UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

HEATHERMARIE THURSTON and CHRISTOPHER ROBERT THURSTON,	)	
Plaintiffs,	)	
v.	)	Case No. 5:15-cv-138
DR. PAUL COTTON, MELISSA SHINEAR, JON MICHAEL SHEESER, JUDITH LEWIS, LEA PENCE, LAURIE LECLAIR, CHITTENDEN COUNTY DEPARTMENT OF CHILDREN AND FAMILIES DIVISION, CYNTHIA FRANTZ, and THOMAS DEVINE,	)	
Defendants.	)	

OPINION AND ORDER
DISMISSING AMENDED COMPLAINT
(Docs. 6, 9)

Plaintiffs Heathermarie Thurston and Christopher Robert Thurston, proceeding *pro se*, bring this action against Defendants Dr. Paul Cotton, Melissa Shinear, Dr. Jon Michael Sheeser, Judith Lewis, Lea Pence, Laurie Leclair, Chittenden County Department of Children and Families Division ("DCF"), Cynthia Frantz, and Vermont Superior Court Judge Thomas Devine. (Doc. 1.) The Thurstons seek an order suspending a child welfare case now pending in state court and awarding custody of Ms. Thurston's son to her and permitting Mr. Thurston to adopt the child. They also seek money damages for fraud, defamation and other state law causes of action. The defendants include three physicians, a nurse and a hospital social worker who treated Ms. Thurston during a recent hospitalization, two attorneys who represent her in the state court case, the judge presiding over the state case, and the Vermont Department of Children and Families.

On June 22, 2015, this court granted the Thurstons' motion to proceed *in forma pauperis*, and dismissed the case for lack of subject matter jurisdiction. The court granted the Thurstons leave to file an amended complaint. The Thurstons have filed an amended complaint, which the court now reviews pursuant to 28 U.S.C. § 1915(e)(2)(B).[1] Also pending before the court is the Thurstons' motion to expedite. (Doc. 9.)

I. Claims

The court assumes the truth of the facts alleged for purposes of § 1915 review. Ms. Thurston is physically disabled, is blind and deaf, and has a mild cognitive impairment.

In August 2013 she sought medical treatment at Fletcher Allen Health Care in order to have shelter until she could move into a subsidized apartment for individuals with disabilities. She disagreed with the admitting physician about the basis for her admission. She sought to be admitted on the basis of her high-risk pregnancy. Dr. Sheeser admitted her for reasons related to mental health. The Thurstons claim that Dr. Sheeser falsified her medical records when he diagnosed her with post-traumatic stress disorder. They claim that Dr. Lewis also provided a false diagnosis in order to cover up Dr. Sheeser's actions. No specific claims are made against Dr. Cotton although he is also named in the complaint.

The Thurstons claim further that Pence, a hospital social worker, discriminated against Ms. Thurston and committed "blackmail" when she threatened to report Ms. Thurston to DCF for refusing to tell Pence her plan for caring for her unborn child. (Doc. 7 at 4.) They also claim that Shinear, a nurse for the hospital, then executed an affidavit in support of DCF's claims against Ms. Thurston, motivated by the belief that people with disabilities should not have children.

Some months after her Fletcher Allen admission in 2013, Ms. Thurston gave birth to a son. This son is currently in foster care and is the subject of a Family Court proceeding in the Chittenden Unit of the Vermont Superior Court.

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[1] The Thurstons also filed additional documents supplementing the amended complaint and motion to expedite (Docs. 7, 8 and 10), which the court has reviewed as well.

In addition to the claims which arise out of the August 2013 admission, the Thurstons allege that Ms. Thurston's attorneys, Leclair and Frantz, who were appointed to represent her in the Family Court case, violated Ms. Thurston's First Amendment rights. They allege that Leclair forced Ms. Thurston to sign a document which falsely stated that Ms. Thurston has PTSD, and that Frantz did not allow Ms. Thurston to finish testifying in court. The Thurstons allege that Judge Thomas Devine, who presides over the juvenile proceedings, denied Ms. Thurston access to her service dog during her supervised visitation with her son, in violation of Title II of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12131-12165. With respect to defendant DCF, the Thurstons allege that DCF falsely or improperly pursued its claims "that [Ms. Thurston] was unable to take care of [herself] and her son" and that Ms. Thurston has "mental health issues" for which she has not received treatment. (Doc. 7 at 2.) Further, they claim that DCF falsely alleged that Ms. Thurston's inability to care for her child or for herself results from her disabilities.

II. Relief Sought

Plaintiffs seek injunctive relief returning custody of Ms. Thurston's son to her and an order allowing Mr. Thurston to adopt him. They also seek monetary compensation for mistreatment by the doctors, medical staff, lawyers, judge and child welfare agency involved in their case.

III. Analysis

The court accepts the facts alleged in the *pro se* amended complaint as true and construes them liberally. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Under § 1915(e)(2)(B), the district court may dismiss a case seeking *in forma pauperis* status if it determines that the complaint: "(i) is frivolous or malicious; (ii) fails to state a claim on which relief may be granted; or (iii) seeks monetary relief from a defendant who is immune from such relief." 28 U.S.C. § 1915(e)(2)(B). The district court also has inherent authority to dismiss a case that presents no meritorious issue. *Pillay v. Immigration & Naturalization Serv.*, 45 F.3d 14, 17 (2d Cir. 1995) (court has "inherent authority" to dismiss petition that presents "no arguably meritorious issue"). The complaint must allege "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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

The claims fall into two broad categories: those concerning events at the hospital and those concerning the child welfare case in state court. The court dismisses all claims under § 1915(e)(2)(B) on the ground that plaintiffs have failed to state a claim upon which relief can be granted. The court will discuss each claim separately.

The claims related to Ms. Thurston's treatment at the hospital are claims for compensation for an allegedly false diagnosis of post-traumatic stress disorder and a separate claim that the hospital social worker and nurse interfered with Ms. Thurston's parental rights by contacting the Department of Children and Families and discriminating against her by reason of her disabilities. These are not claims which can be asserted through a federal civil rights action pursuant to 42 U.S.C. § 1983 because none of the hospital staff who are named are state actors. They are individual employees of a non-profit hospital. They do not act on behalf of a state or local government.

To the extent that plaintiffs attempt to bring claims against the hospital defendants under the ADA or the Rehabilitation Act, 29 U.S.C. § 794(a), these claims also fail. In order to establish a prima facie case of discrimination under the ADA, the plaintiff must show that (1) he or she is a qualified individual with a disability; (2) that the defendant is an entity subject to the ADA; and (3) that the plaintiff "was excluded from participation in . . . services, programs or activities or was otherwise discriminated against" because of the plaintiff's disability. *Hargrave v. Vermont*, 340 F.3d 27, 35 (2d Cir. 2003.) The same requirements apply to Rehabilitation Act claims, *see id.*, with the additional requirement that a plaintiff must show that the benefit, service or program denied was provided by an entity receiving federal funds. 29 U.S.C. § 794(a). Plaintiffs cannot establish a prima facie case of discrimination against the hospital employees under either statute because there is no individual liability under the ADA or under the Rehabilitation Act. *See Harris v. Mills*, 478 F. Supp. 2d 544, 547 (S.D.N.Y. 2007).

The remaining claims against the hospital defendants raise issues under state law. The principal claim is one of fraud. In the absence of a viable federal claim, the court lacks

jurisdiction to hear state-law claims. Accordingly, the claims against the hospital defendants—Drs. Cotton, Lewis and Sheeser, nurse Shinear, and social worker Pence—are DISMISSED.

The court turns now to the claims against defendants involved in the child welfare case.

At the outset, Judge Devine is entitled to absolute immunity for actions relating to the exercise of his judicial authority. *See Mireles v. Waco,* 502 U.S. 9, 11 (1991). Judicial immunity "is overcome only in two sets of circumstances. First, a judge is not immune from liability for nonjudicial actions, i.e., actions not taken in the judge's judicial capacity. Second, a judge is not immune for actions, though judicial in nature, taken in the complete absence of all jurisdiction." *Id.* at 12. The Thurstons' allegations against Judge Devine only concern rulings made in his official judicial capacity, and none of the allegations suggest that Judge Devine acted in the absence of jurisdiction. Therefore, Judge Devine is absolutely immune from suit, and all claims against Judge Devine are DISMISSED pursuant to 28 U.S.C. § 1915(e)(2)(B)(iii).

The claims against Ms. Thurston's defense attorneys, Leclair and Frantz, fail for the same reasons as the claims against the hospital defendants. "[I]t is well-established that court-appointed attorneys performing a lawyer's traditional functions as counsel . . . do not act 'under color of state law' and therefore are not subject to suit under 42 U.S.C. § 1983." *Rodriguez v. Weprin*, 116 F.3d 62, 65-66 (2d Cir. 1997) (citing *Polk County v. Dodson*, 454 U.S. 312, 325 (1981)). The court lacks jurisdiction over any state court claims against the attorneys and these claims are DISMISSED without prejudice.

The Thurstons' remaining claim is one for injunctive relief. They seek an order from the federal court intervening in the state court case concerning custody of Ms. Thurston's son. The court construes the claim against DCF as a request for an injunction based on claims of constitutional misconduct. The doctrine of *Younger v. Harris*, 401 U.S. 37 (1971) does not permit the federal court to interfere in state court cases absent extraordinary circumstances. *See Moore v. Sims*, 442 U.S. 415, 430 (1979). The *Younger* doctrine applies where: (1) there is an ongoing state proceeding; (2) an important state interest is involved; and (3) the plaintiff has an adequate opportunity for judicial review of his or her constitutional claims during or after the proceeding. *Spargo v. N.Y. State Comm'n on Judicial Conduct,* 351 F.3d 65, 75 (2d Cir. 2003).

Here, the only form of relief sought is an order that would cause this court to intervene in ongoing state court proceedings initiated by the state of Vermont to terminate Ms. Thurston's parental rights. The United States Supreme Court recognized in *Moore* that the state has an important interest in conducting this type of child protection proceeding. *See Moore*, 442 U.S. at 430. There is no restriction under Vermont law which prevents the Thurstons from raising constitutional claims in their state court case. The amended complaint does not allege that the state court proceedings will not provide an opportunity for judicial review of any constitutional claims the Thurstons may have against the state.

Accordingly, unless the case presents "unusual circumstances such as bad faith, harassment, or a patently invalid state statute" the federal court cannot review or overrule a state court in its exercise of authority over child protection matters. *Del Valle Hernandez v. U.S. Family Court of Bronx Cnty.*, 107 F.3d 2, at *2 (2d Cir. 1997) (unpublished) (citing *Younger*, 401 U.S. at 53-54). The Thurstons have not identified any unusual circumstances which would permit the federal court to intervene in this case. Their state court case is ongoing, they are represented by counsel, and they have every right to bring their concerns about their treatment and their qualifications as parents to the state court judge. *See Huffman v. Pursue, Ltd.*, 420 U.S. 592, 611 (1975) (observing that *Younger* exceptions are "narrow"); *see also Mason v. Departmental Disciplinary Comm.*, 894 F.2d 512, 515 (2d Cir. 1990) ("It is wholly speculative for [the plaintiff] to conclude that [the state adjudicatory body] have prejudged him or are incapable of impartially deciding whether to initiate formal proceedings and, in that event, of conducting them fairly."). Because the *Younger* abstention doctrine bars the court from granting the relief sought by the Thurstons, the court declines to exercise jurisdiction over this case. Plaintiffs' claims for injunctive relief are DISMISSED pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii). Because the court will not proceed to a trial on the merits of the Thurstons' claims, the Thurstons' motion to expedite (Doc. 9) is DENIED AS MOOT.

IV. No Leave to File a Second Amended Complaint

The Second Circuit has held that district courts should not dismiss the claim of a self-represented party without granting leave to amend at least once "when a liberal reading of the complaint gives any indication that a valid claim might be stated." *Thompson v. Carter*, 284 F.3d 411, 416 (2d Cir. 2002); *see also* Fed. R. Civ. P. 15(a)(2) ("the court should freely give

leave [to amend] when justice so requires"). However, leave to amend the proposed complaint is not required where it would be futile. *See Cuoco v. Moritsugu*, 222 F.3d 99, 112 (2d Cir. 2000) ("The problem with [plaintiff's] causes of action is substantive; better pleading will not cure it. Repleading would thus be futile. Such a futile request to replead should be denied."). Here, the court concludes that granting an additional opportunity to amend the complaint would be futile. Even if the Thurstons did not seek injunctive relief which is barred by the *Younger* doctrine, the amended complaint also does not address the other deficiencies described in the court's previous Opinion and Order (Doc. 5.) Furthermore, in the absence of any viable federal law claims, the Thurstons have not shown that the court would have diversity jurisdiction over any remaining state-law claims, nor that exercising supplemental jurisdiction would be appropriate under the circumstances. Therefore, the court declines to grant leave to file a second amended complaint.

V. Conclusion

For the reasons set forth above, upon conducting the review required under 28 U.S.C. § 1915(a)(1), the claims against the hospital defendants—Drs. Cotton, Lewis and Sheeser, nurse Shinear, and social worker Pence—are DISMISSED. All claims against Judge Devine are DISMISSED. All claims against attorneys Cynthia Frantz and Laurie LeClaire are Dismissed. All claims against the Vermont Department of Children and Families are Dismissed. The motion to expedite (Doc. 9) is DENIED AS MOOT. The case is hereby DISMISSED.

SO ORDERED.

Dated at Rutland, in the District of Vermont, this 10th day of July, 2015.

Geoffrey W. Crawford, Judge
United States District Court