WASHINGTON
LEGISLATIVE OFFICE

May 10, 2010

RE: Docket No. OAG-131; AG Order No. 3143-2010
National Standards to Prevent, Detect, and Respond to Prison Rape

Dear Attorney General Holder:

On behalf of the American Civil Liberties Union, we submit these comments in support of the standards developed by the National Prison Rape Elimination Commission, and additionally urge clarification and strengthening of certain standards to provide for more adequate protection of especially vulnerable populations that are at greatly heightened risk for being sexually abused in prison.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization with more than 500,000 members, dedicated to the principles of liberty and equality embodied in our Constitution and our civil rights laws. The ACLU's National Prison Project, founded in 1972, seeks to promote constitutional conditions of confinement in prisons, jails, juvenile facilities, and immigration detention facilities throughout the nation, through class action litigation and public education. Our policy priorities include reducing prison overcrowding, improving prisoner medical care, eliminating violence and maltreatment in prisons and jails, and minimizing the reliance on incarceration as a criminal justice sanction. The ACLU National Prison Project is the only organization litigating conditions of confinement nationwide on behalf of men, women, and children, including on the issue of prison rape. Margaret Winter, Associate Director of the ACLU National Prison Project, testified before the National Prison Rape Elimination Commission and served on the Standards Development Expert Committee that advised the Commission in the development of the standards.

The proposed standards are as urgently needed today as they were seven years ago, when Congress mandated the creation of these guidelines to protect the millions of men, women and children in our country's prisons, jails and detention centers from the life altering trauma of sexual abuse in custody. If adopted and implemented, these standards are likely to have a far-reaching effect in preventing such abuse. However, there are some areas in which the standards could be enhanced to better achieve the mandate of the Prison Rape Elimination Act.

Our comments first address the three questions posed in the advanced notice of proposed rulemaking, but focus primarily on the second question: whether the Commission's proposed standards impose "substantial additional costs" compared to the costs currently expended. We will then offer comments

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about particular standards, followed by recommendations for modifications to improve the standards. In addition, the ACLU joins in a separate set of comments submitted by a coalition of groups recommending further enhancements of the standards to ensure the safety of lesbian, gay, bisexual, transgender and intersex inmates, who are among the most vulnerable to sexual abuse in prison.

Response to questions posed by the advanced notice of proposed rulemaking

1. ***What would be the implications of referring to "sexual abuse" as opposed to "rape" in the Department's consideration of the Commission's proposed national standards?***

PREA's definition of rape includes all of the conduct within the Commission's definition of sexual abuse except for sexual harassment, staff-on-inmate voyeurism, and staff-on-inmate indecent exposure. In the course of the ACLU's work we have found that it is impossible to address the problem of prison rape without including this full spectrum of sexual abuse, both because sexual harassment, and voyeurism and exhibitionism by security staff, are well-known precursors to sexual assault; and because these kinds of sexual abuse can cause terror, dread, humiliation, and lasting psychic damage as severe as that caused by violent penetration. It is critically important that the national standards take a "zero tolerance" approach to *all* staff sexual misconduct and *all* coercive sexual activity between inmates.

We urge you to adopt the Commission's use of the widely recognized terminology of "sexual abuse" in the standards. Doing so is clearly consistent with the intent of PREA, and will minimize confusion with the criminal standard for rape, which varies by state.

2. ***Would any of the Commission's proposed standards impose "substantial additional costs" within the meaning of the Prison Rape Elimination Act?***

The Prison Rape Elimination Act provides that "[t]he Attorney General shall not establish a national standard under this section that would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison authorities." 42 U.S.C.§15607(a)(3). According to BJS, the costs expended by Federal and State prison authorities in 2006 amounted to some $68 *billion* (http://bjs.ojp.usdoj.gov/content/glance/tables/exptyptab.cfm). It is implausible that any additional cost that might be imposed by the proposed standards could be deemed "substantial" in comparison with this staggering total.

Any consideration of whether implementation of a proposed standard would impose a "substantial additional cost" must take into account the constitutionally-mandated obligation imposed on corrections authorities by the Eighth and Fourteenth Amendments to protect incarcerated persons in their custody from rape. As the PREA's findings state, "The high incidence of sexual assault within prisons involves actual and potential violations of the United States Constitution. In *Farmer v. Brennan*, 511 U.S. 825 (1994), the Supreme Court ruled that deliberate indifference to the substantial risk of sexual assault violates prisoners' rights under the Cruel and Unusual Punishments Clause of the Eighth Amendment."[i] The position by some opponents of the proposed standards, that essentially *any* additional cost to implement a

proposed standard would be a "substantial additional cost" simply cannot be reconciled with this constitutional mandate -- which already requires governmental authorities to undertake necessary expenditures to protect incarcerated people from rape.

It is no defense to a claim of failure to protect from rape for a prison official simply to assert that it would have involved a "significant additional cost" to provide such protection. The term "significant additional cost is a relative one, not only "compared to the costs presently expended by Federal, State, and local prison authorities," but also relative to the nature of the benefit conferred and the harm avoided by providing protection from sexual abuse. As the Supreme Court underscored in *Farmer v. Brennan*, "prison officials have a duty to protect prisoners from violence at the hands of other prisoners. Having incarcerated them with persons with demonstrated proclivities for antisocial criminal, and often violent, conduct, having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature take its course. Prison conditions may be restrictive and even harsh, but gratuitously allowing the beating or rape of one prisoner by another serves no legitimate penological objective, any more than it squares with evolving standards of decency. Being violently assaulted in prison is simply not "part of the penalty that criminal offenders pay for their offenses against society."*Farmer* at 833-834 (internal citations, quotation marks and punctuation omitted).

A review of the legislative history of the Act, a bipartisan initiative that passed unanimously in both the House and the Senate, shows that Congress intended any calculation of "substantial *additional* cost" to take into account not only the constitutional mandate, but also the savings that would flow from decreasing the incidence of prison rape. Congress was concerned with the catastrophic economic as well as social costs to the nation that result from prison rape, and anticipated that implementation of PREA standards would eventually result in enormous cost benefits to correctional administrators and to the entire community. As Senator Sessions noted during the debate, "if a State is not in compliance, it can use the 5-percent money that they would otherwise lose to work on this problem. If they do that, they will not end up losing any money, but it will be a way of us saying: If you are going to continue to draw Federal money, take this issue seriously."[ii]

The bipartisan sponsors and supporters of the bill stressed the ripple effect of prison rape and opined that regulations to decrease prison rape would decrease the cost of running prisons, making programs such as healthcare and mental healthcare more effective, reducing prison unrest, and decreasing recidivism. Congress found that the high incidence of prison rape has a significant effect on interstate commerce because it increases substantially the costs incurred by Federal, State, and local jurisdictions to administer their prison systems; the incidence and spread of HIV, AIDS, tuberculosis, hepatitis B and C, and other diseases, which contribute to increased health and medical expenditures throughout the Nation; the rate of post-traumatic stress disorder, depression, suicide, and the exacerbation of existing mental illnesses among current and former inmates, contributing to increased health and medical expenditures throughout the Nation; and the risk of recidivism, civil strife, and violent crime by individuals who have been brutalized by prison rape.[iii] Accordingly, any analysis of whether the standards "would impose substantial additional costs compared to the costs presently expended by Federal, State, and local prison

authorities“ must take into account the heavy Federal, state and local costs that will be reduced by reducing prison rape.

The language of the statute make it clear that whether a recommended standard would “impose a substantial additional cost” is a relative term; its meaning must be determined in a context-specific inquiry. That is generally the case when federal statutes and their implementing regulations require State and local authorities to incur some cost to protect rights Congress has recognized as basic. For example, the Rehabilitation Act of 1973, 29 U.S.C. § 794(a), like PREA, conditions the receipt of federal funds on compliance with specific remedial standards. Also like PREA, its requirement that governments make available public accommodations has an “undue hardship” cost limitation.[iv] In addition, both costs and benefits are considered in determining whether an accommodation imposes an undue burden.[v] Application of the cost limitation in PREA should likewise involve a weighing of immediate monetary cost against the vast benefits of ending prison sexual abuse.

The same is the case even when Congress’s constitutional authority to enact the statute in question does not depend upon the Spending Clause. Pursuant to Title II of the Americans With Disabilities Act, for example, which broadly applies to public entities, including prisons and jails, whether or not they accept federal financial assistance, a “qualified individual with a disability” cannot, “by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity,” 42 U.S.C. § 12132. The regulations the Attorney General promulgated under Title II provide that a public entity is not required “to take any action that it can demonstrate would result in a fundamental alteration in the nature of a service, program, or activity or in *undue financial and administrative burdens*,” *id.* § 35.150(a)(3). Where the public entity asserts, however, that the proposed action would fundamentally alter the service, program, or activity or result in undue financial and administrative burdens, *the public entity* “has the burden of proving that compliance … would result in such alteration or burden..” Further, “if an action would result in such an alteration or such burdens, a public entity shall take any other action that would not result in such an alteration or such burdens but would nevertheless ensure that individuals with disabilities receive the benefits or services provided by the public entity.”

Should the Department consider differentiating within any of the four categories of facilities for which the Commission proposed standards?

The standards set forth basic measures that all facilities must put in place to meet their constitutional obligation to protect inmates from abuse. In their final recommended standards, the Commission took pains to ensure that each provision was sufficiently flexible to account for the distinctions between facilities and the variance in available resources. For example, in Standard PP-3 (inmate supervision) rather than requiring that cameras or other monitoring technology be installed, the recommended standards merely require that upper management assess whether such technology is needed, given the unique factors of that facility’s environment. Likewise, Standards RP-2 through RP-4 (agreements with outside entities, law enforcement agencies and the prosecuting authority) only require that the agency attempt to enter into memoranda of understanding (MOU), recognizing that these services may not be available everywhere.

Creating distinctions for the level of compliance required will send a dangerous message that certain types of facilities do not need to put in place the measures necessary to protect inmates from sexual abuse. Failing to address the known risk of sexual violence is a constitutional violation, regardless of facility size, personnel, resource limitations or other factors.

Comments on the Standards

Prevention and Response Planning
Proper planning, through the development of sound policies and the collaboration with outside resources, is essential to improving safety. It is also indicative of the strong leadership needed to effectively address sexual violence in detention. The provisions in this section reflect the innovations and concerns raised by corrections leaders throughout the process. In fact, a comparison of the Commission's recommended standards with a draft version released for public comment in 2008 illustrates the significant deference provided to officials.

For example, Standard PP-3 (inmate supervision) requires corrections officials to provide "the inmate supervision necessary to protect inmates from sexual abuse." In comparison, the 2008 draft standard required "continuous sight and sound supervision of inmates." The final recommended version of the standard permits officials to utilize discretion in assessing the level of supervision adequate to maintaining inmate safety. While upper management is required to review critical incidents and monitor technology needs, there is no requirement that such technology be purchased or installed.

Likewise, Standard PP-7 (assessment and use of monitoring technology) calls for the use of appropriate, cost-effective technology, but this provision was amended from its draft version to allow officials to meet its requirements through a feasibility assessment and plan that accounts for financial limitations. As a result, any significant expense that could have been imposed from these standards has already been eliminated.

Standard PP-4 (limits to cross-gender viewing and searches) has also been revised to substantially reduce its requirements, despite findings in each of the BJS' inmate surveys that a significant percentage of sexual abuse in all types of corrections facilities is perpetrated by staff members of the opposite sex. Rather than limiting cross-gender supervision in any areas where inmates disrobe or perform bodily functions – which, consistent with international human rights standards, is the norm in most other western countries – the final recommended standard only prohibits *actually viewing* inmates of the opposite gender who are nude or performing bodily functions.

While some of PREA's opponents claim that this standard would require substantial costs in hiring staff and/or for facility construction, other agencies have shown that it can be met with low-cost solutions. For example, requiring officers of the opposite gender to announce themselves before entering a dormitory area, and providing screens or towels for shower and toileting privacy, would go a long way toward meeting the inmate supervision requirements at little cost. Pat searches can be conducted only at locations near points of contact with potential contraband, allowing for more thorough searches at the most appropriate times and freeing up staff resources for other critical job functions. Many agencies already comply with PP-4's

preclusion of routine cross-gender viewing and searches in their women's facilities. In light of the BJS data, which shows high percentages of abuse by female staff of male inmates, these protections are clearly needed in all facilities.

Prevention

Preventing sexual abuse is at the heart of all PREA-related initiatives, and the training and classification provisions in the standards represent well-established means of doing so. Rather than imposing stringent curricula, Standards TR-1 through TR-5 (training and education) include basic information that can be incorporated into pre-existing staff training sessions and inmate orientations workshops. Policies aimed at eliminating sexual abuse in detention become meaningful only if corrections staff, contractors, and volunteers are appropriately trained to take action to prevent and address incidents of sexual violence. Similarly, inmates must be aware of their absolute right to be free from sexual abuse, and that the facility will not tolerate sexually predatory treatment of inmates.

Proper classification is critical to ensuring that potential predators and potential victims are not housed together. It can also help break the insidious and common corrections practice of automatically placing the victim in protective custody following an incident of sexual abuse. This practice is punitive by default as it results in a loss of services and programs, and leaves the victim isolated. Standards SC-1 (screening for risk of victimization and abusiveness) and SC-2 (use of screening information) address these concerns, relying on the BJS data and other academic research that have identified certain populations that are especially vulnerable to abuse.

A special aspect of this problem arises in immigration detention facilities, where there have been a number of disturbing reports of sexual violence.[vi] The proposed Supplemental Standards for Facilities with Immigration Detainees focus on the unique problems experienced by this vulnerable population. For example, the proposed Supplemental Standards for facilities With Immigration Detainees include standards to be followed in ICE family facilities. Standard IDFF-1 provides that "family facilities develop screening criteria to identify those families and family members who may be at risk of being sexually victimized that will not lead to the separation of families. Housing, program, educational, and work assignments are made in a timely manner that protects families and in all cases prioritizes keeping families together."

The ACLU's litigation to improve conditions in the T. Don Hutto Family Detention Center in Taylor, Texas, as well as our advocacy on family detention issues more generally, highlight the importance of IDFF-1. During the time that ICE was operating Hutto as a family detention facility, ICE did not have a screening process that identified families and family members who may have been at risk of being sexually victimized, and yet we knew of several mothers who faced that risk. Indeed, while litigating to improve conditions at the facility, the ACLU learned of a sexual assault that occurred at the facility.[vii] There was immediate concern that ICE would respond to this assault by transferring and separating members of the detained family. At the time, there were no written protocols governing ICE family detention facilities. IDFF-1 would help ensure that ICE identifies family members at risk for sexual victimization while keeping families together.

Detection and Response

In the aftermath of a sexual assault, inmates need safe, effective reporting options that are responded to swiftly and thoroughly. The ability to contact any trusted staff member and the creation of hotlines to outside entities have proven to be important mechanisms for encouraging reports. However, it is still far too common that officials fail to respond to reports of sexual abuse appropriately, such as by failing to initiate an investigation, refusing to provide protective measures, or by directly facilitating or participating in retaliatory behavior.

When officials fail to protect inmates from sexual abuse, victims need access to legal redress that is not hindered by unrealistic and arbitrary procedural requirements. Unfortunately, the Prison Litigation Reform Act (PLRA), which requires prisoners to exhaust "such administrative remedies as are available" before filing suit, all too often proves to be an insuperable barrier to victims of sexual abuse. The Supreme Court has held that this requirement means that prisoners must complete the prison's internal administrative grievance process, including "compliance with an agency's deadlines and other critical procedural rules."[viii]

Over the past thirteen years since passage of the PLRA, thousands of claims of serious and unconstitutional abuse of prisoners have been forever barred for lack of "proper exhaustion,"[ix] with no inquiry into the truth of the prisoner's substantive claims. *See, e.g.*, *Minix v. Pazera*, 2005 WL 1799538 at *4 (N.D.Ind., July 27, 2005) (dismissing for non-exhaustion because the 15-year-old prisoner, who had been repeatedly beaten and raped, did not file a grievance, even though his mother had made repeated complaints to numerous officials while the abuse was ongoing). Prisoners – many of whom have little education, read poorly or not at all,[x] or have mental illness or mental retardation[xi] – are ill-equipped to comply with technical rules under short deadlines and without the assistance of legal counsel. Unlike most federal administrative remedies, prison and jail grievance systems tend to have extremely short deadlines, mostly 30 days or less, many as short as a week or two.[xii] Further, many prison grievance systems have unclear rules[xiii] or are inconsistently administered,[xiv] and some prisoners are subjected to misinformation[xv] or even threats by prison staff[xvi] that impede them from exhausting properly. Some prisoners' grievances simply disappear.[xvii] In a remarkable number of cases, prisoners receive no response whatsoever to their grievances,[xviii] and prison officials have gotten many cases dismissed by arguing that the prisoner failed to appeal the officials' *failure* to respond.[xix] There is no exception for immediate threats to health or safety.[xx] The result is that prisoner litigation has turned into a game of "gotcha" in which correctional system lawyers and the federal courts scour the record for mistakes in exhausting, while the merits are forgotten.[xxi]

Standard RE-2 (exhaustion of administrative remedies) recognizes that the harsh procedural requirements and unintended consequences of many prison grievance systems – such as filing deadlines as short as two days – cannot realistically be met by prison rape survivors. Similarly, the practice by some agencies of requiring that inmates report complaints to a specific officer – who may have been involved or complicit in the abuse – wholly undermines whatever policies or other efforts facilities have in place to address sexual abuse. Standard RE-2 provides a practical solution to these problems by requiring that a sexual abuse complaint will be deemed exhausted for the purposes of the PLRA "(1) when the agency makes a final decision on the merits of the report of abuse (regardless of whether the report was made by the inmate, made by a third party, or forwarded from an outside official or office) or (2) when 90 days have passed since the report

was made, whichever occurs sooner." This standard respects the concerns of the PLRA. Rather than encourage frivolous lawsuits, this standard will increase the efficiency with which prison rape and sexual violence cases proceed, by allowing courts to focus on the substantive claims of survivors instead of litigating their compliance with technicalities.

Rape and sexual assault can occur as retaliation when prisoners report other forms of correctional officer misconduct. In fact the problems created by the PLRA's exhaustion requirement are so well established that Congress is currently considering amending the PLRA to allow for a more balanced exhaustion requirement,[xxii] and the ABA has also endorsed reform.[xxiii] The Department of Justice should require that prisons' grievance procedures, not just those used in reporting rape, meet minimum standards. Specifically, generally applicable grievance procedures should never operate to require prisoners to request grievance forms from, or submit forms to, the officer to whom a grievance pertains, or require prisoners to attempt informal dispute resolution with such officer. Minimum standards should ensure that grievance procedures are exceedingly clear, streamlined, and responsive.

Monitoring

External scrutiny is vitally important to the strength of any public institution – and corrections facilities are no exception. Sound oversight, conducted by a qualified independent entity, can identify systemic problems while offering effective solutions.[xxiv]

Standard AU-1 (audit requirement) mandates the essential components of independent oversight in a cost-efficient manner. Done properly, this outside monitoring will provide a credible, objective assessment of a facility's safety, identifying problems that may be more readily apparent to an independent monitor than to an official working within a corrections system. It will also help hold systems accountable when they do not meet the requirements of the standards.

Some jurisdictions already have an oversight entity in place, such as an inspector general or ombudsman's office, which can be empowered to conduct these reviews at minimal expense to the corrections agency. While facilities that are not currently overseen by any independent entity may have to incur some financial expense in order to arrange for independent audits, the tremendous benefits to this outside perspective will significantly outweigh the costs, in terms of financial impact as well as safety. By identifying areas of noncompliance and addressing potential hazards proactively, inefficient and dangerous practices will be reformed, resulting in fiscal savings and other benefits.

Changes to Further Strengthen the Standards

We strongly urge the Department to supplement the mandatory Medical and Mental Health Care standards recommended by the Commission, so that DOJ's final regulation explicitly includes the routine offering of pregnancy prophylaxis (commonly referred to as "emergency contraception" or "EC") to sexual abuse victims who are at risk of pregnancy from rape. Offering and providing EC is a critical component of, as the Commission recommends, providing "[u]nimpeded access to treatment" and "ensuring that incarcerated victims of sexual abuse receive the medical and mental health care services they need to heal, be safe, and begin

rebuilding their lives." *See* National Prison Rape Elimination Commission Report, Chapter 6: Treating Trauma (June 2009).

Emergency contraceptive pills, sometimes referred to as the "morning-after pill," can prevent pregnancy after unprotected intercourse, including rape. Emergency contraception must be taken within days after unprotected intercourse. Emergency contraception significantly reduces the risk of pregnancy if taken within 72 hours of unprotected intercourse or contraceptive failure, but experts agree that it is more effective the sooner it is taken. It is most effective if taken within 12 hours of intercourse, but research has shown it can be effective up to at least 120 hours.[xxv]

Unfortunately, nowhere do the Commission's otherwise comprehensive set of recommendations mention EC or recommend that it be offered to sexual assault victims. Nor does the Commission's report make clear that sexual assault victims have a right to be offered this basic care. The failure to include a specific discussion of pregnancy prevention after rape is a glaring omission in an otherwise thorough set of recommendations and an omission that DOJ must not repeat in its final PREA regulations.

Indeed, the need to explicitly address pregnancy prevention and EC is not only self-evident; it is highlighted by the Commission's own findings. One of the case examples discussed in the report involves a female inmate who was raped by a correctional officer. She did not initially come forward to report the rape, but upon realizing she was pregnant came forward to seek help related to the pregnancy and emotional distress. *See* Chapter 6 Treating Trauma (discussing case of Valerie Daniels). While the Commission recommends a number of standards that correctly aim to improve the likelihood of detecting, removing barriers to reporting, and thus responding with appropriate emergency and ongoing care in such circumstances, none of those address options for preventing the risk of pregnancy after a sexual assault. To the contrary, the *only* discussion of pregnancy within the recommendations wrongly implies there is no option for prevention:

> [F]emale victims who have been recently abused should be offered pregnancy tests at the time of the medical evaluation and, if the test is negative, should be offered retesting approximately six weeks thereafter. Victims who have positive tests should receive counseling and have access to all pregnancy-related medical services that are lawful in the community.

See "Ongoing Medical and Mental Health Care for Sexual Abuse Victims and Abusers."[xxvi]

This approach is contrary to the standard of care uniformly recommended by the relevant medical associations. Recognizing that rape victims "fear becoming pregnant as a result of rape" and that "[p]regnancy resulting from rape is indeed the case of great concern and significant additional trauma to the victim," for over a decade, the Sexual Assault Nurse Examiner (SANE) Development and Operation Guide has addressed pregnancy risk evaluation and prevention.[xxvii] Consistent with SANE guidelines, the American College of Obstetricians and Gynecologists recommends that EC be offered to all rape patients at risk of pregnancy.[xxviii] Likewise, in their guidelines for treating women who have been raped, the American Medical Association advises physicians to ensure that rape patients are informed about and, if appropriate, provided EC.[xxix]

In short, offering and providing EC is part of the standard of care for women who have been raped. Accordingly, DOJ must ensure that the rights and health of sexual assault survivors in prisons and jails are not unnecessarily endangered by a failure to incorporate counseling about, and provision of, EC in its national standard. DOJ's final regulations should include explicit guidelines requiring counseling about pregnancy prevention options and the *onsite* provision of EC in *all* prisons, jails, lockups, and community correction facilities housing women, including those that house adults, juveniles, immigrant detainees, and pre-sentence detainees. In addition, because, as discussed above, the effectiveness of EC diminishes with delay, the standard should emphasize that it is imperative to offer EC to female inmates who have been raped at the earliest opportunity—whether that arises during an initial admission exam, a post-assault emergency exam, or at any other time. With these additions to the Commission's recommendations, DOJ can better help rape victims prevent the trauma of unintended pregnancies and safeguard their reproductive and mental health.

In addition, in a separate set of comments submitted jointly with the National Center for Transgender Equality, the National Center for Lesbian Rights, the Transgender Law Center, and Lambda Legal Defense & Education Fund, we have proposed additional modifications to the standards to protect lesbian, gay, bisexual, transgender, and intersex inmates. These changes are necessary to adequately protect this extraordinarily vulnerable population of inmates.

Conclusion

While the Commission's proposed standards are already very strong, they could be further clarified and strengthened in several key areas, which we highlighted above. Those additional improvements should be included and the standards promulgated without delay.

Respectfully,

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[i] 42 U.S.C. § 15601 (13).

[ii] 149 Cong. Rec. S10033 (daily ed. July 28, 2003) (statement of Sen. Sessions).

[iii] 42 U.S.C. § 15601 (14)(E).

[iv] *See* 34 C.F.R. § 104.12; 45 C.F.R. § 84.12. *See also* 42 U.S.C. § 12111(10)(A)("'undue hardship' means an action requiring significant difficulty or expense") (emphasis added) (29 U.S.C. § 794(d) adopts the standards of the Americans with Disabilities Act for employment discrimination complaints).

[v] *Nelson v. Thornburgh*, 567 F. Supp. 369, 379 (D.C. Pa. 1983) (the Rehabilitation Act and Americans with Disabilities Act regulations "reflect a conscious effort at balancing the needs of the handicapped with the budgetary realities of programs receiving federal funds."). *See also New Mexico Ass'n for Retarded Citizens v. New Mexico*, 678 F.2d 847, 854 (10th Cir. 1982) (remanding Rehabilitation Act challenge to the adequacy of state's educational programs for disabled students to weigh the cost of modifying existing programs against the benefit based, in part, on the number of children who would benefit from the changes).

[vi] *See, e.g.*, Press Release, U.S. Dep't of Justice Office of Public Affairs, Detention Officer Sentenced for Repeated Abuse of Detainees (April 7, 2010), *available at* http://www.justice.gov/opa/pr/2010/April/10-crt-380.html.

[vii] Tess Moll, Crime without punishment: Sexual assault at T. Don Hutto falls through cracks of justice system, Taylor Daily Press, Jan. 21, 2008, *available at* http://www.taylordailypress.net/articles/2008/01/18/news/news01.txt.

[viii] *Woodford v. Ngo*, 548 U.S. 81, 90-91, 126 S.Ct. 2378, 2386 (2006). This "proper exhaustion" rule contrasts sharply with the treatment of other civil rights litigants in federal court. Concerning the administrative filing requirement of Title VII of the Civil Rights Act of 1964, the Court said that "technicalities are particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers initiate the process," *Love v. Pullman*, 404 U.S. 522, 526 (1972), and it refused to allow violation of a state administrative time limit to bar the litigant from proceeding in federal court.

[ix] Dismissal for non-exhaustion is usually without prejudice, meaning that in theory the prisoner can exhaust the claim properly and return to court. *See, e.g., Berry v. Kerik*, 366 F.3d 85, 87-88 (2d Cir. 2004). Reality is more like *Catch-22*: by the time a case is dismissed for a mistake in exhaustion, the brief time limit for filing a grievance will inevitably have passed, so under the "proper exhaustion" rule, the prisoner can never satisfy the exhaustion requirement. *Regan v. Frank*, 2007 WL 106537 at *4-5 (D.Haw., Jan. 9, 2007).

[x] The National Center for Education Statistics reported in 1994 that seven out of ten prisoners perform at the lowest literacy levels. Karl O. Haigler et al., U.S. Dept. of Educ., Literacy Behind Prison Walls: Profiles of the Prison Population from the National Adult Literacy Survey xviii, 17- 19 (1994) (available at http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=94102).

[xi] Prisoners with mental illness are subject to the same exhaustion requirement as other prisoners. *See Williams v. Kennedy*, 2006 WL 18314 at *2 (S.D.Tex., Jan. 4, 2006) (dismissing despite prisoner's claim he didn't know of the exhaustion requirement and a prior brain injury made it difficult for him to remember things); *Bakker v. Kuhnes*, 2004 WL 1092287 (N.D.Iowa, May 14, 2004) (rejecting plaintiff's argument that his medication doses were so high they "prohibited him from being of sound mind to draft a grievance"; noting that he failed to submit a grievance after his medication was corrected, and he filed other grievances during the relevant period).

[xii] *Woodford v. Ngo*, 548 U.S. 81, 126 S.Ct. 2378, 2389 (2006). The Court noted that the 15-day deadline the plaintiff missed is not unusual; grievance deadlines are typically 14 to 30 days according to the United States and even shorter according to the plaintiff. *Woodford*, 126 S.Ct. at 2389. The dissenting opinion cited a case from a juvenile facility involving a *48-hour* time limit. *Id*. at 2403, citing *Minix v. Pazera*, 2005 WL 1799538 at *2 (N.D.Ind., July 27, 2005).

[xiii] Even prison officials sometimes can't get their own rules straight. In *Giano v. Goord*, 380 F.3d 670 (2d Cir. 2004), New York State prison officials argued that the plaintiff's claim that evidence in a disciplinary hearing had been falsified was not exhausted by appealing his disciplinary conviction, but that he should have filed a separate grievance on the subject. The court held that the plaintiff had shown special circumstances justifying his failure to exhaust, since any misunderstanding he had of the rule was entirely reasonable. In a later case presenting the same fact situation under the same rules, prison officials made precisely the opposite argument, claiming that a prisoner

who had filed a separate grievance about false disciplinary charges should instead have pursued his claims through a disciplinary appeal. *Larkins v. Selsky*, 2006 WL 3548959 at *9 (S.D.N.Y., Dec. 6, 2006). In the years after *Giano*, the prison system did nothing to clarify its rules to distinguish between the scope of disciplinary appeals and that of grievances. *See also Westefer v. Snyder*, 422 F.3d 570, 580 (7th Cir. 2005) (observing prison policies did not "clearly identif[y]" the proper administrative remedy and there was no "clear route" to administrative review of certain decisions); *Abney v. McGinnis*, 380 F.3d 663, 668-69 (2d Cir. 2004) (noting the lack of instruction in the grievance rules for instances where a favorable grievance decision is not carried out).

[xiv] *Brownell v. Krom*, 446 F.3d 305, 311-12 (2d Cir. 2006) (citing prison officials' erroneous advice that the plaintiff's lost property was not the responsibility of the prison he had been transferred to, which resulted in a failure to investigate; a prison official's advice to abandon his property claim and pursue a grievance instead, resulting in loss of the ability to appeal the property claim; and the lack of any apparent provision in the grievance system for raising newly discovered facts in a previously filed grievance); *Warren v. Purcell*, 2004 WL 1970642 at *6 (S.D.N.Y. Sept. 3, 2004) (noting 'baffling' grievance response that left prisoner with no clue what to do next); *Kendall v. Kittles*, 2004 WL 1752818 at *2 (S.D.N.Y., Aug. 4, 2004) (noting that Grievance Coordinator's affidavit said that plaintiff needed a physician's authorization to grieve medical concerns; no such requirement appears in the New York City grievance policy); *Livingston v. Piskor*, 215 F.R.D. 84, 86-87 (W.D.N.Y. 2003) (noting evidence that grievance personnel, contrary to policy, refused to process grievances where a disciplinary report had been filed); *Casanova v. Dubois*, 2002 WL 1613715 at *6 (D.Mass., July 22, 2002) (finding that, contrary to written policy, practice was "to treat complaints of alleged civil rights abuses by staff as 'not grievable'"), *remanded on other grounds*, 304 F.3d 75 (1st Cir. 2002).

[xv] *See Jackson v. District of Columbia*, 254 F.3d 262, 269-70 (D.C.Cir. 2001) (holding that a plaintiff who complained to three prison officials and was told by the warden to "file it in the court" had not exhausted); *Yousef v. Reno*, 254 F.3d 1214, 1221-22 (10th Cir. 2001) (holding that plaintiff who was confused by prison officials' erroneous representations about the powers of the grievance system was still required to exhaust); *Chelette v. Harris*, 229 F.3d 684, 688 (8th Cir. 2000) (holding that a plaintiff who complained to the warden and was told the warden would take care of his problem, but the warden didn't, was not excused from exhausting the grievance system), cert. denied, 531 U.S. 1156 (2001); *Mendez v. Herring*, 2005 WL 3273555 at *2 (D.Ariz., Nov. 29, 2005) (dismissing claim of a prisoner who said staff told him his rape complaint was not grievable, since futility is not an excuse); *U.S. v. Ali*, 396 F.Supp.2d 703, 707 (E.D.Va. 2005) (holding that a prisoner who received a response that "[a]s these issues are addressed by your attys [sic] and the government you will be informed" and did not appeal failed to exhaust); *Thomas v. New York State Dep't of Correctional Services*, 2003 WL 22671540 at *3-4 (S.D.N.Y., Nov. 10, 2003) (dismissing case where prison staff told the prisoner a grievance was not necessary; this was "bad advice, not prevention or obstruction," and the prisoner did not make sufficient efforts to exhaust).

[xvi] There is a well-known pattern of threats and retaliation against prisoners who file grievances and complaints. *See Dannenberg v. Valadez*, 338 F.3d 1070, 1071-72 (9th Cir. 2003) (noting jury verdict for plaintiff on claim of retaliation for assisting another prisoner with litigation); *Walker v. Bain*, 257 F.3d 660, 663-64 (6th Cir. 2001) (noting jury verdict for plaintiff whose legal papers were confiscated in retaliation for filing grievances), cert. denied, 535 U.S. 1095 (2002); *Gomez v. Vernon*, 255 F.3d 1118 (9th Cir.) (affirming injunction protecting prisoners who were the subject of retaliation for filing grievances and for litigation), *cert. denied*, 534 U.S. 1066 (2001); *Trobaugh v. Hall*, 176 F.3d 1087 (8th Cir. 1999) (directing award of compensatory damages to prisoner placed in isolation for filing grievances); *Hines v. Gomez*, 108 F.3d 265 (9th Cir. 1997) (affirming jury verdict for plaintiff subjected to retaliation for filing grievances), cert. denied, 524 U.S. 936 (1998); *Cassels v. Stalder*, 342 F.Supp.2d 555, 564-67 (M.D.La. 2004) (striking down disciplinary conviction for "spreading rumors" of prisoner whose mother had publicized his medical care complaint on the Internet); *Atkinson v. Way*, 2004 WL 1631377 (D.Del., July 19, 2004) (upholding jury verdict for plaintiff subjected to retaliation for filing lawsuit); *Tate v. Dragovich*, 2003 WL 21978141 (E.D.Pa., Aug. 14, 2003) (upholding jury verdict against prison official who retaliated against plaintiff for filing grievances); *Hunter v. Heath*, 95 F.Supp.2d 1140 (D.Or. 2000) (noting prisoner's acknowledged firing from legal assistant job for sending "kyte" (officially sanctioned informal complaint) to the Superintendent of Security concerning the confiscation of a prisoner's legal papers), *rev'd on other grounds*, 26 Fed.Appx. 754, 2002 WL 112564 (9th Cir. 2002); *Maurer v. Patterson*, 197 F.R.D. 244 (S.D.N.Y. 2000) (upholding jury verdict for plaintiff who was subjected to retaliatory disciplinary charge for complaining about operation of grievance program); *Gaston v. Coughlin*, 81 F.Supp.2d 381 (N.D.N.Y. 1999) (awarding damages for trumped-up disciplinary

charge made in retaliation for prisoner's complaining about state law violations in mess hall work hours), on reconsideration, 102 F.Supp.2d 81 (N.D.N.Y. 2000); *Alnutt v. Cleary*, 27 F.Supp.2d 395, 397-98 (W.D.N.Y. 1998) (noting jury verdict for plaintiff who was subject to verbal harassment, assault, and false disciplinary charges in retaliation for his work as an Inmate Grievance Resolution Committee representative).

[xvii] *See Dole v. Chandler*, 438 F.3d 804, 811-12 (7th Cir. 2006) (holding a prisoner had exhausted when he did everything necessary to exhaust but his grievance simply disappeared, and he received no instructions as to what if anything to do about it).

[xviii] *See*, for example, these cases, which courts have allowed to go forward in spite of the protracted failure by prison officials to respond to grievances or appeals. *Brown v. Koenigsmann*, 2003 WL 22232884 at *4 (S.D.N.Y., Sept. 29, 2003); *accord*, *Levi v. Briley*, 2006 WL 2161788 at *3 (N.D.Ill., July 28, 2006) (declining to dismiss where the prisoner had waited two years for a final decision); *Jones v. Blanas*, 2005 WL 1868826 at *3 (E.D.Cal., Aug. 3, 2005); *White v. Briley*, 2005 WL 1651170 at *6 (N.D.Ill., July 1, 2005); *Casarez v. Mars*, 2003 WL 21369255 at *6 (E.D.Mich., June 11, 2003) (holding that prison officials' lack of response to a Step III grievance did not mean failure to exhaust); *John v. N.Y.C. Dept. of Corrections*, 183 F.Supp.2d 619, 625 (S.D.N.Y. 2002) (rejecting argument, three years after grievance appeal, that plaintiff must continue waiting for a decision).

Some courts, on the other hand, have stated categorically that exhaustion is not completed until the prisoner receives a decision, even if the prisoner has taken all necessary steps to exhaust. *See Petrusch v. Oliloushi*, 2005 WL 2420352 at *4 (W.D.N.Y., Sept. 30, 2005) (dictum); *Rodriguez v. Hahn*, 209 F.Supp.2d 344, 347-48 (S.D.N.Y. 2002). In *Wyatt v. Doe*, 2006 WL 1407636 at *1 (S.D.Tex., May 19, 2006), the court said that a prisoner whose grievance had remained "under exhaustion" for eight months and whose appeal had been ignored "[did] not establish that the investigation has been delayed unreasonably," even though the grievance process in Texas is supposed to be completed within 90 days. *See Pugh v. Braneff*, 2006 WL 1408392 at *2 (E.D.Tex., May 19, 2006). In *Ford v. Johnson*, 362 F.3d 395, 400 (7th Cir. 2004), a federal appeals court held that the prisoner had failed to exhaust where he had waited six months for a final decision in a system where decisions are supposed to be rendered within 60 days "whenever possible." *See also Mendez v. Artuz*, 2002 WL 313796 at *2 (S.D.N.Y., Feb. 27, 2002) (dismissing for non-exhaustion where a prisoner's grievance appeal had not been initially processed as a result of "administrative oversight").

Some grievance systems do not even have deadlines for responses, so the prisoner must engage in guesswork as to whether enough time has passed that the court will think he has waited long enough. *See Olmsted v. Cooney*, 2005 WL 233817 at *2 (D.Or., Jan. 31, 2005) (holding prisoner who waited seven weeks after filing last appeal was not shown to have failed to exhaust); *Thompson v. Koneny*, 2005 WL 1378832 at *5 (E.D.Mich., May 4, 2005) (holding that a decision delayed six and a half months was not "timely" and case could not be dismissed for non-exhaustion where prisoner filed after five and a half months); *McNeal v. Cook County Sheriff's Dep't*, 282 F.Supp.2d 865, 868 n.3 (N.D.Ill. 2003) (holding that 11 months is long enough, citing cases holding that seven months is long enough and one month is not).

[xix] *See Cox v. Mayer*, 332 F.3d 422, 425 n.2 (6th Cir. 2003); *Donahue v. Bennett*, 2004 WL 1875019 at *6 n.12 (W.D.N.Y., Aug. 17, 2004); *Bailey v. Sheahan*, 2003 WL 21479068 at *3 (N.D.Ill., June 20, 2003); *Sims v. Blot*, 2003 WL 21738766 at * 3 (S.D.N.Y., July 25, 2003); *Larry v. Byno*, 2003 WL 1797843 at *2 n.3 (N.D.N.Y., Apr. 4, 2003) ("This Court's decision should not be seen as condoning" the failure to follow procedure by not rendering a decision); *Harvey v. City of Philadelphia*, 253 F.Supp.2d 827, 830 (E.D.Pa. 2003) (holding that failure to use a procedure permitting sending a grievance directly to the Commissioner if the prisoner believes he is being denied access to the process was a failure to exhaust); *Croswell v. McCoy*, 2003 WL 962534 at *4 (N.D.N.Y., Mar. 11, 2003); *Mendoza v. Goord*, 2002 WL 31654855 at *3 (S.D.N.Y., Nov. 21, 2002) (dismissing for failure to appeal a non-response even though the plaintiff "tried many avenues to seek relief from prison authorities"); *Petty v. Goord*, 2002 WL 31458240 at *4 (S.D.N.Y., Nov. 4, 2002); *Graham v. Cochran*, 2002 WL 31132874 (S.D.N.Y., Sept. 25, 2002); *Reyes v. Punzal*, 206 F.Supp.2d 431, 432-33 (W.D.N.Y.2002); *Martinez v. Dr. Williams R.*, 186 F.Supp.2d 353, 357 (S.D.N.Y. 2002); *Saunders v. Goord*, 2002 WL 1751341 at *3 (S.D.N.Y., July 29, 2002); *Jorss v. Vanknocker*, 2001 WL 823771 at *2 (N.D.Cal., July 19, 2001), aff'd, 44 Fed.Appx. 273, 2002 WL 1891412 (9th

Cir. 2002); *Smith v. Stubblefield*, 30 F.Supp.2d at 1174; *Morgan v. Arizona Dept. of Corrections*, 976 F.Supp. 892, 895 (D.Ariz. 1997).

[xx] *See, e.g. Jones v. Oaks Correctional Facility Health Services*, 2005 WL 3312562 at *2 (W.D.Mich., Dec. 7, 2005) (stating even a case that presents imminent danger of serious physical harm must be exhausted); *Calderon v. Anderson*, 2005 WL 2277398 at *5 (S.D.W.Va., Sept. 19, 2005) (stating exhaustion was required despite the prisoner's claim of "life-or-death situation"); *Drabovskiy v. U.S.*, 2005 WL 1322550 at *2 (E.D.Ky., June 2, 2005) ("To the extent the plaintiff's motion for emergency appeal is intended to be a request for the Court to forgive the exhaustion requirement necessary [sic], he provides no factual or legal grounds therefor."); *Joseph v. Jocson*, 2004 WL 2203298 at *1 (D.Or., Sept. 29, 2004) ("Plaintiff contends he should not be required to exhaust available remedies because delay may result in irreparable harm. Exhaustion is mandatory.") While one court has suggested that preliminary relief may be granted pending exhaustion, *see Jackson v. District of Columbia*, 254 F.3d 262, 267-68 (D.C.Cir. 2001), we are not aware of cases in which that argument has actually been applied. One court did decline to dismiss for non-exhaustion where the prisoner was shortly to be executed and exhaustion was not complete. *Evans v. Saar*, 412 F.Supp.2d 519, 527 (D.Md. 2006).

[xxi] As one court put it, once suit is filed, "the defendants in hindsight can use any deviation by the prisoner to argue that he or she has not complied with 42 U.S.C. § 1997e(a) responsibilities." *Ouellette v. Maine State Prison*, 2006 WL 173639 at *3 n.2 (D.Me., Jan. 23, 2006), *aff'd*, 2006 WL 348315 (D.Me., Feb. 14, 2006). Other courts have expressed similar concerns. *See, e.g.*, *Campbell v. Chaves*, 402 F.Supp.2d 1101, 1106 n.3 (D.Ariz. 2005) (noting danger that grievance systems might become "a series of stalling tactics, and dead-ends without resolution"); *LaFauci v. New Hampshire Dept. of Corrections*, 2005 WL 419691 at *14 (D.N.H., Feb. 23, 2005) ("While proper compliance with the grievance system makes sound administrative sense, the procedures themselves, and the directions given to inmates seeking to follow those procedures, should not be traps designed to hamstring legitimate grievances."); *Rhames v. Federal Bureau of Prisons*, 2002 WL 1268005 at *5 (S.D.N.Y., June 6, 2002) ("While it is important that prisoners comply with administrative procedures designed by the Bureau of Prisons, rather than using any they might think sufficient, . . . it is equally important that form not create a snare of forfeiture for a prisoner seeking redress for perceived violations of his constitutional rights.").

[xxii] Prison Abuse Remedies Act of 2009, H.R. 4335 (111th Cong. 2009) (PARA). PARA would reform the PLRA's exhaustion requirement along the same lines as the Standard RE-2 by providing that a court stay any prisoner case for 90 days if the prisoner has failed to comply with the facility's grievance procedure to allow prison officials to solve the problem before the case proceeds in federal court.

[xxiii] *See* ABA Resolution 102B, 2007 Midyear Meeting (Prison Litigation Reform Act), available at http://www.abanet.org/leadership/2007/midyear/docs/SUMMARYOFRECOMMENDATIONS/hundredtwob.doc.

[xxiv] CONFRONTING CONFINEMENT, A REPORT OF THE COMMISSION ON SAFETY AND ABUSE IN AMERICA'S PRISONS 79-81 (June 2006). The critical importance of independent audits to establishing accountability in correctional settings is a key finding of the Vera Institute's Commission on Safety & Abuse in America's Prisons. The Commission was co-chaired by former United States Attorney General Nicholas de B. Katzenbach and the Honorable John Gibbons, former Chief Judge of the United States Court of Appeals for the Third Circuit. The 20-member panel included Republicans and Democrats, conservatives and liberals, those who run correctional systems and those who litigate on behalf of prisoners, scholars, and individuals with a long history of public service and deep experience in the administration of justice. For over a year, the Commission explored violence and abuse in America's prisons and jails and how to make correctional facilities safer for prisoners and staff and more effective in promoting public safety and public health. A bedrock finding of the Commission was the need for independent oversight and the necessity for every state to have a truly independent agency to monitor prison and jails in order to control violence and abuse.

[xxv] James Trussell, Elizabeth G. Raymond, Emergency Contraception: A Last Chance to Prevent Unintended Pregnancy (March 2010) (reviewing medical literature about emergency contraception), *available at* http://ec.princeton.edu/questions/ec-review.pdf.

[xxvi]This discussion appears in MM-3, which is included in Standard for Adult Prisons and Jails and Standards for Juvenile Facilities, and in MM-2 of the Standards for Community Corrections.

[xxvii]*See, e.g.,* SANE Development & Operation Guide at 75-76, 104-06, 118 (Aug. 1999) (Office for Victims of Crime Doc.: NCJ 170609).

[xxviii]*See, e.g.,* Am. Coll. Obstet. Gynecol., Acute Care of Sexual Assault Victims (2009), *available at* http://www.acog.org/departments/dept_notice.cfm?recno=17&bulletin=1625;

[xxix]*See, e.g.,* Am. Med. Ass'n, Strategies for the Treatment and Prevention of Sexual Assault (1995); Am. Med. Ass'n, National Advisory Council on Violence and Abuse, Policy Compendium (Apr. 2008) (H-75.985 Access to Emergency Contraception).