, the state domestic relations proceedings were pending at the time this case was filed (and are currently pending), which satisfies the first criteria for *Younger* abstention. *Kelm v. Hyatt,* 44 F.3d 415, 419 (6th Cir.1995). Further, the 6th circuit has held that such proceedings do involve paramount state interests and therefore qualify under the second *Younger* test. *Id.* at 420 (citing *Ankenbrandt v. Richards*, 504 U.S. 712 (1992)). Finally, in *Kelm,* the Sixth Circuit concluded that the Ohio courts do provide an adequate forum for such plaintiff's constitutional claims and that the third criterion for *Younger* abstention was also satisfied.

It is well-established that lower federal courts lack the subject matter jurisdiction to conduct appellate review of state court decisions. *Berry v. Schmitt*, 688 F.3d 290, 289 (6th Cir.2012) (citing *Exxon Mobil Corp.*, 544 U.S. at 291). As such, Plaintiff's request to add such defendants is futile and therefore his motion to amend (Doc. 16) should be denied.

III. Conclusion

For these reasons, is therefore **RECOMMENDED** that Defendant's motion to dismiss (Doc. 13) be **GRANTED**, Plaintiff's motion to amend (Doc. 16) be **DENIED**; all remaining pending motions (Docs. 2, 9, 18) be **DENIED as MOOT**; and this case be **CLOSED.**

s/ Stephanie K. Bowman
Stephanie K. Bowman
United States Magistrate Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

BRANDON BOWIE,

Plaintiff,

vs.

HAMILTON COUNTY JUVENILE COURT

Defendants.

Case No. 1:18-cv-395

Barrett, J.
Bowman, M.J.

NOTICE

Pursuant to Fed. R. Civ. P. 72(b), any party may serve and file specific, written objections to this Report and Recommendation ("R&R") within **FOURTEEN (14) DAYS** of the filing date of this R&R. That period may be extended further by the Court on timely motion by either side for an extension of time. All objections shall specify the portion(s) of the R&R objected to, and shall be accompanied by a memorandum of law in support of the objections. A party shall respond to an opponent's objections within **FOURTEEN (14) DAYS** after being served with a copy of those objections. Failure to make objections in accordance with this procedure may forfeit rights on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

Other Orders/Judgments

1:18-cv-00395-MRB-SKB Bowie v. Hamilton County Juvenile Court

CASREF,LC1,PRO SE

U.S. District Court

Southern District of Ohio

Notice of Electronic Filing

The following transaction was entered on 1/9/2019 at 8:29 AM EST and filed on 1/9/2019
Case Name: Bowie v. Hamilton County Juvenile Court
Case Number: 1:18-cv-00395-MRB-SKB
Filer:
Document Number: 25

Docket Text:
REPORT AND RECOMMENDATIONS - IT IS RECOMMENDED that Defendant's motion todismiss [13] be GRANTED, Plaintiff's motion to amend [16] be DENIED; allremaining pending motions [2] [9] [18] be DENIED as MOOT; and this case be CLOSED. Objections to R&R due by 1/23/2019. Signed by Magistrate Judge Stephanie K. Bowman on 1/9/2019. (km) (This document has been sent by regular mail to the party(ies) listed in the NEF that did not receive electronic notification.)

1:18-cv-00395-MRB-SKB Notice has been electronically mailed to:

Pamela J Sears pam.sears@hcpros.org

Eric Adam Munas eric.munas@hcpros.org

Cooper D Bowen cooper.bowen@hcpros.org

1:18-cv-00395-MRB-SKB Notice has been delivered by other means to:

Brandon Bowie
1608 Brentnell Avenue
Columbus, OH 43219

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
[STAMP dcecfStamp_ID=1040326259 [Date=1/9/2019] [FileNumber=6455017-0]
[561167aac287e263e18a0220c30f633643e7e86b67b1d23193fcad4986138d0a12b6
63124a3374bf4f56609b647ae9cced2a14aa7d70b118b0ab3a0e636faba7]]

App B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

BRANDON BOWIE,

Plaintiff,

v.

HAMILTON COUNTY
JUVENILE COURT, et al.

Defendants.

Case No. 1:18-cv-395

McFarland, J.
Bowman, M.J.

REPORT AND RECOMMENDATION

This civil action is before the Court on Defendants' Motion for Judgment on the Pleadings (Doc. 40) and the parties' responsive memoranda.

I. Background and facts

This action arises from underlying child visitation cases within the Hamilton County Juvenile Court. Plaintiff Brandon Bowie has brought claims against Defendants Judge Sylvia Hendon and Magistrate Catherine Kelley, in their official capacities, as well as "Hamilton County Juvenile Court" and "Hamilton County, Ohio" for violation of Title II of the American Disabilities Act and Title 504 of the Rehabilitation Act. (Doc. 31 at ¶1).

Plaintiff lives in Columbus, Ohio and claims a neurological condition makes it difficult for him to travel from Columbus to Cincinnati. (Doc 31, Page ID #447-448). Magistrate Kelley had previously allowed Mr. Bowie to appear via telephone at certain hearings. A hearing was scheduled for June 20, 2017 to hear several pending motions, including a motion for contempt filed by the mothers of Mr. Bowie's children as well as Mr. Bowie's own motions. The day of the hearing, counsel for Mr. Bowie filed a motion for him to appear via telephone or video. Magistrate Kelley denied Plaintiff's motion to

appear via telephone or video that was filed that morning as it would "interfere with the ability of the court to properly observe and assess the credibility of Mr. Bowie." (See Doc. 37-1, PAGEID# 510, June 20, 2017 Journal Entry). However, Plaintiff's motion to waive appearance was granted and he was represented by counsel at the hearing. (Id.) Plaintiff alleges that his pending motions were dismissed due to his inability to offer evidence since he was not participating in the hearing.[1] Judge Sylvia Hendon held a hearing on the objections on March 23, 2018. She then set the matter for sentencing on May 24, 2018 and ordered Plaintiff to appear. (Id. at PAGEID# 511, April 12, 2018 Journal Entry). After a continuance was granted on May 24, 2018, the hearing was re-set for June 20, 2018. (Id., May 24, 2018 Journal Entry).

On June 20, 2018 Plaintiff failed to appear at the hearing before Judge Hendon. He told the court that he had to go to the emergency room for a tooth ache. (Id., June 20, 2018 Journal Entry). The Judge then re-set the hearing for July 20, 2018 and allowed the Plaintiff to appear via telephone. (Id., July 20, 2018 Journal Entry). Plaintiff was found in contempt for violation of the visitation order. (Id.) The Judge allowed subsequent continuances of the trial on support issues for Plaintiff's medical reasons and also allowed him to waive appearance at a pre-trial if he satisfied payment of the contempt penalty. (Id., October 10, 2018 Journal Entry and December 17, 2018 Journal Entry). Plaintiff subsequently filed an appeal of the Judge's Decision. (Id. at PAGEID# 512, April 8, 2019 Entry).

[1] Although the Journal Entry does not support this allegation, it is evident from the transcript of the hearing before Judge Hendon on March 23, 2018 that Magistrate Kelley did not address the contempt motions and motion to modify parenting time that Plaintiff had pending. See Doc. 8-1, PAGEID#257-259.

Plaintiff brought this action against Judge Hendon, Magistrate Kelley, the Hamilton County Juvenile Court and Hamilton County, Ohio for violations of Title II of the Americans with Disabilities Act ("ADA"). Plaintiff had originally filed his complaint solely against the Hamilton County Juvenile Court. (Doc. 8). A motion to dismiss was filed as the Hamilton County Juvenile Court is not sui juris and thus not capable of being sued. (Doc. 13). The undersigned recommended that the motion be granted (Doc. 25); however, the district judge declined to adopt the Report and Recommendation relying on the Northern District of Ohio opinion in *Jaegly v. Lucas Cty. Bd. Of Commissioners*, No. 16-cv-1982, 2017 WL 6042237, at *4 (N.D. Ohio Dec. 6, 2017) and permitted Plaintiff to file a second amended complaint. The reasoning in *Jaegly,* adopted by this court, was that Title II of the ADA provides express statutory authority to sue the domestic relations division of an Ohio court of common pleas. (Doc. 30, PageID 432). Further, the Court held that Ohio has waived Eleventh Amendment immunity against Rehabilitation Claims. (Id.). The Court further held both Judge Hendon and Magistrate Kelley are immune from Plaintiff's claim for damages.

In his Second Amended Complaint, Plaintiff seeks a declaration that Defendants' alleged actions violated Title II of the ADA and Section 504 of the Rehabilitation Act, as well as injunctive relief (1) enjoining Defendants "from engaging in discriminatory practices against Bowie a qualified individual with a disability," and (2) ordering Defendants to comply with Title II of the ADA and Section 504 of the RA. In addition, Plaintiff also maintained his request for compensatory damages against Defendants in the amount of $125,000.00.

Defendants now move for dismissal of Plaintiff's Second Amended Complaint, with prejudice, for failure to state a claim. (Doc. 40 at 1). Defendants assert: (1) Plaintiff is not

entitled to declaratory relief or compensatory relief against Judge Hendon or Magistrate Kelley as a matter of law; (2) Plaintiff is not entitled to injunctive relief because Plaintiff's requested accommodation was unreasonable and Plaintiff did not state a claim for relief under Title II of the American Disabilities Act or Section 504 of the Rehabilitation Act; and (3) "Plaintiff's claims against punitive Defendants Hamilton County Juvenile Court and Hamilton County, Ohio fail for the additional reasons that they are not *sui juris*." (*Id.* at 4).

Plaintiff rejects Defendants' assertions and argues that judgment on the pleadings against Plaintiff's second amended complaint would be improper. Plaintiff asserts that his second amended complaint (Doc. 31) provides detailed allegations of Defendants' violation of Plaintiff's rights under the ADA and RA. (Doc. 44 at 2).

II. Analysis

A. *Standard of Review*

The Federal Rules of Civil Procedure permit parties to move for judgment on the pleadings. Fed. R. Civ. Proc. R. 12(c). The standard of review for a 12(c) motion is the same *de novo* standard of review that courts apply in a 12(b)(6) motion for failure to state a claim. *Mixon v. Ohio*, 193 F.3d 389, 399-400 (6th Cir. 1999) (citing *Grindsatff v. Green*, 133 F.3d 416, 421, (6th Cir. 1998)). A court must "construe the complaint in the light most favorable to the plaintiff, accept all of the complaint's factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of the claims that would entitle relief." 133 F.3d 416, 421 (citing *Meador v. Cabinet for Human Resources*, 902 F.2d 474, 475 (6th Cir. 1976)). Nonetheless, courts are only required to accept "well pleaded facts as true, not the legal conclusions that may be alleged or that may be drawn from the pleaded facts." *Blackburn v. Fisk Univ.* 443, F.2d 121, 124 (citing

L'Orange v. Medical Protective Co., 394 F.2d 57 (6th Cir.); *Sexton v. Barry*, 233 F.2d 220 (6th Cir.); *Ryan v. Scoggin*, 245 F.2d 54 (10th Cir.)).

Plaintiff attached evidence of his disability and two transcripts of court proceedings to his first amended complaint (Doc. 8-1) and then refiled the same evidence of disability as well as additional domestic court filings to his second amended complaint (Doc. 31-1). Plaintiff then filed a supplemental complaint, attaching additional court pleadings (Doc. 33). Defendants filed a pleading asking the court to strike the supplemental complaint to which they attached a certified copy of the relevant domestic court record. (See Doc. 37-1). The Court ultimately ordered that the supplemental complaint be stricken. (Doc. 38). As a preliminary matter, by attaching these documents to the pleadings and motions relative to the pleadings, the parties have implicitly asked the Court to take judicial notice of the attachments. In ruling on a Rule 12(b)(6) or 12(c) motion, a court "may consider the Complaint and any exhibits attached thereto, public records, items appearing in the record of the case and exhibits attached to defendant's motion to dismiss so long as they are referred to in the Complaint and are central to the claims contained therein." *Brent v. Wayne County Dep't of Human Services*, 901 F.3d 656, 694 (6th Cir. 2018); *Amini v. Oberlin College*, 259 F.3d 493, 502 (6th Cir. 2001). "Although typically courts are limited to the pleadings when faced with a motion under Rule 12(b)(6), a court may take judicial notice of other court proceedings without converting the motion into one for summary judgment." *Buck v. Thomas M. Cooley Law Sch.*, 597 F.3d 812, 816 (6th Cir. 2010); see also *Winget v. JP Morgan Chase Bank, N.A.*, 537 F.3d 565, 576 (6th Cir. 2008) (stating that, on a motion to dismiss, a court "may take judicial notice of another court's opinion not for the truth of the facts recited therein, but for the existence of the opinion, which is

not subject to reasonable dispute over its authenticity"). Neither party has raised the issue of the Court taking judicial notice of the documents previously referenced nor objected to their consideration by the Court. Accordingly, based on the present record, the Court concludes that it can take judicial notice of the state court transcripts (Doc. 8-1) and court record (Doc.37-1) without converting Defendants' Motion to Dismiss into a motion for summary judgment. See *id.*; see also *Gonzales v. City of Fostoria*, No. 3:13-cv-796, 2014 U.S. Dist. LEXIS 2504, 2014 WL 99114, at *7 (N.D. Ohio Jan. 9, 2014) (taking judicial notice of municipal court's docket sheets that establish that the plaintiff pleaded no contest and was subsequently found guilty and that consideration of the state court decision and docket sheets did "not convert the motion to dismiss to a motion for summary judgment"); *Ghaster v. City of Rocky River,* 913 F. Supp. 2d 443, 454-55 (N.D. Ohio 2012) (finding that a court may take judicial notice of another court's docket where, inter alia, the plaintiff referred to or attached the public record to the complaint); *Slusher v. Reader*, No. 2:18-cv-570, 2019 U.S. Dist. LEXIS 51706 (S.D. Ohio Mar. 27, 2019)(same).

B. *Defendants' Motion for Judgement on the Pleadings is well taken*

Defendants contend, *inter alia,* that a 12(c) dismissal of Plaintiff's Second Amended Complaint is proper because Plaintiff failed to state a claim for disability discrimination. (Doc. 40 at 1). The undersigned agrees.

Title II of the Americans with Disabilities Act of 1990 ("ADA") states that "[n]o qualified individual with a disability shall, by reason of such disability, be excluded from participation or denied the benefits of the services, programs or activities of a public entity." 42 U.S.C. § 12132. The Rehabilitation Act states that "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his

disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a).

In order to prove a public program or service violates Title II of the ADA, a plaintiff must show: 1) that he is a qualified individual with a disability; 2) that he was either excluded from participation in or denied the benefits of a public entity's services, programs, or activities, or was otherwise discriminated against by the public entity; and 3) that such exclusion, denial of benefits, or discrimination was by reason of his disability. See 42 U.S.C. § 12132; *see also Barrilleaux v. Mendocino County*, 61 F.Supp. 3d 906, 915 (N.D. Cal. 2014), *citing Weinreich v. Los Angeles Cnty. Metro. Transp. Auth.*, 114 F.3d 976, 978 (9th Cir. 1997). The same standard applies to a plaintiff who seeks to establish a claim under section 504 of the Rehabilitation Act, in addition to showing the program receives federal funding. *See Center v. City of W. Carrollton*, 227 F. Supp. 2d 863, 867 (S.D. Ohio 2002) and *Davis v. Flexman*, 109 F. Supp. 2d 776, 785 (S.D. Ohio 1999). "Title II requires only 'reasonable modifications that would not fundamentally alter the nature of the service provided,' not 'to employ any and all means to make judicial services accessible to persons with disabilities.'" *Bedford v. Michigan*, 722 F. App'x 515, 519 (6th Cir. 2018) *quoting Tennessee v. Lane*, 541 U.S. at 531-32.

Here, Defendants argue that the court's refusal to allow Plaintiff to attend the June 20, 2017 hearing via telephone was not because of his disability. (Doc. 48 at 5). In this regard, Defendants contend that the court's denial of Plaintiff's request did not demonstrate: "(1) that he was either excluded from participation in or denied the benefits of the Juvenile Court's services, programs, or activities or was otherwise discriminated

against" or that any "exclusion, denial of benefits, or discrimination was by reason of his disability." (*Id.*). Defendants explain that the court denied Plaintiff's request not because of his disability, but because Plaintiff's "remote appearance would 'interfere with the ability of the court to properly observe and assess the credibility of Mr. Bowie." (Doc. 48 at 7 citing Doc. 37-1 at 6). Therefore, Defendants conclude that the decision to deny Plaintiff's request to attend the hearing remotely did not violate Title II of the ADA or §504 of the RA. (Doc. 48 at 5). Furthermore, Plaintiff's counsel did not even request that Plaintiff attend remotely until the day of the hearing. (See Doc. 8-1, transcript, p7-9).

Defendants further note that Plaintiff then filed a motion to waive his appearance at that hearing and that the court granted this motion because of his disability, thus making an accommodation. (Doc. 48 at 4 and Doc. 40 at 9). Plaintiff also had representation at the June 2017 hearing as his attorney was present. (Doc. 40 at 2). Additionally, Defendants note that Plaintiff was allowed to attend other hearings via telephone, including the July 2018 hearing. (*Id.* at 3). Such instances of accommodations further suggest that Defendant's denial of Plaintiff's request to attend the June 2017 hearing remotely was not because of Plaintiff's disability.

In his Opposition to Defendants' 12(c) Motion for Judgment on the Pleadings (Doc. 44), Plaintiff seems to conclude that Defendant's refusal to allow remote attendance at the June 2017 hearing violated the ADA and RA. He cites the Title II factors that a plaintiff must show to prove an ADA violation, but he does not explain how Defendant's conduct satisfies these factors. (*Id.* at 8). Plaintiff does not rebut the Defendants' argument that refusal to allow for remote participation in the June 2017 hearing was not because of Plaintiff's disability, but because of the necessity that Plaintiff be present at that specific

hearing to evaluate his credibility. Plaintiff does not dispute that Defendants made various accommodations to Plaintiff in the past, and that he had an attorney present at the June 2017 hearing. (*Id.* 4). Plaintiff also does not dispute that Defendant Kelley waived his appearance at the June 2017 hearing. He takes the position, however, that because the waiver resulted in Plaintiff's filings being dismissed and Plaintiff not getting to testify at the hearing, he was excluded from the hearing. (*Id.* at 9-10).

As noted by Defendants, Title II requires "reasonable modifications that would not fundamentally alter the nature of the services provided." (Doc. 40 at 10 quoting *Tennessee v. Lane*, 541 U.S. 59, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004)). Here, the Hamilton County Juvenile Court provided reasonable accommodations to Plaintiff by granting his motion to waive appearance at the June 2017 hearing, and allowing Plaintiff to appear via telephone in prior and subsequent matters. Defendants, however, determined that Plaintiff's actual appearance at the June 2017 hearing was necessary. His actual appearance was necessary because they did not believe that a remote appearance would allow for the Juvenile Court to properly perform its functions. The hearing in question was a contempt hearing and Magistrate Kelley determined she needed Plaintiff's physical presence and allowing an appearance via video or telephone would "interfere with the ability of the court to properly observe and assess the credibility of Mr. Bowie." (See Doc. 37-1, PAGEID# 510,June 20, 2017 Journal Entry). As noted by Defendants, a contempt proceeding also involves the necessity of the court's being able to judge a party's demeanor and character, both of which prove difficult or in some cases impossible if the party is not present.

Because Plaintiff cannot meet all the elements of an ADA claim/RA claim, Plaintiff's claims must fail as a matter of law. In light of the foregoing, Defendants' motion is well-taken in and they are entitled to judgment as a matter of law.[2]

III. Conclusion

For the reasons stated, it is herein **RECOMMENDED** that Defendants' Motion for Judgment on the Pleadings (Doc. 40) be **GRANTED**; and this matter be **CLOSED**.

s/ Stephanie K. Bowman
Stephanie K. Bowman
United States Magistrate Judge

[2] Additionally, Judge Barrett's prior order permitted Plaintiff to bring a claim against Hamilton County, Ohio and the Hamilton County Juvenile Court over the recommendation of the undersigned to the contrary. Defendants have again raised the issue that Hamilton County and the Juvenile Court are not proper defendants as they are not entities capable of being sued. To the extent the District Judge would revisit this issue, the Defendants have properly set forth their argument (see Doc. 40, p12-14) and the undersigned agrees. In order to sue a court a plaintiff must sue a person as a representative of the court, not sue the court. In order to sue a county a plaintiff must sue a person or entity, like the Board of County Commissions, not the geographic location. The entities themself remain incapable of being sued. Thus, the undersigned again recommends that all claims against Hamilton County and the Hamilton County Juvenile Court be dismissed for this reason as well as for the reasons set forth above.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

BRANDON BOWIE,

Plaintiff,

v.

HAMILTON COUNTY
JUVENILE COURT, et al.

Defendants.

Case No. 1:18-cv-395

McFarland, J.
Bowman, M.J.

NOTICE

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App C.

James J. Whitfield (0080720)
Counsel for B. Bowie

COURT OF COMMON PLEAS
HAMILTON COUNTY JUVENILE COURT

IN RE:	*	CASE NO.: F11-803X
ALAYAH BOWIE ARIELLE BOWIE	*	OBJECTIONS TO MAGISTRATE'S DECISION (Amended)

* *

Now comes Brandon Bowie ("Father"), by and through counsel, and pursuant to Juv. R. 40 hereby submits the instant Objections to the Magistrate's decision issued on June 20, 2017 and in support states the following:

1. Father lives in Columbus, Ohio and the Social Security Administration' determined that Mr. Bowie is disabled under section 1614(a) (3) (A) of the Social Security Act nearly seven (7) years ago. His documented physical limitations make it impractical and incredibly burdensome to travel. Though the Court waived Father's requirement to be present in Court, it refused to allow him to participate in the proceedings improperly dismissing his pending contempt motion and allowing him to defend allegations of contempt from the opposing party.

2. On 6/20/2017, the court did not reasonably accommodate Father. Mr. Bowie was denied the opportunity to testify in a visitation/contempt hearing without notice and his motions/filings were dismissed which was an egregious act by the court. These acts were in violation of federal mandates which state that the courts (and other government entities) must try to abide by the preference of the person needing an accommodation. The American Disability Act requires public entities to give "primary consideration to the requests of the individual" in deciding what auxiliary aid or service is necessary to ensure that communications with persons with disabilities are as effective as with other persons. 35 C.F.R. §35.160(b) (2). The ADA further outlines that when possible to reasonably accommodate someone who is disabled, the courts have a duty to comply. In this matter Father was denied reasonable accommodations his rights as a disabled individual were clearly violated.

3. The Court went on to find Father in contempt of parenting time order despite an admission from Maya Austell ("Mother") that she received notice of an extended visit several weeks in advance of the alleged contempt. Further the Court levied a $900.00 fine (and attorney fees) against an indigent party who acted without malice.

4. Despite knowledge of Father's travel limitations and without receiving any additional evidence or testimony, Father's Motion to Modify parenting time was dismissed while his parenting time was modified, per Mother's motion, essentially eliminating parenting time between Father and his daughters.

WHEREFORE, Brandon Bowie respectfully requests:

That this Court set this matter for hearing before the Judge, that this Court find the objections well taken, that this Court modify or set aside the order of June 20, 2017 to truly reflect the best interests of the children and all the relevant facts of the case and that this Court grant such and other further relief as the nature of this case requires.

Respectfully submitted,

James J. Whitfield (0080720)
Attorney for B. Bowie
119 East Court Street
Cincinnati, Ohio 45202
Telephone (513) 290-0822
Facsimile (513) 961-3349
whitfieldlaw@outlook.com

CERTIFICATE OF SERVICE

I hereby certify that service of the instant Objections was requested via the Clerk of Courts to all parties and/or counsel, namely James Hartke via electronic transmission on or immediately following the date of filing.

James J. Whitfield

App D.

NDVIEW FAMILY PRACTICE
1550 W. 5TH AVENUE
COLUMBUS, OHIO 43212-2473

TELEPHONE: (614) 488- 7929

FAX: (614) 488-0226

CHARLES B. MAY D.O.
STEPHEN ALTIC, D.O.

HILARY McCORD, PA-C
COURTNEY ROLAND, PA-C

January 12, 2017

Brandon Bowie
921 N. Nelson Rd.
Columbus, Ohio 43219

DOB: 10/22/1986

Dear Mr. Bowie:

You have been under my care for a number of years for an industrial injury that resulted in ulnar nerve entrapment thoracic outlet syndrome and left shoulder/scapular dyskinesia. These conditions continue to impair the function in your left arm with vascular impairment as well as neurologic impairment referable to the ulnar nerve. This has resulted in some muscular issues for you as well and strength loss in the left arm. I had previously indicated that you should limit your driving to no more than 20-30 miles at a time and certainly commercial driving at less than 20 miles. It is my understanding you have been required to show up personally for hearings in Cincinnati relative to issues regarding child support. It is my opinion that your neurologic and vascular problems in the left arm limit your ability to drive as I have stated above. It might be more beneficial for you, therefore, to be able to have videoconferencing or hearings by way of video.

Sincerely,

Stephen Altic, D.O.