UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

BREWSTER MARSHALL,

Plaintiff,

v.

NEW YORK STATE PUBLIC HIGH SCHOOL ATHLETIC ASSOCIATION, INC., SECTION IV OF NEW YORK PUBLIC HIGH SCHOOL ATHLETIC ASSOCIATION, INC., and MARYELLEN ELIA, in her official capacity as Commissioner of Education of the State Of New York,

Defendants.

DECISION AND ORDER

6:17-CV-06310 EAW

INTRODUCTION

On May 17, 2017, K.M. commenced this action on behalf of her minor child, Brewster Marshall ("Plaintiff"),[1] a high school senior suffering from postural orthostatic tachycardia syndrome ("POTS") as well as other ailments. (Dkt. 1). Plaintiff alleges that the New York State Public High School Athletic Association, Inc. ("NYSPHSAA") and Section IV of the New York Public High School Athletic Association, Inc. ("Section IV") unlawfully denied him extended athletic eligibility to play a fifth consecutive year of high

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[1] On November 17, 2017, by oral motion, Plaintiff sought leave to substitute himself as party plaintiff in this action because he had since reached the age of majority. The Court orally granted Plaintiff's unopposed motion, as confirmed by Text Order entered November 20, 2017. (Dkt. 57). The next day, the Clerk of Court terminated K.M. from this action, and named Brewster Marshall as the new party plaintiff.

school basketball in violation of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12132 ("ADA"), and Section 504 of the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504"). (*See id.* at 8-9). Specifically, Plaintiff contends that NYSPHSAA and Section IV discriminated against him because of his disabilities by refusing to provide him with a reasonable accommodation permitting his participation in interscholastic basketball during his fifth and final year of high school. (*See id.* at 6-7). On August 23, 2017, Plaintiff filed an amended complaint in which Plaintiff joined Maryellen Elia, in her official capacity as Commissioner of Education of the State of New York (the "Commissioner"), with NYSPHSAA and Section IV, as a defendant in this action (collectively, "Defendants"). (Dkt. 19). While Plaintiff further elaborates upon his factual allegations in the amended complaint, the nature of those allegations remains largely unchanged. However, Plaintiff now requests that the Court order the Commissioner to "promptly promulgate an emergency regulation by which students with disabilities who, because of their disabilities, must attend high school for more than four years may request extended athletic eligibility." (*Id.* at 11).

Presently before the Court is Plaintiff's motion for a preliminary injunction (Dkt. 38), and the Commissioner's motion to dismiss (Dkt. 46).[2] For the following reasons, both motions are denied.

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[2] NYSPHSAA and Section IV have both answered the amended complaint. (Dkt. 25; Dkt. 36).

FACTUAL BACKGROUND[3]

Plaintiff is a high school senior who resides in Horseheads, New York, and attends Horseheads High School. (Dkt. 19 at 2, 4). Plaintiff suffers from various health issues, including "chronic complex migraine headaches"; "patent foramen ovale," which is "a small hole in the heart"; Factor V Leiden, which is a "blood clotting disorder"; and POTS, which "creates chronic difficulty standing upright due to lightheadedness and other symptoms associated with reduced blood flow to the brain." (*Id.* at 3). These disabilities prevent Plaintiff from carrying a full high school course load. (*Id.* at 3-4). As a result, on July 18, 2016, Plaintiff received notification that he would not progress to the 12th grade, and that he would not graduate in June 2017, as originally planned. (*Id.* at ¶¶ 30, 32).

Plaintiff entered the 9th grade at Horseheads High School in September 2013. (*Id.* at ¶ 15). Although Plaintiff's disabilities limited the frequency in which he participated in competitive interscholastic basketball, Plaintiff has, in fact, entered competition for each year since September 2013. (*Id.* at ¶¶ 35-39). Despite having participated in high school basketball for four consecutive seasons, Plaintiff sought extended athletic eligibility to participate in varsity basketball during his fifth and final year of high school. (*See id.* at ¶ 41).

On June 15, 2016, the Horseheads Central School District (the "District") submitted an application for extended athletic eligibility to Section IV on Plaintiff's behalf. (*Id.* at ¶ 53). Section IV did not consider this application because, at the time, Plaintiff had not

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[3] The following facts are taken from Plaintiff's amended complaint unless otherwise specified. (Dkt. 19).

yet completed four years of high school. (*Id.* at ¶ 54). Subsequently, Plaintiff requested that he receive a "reasonable modification under the ADA," permitting extended eligibility for basketball, a contact sport, because no such exception currently exists for students who must attend more than four years of high school due to a disability. (*Id.* at ¶¶ 58-59). Plaintiff has yet to receive a response to this request. (*Id.* at ¶ 60).

On April 24, 2017, the District submitted a second application to Section IV, which included a request for a reasonable accommodation under the ADA on Plaintiff's behalf. (*Id.* at ¶ 61). On July 20, 2017, Section IV denied this application without mentioning the requested reasonable accommodation. (*Id.* at ¶¶ 62-63). On August 7, 2017, Bert Conklin, the District's Athletic Director, appealed Section IV's decision on Plaintiff's behalf, and requested that Plaintiff receive a reasonable accommodation under the athletic eligibility rules. (*Id.* at ¶ 64; *see* Dkt. 38-3 at 8-9 (Conklin's affidavit)). On August 14, 2017, Section IV's Appeals Committee affirmed the initial decision without mentioning the request for a reasonable accommodation. (Dkt. 19 at ¶¶ 65-66).

Plaintiff alleges that Defendants are all public entities for purposes of the ADA (*see id.* at ¶¶ 77-79), and that they each receive "federal financial assistance" for purposes of Section 504 (*id.* at ¶ 88). Plaintiff further alleges that his requested extension of athletic eligibility constitutes a reasonable modification under the ADA and does not frustrate the purposes of the four-year athletic eligibility standard (hereinafter, the "Duration of Competition Rule"). (*Id.* at ¶¶ 82, 90). Plaintiff claims that Defendants have discriminated against him because of his disabilities by refusing to grant a reasonable modification in violation of Title II of the ADA and Section 504. (*See id.* at ¶¶ 83, 91).

PROCEDURAL HISTORY

On October 13, 2017, Plaintiff filed a motion for a preliminary injunction requesting the Court enjoin Defendants from denying him extended athletic eligibility for the 2017-18 Section IV High School Boys Varsity Basketball Season. (Dkt. 38 at 4). Plaintiff also filed a motion to expedite a hearing on the motion for a preliminary injunction. (Dkt. 39). On October 16, 2017, the Court granted Plaintiff's motion to expedite, and set a briefing schedule and an oral argument date. (Dkt. 43). On October 24, 2017, the Commissioner filed a motion to dismiss the amended complaint, arguing that Plaintiff failed to state a claim upon which relief may be granted, that the abstention doctrine strips this Court of subject matter jurisdiction, and that the Commissioner enjoys legislative immunity against Plaintiff's request for an emergency regulation. (Dkt. 46-1). All Defendants have submitted papers in opposition to Plaintiff's motion for a preliminary injunction (Dkt. 47; Dkt. 48; Dkt. 49; Dkt. 50), and Plaintiff has opposed the Commissioner's motion to dismiss (Dkt. 52). On November 17, 2017, the Court held oral argument, and reserved decision on both motions. (Dkt. 56).

DISCUSSION

"'A motion to dismiss based on the abstention doctrine is . . . considered as a motion made pursuant to Rule 12(b)(1).'" *Rehab. Support Servs., Inc. v. Town of Esopus*, 226 F. Supp. 3d 113, 125 (N.D.N.Y. 2016) (quoting *City of N.Y. v. Milhelm Attea & Bros., Inc.*, 550 F. Supp. 2d 332, 341 (E.D.N.Y. 2008)). For this reason, the Court will first address the Commissioner's abstention argument to determine whether the Court has subject matter jurisdiction to entertain this action.

I. Motion to Dismiss under Rule 12(b)(1)

A. Legal Standards

"A plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that the court retains jurisdiction." *Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000). "When considering a motion to dismiss for lack of subject matter jurisdiction or for failure to state a cause of action, a court must accept as true all material factual allegations in the complaint." *Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998). "[T]he district court can refer to evidence outside the pleadings and the plaintiff asserting subject matter jurisdiction has the burden of proving by a preponderance of the evidence that it exists." *Luckett v. Bure*, 290 F.3d 493, 496-97 (2d Cir. 2002). "Indeed, a challenge to the jurisdictional elements of a plaintiff's claim allows the Court to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Celestine v. Mt. Vernon Neighborhood Health Ctr.*, 289 F. Supp. 2d 392, 399 (S.D.N.Y. 2003), *aff'd*, 249 F. App'x 851 (2d Cir. 2007). "The court may consider affidavits and other materials beyond the pleadings but cannot rely on conclusory or hearsay statements contained in the affidavits." *Young v. United States*, No. 12–CV–2342 (ARR)(SG), 2014 WL 1153911, at *6 (E.D.N.Y. Mar. 20, 2014) (quotation omitted).

B. *Pullman* Abstention Does Not Apply

The Commissioner argues that the abstention doctrine set forth in *R.R. Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496 (1941) applies here because currently pending state administrative proceedings could moot any decision by this Court in this federal action.

(Dkt. 46-1 at 14-15). Plaintiff responds that abstention would be inappropriate because the Commissioner does not consider ADA and Section 504 claims, such as those asserted here, to be properly before her on administrative appeal, and thus, there is no concern that this action may be rendered moot or that inconsistent outcomes will result from the procession of these federal claims. (Dkt. 52 at 24-25).

"Abstention from the exercise of federal jurisdiction is the exception, not the rule." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). The Second Circuit has "abstained under *Pullman* 'when three conditions are met: (1) an unclear state statute is at issue; (2) resolution of the federal constitutional issue depends on the interpretation of the state law; and (3) the law is susceptible to an interpretation by a state court that would avoid or modify the federal constitutional issue.'" *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 100 (2d Cir. 2004) (quoting *Vt. Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 385 (2d Cir. 2000)). Here, no "federal constitutional issue" is dependent upon the interpretation of state law in this action. *See Am. Ass'n of People With Disabilities v. Smith*, 227 F. Supp. 2d 1276, 1283 (M.D. Fla. 2002) ("*Pullman* abstention is clearly not applicable here if for no other reason than the fact that there are no federal constitutional issues before this Court to be avoided by such abstention."); *see also Cecos Int'l, Inc. v. Jorling*, 706 F. Supp. 1006, 1013 (N.D.N.Y. 1989) ("Abstention under *Pullman* is not proper, however, 'when a state statute is not fairly subject to an interpretation which will render unnecessary adjudication of the federal constitutional question.'" (quoting *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 236 (1984))), *aff'd*, 895

F.2d 66 (2d Cir. 1990). Plaintiff has not asserted a federal constitutional claim in the amended complaint; Plaintiff's claims arise from federal statutory law. (Dkt. 19).[4]

Other reasons advise against *Pullman* abstention as well. "Here, the presence of federal statutory claims and the clarity of the state . . . regulation[] renders *Pullman* inapplicable." *Philipp v. Carey*, 517 F. Supp. 513, 521 (N.D.N.Y. 1981). Indeed, the parties do not argue that the Commissioner's regulation is unclear; rather, the primary disagreement in this case is whether the Duration of Competition Rule constitutes an "essential eligibility requirement" and whether modification of this requirement is a "reasonable accommodation" under *federal* law. (*See* Dkt. 38-2 at 10-16; Dkt. 46-1 at 6-14; Dkt. 49 at 12-21; Dkt. 52 at 8-23). Moreover, "[t]he regulation[] at issue [is] neither ambiguous nor unintelligible, nor [is it] rendered 'unclear' [even if] no state court has yet construed [it]" in this context. *Handberry v. Thompson*, 446 F.3d 335, 356 (2d Cir. 2006) (internal quotation marks and citation omitted).

Lastly, it appears unlikely that the state administrative proceedings will reach the merits of Plaintiff's ADA and Section 504 causes of action. Several prior decisions of the Commissioner have expressly declined to opine upon ADA and Section 504 contentions, stating that an administrative appeal to the Commissioner is not the proper forum to assert such claims. *See, e.g.*, *Appeal of John P. Ghezzi, et al.*, 55 Ed Dept Rpt, Decision No.

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[4] To the extent Plaintiff argues that the Supremacy Clause of the United States Constitution requires the modification of the Duration of Competition Rule (Dkt. 54 at 8-9), any preemption inquiry is inherent to the ADA's statutory scheme, but it does not give rise to an independent constitutional issue under the United States Constitution, as will be explained further below.

16890 ("To the extent that [the] petitioners assert claims under the ADA, the appeal must be dismissed for lack of jurisdiction. An appeal to the Commissioner is not the proper forum in which to raise alleged violations of the ADA."); *Appeal of a Student with a Disability*, 48 Ed Dept Rpt 108, 110, Decision No. 15,806 ("Ultimately, enforcement of § 504 is within the jurisdiction of the federal courts, the U.S. Department of Justice and the U.S. Department of Education and may not be obtained in an appeal brought pursuant to Education Law § 310."); *Appeal of Linda Cochran, et al.*, 35 Ed Dept Rpt 555, Decision No. 13,631 ("[S]uch a claim would assert a violation of 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794) as well as the ADA (42 U.S.C. 12101-12133), enforcement of which is within the jurisdiction of the federal courts, the U.S. Department of Justice and the U.S. Department of Education."). Furthermore, at oral argument, Plaintiff's counsel confirmed that no ADA claims are presently before the Commissioner on the pending administrative appeal. The Court also notes that it is not without significance that Plaintiff has not yet received any administrative response regarding the requests for a reasonable accommodation.

Therefore, the Court finds that *Pullman* abstention is not applicable to this matter, and the Commissioner's motion to dismiss is denied insofar as it is based upon this ground.

C. *Younger* Abstention Does Not Apply

While the Commissioner does not specifically argue for the application of the separate abstention doctrine set forth in *Younger v. Harris*, 401 U.S. 37 (1971), in the interest of completeness and to the extent the Commissioner's argument could be construed

as contending that this action may interfere with the pending state administrative proceeding, the Court disagrees and denies abstention under *Younger*.

"Although *Younger* was initially developed as a limitation on the ability of federal courts to interfere with pending state criminal proceedings, the Supreme Court has since extended *Younger*'s application to bar federal interference with certain state civil and administrative proceedings." *ACRA Turf Club, LLC v. Zanzuccki*, 748 F.3d 127, 132 (3d Cir. 2014). Nonetheless, the Supreme Court has recently clarified that *Younger* abstention applies only in three "exceptional circumstances": (1) "ongoing state criminal prosecutions"; (2) "certain civil enforcement proceedings"; and (3) "civil proceedings involving certain orders . . . uniquely in furtherance of the state courts' ability to perform their judicial functions." *Sprint Commc'ns, Inc. v. Jacobs*, 134 S. Ct. 584, 591 (2013). Clearly, there is no "ongoing state criminal prosecution" involved in this action. Similarly, state actors have commenced no "civil enforcement proceedings." Indeed, Plaintiff initiated the state administrative proceedings at issue here, and these proceedings are certainly not "more akin to a criminal prosecution than are most civil cases." *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 604 (1975). Lastly, the state courts are not involved in this action, rendering the third narrow circumstance in which this Court may invoke *Younger* abstention inapplicable. *See Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 13 (1987) (involving bond requirements); *Juidice v. Vail*, 430 U.S. 327, 336 (1977) (involving civil contempt orders).

Therefore, the Court finds that it has subject matter jurisdiction over this action, and the Commissioner's motion is denied insofar as it seeks dismissal of the amended complaint pursuant to the abstention doctrine.

II. Motion to Dismiss under Rule 12(b)(6)

A. Legal Standards

"'In considering a motion to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6), a district court must limit itself to facts stated in the complaint or in documents attached to the complaint as exhibits or incorporated in the complaint by reference.'" *Newman & Schwartz v. Asplundh Tree Expert Co.*, 102 F.3d 660, 662 (2d Cir. 1996) (quoting *Kramer v. Time Warner, Inc.*, 937 F.2d 767, 773 (2d Cir. 1991)). A court should consider the motion by "accepting all factual allegations in the complaint and drawing all reasonable inferences in the plaintiff's favor." *Ruotolo v. City of N.Y.*, 514 F.3d 184, 188 (2d Cir. 2008) (internal quotations and citation omitted). To withstand dismissal, a plaintiff must set forth "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). "'A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Turkmen v. Ashcroft*, 589 F.3d 542, 546 (2d Cir. 2009) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (alteration in

original) (internal quotations and citations omitted). Thus, "at a bare minimum, the operative standard requires the plaintiff [to] provide the grounds upon which his claim rests through factual allegations sufficient to raise a right to relief above the speculative level." *Goldstein v. Pataki*, 516 F.3d 50, 56 (2d Cir. 2008) (alteration in original) (internal quotations and citations omitted).

B. Principles of the ADA and Section 504

One of the stated purposes underlying the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(1). In effecting this goal, Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." *Id.* § 12132. Section 504 of the Rehabilitation Act provides 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 the 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). "As the standards for actions under these provisions of the ADA and the Rehabilitation Act are generally equivalent, [courts in this Circuit] analyze such claims together." *Dean v. Univ. at Buffalo Sch. of Med. & Biomedical Scis.*, 804 F.3d 178, 187 (2d Cir. 2015).

C. Requirements to State a Claim under the ADA and Section 504

> To establish a prima facie case of discrimination under either the ADA or Section 504, a plaintiff must show the following: (1) plaintiff is a "qualified individual with a disability;" (2) plaintiff was "excluded from participation in a public entity's services, programs or activities or was otherwise discriminated against by [the] public entity;" and (3) "such exclusion or discrimination was due to [plaintiff's] disability."

B.C. v. Mount Vernon Sch. Dist., 837 F.3d 152, 158 (2d Cir. 2016) (quoting *Fulton v. Goord*, 591 F.3d 37, 43 (2d Cir. 2009)). "A qualified individual with a disability is defined as a disabled person who, whether or not given an accommodation, 'meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.'" *Powell v. Nat'l Bd. of Med. Exam'rs*, 364 F.3d 79, 84-85 (2d Cir.) (quoting 42 U.S.C. § 12131(2)), *opinion corrected*, 511 F.3d 238 (2d Cir. 2004). "Cases interpreting the 'essential eligibility requirement' language indicate that whether an eligibility requirement is essential is determined by consulting the importance of the requirement to the program in question." *Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 157 (2d Cir. 2013). "The [implementing] regulations indicate that 'essential eligibility requirements' are those requirements without which the 'nature' of the program would be 'fundamentally alter[ed].'" *Id.* (quoting 28 C.F.R. § 35.130(b)(7)).

"A requirement of a program is not, however, considered to be 'essential' if a 'reasonable accommodation' would enable an individual to qualify for the benefit. Accordingly, the 'reasonableness' of an accommodation and the 'essentialness' of an eligibility requirement are inextricably intertwined and must be examined together." *Castellano v. City of N.Y.*, 946 F. Supp. 249, 253 (S.D.N.Y. 1996), *aff'd*, 142 F.3d 58 (2d