

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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KENNETH FOWLER,

Plaintiff,

v.

LIZZIE TEGELS, MELINDA DERUS,  
MS. DOUGHERTY, DR. REYNOLDS,  
DR. LUI, and TAMMI MAASEN,

Defendants.

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OPINION & ORDER

19-cv-704-wmc

Plaintiff Kenneth Fowler filed this civil action pursuant, claiming that defendants have been violating his rights under the Americans with Disabilities Act by denying him access to the Wisconsin Talking Book Program. Fowler's complaint is ready for screening pursuant to 28 U.S.C. § 1915A, and he has renewed his motion for assistance in recruiting counsel (dkt. #12). For the following reasons, the court will grant Fowler leave to proceed on an ADA and Rehabilitation Act claim against the Wisconsin Department of Corrections ("DOC"), but will deny without prejudice his motion for assistance in recruiting counsel.

ALLEGATIONS OF FACT

Plaintiff Kenneth Fowler is currently confined by the DOC at Jackson Correctional Institution ("Jackson"). Fowler names six defendants: Warden Lizzie Tegels; ADA Coordinator Melinda Derus; Ms. Dougherty; Dr. Reynolds; Dr. Lui; and Tammie Maasen.

Fowler has a learning disability that impairs his ability to read and write, and the DOC's obligation to provide accommodations for his disability was the subject of a prior lawsuit before this court, *Fowler v. Wall*, No. 14-cv-028 (W.D. Wis. Jan. 13, 2014).

Pursuant to a settlement agreement in that case, Fowler was provided access to a number of devices that read documents aloud. However, the settlement agreement did not include a provision providing Fowler access to the Wisconsin Talking Book Program, which is part of a national network cooperating with the National Library Service for the Blind and Print Disabled (“NLS”), which provides audio books and braille materials to persons living in Wisconsin who cannot see regular print or handle print materials. *See* Wisconsin Talking Book and Braille Library, [dpi.wi.gov/talkingbooks](http://dpi.wi.gov/talkingbooks) (last visited Sept. 27, 2021).

At some point in 2019, Derus denied Fowler access to the Wisconsin Talking Book Program, apparently because Derus failed to submit his application materials properly, omitting a signature from a doctor or psychologist. After his application was rejected, Fowler resubmitted one, this time with Dr. Lui’s signature, and the Talking Book Program was sent to Fowler at Jackson. When it arrived, however, security improperly turned the Talking Book Program over to the education department at Jackson, who then turned it over to the Inmate Complaint Department. Eventually the Talking Book Program made its way to Jerus, who wanted to confer with Fowler’s doctor about whether he actually was qualified for the program.

It is unclear when, but at some point, Fowler met with Jerus, who relayed that Fowler’s doctor still had not responded to her email about Fowler’s qualifications. Jerus ultimately denied Fowler’s application for the Talking Book Program, apparently based on Dr. Lui’s response that Fowler did *not* qualify for the program, as well as Dr. Reynolds’ assessment that the Talking Book Program should be returned. Fowler filed multiple inmate complaints about his denied access to the Talking Book Program, which Dougherty

denied.

## OPINION

Plaintiff seeks to proceed against all defendants on a claim under the Americans with Disabilities Act. To establish a violation of Title II of the ADA, a plaintiff “must prove [1] that he is a ‘qualified individual with a disability,’ [2] that he was denied ‘the benefits of the services, programs, or activities of a public entity’ or otherwise subjected to discrimination by such an entity, and [3] that the denial or discrimination was ‘by reason of’ his disability.” *Wagoner v. Lemmon*, 778 F.3d 586, 592 (7th Cir. 2015) (quoting *Love v. Westville Corr. Ctr.*, 103 F.3d 558, 560 (7th Cir. 1996) (citing 42 U.S.C. § 12132)). The Rehabilitation Act is substantially identical, and a claim under § 504 of the Act has four elements: (1) an individual with a disability; (2) who was otherwise qualified to participate; (3) but who was denied access solely by reason of disability; (4) in a program or activity receiving federal financial assistance (which all state departments of corrections do). *See Jaros v. Illinois Dep’t of Corr.*, 684 F.3d 667, 671-72 (7th Cir. 2012).<sup>1</sup>

Plaintiff’s allegations related to his dyslexia and how Jackson staff have handled his need for other accommodations permit a reasonable inference that he is disabled. It is likewise reasonable to infer, since he alleges that Dr. Lui signed his second application, that he was qualified to participate in the Talking Book Program, and that his inability to

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<sup>1</sup> The court will construe this claim as one arising under both the ADA and the Rehabilitation Act, since there is an open question in this circuit as to whether ADA violations not implicating constitutional rights may be brought in federal court. *See Norfleet v. Walker*, 684 F.3d 688, 690 (7th Cir. 2012).

participate in the program excluded him from services available to other prisoners, such as access to the same or similar materials from the library as non-disabled prisoners. That said, although plaintiff's allegations support an ADA/Rehabilitation Act claim, he has not identified a proper defendant, since the only appropriate defendant for a claim under the ADA and the Rehabilitation Act is the Wisconsin Department of Corrections. See 42 U.S.C. § 12131(1)(b); *Jaros v. Illinois Dep't of Corrections*, 684 F.3d 667, 670 n.2 (7th Cir. 2012). Therefore, plaintiff may not proceed on a claim against any of the named defendants, but the court will substitute the DOC as the defendant in this case and allow plaintiff to proceed on his claim against it.

Finally, the court is denying plaintiff's motion for assistance in recruiting counsel without prejudice. Although the court will accept that plaintiff has made reasonable efforts to recruit an attorney on his own, recruitment of counsel at this stage in this lawsuit is not necessary because the court is not persuaded that the legal and factual demands of this lawsuit exceed his abilities to represent himself further. See *Pruitt v. Mote*, 503 F.3d 647, 654-55 (7th Cir. 2007). This lawsuit was only just screened to proceed, and it will be scheduled for a telephonic preliminary pretrial conference shortly, during which Magistrate Judge Crocker will explain how this case will proceed, set the schedule, and follow up with a detailed order that memorializes the schedule and attaches this court's procedures. The court is sympathetic to just how challenging litigating this case may be, given the nature of plaintiff's disability, but it is simply too early in this lawsuit, and volunteer counsel are too scarce a resource, for this court to conclude that plaintiff needs the assistance of counsel at this stage. Plaintiff should use the resources available to him at Jackson to review these

materials, and then, if plaintiff finds he is still unable to meet the demands of this lawsuit without the help of an attorney, he may renew this motion.

## ORDER

IT IS ORDERED that:

- 1) Pursuant to Federal Rule of Civil Procedure 21, the Wisconsin Department of Corrections is added as a defendant. The caption is AMENDED to reflect that the Wisconsin Department of Corrections is the only defendant in this case.
- 2) Plaintiff Kenneth Fowler is GRANTED leave to proceed against the Wisconsin Department of Corrections on his claim that he was denied access to the Talking Book program in violation of the Americans with Disabilities Act and Rehabilitation Act.
- 3) Plaintiff is DENIED leave to proceed on any other claim, and defendants Tegels, Derus, Dougherty, Reynolds, Lui and Maasen are DISMISSED.
- 4) Pursuant to an informal service agreement between the Wisconsin Department of Justice and this court, copies of plaintiff's complaint and this order are being sent today to the Attorney General for service on the defendant. Under the agreement, the Department of Justice will have 60 days from the date of the Notice of Electronic Filing in this order to answer or otherwise plead to the plaintiff's complaint if it accepts service for the defendant.
- 5) For the time being, plaintiff must send the defendant a copy of every paper or document he files with the court. Once plaintiff has learned what lawyer will be representing the defendant, he should serve the lawyer directly rather than the defendant. The court will disregard any documents submitted by plaintiff unless plaintiff shows on the court's copy that he has sent a copy to the defendant or to the defendant's attorney.
- 6) Plaintiff should keep a copy of all documents for his own files. If plaintiff does not have access to a photocopy machine, he may send out identical handwritten or typed copies of his documents.
- 7) If plaintiff is transferred or released while this case is pending, it is plaintiff's obligation to inform the court of his new address. If he fails to do this and defendant or the court are unable to locate him, his claims may be dismissed for his failure to prosecute him.

8) Plaintiff's motion for assistance in recruiting counsel (dkt. #12) is DENIED without prejudice.

Entered this 27th day of September, 2021.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge