

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

HANNAH SABATA; DYLAN
CARDEILHAC; JAMES CURTRIGHT;
JASON GALLE; RICHARD GRISWOLD;
MICHAEL GUNTHER; ANGELIC
NORRIS; R.P., a minor; ISAAC REEVES;
ZOE RENA; and BRANDON
SWEETSER, on behalf of themselves and
all others similarly situated,

Plaintiffs,

vs.

NEBRASKA DEPARTMENT OF
CORRECTIONAL SERVICES; SCOTT R.
FRAKES, in his Official Capacity as
Director of the Nebraska Department of
Correctional Services; HARBANS DEOL,
in his Official Capacity as Director of
Health Services of the Nebraska
Department of Correctional Services;
NEBRASKA BOARD OF PAROLE;
JULIE MICEK, in her Official Capacity as
the Board of Parole Acting Parole
Administrator; and DOES 1 to 20,
inclusive,

Defendants.

8:17CV3107

**MEMORANDUM
AND ORDER**

This matter is before the Court on the joint partial Motion to Dismiss (Filing No. 34) for failure to state a claim and lack of subject-matter jurisdiction filed by Nebraska Department of Correctional Services (“NDCS”); Scott R. Frakes, in his official capacity as Director of the NDCS (“Frakes”); Harbans Deol, in his official capacity as Director of Health Services of the NDCS (“Deol”); Nebraska Board of Parole (“BOP”); and Julie Micek, in her official capacity as the BOP acting Parole Administrator’s (“Micek” and collectively, “defendants”). *See* Fed R. Civ. P. 12(b). For the reasons stated below, the

Motion is granted in part and denied in part, and the 42 U.S.C. § 1983 claims are dismissed against the NDCS and the BOP.

I. BACKGROUND

Plaintiffs Hannah Sabata (“Sabata”), Dylan Cardeilhac (“Cardeilhac”), James Curtright (“Curtright”), Jason Galle (“Galle”), Richard Griswold (“Griswold”), Michael Gunther (“Gunther”), Angelic Norris (“Norris”), R.P. (a minor), Isaac Reeves (“Reeves”), Zoe Rena (“Rena”),¹ and Brandon Sweetser (“Sweetser” and collectively, “plaintiffs”) are incarcerated² in Nebraska’s prison system. All of the plaintiffs except for Rena are alleged to be disabled under the Americans with Disabilities Act of 1990 (“ADA”), 42 U.S.C. § 12181 *et seq.*

On August 15, 2017, the plaintiffs filed the present action and proposed class action in which they allege the defendants have violated their civil and constitutional rights. The plaintiffs assert four claims and divide themselves into various classes and subclasses. The “NDCS Class” consists of all the defendants. The “Isolation Subclass” consists of all the defendants but Curtright, Gunther, and Sweetser. The “Disability Subclass” consists of all the defendants but Rena.

The first claim alleges that Frakes and Deol subject the NDCS class to a substantial risk of serious harm from inadequate health care in violation of § 1983 and the Eighth Amendment of the United States Constitution. The second claim alleges that the NDCS, Frakes, and Deol subject the Isolation Subclass to a substantial risk of serious harm from conditions in isolation in violation of § 1983, the Eighth Amendment, the ADA, and the Rehabilitation Act of 1973 (“Rehabilitation Act”), 29 U.S.C. 701 *et seq.*

¹Rena was incarcerated under the name Cassie Zoubek but has since legally changed her name.

²Sabata was incarcerated at the time of filing but has since been granted parole. The defendants, claiming mootness, have separately moved to dismiss her claims (Filing No. 49). That Motion is not addressed in this Memorandum and Order.

The third claim alleges that all the defendants deny the Disability Subclass the benefits of services, programs, or activities in violation of the ADA. The fourth claim alleges that all the defendants exclude the Disability Subclass from programs, services, and activities in violation of the Rehabilitation Act.

On November 6, 2017, the defendants filed a partial Motion to Dismiss (Filing No. 34). The defendants claimed (1) the plaintiffs lacked standing to pursue any claim against the BOP and Micek (collectively, “BOP Defendants”), (2) any claims against the BOP Defendants were not ripe, and (3) the plaintiffs’ § 1983 claims against the NDCS and BOP are barred by the State of Nebraska’s sovereign immunity as recognized under the Eleventh Amendment to the United States Constitution.

II. DISCUSSION

Although their motion professes to encompass both failure to state a claim and lack of subject-matter jurisdiction, the defendants make no argument that the plaintiffs have failed to state a claim under Federal Rule of Civil Procedure 12(b)(6). The defendants’ arguments, all categorized as dealing with subject-matter jurisdiction, are that the plaintiffs’ claims are barred by the doctrines of (1) standing, (2) ripeness, and (3) state sovereign immunity. The defendants’ first two arguments ask for the dismissal of the BOP Defendants as parties. The defendants’ third argument asks for the dismissal of any § 1983 claims against the BOP and the NDCS.

A. Standing

Article III of the United States Constitution requires any party presenting a claim before a federal court to have standing. *Spokeo, Inc. v. Robins*, 578 U.S. ___, ___, 136 S. Ct. 1540, 1547 (2016). “The plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision.” *Id.* The defendants first argue the plaintiffs have failed to affirmatively establish they are parole eligible, and, therefore, no injury could be fairly traceable to the conduct of the BOP Defendants. Second, the defendants

claim that, even if the plaintiffs are parole eligible, the plaintiffs have failed to substantively allege any concrete injury resulting from the actions of the BOP Defendants.

1. The Parole Process

A prisoner is “eligible for parole when the offender has served one-half the minimum term of his or her sentence.” Neb. Rev. Stat. § 83-1,110. The Nebraska parole process consists of four steps: (1) initial and ongoing prisoner reviews, (2) Key reviews, (3) prisoner interviews, and (4) parole hearings. The BOP must perform the initial review within one year of incarceration, and the frequency of the ongoing reviews is determined by the sentence length. Neb. Rev. Stat. § 83-192(1)(f). The reviews include “the circumstances of the offense, the presentence investigation report, the committed offender’s previous social history and criminal record, his or her conduct, employment, and attitude during commitment, and the reports of such physical and mental examinations as have been made.” *Id.* During the review, the BOP must also “meet with such committed offender and counsel him or her concerning his or her progress and prospects for future parole.” *Id.*

Any review that takes place within twelve months of a parole-eligibility date or after the eligibility date is known as a Key review. Neb. Parole Bd. R. § 4-201. In a Key review, the BOP must “advise the prisoner of specific tasks, action steps and recommendations that will give the [prisoner] his or her best chance at being granted parole” such as “completion of department programming, final risk and needs assessments, behavioral and reentry planning requirements, and maintaining a clean department discipline record.” *Id.*

At least two members of the BOP or a person designated by the BOP must perform a prisoner interview within sixty days before the prisoner’s parole-eligibility date. *Id.* § 4-202(A). If the reviewers decide “the offender is reasonably likely to be granted parole,” the BOP must schedule a parole hearing “set no sooner than 45 days

from the time of review.” *Id.* §§ 4-202(B), 4-301(A). At the hearing, the prisoner “may present evidence, call witnesses, and be represented by counsel.” *Id.* § 4-301(B). The BOP must then make a decision regarding release within a reasonable time. *Id.* § 4-301(D).

2. Allegations of Parole Eligibility

The defendants argue that the plaintiffs are required to plead facts affirmatively establishing that the defendants were parole eligible at the time of filing. In *Peck v. Battey*, the Eighth Circuit seemed to suggest an individual might lack standing to challenge parole policy when he was not eligible for parole at the time of filing. 721 F.2d 1157, 1159 (8th Cir. 1983). However, in a supplemental affidavit, the prisoner in *Peck* had shown he had later become eligible for parole but his parole was denied, and the circuit court concluded that “entitl[ed] [him] to his day in court.” *Id.* Another district court in this circuit has interpreted *Peck* to mean that a prisoner whose initial parole date has not yet come lacks standing to challenge a parole board. *Horse v. Young*, No. 4:14-CV-04137, 2016 WL 901256, at *6 (D. S.D. March 3, 2016) (citing *Peck*, 721 F.2d at 1159).³

In the Complaint, each plaintiff is identified as “serving a sentence that allows for parole eligibility pursuant to Neb. Rev. Stat. § 83-1,110. [Each plaintiff] intends to request a parole hearing once eligible to do so[.]”⁴ While it is true that every prisoner except for those serving life terms are automatically eligible for parole after serving half of their sentence, there is nothing in the Complaint about the length of the plaintiffs’

³It is possible this case is distinguishable from both *Peck* and *Horse*. In those cases, it did not appear the parole process began until the prisoner reached his or her parole date. Under Nebraska’s system, the parole process begins before the parole date, and the prisoner can interact with BOP officials to increase the probability of parole before the hearing.

⁴The first sentence is not completely accurate. Curtright, Griswold, and Gunther are all serving sentences of life to life. In Nebraska, any offender serving a life sentence is “ineligible for parole consideration until the sentence is commuted.” *Adams v. State Bd. of Parole*, 879 N.W.2d 18, 25 (Neb. 2016).

prison terms or the amount of time they have already served. However, the plaintiffs have since filed an Index (Filing No. 42) of evidence. The index of evidence contains specific information drawn from the public record about each prisoner's sentence. This evidence indicates four plaintiffs are currently past their parole-eligibility date. In addition, all of the plaintiffs, except for those three serving life sentences, have served at least one year and have begun the parole process by having their initial prisoner review. Because at least four of the plaintiffs are eligible for parole, and all but three have begun the process, at least some plaintiffs are subject to the BOP rules and can adequately allege damages attributable to the BOP Defendants.

3. Allegations of Concrete Injury

The basis of the plaintiffs' claimed injuries is that (1) the BOP evaluates prisoners at parole hearings using improper factors that disproportionately screen out prisoners with disabilities, and (2) the BOP does not promulgate any processes, policies, or procedures for providing reasonable modifications or auxiliary aids or services to prisoners with disabilities. Allegedly, this use of improper factors and lack of clear policy disproportionately burdens prisoners with disabilities in violation of the ADA. The plaintiffs do not allege the BOP Defendants have denied them accommodations for any of their disabilities, nor do they claim to have even requested any accommodations from the BOP Defendants.

Neither of the parties' respective briefs address the issue of whether the use of improper factors during parole determination constitutes a concrete injury. The defendants argue the ADA does not require the prophylactic publication of policies governing the provision of reasonable modifications, so long as the reasonable modifications are actually provided when requested.

Among the criteria used by the BOP to evaluate prisoners are personality; intelligence; employment history; mental or physical makeup, including disability or handicap; conduct in the facility; and behavior and attitude. Neb. Parole Bd. R. § 4-

401(A). The plaintiffs claim that these criteria disproportionately screen out prisoners with disabilities. Being denied parole due to criteria that improperly discriminate against those with disabilities would be an actual injury. Although no plaintiff has specifically stated that he or she has been denied parole due solely to the application of a supposedly illicit factor, they have alleged at least some of the defendants have already had a parole hearing where improper criteria were used, and those defendants were denied parole.⁵ *Cf. Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993) (“When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing.”), *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) (finding standing when an individual alleged a university “had denied him the opportunity to compete for admission on an equal basis”).

The plaintiffs have presented sufficient factual matter to “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Thus, at least some of the plaintiffs have standing to challenge the BOP rules as violations of the ADA, and the Court will not dismiss the BOP Defendants.⁶

Because at least some of plaintiffs have standing to litigate claims against the BOP Defendants due to their use of the challenged parole criteria, it is unnecessary to reach the issue of whether the BOP’s non-promulgation of policies for reasonable accommodations would also constitute an actual injury.

⁵It is possible that these rules do not actually violate the ADA, but that analysis is premature when analyzing standing issues.

⁶Whether each named plaintiff has standing to bring each claim is not at issue; the current question is whether the Court should dismiss the BOP Defendants because no plaintiff can bring a claim against them.

B. Ripeness

“A claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.” *KCCP Tr. v. City of N. Kansas City*, 432 F.3d 897, 899 (8th Cir. 2005) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)). However, as mentioned earlier, the claim that the BOP uses discriminatory criteria does not rest upon contingent future events because the BOP is currently using the criteria in parole hearings, and the BOP has denied parole to some of the plaintiffs following their hearings. The plaintiffs’ claim that the BOP uses improper criteria in deciding parole is ripe for adjudication.

C. Immunity

The defendants claim the NDCS and BOP, as state agencies, are immune under the Eleventh Amendment to suits under 42 U.S.C. § 1983. *Monroe v. Ark. State Univ.*, 495 F.3d 591, 594 (8th Cir. 2007). The plaintiffs have agreed to dismiss their § 1983 claims against the NDCS but are silent as to their § 1983 claims against the BOP. As the BOP is also a state agency, the same logic applies to it as to the NDCS. Thus, plaintiffs’ § 1983 claims are dismissed as to the NDCS and BOP and will only continue as to the named state officials Frakes, Deol, and Micek.

III. CONCLUSION

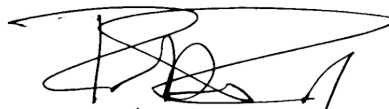
Based upon the allegations of the Complaint as supplemented by the Index (Filing No. 42) of evidence, at least some plaintiffs have standing to bring claims against the BOP Defendants because the BOP has already used the allegedly discriminatory criteria in parole hearings involving some of the plaintiffs, and some of those plaintiffs have been denied parole. Because those plaintiffs have been denied parole, their claims are ripe for adjudication. The BOP Defendants will not be dismissed as parties. Any § 1983 claims against the BOP and NDCS are barred by the Eleventh Amendment and are dismissed. Accordingly,

IT IS ORDERED:

1. Defendants' Motion to Dismiss (Filing No. 34) for failure to state a claim and lack of subject-matter jurisdiction is denied in part and granted in part.
2. The BOP Defendants are not dismissed as parties.
3. All § 1983 claims against the BOP and NDCS are dismissed with prejudice.

Dated this 16th day of January, 2018.

BY THE COURT:

A handwritten signature in black ink, appearing to read 'R. Rossiter, Jr.', written over a horizontal line.

Robert F. Rossiter, Jr.
United States District Judge