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United States District Court,
S.D. New York.

Zakunda–Ze HANDBERRY, et al., Plaintiffs,
v.
William C. THOMPSON, Jr., et al., Defendants.

No. 96 Civ. 6161(CBM). | Jan. 28, 2003.

City prison inmates brought § 1983 class action alleging that city department of correction, city board of education, and state department of education had not provided them with educational services to which they were entitled under federal and state law. On defendants' motions to dismiss, the District Court, Motley, J., held that: (1) Prison Litigation Reform Act's (PLRA) exhaustion requirement was not jurisdictional; (2) city waived contention that inmates failed to exhaust their administrative remedies; and (3) there were no administrative remedies available to inmates.

Motions denied.

West Headnotes (3)

[1] **Prisons**
Exhaustion of Other Remedies

Prison Litigation Reform Act's (PLRA) exhaustion requirement is not jurisdictional. 42 U.S.C.A. § 1997e(a).

1 Cases that cite this headnote

[2] **Civil Rights**
Criminal law enforcement; prisons

City waived contention that city prison inmates failed to exhaust their administrative remedies, as required by Prison Litigation Reform Act (PLRA), before filing § 1983 suit alleging deprivation of educational services to which they were entitled under federal and state law, where, nearly seven years earlier, city had opposed state's motion to dismiss for failure to exhaust, extensive discovery had taken place since then, tremendous amount of judicial resources had been expended on case, and any benefit in starting all over was speculative. 42 U.S.C.A. § 1983; 42 U.S.C.A. § 1997e(a).

Cases that cite this headnote

[3] **Civil Rights**
Criminal law enforcement; prisons

City prison inmates were not required to exhaust administrative remedies before bringing § 1983 class action alleging that city department of correction (DOC), city board of education, and state department of education had not provided them with educational services to which they were entitled under federal and state law, where DOC did not have jurisdiction to address failure to provide educational services to city prison inmates. 42 U.S.C.A. § 1983; 42 U.S.C.A. § 1997e(a).

2 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

OPINION

MOTLEY, J.

***1** On August 16, 1996, eleven inmates incarcerated in jails on Rikers Island filed this class action alleging that the New York City Department of Correction ("DOC"), the New York City Board of Education ("BOE"), and the New York State Department of Education ("SED") had not provided them with educational services to which they are entitled under federal and state law.

The applicable DOC inmate grievance procedure was at the time this case was filed, and continues to be, set forth in Directive 3375R, which provides that "matters outside the jurisdiction of the Department of Correction" cannot be grieved in the DOC system. *See* Directive 3375R § II.B.5. Plaintiffs concede that they did not file DOC grievances concerning the denial of education, claiming that the provision of education is the sole province of the BOE. The claims raised in this matter, they argue, which refer to defendants' failure to provide certain educational services, are not cognizable by the DOC grievance process. Plaintiffs argue that under prevailing Supreme Court jurisprudence and as a practical matter they need not—and indeed, that they cannot—exhaust.

For the reasons set forth below, the court finds that the Supreme Court's decision in *Porter v. Nussle,* 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002) does not require plaintiffs in this case to exhaust administrative remedies prior to bringing their 42 U.S.C. § 1983 class action in district court. The City defendants' motion to dismiss is DENIED. The State's renewed motion to dismiss is likewise DENIED. The injunction issued by this court on August 29, 2002 is hereby REINSTATED in full, effective immediately.

RELEVANT BACKGROUND

In 1996, defendant Richard Mills, the State Commissioner of Education, moved to dismiss this case on the ground that plaintiffs had not exhausted administrative remedies under the Prison Reform Litigation Act ("PLRA"). The City opposed this motion, noting that:

> [T]he New York City Department of Corrections' Inmate Grievance Resolution Program identifies as 'non-grievable' "matters outside the jurisdiction of the Department of Correction.... The complaint in the instant action includes allegations against officials of the New York City Department of Correction, the New York City Board of Education, and the New York State Commissioner of Education. Thus, plaintiffs raise issues that, at the time, appear to be outside the jurisdiction of the Department of Correction.... Accordingly, defendant Mills' motion on this ground should be denied without prejudice.

See City Opp.1996 at 3.

Thereafter, in his Report and Recommendation ("Report") to Judge Kimba M. Wood. Magistrate Judge James C. Francis found that "DOC has no power to resolve this matter, *and* it is not grievable through a DOC hearing. Exhaustion of the grievance process would therefore be futile." *See* Report at 4–5 (emphasis added). The Report specifically informed the parties that they had 10 days to submit objections pursuant to Fed.R.Civ.P. Rule 72. Defendants were granted an extension to file objections to the Report. No objections were filed. Pursuant to her adoption of the Report, Judge Wood found that plaintiffs' failure to exhaust administrative remedies was not a bar to suit. *See* Order, May 27, 1997.

***2** In 1999, in its cross-motion for summary judgment, the City changed its position, arguing that the plaintiffs *were* required to exhaust under the PLRA. This court rejected the City's newly-embraced exhaustion of remedies argument, observing:

> This is not the first occasion a defendant in this case has proffered this tenuous argument. The weakness of this argument was clearly explained in [Magistrate Judge Francis's Report] as adopted by order of Judge Kimba M. Wood dated May 27, 1997. This court is equally unpersuaded by City defendants' exhaustion argument. The [PLRA] does not require prospective plaintiffs to avail themselves of the grievance procedure for issues outside the jurisdiction of DOC. Resolution of plaintiffs' claims for educational services falls beyond the powers of DOC and thus the claims are not barred by the PLRA's exhaustion requirement.

See Handberry, 92 F.Supp.2d at 247–48.

On August 29, 2002, this court issued an Order Amending the City Defendants' Education Plan ("Order"). *See Handberry v. Thompson,* 219 F.Supp.2d 525 (S.D.N.Y.2002). Thereafter, defendants moved for a partial stay pending their appeal of the court's injunction directing them to provide plaintiffs with educational services in accordance with federal and state law. On November 27, 2002, the Court of Appeals for the Second Circuit issued a one-paragraph-long order vacating this court's injunction and remanding the case, stating, in relevant part:

> The findings on the basis of which the injunction was issued predated the decision of the Supreme Court in *Porter v. Nussle,* 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002). Upon due consideration, it is ORDERED that the injunction is vacated and the case is remanded to the district court for consideration of whether, under *Porter v. Nussle,* the plaintiffs were required to exhaust administrative remedies prior to bringing their 42 U.S.C. § 1983 class action in the district court and, if so, what further administrative or judicial proceedings are necessary. This order is without prejudice to a reinstatement of the injunction, as appropriate, after such further proceedings.

On December 3, 2002, this court ordered the parties to submit briefs addressing what effect the Court's decision in *Porter v. Nussle* might have on this litigation. On January 14, 2003 this court held a hearing addressing the matter. Upon due consideration, this court now finds that plaintiffs in this case are not required to exhaust administrative remedies prior to bringing their 42 U.S.C. § 1983 class action in district court.

ANALYSIS

Waiver

As an initial matter, plaintiffs argue that it is unnecessary to reach the issue of the effect of *Porter* on this litigation, urging the court instead to invoke the equitable doctrines of waiver and estoppel to prevent defendants from pursuing the exhaustion issue. Plaintiffs argue that the City waived the exhaustion defense through what it perceives as a failure to timely seek a ruling on the issue. In addition, plaintiffs believe that City should be estopped from now raising the issue of exhaustion in light of their adoption of a seemingly contrary position in opposition to the State's motion to dismiss in 1996.

***3** In order for these equitable doctrines even to be available, the court must first find that the PLRA exhaustion requirement does not act as a jurisdictional bar. Although the Second Circuit has not yet ruled on this issue, every Circuit to consider the question, both before and after *Porter,* has concluded that the PLRA's exhaustion requirement is not jurisdictional. *See Ali v. District of Columbia,* 278 F.3d 1, 5–6 (D.C.Cir.2002); *Casanova v. Dubois,* 289 F.3d 142, 147 (1st Cir.2002); *Rumbles v. Hill,* 182 F.3d 1064, 1067 (9th Cir.2002); *Nyhuis v. Reno,* 204 F.3d 65, 69 n. 4 (3d Cir.2000); *Wright v. Hollingsworth,* 260 F.3d 357, 358 n. 2 (5th Cir.2001); *Curry v. Scott,* 249 F.3d 493, 501 (6th Cir.2001); *Perez v. Wisconsin Dep't of Corrections,* 182 F.3d 532, 535–36 (7th Cir.1999); *Foulk v. Charrier,* 262 F.3d 687, 696 (8th Cir.2001). The Court in *Porter* did not address this issue in any manner, and nothing in *Porter* cuts against the reasoning of these courts. While a handful of cases in the Southern District have treated the exhaustion requirement as jurisdictional, this court is unconvinced by the (often nonexistent reasoning) in those cases. Indeed, courts in the Southern District have concluded that the exhaustion requirement is not jurisdictional. *See, e.g., Mendoza v. Goord,* 2002 WL 31654855 at *2.

The Second Circuit has held that exhaustion is to be pled as an affirmative defense. *Snider v. Melindez,* 199 F.3d 108, 111–112 (2d Cir.1999); *Jenkins v. Haubert,* 179 F.3d 19, 28–29 (2d Cir.1999). Recently, in *Davis v. New York,* 316 F.3d 93, 2002 WL 31780920 at *7 (Dec. 13, 2002, 2d Cir..), the Second Circuit remanded to determine, *inter alia,* whether defendants waived the PLRA exhaustion defense. The Second Circuit's actions in these cases are inconsistent with the position that exhaustion is jurisdictional, but rather renders it "akin to a statute of limitations." *Ray v. Kertes,* 285 F.3d 287, 293 (3d Cir.2002).

[1] The court finds the chorus of these courts of appeals to be irresistible and manifestly correct. The PLRA's exhaustion requirement simply "governs the timing of the action" and does not contain the type of " "sweeping and direct" ' language that would indicate a jurisdictional bar rather than a "mere codification[ ] of administrative exhaustion requirements." *Chelett v. Harris,* 229 F.3d 684, 688 (8th Cir.2000) (quoting *Weinberger v. Salfi,* 422 U.S. 749, 757, 95 S.Ct. 2457, 45 L.Ed.2d 522 (1975)). Accordingly, this court finds that the PLRA exhaustion requirement is not jurisdictional.

The City raised the exhaustion issue in its answer in 1996. Weeks later, however, the City reversed itself, opposing defendant Mills' motion to dismiss due to failure to exhaust. The City now insists that in 1996 it argued that defendant Mills' motion was premature because no discovery had been conducted on exhaustion issues. And, indeed, in 1996 the City noted that Mills' motion to dismiss for plaintiffs' failure to exhaust "may ultimately be decisive," but that discovery was necessary to determine which educational activities were "solely attributable to the Department of Correction." *See* City Opp. at 3. The City argues that it did not unequivocally concede the issue of jurisdiction, but merely sought discovery on it in order to determine which issues in plaintiffs' complaint were solely attributable to the DOC.

Moreover, the City notes that it raised the exhaustion issue again in its 1999 cross-motion for summary judgment. In light of the foregoing, the City insists that it preserved the defense.

***4** [2] For a variety of reasons, the court believes that defendants ought not to be allowed to raise the exhaustion argument.[1] In 1996, in opposition to defendant Mills' motion to dismiss, the City argued that plaintiffs' claims would be grievable if they were "solely attributable to the [DOC]." *Id.* For reasons that are unclear to the court, the City asserts that discovery somehow served to clarify the exhaustion question. Interestingly, upon reviewing paragraphs 12–22 of the complaint, the Director of the Inmate Grievance Resolution Program for the DOC, Arthur Harris, concluded that the inmates could have filed an inmate grievance concerning access to school. *See* Harris Dec. at 3. One wonders why the issue was not equally clear to the City—or clear enought to pursue the exhaustion of remedies argument—when it opposed defendant Mills' motion to dismiss in 1996. The memorandum annexed to the City's brief on *Porter* addresses the issue of which aspects of the school program were grievable. This memorandum has been available to the City since this litigation commenced. According to the City's argument, if anything could be grieved, then the exhaustion requirement obtains and the case must be dismissed. Porter does not change the fact that the City could have taken this position in 1996, but instead opposed Mills' motion. The court cannot see how discovery could have clarified the issue of whether it was appropriate to raise the exhaustion issue in 1996. While the court recognizes the qualifications that the City attached to any putative concession in connection with the jurisdiction question in 1996, in light of the position the City adopted, this litigation was significantly protracted by a number of *years.* Plaintiffs requested and received discovery when it was apparent from the four comers of the complaint that issues raised were arguably within DOC jurisdiction. The City clearly could have, and indeed should have, pursued the exhaustion issue in response to Mills' motion to dismiss in 1996. It has waived this defense.

Nearly seven years have passed since this case began. Extensive discovery has take place. Numerous hearings and conferences have been held with reference to this matter. One magistrate judge and two district court judges have addressed issues raised in this case. The provision of and access to education in New York prisons has been observed and studied by a court-appointed monitor, who has provided thoughtful and detailed reports on the matter. Having come to factual and legal conclusions concerning the responsibilities of defendants in connection with provision of and access to education in New York prisons, all of the parties involved have gleaned a remarkable amount of information concerning how the defendants can best fulfill their legal obligations. The resources, judicial and otherwise, expended on this case over the past six years, have been tremendous.

In *Porter v. Nussle,* 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002), the case which the Second Circuit instructed this court to consider vis-a-vis the issue of exhaustion, the Court made a number of observations concerning Congress's rationale for mandating exhaustion of available remedies. For example, the Court noted that internal review might filter out frivolous claims. *Id.* at 525. After more than six years of litigation, a motion to dismiss, motions for summary judgment, the work of a court-appointed monitor, and the issuance of the August 29, 2002 injunction, the court firmly believes that issue of frivolity has been addressed.

***5** In connection with the judicial economy rationale, the Court in *Porter* noted that "[i]n some cases, corrective action taken in response to an inmates' grievance might improve prison administration and satisfy the inmate, thereby obviating the need for litigation." *Id.* at 525 (citing *Booth v. Churner,* 532 U.S. 731, 737, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001)). As this court shall show in its consideration of the meaning of the statutory phrase "administrative remedies ... available" *infra,* this putative rationale simply has no force in the instant case.[2]

In addition, the Court observed that "[b]eyond a doubt, Congress enacted § 1997e(a) to reduce the quantity and improve the quality of prisoner suits." *Id.* at 525. We can speculate about whether administrative procedures might have clarified the issues so closely considered by this court for more than six years, thereby improving the quality of this suit. We cannot fail to pause and consider, though, whether the speculative benefits of starting over, after more than six years, outweigh the tremendous costs which would inhere in such an enterprise. As the court already observed, the parties and members of this court have expended a remarkable amount of time and money addressing the issues of provision of and access to education in New York's prisons. In addition, dismissing now for failure to exhaust would result in undue prejudice to the subsequent assertion of a court action. In addition to the foregoing, the court is not convinced that *Porter* and *Booth* definitively foreclosed the possibility that exhaustion may be waived or *excused* in light of the interest of, e.g., judicial economy or undue prejudice.[3]

In any case, it is apparent from submissions offered by the City that the issue should have been raised with respect to Mills' motion to dismiss in 1996. Principles of equity direct the court to disallow the exhaustion argument to be introduced again into this litigation.

Porter v. Nussle

Although it would normally be unnecessary to reach the

merits of the case after invocation of the doctrine of waiver, the Second Circuit's order remanding the case specifically ordered this court to consider whether *Porter* requires exhaustion under the PLRA. As such, we shall turn to this discrete issue.[4]

The PLRA exhaustion requirement is codified at 42 U.S.C. § 1997e(a). It states:

> § 1997e. Suits by prisoners
>
> (a) Applicability of administrative remedies 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 (emphasis added).

We revisit the issue of exhaustion in light of the Supreme Court's consideration of the exhaustion requirement in 42 U.S.C. § 1997e(a) in two recent cases. In *Porter v. Nussle,* 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002), Ronald Nussle, an inmate in a Connecticut prison, without filing an inmate grievance, commenced an action in federal court under 42 U.S.C. § 1983, charging that officers had singled him out for a beating in violation of the Eighth Amendment's ban on "cruel and unusual punishments." Nussle bypassed the grievance procedure provided for by the Connecticut Department of Correction. The district court, relying on § 1997e(a), dismissed Nussle's complaint for failure to exhaust administrative remedies. *Nussle v. Willette,* 3:99CV1091 (AHN) (D.Conn., Nov. 22, 1999).

***6** The Court of Appeals for the Second Circuit reversed the district court's judgment, holding that § 1997e(a) governs only conditions which affect prisoners generally, not single incidents. Thus, actions that immediately affect only particular prisoners, such as corrections officers' use of excessive force, would not be governed by § 1997e(a). Though § 1997e(a) requires exhaustion of inmates' claims with respect to "prison conditions, the Second Circuit noted that the provision contains no definition of the ambiguous words "prison conditions." *Nussle v. Willette,* 224 F.3d 95, 101 (2d Cir.2000). With reference to the PLRA's exhaustion requirement, the Second Circuit concluded that the term was most appropriately read to mean " 'circumstances affecting everyone in the area," ' rather than " 'single or momentary matter[s],' such as beatings ... directed at particular individuals." *Id.* at 101 (quoting *Booth v. Churner,* 206 F.3d 289, 300–301 (3d Cir.2000) (Noonan, J., concurring and dissenting), *aff'd on other grounds,* 532 U.S. 731, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001)).

The Supreme Court granted certiorari and, in *Porter v. Nussle,* rejected the Second Circuit's reading of § 1997e(a). Writing for a unanimous Court, Justice Ginsberg noted that

> [t]he current exhaustion provision differs markedly from its predecessor. Once within the discretion of the district court, exhaustion in cases covered by § 1997e(a) is now mandatory. *See Booth v. Churner,* 532 U.S. 731, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001). All *"available"* remedies must be exhausted; those remedies need not meet federal standards, nor must they be "plain, speedy, and effective." *See* ibid; *see also id.* at 740, n. 5. Even when the prisoner seeks relief not available in grievance proceedings, notably money damages, exhaustion is a prerequisite to suit. *See id.* at 741. And unlike the previous provision, which encompassed only § 1983 suits, exhaustion is now required for all action[s] brought with respect to prison conditions," whether under § 1983 or "any other Federal law." *Compare* 42 U.S.C. § 1997e (1994 ed.) *with* 42 U.S.C. § 1997e(a) (1994 ed., Supp. V) (emphasis added).

Id. at 524.

Homing in on the issue before the Court, Justice Ginsberg stated that Nussle's case "requires us to determine what the § 1997e(a) term 'prison conditions' means...." *Id.* at 525. Proceeding to "read the term 'prison conditions" ' in its proper context, the Court in *Porter* observed that the PLRA exhaustion provision is captioned "Suits by prisoners," noting that "this unqualified heading scarcely aids the argument that Congress meant to bi-sect the universe of prisoner suits." *Id.* at 527 (citing 42 U.S.C. § 1997e). Drawing inferences from text and context, the Court concluded that the Second Circuit's interpretation of the term "prison conditions" vis-a-vis the "single occurrence, prevailing circumstance dichotomy" was incorrect. *Id.* at 531. Rather, the Court observed that "the PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong." *Id.* at 532.

***7** [3] As an initial matter, and in direct response to the Second Circuit's order remanding the case, the court finds that the Supreme Court's holding in *Porter* does not require the plaintiffs to exhaust administrative remedies prior to bringing their 42 U.S.C. § 1983 class action in

district court. A careful reading of *Porter* reveals that the Court focused on the narrow issue of the meaning of the statutory term "prison conditions" and the impact of that meaning on the operative effect of the PLRA's exhaustion requirement. The Second Circuit's conclusion that the exhaustion requirement applied only to complaints about general conditions in prison and not isolated instances was predicated upon its particular interpretation of the meaning of the statutory term "prison conditions." In *Porter,* the Supreme Court explained why the Second Circuit's understanding of the term was wrong.

Plaintiffs in this case have never contended that they are excused from the exhaustion requirement on the grounds that the failure to provide education to inmates is not a "prison condition." Plaintiffs do argue, *inter alia,* that it was not necessary to exhaust inasmuch the only putative remedies, the relevant grievance procedures, do not qualify as being "available" under § 1997e(a).

It bears repeating that 42 U.S.C. § 1997e(a) requires exhaustion only of "such administrative remedies *as are available"* (emphasis added). Under *Porter, the PLRA exhaustion requirement, which only obtains with respect to "remedies" which are "available," applies to isolated incidents as well as more general claims.* The City defendants take issue with this understanding of *Porter,* insisting that simply because plaintiff, an inmate, brought a claim in federal court about prison life, administrative remedies must be exhausted. The City's simplistic understanding of *Porter* must be rejected. In order to understand its interpretive error, it is helpful to look at the sentence in *Porter* which the City seizes upon pursuant to its renewed exhaustion argument:

> [W]e hold that the PLRA's exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.

534 U.S., at 532.

If viewed in isolation, this excerpt might lend support to the City's preferred understanding of the case. As the foregoing discussion reveals, however, the first clause of the holding in *Porter* ("we hold that the PLRA's exhaustion requirement applies to all inmate suits about prison life") is expressed vis-a-vis the narrow inquiry of whether the requirement applies to episodic claims. Justice Ginsberg, in discussing the newly invigorated exhaustion requirement, notes in *Porter* that "all 'available' remedies must now be exhausted." *Id.* at 524. There is at least one directive and pellucidly clear reason why the Court's opinion included, in quotation marks, the statutory word 'available' in this sentence: *Congress included the word 'available' in the text of § 1997e(a). See* 42 U.S.C. § 1997e(a).

***8** In construing the intended meaning of a statute, a court should begin with an examination of its language. *See Duncan v. Walker,* 533 U.S. 167, 172, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001). The Court, by making reference to the statutory word "available" in this manner, acknowledged that the word operates as a modifier, indeed a qualifier, with respect to the term "administrative remedies." *See Brown v. Croak,* 312 F.3d 109, 111 (3d Cir.2002) ("The PLRA does not require exhaustion of all remedies. Rather, it requires exhaustion of such administrative remedies 'as are available" ') (citing 42 U.S .C. § 1997e(a)). The City's reading of the *Porter* holding and the PLRA is erroneous inasmuch as it requires the court to read the word "available" out of the statute. This we cannot do. Standard canons of statutory interpretation, the Court's explicit and qualifying reference to the statutory word "available," and common sense dictate that the court not ignore a statutory term. *Porter* altered the legal landscape to the extent that it clarified that *the PLRA exhaustion requirement, which only obtains with respect to "remedies" which are "available," applies to isolated incidents as well as more general claims.*

While the Court in *Porter* recognized that only "available" remedies must be exhausted, the Court did *not* address the issue of the meaning of the statutory term "available." It is unnecessary, then, to read *Porter* as requiring exhaustion in all inmate suits about prison life, or in this case in particular. Judge Baer recognized the limited nature of the Court's holding in *O'Connor v. Featherston,* 2002 WL 818085 (April 29, 2002 S.D.N.Y..), observing:

> While the holding in *Porter* was based on the Supreme Court's delineation of the term "prison conditions," so as to encompass claims with respect to excessive force, the Court was otherwise silent as to the outer limits of other parts of the statute, in particular, the circumstances that may serve to satisfy the requirement of when "administrative remedies as are available are exhausted."

Id. at *2.

Available remedies?

Though the foregoing may constitute a sufficient response to the Second Circuit's order remanding this case, this court does not believe that anything in *Porter, Booth,* any other relevant case, or the history of this case suggests that there were "remedies" which were "available," but which were not exhausted by plaintiffs. The availability

of administrative remedies to a prisoner is a question of law. *See Brown,* 312 F.3d, at 111 (citing *Ray v. Kertes,* 285 F.3d 287, 291 (3d. Cir.2002)). This court addressed this issue in its ruling on the jurisdiction issue in 1999.

Plaintiffs argue that under the standard provided by the Supreme Court in *Booth,* the DOC grievance procedure was not "available." In *Booth,* the Supreme Court "[held] *only* that Congress has provided in § 1997e(a) that an inmate must exhaust irrespective of the forms of *relief* sought and offered through administrative avenues." 532 U.S. 731, at 741, n. 6, 121 S.Ct. 1819, 149 L.Ed.2d 958 (emphasis added); *LaFontaine v. Lilley,* U.S.App. LEXIS 18234 at * *3 (September 3, 2002, 2d Cir.) (observing that under *Booth,* the PLRA "requires a prisoner to exhaust administrative *remedies* regardless of the particular form of *relief* the prisoner desires as long as the administrative procedures can provide some relief to the prisoner") (emphasis added).

***9** In *Booth,* the Court addressed the specific circumstance of whether an inmate seeking only money damages must complete a prison administrative process that *could* provide some sort of relief on the complaint stated, but no money. The Court concluded that he must. Noting that the meaning of the phrase "administrative remedies ... available" was the crux of the case, *id.* at 736, the Court observed that "[w]hile the modifier 'available' requires the possibility of some relief for the action complained ..., the word 'exhausted' has a decidedly procedural emphasis. It makes sense only in referring to the procedural means, not the particular relief ordered." *Id.* at 739. The Court thus made a clear distinction between remedies, which are administrative procedures or procedural means, and the relief offered through those administrative channels. Although the inmate in *Booth* sought relief—money damages—which the given administrative remedy could not provide, that procedure itself was in fact "available" to the inmate. Neither of the parties in the case argued that the relevant administrative procedure lacked authority to provide some relief in response to the inmate's allegations. *Id.* at 736.

In contrast to *Booth,* however, now there is a dispute in the instant case as to whether the relevant administrative remedies were in fact "available" pursuant to § 1997e(a). Indeed, the parties disagree as to whether the DOC grievance procedure had jurisdiction to consider plaintiffs' complaint. According to the grievance directive, "non-grievable" matters are defined to include "matters outside the jurisdiction of the Department of Correction." Directive ¶ 3375R, ¶ II.B.5. Plaintiffs point out that Judge Wood (accepting Magistrate Judge Francis's Report) in 1996, and then this court in 1999, both concluded that the DOC lacks said jurisdiction. Consistent with this position, plaintiffs argue that the DOC does not have jurisdiction to address the failure to provide educational services because the provision of education falls within the purview of the BOE.

A grievance mechanism bereft of jurisdiction, plaintiffs argue, is "unavailable" under the PLRA. Whereas the DOC does not have jurisdiction to hear plaintiffs' claims—a fact which the Court in *Booth* implied to be relevant to an analysis of whether a remedy is "available" under § 1997e(a)—there is no "available" remedy pursuant to § 1997e(a). *See Booth,* 532 U.S., at 736, n. 4 (observing that if administrative officers do not have "authority to act on the subject of the complaint," the inmate would have "nothing to exhaust"). Thus, plaintiffs argue, the exhaustion requirement of § 1997e(a) did not obtain.

In his Report to Judge Wood in 1996, Magistrate Judge Francis found that the "[w]here adequate and speedy remedies are not available, exhaustion of state administrative remedies is not required prior to the adjudication of a § 1983 claim in federal court." *See* Report at 4 (citing *Heck v. Humphrey,* 512 U.S. 477, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994)). Magistrate Judge Francis added: "DOC has no power to resolve this matter, and it is not grievable through a DOC hearing. Exhaustion of the grievance process would therefore be futile." *See* Report at 4–5.

***10** And to repeat again, in 1999, in rejecting the exhaustion of remedies argument, this court noted that:

> [t]he weakness of [the exhaustion] argument was clearly explained in [Magistrate Judge Francis's Report].... The [PLRA] does not require prospective plaintiffs to avail themselves of the grievance procedure for *issues outside the jurisdiction of DOC.* Resolution of plaintiffs' claims for educational services falls beyond the powers of DOC and thus the claims are not barred by the PLRA's exhaustion requirement.

See Handberry, 92 F.Supp.2d at 247–48 (emphasis added).

The City now claims that there were administrative processes which were in fact "available" to hear at least some of plaintiffs' complaints concerning educational services.[5]

Plaintiff responds that even those aspects of plaintiffs' claims that are arguably the responsibility of the DOC—including, for example, whether inmates are informed of their right to receive an education, whether sufficient officers are assigned to provide security for the

school program, or whether security concerns bar certain inmates from attending school—are ancillary to BOE's provision of education. Plaintiffs are correct. As a practical matter, the aspects of plaintiffs' claims which might theoretically be cognizable by the DOC grievance process cannot be addressed in any meaningful manner unless and until, as a threshold matter, BOE decides to provide education in the prisons. In short, if there is no educational program operated by DOC as was the case in the adult jails when this case was filed—then any role which DOC might potentially play in its implementation remains dormant.[6]

In *Booth,* the Court noted that "[w]ithout the possibility of some relief, the administrative officers would presumably have no authority to act on the subject of the complaint, leaving the inmate with nothing to exhaust." *Id.* at 736, n. 4. This crucial observation strikes at the heart of the disputed issue of availability in the instant case. In the set of facts before the court, it would not be "possibl[e]" for DOC to provide some "relief" unless and until BOE decided to provide education in the prisons. *Id.* Again, as a practical matter, the court presumes that the administrative officers would not, e.g., make announcements concerning education which would not be provided, would not provide security for a non-existent school program, and the like. As plaintiffs noted in oral argument, "The [DOC] has to provide space, but that's meaningless if there's not a teacher to teach in that class. The [DOC] has to give notice of education, but that's meaningless if there's no education to give notice about." *See* Tr. at 11–12. Even if, pursuant to a thought experiment, the relevant DOC remedy did provide information services regarding non-existent schools or placed security in an empty room designated a "school" by the authorities, such actions, by definition, would not constitute even "some relief" pursuant to plaintiffs' complaints. Thus, there would be no "possibility of some relief." *Id.* According to Justice Souter's statement in *Booth,* the remedial body would presumably have no authority to act. According to *Booth,* the inmates in this case have nothing to exhaust.

***11** Neither the City nor the State present the court with any argument, based on *Porter, Booth,* or the facts of this case, which explains why it should reverse its decision concerning the DOC's lack of jurisdiction in 1999. The court notes that in his Report in 1996, Magistrate Judge Francis made reference to the consideration of the adequacy and speed of remedies. *See* Report at 4. In *Booth,* the Court observes that Congress eliminated from the PLRA the condition that the available remedy be "plain, speedy, and effective" before exhaustion could be required. *Id.* at 739. The dicta in the Report, however, referred to the discrete issue of whether exhaustion was required in this class action, independent of consideration of the issue of jurisdiction. *See* Report at 4 ("The plaintiffs contend that the exhaustion requirement ... is not applicable to class actions. However, it is not necessary to reach that issue. Where adequate and speedy state remedies are not available, exhaustion of state administrative remedies is not required....").

Moreover, notwithstanding the Court's opinion in *Booth,* Judge Francis's use of the word "futile" with reference to the issue of jurisdiction has no effect on this case. In a footnote in *Booth,* Justice Souter noted:

> That Congress has mandated exhaustion in either case defeats the argument ... that this reading of § 1997e ... is at odds with traditional doctrines of administrative exhaustion, under which a litigant need not apply to an agency that has "no power to decree ... relief," *Reiter v. Cooper,* 507 U.S. 258, 113 S.Ct. 1213, 122 L.Ed.2d 604 (1993), or need not exhaust where doing so would otherwise be futile (citations omitted). Without getting into the force of this claim generally, we stress the point ... that we will not read futility or other exceptions into statutory requirements where Congress has provided otherwise. Here, we hold only that Congress has provided in § 1997e(a) that an inmate must exhaust irrespective of the forms of relief sought and offered through administrative avenues.

Booth, 532 U.S., at 741, n. 6.

Magistrate Judge Francis's conclusion that DOC does not have jurisdiction was not predicated on a futility exception. Rather, he observed that "DOC has no power to resolve this matter, *and* it is not grievable through a DOC hearing. Exhaustion ... would therefore be futile." *See* Report at 4–5 (emphasis added). This court understood this to have presented independently sufficient reasons to reject the exhaustion argument: lack of power, lack of jurisdiction, lack of availability. In 1999, upon due consideration, this court concluded that DOC did not have jurisdiction to hear plaintiffs' claims. Nothing in *Porter* or *Booth* alters this conclusion.

IDEA Impartial hearing process

The City further argues that plaintiffs were required under the PLRA to exhaust the IDEA impartial hearing requirement provided in N .Y. Educ. L. § 4404(1). The court can see no reason why the City failed to raise this

issue in 1996 with reference to exhaustion. The Court's interpretation of the PLRA's statutory language in *Porter* does not justify the delay in proffering this argument. The relevant statutory text remains the same. Defendants have waived this argument.[7]

CONCLUSION

***12** In light of the foregoing, the court finds that the Supreme Court's decision in *Porter v. Nussle,* 534 U.S. 516, 122 S.Ct. 983, 152 L.Ed.2d 12 (2002) does not require plaintiffs in this case to exhaust administrative remedies prior to bringing their 42 U.S.C. § 1983 class action in district court. The City defendants' motion to dismiss is DENIED. The State's renewed motion to dismiss is likewise DENIED. The injunction issued by this court on August 29, 2002 is hereby REINSTATED in full, effective immediately.

SO ORDERED.

Footnotes

1 The court does not reach plaintiffs' estoppel argument.

2 In *Booth v. Churner,* 532 U.S. 731, 121 S.Ct. 1819, 149 L.Ed.2d 958 (2001), Justice Souter noted that "[w]ithout the possibility of some relief, the administrative officers would presumably have no authority to act on the subject of the complaint, leaving the inmate with nothing to exhaust." 532 U.S., at 736, n. 4. The court provides a robust analysis of this issue, *infra.*

3 In *Booth,* the Court did conclude that amendments to § 1997e(a) "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." *Id.* at 739. Neither *Porter* nor *Booth* clearly foreclosed all possibilities that even mandatory exhaustion may be *excused* by a district court. *See Lyon v. Vande Krol,* 305 F.3d 806, 812 (8th Cir.2002) (Bright, J., dissenting).

4 As the court's analysis shall show, the Court's decision in *Porter* itself does not require the plaintiffs in the case to exhaust prior to bringing this action in federal district court. According to a literal reading of the Second Circuit's order remanding the case, this court's analysis could have ended there. To the extent that the Court's decision in *Porter* made reference to *Booth,* the court opted to go a step further and address the issue of whether *Porter* or *Booth* affected an analysis of whether "remedies" were "available" under § 1997e(a).

5 To the extent that this argument was not previously made, it would be deemed to be waived.

6 As the court shall explain, this argument is not based on a futility exception.

7 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. *Id.* at 525. 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.