UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

JOSEPH WATLEY and KARIN HASEMANN,	:	
Plaintiffs,	:	Civil Action No. 3:13-cv-1858-RNC
v.	:	
JOETTE KATZ and DEPARTMENT OF CHILDREN AND FAMILIES,	:	
Defendants.	:	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS

Andrew D. O'Toole
O'TOOLE + O'TOOLE LLC
280 Trumbull St., 15th Floor
Hartford, Connecticut 06103
Tel.: (860) 519-5805
Email: aotoole@otoolegroup.com

Counsel for Plaintiffs

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PRELIMINARY STATEMENT

Plaintiffs Karin Hasemann and Joseph Watley submit this memorandum in opposition to the motion to dismiss (ECF # 59) filed by the Department of Children and Families ("DCF") and its Commissioner, Joette Katz (collectively, DCF and Commissioner Katz are referred to as "Defendants"). For the reasons set forth below, Defendants' motion to dismiss should be denied.

Plaintiffs commenced this action *pro se* in December 2013, and the case now returns to this Court following an appeal to the Second Circuit. *Watley v. Katz*, 631 Fed. App'x 74 (2d Cir. 2016). Plaintiffs are the unmarried parents of two boys, over whom their parental rights were terminated based on the doctrine of "predictive neglect,"[1] and a continuous course of discriminatory assessments of Plaintiffs' disabilities or perceived disabilities, in tandem with a failure to accommodate or modify DCF programs and services.

Plaintiffs are disabled, have a record of disability and/or have been regarded as having mental and/or physical disabilities by DCF. Plaintiffs were eligible for certain services and programs offered by DCF, but discriminated against based on their disabilities and/or stereotypes about those perceived disabilities and otherwise denied or unable to access to programs and services in violation Title II of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §§ 12131-12134, Section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act"), and their constitutional rights.

At all relevant times, DCF affirmatively told Plaintiffs and the state courts that the ADA and Rehabilitation Act did not even apply to the programs and services it offered parents like them and failed to modify or alter DCF's programs and services in a manner so that Plaintiffs

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[1] Connecticut state law does not even require that actual neglect or abuse occur, but "permit[s] an adjudication of neglect based on a potential for harm or abuse to occur in the future." *In re Michael D.,* 752 A.2d 1135, 1138 (Conn. App. Ct. 2000).

[2] Pursuant to the Second Circuit's mandate, 28 U.S.C. § 1915(e)(1) and D. Conn. Loc. R.

could fully access, participate and/or benefit from those programs and services, notwithstanding their disability. DCF also retaliated against Plaintiffs when Plaintiffs requested modifications and denied Plaintiffs visitation when they attempted to assert their ADA and Rehabilitation rights. Unfortunately, the discrimination based on disability or perceived disability experienced by Plaintiffs at the hands of DCF is not unique. Though last year marked the twenty-fifth year since the ADA was first enacted and the Rehabilitation Act is over fifty years old, the First Amended Complaint in this case (ECF # 41) (the "Complaint"),[2] recent DOJ enforcement action against the Massachusetts DCF in a strikingly similar case, and technical guidance issued by DOJ to state child welfare agencies underscore that state agencies, including DCF, continue to discriminate against parents with disabilities or perceived disabilities. *See e.g.*, Protecting the Rights of Parents and Prospective Parents with Disabilities: Technical Assistance for State and Local Welfare Agencies and Courts under Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act, issued by U.S. Dept. of Health and Human Services (HHS) and U.S. Dept. of Justice (DOJ), issued Aug. 10, 2015 ("DOJ and HHS Technical Assistance"),[3] ("Both the HHS Office of Civil Rights (OCR) and DOJ Civil Rights Division have received numerous complaints from individuals with disabilities involved with the child welfare system, and the frequency of such complaints is rising. . . . [I]n a recent joint investigation by OCR and DOJ of practices of a State child welfare agency, OCR and DOJ

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[2] Pursuant to the Second Circuit's mandate, 28 U.S.C. § 1915(e)(1) and D. Conn. Loc. R. 83.10, the Court appointed Plaintiffs *pro bono* counsel. (ECF No. 25).

[3] A copy of the HHS and DOJ Technical Assistance for State Child Welfare Agencies and Courts was provided to the Second Circuit. (*Watley v. Katz*, No. 14-3862-cv (2d Cir. filed Aug. 25, 2015), ECF # 90, 4-25). This Court may take judicial notice of materials filed in the Second Circuit and for the Court's convenience, a copy of the DOJ and Technical Assistance is attached as Exhibit A.

determined that the State agency engaged in discrimination against a parent with disability.[4] The investigation arose from a complaint that a mother with developmental disability was subject to discrimination on the basis of her disability because the State did not provide her with supports and services following the removal of her two-day old infant. The supports and services provided and made available to nondisabled parents were not provided to this parent, and she was denied reasonable modifications to accommodate her disability. As a result this family was separated for more than two years.").

The facts set forth in the Complaint are tragically too similar to those on which DOJ and HHS concluded that the Massachusetts DCF had violated the ADA and Rehabilitation Act and ordered that DCF agency to pay a similarly disabled mother compensatory damages. Because the claims alleged by Plaintiffs in this action implicate important federal rights and involve issues of discrimination by state child welfare agencies that "are long-standing and widespread," DOJ and HHS Technical Assistance, and Plaintiffs have never been afforded a full and fair opportunity to vindicate these rights, this action should proceed. Though Plaintiffs would like their children to know that they have never stopped loving them and would like nothing more than the chance to parent them, they understand and now (reluctantly) accept that they may not challenge the state court judgment in this action. Nonetheless, Plaintiffs pursue this action for themselves and other similarly situated parents with mental, intellectual or psychiatric disability to recover the compensatory and injunctive relief they are entitled to based on Defendants' past and ongoing discriminatory and retaliatory acts against them.

For the reasons that follow, the Defendants' motion to dismiss should be denied.

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[4] A copy of the DOJ Enforcement Letter Against Massachusetts DCF, dated Jan. 29, 2015 (available at www.ada.gov/ma_docf_lof.pdf). For the Court's convenience, a copy is attached hereto as Exhibit B.

FACTUAL ALLEGATIONS

Plaintiffs are the parents of Joseph W. (or "Joey Jr.") and Daniel W., who are now 11 and 10 years old. (Compl. ¶1). Both sons were removed from Plaintiffs' care within days of their birth while the family was still in the hospital. (*Id.* ¶¶ 10, 11, 41, 42). Plaintiffs were denied visitation with their sons from 2008 even though their parental rights did not terminate until five years later. (*Id* ¶ 81). DCF contended that the causes of the predicted future neglect of Joey Jr. and Daniel were Mr. Watley and Ms. Hasemann's actual or perceived medical and psychological disabilities. (*Id*. ¶ 16).

Mr. Watley is disabled due to a spinal injury, receives SSDI benefits, and according to DCF, suffers from "personality disorder not otherwise specified." (*Id.* ¶ 6). Mr. Watley resides with his mother in Thomaston, Connecticut. (*Id.*). Ms. Hasemann suffers from severe narcolepsy, has a history of seizures, and, when she was sixteen years old, had a frontal lobe brain tumor removed. (*Id.* ¶ 7). DCF contended that severe narcolepsy made activities of daily personal life difficult, because individuals like Ms. Hasemann who suffer from narcolepsy have difficulty maintaining alertness and activities such as driving to school and work. (*Id*.). DCF also contended that Ms. Hasemann suffered from the following inconsistent and contradictory disabilities: (1) ADHD, (2) personality disorder major depression, (3) chronic functional impairments, (4) cognitive deficits, (5) serious mental health issues, (6) cognitive disorder not otherwise specified subsequent to having her brain tumor removed, (7) neurological based disorder; (8) schizotypal personality disorder, or (9) antisocial personality disorder. (*Id*.). Some of the doctors DCF consulted opined that some of Ms. Hasemann's symptoms or behaviors are consistent with a frontal lobe brain tumor. (*Id*.). Ms. Hasemann also lives with her parents in Watertown, Connecticut. (*Id*.).

DCF is responsible for providing and administering programs to strengthen families; making reasonable efforts to encourage and assist families to use all available resources to maintain the family unit intact and to reduce the risk of a child's placement into substitute care; and providing substitute care only when child safety and risk factors cannot be reasonably reduced or eliminated through services to the child's family. (*Id.* ¶ 8). DCF receives financial assistance from the federal government. (*Id.*). Defendant Commissioner Katz is DCF's chief policymaker responsible for setting and overseeing its customs, policies and procedures, including those at issue in this action. (*Id.* ¶ 9).

Throughout its interactions with Plaintiffs, DCF affirmatively denied their repeated efforts to invoke their rights under the ADA and Rehabilitation Act. (*Id.* ¶ 14). DCF repeatedly told the Plaintiffs and the state courts that the federal anti-discrimination protections afforded under the ADA did not apply to neglect and/or termination proceedings, and that DCF does not have to provide reasonable modifications for Plaintiffs so that they may benefit and access the programs, activities and services offered by DCF. (*Id.*). DCF bore an ongoing duty to reunite the Plaintiffs with their children through a range of services and programs aimed at rehabilitation and remediation of the alleged deficiencies that DCF alleged to be the basis of the predicted neglect. (*Id.* ¶ 15). DCF bore the duty to offer programs and services aimed at rehabilitation and reunification until their parental rights were terminated. (*Id.* ¶ 17).

DCF has failed to adopt policies and/or procedures and failed to train its employees of DCF's obligations, duties and responsibilities under the ADA and Rehabilitation Act in providing services, programs and activities to parents, including Plaintiffs. (*Id.* ¶ 18). Given its view that the ADA did not apply to the services and programs it offers to parents, DCF did even not conduct the required self-evaluation or transition plan for its programs, activities and services as it was required to do following passage of Title II of the ADA. *See* 28 CFR § 35.150(d). (*Id.*

¶ 19). Even though DCF regarded Plaintiffs as being disabled, and contended based on stereotypes of those disabilities that Plaintiffs were not able to care for their children, Defendants never provided Plaintiffs with notice of their rights and/or DCF's obligations under the ADA and/or Rehabilitation Act. (*Id*. ¶ 20). Defendants did not designate a responsible person and grievance procedure for parents like Plaintiffs to raise their disability-based discrimination and retaliation concerns. *See* 28 C.F.R. § 35.107. (*Id*. ¶ 21). Plaintiffs repeatedly requested the name of the responsible ADA coordinator, but were never provided a name or contact information. (*Id*. ¶ 22). At no time after becoming involved with Plaintiffs did DCF ever designate an ADA coordinator. (*Id*. ¶ 23). No ADA coordinator was ever assigned to handle or respond to Plaintiffs' requests or complaints. (*Id*.). DCF failed to ever provide Plaintiffs with a grievance procedure for Plaintiffs or other similarly situated parents to grieve requests under the ADA and Rehabilitation Act. (*Id*.). When Plaintiffs attempted to assert their rights under the ADA and Rehabilitation Act and request modifications, DCF rejected their requests and affirmatively told Plaintiffs that the ADA and Rehabilitation Act did not apply to its programs and services. (*Id*. ¶ 26). However, all of DCF's programs, services and/or activities are subject to the requirements and obligations imposed under the ADA and Rehabilitation Act. (*Id*. ¶ 27).

DCF also failed to modify or tailor its programs and services or modify their procedures and requirements in light of Plaintiffs' disabilities or perceived disabilities. (*Id.* ¶ 24). As a result of their disabilities and DCF's failure to modify their programs and services or provide additional individual and family supports, Plaintiffs could not fully access and benefit from those services for which they qualified and DCF was required to provide. (*Id.* ¶ 44). Kathy Dayner, the DCF social worker assigned to Ms. Hasemann and then to Mr. Watley was not qualified or trained to make medical or psychological diagnoses and had received absolutely no training, knowledge or aware of what the ADA was or required. (*Id.* ¶ 35).

While investigating and pressing for the termination of her parental rights, DCF had Ms. Hasemann evaluated by several professionals. (*Id.* ¶ 36). Several of these professionals affirmatively concluded and opined that Ms. Hasemann was more than capable of caring for a child, did not pose a threat to children and had good family support from her parents. (*Id.*). DCF's own referring psychologist determined that Ms. Hasemann was not a threat to Kristina, did not reveal psychotic symptoms and had adequate family supports. (*Id.*). Ms. Hasemann was found to be capable of assuming the care of Kristina, but would benefit from interventions to assist her and that that her parents would be a support her. (*Id.* ¶ 37). Nonetheless, Kristina was discharged from the hospital and immediately placed in foster care and placed with complete strangers, Mr. and Mrs. Doe. (*Id.* ¶ 39). DCF did so without visiting Ms. Hasemann's house or meeting with her parents. (*Id.*).

DCF was fully aware that that Ms. Hasemann had strong family supports and that her parents, with whom she lived, would be able to assist her. (*Id.* ¶ 40). Nevertheless, three days after Joe Jr. was born, DCF took him from the hospital and placed him in foster care. (*Id.* ¶ 41). Daniel was likewise immediately removed from the care of Mr. Watley and Ms. Hasemann at birth in the hospital. (*Id.* ¶ 42). DCF did not even consider or place Joe Jr. and Daniel with Mr. Watley's family even though he resided in the same house with his mother and at that time his grandmother. (*Id.* ¶ 43). DCF did not consider placement with Mr. Watley's sister or brother, who both had the means and ability to assist Mr. Watley and/or care for the boys. (*Id.*). Mr. Watley's brother had previously been licensed by DCF to serve as a foster parent for other children. (*Id.*).

Ms. Hasemann and Mr. Watley had and continued to have viable family supports and could have significantly benefitted from a number of supports and services DCF provides or makes available to families involved in the child welfare system and which could have prevented

the ongoing placement of Kristina, Joe Jr. and/or Daniel into foster care. (*Id.* ¶ 44). In particular, DCF first failed to consider a plan that relied on Mr. Watley and Ms. Hasemann's respective family resources. (*Id.*). To the extent DCF continued to have concerns, DCF could have implemented various in-home supports to afford Mr. Watley and Ms. Hasemann the opportunity to have Kristina, Joe Jr. and Daniel at home. (*Id.* ¶ 36). Instead, DCF immediately placed each of the children into foster care and set its goal to terminating their parental rights based solely on stereotypes and generalizations about their disabilities and how their disabilities impaired their ability to parent. (*Id.*).

At the time Joe Jr. was removed from Plaintiffs and placed into foster care, there had been no actual or threatened harm to or neglect of Joe Jr. (*Id.* ¶ 48). At the time Joe Jr. was born, Mr. Watley had no previous DCF involvement. (*Id.* ¶ 49). Mr. Watley also had never received any psychological treatment or diagnosis. (*Id.*). Nonetheless, three days after Joe Jr.'s birth, DCF removed Joe Jr. from Mr. Watley and Ms. Hasemann's care and custody. (*Id.* ¶ 50). Plaintiffs never even took Joe Jr. home from the hospital. (*Id.* ¶ 51). DCF's initial suspicion to remove Joe Jr. was not based on any evidence of neglect or abuse, but instead based on stereotypes and assumptions of Plaintiffs' disabilities or perceived disabilities, and/or Mr. Watley's association with Ms. Hasemann. (*Id.* ¶ 52). DCF also placed a 96-hour administrative hold on Daniel as soon as he was born and then placed him immediately in foster care at birth with Mr. and Mrs. Doe. (*Id.* ¶ 53). Again, DCF did not place Joe Jr. or Daniel with any of Plaintiffs' available family members. (*Id.* ¶ 54). DCF denied Plaintiffs access to appropriate family-based support services that if provided would have permitted them to successfully achieve rehabilitation and reunification. (*Id.* ¶ 55). DCF assumed that Mr. Watley and Ms. Hasemann were incapable of learning how to safely care for their children because of their disabilities, and, therefore, denied them the opportunity to receive meaningful assistance from

their parents, siblings and/or other service providers. (*Id.* ¶ 57).

From the beginning and throughout its involvement, DCF worked toward a pre-determined goal to place the Watley/Hasemann children with the same foster care parents so they could be adopted, and sought to terminate Plaintiffs' parental rights on the basis of Plaintiffs' disability without considering their ample family supports, or reasonable modifications that would have permitted them to fully access and benefit from services and programs and/or supports that the Plaintiffs needed based on the type of disabilities they have or were perceived as having. (*Id.* ¶ 58). Mr. Watley was also discriminated against based on his association with Ms. Hasemann. (*Id.* ¶ 59). Mr. Watley's only fault as a parent was being in love with Ms. Hasemann and wanting to raise his sons with the woman he loved. (*Id.* ¶ 60). DCF's own psychologist determined that Mr. Watley was not a risk to himself or his son, Joe, Jr. (*Id.* ¶ 61). One of DCF's own clinical psychologists recommended that Joe Jr. stay with Mr. Watley three nights per week for a six-week trial period to allow Joe Jr. to acclimate, with DCF making unannounced visits, with the goal that if after six weeks, there were no incidents, full reunification should proceed. (*Id.* ¶ 62). DCF intentionally disregarded the psychologist's recommendation that Mr. Watley be provided such overnight visitations. (*Id.* ¶ 63). Joe Jr. never spent a single overnight visit with Mr. Watley. (*Id.*). When Mr. Watley invoked his and Ms. Hasemann's rights under the ADA and rejected DCF's ultimatum that he could have his sons only if he agreed to end his relationship with Ms. Hasemann, DCF only redoubled its resolve to terminate his and Ms. Hasemann's parental rights. (*Id.* ¶ 63).

DCF retaliated against Mr. Watley solely because he did not appear to endorse their stereotype and assumption that Ms. Hasemann's purported mental or developmental issues would interfere with her ability to parent. (*Id.* ¶ 66). At one point, DCF determined that Ms. Dayner, the caseworker who had been assigned since 2002, had to be removed from the case

given the hostility that had developed. (*Id.* ¶ 67). DCF's own consulting psychologist had recommended removal of Ms. Dayner based on the negative impact her involvement was having on Plaintiffs. (*Id.*).

Plaintiffs' attempts to dispute the many and conflicting diagnoses proffered by the professionals DCF consulted were used by DCF as further evidence of the Plaintiff's denial and difficulty. (*Id.* ¶ 68). Somewhat ironically, Plaintiffs were deemed unable to parent solely based on DCF's assessment of predictive neglect based on their disability, yet DCF did not modify its programs or provide additional supports to help people suffering from the plaintiffs' perceived disabilities. (*Id.*). In other words, DCF knew or should have known that given Plaintiffs' alleged psychological or emotional disabilities, they would need modifications or individual supports to access the programs and services offered to others who were not disabled. (*Id.*).

For instance, Ms. Hasemann had been successfully received counseling and other therapeutic treatment from Ms. Rosalie Guest, RN, a licensed professional counselor. (*Id.* ¶ 70). Even though Ms. Hasemann had grown to trust Ms. Guest and was making progress, DCF refused to allow Ms. Hasemann to continue to receive treatment from Ms. Guest because she had not been recommended and approved by DCF. (*Id.*). DCF refused to modify its claimed procedures to permit Ms. Hasemann to continue to treat with Ms. Guest and fully access and benefit from these services. (*Id.*).

Similarly, Mr. Watley had grown to trust a psychologist with whom he had been working. However, DCF contacted this psychologist, and the psychologist then attempted to convince Mr. Watley to accept a plea of *nolo contendere* offered by DCF in the neglect and termination proceedings whereby Mr. Watley would agree to terminate his right to his sons. (*Id.* ¶ 71). Naturally, Mr. Watley lost all confidence in the psychologist. (*Id.*). DCF retaliated against Mr. Watley and directly interfered with his treatment with this psychologist. (*Id.*). At a

later point, Mr. Watley requested a referral for treatment with another doctor located in Waterbury -- close to his home -- that had been highly recommended to him, but DCF denied Mr. Watley's request. (*Id.* ¶ 72).

Mr. Watley also requested referral to a program that DCF had previously recommended, but DCF again refused. (*Id.* ¶ 73). After the first and the second trials had concluded, DCF stopped providing Plaintiff services and remained steadfast in guaranteeing the result DCF sought at the outset – the termination Plaintiffs' parental rights over their sons. (*Id.* ¶ 74). DCF failed to meaningfully provide Plaintiffs with access to services and essentially stopped trying to rehabilitate or reunify Plaintiffs with their children. (*Id.* ¶ 75). For example, when Plaintiffs requested providers near their homes given the difficulties they had with traveling, DCF failed to recommend qualified providers to them. (*Id.* ¶ 76). Even though regular visitation is required and offered to other parents, and Plaintiffs repeatedly requested visitation, Plaintiffs were deprived of any visitation with their two sons after the first trial in October 2008. (*Id.* ¶ 77). And, although their parental rights were not ultimately terminated until December 2013, DCF refused Plaintiffs any visitation with their sons while the state court appeals and retrials took place. (*Id.* ¶ 77).

Based on the mental and psychological disabilities that DCF contended Mr. Watley and Ms. Hasemann have or were perceived to have, DCF knew or should have known that they would be highly resistant to intervention, suspicious and distrustful of receiving negative information. (*Id.* ¶ 79). Nonetheless, DCF remained deliberately indifferent and failed to provide them with an ADA coordinator, provide them with requested modifications or provide other supports that would have permitted them to access and benefit from the services and programs they were entitled to receive. (*Id.* ¶ 79). DCF instead remained deliberately indifferent to their needs and hastily determined that foster care and termination of their parental rights and

adoption was the goal. (*Id.* ¶ 80). DCF failed to provide reasonable modifications or provide family and other supports. (*Id.* ¶ 80).

Plaintiffs have had no contact, visitation, received any information about Joe Jr. or Daniel since October 2008, even though their parental rights were not finally terminated until December 2013. (*Id.* ¶ 81). Mr. Watley and Ms. Hasemann requested visitation, but DCF denied them visitation with their sons. (*Id.* ¶ 82) DCF used the lack of visitation and the absence of an ongoing relationship between Plaintiffs and their sons to justify the ultimate termination of their parental rights. (*Id.*).

Mr. Watley and Ms. Hasemann continue to live with their respective parents, and each of them presently cares for other children. (*Id.* ¶ 88). Plaintiffs will continue to care for children, and separately intend to have or adopt their own child. (*Id.* ¶ 89). As a result, each remains at substantial risk of having any child in their care or custody removed, and of facing investigation and other discriminatory actions by DCF based on assumptions and stereotypes about their disabilities. (*Id.* ¶ 89).

The Complaint contains four counts. In Counts One, Two and Three, Plaintiffs seek monetary relief against DCF and prospective, injunctive relief as against Commissioner Katz (in her official capacity) for discrimination and retaliation in violation of the Rehabilitation Act and the ADA. Count Four is a Section 1983 claim brought solely against Commissioner Katz, in her individual capacity, based on allegations that as the chief policy maker of DCF she has violated and continues to violates the constitutional rights of Plaintiffs. (*Id*. ¶¶ 126-144).

ARGUMENT

I. Plaintiffs' Claims Are Not Barred By *Res Judicata*, Collateral Estoppel or the *Rooker-Feldman* Doctrine

Defendants' motion seeking to dismiss the instant action based on *res judicata*, collateral estoppel and/or the *Rooker-Feldman* doctrine is based on the false premise that Plaintiffs had the ability to raise and litigate their claims of disability based discrimination in the prior neglect and termination proceedings that took place in state court. Throughout the prior state court proceedings, DCF and the Attorney General affirmatively took the position that the ADA could not be raised as a claim or defense in the state court proceedings. In fact, DCF also took the misleading position that the services and programs it provides parents were not covered by the ADA. DCF convinced the state court trial judge that such claims were not properly before that court and that such claims had to be brought in this Court. Having taken that position before the state court and the state court having adopted DCF's position, Defendants are estopped from now taking the precise opposite position in this Court.

A. Plaintiffs Could Not Raise or Litigate their Federal Disability-Based Discrimination Claims in the Neglect and Terminations Proceedings

Contrary to Defendants' motion suggesting otherwise, (1) Plaintiffs could not as a matter of state law raise their ADA or Rehabilitation Act claims in the state court neglect and termination proceedings as either a claim or defense, (2) the state court proceedings lacked jurisdiction in the context of those proceedings to award Plaintiff's compensatory damages, (3) when Plaintiffs attempted to assert their rights under the ADA, DCF took the position that the services and programs it was required to provide were not covered, (4) DCF took and the state court adopted the view that such disability discrimination claims could not be heard in the state court proceedings and had to be brought in a separate action.

A neglect petition is "*sui generis* and, unlike a complaint and answer in the usual civil case, does not lead to a judgment for or against the parties named." *In re David L.*, 733 A.2d. 897, 901 (Conn. App. Ct. 1999). The state courts in Connecticut have held that the ADA cannot be raised as a defense or affirmative claim in a neglect or termination of parental rights proceeding. *See In re Antony B.*, 735 A.2d 893, 899 (Conn. App. Ct. 1999) (in termination proceedings); *In re Joseph W.*, 46 A.3d 59, 69-70 (Conn. 2012) (in neglect proceedings).

Neglect and TPR proceedings are quite different from typical civil litigation, in which a party seeking prospective relief rarely bears a duty to help an opponent remediate whatever acts or omissions form the basis for relief. Plaintiffs' sons in this case were the subject of three such petitions in the Connecticut Superior Court. The first two were neglect petitions, a species of lawsuit in which DCF approaches the state court with allegations that a child has been abandoned, is "denied proper care and attention," or lives in "conditions . . . injurious to the well-being of the child." Conn. Gen. Stat. § 46b-120. *See id.* § 46b-129(a) (setting forth petition procedure).[5]

Just as with the future tense of predictive neglect, state law has evolved to permit DCF to take custody of a child before a neglect judgment enters, which also happened to Joseph and Daniel. Within hours of both boys' emergence from the womb, DCF issued administrative seizure orders of them (so-called "ninety-six hour holds," *see* Conn. Gen. Stat. §§ 17a–101g(e),(f)) and removed the boys from Plaintiffs' custody. Then, simultaneous to lodging neglect petitions as to each son, DCF sought–and was granted–an *ex parte* order of temporary

[5] Although an allegedly neglected child's parents must receive notice of the petition, *see* Conn. Gen. Stat. § 46b-129(a), a neglect petition notably does not name the parents and does not seek to allocate fault for the neglect, and "does not lead to a judgment for or against the parties named." *In re David L.*, 733 A.2d 897, 901 (Conn. App. Ct. 1999). *Accord In re Elisabeth H.*, 696 A.2d 1291, 1292 (Conn. App. Ct. 1997) (a neglect petition "is not directed against them as parents, but rather is a finding that the child [is] neglected").

custody ("OTC"), by which the state court determines whether custody should be transferred to "a person related to the child . . . or . . . some other person or suitable agency pending disposition of the [neglect] petition." Conn. Gen. Stat. § 46b-129(b)(2)(A). *See also* Conn. R. Super. Ct. ("Practice Book") § 33a-6(b) (providing for *ex parte* OTCs). The granting of an OTC is a temporary measure not intended to sever family ties. To the contrary, once an OTC enters, the state court is required to entertain argument and then issue DCF and the parents "specific steps necessary for each to take for the [parents] to retain or regain custody of the child." Practice Book § 33a-6(d). In each of the Plaintiffs' sons' neglect petitions, the state court sustained the *ex parte* OTCs, and temporarily committed each boy to DCF custody for the duration of the neglect litigation.[6] However, even after the state court opts for temporarily committing a child to DCF, "[DCF] does have a continuing statutory duty to provide reunification services" to the parents. *In re Natalie S.*, 139 A.3d 824, 832 (Conn. App. Ct. 2016) (citing Conn. Gen. Stat. § 17a-111b(a)).

When Plaintiffs attempted to raise the ADA and Rehabilitation Act as a defense and affirmative claim in the neglect and termination proceedings, the state courts refused to consider the issues. The state court decisions, including the Supreme Court's decision, *In re Joseph W.*, 46 A.3d 59, 69-71 (Conn. 2012) and the trial court's decision, *In re Joseph W.*, 79 A.3d 155, 162 (Conn. Super. Ct. 2013) make clear that Plaintiffs were precluded from ever litigating their

[6] *In re Joseph W.*, Jr., 79 A.3d 155, 159 (Conn. Super. Ct. 2013). If the neglect proceeding concludes with a judgment that neglect has been proven, the state court has four possible remedies. It may temporarily "commit such child or youth to the [DCF] Commissioner" or shift temporary custody to an "agency that is permitted by law to care for neglected . . . children," or "any other person . . . found to be suitable," including a relative. Conn. Gen. Stat. § 46b-129(j)(2)(A),(B). Third, the state court may permanently grant legal guardianship to such a person or agency. *Id.* § 46b-129(j)(2)(C). And fourth, the state court may return the child to the parents, "with protective supervision by [DCF] subject to conditions established by the court." *Id.* § 46b-129(j)(2)(D).

federal objections as either a claim or defense to or within the neglect and termination proceedings.

B. DCF Is Judicially Estopped From Arguing That Plaintiffs Could Have Litigated their Disability Claims in the Prior State Court Proceedings Because It Successfully Took the Opposite Position There

Throughout the neglect and termination proceedings, DCF took the position that the federal ADA (and the Rehabilitation Act) could not be raised as an affirmative claim or defense in the state court proceedings. Notwithstanding its prior inconsistent position, which was adopted by the state court, DCF now claims that Plaintiffs had the opportunity to and litigated these issues and claims on the merits. DCF is judicially estopped from doing so.

In its motion, DCF argues that Plaintiff raised or could have raised the issues and claims they seek to vindicate in this action in the prior state court proceeding. (DCF Br. 9-24). This position is diametrically opposed to the position DCF previously took in the state court neglect and termination proceedings. As reflected in the transcript from the third and final state court trial, DCF took (and the state court adopted) the position that: (1) the Connecticut Supreme Court's decision in *In re Joseph W., Jr.*, 46 A.3d 59, foreclosed Plaintiffs from raising their claims of disability discrimination in violation of the ADA in the pending child neglect and termination proceedings (*In re Joseph W. and Daniel W.*, Nos. L15-CP05-008, L15-CP06-008, Conn. Super. Ct., Hearing Transcript, dated Dec. 3, 2012 (ECF # 108) (Exhibit C) ("Tr."), 26)[7], (2) Plaintiffs could not raise their claims of disability discrimination under the ADA in the context of the neglect and termination proceedings (Tr., 19); and (3) that Plaintiffs wanted to

[7] When this matter was on appeal, the Second Circuit granted Plaintiffs' motion to take judicial notice of this excerpted, portion of the transcript from the December 3, 2012 state court hearing pursuant to Fed. R. Evid. 201. (*Watley v. Katz*, Dkt. No. 14-3862-cvd (2d Cir.), ECF ## 108, 123 (a copy Plaintiffs' motion with a copy of the transcript along with the Second Order granting the motion are as Exhibit C). *See Global Network Comms., Inc. v. City of New York*, 458 F.3d 150, 157 (2d Cir. 2006).

pursue any claims that DCF had discriminated against them based on their disability, they had to do so through a separate lawsuit against DCF (Tr., 19).

The following colloquy between the state court judge and DCF's attorney during puts to rest any claim that Plaintiffs could have or were able to fully and fairly litigate these issues or discrimination claims in the prior state court proceedings:

[DCF]: . . . Your Honor, my understanding in reading the Americans with Disabilities Act, as it pertains to child protection proceedings as set forth and what the Court had noted as the Supreme Court Decision in In Re: Joseph W., which is 305 Conn. 633, and that was decided on June 28th of this year.

The parents did appeal the issue regarding whether or not there was a violation of the ADA. I think that Decision makes it clear that in child protection proceedings, Your Honor, it's neither –it's not a service that's provided to the parent, and what is stated in the Decision from the Justices is that separate and apart from a child protection proceeding, to the extent that the parents feel that they're discriminated, that's a separate cause of action, but not a cause of action within the child protection proceedings, whether it be a neglect or termination. And that echoes the two Appellate Court Decisions that were previously decided, [*In re: Brendan C.*, from 2005, 874 A.2d 826 (Conn. App. Ct.), *cert. denied*, 882 A.2d 669 (Conn. 2005)], as well as [*In re: Antony B*, 735 A.3d 893 (Conn. App. Ct. 1999)], and that's a 1999 Decision. So I think both, Your Honor, previous to the Supreme Court's Decision over the summer, this was not a case of first impression for the Appeals Court, both decisions prior to the Supreme Court Decision and now ---

THE COURT: Well this is the first case where the Supreme Court, actually, ruled in –

[DCF]: Correct, your Honor.

THE COURT: -- support of the Prior Appellate Court Decisions. Correct?

[DCF]: Yes, your Honor. And so I think, at this point. Your Honor it's well settled with at least the narrow pieces that we are here, which are proceedings before the Court that are child protection proceedings. To the extent the mother and father are making an ADA violation claim, that's a separate and distinct case that needs to be brought outside these proceedings . . . .

(Tr., 12-13).

The state court adopted DCF's position in finding that: (1) the Connecticut Supreme Court's decision in *In re Joseph W.* foreclosed Plaintiffs from raising their claim of discrimination in violation of the ADA in the pending child neglect and termination proceedings (Tr., 26); (2) Plaintiffs could not bring the claims of disability discrimination under the ADA in the context of the neglect and termination proceedings (Tr., 19); and (3) that if they wanted to pursue their claims alleging DCF's violation of the ADA, they could do not do so within the context of the neglect and termination proceedings, but had to do so in a separate federal lawsuit naming DCF (Tr., 9, 18-19, 23).

The judicial estoppel doctrine applies where a party argued an inconsistent position in a prior proceeding, and that position was adopted by the first tribunal. *See Bates v. Long Island R.R. Co.*, 997 F.2d 1028, 1037-38 (2d Cir. 1993); *Young v. United States Dep't of Justice*, 882 F.2d 633, 639 (2d Cir. 1989). The doctrine "protect(s) judicial integrity by preventing litigants from playing fast and loose with courts, thereby avoiding unfair results and 'unseemliness.'" *Young*, 882 F.2d at 639.

DCF indisputably took an "inconsistent position" about Plaintiffs' ability to raise ADA and Rehabilitation Act claims or defenses in the neglect and termination proceedings, as compared to the position it now advances in this Court. If this Court were now to permit DCF to take the opposite position—advanced by DCF in its motion to dismiss— judicial inconsistency would result. Defendants' motion must therefore be denied.

C. Defendants Fail to Prove That Claim Preclusion or Res Judicata Precludes this Action

Claim preclusion, also known as *res judicata,* does not apply where "the initial forum did not have the power to award the full measure of relief sought in the later litigation." *Burgos v. Hopkins*, 14 F.3d 787, 790 (2d Cir. 1994) (internal quotation omitted). Here, it is undisputed that

the state court refused to consider the Plaintiffs' ADA claims and did not have the power to award money damages to Plaintiffs based on their alleged ADA and Rehabilitation Act claims against DCF. Even where a second action arises from some of the circumstances that gave rise to a prior action, claim preclusion does not apply if barriers precluded the plaintiff from asserting its claims or the first forum cannot afford the plaintiff with the full measure of relief.

Under Connecticut law, a prior action bars subsequent litigation between the same parties only where the precluded party had an adequate opportunity to litigate the claim in the prior proceeding. *See O'Connor v. Pierson*, 568 F.3d 64, 69 (2d Cir. 2009). A party has not had an adequate opportunity to litigate a claim if "the court in the first action would clearly not have had jurisdiction to entertain the omitted theory or ground or, having jurisdiction, would clearly have declined to exercise it has a matter of discretion." *Id.* at 71 (*quoting Connecticut Nat'l Bank v. Rytman*, 694 A.2d 1246, 1257 (Conn. 1997)). As outlined above, the state court proceedings did not provide Plaintiffs with a full and fair opportunity to litigate their federal discrimination claims under the ADA (or Rehabilitation Act). Indeed, the transcript from the final hearing confirms that the state court lacked jurisdiction to entertain these federal anti-discrimination laws as either a claim or defense in those proceedings, that DCF took the position that the ADA did not apply to its programs and services, and any claim Plaintiffs had under these federal statutes must be brought in a separate lawsuit file in this Court. Accordingly, "[t]he doctrine of *res judicata* does not bar the Plaintiffs in the present case from pursuing claims [they] previously [had] not been afforded the opportunity to litigate." *Gaynor v. Payne*, 804 A.2d 170, 180 (Conn. 2002) (concluding that plaintiff was not barred from raising claim for money damages where such claim could not have been brought in earlier probate proceedings).

D. Defendants Also Fail to Demonstrate that Issue Preclusion or Collateral Estoppel Shields Them From Plaintiffs' Claims

Under Connecticut law, to be subject to issue preclusion (or collateral estoppel), an issue must have been: (1) "fully and fairly litigated," (2) "actually decided," and (3) "necessary to the judgment" in the first action, *Virgo v. Lyons*, 551 A.2d 1243, 1245 (Conn. 1988) (internal quotations omitted), and (4) "identical" to the issue to be decided in the second action. *State v. Joyner*, 774 A.2d 927, 935 (Conn. 2001). An issue has been fully and fairly litigated only if the party against whom collateral estoppel is asserted had a "full and fair opportunity" to litigate that issue in the prior proceeding. *Aetna Cas. & Sur. Co. v. Jones*, 596 A.2d 414, 425 (Conn. 1991).

"An issue is actually litigated if it is properly raised in the pleadings or otherwise, submitted for determination, and in fact determined." *Joyner*, 774 A.2d at 935 (internal quotation omitted). "An issue is necessarily determined if, in the absence of a determination of the issue, the judgment could not have been validly rendered." *Id.* (internal quotation omitted). The Second Circuit has specifically cautioned that "[i]ssue preclusion will apply only if it is *quite clear* that these requirements have been satisfied, lest a party be precluded from obtaining at least one full hearing on his or her claim." *McKithen v. Brown*, 481 F.3d 89, 105 (2d Cir. 2007) (internal quotation omitted).

Most importantly, the state court held that the ADA did not apply and could not be raised as a defense or affirmative claim in Plaintiffs' neglect and termination proceedings. The only claims fully and fairly litigated were issues arising under Connecticut's termination and child neglect statutes. The state court's resolution of those claims under the standards imposed under state law statute did not adjudicate the distinct federal rights, obligations and remedies afforded under the ADA and Rehabilitation Act. Put another way, given the Connecticut Supreme Court's ruling that the ADA did not provide a defense or impose any obligations, the state court's clear indication that such statutes did not need to be considered and certainly not

necessary to the state court judgment adjudicating the state law issues of neglect and termination of parental rights.

As noted *supra* at pp. 13-18, Plaintiffs were not able to raise their ADA or Rehabilitation Act claims in the context of the *sui generis* neglect and termination proceedings. The state court only decided whether DCF had satisfied the state law standard governing the neglect and termination of parental rights, but specifically held that the ADA was not a proper defense or viable claim that could be brought in the state court proceedings. Indeed, DCF affirmatively took the position that the state court should not consider the federal law standards imposed by the ADA. Therefore, Plaintiffs' ADA and Rehabilitation Act claims alleging intentional discrimination based upon disability, perceived disability and/or association with an individual with a disability are not barred by issue preclusion. Since Plaintiffs' ADA and Rehabilitation Act claims as against DCF relating to its decision to commence the neglect and termination proceedings and failing to provide them with modifications or accommodations so that they could access and fully benefit from the services and programs offered by DCF, including visitation and reunification services, were never actually litigated and expressly determined not to be material to the state court resolution of the termination proceedings, Defendants fail to carry their burden of demonstrating that Plaintiffs' claims are barred by issue or claim preclusion. Other than the fact that the state standard and the ADA and Rehabilitation Act may use the same word "reasonable," there is nothing in Connecticut law suggesting that the standard imposed under state law is identical to that imposed under the ADA and Rehabilitation Act. Indeed, Connecticut case law plainly states that the ADA can neither be raised as a claim or defense in such proceedings. Nothing in Connecticut law suggests that compliance with the ADA or Rehabilitation Act is *sine qua non* with meeting the standard imposed under Connecticut law. Indeed, DCF's position before the state court that the ADA did not apply, and was neither

a claim nor defense, underscores that the federal requirements and duties imposed by the Rehabilitation Act and ADA were not relevant nor decided in the limited scope of the state court proceedings.

E. The *Rooker-Feldman* Doctrine Does Not Deprive This Court of Jurisdiction

Through this action, Plaintiffs seek damages and other injunctive relief for violations of the ADA and Rehabilitation Act resulting from DCF's discriminatory acts, including DCF's decisions to commence and continue the neglect and termination proceedings based upon stereotypes and assumptions about their ability to parent based on their disability, perceived disability or association with an individual with a disability, and DCF's alleged failure to reasonably modify policies and procedures and imposing methods of administration that had the effect of discriminating against them and their ability to access and/or benefit from various services, and programs including family supports, therapy, visitation and reunification services. Contrary to DCF's suggestion otherwise, the Complaint does not seek to challenge or ask for this Court to review the state court judgment and does not seek damages as a result of the state court judgment.

A claim is only barred under the *Rooker-Feldman* doctrine when: "(1) the plaintiff lost in state court, (2) the plaintiff complains of injuries caused by the state court judgment, (3) the plaintiff invites the district court review of that judgment, and (4) the state court judgment was entered before the plaintiff's federal lawsuit was commenced." *McKithen*, 626 F.3d at 154. The *Rooker-Feldman* doctrine does not deprive this Court of jurisdiction because: (1) this Court may determine damages liability without reviewing the propriety of the state court judgment, (2) the injuries complained of in this action were not caused by the state court judgment, but by DCF's prior and ongoing conduct, which, as alleged, violated Plaintiffs' rights under the Rehabilitation Act and ADA.

Plaintiffs' claims were not and could not have been raised and fully and fairly litigated in the state court neglect and termination proceedings. In fact, when Plaintiffs attempted to do so, DCF and the state court refused to consider them and suggested that they commence a separate federal lawsuit. (Tr., 19). Therefore, the fact that the state court judgment terminated parental rights does not foreclose Plaintiffs from proceeding on their claims that DCF's actions and conduct towards them was motivated by animus due to disability, perceived disability and/or association with an individual with a disability. When Plaintiffs filed this separate suit (as clearly contemplated by DCF and the state court judge), Defendants now contend that their claims were barred, even though such claims were not considered by the state court.

The fact that the state court ultimately found that the Plaintiffs' parental rights could be terminated does not mean that DCF's decisions and conduct towards Plaintiffs were not also motivated by intentional discrimination and impressible stereotypes based on disability or perceived disability or that DCF was not acting deliberately indifferent to Plaintiffs' rights and its obligations under the ADA and Rehabilitation Act. *See Phifer v. City of New York*, 289 F.3d 49, 59 (2d Cir. 2002) ("Logically, the fact that the family court found that the accusations of neglect were true does not necessarily mean that the defendants' initial suspicions were not colored by racism."). The Second Circuit has held under similar circumstances where the state family court had limited jurisdiction and no authority to decide claims arising under federal law, and the court refused to consider federal claims, *Rooker-Feldman* did not bar a subsequent federal suit seeking to vindicate their IDEA rights. *King v. State Educ. Dep't*, 182 F.3d 161, 163 (2d Cir. 1999). Because the Connecticut Superior Court expressly refused to consider Plaintiffs' ADA claims as a defense, and could not award monetary relief against DCF within the context of those proceedings, Defendants' assertion of the *Rooker-Feldman* doctrine is misplaced.

Contrary to Defendants' suggestion otherwise, Plaintiffs do not now seek to challenge or undo the state court judgment through this action. Rather, Plaintiffs merely seek compensatory damages and prospective relief for the alleged violations of their rights under the Rehabilitation Act and ADA. The state court here did not create or cause the injury; DCF did. The state court "simply ratified, acquiesced or left unpunished," DCF's violations of Plaintiff's rights under the Rehabilitation Act and ADA. *McKithen*, 481 F.3d at 98 (internal quotation omitted). In *McNamara v. Kaye*, the Second Circuit, stated that claims challenging general procedures would not be barred by *Rooker–Feldman* unless they seek modification of the specific orders affecting the plaintiff. 360 Fed. App'x 177, 177 (2d Cir. 2009) ("Inasmuch as [the plaintiff's] claims challenge the procedures applied in all attorney disciplinary proceedings and seek damages and prospective relief rather than a modification of her suspension or reinstatement orders, her claims would not appear to be barred by *Rooker–Feldman*."). Accordingly, Plaintiffs' claims in this action are not precluded by the *Rooker-Feldman* doctrine.

II. The Complaint States Plausible Claims For Disability Discrimination and Retaliation in Violation of the ADA and Rehabilitation Act

A. Rule 12(b)(6) Legal Standard

In order to survive a motion to dismiss under Rule 12(b)(6), a complaint must allege a plausible set of facts sufficient to raise a right to relief above the speculative level." *Operating Local 649 Annuity Trust Fund v. Smith Barney Fund Mgmt. LLC*, 595 F.3d 86, 91 (2d Cir. 2010) (internal quotation omitted). Plausibility at the pleading stage is nonetheless distinct from probability, and "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of [the claims] is improbable, and ... recovery is very remote and unlikely." *Id.* at 556 (internal quotation omitted). This Court's inquiry is "merely to assess the legal feasibility of a complaint, not to assay the weight of evidence which might be offered in support thereof." *Ryder Energy Distr. Corp. v. Merrill Lynch Comm., Inc*., 748 F.2d 774, 779 (2d Cir. 1984).

B. Count One States Plausible Claims of Discrimination Based on Disability or Perceived Disability

The Rehabilitation Act guarantees that "no otherwise qualified individual with a disability, . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). Similarly, Title II of the ADA provides, in relevant part, that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

All of the services, programs and activities offered by DCF are covered under Title II of the ADA and the Rehabilitation Act. Coverage under Title II the ADA and the Rehabilitation Act has been broadly construed and extends to all programs, services, and activities of a state and its agencies, "without any exception." *Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 209 (1998); *see also Innovative Health Sys., Inc. v. City of White Plains*, 117 F.3d 37, 45 (2d Cir. 1997) (noting that "programs, services, or activities" is a "catch-all phrase that prohibits all discrimination by a public entity, regardless of the context"), *overruled on other grounds by Zervos v. Verizon N.Y.*, 252 F.3d 163, 171 n.7 (2d Cir. 2001). Under federal regulations, covered entities may not directly, contractually, or through other arrangements "deny a qualified individual with a disability the opportunity to participate in or benefit from [an] aid, benefit, or service." 28 C.F.R. § 35.130(b)(1)(i); *see also* 45 C.F.R. § 84.4(b)(1)(i).[8] DOJ and HHS, the

[8] DOJ and HHS' regulations and technical assistance must be "given controlling weight" and their interpretations are entitled to "substantial deference." *Blum v. Bacon*, 457 U.S. 132, 141 (1982); *see also Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 195 (2002) *superseded by*

two federal agencies expressly charged with enforcement of these statutes, have made clear that the ADA and the Rehabilitation Act applies to everything "DCF does, including its investigations, assessments, removals, family preservation, provision of services, determining goals and permanency plans, setting service plan tasks, reunification, guardianship, adoption and assisting clients in meeting such tasks."

To state a claim for violation of the Rehabilitation Act or ADA, a party must allege: (1) that he or she is a qualified individual with a disability; (2) that he or she was excluded from or unable to fully access or benefit from a public entity's services, programs or activities or was otherwise discriminated against by a public entity; and (3) that such exclusion or discrimination was due to his or her disability. *See Henrietta D. v. Bloomberg*, 331 F.3d 261, 287 (2d Cir. 2003). Moreover, "a plaintiff advancing a reasonable accommodation claim under the ADA or Rehabilitation Act need not also show that the challenged program or practice has a disparate impact on persons with disabilities; [and] a plaintiff may show suing under the ADA or Rehabilitation Act may show that he or she has been excluded from or denied the benefits of a public entity's services or programs 'by reason of such disability' even if there are other contributory causes for the exclusion or denial." *Henrietta D.*, 331 F.3d at 291. The same requirements apply with equal force to claims under the Rehabilitation Act and ADA. *See Rodriguez v. City of New York*, 197 F.3d 611, 618 (2d Cir. 1999) ("Because Section 504 of the Rehabilitation Act and the ADA impose identical requirements, we consider [such] claims in tandem.").

First, the complaint alleges that DCF's initial decision to take the sons, initiate the petitions and continue the neglect and termination petitions and conduct toward Plaintiffs while

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statute, ADA Amendments Act of 2008, Pub. L. No. 110-325, § 4, 122 Stat. 3554 (codified as amended at 42 U.S.C. § 12103).

those petitions were pending were motivated by disability-based animus and/or DCF's impermissible perception or stereotypes about them based on their disability, perceived disability and/or association with an individual with a disability and how DCF wrongly predicted or suspected how their disabilities or perceived disabilities would potentially interfere with their ability to parent. Second, the complaint also set forth plausible claims that DCF intentionally violated the ADA and Rehabilitation Act by failing to reasonably modify and/or make accommodations to its guidelines, policies and procedures to permit Plaintiffs the ability to fully access and benefit from the programs, activities and/or services DCF offers, including those services available to rehabilitate parents and/or reunify children with their parents.

The Defendants' motion purposefully ignores all of the ways in which Plaintiffs allege that they requested modifications or changes so that they could fully access and benefit from the services, but impermissibly invites this Court to make findings as to the reasonableness of DCF's actions and/or to resolve whether DCF had authority to make those modifications. The Defendants ignore other allegations and their ultimate responsibility under the Rehabilitation Act and ADA to provide those services in a non-discriminatory way.

Under the Rehabilitation Act and ADA, Defendants may not "[a]fford a qualified individual with a disability an opportunity to participate in or benefit from the aid, benefit, or service that is not equal to that afforded others." 28 C.F.R. § 35.130(b)(1)(ii); *see also* 45 C.F.R. § 84.4(b)(1)(ii). Defendants may not utilize criteria or methods of administration "[t]hat have the effect of subjecting qualified individuals with disabilities to discrimination on the basis of disability [or t]hat have the purpose or effect of defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals with disabilities." 28 C.F.R. § 35.130(b)(3)(i), (ii); *see also* 45 C.F.R. § 84.4(b)(4)(i), (ii). In addition to these prohibitions, Defendants must affirmatively take steps to avoid discrimination on the basis of

disability. In particular, covered entities are required to "make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity being offered." 28 C.F.R. § 35.130(b)(7); *see also* 45 C.F.R. § 84.4(a); U.S. Dep't of Justice, Title II Technical Assistance Manual § II-6.1000, Illustration 2 (1993) (explaining that entities need to make modifications to programs such as individualized assistance to permit individuals with disabilities to benefit).

As alleged in the Complaint, Defendants failed to provide Plaintiffs' repeated requests for modifications and remained indifferent to the fact that Plaintiffs were not able to fully access and benefit from the services and other programs available to parents whose children were subject to neglect and termination proceedings. *See Henrietta D.*, 331 F.3d at 277 (holding that evidence "that a disability makes it difficult for a plaintiff to access benefits is sufficient to sustain a claim," regardless of comparative treatment of others). DCF here were fully aware of the difficulties Plaintiffs were having accessing and fully benefitting from the services and programs largely due to their disability or perceived disability. Notwithstanding their knowledge, Defendants remained deliberately indifferent to Plaintiffs' requests for modifications or potential supports that would have allowed them to full access and benefit from the services and programs offered to other parents. DCF failed to fulfill its obligations under the Rehabilitation Act and ADA, and cannot evade responsibility for ensuring that its programs and services were provided in a non-discriminatory way and that reasonable requests for modifications were provided to permit full access to, and benefit from, the services. The plausibility of Plaintiffs' claims under the ADA and Rehabilitation Act is bolstered by the fact that DOJ and HHS recently brought an enforcement action against the Massachusetts DCF under closely analogous circumstances.

While that mother was lucky to the extent DOJ was able to intervene before that DCF terminated her rights, it bears noting that the Massachusetts DCF was also required to compensate the mother for the damages she sustained. In the Complaint, Plaintiffs have alleged more than sufficient facts demonstrating that the Defendants were aware of, but deliberately indifferent to Plaintiffs' needs based on their disabilities, perceived disabilities and requests for modifications or supports so that they could fully access and benefit from the services provided by DCF**.**

C. Count Two States a Plausible Claim of Associational Discrimination Under the Rehabilitation Act and ADA

Defendants acknowledge (as they must) that the Second Circuit has expressly held that under the Rehabilitation Act "to gain entry to the courts, non-disabled parties bringing associational discrimination claims need only prove an independent injury causally related to the denial of federally required services to the disabled persons with whom the disabled plaintiffs are associated." *Loeffler v. Staten Island Univ. Hosp.*, 582 F.3d 268, 279 (2d Cir. 2009). While the Second Circuit has not yet decided an associational claim under Title II of the ADA, there is little reason to doubt it would reach the same conclusion given it routinely analyzes claims under these statutes identically. *See Rodriguez*, 197 F.3d at 618.

As set forth in the Complaint, Mr. Watley alleges in Count Two that he independently injured as a direct result of DCF's failure to provide Ms. Hasemann with supports and modifications for her disability or perceived disability. DCF not only removed both sons from Mr. Watley based on his relationship with Ms. Hasemann, but disregarded the recommendation of the first psychologist that found Mr. Watley was not a risk to himself or his son and that overnight visitation should be started. DCF then presented Mr. Watley with a true Catch-22 proposition; either stay with Ms. Hasemann and never see his sons, or agree to end his relationship with Ms. Hasemann and keep his sons away from her. Mr. Watley suffered his own independent injury based on DCF's failure to provide Ms. Hasemann with the supports and

modifications to services and programs it is required to provide. While Defendants' motion invites this Court to ignore the facts alleged in the Complaint (DCF Br. at 37), that is improper for purposes of resolving a motion to dismiss where all facts should be assumed as true and all plausible inferences drawn in Plaintiffs' favor.

D. Count Three States a Plausible Claim for Retaliation

Count Three also states a plausible claim for retaliation against DCF. The elements of a retaliation claim under either the Rehabilitation Act and/or ADA are: "(i) a plaintiff was engaged in protected activity; (ii) the alleged retaliator knew that plaintiff was involved in protected activity; (iii) an adverse decision or course of action was taken against plaintiff; and (iv) a causal connection exists between the protected activity and the adverse action." *Weixel v. Bd. of Educ. of City of New York*, 287 F.3d 138, 148 (2d Cir. 2002), *superseded by statute on other grounds* by 42 U.S.C. § 12102(3)(A). (internal quotation and citation omitted). The Complaint pleads sufficient facts to satisfy these elements.

As to the first element, the Defendants concede (as they must) that the Complaint alleges sufficient facts that Plaintiffs engaged in some protected activity of which they were aware. *See Weixel*, 287 F.3d at 149; *accord Rodriguez v. Atria Sr. Living Grp., Inc*., 887 F. Supp. 2d 503, 512 (S.D.N.Y. 2012). Nonetheless, Defendants wrongly suggest that the Complaint fails to allege specific protected activity and requests for modifications. They impermissibly invite this Court to decide on a motion to dismiss that Plaintiffs cannot prove a causal connection between their assertions that they were entitled to protections and modifications under the ADA and the sequelae of events that followed. Plaintiffs made several requests to modify how those services were being delivered and/or requested additional supports or services so they could fully access and benefit from the services. Accordingly, Count Three states a plausible claim of retaliation in violation of the Rehabilitation Act and ADA and may not be dismissed.

III. Plaintiffs' Claims Are Not Barred by the Applicable Three-Year Statute of Limitations

As a threshold matter, Defendants' motion is procedurally defective. Defendants' motion requests that this Court resolve their affirmative defense based on statute of limitations, even though such defense is not proven by the Complaint or documents incorporated by reference. Moreover, Defendants' motion appears to concede that at least some of the conduct alleged in the Complaint is timely. This Court cannot resolve this issue based on the allegations in the Complaint and incomplete record presented by Defendants' motion.

Defendants' motion correctly notes that this Court had previously held that for Rehabilitation Act and ADA claims it will borrow the applicable three-year statute of limitations afforded under Conn. Gen. Stat. § 52-577. *See Lee v. Dep't of Children and Families*, 939 F. Supp. 2d 160, 171 (D. Conn. 2013). However, Defendants fail to acknowledge that this Court also held in *Lee* that it borrows Connecticut's tolling rules, and that the statute of limitations under the Rehabilitation Act claim is tolled, where there is a continuous course of conduct. *Id*. Here, the Complaint sets forth a continuous course of conduct by DCF in failing to provide Plaintiffs with modifications, and so none of the allegations are time-barred. Because Plaintiffs energetically attempted to raise their ADA and Rehab Act claims throughout their experiences with DCF, tolling would apply for any conduct that took place more than three years before they filed this action.

Even if the statute were not subject to tolling under Connecticut's rule for a continuous course of conduct, the doctrine of equitable tolling should also extend the statute of limitations deadline to prevent the fundamental unfairness of what transpired when Plaintiffs attempted to raise their discrimination claims in the state court. *E.g., Warren v. Garvin*, 219 F.3d 111, 113 (2d Cir. 2000). Equitable tolling is available where a plaintiff actively attempts to vindicate his claims, but "assert[s] his rights in the wrong forum." *Miller v. Int'l Tel. & Telegraph Corp.*, 755

F.2d 20, 24 (2d Cir. 1985). *See generally Dodds v. Cigna Securities*, 12 F.3d 346, 350 (2d Cir. 1993) (explaining that equitable tolling of any sort is only available to the plaintiff who exercises reasonable care and diligence to assert his claims). Tolling is viewed "as a matter of fairness," *Miller*, 755 F.2d at 24, because a plaintiff who raises a claim in a forum lacking jurisdiction over it nonetheless places his opponent on notice of the claim, and gives the opponent the opportunity to investigate and prepare a defense at the time that the dispute surfaces. *See Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965).

Here, Plaintiffs "did not sleep on [their] rights" and thereby sandbag the Defendants with a claim that is impossible to defend due to faded memories and dissipated evidence over the lapse of years. *Burnett*, 380 U.S. at 429. Instead, they "acted with reasonable diligence during the time period [they] seek[] to have tolled," *Zerilli-Edelglass v. N.Y. City Transit Auth.*, 333 F.3d 74, 80–81 (2d Cir. 2003), by insisting upon their ADA and Rehabilitation Act rights. Their understandable mistake was to raise the acts in the state court during the course of the dispute that they believed to be protected by those statutes. *See Polanco v. Drug Enforcement Admin.*, 158 F.3d 647, 655 (2d Cir. 1998) (remanding for inquiry into wrong-forum equitable tolling where the plaintiff attempted to petition for return of seized assets in the district in which he was convicted rather than in the district in which the seizure occurred); *Eidshahen v. Pizza Hut of Am.*, 973 F. Supp. 113, 115 (D. Conn. 1997) (applying equitable tolling where plaintiff filed in the wrong judicial district).

Compounding things was the state of the law in Connecticut. Plaintiffs raised their federal ADA and Rehabilitation Act rights in a forum governed by case law holding that, procedurally, termination of parental rights proceedings are not "'services, programs, or activities'" of a government as the ADA uses those terms, and so may not be heard as affirmative defenses. *In re Antony B.*, 735 A.2d at 899 (quoting 42 U.S.C. § 12132). Making things worse

was the unsettled state of the ADA and Rehabilitation Act in neglect proceedings. That question was only settled by Plaintiffs' own appeal to the Connecticut Supreme Court in 2012, well after they had first raised their ADA and Rehabilitation Act objections in both the neglect and TPR proceedings. *In re Joseph W.*, 46 A.3d at 69-70. This Court should therefore ensure that Plaintiffs are not prevented from having their federal claims ever fully and fairly adjudicated.

Alternatively, even assuming for the sake of argument that the continuing course of conduct recognized under Connecticut tolling law did not apply and/or this Court were to withhold equity from Plaintiffs, all actions which occurred after December 13, 2010 would nonetheless be actionable. The unusual nature of neglect and TPR proceedings required the DCF to provide family reunification services, and other programs, including visitation, unless and until a TPR judgment entered. When the first neglect and TPR judgments involving the Plaintiffs were reversed in 2011, the defendants were right back to being responsible for providing those services and making any accommodations to address Plaintiffs' disabilities or perceived disabilities.

In August 2007, the state court entered a judgment of neglect as to both children, because Ms. Hasemann entered a *nolo contendere* to the question of whether Joseph and Daniel would be neglected in the future. *See* Practice Book § 35a-1(b). As part of the mandatory canvass, *id.*, the state court examined Ms. Hasemann and Mr. Watley before entering judgment. *In re Joseph W., Jr.*, 79 A.3d at 159. Mr. Watley did not enter a *nolo*. *Id.* In the remedy phase of the neglect proceeding, the state court temporarily committed both Plaintiffs' sons to DCF's care, Conn. Gen. Stat. § 46b-129(j)(2)(A).

A few short months later, in December 2007, DCF filed a third proceeding involving Plaintiffs' sons. This time, DCF petitioned for the termination of Plaintiffs' parental rights, as to both sons. *In re Joseph W., Jr.*, 79 A.3d at 159. As grounds for erasing the Plaintiffs' legal

relationship to their children, DCF alleged that Plaintiffs had failed to rehabilitate, *i.e.*, that they had "failed to achieve such degree of personal rehabilitation as would encourage the belief that . . . [they] could assume a responsible position in the life of the child[ren]." Conn. Gen. Stat. § 17a-112(j)(3)(B)(ii). Judgment entered in October 2008, and Plaintiffs appealed. Plaintiffs requested continued visitation, but were denied any visitation with their sons from 2008 until their sons were ultimately adopted in 2013.

On June 28, 2011, after a stop at the Connecticut Appellate Court, the Connecticut Supreme Court reversed both the neglect and TPR judgments. So, well within the statute of limitations governing this action, the parties were back at square one. Defendants had temporary custody of Plaintiffs two sons pursuant to the orders of temporary custody, and there was no judgment either that the children were neglected, or that Plaintiffs had failed to rehabilitate. Accordingly, on the day the Connecticut Supreme Court's mandate issued, Defendants instantly re-shouldered all of their duties and obligations to reunify Plaintiffs with their children and afford them the opportunity to fully benefit and access DCF's services and programs, and make appropriate modifications and provide additional supports or grant exceptions, based on Plaintiffs' disabilities or perceived disabilities. Even assuming the statute of limitations could preclude certain conduct, all of the conduct that occurred after December 13, 2010 would be actionable. Since the dates of Defendants' alleged discriminatory acts are not clear from the face of the Complaint and Defendants' motion to dismiss fails to demonstrate which actions alleged are time-barred, a statute of limitations defense cannot be resolved on this record.

IV. Neither The Eleventh Amendment Nor Qualified Immunity Precludes Count Four's Section 1983 Claim Against Commissioner Katz in Her Individual Capacity for Violating Plaintiffs' Constitutional Rights

Although Defendants challenge whether Counts One, Two and Three adequately state a claim, their motion does not similarly challenge whether Count Four states a claim as a matter of

law. Instead they only contend that Count Four seeking to hold Commissioner Katz personally liable for money damages is precluded by the Eleventh Amendment and not permissible under the ADA and Rehabilitation Act. Defendants mischaracterize Count Four, which alleges a Section 1983 claim against Commissioner Katz, in her individual capacity, for acting under color of state law to violate Plaintiffs' rights under the U.S. Constitution.[9]

Count Four seeks to hold Commissioner Katz liable for violating Plaintiffs' rights under the First, Fourth and Ninth Amendments to the Constitution. Count Four alleges that Commissioner Katz, acting under the color of state law, violated Plaintiffs' right to be free from unwarranted state intrusion with respect to their rights to intimate, parental and/or familial association as guaranteed under the First, Ninth and Fourteenth Amendments. *See Patel v. Searles*, 305 F.3d 130, 136 (2d Cir. 2002) ("The husband/wife and parent/child relationships are obviously among the most intimate" and therefore "warrant the highest level of constitutional protection"); *Adler v. Pataki*, 184 F.3d 35, 42 (2d Cir. 1999) (noting that "[t]he Supreme Court has recognized . . . an individual's right to associate with others in intimate relationships"). The Second Circuit has noted that families and parents have, "in general terms, a substantive right under the Due Process Clause 'to remain together without the coercive interference of the awesome power of the state.'" *Tenenbaum v. Williams*, 193 F.3d 581, 600 (2d Cir. 1999) (quoting *Duchesne v. Sugarman*, 566 F.2d 817, 825 (2d Cir. 1977)). Count Four alleges that Commissioner Katz, as chief policymaker of DCF, was deliberately indifferent to the rights of Plaintiffs and other parents with mental or psychiatric disabilities and as DCF chief policymaker responsible for failing to implement policies and procedures to address the needs of those with

[9] To be clear, Plaintiffs do not seek money damages from Commissioner Katz in her individual or official capacity for the violations of the ADA or Rehabilitation Act alleged in Counts One, Two and Three. However, as noted *infra* at p. 38, the Complaint appropriately seeks prospective and injunctive against Commissioner Katz, in her official capacity.

disabilities, discriminated against those with disabilities and failed to provide supports and other reasonable modifications so that Plaintiffs could fully access and benefit from the services they were entitled to receive. As a result, Plaintiffs were unable to fully access and benefit from DCF's services, all while suffering unwarranted DCF intrusion into their relationship with their children and one another. Moreover, DCF took the position that the ADA (and presumably the Rehabilitation Act) did not apply to the services they were required to provide to Plaintiffs, even though the Supreme Court has made clear since 1998 that Title II the ADA and the Rehabilitation Act extends to all programs, services, and activities of a state and its agencies, "without any exception." *Yeskey*, 524 U.S. at 209. Accordingly, Commissioner Katz is not entitled to qualified immunity.

V. DCF Enjoys No Eleventh Amendment Immunity From Suit for the Claims Brought Under the Rehabilitation Act or the ADA

The Complaint alleges that DCF intentionally discriminated against Plaintiffs and/or were deliberately indifferent to their needs based on disability, and thus, seeks to recover monetary damages. The Complaint also seeks prospective and declaratory relief to remedy the ongoing violations of the Rehabilitation Act and ADA.

The Rehabilitation Act abrogates the Eleventh Amendment immunity generally enjoyed by state agencies, such as DCF. *See United States v. Georgia*, 546 U.S. 151, 159 (2006)*; Garcia v. S.U.N.Y. Health Servs. Cent.*, 280 F.3d 98, 112 (2d Cir. 2001). In enacting Rehabilitation Act, Congress unequivocally expressed its "intent to condition acceptance of federal funds on a state's waiver of its Eleventh Amendment immunity." *Garcia*, 280 F.3d at 113 (*citing* 42 U.S.C. § 2000d–7). Since the Complaint correctly alleges that DCF accepts federal funds, "[t]here is no doubt that DCF is subject to Rehabilitation Act . . . ." *Brown v. Connecticut*, No. 03:08cv1478 (MRK), 2000 WL 2220580, at *18 (D. Conn. May 27, 2010).

Given that DCF has no immunity from money damages for violations of the Rehabilitation Act and the disability-based discrimination and retaliation claims are all brought under the Rehabilitation Act and ADA, the Court need not separately resolve whether money damages could be awarded under the ADA, as well. However, should the Court reach this issue, it is equally clear that monetary damages are available under Title II of the ADA, where, as here, a plaintiff alleges intentional discrimination. *See Loeffler*, 582 F.3d at 275 ("The law is well settled that intentional violations of Title VI, and thus [Title II] of the ADA and the Rehabilitation Act, can call for an award of money damages.") (internal quotation and citation omitted); *Garcia*, 280 F.3d at 111.

The Complaint alleges sufficient facts to support Plaintiffs' claim that DCF acted with disability-based animus toward them or acted with deliberate indifference to their ADA and Rehabilitation Act rights. In *Loeffler,* the Second Circuit held that material factual disputes as to whether the defendant hospital acted with deliberate indifference to the deaf plaintiffs' rights under the Rehabilitation Act. 582 F.3d at 276-77. Specifically, the Second Circuit found that there were genuine issues of fact, precluding summary judgment, including: (i) whether the patients had requested an interpreter upon arrival at the hospital, as well as before and after the patient's surgery; (ii) whether the treating physician was a policymaker who "laughed off" multiple requests for a sign language interpreter by the patient and his family; and (iii) other healthcare providers refused to accommodate patient with auxiliary aids including an interpreter and a TTY device. *Id.* In *Loeffler*, the Second Circuit held that a reasonable jury could conclude that the hospital "had actual knowledge of discrimination against the Loefflers, had authority to correct the discrimination, and failed to respond adequately." *Id.* at 276. The Court reasoned that, even if the hospital had a general interpretive services policy and auxiliary aids, those policies and aids are insufficient if policymakers are unaware of how the policy functions, ignore

requests, or refuse to accommodate or offer reasonable modifications of those services to a patient. *Id.* at 276–77. Similarly, Plaintiffs here allege in their Complaint that DCF was not only intentionally discriminatory against them based on stereotypes or generalizations about them based on their disability, perceived disability and/or association with one who has a disability, but also that DCF was deliberately indifferent to Plaintiffs' ADA and Rehabilitation rights and failed to respond adequately by not offering them reasonable modifications so that Plaintiffs could benefit from and access the services and programs offered by DCF to parents.

Finally, the Court clearly has jurisdiction to consider the requested prospective and injunctive relief sought against Commissioner Katz, in her official capacity, consistent with the *Ex parte Young* doctrine. *See Wang v. Office of Professional Medical Conduct, New York*, 354 F. App'x 459, 461 (2d Cir. 2009) (noting that a plaintiff seeking prospective relief from the state "must name as defendant a state official rather than the state or a state agency directly."); *Henrietta D.*, 331 F.3d at 287.

VI. Plaintiffs Have Standing to Seek Prospective Injunctive Relief Because They Care for Children and Intend to Parent Other Children, Whether Through Birth or Adoption

In the Complaint, Plaintiffs have sufficiently alleged sufficient facts to support their standing to seek prospective injunctive relief against Commissioner Katz, in her official capacity to ensure that DCF does not further discriminate or retaliation against them. Plaintiffs seek to vindicate their own legal rights and interests, and their interest in remedying disability discrimination falls within the zone of interests the Rehabilitation Act and ADA was designed to address. Plaintiffs have each and continue to take care of other children. Plaintiffs therefore currently face the real risk that DCF may investigate or take other action against them based on their continued care and supervision of children. Moreover, Plaintiffs each intend to have or

adopt children. Based on DCF's prior discriminatory and retaliatory actions towards Plaintiffs, they obviously face the real and substantial risk that DCF will take future actions against them.

As set forth in the Complaint, Plaintiff have continued to and presently care for other children and intend to parent a child of their own. Given DCF's interventions with Plaintiffs' prior children lead to subsequent interventions by DCF immediately following the birth of their two boys, DCF will likely take action against them to the extent they continue to care for children and intend to have children of their own. Thus, Plaintiffs face of the risk that DCF may further attempt to take similar discriminatory action against them based on disability or perceived disability. Absent declaratory and equitable relief, Plaintiffs face continued discriminatory and retaliatory action by DCF based on the fact that they continue to care for children, but given the quick timing required in child protections proceedings, DCF's actions would evade review. Since Defendants argue that the ADA and/or Rehabilitation Act does not apply and may not be raised as a claim or defense in child neglect and protection proceedings, there is a significant risk that DCF's violations of these federal rights and its obligations under the ADA and Rehabilitation will go unchecked.

VII. Defendants' Motion to Dismiss Should Be Denied Because Defendants Fail to Support their Motion with an Adequate Record, Discovery Has Not Taken Place, and Contested Factual Issues Abound

Finally, Defendants' motion should be denied because they fail to carry their burden of proving the affirmative defenses of claim preclusion, issue preclusion and statute of limitations or the lack of standing. *See Coleman v. Blanchette*, No. 11-cv-1632 (WIG), 2012 WL 3822022, *5 (D. Conn. Sept. 4, 2012) ("The party asserting claim or issue preclusion bears the burden of demonstrating with clarity and certainty what was determined by the prior judgment.") Unlike the cases in which they rely, Defendants motion fails to provide an adequate record of what occurred in the state court proceedings. The inadequacy of the record from which Defendants

request this Court to decide and resolve these issues is fatal to their motion. The decisions cited by and relied on by Defendants only underscore the instant motion's inadequacy. Those decisions reflect that courts have only resolved such affirmative defenses where a motion to dismiss or motion for summary judgment, has been supported with trial transcripts and pleadings from the prior state court decisions,[10] and there was no dispute as to what occurred or could have been raised in the prior state court proceedings. As set forth above, Plaintiffs' federal disability discrimination claims could not have been raised and were never litigated in state court. Given the record submitted by Defendants, the Complaint and the contested facts outlined above, the present motion to dismiss should not be granted. Plaintiffs oppose any belated attempt by Defendants to cure these defects in reply, *see Manon v. Pons*, 131 F. Supp. 3d 219, 238-39 (S.D.N.Y. 2015), and/or to convert the instant motion into one for summary judgment, *see Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002). Discovery (which was stayed at Defendants' request notwithstanding Plaintiffs' objection (ECF ## 65, 66)) should proceed to permit "further development of the record," as contemplated by the Second Circuit. *Watley*, 631 Fed. App'x, at 76.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss (ECF # 59) should be denied.

Dated: December 20, 2016
Hartford, Connecticut

PLAINTIFFS

By: /s/ Andrew D. O'Toole

[10] *Coleman*, 2012 WL 3822022, at *6 n.5 ("The state-court trial transcripts have been provided as exhibits to Defendant's motion."); *J.R. Blanchard v. City of New York*, No. 11-CV-841, 2012 WL 5932816, *2 (E.D.N.Y. Nov. 27, 2012) (citing to several state court transcripts all of which were attached as exhibits to Defendants' motion).

Andrew D. O'Toole (ct-20015)
O'TOOLE + O'TOOLE, PLLC
280 Trumbull Street, 15th Floor
Hartford, Connecticut 06103
Tel.: (860) 519-5805
Email: aotoole@otoolegroup.com

Their Pro Bono Appointed Counsel

CERTIFICATE OF SERVICE

I hereby certify that on December 20, 2016, a copy of the foregoing was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Andrew D. O'Toole