UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM G. and WALTER W., et al.,	
Plaintiffs,	**03 Civ. 8331 (RCC)**
- against -	**MEMORANDUM & ORDER**
GEORGE PATAKI, in his official capacity as Governor of the State of New York; SHARON CARPINELLO, in her official capacity as Acting Commissioner of the New York State Office of Mental Health; WILLIAM GORMAN, in his official capacity as Commissioner of the New York State Office of Alcohol and Substance Abuse Services; and BRION TRAVIS, in his official capacity as Chairman and Chief Executive Officer, New York State Division of Parole,	
Defendants.	

RICHARD CONWAY CASEY, United States District Judge:

This case raises the issue of whether the Prisoner Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e(a), requires New York State inmates claiming violations of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12132, and Section 504 of the Rehabilitation Act of 1973 ("Rehabilitation Act"), 29 U.S.C. § 794, to exhaust remedies provided by the U.S. Department of Justice ("DOJ"). George Pataki, Sharon Carpinello, William Gorman, and Brion Travis ("Defendants") move to dismiss this putative class action under the PLRA for failure to state a claim. The Court concludes that the PLRA does require exhaustion of the DOJ remedies but that Defendants are not entitled to dismissal of the case at this stage of the litigation. Accordingly, Defendants' motion is **DENIED**.

I. BACKGROUND

In New York State ("State"), individuals who have been released from custody on parole or

post-release supervision (also known as "supervised release") are subject to arrest, on a warrant issued by the parole board, by parole officers who have reasonable cause to believe that the individuals have violated the conditions of that release. N.Y. Exec. Law § 259-i(3)(a)(i). These "parole detainees" are incarcerated pending a preliminary hearing before a hearing officer to determine whether there is probable cause to believe that conditions of parole or supervised release have been violated. See id. § 259-i(3)(c). Parole detainees are also provided the right to a final revocation hearing if probable cause is found. See id. § 259-i(3)(f).

Some parole detainees are housed in New York City jails, often Rikers Island, pending revocation hearings. (Compl. ¶ 2.) Plaintiffs are a proposed class of such detainees with mental illnesses and substance-abuse problems. (Id. ¶ 1.) Parole-hearing officers have determined that Plaintiffs should be placed in residential treatment programs for mental illness and chemical addiction ("MICA programs") rather than face imprisonment for their alleged parole violations. (Id. ¶¶ 2, 4.) The proposed class is made up of "individuals with . . . serious and persistent mental illness[es] and . . . history of substance abuse (including alcohol abuse) who are (a) incarcerated at State expense in New York City jails as parole detainees and (b) awaiting an opening in a MICA program." (Id. ¶ 33.) Plaintiffs allege that the members of the proposed class often remain in jail for long periods of time waiting for openings in the few MICA programs that exist; in addition, the complaint alleges that the State-funded programs refuse to serve individuals with severe and persistent mental illnesses such as Plaintiffs. (Id. ¶ 6.)

Named plaintiffs William G. and Walter W.[1] suffer from mental illnesses and substance

[1] The complaint does not provide the named plaintiffs' surnames because of the sensitive and personal nature of the allegations. (Compl. at 5 n.1.)

abuse and were under the supervision of the New York State Division of Parole after they were released from prison. (Id. ¶¶ 13-14, 19-20.) After William G. was arrested for an alleged parole violation, the hearing officer and parole specialist assigned to his case agreed that a MICA program rather than incarceration was the best disposition for him. (Id. ¶¶ 14-15.) Parole-revocation proceedings have been consistently adjourned pending the opening of space for William G. in a MICA program. (Id. ¶ 15.) It is not explicitly stated in the complaint whether there has been a finding of probable cause that William G. violated his parole or whether his parole has been revoked following a final revocation hearing. Walter W.'s parole was revoked after he was arrested for attempted possession of a controlled substance; the parole officials supervising his case agreed that he should be placed in a MICA program and not a prison. (Id. ¶¶ 20-21.) Walter W. has been informed that he will be sentenced to imprisonment for violating the terms of his parole if no MICA program becomes available, although it is not clear from the complaint when such sentencing will occur. (Id. ¶ 21.)

Plaintiffs seek declaratory and injunctive relief under the ADA and the Rehabilitation Act. They allege that Defendants have violated those statues by, among other things, excluding Plaintiffs from MICA programs based on the severity of their disabilities and requiring Plaintiffs to remain incarcerated instead of placing them in MICA programs. Defendants have moved to dismiss the complaint on the single ground that Plaintiffs have failed to exhaust administrative remedies as required by the PLRA. Specifically, Defendants contend that Plaintiffs failed to exhaust the procedures provided by the DOJ to investigate, and possibly resolve, complaints of unlawful discrimination based on disability.

The DOJ procedures at issue provide a voluntary process for the filing of a complaint by

"[a]n individual who believes that he or she or a specific class of individuals has been subjected to discrimination on the basis of disability by a public entity." 28 C.F.R. § 35.170(a). The complaint is to be filed with or forwarded to the appropriate federal agency, id. § 35.170(c), in this case, the DOJ itself, see id. § 35.190(b)(6) (providing that the DOJ is the agency responsible for investigating discrimination claims against correctional institutions). The DOJ investigates the complaint, attempts to resolve it informally, and, if no resolution can be achieved, issues a report including findings of fact and conclusions of law. Id. § 35.172(a). If the public entity about which the complaint is filed has, in the DOJ's judgment, failed to comply with federal antidiscrimination law, the agency can refer the matter to the Attorney General for appropriate action. Id. §§ 35.172(b), 35.174.

II. DISCUSSION

The PLRA provides in pertinent part, "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, 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 Supreme Court has held that the "PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or some other wrong." Porter v. Nussle, 534 U.S. 516, 532 (2002). The fact that the available remedies would not provide the relief sought is immaterial to the exhaustion requirement. Booth v. Churner, 532 U.S. 731, 740-41 (2001). Plaintiffs argue that the exhaustion requirement is inapplicable here for two reasons: first, the suit is not one "with respect to prison conditions" because it only challenges discrimination in community-based mental-health treatment; second, the DOJ's procedures are not "administrative remedies" under the PLRA because they are external to the prison

system in which Plaintiffs are confined.

A. This Action Relates to Prison Conditions

The gravamen of the claims here is that Plaintiffs are confined in prisons instead of in rehabilitation centers in violation of federal law; thus, this is a suit "with respect to prison conditions." The phrase "with respect to prison conditions" is not defined in § 1997e(a). It is, however, defined in another section of the PLRA. That section states, "Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs." 42 U.S.C. § 3626(a)(1). The statute further provides:

> [T]he term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison . . . .

Id. § 3236(g)(2). As the Seventh Circuit has explained, reference to this definition when interpreting § 1997e(a) is appropriate because both statutory sections are "'part of the same legislation with the same overreaching objectives—to enable prison officials to resolve complaints internally and to limit judicial intervention in the management of state and federal prisons.'" Witzke v. Femal, 376 F.3d 744, 751 (7th Cir. 2004) (quoting Smith v. Zachary, 255 F.3d 446, 449 (7th Cir. 2001)).

In Witzke, the Seventh Circuit held that the "plain wording of the term 'prison conditions' is that only complaints relating to conditions within a prison or correctional facility are subject to the exhaustion requirements" of § 1997e(a). Id. at 752. This conclusion is consistent with § 3236(g)(2)'s definition that includes "the conditions of confinement." See id. Here, Plaintiffs seek to be placed in MICA programs in lieu of incarceration in prison for violations of parole and

supervised release. They argue that it is unlawful under federal law for the State to confine them in the more restrictive environment of a prison, where they cannot get the mental-health and substance-abuse treatment they need, instead of a MICA program where that treatment is available. They therefore challenge the conditions in which they are confined.

Witzke supports this conclusion. There, the plaintiff claimed that he was deprived of his Eighth Amendment rights while he was residing at a halfway house in lieu of imprisonment for violation of probation. See id. at 747. The plaintiff argued that the PLRA did not apply to his claims because they did not relate to prison conditions. Id. at 750. The court rejected the argument. The court addressed two questions: (1) whether an individual residing in a halfway house in lieu of imprisonment for a probation violation is "confined," and (2) whether such an individual is confined in a "jail, prison, or other correctional facility" as those terms are meant in the PLRA. Id. at 752. The court answered both in the affirmative. First, the plaintiff was confined because he entered the program only after admitting to violations of probation, which could have led to revocation of probation, and the program imposed more restrictions than typically accompany probation such as residence at the facilities. Id. Second, the halfway house fit within the definition of "any . . . other correctional facility," which the Seventh Circuit defined as a "'generic term describing prisons, jails, reformatories, and other places of correction and detention.'" Id. at 753 (quoting Alexander S. v. Boyd, 113 F.3d 1373, 1383 (4th Cir. 1997)) (internal quotation marks omitted).

Witzke's relevance here is not to the question of whether Plaintiffs are currently confined, but to the issue of whether a suit about the location of one's detention for a parole or supervised-release violation relates to prison conditions. As the Seventh Circuit held, rehabilitation facilities in which one is placed in lieu of incarceration are correctional facilities under the PLRA. Thus, what

Plaintiffs desire is a transfer from one correctional facility to another.[2] Plaintiffs allege that Defendants have violated the ADA and Rehabilitation Act by "requiring Plaintiffs to live and receive services as institutionalized inmates in jails, although jail is not the most integrated setting appropriate to their needs." (Compl. ¶¶ 60(b), 67(b).) Plaintiffs maintain that it is unlawful for them to be held in one correctional facility under conditions that do not include the mental-health and substance-abuse treatment that the State agrees they need, and they request placement in a different correctional facility that has such treatment.[3] Plaintiffs would be placed in MICA programs by State officials as the result of alleged violations of parole or supervised release; without the alleged parole violations, Plaintiffs would not be detained in New York City prisons or MICA programs. The MICA programs are an alternative type of confinement, similar to the halfway house in Witzke.

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[2] Because Plaintiffs seek to be transferred to another correctional facility with conditions more favorable to the treatment of mental illness and substance abuse, Plaintiffs' reliance on Bolden v. Stroger, No. 03 C. 5617, 2005 WL 283419 (N.D. Ill. Feb. 1, 2005), is misplaced. The court in Bolden held that pretrial detainees with mental disabilities were not challenging prison conditions in a claim alleging that they were unlawfully denied access to medication and treatment after their release from custody. See id. at *1 ("[T]he treatment (or lack thereof) of detainees after their release from the Jail is not a prison condition."). The court also held that the plaintiff detainees were challenging prison conditions in a claim that they were "excluded from participation in various release and substance abuse treatment programs" while they were detained. Id. at *2. Bolden actually supports Defendants' position because the second claim, and not the first, is similar to those asserted in this case.

[3] This civil action is therefore unlike a habeas corpus petition that seeks to free the petitioner from any further incarceration at all. Thus, Plaintiffs cannot rely on § 3236(g)(2)'s exception to the definition of a "civil action with respect to prison conditions" for "habeas corpus proceedings challenging the fact or duration of confinement in prison." See 42 U.S.C. § 3236(g)(2). First, this is not a habeas action, which is exempted from the PLRA's exhaustion requirement but which would require the judicially imposed exhaustion of administrative remedies. See Carmona v. U.S. Bureau of Prisons, 243 F.3d 629, 634 (2d Cir. 2001); United States v. Basciano, 369 F. Supp. 2d 344, 348 (E.D.N.Y. 2005). Second, the desired end of the type of habeas petition exempted is release from the custody of state or federal officials. The desired end of this suit is merely confinement in a different type of institution under different conditions of confinement.

Plaintiffs' claims relate to the conditions under which they are confined, and hence to prison conditions. Because the Plaintiffs' claims are "with respect to prison conditions," the PLRA applies and they must exhaust all available administrative remedies. The next point of contention is whether the DOJ procedures are among such remedies.

B. The PLRA Requires Exhaustion of DOJ Remedies

The PLRA mandates that prisoners may not bring suit with regard to prison conditions without exhausting "such administrative remedies as are available." 42 U.S.C. § 1997e(a). Plaintiffs contend that the phrase includes only internal prison administrative remedies and not external remedies such as those provided by the DOJ. But the language of the PLRA contains no indication that the requirement is so limited, and the reasoning behind the statute strongly supports the conclusion that available external remedies must also be exhausted.

The text of the PLRA does not limit available administrative remedies to those that are internal to the prison system in which a plaintiff is confined. See Burgess v. Garvin, No. 01 Civ. 10994 (GEL), 2003 WL 21983006, at *3 (S.D.N.Y. Aug. 19, 2003), reconsideration granted on other grounds, 2004 WL 527053 (S.D.N.Y. Mar. 16, 2004). The court in Burgess explained, "The plain language of [the PLRA] requires the prisoner to exhaust 'such administrative remedies as are available.' It is not limited to administrative redress within the prison system in which the prisoner is being held, or to administrative remedies provided by any particular sovereign." Id. The DOJ remedies, to the extent that they are available to Plaintiffs, must be exhausted pursuant to the plain language of the PLRA.

Exhaustion of the DOJ procedures would also serve the same goals that the PLRA was enacted to achieve. The PLRA was meant to "reduce the quantity and improve the quality of

prisoner suits," and to "afford[] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case." Porter, 534 U.S. at 525; see also Witzke, 376 F.3d at 751 (noting that the objectives of the PLRA are "to enable prison officials to resolve complaints internally and to limit judicial intervention in the management of state and federal prisons"). Intervention by the DOJ is likely to reduce the number of prisoner suits because state law-enforcement officials have incentives to respond to findings by their federal counterparts that they are violating federal law, potentially leading to the resolution of meritorious claims. One such incentive is found in the regulations themselves—the threat of enforcement by the Attorney General. See 28 C.F.R. § 35.174. In addition, prisoners (and their attorneys, if they are represented as in this case) may be less likely to bring federal lawsuits when the DOJ has explained that their claims are without merit. Thus, the federal courts would more likely be left to resolve those cases in which judicial intervention is truly necessary.

The DOJ procedures also give corrections officials the opportunity to address claims that they are not complying with the ADA and Rehabilitation Act before being forced to litigate the matter in federal court. The first step in the process after an investigation is for the DOJ to attempt informal resolution of the claim. See 28 C.F.R. § 35.172(a). Prison officials will have, with the benefit of the DOJ's guidance on federal disability-discrimination law, the chance to analyze and address prisoner complaints internally before they become subject to the mandatory process of federal litigation. For this reason, the Court must disagree with the conclusion in Veloz v. New York, 339 F. Supp. 2d 505 (S.D.N.Y. 2004), that complaints with the DOJ do not allow prison officials time to remedy the issues themselves. See id. at 519. As already explained, the DOJ investigates the claims, seeks informal resolution between the inmate and the institution, and refers matters to the

Attorney General only if a noncompliant institution does not agree to a proposed resolution. Thus, the DOJ procedures provide the opportunity to internally resolve disputes and give incentive to prison officials to do so that the prisoner-grievance process does not.

The Court disagrees with Plaintiffs that the Ninth Circuit's decision in Rumbles v. Hill, 182 F.3d 1064 (9th Cir. 1999), overruled on other grounds by Booth, 532 U.S. 731, requires a different result. The court in Rumbles held that prisoners do not have to exhaust state tort remedies under the PLRA before filing suit under 42 U.S.C. § 1983. California law provides for an administrative process for filing tort claims against state agencies such as the department of corrections. See id. at 1069. The court reasoned that the PLRA only requires the exhaustion of administrative remedies internal to the prison system, relying on 42 U.S.C. § 1997e(b), which provides that "the failure of a State to adopt or adhere to an administrative grievance procedure shall not constitute the basis for an action." Rumbles, 182 F.3d at 1069-70. From the word "grievance" in § 1997e(b), the court deduced that Congress meant internal prison grievances when it said administrative remedies in § 1997e(a). See id. at 1069-70. This Court does not find as much guidance in the word "grievance" as the Ninth Circuit did.[4] Indeed, Congress's inclusion of the word in § 1997e(b) may be better evidence that its omission from § 1997e(a) was purposeful than that its inclusion in § 1997e(a) was implied. See Sosa v. Alvarez-Machain, 542 U.S. 692, 124 S. Ct. 2739, 2754 n.9 (2004) ("[W]hen the legislature uses certain language in one part of the statute and different language in another, the

[4] The Court finds even less guidance in a statement by one congressional advocate of the PLRA that the statute would remove from the federal courts many claims that could be resolved within the prison grievance system, but which is silent on whether external remedies must also be exhausted. Cf. Rumbles, 182 F.3d at 1070 (relying on a statement by Senator Kyl that "[m]any prisoner cases seek relief for matters that are relatively minor and for which the prison grievance system would provide an adequate remedy").

court assumes different meanings were intended." (internal quotation marks omitted)); Rusello v. United States, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation marks and alteration omitted)).

Nor can the Court agree with the Ninth Circuit's reasoning that Congress did not intend in the PLRA to "overrule[] the well-established principle that exhaustion of state tort remedies is not required before bringing a section 1983 action." Id. § 1069. The very purpose of the PLRA was to reverse the default rule of nonexhaustion under § 1983 and other federal statutes. See Porter, 534 U.S. at 523-24 (noting that the PLRA is an "invigorated . . . exhaustion prescription" for prisoners when "[o]rdinarily, plaintiffs pursuing civil rights claims under 42 U.S.C. § 1983 need not exhaust administrative remedies before filing suit in court"). Although the question is not before this Court, nothing in the PLRA suggests that state tort remedies are any different, provided they are administrative and available to prisoners. It follows, then, that the DOJ administrative remedies, to the extent that they are available to Plaintiffs, must be exhausted prior to bringing suit.

Because the DOJ procedures fall within the plain language and the purpose of the PLRA, they must be exhausted as a matter of law before a prisoner may bring suit. This conclusion, notwithstanding, Plaintiffs are not foreclosed from establishing that the exhaustion requirement does not bar their suit.

C. Plaintiffs May Be Able to Establish That An Exception to Exhaustion Applies

Despite the Court's ruling that as a matter of law the PLRA requires exhaustion of the DOJ remedies for disability-discrimination claims, the standard on a motion to dismiss for failure to state

a claim is whether Plaintiffs can establish no set of facts entitling them to relief. See Courtenay Communications Corp. v. Hall, 334 F.3d 210, 213 (2d Cir. 2003). The exhaustion of administrative remedies is not a jurisdictional requirement, but an affirmative defense. Giano v. Goord, 380 F.3d 670, 675 (2d Cir. 2004). And the question of whether administrative remedies are actually available requires a factual inquiry. See Hemphill v. New York, 380 F.3d 680, 686 (2d Cir. 2004) (holding that district courts must determine whether administrative remedies were "in fact" available to a prisoner). Even if the remedies were in fact available, the exhaustion requirement is subject to estoppel, waiver, and special circumstances that excuse the failure to exhaust. Giano, 380 F.3d at 675. One reason for which a plaintiff may be excused from the exhaustion requirement, or a defendant estopped from asserting it, is the defendant's behavior. See Hemphill, 380 F.3d at 686 (holding that defendants' actions may estop them from asserting the failure to exhaust administrative remedies under the PLRA).

On a motion for reconsideration in Burgess, a decision issued after the parties briefed this motion, the plaintiffs maintained that New York prison officials keep prisoners ignorant of the DOJ procedures. See 2004 WL 527053, at *5. The court in Burgess granted the motion for reconsideration and permitted additional discovery on the ground that, if the contention were true, it might render the DOJ administrative procedures unavailable to the plaintiffs. Id. Plaintiffs, therefore, may be able to establish the unavailability of the DOJ remedies, special circumstances, or estoppel. The Court cannot hold that Plaintiffs are unable to establish any facts to counter Defendants' exhaustion defense.

It is not apparent that Plaintiffs are unable to establish any set of facts to satisfy the exhaustion requirement that the PLRA imposes as a matter of law. The determination as to whether

the DOJ remedies, which must normally be exhausted under the PLRA, were in fact available to Plaintiffs, and whether estoppel or some special circumstance excuses exhaustion may be better addressed at the summary-judgment stage.

III. CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss the complaint is **DENIED**. The parties shall appear at a conference in this matter on September 16, 2005, at 9:30 a.m. in Courtroom 14C.

So Ordered: New York, New York
August 11, 2005

Richard Conway Casey, U.S.D.J.