May 26, 2005

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Re: Comment on Advanced Notice of Proposed Rulemaking
CRT Docket No. 2004-DRS01; AG Order No. 2736-2004; RIN 1190-AA46 and 1190-AA44; Nondiscrimination on the Basis of Disability in State and Local Government Services;
Exhaustion of Administrative Remedies

Dear Ms. Nicholson and Ms. Beckman:

The American Civil Liberties Union, the Disability Rights Education and Defense Fund, the Legal Aid Society of New York and the Prison Law Office submit these comments in reference to the Advance Notice of Proposed Rulemaking (“ANPRM”) regarding revisions to the Americans with Disabilities Act (“ADA”) standards. In particular, we direct our comments to the provisions of the ANPRM that concern the exhaustion of administrative remedies by prisoners.

The ANPRM proposes that in order to exhaust administrative remedies under the Prison Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a), prisoners who wish to file lawsuits alleging violation of Title II of the ADA must first file a Complaint with the Department of Justice (“DOJ”). We oppose such a regulation for two reasons. First, the proposed regulation is contrary to what Congress intended in enacting the PLRA. The PLRA’s language, legislative history and judicial interpretations make clear that Congress did not intend that the PLRA require exhaustion of remedies other than internal prison grievance procedures. Second, Congress did not intend to require exhaustion of administrative remedies for any Title II litigants and because such a regulation would implement the PLRA, a statute which DOJ has no authority to implement.
1. **THE PRISON LITIGATION REFORM ACT REQUIRES EXHAUSTION OF INTERNAL PRISON GRIEVANCE SYSTEMS, NOT EXTERNAL PROCEDURES SUCH AS THE DOJ COMPLAINT PROCEDURE.**

The PLRA provides: “No action shall be brought with respect to prison conditions . . . by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). The exhaustion requirement proposed in the ANPRM relies on the faulty premise that the PLRA requires prisoners to exhaust the DOJ complaint procedure. The PLRA’s exhaustion requirement cannot reasonably be read to require prisoners to exhaust administrative remedies other than the prison’s own remedies. That conclusion is supported by the language and structure of the statute, United States Supreme Court and lower court interpretations of the PLRA’s exhaustion requirement and its purpose, and the statute’s legislative history and that of its predecessor statute.

a. **The Statute Refers to Internal Prison Procedures.**

Reading the statute as a whole, it is apparent that it addresses itself only to prison grievance procedures. While the term “administrative remedy” may not be sufficiently clear in isolation, the statutory context establishes that Congress was referring solely to internal prison grievance procedures. The plain language of the subsection immediately following 42 U.S.C. § 1997e(a) indicates that the PLRA refers only to internal administrative remedies. Congress provided that: “[t]he failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action under 1997a or 1997c of this title.” 42 U.S.C. § 1997e(b)(emphasis added). Congress would not have used this language if it were referring to the panoply of other complaint procedures available to prisoners. “It thus appears that throughout § 1997e, Congress is referring to institutional grievance processes.” *Rumbles v. Hill*, 182 F.3d 1064, 1070 (9th Cir. 1999) (internal quotation marks omitted).

b. **Courts Have Made Clear That the Statute Requires Exhaustion of Internal Prison Procedures Only.**

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1 The “ordinary meaning of the term ‘administrative remedy’” is not “clear” and thus requires examination of the statute’s motivating policies and its legislative history as the Third Circuit observed in *Concepcion v. Morton*, 306 F.3d 1347, 1353 (3d Cir. 2002). Turning to the dictionary does not resolve the question, but certainly does not favor the reading suggested by the ANPRM. Administrative is defined as “proceeding from . . . an administration,” which, in turn, is defined as “a body of persons who are responsible for managing a business or an institution.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 28 (1993). These definitions do not suggest that the DOJ complaint procedure is an “administrative remedy” in relation to state and local prison systems, as DOJ does not manage these facilities.

The Supreme Court has authoritatively stated the purpose of the PLRA exhaustion requirement: “Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits; to this purpose, Congress afforded corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.” Porter v. Nussle, 534 U.S. 516, 524-25 (2002) (emphasis supplied).\(^3\)

Circuit courts have similarly held that the PLRA requires exhaustion of administrative remedies within prison systems. Thus, the Seventh Circuit has stated that “if a prison has an internal administrative grievance system through which a prisoner can seek to correct a problem, the prisoner must utilize that administrative system before filing a claim. . . . [C]ourts merely need to ask whether the institution has an internal grievance procedure . . . .” Massey v. Helman, 196 F.3d 727, 733-34 (7th Cir. 1999) (emphasis supplied).\(^4\)

The most thorough explication of this point is in Rumbles v. Hill, 182 F.3d 1064 (9th Cir. 1999), cert. denied, 528 U.S. 1074 (2000), in which the court held that administrative tort claims procedures need not be exhausted prior to filing a federal lawsuit, and that nothing in the PLRA’s legislative history showed any intent by Congress to displace the prior understanding to that effect. The court said:

The language of the PLRA, as well the language of the pre-PLRA version of section 1997e, indicates that Congress had internal prison grievance procedures in mind when it passed the PLRA. That is, while Congress certainly intended to require prisoners to exhaust available prison administrative grievance procedures, there is no indication that it intended prisoners also to exhaust state tort claim procedures.

Similarly if more succinctly, the court in Handberry v. Thompson, 2003 WL 194205 (S.D.N.Y. Jan. 28, 2003), commented on defendants’ argument that prisoners’ challenge under the Individuals with Disabilities Education Act (IDEA) to the denial of special education services in jail should have been exhausted through the IDEA impartial hearing requirement provided by the state Education Law. “Though the court takes no position on the issue, Porter would appear to defeat the City’s argument. In Porter, the Court noted that Congress wished to afford corrections officials the opportunity to address complaints internally. [534 U.S.] at 25. This observation is inconsistent with a rule requiring exhaustion of a remedy which is outside of the prison and which does not involve prison authorities.” 2003 WL 194205, at *11 (emphasis added).

Despite the fact that the PLRA’s exhaustion requirement has been in effect since 1996

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\(^3\) See also Johnson v. Testman, 380 F.3d 691 (2d Cir. 2004).

\(^4\) Accord, Alexander v. Hawk, 159 F.3d 1321, 1326 (11th Cir. 1998) (holding that “available” remedies under the PLRA refers to prison administrative remedy programs).
and has generated hundreds of decisions, and the fact that prisoners have been bringing suit under the ADA and Section 504 since well before the PLRA went into effect, neither the Supreme Court nor any circuit has ever held prisoners responsible for exhausting procedures other than prison grievance procedures. In fact, the only cases found on the subject arise out of the Southern District of New York, as it appears that the only correctional system -- state, local or federal -- to have argued that the PLRA requires exhaustion of the DOJ complaint procedure is the New York State Department of Correctional Services. The only correctional system to have asserted the defense has stated that it will no longer do so. As recounted by the United States Court of Appeals for the Second Circuit, “[DOCS] further represented that the [DOJ exhaustion] defense will be withdrawn in any pending litigation in which liability against DOCS and its agents is asserted under the ADA and that DOCS does not now intend to assert the defense in any such future litigation.”

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The Legislative History of the PLRA Makes Clear That Congress Intended to Require the Exhaustion of Internal Prison Administrative Remedies Only.

The legislative history of the PLRA, while sparse, confirms that Congress intended that the term “administrative remedies” refer to internal prison grievance procedures. There is little “elaboration or explanation of the PLRA’s exhaustion requirement in the legislative history.” Cruz v. Jordan, 80 F. Supp. 2d 109, 115 (S.D.N.Y. 1999). What little discussion there is of the exhaustion requirement, however, indicates that Congress intended to mandate exhaustion of all prison grievance mechanisms and nothing else. Senator Kyl, one of the co-sponsors of the PLRA, stated:

Mr. President, I join Senator Dole in introducing the Prison Litigation Reform Act of 1995. This bill will deter frivolous inmate lawsuits. . . . Section 7 will make the exhaustion of administrative remedies mandatory. Many prisoner cases seek relief for matters that are relatively minor and for which the prison grievance system would provide an adequate remedy.


Representative LoBiondo explained that he had ensured that the PLRA’s exhaustion requirement also applied to federal prisoners so as to “return[] these cases to the Federal Bureau of Prisons.” 141 Cong. Rec. H14105 (1995) (Rep. LoBiondo). And the House Judiciary Committee specifically referred, in its limited commentary on the PLRA, to “prison grievance systems.”

5 Rosario v. Goord, 400 F.3d 108, 109 (2d Cir. 2005)
Mandating exhaustion of internal grievance procedures was closely connected to Congress’ desire to vest control of prisons in their administrators, in response to the perception that State prison authorities had been displaced by federal courts in prison litigation. 141 Cong. Rec. S14408-01 (1995) (statement of Senator Hatch). Senator Abraham, speaking in support of the legislation, criticized the judicially-enforced consent decrees that had resulted from suits brought by the United States Department of Justice against the Michigan Department of Corrections. 141 Cong. Rec. S14408-01 (1995). Considering this history, it would make little sense to assume that Congress intended to swap federal court intervention for federal executive intervention by requiring all prisoners to take their disability complaints to DOJ, especially where the prisoner already had provided the state or local prison system with the opportunity to resolve the problem.

d. The History of the PLRA’s Predecessor Statute Makes Clear that Congress Had Only Internal Administrative Remedies in Mind When Passing the PLRA.

Support for the argument that Congress meant for the term “administrative remedies” to refer to internal prison remedies can also be found in the history of the Civil Rights of Institutionalized Persons Act (CRIPA), 42 U.S.C. § 1997e, predecessor to the PLRA. Because CRIPA is a predecessor statute that used the same term – “administrative remedies” – as does the PLRA, the intent of Congress when it drafted CRIPA is highly relevant.6

When it enacted CRIPA in 1980, Congress provided that, at a court’s discretion, prisoners could be required to exhaust “administrative remedies” that were “plain, speedy, and effective” before proceeding with a § 1983 suit. 42 U.S.C. § 1997e(a)(1) (1990). Several factors compel the conclusion that the term “administrative remedies” as used in CRIPA referred only to internal grievance procedures.

i. Legislative History of CRIPA

The history of CRIPA establishes that the primary purpose of adding an exhaustion requirement was precisely to encourage State prison systems to develop internal grievance mechanisms to resolve prisoners’ complaints. See, e.g., H.R. Conf. Rep. No. 897, 96th Cong. 2d Sess. 9 (1980) (purpose of bill is to “stimulate the development and implementation of effective administrative mechanisms for the resolution of grievances in correctional . . . facilities”); id. at 15-17 (discussing exhaustion of remedies in context of “correctional grievance resolution

6 See, e.g., Kennedy v. Mendoza-Martinez, 372 U.S. 144, 169-83 (1963) (considering the history of the predecessor to the current statute to decide whether Congress meant for the statute to be punitive in effect); U.S. v. Awadallah, 349 F.3d 42, 54 (2d Cir. 2003) (relying on legislative history of predecessor statute to construe current statute when both forms of the statute used identical language); Moretti v. C.I.R., 77 F.3d 637, 643 (2d Cir. 1996) (relying on judicial interpretation of term in predecessor statute where current statute used that same term).

This section provides, in certain cases, for exhaustion of *correctional grievance procedures* prior to consideration of a prisoner suit in federal court. . . . Requiring the exhaustion of *in-prison grievances* should resolve some cases thereby reducing the total number and help frame the issue in the remaining cases so as to make them ready for expeditious court consideration.


7 In addition to the statements in the Conference Committee Report that are highly probative of legislative intent, the pages of the Congressional Record are replete with references to prison grievance systems when the exhaustion provisions of CRIPA were debated. 125 Cong. Rec. H11976 (1978) (statement of Rep. Railsback) (discussing “grievance procedure” in prisons); id. at 15441 (statement of Rep. Kastenmeier) (effect of exhaustion provision will be to divert complaints to the States and their local institutions); 125 Cong. Rec. H12491-92(1979) (statement of Rep. Drinan) (detailing studies of “prison grievance mechanisms”); id. at 12492 (statement of Rep. Drinan) (§ 1997e intended to encourage “the establishment of grievance mechanisms in State correctional systems”); id. at 12493 (statement of Rep. Mitchell) (same); id. at 12494 (statement of Rep. Rodino) (referring to development of “correctional grievance mechanisms”); 126 Cong. Rec. H10780 (1980) (statement of Rep. Kastenmeier) (CRIPA “would encourage, but not require, States and political subdivisions to establish correctional grievance mechanisms”).
The link between exhaustion of administrative remedies and the development of internal grievance procedures was summed up by Representative Butler:

If we had the grievance machinery, and if they were required to go through that grievance machinery, we believe that many of these cases . . . would be quickly resolved, and resolved at the level where they should be resolved and that is where the grievance arises, and that is in the penal institution [or] the local jail.


ii. Judicial Interpretations of the Term “Administrative Remedies” in CRIPA

The Supreme Court cases interpreting CRIPA also equated the term “administrative remedies” with the internal “grievance resolution system” of each prison. In Patsy v. Board of Regents of State of Fla., the Supreme Court noted that the intent of Congress was to “divert[] certain prisoner petitions back through state and local institutions, and also to encourage the States to develop appropriate grievance procedures.” 457 U.S. 496, 509 (1982). Thus the term “administrative remedies” as it was used in CRIPA was intended and understood to mean internal prison grievance procedures.

iii. The PLRA Did Not Change the Meaning of the Term “Administrative Remedies” as it Was Used in CRIPA

The PLRA, enacted in 1996 to amend CRIPA, did not expand the content of the term “administrative remedies.” The PLRA instead “eliminated both the discretion to dispense with administrative exhaustion and the condition that the remedy be ‘plain, speedy, and effective’ before exhaustion could be required.” Booth, 532 U.S. at 739; Thomas v. Woolum, 337 F.3d 720, 752 (6th Cir. 2003) (Congress’ principal concern was making exhaustion mandatory). In so doing the PLRA provided “corrections officials time and opportunity to address complaints internally.” Porter v. Nussle, 534 U.S. at 534.

When enacting the PLRA, Congress was surely aware that courts had equated the term “administrative remedies” with internal prison grievance procedures and still gave no indication that the judicial interpretation was contrary to Congressional intent. See, e.g., Lorillard v. Pons, 434 U.S. 575, 581 (1978) (“[W]here, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation

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8 See also Farmer v. Brennan, 511 U.S. 825, 847 (1994) (referring, under CRIPA, to availability of “adequate prison procedures” and “internal prison procedures”) (emphasis added); McCarthy v. Madigan, 503 U.S. 140, 150 (1992) (stating that CRIPA “imposes a limited exhaustion requirement . . . provided that the underlying state prison administrative remedy meets specified standards”) (emphasis added).
given to the incorporated law, at least insofar as it affects the new statute.”) That presumption is even stronger where Congress showed a “willingness to depart” from other aspects of the prior law. *Id.*

2. **REQUIRING PRISONERS TO FILE COMPLAINTS WITH DOJ IS CONTRARY TO TITLE II AND SERVES TO IMPLEMENT THE PLRA, NOT THE ADA**

Requiring prisoners to file complaints with DOJ prior to filing a federal lawsuit, as the ANPRM proposes to do, is inappropriate because it is inconsistent with the ADA and because such a regulation is not intended to implement the ADA, but to implement a completely distinct statutory scheme, the PLRA.

In enacting Title II of the ADA, Congress explicitly gave DOJ the authority to promulgate regulations implementing the statute.\(^9\) In doing so, DOJ established a procedure by which individuals could file complaints with DOJ alleging disability-based discrimination on the part of a public entity. It is well established that the DOJ complaint procedure outlined in 28 C.F.R. § 35.171 is voluntary and individuals opting for a private suit need not exhaust with the DOJ prior to filing a federal claim.\(^10\) In enacting Title II of the ADA, Congress did not intend that litigants would be required to exhaust any administrative remedies prior to bringing their claims to the courts.

Had Congress intended to create a mandatory administrative exhaustion scheme for Title II litigants, it would have expressly done so, as it did with respect to the employment discrimination provisions of Title I.\(^11\) Thus, a regulation that would require prisoners or any individuals covered by Title II to exhaust the DOJ administrative scheme prior to filing a lawsuit


\(^{11}\) Title I of the ADA requires litigants to file an administrative charge with the Equal Employment Opportunity Commission within 180 days of the alleged act of employment discrimination. 42 U.S.C. § 12117; *Bonilla v. Muebles J.J. Alvarez, Inc.*, 194 F.3d 275, 277-278 (1st Cir.1999); *Stewart v. County of Brown*, 86 F.3d 107, 110 (7th Cir.1996); *McSherry v. Trans World Airlines, Inc.*, 81 F.3d 739, 740 (8th Cir.1996); *Dao v. Auchan Hypermarket*, 96 F.3d 787, 788 (5th Cir. 1996).
conflicts with the statute and Congress’ intent.

The rule making authority that Congress delegated to DOJ is not open-ended. DOJ may only promulgate rules that are “reasonably related” to the legislative purpose of Title II of the ADA. A requirement that prisoners, but not other Title II litigants, file complaints with DOJ before initiating a private suit bears no reasonable relation to the statute’s purpose. The ADA makes no distinction between prisoner litigants and others wishing to file a private suit under Title II. Thus, promulgating a regulation that would require prisoners to file DOJ complaints exceeds the agency’s authority under Title II.

For good reason, the ANPRM does not state that Title II requires prisoners to file complaints with DOJ prior to filing a federal lawsuit. Instead it states that administrative exhaustion is required by the Prison Litigation Reform Act (“PLRA”). The ANPRM states that “in order to properly implement [the PLRA]” the revised DOJ regulation implementing Title II will provide that in order to satisfy the PLRA’s exhaustion requirement a prisoner must file a DOJ complaint in order to proceed in court on a Title II claim. The ANPRM seeks to propose a regulation that implements the PLRA, which requires exhaustion of administrative remedies, not Title II, under which exhaustion is voluntary. It is inappropriate for DOJ to promulgate regulations implementing the PLRA, a statute that it has no authority to implement, as Congress did not so authorize. DOJ has no authority to implement the PLRA and in any event, should not attempt to do so under its Title II authority.

Conclusion


13 42 U.S.C. § 12101 (b) provides that the purpose of Title II is:

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

14 See Pennsylvania Dept. of Corrections v. Yeskey, 524 U.S. 206, 209 (1998) (holding that “the ADA plainly covers state institutions without any exception that could cast the coverage of prisons into doubt.”)
Congress did not intend that the PLRA require exhaustion of grievance procedures other than the prison systems’ internal remedies; nor did Congress intend that any individuals, including prisoners, be required to exhaust administrative remedies before filing a private suit under Title II of the ADA. Furthermore, because DOJ does not have the authority to implement the PLRA, and because the regulation concerning administrative exhaustion proposed in the ANPRM would do just that, such a regulation should not be promulgated.

We appreciate your attention to these comments. Please do not hesitate to contact us should you have any questions.

Very truly yours,

The American Civil Liberties Union
Disability Rights Education and Defense Fund
The Legal Aid Society of New York, Prisoners' Rights Project
The Prison Law Office