

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

**BEVERLY LAMBERSON, as
Administratrix of the Estate of
Melinda Lamberson Reynolds,
Deceased,**

Plaintiff

v.

**COMMONWEALTH OF
PENNSYLVANIA, et al.,**

Defendants

**CIVIL ACTION
NO. 3:09-cv-1492**

(Judge Munley)

Electronically Filed

**BRIEF IN SUPPORT OF DEFENDANTS' MOTION
FOR SUMMARY JUDGMENT**

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PROCEDURAL HISTORY OF THE CASE

This action was brought by a former licensed nurse claiming that her license to practice was suspended because of defendants' refusal to permit her to receive methadone maintenance treatment as accommodation to treat her drug dependency. She claimed that this refusal violated both the Americans with Disabilities Act, 42 U.S.C. §12101, *et seq.* (the ADA) and Section 504 of the Rehabilitation Act, 29 U.S.C. §794 (the Rehabilitation Act). The amended complaint sought declaratory and injunctive relief as well as damages.

The original plaintiff was Melinda Lamberson Reynolds, a licensed practical and professional nurse. During the course of this litigation, Reynolds died and the administratrix of Reynolds' estate, Beverly Lamberson, was substituted as plaintiff. The amended complaint names as defendants the state entities – the Commonwealth of Pennsylvania, the Department of State, the Bureau of Professional and Occupational Affairs, the Division of Professional Health Monitoring Programs and the State Board of Nursing – as well individuals, Basil L. Merenda, the former commissioner of the Bureau of Professional and Occupational Affairs, and then current members of the Board of Nursing.¹

¹ Of the named Nursing Board members, Kathleen M. Dwyer, Judy A. Hale, Suzanne M. Hendricks, Joseph J. Napolitano, Ann L. O'Sullivan and Joanne L. Sorensen are still members. Linda Tanzini Ambroso, K. Stephen Anderson, Christopher Bartlett, Rafaela Colon and Janet H. Shields are no longer members of the Board.

Defendants moved to dismiss plaintiff's amended complaint. Defendants in their motion argued, among other matters, that this action was barred by the abstention doctrine, that plaintiff's ADA claim against the state agency defendants was barred by the Eleventh Amendment and that plaintiff could not recover damages against the individual defendants under the ADA or the Rehabilitation Act. This Court granted the motion insofar that it sought dismissal of the damages claims against the individual defendants. Otherwise, the motion was denied.

The discovery period is concluded. Defendants have moved for summary judgment and submitted a statement of material facts in support of that motion. This brief is now submitted in support of defendants' motion for summary judgment.

STATEMENT OF FACTS

On October 2, 1997, Reynolds enrolled in a methadone maintenance program operated by Morris County After Care Center. She continued to receive treatment there until approximately February 2004. Morris County After Care Records, MLR 17766. The Physician's and Nurse's Progress Notes dated October 2, 1997 state that Reynolds had been "addicted to heroin for 20 years off and on." Morris County After Care Records, MLR 17764. Reynolds' "Drug History" form also indicates 20 years of heroin use. Morris County After Care Records, MLR

17761. In the same drug history form, under “Other Drugs used,” is listed Xanax. Id.

In September 2003, the center advised Reynolds to get off “benzos” and then sent her to St. Claire Hospital medical unit in Dover “for detox from benzodiazepines.” Morris County After Care Records, MLR 17656, 17657, 17662. Reynolds entered a detox program at St. Claire Hospital for 11 days and was “successfully detoxed from Benzo.” She was discharged on September 28, 2003. Morris County After Care Records, MLR 17662.

On March 29, 2004, Reynolds enrolled in the methadone maintenance program at New Directions Treatment Services (“NDTS”). NDTS Records, MLR 18400. In an assessment dated April 12, 2004, Reynolds’ counselor states, “Client seems to be vague when disclosing information regarding her family history and past experiences with drugs. She also seems to minimize her use and make light of it. Client is guarded and is feeling out her therapy session.” NDTS Records, MLH 18576. A written case consultation note of June 7, 2004, states, “Presently, client continues to use benzo’s without the support of a treating psychiatrist.” NDTS Records, MLR 18586.

In the fall of 2004, New Directions Treatment Services also tried to detox her from benzodiazepines. NDTS Records, MLR 18530, 18528. The detox, however, was not successful. When confronted on February 3, 2005, with the fact

that Reynolds had supplemented her benzodiazepine use during detox, Dr. Wilson notes, “She admitted she had. She feels she doesn’t abuse benzos and uses them for her anxiety.” NDTS Records, MLR 17969.

On February 14, 2005, there is a note stating that Reynolds had resumed use of benzodiazepines and that she “appears under the influence today.” NDTS Records, MLR 17938. Also, on February 14, 2005, Reynolds received notice that “due to (5) consecutive positive urines, you are now on Program Probation.” NDTS Records, MLR 18726.

On February 23, 2005, Dr. Wilson of new Directions noted that Reynolds had supplemented benzodiazepines during detox, NDTS Records, MLR 17969, and when she spoke to Dr. Vellaluz about it, Vellaluz told her “that a person using 10 mg Xanax a day is not using it for therapeutic reasons.” *Id.* Because of her resumed benzodiazepine use, *see* NDTS Records, MLR 18526, in late February and early March, 2005, New Directions directed Reynolds to a mandatory detox from methadone. NDTS Records, MLR 18724, 18725.

New Directions, however, reversed this decision and, instead, referred Reynolds to Cedar Point Family Services for treatment of her anxiety disorder. NDTS Records, MLR 18724; *see* Limoges Report at 6. In March 2005, Cedar Point noted that Reynolds’ “[i]mpairments include being less aware in the daytimes, more groggy. Tired in the afternoon. Has trouble concentrating when

anxious. Feels ill and shaky when having panic attacks.” Cedar Point Records, MLR 21076. Reynolds was discharged from Cedar Point on November 22, 2005, due to “non-compliance with appts., no response to letter inquiring about interest in services.” Cedar Point Records, MLR 21051.

According to a note from her counselor at New Directions on August 17, 2005, when Reynolds informed that her urine had come back positive for Xanax when she had been approved only for Klonopin, “client had very little to say.” Her counselor later in the same note states: “Seemingly client did not count on the urine to break down the types of Benzo and has been taking them for a while for them to show up in your system.” NDTs Records, MLR 18564. On August 24, 2005, Reynolds’ counselor noted: “Additionally she is exhibiting addictive behaviors by not informing her treating psychiatrist about the additional Xanax she is taking.” NDTs Records, MLR018564.

On September 8, 2005, Gastroenterology Associates, Ltd., strongly recommended that Reynolds continue on the benzodiazepines to help her deal with the side effects of the hepatitis C treatment she was receiving: “[I]t does appear that ... Xanax may not be the best medication for someone with a history like Malinda [sic]. ... I do continue to feel that the benefit from eradicating the virus from the system, far outweighs the risk of harm of her taking Xanax, even with her history of addictions.” NDTs Records, MLR 18375-18376. New Directions

subsequently approved plaintiff's use of benzodiazepines. NDTs Records, MLR 18377, 18518.

On or about February 18, 2005, the complaints office of the Department of State received a complaint from Reynolds' then employer, InteliStaf Healthcare. The letter stated that a urine specimen provided by Reynolds tested positive for benzodiazepines. At the time, Reynolds was working in SCCI, a long-term acute care facility in Easton, PA. Harris Deposition 68-69, 71-72, Exhibit P-9; Reynolds PHMP File, MLR 1067. InteliStaf Healthcare had the test performed because Reynolds displayed erratic behavior and there were incidents in which Reynolds "occasionally nodded off" and "her charting was illegible, incorrect, or missing altogether." Harris Deposition 68, Exhibit P-9; Reynolds PHMP File MLR 1067.

On March 1, 2005, Pearl Harris, a case manager for the state's professional health monitoring program (PHMP), sent a letter to Reynolds informing her that information had been received indicating she may be suffering from an impairment. The letter stated that the PHMP's voluntary recovery program (VRP) offered Reynolds the opportunity to receive assessment and treatment if necessary without public action by the State Board of Nursing. Among other matters, the letter stated that Reynolds should schedule an appointment for an evaluation with Kathy Toothill, an individual who provided evaluations the state monitoring program. Harris Deposition 66-67 Exhibit P-9.

Sometime after Pearl E. Harris sent the letter of March 1, 2005, Reynolds called Harris and told her that Kathy Toothill was not available to do the evaluation and that the only other drug and alcohol treatment facility Reynolds knew in her area was A Better Today. Reynolds stated that she would like to have her evaluation done there. Harris Deposition 78-79. Harris noted this change of evaluator was noted on a form called “scratch sheet.” Harris Deposition Exhibit 10.

On September 7, 2005, Harris received a letter from A Better Today stating that Reynolds had been given a drug and alcohol evaluation on June 14, 2005. The letter stated that “based on the information given by this individual at this time, she was deemed appropriate for Outpatient Treatment two times weekly.” The letter further indicated that she had attended six of sixteen scheduled treatment sessions to date. (The letter clearly mistakenly refers to Reynolds as “Ms. Harris.”) Harris Deposition 86-87, Exhibit P-12.

Reynolds never returned the proper paperwork to be enrolled in the VRP, *see* Reynolds PHMP File, MLR 1035, and on October 7, 2005, Harris sent Reynolds a letter notifying her that her VRP file had been closed and that it would be “forwarded to the Legal Division of the Bureau of Professional and Occupational Affairs to review regarding initiation of formal public disciplinary procedures against your license to practice by the Pennsylvania State Board of Nursing. Reynolds PHMP File, MLR 1027.

On November 16, 2005, Harris received a letter from A Better Today advising her that “Ms. Reynolds has been Therapeutically Discharged as of October 28, 2005, due to non-compliance with treatment attendance requirements.” Reynolds PHMP File, MLR 1048.

On May 22, 2006, the State Board of Nursing ordered Reynolds to have an evaluation by George E. Woody. NDTS record, MLR 18362-18367. Dr. Woody conducted that evaluation on July 20, 2006. Woody Record, MLR 17036. The examination found that Reynolds suffered from opioid dependence but that she could practice nursing “provided she is monitored for a time to be determined by the Board.” Woody Record, MLR 17040. The report does not mention Reynolds’ history of dependence on benzodiazepines, or the efforts to detox her. Woody Record, MLR 17036-17040.

Because Dr. Woody had stated that there was a need for monitoring, and because Reynolds did not enroll in the Voluntary Recovery Program, the Commonwealth filed an Order to show Cause directing Reynolds to show cause why her license should not be suspended, revoked or otherwise restricted. Board Proceedings, MLR 22342-22348.

Reynolds never answered the charges but, instead, settled the proceeding by entering a Consent Agreement and Order. Under the terms of the agreement, a finding of a violation of the consent order would result in the suspension of

Reynolds's license. Board Proceedings, MLH 22391-22410. The agreement permitted Reynolds to continue to practice on a probationary status provided she complied with its terms. *Id.* Reynolds was represented by counsel at the time she signed the agreement. Board Proceedings, MLR 22411. The Board adopted the consent order on January 4, 2007. *Id.*

Under the agreement, Reynolds was obligated to provide written verification of support group attendance, submit to random drug tests as directed by PHMP, arrange to have forwarded to PHMP a copy of her approved evaluation, and pay all costs incurred in complying with the terms of her Consent Agreement. Board Proceedings, MLH 22391-22410. The consent agreement provided that Reynolds's nursing license would be subject to an act of suspension of up to three years for violating the terms and conditions of her probation. *Id.*

In a letter to Reynolds on March 5, 2007, Ms. Harris, notified her of the following instances of non-compliance with the Board Order: "failing to provide Release of Information and other related materials in reference to your Evaluation & Treatment. Failure to set-up and provide ROBS [random observed body fluid toxicology screenings]²; failure to provide Support Group Verification Sheets since entering the Program in January, 2007 and failure to ensure that written reports were sent to this Office by your Employer and Treatment Providers." Reynolds

² These screenings are necessary to ensure a professional continues to abstain from drug use.

PHMP File, MLR 890. In her memo of April 24, 2007, to Heidi Weirich in the Complaints section, Harris reiterated these same violations. Reynolds PHMP File, MLR 881. Harris also told Weirich that Reynolds had failed to comply with treatment recommendations from her provider in that she had not entered inpatient treatment to be weaned from methadone. Board Proceedings, MLR 22387-22388.

Harris had been informed by A Better Today that Reynolds had not followed treatment recommendations. Nursing Board Proceedings, MLR 22352. Vince Carolan of A Better Today confirmed this information in a letter to Harris dated July 11, 2007. The letter stated: “Based on the physiological nature of her current ongoing dependence to Xanax and Methadone, Ms. Reynolds was directed to enter into a level 3A Medical Detoxification Unit before being admitted to out-patient therapy with A Better Today. Ms. Reynolds agreed to enter a facility arranged for by A Better Today. Although this process was agreed upon and facilitated, Ms. Reynolds failed to follow through and made repeated calls to ABT [A Better Today] in which she sounded impaired.” Reynolds PHMP File, MLR 967.

On May 9, 2007, the Commonwealth submitted a Petition for Appropriate Relief to the Probable Cause Screening Committee of the State Board of Nursing in accordance with the procedure set forth in the Consent Agreement and Order. The petition reiterated that Reynolds had violated the terms of the consent agreement by, among others, failing to begin submission of her body fluid

toxicology screens, failing to submit written verification that she attended support group meetings, failing to submit an assessment by a PHMP-approved provider and failing to comply with treatment recommendations from her provider in that she had not entered inpatient treatment to be weaned from methadone. Board Proceedings, MLR 22387-22388. The Board Committee issued a Preliminary Order on the same day suspending Reynolds' license to practice nursing subject to her right to defend the allegations by filing an answer and requesting a hearing.

Reynolds answered the petition on May 24, 2007. The answer did not request an accommodation to be permitted to remain on methadone maintenance treatment. Nursing Board Proceedings, MLR 22414-22417.

The matter was heard before a hearing examiner on July 11, 2007. At the hearing, Reynolds testified that the incident that led to her employer reporting her to the complaint office on February 18, 2005, was taking a single Restoril for sleep. Board Proceedings, MLR 22362. She did not mention her history on benzodiazepine use and the attempts to have her detoxed.

The hearing examiner noted that the parties stipulated to the violation of the consent agreement as alleged in the petition for relief, and the Reynolds would present only mitigating evidence at the hearing. Board Proceedings MLR 22350. At her hearing, neither Reynolds nor her counsel requested permission for her to remain on methadone as an accommodation. Indeed, Reynolds testified under oath

that she was committed to being detoxed off of methadone. Nursing Board Proceedings, MLR 22360.

In the hearing examiner's proposed adjudication and order, which was adopted by the Board, he found that Reynolds did not enroll in FirstLab and, consequently, had not submitted any random unannounced and observed body fluid toxicology screens. Reynolds PHMP File, MLR 995. He found that she also failed to submit monthly verification that she was attending support group meetings. *Id.* He found that she also failed to comply with her evaluation treatment recommendation that she enter inpatient treatment and be weaned from methadone. *Id.* He declined, however, to recommend a full three-year suspension in light of Reynolds' mitigating evidence. He recommended, instead, suspending her license for no less than three years with the suspension to be stayed when Reynolds provides the Nursing Board with an evaluation from an approved treatment provider that she was safe to practice nursing.

No exceptions were filed to the proposed adjudication suspending Reynolds' license due in part to her failure to enter inpatient treatment and be weaned from methadone, Reynolds PHMP File, MLR 995, and on September 18, 2007, the Nursing Board entered its final order and adopted the hearing examiner's proposed adjudication. Reynolds PHMP File, MLR 979-980. Reynolds did not appeal the final order suspending her license.

On June 26, 2009, Reynolds was arrested for Driving Under the Influence of a Controlled Substance among other charges. Monroe County Court of Common Pleas Docket CP-45-CR-0001454-2009, MLR 19184-19191.

On September 18, 2010, Pocono Mountain Regional EMS was dispatched because Reynolds was found unresponsive in her home by a neighbor. According to the EMS record, Reynolds “initially denied use of narcotics but stated that she had taken her prescribed Methadone and Xanax within 20 minutes of each other at an unspecified time earlier in the evening.” Pennsylvania EMS Report, MLR 21432-21437.

Then, on June 20, 2011 Reynolds was involved in a car accident and taken to St. Luke’s Hospital. The assessment of the Emergency Room attending physician was that she suffered from an altered mental status. St. Luke’s Hospital Record, MLR 19962. An initial drug screen showed that she tested positive for benzodiazepines, methadone and tricyclic antidepressants. The attending physician noted that Reynolds was currently lethargic. St. Luke’s Hospital Record, MLR 19963, 19981.

On August 19, 2011, Reynolds was arrested for, among other charges, Driving Under the Influence of a Controlled Substance and Driving while Operator’s Privilege is Suspended or Revoked. Criminal Complaint MLR 21608-21613. Toxicology reports showed the presence of, among other drugs, Diazepam

(Valium) and Alprazolam (Xanax) and their metabolites, as well as methadone. Criminal Complaint 21613; Limoges Report at 9.

An NDTs Incident Report dated October 5, 2011, describes an incident in which Reynolds and another client were seen on camera passing pills to one another in the waiting room. NDTs Records, MLR 18092. In a progress note dated November 22, 2011, Reynolds' counselor states: "Client continues to produce negative urine specimens but reports she may take an extra pill when situations become too stressful." NDTs Records, MLR 18742. On November 23, 2011, counselors at NDTs discovered Reynolds in the waiting room slumped in the seat hanging over the side of her chair. When roused by a counselor, she spoke with very slurred words and her conversation was rambling. NDTs record, MLR 18744. Dr. Wilson of New Directions saw Reynolds the same day and noted that Reynolds "[a]ppears to be very lethargic. Will actually fall asleep in middle of a sentence. Some of her conversation is rambling and subject matters do not relate to each other." Dr. Wilson's assessment was that Reynolds was under the influence and she suspected that she had taken Xanax in the waiting room. NDTs record, MLR 18738.

On November 28, 2011, the following was entered in Reynolds' progress notes: "Presents with garbled speech. Unable to complete a sentence. Security found outside getting pills from another client." NDTs record, MLR 18739. On

December 6, 2011, Reynolds counselor at New Directions wrote a follow-up note to the incident of November 28, 2011: “During patients last clinic attendance, on Monday 11/28/11 patient was seen by the agency Nurse Practitioner, and the Intake Coordinator as a result of patient appearing off balanced heavily sedated and in danger of her self. As a result, according to the medical records an incident report was completed by the nurse practitioner and EMS was called as client was assessed and taken to Muhlenberg Lehigh Valley Hospital in Bethlehem. It is unclear if client was discharged or left AMA or if a toxicology was completed.” NDTs record, MLR 18742.

Reynolds’ urine tests showed she took cocaine and opiates. NDTs Records, MLR 17772, 17776, 17777, 17884, 17945, NDTs Records (produced by plaintiff), PMLR 416, 417-18; Limoges Report at 7.

On February 18, 2012, Reynolds was found lying on the side of a road. She was transported to Pocono Medical Center and was pronounced dead. The autopsy report of Reynolds’ death states the death was caused by “mixed substance toxicity and hypothermia.” Autopsy Report at 2. Found in her blood were methadone; EDDP, a methadone metabolite; and Alprazolam (Xanax), which is a benzodiazepine. Autopsy Report at 1.

Dr. Richard F. Limoges is a physician certified in Psychiatry and Addiction Psychiatry. He is a professor in the University of Pennsylvania School of

Medicine in the psychology department and is also on the medical staff there. He has expertise in addictions and alcoholism and evaluating impaired professionals. Limoges Report, Curriculum Vitae.

His opinion to a reasonable degree of medical certainty is that Reynolds was not qualified to practice practical or professional nursing during the time period beginning May 8, 2007, or any time thereafter. Limoges Report 11. Dr. Limoges states, given Reynolds' continued deterioration, "either methadone or benzodiazepines had to be discontinued. ... In order for her to practice nursing safely and prudently and in a predictable manner, Ms. Reynolds had to discontinue one or the other medication. This must be a requirement for a person responsible for the life and well-being of another." Limoges Report at 9. Reynolds refusal or inability to discontinue either of these drugs rendered her unqualified to practice nursing: "Thus, not having dealt with this significant pervasive disorder, she continued to remain not qualified to practice practical or professional nursing." Limoges Report at 6-7.

STATEMENT OF QUESTIONS INVOLVED

1. Do the undisputed facts show that Reynolds' license was suspended for non-compliance with a Nursing Board Consent Order and not by reason of her disability?

2. Do the undisputed facts show that methadone maintenance treatment was not a reasonable accommodation for Reynolds?
3. Do the undisputed facts show that Reynolds never requested an accommodation to be permitted to continue her methadone treatment?
4. Do the undisputed facts show that Reynolds was not otherwise qualified to practice nursing?
5. Should the individual defendants be dismissed from this action?
6. Should this court abstain from hearing this case?
7. Is plaintiff's ADA claim barred by the Eleventh Amendment?

ARGUMENT

I. THE UNDISPUTED FACTS SHOW THAT REYNOLDS' LICENSE WAS SUSPENDED FOR HER NON-COMPLIANCE WITH A NURSING BOARD CONSENT ORDER AND NOT BY REASON OF HER DISABILITY

Title II of the ADA, 42 U.S.C. § 12132, 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.” The Rehabilitation Act, 29 U.S.C. § 794(a), provides: “No otherwise qualified individual with a disability ... 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....” In the case of *Inmates of Allegheny County Jail v. Wecht*, 93 F.3d 1124, 1136 (3d Cir.1996), the Court of Appeals explained that the substantive legal standards governing claims under the Rehabilitation Act and Title II of the ADA are largely identical:

Although the language of the two statutes differs slightly – e.g., the Rehabilitation Act protects against discrimination “solely by reason of ... disability,” whereas the ADA protects against discrimination “by reason of ... disability”-the standards under the two statutes are identical. *McDonald v. Pennsylvania Department of Public Welfare*, 62 F.3d 92, 94 (3d Cir.1995) (“Whether suit is filed under the Rehabilitation Act or under the Disabilities Act, the substantive standards for determining liability are the same.”). We have held that there are four elements for establishing a violation of section 504:(1) that the plaintiff is an “individual with a disability” as defined under the Act, (2) that the plaintiff is “otherwise qualified” for the program sought or that the plaintiff would be qualified if the defendant made reasonable modifications to the program, (3) that the plaintiff was excluded from the program “solely by reason of her or his disability,” and (4) that the program receives federal funds. *Wagner v. Fair Acres Geriatric Center*, 49 F.3d 1002, 1009 (3d Cir.1995). With the exception of the fourth element, which is not pertinent to a claim brought under the ADA, the elements of a claim under Title II of the ADA are interchangeable with the elements of a claim under section 504. Thus, an ADA Title II claimant must show (1) that the plaintiff is “qualified” or that the plaintiff would be qualified if the defendant made reasonable modifications, (2) that the plaintiff has a “disability,” and (3) that “by reason of such disability,” the plaintiff was excluded from a service, program, or activity provided by a public entity.

Accord Bowers v. National Collegiate Athletic Association, 475 F.3d 524, 553 n. 32 (3d Cir.2007). In essence, Title II of the ADA applies the Rehabilitation Act standard to all public entities, regardless of whether they receive federal funds. *Id.*

Further, under both the ADA and the Rehabilitation Act, drug addiction is included within the meaning of disability, where the impairment is not due to the

“current illegal use of drugs.” 28 C.F.R. § 35.104. Thus, a recovering drug addict with a record of drug addiction may be considered disabled under the ADA or Rehabilitation Act, but individual currently using illegal drugs is not considered disabled. The illegal use of drugs “does not include the use of a drug taken under supervision by a licensed health care professional, or other uses authorized by the Controlled Substances Act or other provisions of Federal law.” *Id.*

In light of the Supreme Court’s ruling in *Grioss v. FBL Fin. Servs.*, 557 U.S. 167 (2009), courts in this Circuit have concluded that the mixed-motive analysis does not apply to ADA claims. *See Warshaw v. Concentra Health Servs.*, 719 F.Supp.2d 484, 502 (E.D.Pa.2010); *see also Cottrell v. Good Wheels*, No. Civ. 08 – 1738, 2011 WL 900038, *6 n. 5 (D.N.J. March 15, 2011). Rather, “the ADA’s ‘by reason of’ language requires a showing of causation: the plaintiff must demonstrate that, but for the failure to accommodate, he would not be deprived of the benefit he seeks.” *Muhammad v. Court of Common Pleas of Allegheny Country*, No. 11–3669, 2012 WL 1681861, at *2 (3d Cir. May 15, 2012) (citing *Good Shepherd Manor Found., Inc. v. City of Momence*, 323 F.3d 557, 561–62 (7th Cir.2003)).

Here, it is clear from the record that the reason that the Nursing Board suspended Reynolds’ license was because she had not complied with terms of the Consent Agreement and Order entered adopted by the Board on January 4, 2007. One of the ways in which Reynolds breached the agreement was her failure follow

the recommendation of her treatment provider to be to be detoxed off of methadone. But, that was not the sole reason that the Nursing Board suspended her license. She had also violated the agreement in other respects – particularly her failure to arrange for and to submit to random and observed body fluid screenings (ROBS) and her failure to provide written verification of support group attendance. Given these serious violations, Reynolds’ license would have been suspended regardless of her compliance with her treatment provider’s recommendation that she be detoxed from methadone.

The Consent Agreement she entered into in response to the initial Rule to Show Cause required, among other things, that Reynolds provide written verification of support group attendance, submit to random drug tests as directed by PHMP and arrange to have forwarded to PHMP a copy of her approved evaluation. Board Proceedings, MLR 22391-22410. Board Proceedings, MLR 22432. The agreement also required that Reynolds be evaluated by her treatment provider, Board Proceedings, MLR 22396-22397, and that she fully comply with any treatment recommendations made by the provider. Board Proceedings, MLR 22397. The agreement provided that violation of its terms and conditions would result in immediate termination of Reynolds’ probation period. Board Proceedings, MLR 22432.

In a letter to Reynolds on March 5, 2007, Ms. Harris, notified her of the following instances of non-compliance with the Board Order: “failing to provide Release of Information and other related materials in reference to your Evaluation & Treatment. Failure to set-up and provide ROBS; failure to provide Support Group Verification Sheets since entering the Program in January, 2007 and failure to ensure that written reports were sent to this Office by your Employer and Treatment Providers.” Reynolds PHMP File, MLR 890. In her memo of April 24, 2007, to Heidy Weirich in the Complaints section, Harris reiterated these same violations. Reynolds PHMP File, MLR 881. Harris also told Weirich that Reynolds had failed to comply with treatment recommendations from her provider in that she had not entered inpatient treatment to be weaned from methadone. Board Proceedings, MLR 22387-22388.

The Commonwealth’s May 9, 2007, Petition for Appropriate Relief to the Probable Cause Screening Committee of the State Board of Nursing reiterated that Reynolds had violated the terms of the consent agreement by, among others, failing to begin submission of her body fluid toxicology screens, failing to submit written verification that she attended support group meetings, failing to submit an assessment by a PHMP-approved provider and failing to comply with treatment recommendations from her provider in that she had not entered inpatient treatment

to be weaned from methadone. Board Proceedings, MLR 22387-22388. These violations were stipulated to by Reynolds. Board Proceedings MLR 22350.

Finally, and most importantly, in the hearing examiner's proposed adjudication and order, which was adopted by the Board, he found that Reynolds did not enroll in FirstLab and, consequently, had not submitted any random unannounced and observed body fluid toxicology screens. Reynolds PHMP File, MLR 995. He found that she also failed to submit monthly verification that she was attending support group meetings. *Id.* He found that she also failed to comply with her evaluation treatment recommendation that she enter inpatient treatment and be weaned from methadone. *Id.*

Thus, it is clear that Reynolds' failure to enter a treatment program to be weaned for methadone was not the only reason for terminating her probation period. The hearing examiner equally emphasized her failure to submit toxicology screenings – without which her PHMP monitors could not determine whether or not she remained drug free – and her failure to verify that she was attending support group meetings as agreed in the consent order as reasons for the termination. There is nothing in the record to suggest that these were not among the actual reasons for the determination of the hearing examiner and Board, and did not provide sufficient basis for the suspension without her failure to enter into a treatment program to be detoxed from methadone. Therefore, plaintiff cannot

show that that her license was suspended solely by reason of her disability, namely her methadone dependence.

In addition, although in suspending her license the Board did not exclusively rely on Reynolds' failure to follow treatment recommendations to be weaned from methadone, even if considered alone, this basis for its decision is not evidence that Reynolds was discriminated against because she was receiving methadone maintenance treatment. Rather, Reynolds' concurrent dependence on benzodiazepines placed her at a special risk for using methadone.

It is clear that the basis for A Better Today's recommendation for Reynolds to enter a detoxification unit was not based on a flat rejection of all methadone treatment for opiate addiction but, instead, was due to the danger of using methadone while also taking benzodiazepines: "Based on the physiological nature of her current ongoing dependence to Xanax and Methadone, Ms. Reynolds was directed to enter into a level 3A Medical Detoxification Unit before being admitted to out-patient therapy with A Better Today." Reynolds PHMP File, MLR 967.

A Better Today was not the first medical provider to express concern over the possible danger of drug interaction from Reynolds' mixed benzodiazepine use and her methadone treatment. In September 2003, Morris After Care Services advised her to get off "benzos" and then sent her to St. Claire Hospital medical unit

in Dover “for detox from benzodiazepines.” Morris County After Care Records, MLR 17656, 17657, 17662.

In the fall of 2004, New Directions Treatment Services also tried to detox her from benzodiazepines. NDTS Records, MLR 18530, 18528. After that effort proved unsuccessful, NDTS Records, MLR 18526, in late February and early March, 2005, New Directions reached the same conclusion as A Better Today – and directed Reynolds to a mandatory detox from methadone. NDTS Records, MLR 18724, 18725.³

Dr. Limoges in his report likewise points out the “perils of combining methadone and benzodiazepines.” He notes the “life-threatening synergistic effects of these two medications, especially on CNS [central nervous system] functioning and on respiratory functions.” Limoges Report at 7.

Indeed, the concerns of Morris County After Care, New Directions and A Better Today were well-founded. The autopsy report of Reynolds’ death states the death was caused by “mixed substance toxicity and hypothermia.” Autopsy Report at 2. Found in her blood were methadone; EDDP, a methadone metabolite; and Alprazolam (Xanax), which is a benzodiazepine. Autopsy Report at 1.

³ Although New Directions later backed away from requiring that Reynolds detox from methadone, nothing in the record suggest that her continued use of multiple drugs was no longer a concern. NDTS Records, MLR 18375-18377, 18518, 18724.

Accordingly, Reynolds' license was not suspended due to any Nursing Board policy prohibiting nurses from practice while receiving methadone maintenance treatment. Instead, the facts of this case show that her license was suspended because she failed to comply with the terms of the consent agreement she had signed. Two of the conditions she failed to meet were unrelated to her methadone use. A third condition she failed to meet – her failure to enter a program to be weaned from methadone – did not relate to any blanket policy forbidding licensed nurses from receiving methadone maintenance treatment, but to the dangers of her taking concurrently taking benzodiazepines and methadone. Therefore, Reynolds' license was not suspended due to simply her participation in methadone maintenance therapy.

II. FOR REYNOLDS, METHADONE MAINTENANCE TREATMENT WAS NOT A REASONABLE ACCOMMODATION

The amended complaint contends that Reynolds was excluded “from being licensed to practice in her profession because of defendants’ ongoing refusal to permit her to receive methadone maintenance treatment as an accommodation to treat her drug dependency.” Amended Complaint ¶1. Because plaintiff was also dependent on benzodiazepines, allowing her to continue on methadone was not a reasonable accommodation.

Under the ADA and the Rehabilitation Act, public entities are 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,” 28 C.F.R. § 35.130(b) (7), or would produce undue burden. 28 C.F.R. § 35.150(a) (3).

Here, as discussed in the prior section, because of the threat to her health and risk of impairment, allowing Reynolds to practice while receiving methadone maintenance treatment at a time when she was also dependent on benzodiazepines was not a reasonable accommodation.

As discussed in the prior section, a number of Reynolds’ providers recognized that her dependence on benzodiazepines placed her at a special risk for using methadone. These providers included Morris County After Care, Morris County After Care Records, MLR 17656, 17657, 17662; New Directions Treatment Services, NDTS Records, MLR 18724, 18725, 18526, 18528, 18530; and A Better Today, Reynolds PHMP File, MLR 967.

Even Gastroenterology Associates, Ltd., which recommended that Reynolds continue on the benzodiazepines, had concerns about the combination: “[I]t does appear that ... Xanax may not be the best medication for someone with a history like Malinda [sic]. ...” However, “I do continue to feel that the benefit from eradicating the virus from the system, far outweighs the risk of harm of her taking Xanax, even with her history of addictions.” NDTS Records, MLR 18375.

Likewise, Dr. Limoges in his report likewise points out the “perils of combining methadone and benzodiazepines.”

The records also show that this combination of drugs caused Reynolds to be seriously impaired as revealed in a series of incidents. Cedar Point Records, MLR 21076 (observation on March 15, 2005, that Reynolds was “less aware in the daytimes,” “more groggy,” “tired in the afternoon,” and had “trouble concentrating.”); Monroe County Court of Common Pleas Docket CP-45-CR-0001454-2009, MLR 19184-19191 (on June 26, 2009, arrested for driving under the influence of a controlled substance); Pennsylvania EMS Report, MLR 21432-21437 (in September 2010, found unresponsive by neighbor after using methadone and Xanax within 20 minutes of each other); St. Luke’s Hospital Record, MLR 19962, 19963, 19981 (after an automobile accident in June 2011, Reynolds presented with an altered mental state and tested positive for benzodiazepines, methadone and anti-depressants); Criminal Complaint MLR 21608-21613, Limoges Report at 9 (in August 2011, she was again arrested for driving under the influence and tested positive for Valium, Xanax and methadone); NDTs record, MLR 18742, 18744, 18738, 18739 (on two occasions in November 2011, Reynolds appeared at New Directions as lethargic, incoherent, “under the influence” and a danger to herself.)

Here, it is clear that Reynolds' mixed use of benzodiazepines and methadone was not safe for herself and also would seriously compromise her ability to work as a nurse. Under these circumstances, to allow Reynolds to work while continuing her methadone maintenance therapy and taking benzodiazepines was not a reasonable accommodation.

III. THE UNDISPUTED FACTS SHOW THAT REYNOLDS NEVER REQUESTED AN ACCOMMODATION TO BE PERMITTED TO CONTINUE HER METHADONE TREATMENT

The ADA and Rehabilitation Act only imposes a responsibility on a public entity to make a reasonable accommodation when it is asked to do so. “[B]efore a district court can assess whether a plaintiff has met his or her burden of establishing each of the elements of a prima facie case, the plaintiff must show that a special accommodation of a disability was, in fact, requested.” *Colon-Jimenez v. GR Management Corp.*, 218 Fed.Appx. 2, 3 (1st Cir. 2007). “A routine or ‘mundane’ request, such as a request to transfer to a different apartment, does not rise to the level of a request for a reasonable accommodation unless the plaintiff specifically explains ‘how the accommodation requested is linked to some disability.’” *Id.* (quoting *Reed v. LePage Bakeries, Inc.*, 244 F.3d 254, 260, 261 (1st Cir.2001)). *See Tips v. Regents of Texas Tech University*, 921 F.Supp. 1515, 1518 (N.D.Tex.1996) (holding that the plaintiff failed to establish a prima facie case because the postgraduate student did not make her learning disability known

to the school); *Oconomowoc Residential Programs, Inc. v. City of Greenfield*, 23 F.Supp.2d 941, 955 (E.D.Wis.1998)(“FHAA or ADA plaintiffs have the burden of seeking an accommodation before seeking relief in a judicial forum.”)(citing *Oxford House–A v. City of Univ. City*, 87 F.3d 1022, 1024–25 (8th Cir.1996)).

Here, the record shows that Reynolds never requested permission to receive methadone maintenance treatment as an accommodation to allow her to continue practicing nursing. Reynolds, represented by counsel, did not make any request for accommodation in response to the original Rule to Show Cause filed before the Nursing Board on October 5, 2006. Likewise, she did not request an accommodation in her answer to the Petition for Appropriate Relief filed on May 24, 2007. Nursing Board Proceedings, MLR 22414-22417. At her hearing before the Board, neither Reynolds nor her counsel requested permission for her to remain on methadone as an accommodation. Indeed, Reynolds testified under oath that she was committed to being detoxed off of methadone. Nursing Board Proceedings, MLR 22360.

Finally, no exceptions were filed to the proposed adjudication suspending Reynolds’ license due in part to her failure to enter inpatient treatment and be weaned from methadone, Reynolds PHMP File, MLR 995. And no appeal was taken from the final order suspending her license.

Throughout the entire proceedings before the Board, Reynolds never asked for an accommodation. It was Reynolds' "responsibility to put [the Board] "on notice by making 'a sufficiently direct and specific request for special accommodations.'" *Gill v. Franklin Pierce Law Center*, 899 F.Supp. 850, 855 (D.N.H.1995) (quoting *Nathanson v. Med. Coll. of Pa.*, 926 F.2d 1368, 1381 (3d Cir.1991)). Her failure to make such a request requires that judgment be granted in defendants' favor.

IV. REYNOLDS WAS NOT OTHERWISE QUALIFIED TO PRACTICE NURSING

Title II of the ADA prohibits the exclusion of otherwise qualified participants from any program or benefits on account of their disability. 42 U.S.C. § 12132. Title II of the ADA states, "[n]o 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. Thus, a claim under the ADA requires, among other things, that the plaintiff is otherwise qualified for the program sought or would be qualified if the defendant made reasonable modifications to the program. *See Wagner v. Fair Acres Geriatric Ctr.*, 49 F.3d 1002, 1009 (3d Cir.1995).

Title II of the ADA defines a "qualified individual with a disability" as:

an individual with a disability who, with or without reasonable modifications to the rules, policies, or practices, the removal of architectural, communication, or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

42 U.S.C. § 12131(2).

Here, as outlined in the report of Dr. Limoges, Reynolds was not otherwise qualified for a nursing license. Dr. Limoges concluded that Reynolds was not qualified to engage in the practice of nursing primarily because of “her continued abuse of concomitant benzodiazepines and methadone and the effect they produced on Ms. Reynolds’ behavior, judgment and cognition....” Limoges Report at 11. As previously discussed in this brief, Reynolds’ medical records show attempts to detox her from the benzodiazepines at least twice – once at St. Claire Hospital in 2003, Morris County After Care Records, MLR 17662, and once at New Directions in 2004, NDTS Records, MLR 18528, 18530. Further, New Directions was willing to detox her off methadone in 2005, due to her use of other drugs. NDTS Records, MLR 18724, 18715; *see* Limoges Report at 6.

As Dr. Limoges, points out, however, Reynolds never seemed to appreciate the peril she faced. Reynolds minimized her benzodiazepine use in the license suspension hearing on July 11, 2007. She claimed, for example, that the incident that led to her employer reporting her to the complaint office on February 18, 2005, was taking a single Restoril for sleep. Board Proceedings, MLR 22362.

But the medical records show that her problems with benzodiazepines at the time were much more serious than a single pill. On February 23, 2005, Dr. Wilson of new Directions noted that Reynolds had supplemented benzodiazepines during detox, NDTs Records, MLR 17969, and when she spoke to Dr. Vellaluz about it, Vellaluz told her “that a person using 10 mg Xanax is not using it for therapeutic reasons.” *Id.* On February 14, 2005, there is a note stating that Reynolds had resumed use of benzodiazepines and that she “appears under the influence today.” NDTs Records, MLR 17938. Also, on February 14, 2005, Reynolds received notice that “due to (5) consecutive positive urines, you are now on Program Probation.” NDTs Records, MLR 18726. Plaintiff fails to acknowledge in any of the proceedings before the Nursing Board her serious dependence on benzodiazepines. *See* Limoges Report at 2-4 6-7.

As Dr. Limoges also points out, Reynolds’ offhand attitude toward her benzodiazepine dependence shows up in her medical record. On April 12, 2004, her counselor notes that she “also seems to minimize her use and make light of it.” NDTs Records, MLR 18576. And when confronted on February 3, 2005, with the fact that Reynolds had supplemented her benzodiazepine use during detox, Dr. Wilson notes, “She admitted she had. She feels she doesn’t abuse benzos and uses them for her anxiety.” NDTs Records, MLR 17969. Later, when informed that her urine had come back positive for Xanax when she had been approved only for

Klonopin, “client had very little to say.” He counselor later in the same note states: “Seemingly client did not count on the urine to break down the types of Benzo and has been taking them for a while for them to show up in your system.” NDTs Records, MLR 18564. As Dr. Limoges points out, Reynolds failure to acknowledge her drug dependency prevented her from being able to change her life. “Thus, not having dealt with this significant pervasive disorder, she continued to remain not qualified to practice practical or professional nursing.” Limoges Report at 6-7.

It is also clear that Reynolds’ use of benzodiazepines went beyond any prescription and that she was abusing them. A written case consultation note of June 7, 2004, states, “Presently, client continues to use benzo’s without the support of a treating psychiatrist.” NDTs Records, MLR 18586. On August 24, 2005, Reynolds’ counselor noted: “Additionally she is exhibiting addictive behaviors by not informing her treating psychiatrist about the additional Xanax she is taking.” NDTs Records, MLR 18564. In her arrest report of August 19, 2011, it stated that toxicology reports showed the presence of, among other drugs, Diazepam (Valium) and Alprazolam (Xanax) and their metabolites, as well as methadone. Criminal Complaint 21613; Limoges Report at 9. In addition, New Directions’ records show several instances in which it was discovered that Reynolds obtained pills from other patients. NDTs Records, MLR 18092, 18739.

Not only did Reynolds abuse benzodiazepines, but her urine tests showed also abused cocaine and opiates. NDTs Records, MLR 17772, 17776, 17777, 17884, 17945, NDTs Records (produced by plaintiff), PMLR 416, 417-18; Limoges Report at 7.

Reynolds' drug abuse manifested itself in extreme lethargy and incoherence in speech. These instances are noted throughout her treatment and criminal records. Cedar Point Records, MLR 21076; St. Luke's Hospital Record, MLR 19963, 19981; NDTs Record, MLR 17938, 18738, 18739, 18742, 18744; Criminal Complaint MLR 21613; Pennsylvania EMS Report, MLR 21432-21437; see Limoges Report at 9-10.

As Dr. Limoges states, given Reynolds' continued deterioration, "either methadone or benzodiazepines had to be discontinued. ... In order for her to practice nursing safely and prudently and in a predictable manner, Ms. Reynolds had to discontinue one or the other medication. This must be a requirement for a person responsible for the life and well-being of another." Limoges Report at 9. Reynolds refusal or inability to discontinue either of these drugs rendered her unqualified to practice nursing.

V. THE INDIVIDUAL DEFENDANTS SHOULD BE DISMISSED FROM THIS ACTION.

In its decision, granting in part and denying in part defendants' motion to dismiss, this Court ruled that the individual defendants could not be held liable for

damages under the ADA or the Rehabilitation Act. Memorandum of June 21, 2010 at 23 (Document 36). Now that the original plaintiff, Reynolds, is deceased, plaintiff's request for declaratory relief (Count One) and injunctive relief (Count Two) is moot. *See Gibbone v. D'Amico*, No. Civ.05-2225, 2005 WL 2009896, at *5 (D.N.J. Aug. 15, 2005) ("Thus, to the extent that the Complaint seeks such declaratory and injunctive relief, the claim must be dismissed as moot due to Gibbone's death."). Accordingly, plaintiff can obtain no relief against the individual defendants and they should be dismissed from the action.

VI. THIS COURT SHOULD ABSTAIN FROM HEARING THIS CASE

In defendants' motion to dismiss plaintiff's amended complaint, they argued that this Court should abstain from hearing this case under *Younger* abstention principles. *See Younger v. Harris*, 401 U.S. 37 (1971). This court disagreed and denied the motion to dismiss on abstention grounds.

Defendants raise the issue again at summary judgment for two reasons. First, defendants want to ensure that the issue is preserved for appeal. Second, the Court based its decision, as it should have, on the allegations of the amended complaint. Defendants believe, however, that the undisputed facts of this case show that *Younger* abstention is applicable here and requires judgment in defendants' favor.

“Younger abstention reflects a strong federal policy against federal-court interference with pending state judicial proceedings absent extraordinary circumstances.” *Adams v. Lynn*, 472 Fed.Appx. 125, 128 (3^d Cir. 2012) (citation omitted). A district court may abstain on *Younger* grounds when three conditions are met: (1) there are pending or ongoing state judicial proceedings; (2) the state proceedings implicate important state interests; and (3) the state proceedings afford an adequate opportunity to raise any constitutional issues. *See O’Neill v. City of Philadelphia*, 32 F.3d 785, 789 (3d Cir.1994).

There is no dispute that the states have an interest in ensuring the proper conduct of their licensed professionals. *Middlesex County Ethics Committee v. Garden State Bar Assn.*, 457 U.S. 423, 434 (1982) (recognizing the important state interest in “maintaining and assuring the professional conduct of the attorneys it licenses.”); *Doe v. Conn., Dep’t of Health Servs.*, 75 F.3d 81, 85 (2d Cir.1996) (ruling state “legislative scheme for disciplining doctors serves important and obvious public health objectives”); *Bettencourt v. Bd. of Registration in Med.*, 904 F.2d 772, 778 (1st Cir.1990) (ruling that enforcing proper standards of medical licensing “obviously implicate[s] important state interests”).

In addition, while the proceeding before the Nursing Board concluded on September 18, 2007, Reynolds PHMP File, MLR 979-980, it remains “pending,” within the meaning of *Younger* abstention because Reynolds did not exhaust her

administrative and judicial remedies. Indeed, where the claimants have chosen not to pursue their state-court judicial remedies, but have instead sought to invalidate the administrative decision by filing a federal action, state proceedings are considered still pending under *Younger*. *O'Neill v. City of Philadelphia*, 32 F.3d at 791. In *Huffman v. Pursue, Ltd.*, 420 U.S. 592, 608 (1975), the Supreme Court stated that “a necessary concomitant of *Younger* is that a party must exhaust his state appellate remedies before seeking relief in the District Court.” Thus, “a party may not procure federal intervention by terminating the state judicial process prematurely – forgoing the state appeal to attack the trial court's judgment in federal court.” *New Orleans Pub. Serv., Inc. v. Counsel of City of New Orleans*, 491 U.S. 350, 369 (1989). Indeed, “a defendant to a coercive administrative proceedings must exhaust his state administrative and judicial remedies and may not bypass them in favor of federal court proceeding in which he seeks effectively to ‘annul the results’ of a state administrative body.” *Moore v. City of Asheville, N.C.*, 396 F.3d 385, 388 (4th Cir.2005).

Here, plaintiff's failure to either submit exceptions to the proposed adjudication or appeal the final order, Reynolds PHMP File, MLR 979-980, means that, for *Younger* purposes, the state action is still pending.

As for the third *Younger* prerequisite – that the state proceedings afford an adequate opportunity to raise any constitutional issues – this Court held on

reconsideration that, based on the allegations of the amended complaint, “that plaintiff did not have a remedy in state court, and thus, cannot be faulted for not appealing the Board’s decision.” Order of August 9, 2010, at 3 (Document 42). The Court went to say that “[p]laintiff alleges that the decision allowed her to retain her nursing license if she agreed to enter a rehabilitation program, and nothing in the decision forbade the use of a program that offered methadone maintenance. Plaintiff thus had nothing to appeal in the Board’s decision.”

While a motion to dismiss challenges the sufficiency of the pleadings, the mission of the summary judgment procedure is to pierce the pleadings and to assess the proof in order to see whether there is a general need for trial. *See* Fed.R.Civ.P. 56, 1963 Advisory Committee Notes. Here, the undisputed facts show that the order of the Nursing Board suspending Reynolds’ license was, in part, based on Reynolds’ failure to enter inpatient treatment and be weaned from methadone. Reynolds PHMP File, MLR 995. In fact, Reynolds’ failure to enter inpatient treatment to be weaned from methadone was one of the grounds on which the Petition for Appropriate Relief sought immediate termination of her period of probation and suspension of her license. Board Proceedings, MLR 22387-22388.

Certainly, Reynolds could have appealed the Board decision on the ground that requiring her to be detoxed from methadone violated the ADA and the Rehabilitation Act. Because Reynolds could have raised her ADA and

Rehabilitation Act claims in an appeal to Commonwealth Court, her failure to do so requires this Court to abstain under the *Younger* decision.

VII. PLAINTIFF'S ADA CLAIM IS BARRED BY THE ELEVENTH AMENDMENT

Defendants also argued in support of their motion to dismiss that plaintiff's ADA Title II claim was barred by the Eleventh Amendment. Defendants contend that, because Congress has not developed a legislative record of discrimination in the issuance or suspension of professional licenses by the states, it has not properly abrogated the Eleventh Amendment as to disability discrimination in licensing. Defendants recognize that the Court has ruled on this issue, but assert it again on summary judgment to ensure its preservation for appeal.

CONCLUSION

For the foregoing reasons, summary judgment should be granted in defendants' favor and against plaintiff.

Respectfully submitted,

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Date: November 20, 2012

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

**MELINDA LAMBERSON
REYNOLDS,**

Reynolds

v.

**COMMONWEALTH OF
PENNSYLVANIA, ET AL.,**

Defendants

**CIVIL ACTION
NO. 3:09-cv-1492**

(Judge Munley)

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CERTIFICATE OF SERVICE

I, Michael L. Harvey, Senior Deputy Attorney General, Commonwealth of Pennsylvania, hereby certify that on November 20, 2012, I caused to be served a copy of the foregoing document titled Brief in Support of Defendants' Motion for Summary Judgment:

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