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SHINING A LIGHT: THE NEED FOR INDEPENDENT OVERSIGHT IN JUVENILE JUSTICE FACILITIES AND REFORM OF THE PRISON LITIGATION REFORM ACT.

CHRISTINE BELLA

I. INTRODUCTION¹

New York State has undergone significant changes to its juvenile justice system in recent years. The juvenile justice system in New York State has been transformed as a result of recent lawsuits by the United States Department of Justice² and The Legal Aid Society,³ landmark 2012 State Close to Home legislation,⁴ the closure of juvenile placement facilities in upstate New York by then Office of Children and Family Services (OCFS) Commissioner Gladys Carrión,⁵ and other city and state initiatives to keep children in their communities. Still more reforms are on the horizon.⁶

The experience of children before and after these reforms highlights the need for continued attention, oversight, and reform. “In the city they hit you a lot, but upstate they hit you hard.”⁷ This is how a young man distinguished between how staff in the local detention facilities⁸ and staff

¹ Special thanks to Daniel Abdul-Malak for his assistance with research and writing for this article.

² See generally *United States v. N.Y.*, 10-CV-00858, (N.D.N.Y. 2010).

³ See generally *G.B. et al. v. Carrión et al.*, N.Y.L.J., Jan. 27, 2012 (S.D.N.Y. Jan. 19, 2012) (Crotty, J.) (The Legal Aid Society, along with the law firm of Orrick, Herrington and Sutcliff LLP., filed a lawsuit on behalf of fifteen named plaintiffs and a putative class of New York State Office of Children and Family Services (OCFS) residents against OCFS, seeking: (1) prospective relief to prevent unlawful physical restraints and to improve mental health treatment on behalf of the class; and (2) damages for the individual named plaintiffs).

⁴ “Close to Home” is a series of recent legislative amendments that amounts to a major transformation in juvenile justice policy in NYS. Simply put, rather than being sent to larger facilities in upstate New York, as had been the case, New York City youth, adjudicated delinquent and placed by Family Court judges, will be sentenced to small facilities located in (and near) New York City, closer to their families, communities, and other supports, and where they can receive educational credits. N.Y. Assemb. B. 9057, 2011-12 Gen. Assemb. (N.Y. 2012).

⁵ In December 2013 New York City Mayor Bill di Blasio appointed Gladys Carrión as Commissioner of the New York City Administration for Children’s Services.

⁶ See *infra* footnotes 12 – 14.

⁷ 2009 Interview with young man in state-operated facility for juvenile delinquents.

⁸ See Barry Holman & Jason Zeidenberg, JUSTICE POLICY INST., *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities 2* (2006) (defining detention

in the state facilities⁹ physically restrained youth in their custody.¹⁰ This seemingly simple statement speaks volumes and offers a rare glimpse into the treatment of incarcerated youth. It reveals on the one hand a system that is over-reliant on restraint use, describing staff that are quick to use physical interventions, and on the other hand, a system in which staff frequently resort to the use of excessive force during physical restraints. Clearly, both practices are harmful to both youth and staff.

This article examines the harms that incarcerated youth¹¹ face and emphasizes the need for greater protections through increased oversight, advocacy, and legislative reform. Even after the aforementioned historic reforms, presently New York still stands as one of two states in which the age of criminal responsibility for any offense is just 16.¹² On April 9, 2014, Governor Andrew Cuomo announced the creation of a Commission on Youth, Public Safety and Justice.¹³ The Commission, tasked with providing “concrete, actionable recommendations regarding youth in New York’s criminal and juvenile justice systems issued its report with recommendations in January 2015.¹⁴ Notwithstanding the Commission’s report which contains among other things, recommendations to raise the age of criminal responsibility in New York for some youth for some offenses, certain youth will continue to be

and explaining why some youths end up in detention) (quoting V. Schiraldi & J. Ziedenberg, JUSTICE POLICY INST., *The Multnomah Experiment: Reducing Disproportionate Minority Confinement* (2003)).

⁹ See The Annie E. Casey Foundation, *No Place for Kids: The Case for Reducing Juvenile Incarceration 2* (2011) (defining and describing state juvenile correction systems) (citing Hazel & Neal, Youth Justice Board, *Cross-National Comparison for Youth Justice* (2008)).

¹⁰ See Council for Exceptional Children, *CEC’s Policy on Physical Restraint and Seclusion Procedures in School Settings* (2009), available at <https://www.cec.sped.org/~media/Files/Policy/CEC%20Professional%20Policies%20and%20Positions/restraint%20and%20seclusion.pdf> (defining a physical restraint, and providing the standard views and uses of physical restraint in schools and other programs today).

¹¹ Significant scientific research continues to support the long-held notion that children and adolescents are different from adults. Advances in technology have allowed scientists to see exactly how adolescent brains differ, demonstrating which parts of the brain continue to develop well into the mid-20s. These differences have important legal implications, particularly for the treatment of youth in our justice system. See, e.g., *Roper v. Simmons*, 543 U.S. 551, 554 (2005) (defining “youth” or “juvenile” as any person under 18); Cf. Fam. Ct. Act §119(c); see also Dom. Rel. Law § 2; see also N.Y. C.P.L.R. §105(j); see also Mental Hyg. § 1.03(26); but see N.Y. C.P.L. § 720.10(1) (defining “youth” as a “person charged with a crime alleged to have been committed when he was at least sixteen years old and less than nineteen years old, or a person being charged as a juvenile offender as defined in subdivision forty-two of section 1.20 of this chapter.”).

¹² The Commission on Youth, Public Safety and Justice was created by Executive Order 131 on April 9, 2014. See also Andrew M. Cuomo, Governor, Press Release, April 9, 2014.

¹³ *Id.*

¹⁴ Final Report of the Governor’s Commission on Youth, Public Safety and Justice, Recommendations for Juvenile Justice Reform in New York State, January 2015. https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/ReportofCommissiononYouthPublicSafetyandJustice_0.pdf

prosecuted as adults.¹⁵ Additionally, at present, despite the Department of Justice's scathing findings and subsequent 2014 lawsuit alleging constitutional violations regarding the treatment of youth at Rikers Island, adolescents between the ages of 16 and 18, continue to be housed in adult facilities,¹⁶ and still others prosecuted between the ages of thirteen and fifteen as adults are held in secure juvenile facilities.¹⁷ With regard to legislative reform specifically, this article calls for an amendment to the Prison Litigation Reform Act (PLRA)¹⁸ that would exclude incarcerated youth from its purview.¹⁹ Application of the PRLA to all inmates, including youth, acts as a barrier to allowing incarcerated youth to obtain access to the courts and to receive protection from harm while in custody.

The PLRA was enacted largely to limit courts from ordering broad prospective relief against correctional agencies²⁰ and to stem what was reported to be an influx of purportedly "frivolous" prisoner claims in federal court.²¹ The PLRA requires the "exhaustion of available administrative remedies" before filing claims in federal court related to *any* condition of confinement, including claims of abuse and lack of

¹⁵ *Id.*

¹⁶ Inmates between the ages of 16 and 18 are held in the Robert N. Davoren Center at Rikers Island while awaiting trial. On August 4, 2014, The United States Department of Justice released a report which included among other things a finding that there is a pattern and practice of conduct at Rikers that violates the constitutional rights of adolescent inmates. U.S. Inquiry Finds a Culture of Violence Against Teenage Inmates at Rikers Island. NEW YORK TIMES, August 5, 2014 http://www.nytimes.com/2014/08/05/nyregion/us-attorneys-office-reveals-civil-rights-investigation-at-rikers-island.html?ref=nyregion&_r=0

¹⁷ Youth prosecuted as Juvenile Offenders (between the ages of thirteen and fifteen of certain enumerated offenses) in New York City are held pretrial in one of two secure detention facilities operated by the New York City Administration for Children's Services. *See infra* footnote 26.

¹⁸ Prison Litigation Reform Act of 1995, Pub. L. No. 104-34, 110 Stat. 1321 (codified in Titles 11, 18, 28, and 42 of the United States Code). Although this writer believes that the PLRA should be repealed in its entirety due to its harsh and unjust consequences, this article is limited in scope and merely asserts that the PLRA is particularly harsh and misplaced and should be amended, at a minimum, so it is no longer applicable to detainees or prisoners under the age of 21.

¹⁹ Prison Abuse Remedies Act of 2009, H. R. 4335, 111th Cong. (2009). This Act is the most recent attempt at legislative reform of the PLRA. The proposed amendment provided, in relevant part: "Section 4. Exemption of Juveniles from Prison Litigation Reform Act (a) Title 18.— (1) Juvenile Proceedings—Section 3626(g) of Title 18, United States Code, (to be amended)—(A) in paragraph (3) by striking 'or adjudicated delinquent for,'; and (B) to that paragraph (5) reads as follows: '(5) the term 'prison' means any Federal, State, or local facility that incarcerates or detains prisoners; . . . "' This amendment did not pass. Senator Paul Wellstone also proposed amendments to the PLRA to, among other things, to remove juveniles from the PLRA. *See* Mental Health Juvenile Justice Act of 1999, S. 464, 106th Cong. (1999); S. 465, 106th Cong. (1999); H.R. 837, 106th Cong. (1999).

²⁰ 18 U.S.C. § 3626(g)(7) (2000). The PLRA requires that prospective relief be "narrowly drawn, extend . . . no further than necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). *See generally* John Boston, *Prisoners' Self-Help Litigation Manual*, Oxford Univ. Press, 4th ed., 2010.

²¹ 42 U.S.C. § 1997e(a) (2000). *See* 141 Cong Rec. 27, 042 (1995). *See generally* John Boston, *Litigation Manual*.

treatment.²² The Supreme Court has stated that the PLRA “exhaustion” requirement, which will be discussed more fully, was intended to “reduce the quantity and improve the quality of prisoner suits” and to allow “corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.”²³ Application of the PLRA to keep incarcerated youth from bringing federal claims is entirely misplaced. First, incarcerated youth require greater protections and oversight due to their marginalized status and acute vulnerabilities to harm. Second, incarcerated youth file very few lawsuits, including before the enactment of the PLRA.²⁴

II. ISOLATION AND VULNERABILITY: CONDITIONS THAT IMPACT THE LIVES OF INCARCERATED YOUTH

Incarcerated youth often face serious challenges that neither their families nor the public-at-large are even aware of.²⁵ Historically, incarcerated youth in New York State, have been sent to large remote facilities where they are geographically and socially isolated.²⁶ In New

²² 18 U.S.C.A. § 3626 (g)(3). In addition to the exhaustion requirement, the PLRA has several other provisions that are of great concern and limit prisoners from seeking protections from the court in conditions litigation. The PLRA imposes limitation on prospective relief. *See* 18 U.S.C. § 3626 (2000). The PLRA limits relief for emotional and mental injury to only occasions where the plaintiff can demonstrate physical injury. *See* 42 U.S.C. § 1997e(e); *see, e.g., Al-Amin v. Smith*, 637 F.3d 1192, 1199 (11th Cir. 2011). *But see* *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002). *See also* Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54 (amending § 7(e) of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997e(e)) to add “the commission of a sexual act” to the physical harm requirement). The PLRA also restricts the amount of attorney’s fees, rather than allow for market rates. *See Alexander S. v. Boyd*, 113 F.3d 1373 (4th Cir. 1997). The PLRA requires prisoners who file in forma pauperis to pay the full filing fee, which is several hundred dollars. *See* 28 U.S.C. § 1915(a)(1)-(b).

²³ *Porter v. Nussle*, 534 U.S. 516, 524-25 (2002).

²⁴ *See* Human Rights Watch, *No Equal Justice: The Prison Litigation Reform Act in the United States*, June 15, 2009, at n. 11, available at <http://www.hrw.org/sites/default/files/reports/us0609webwcover.pdf> (citing Margo Schlander and Giovanna Shay, *Preserving the Rule of Law in America’s Jails and Prisons: The Care for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 152 n. 66 (2008)). *See also* Michael J. Dale, *Lawsuits and Public Policy: The Role of Litigation in Correcting Conditions in Juvenile Detention Centers*, 32 U.S.F. L. REV. 675 (1998).

²⁵ *See* CITIZENS’ COMMITTEE FOR CHILDREN OF NYC, INC., *Inside Out: Youth Experiences Inside New York’s Juvenile Placement System*, at 4 (Dec. 2009), available at <http://www.cccnewyork.org/data-and-reports/publications/ccc-report-inside-out-youth-experiences-inside-new-yorks-juvenile-placement-system/> (“New York State’s juvenile placement system has historically been cut off to the public eye despite years of poor youth outcomes and anecdotal evidence from former youth residents who have shed light on the conditions of care and who have spoken about the negative social and emotional impact of being locked up at an early age”).

²⁶ Megan F. Chaney, *Keeping the Promise of Gault: Requiring Post-Adjudicatory Juvenile Defenders*, 19 GEO J. ON POVERTY L & POL’Y 351, 354 (2012). Sandra Simkins, Marty Beyer & Lisa Geis, *The Harmful Use of Isolation in Juvenile Facilities: the Need for Post-Disposition Representation*, 38 WASH. U.J.L. & POL’Y 241, 257-61 (2012);

York State and some other jurisdictions,²⁷ this trend is changing for some,²⁸ but not all youth.

In the case of New York, for example, “juvenile offenders”²⁹ (youth convicted as “adults” or adjudicated as “youthful offenders”³⁰ for offenses committed between the ages of thirteen and fifteen) continue to be sent to large, distant facilities.³¹ And New York’s sixteen and seventeen year olds are charged, prosecuted, and sentenced as adults regardless of offense, with pre-trial detainees and sentenced prisoners being held in adult facilities.³²

Incarcerated youth are frequently unaware of their rights and are often unable to effectively assert them. They typically lack meaningful access to counsel,³³ and unlike adult prisoners, those sentenced to juvenile facilities lack access to law libraries or legal information in the facilities where they are held.³⁴ Further, it is important to note in this context that juveniles cannot even file federal lawsuits on their own, due to infancy, as the courts

²⁷ “Missouri’s Department of Youth Services has become a national model for juvenile justice systems” with their “emphasis on small facilities . . . and focus on support and rehabilitation.” JUSTICE POLICY INSTITUTE, *The Costs of Confinement: Why Good Juvenile Justice Policies Make Good Fiscal Sense*, May 2009 p.9.

²⁸ See *infra*, footnote 3. Close to Home legislation. Budget Bill Chapter 57 of the Laws of 2012. Juvenile Offenders (juveniles prosecuted as adults) will continue to be placed in upstate secure facilities operated by the Office of Children and Family Services. See also Kendra Hurley, *Home in the City*, CHILD WELFARE WATCH BRUSHES WITH THE LAW, Winter 2013/2013, at pp 25-27.

²⁹ NY Crim. Pro L (CPL) § 1.20(42). NY Penal Law § 60.10.

³⁰ NY CPL § 720.10.

³¹ NY CPL § 70.20(4). In New York State, juveniles prosecuted as juvenile offenders (between the ages of thirteen and fifteen) are sentenced to the Office of Children and Family Services secure facilities. Not all New York State youth are sentenced to OCFS facilities. In fact, youths sixteen and older are sentenced to adult facilities with some site and sounds protections. See also NY Exec. L. § 508.

³² NY CPL § 180.75. New York is one of two states (the other being North Carolina) that prosecute all 16 and 17-year olds as adults regardless of the offense. See also *supra* fn. 10 (referring to the Commission on Youth, Public Safety and Justice); *J.D.B. v. North Carolina*, “[t]he law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them” 131 S.Ct. 2394, 2397 (2011). “Children ‘generally are less mature and responsible than adults’ . . . [and] ‘often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them’ “ (Id. at 2403 (citations omitted)). Cf *supra* footnotes 10 - 14.

³³ Megan F. Chaney, *Keeping the Promise of Gault: Requiring Post-Adjudicatory Juvenile Defenders*, 19 GEO J. ON POVERTY L. & POL’Y 351, 252 (2012).

³⁴ “Moreover, youth incarcerated in juvenile facilities generally do not have access to law libraries or other sources of information about the law that might enable them to sue more often. One court has even observed, ‘[a]s a practical matter, juveniles between the ages of twelve and nineteen, who, on average, are three years behind their expected grade level, would not benefit in any significant respect from a law library, and the provision of such would be a foolish expenditure of funds.’” Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America’s Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 152-53 (2008) (citing *Alexander S. v. Boyd*, 876 F. Supp. 773, 790 (D.S.C. 1995)). See *Alexander S. v. Boyd*, 876 F. Supp. 773, 790 (D.S.C. 1995). This case states that it would be a waste of resources to provide a law library to incarcerated youth, namely juveniles between the ages of twelve and nineteen, because given their educational delays, they would not benefit from such a service.

require their parents, guardians, “next friends,” or guardian ad litem to commence an action.³⁵

To make matters worse, heightened privacy laws, ostensibly for the juvenile’s protection, limit access to information about the conditions of their confinement. Such youth exist in a rigidly controlled environment that allows only limited and highly supervised contact with the outside world, family members included. Even where family members or advocates know about harmful situations, they do not always know where to turn for meaningful relief and often fear retaliation against the young person if they raise their concerns.

A. UNDERSTANDING THE POPULATION OF “INCARCERATED YOUTH”

A discussion of the conditions of confinement for youth must acknowledge the impacted community. First, disproportionate minority contact/confinement (DMC)³⁶ while not unique to incarcerated youth (it exists at every stage of the juvenile or criminal process),³⁷ is strikingly evident when walking into a youth facility or prison.³⁸ Secondly, many incarcerated youth lack strong familial support, suffer from a multitude of disabilities, including mental illness,³⁹ cognitive and educational delays,⁴⁰

³⁵ FED. R. CIV. P. 17(c); see FED. R. CIV. P. 5.2.

³⁶ Huizinga, David *et al.*, *Disproportionate Minority Contact in the Juvenile Justice System: A Study of Differential Minority Arrest/Referral to Court in Three Cities*, A Report to the Office of Juvenile Justice and Delinquency Prevention. (July 8, 2007). Disproportionate Minority Confinement 2002, *Update Summary Office of Juvenile Justice and Delinquency Prevention* (September 2004).

³⁷ In New York City, roughly 88 percent of the youth arrested are either Black or Latino, groups that comprise only 64 percent of the City’s total youth population. In New York State, while minority youth represent approximately 46 percent of the state’s juvenile population, they account for nearly 65 percent of state’s juvenile arrests. N.Y. STATE JUVENILE JUSTICE ADVISORY GRP., N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 2011 ANNUAL REPORT 29, available at <http://criminaljustice.state.ny.us/pio/annualreport/JJAGReport2011.pdf>.

³⁸ Youth of color constitute an even larger share of the juvenile justice population at later stages of case processing. In New York City, according to the demographic data taken from ACS’ website for fiscal year 2012, approximately 95 percent of youth admitted to detention are youth of color; 63.5 percent of youth are Black; 31.1 percent Hispanic, and 2.2% White. NEW YORK CITY ADMIN. FOR CHILDREN’S SERVICES, DETENTION DEMOGRAPHIC DATA FISCAL YEAR REPORT 2012 1, available at http://www.nyc.gov/html/acs/downloads/pdf/acs_Council_Demographic_FY12.pdf. In New York State, according to a 2011 Juvenile Justice Advocacy Group (JJAG) report, 92 percent of youth entering detention were youth of color; and 97 percent of youth entering OCFs operated facilities were youth of color. N.Y. STATE JUVENILE JUSTICE ADVISORY GRP., N.Y. STATE DIVISION OF CRIMINAL JUSTICE SERVICES, 2011 ANNUAL REPORT 29, available at <http://criminaljustice.state.ny.us/pio/annualreport/JJAGReport2011.pdf>.

³⁹ Thomas Grisso, speaking at the “Intersection of Mental Health and Juvenile Justice for New York City Youth” Where We Are and Where We’re Going in Policy and Practice, October 19, 2012. “About 65 percent of youth in juvenile justice settings meet criteria for one or more mental health disorders as compared to about 20 percent in the general youth population.” Jennie L. Shufelt & Joseph Coccozza, *Youth with Mental Health Disorders in the Juvenile Justice System: Results from a Multi-State Prevalence Study*, NAT’L CTR. FOR MENTAL HEALTH AND JUVENILE JUSTICE 2 (2006), available

and trauma histories.⁴¹ These factors, among others, make it virtually impossible for youth to access the help they need to hold facilities, agencies, and staff accountable for misconduct or maltreatment.

For all incarcerated youth, institutional isolation is frequently coupled with an acute vulnerability to harm.⁴² Incarcerated youth are exposed to risks related to the following practices: physical restraints,⁴³ staff on youth violence or force,⁴⁴ youth on youth violence, isolation (also known as room confinement)⁴⁵ and sex abuse by staff or other youth.⁴⁶ They are also more

at <http://www.ncmhjj.com/pdfs/publications/PrevalenceRPB.pdf>.

While researchers estimate that upwards of two-thirds of young people in detention centers could meet the criteria for having a mental disorder, a little more than a third need ongoing clinical care—a figure twice the rate of the general adolescent population. Barry Holman & Jason Zeidenberg, *The Dangers of Detention: Impact of Incarcerating Youth in Detention and Other Secure Facilities*, JUSTICE POLICY INST. 8 (November 28, 2006), available at http://www.justicepolicy.org/uploads/justicepolicy/documents/dangers_of_detention.pdf (citing THOMAS GRISSO, *DOUBLE JEOPARDY: ADOLESCENT OFFENDERS WITH MENTAL DISORDERS* (Univ. of Chicago Press 2004)).

⁴⁰ Mary M. Quinn, *Youth with Disabilities in Juvenile Corrections: A National Survey*, 71 EXCEPTIONAL CHILDREN 339, 340 (2005), available at http://www.helpinggangyouth.com/disability-best_corrections_survey.pdf. According to the Justice Policy Institute Report by Barry Holman and Jason Zeidenberg, *The Dangers of Detention: Impact of Incarcerating Youth in Detention and Other Secure Facilities*, The Department of Education study showed that 43 percent of incarcerated youth receiving remedial education services in detention did not return to school after release, and another 16 percent enrolled in school but dropped out after only five months. Barry Holman & Jason Zeidenberg, *The Dangers of Detention: Impact of Incarcerating Youth in Detention and Other Secure Facilities*, JUSTICE POLICY INST. 9 (November 28, 2006), available at http://www.justicepolicy.org/uploads/justicepolicy/documents/dangers_of_detention.pdf (citing LEBLANC, UNLOCKING LEARNING; CHAPTER 1 IN CORRECTIONAL FACILITIES (U.S. Dep't of Educ. 1991)).

⁴¹ “Studies from a number of psychological journals report that between 75-93 percent of youth entering the juvenile justice system annually are estimated to have experienced some degree of traumatic victimization.” JUSTICE POLICY INSTITUTE, *Healing Invisible Wounds: Why Investing in Trauma-Informed Care for Children Makes Sense* 5 (2010).

⁴² “America’s juvenile corrections institutions subject confined youth to intolerable levels of violence, abuse and other forms of maltreatment. See RICHARD A. MENDEL, NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 5 (2011); PATRICIA PURITZ & MARY ANN SCALI, BEYOND THE WALLS: IMPROVING CONDITIONS OF CONFINEMENT FOR YOUTH IN CUSTODY 11 (1998).

⁴³ The use of physical restraints is recognized as “an intervention of last resort” due to the high-risk outcomes associated with it, which include trauma, injury, and even death. Michael A. Nunno, Martha J. Holden, & Amanda Tollar, *Learning From Tragedy: A Survey of Child and Adolescent Fatalities*, 30 CHILD ABUSE & NEGLECT 1333, 1337 (2006); Researchers note the stress of being placed in a restraint, in conjunction with the effects of medication can place children at risk. Wanda K. Mohr and Brian D. Mohr, *Mechanisms of Injury and Death Proximal to Restraint Use*, 44 ARCHIVES PSYCHIATRIC NURSING 285, 285 (2000).

⁴⁴ See RICHARD A. MENDEL, NO PLACE FOR KIDS: THE CASE FOR REDUCING JUVENILE INCARCERATION 5 (2011).

⁴⁵ IAN KYSEL, GROWING UP LOCKED DOWN: YOUTH IN SOLITARY CONFINEMENT IN JAILS AND PRISONS ACROSS THE UNITED STATES 2 (2012), <http://www.aclu.org/files/assets/us1012webwcover.pdf>; “Nationally, over half of the youth who committed suicide while in a correctional facility were in solitary confinement and 62 percent had a history of being placed in solitary confinement.” Research shows that individuals forced into solitary confinement had much higher rates of recidivism and mental illness. *Yee Introduces Bill to Limit Use of Solitary Confinement of Juveniles*, SENATOR LELAND YEE, PH. D (2013), <http://sd08.senate.ca.gov/news/2013-08-yee-introcues-bill-limit-use-solitary-confinement-juvenile>.

likely to engage in self-harming and suicidal behavior.⁴⁷

Consider the significant harms, challenges and hardships facing youth sentenced as adults.⁴⁸ Youth sentenced to adult facilities face even greater risks than youth sentenced as juveniles. They are 36 times more likely to commit suicide; they are at greater risk of physical and sexual assault; they are five times as likely to be sexually assaulted;⁴⁹ and they are twice as likely to report being “beaten up” by staff.⁵⁰

B. INCARCERATED YOUTH HAVE THE RIGHT TO BE FREE FROM HARM

“America must not only take better care of its children before they get into trouble, but also not abandon them when they get into trouble.”⁵¹ It has been more than fifteen years since the American Bar Association Juvenile Justice Center released its report Beyond the Walls: Improving Conditions of Confinement for Youth in Custody in response to United States Attorney General Janet Reno’s quote above.⁵² Yet incarcerated youth continue to be marginalized and exposed to harm.

The Fourteenth Amendment guarantees youth the right to be free from harm while in confinement.⁵³ Furthermore, according to the Supreme

See also <http://www.nytimes.com/2014/09/29/nyregion/solitary-confinement-to-end-for-youngest-at-rikers-island.html>

⁴⁶ Allen J. Beck & Timothy A. Hughes, SEXUAL VIOLENCE REPORTED BY CORRECTIONAL AUTHORITIES 7 (2005), <http://www.bjs.gov/content/pub/pdf/svrca04.pdf>. (finding that the rate of reported sexual violence was nearly ten times higher in juvenile facilities than adult prisons); *See also* Prison Rape Elimination Act, Pub. L. No. 108-79, 117 STAT. 975 (2003).

⁴⁷ The Office of Juvenile Justice and Delinquency Prevention reports that 11,000 youth engage in more than 17,000 acts of suicidal behavior in the juvenile justice system annually. BARRY HOLMAN & JASON ZIEDENBERG, THE DANGERS OF DETENTION: THE IMPACT OF INCARCERATING YOUTH IN DETENTION AND OTHER SECURE FACILITIES 9 (2006). DALE G. PARENT ET AL., CONDITIONS OF CONFINEMENT: JUVENILE DETENTION AND CORRECTIONS FACILITIES 10 (1994).

⁴⁸ *See supra* fn. 12 (DOJ Rikers Report)..

⁴⁹ T. J. Parsell, *Behind Bars, Teenagers Become Prey*, N.Y. TIMES (June 5, 2012), <http://www.nytimes.com/roomfordebate/2012/06/05/when-to-punish-a-young-offender-and-when-to-rehabilitate-in-prison-teenagers-become-prey>); *See also* CAMPAIGN FOR YOUTH JUSTICE, <http://campaignforyouthjustice.org>.

⁵⁰ *The Risks Juveniles Face When They Are Incarcerated With Adults*, JUSTICE POLICY INSTITUTE, http://www.justicepolicy.org/images/upload/97-02_rep_riskjuvenilesface_jj.pdf.

⁵¹ Patricia Puritz & Mary Ann Scali, BEYOND THE WALLS: IMPROVING CONDITIONS OF CONFINEMENT FOR YOUTH IN CUSTODY, iii, (American Bar Association Juvenile Justice Center, 1998). (quoting Janet Reno, United States Attorney General).

⁵² *Id.*

⁵³ The Fourteenth Amendment of the United States Constitution, which prohibits the deprivation of “life, liberty or property without due process of law” guarantees to each child in state custody the substantive right to be free from harm.” *Youngberg v. Romeo*, 457 U.S. 307, 324 (1982); U.S. CONST. amend. XIV, § 1. *See also* The Eighth Amendment’s prohibition against cruel and unusual punishment applies to the states through the Due Process Clause of the Fourteenth Amendment. U.S. CONST. amend. VIII; *Robinson v. California*, 370 U.S. 660, 666 (1962). Thus, “when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding

Court, youth prosecuted and sentenced as juvenile delinquents have a rehabilitative mandate,⁵⁴ in contrast to those prosecuted in the criminal justice system.⁵⁵ Yet despite these so-called protections, incarcerated youth, so frequently marginalized even from their own families and counsel, do not receive necessary treatment and are exposed to harms related to use of physical restraints, isolation and excessive force.

Unequivocally, the job of protecting incarcerated youth from harm falls squarely on adults; it is the role of legislators, facility administration, staff, parents and the judiciary alike to ensure the safety and well-being of incarcerated youth in keeping with both the spirit and letter of the law. However, as will be discussed in greater detail below, the PLRA, through its “exhaustion requirement,” shifts this burden of seeking protection onto the shoulders of incarcerated youth.⁵⁶

III. LEGISLATIVE REFORM AND THE PRISON LITIGATION REFORM ACT (PLRA)

While it is not the only way to ensure protection from harm, litigation seeking prospective relief and/or monetary damages for injury, is often a viable course for bringing about systemic changes to harmful policies and practices. Though costly, contentious and time consuming, litigation can also be effective when it comes to changing policy, ensuring accountability and compensating individuals for injuries. A major barrier to bringing such litigation on behalf of incarcerated youth, however, is the PLRA.

The PLRA applies to incarcerated youth and adults alike.⁵⁷ The act defines the term “prisoner” broadly to mean “any person subject to incarceration, detention, or admission to any facility who is accused of, convicted of, sentenced for, or *adjudicated delinquent* for, violations of

duty to assume some responsibility for his safety and general well-being.” *DeShaney v. Winnebago County Dep’t of Soc. Servs.*, 489 U.S. 189, 199–200 (1989).

⁵⁴ *In re Gault*, 387 U.S. 1, 15-16 (1967). *Cf.* Paul Holland & Wallace J. Mlyniec, *Whatever Happened to the Right to Treatment?: The Modern Quest for a Historical Promise*, 68 TEMP. L. REV. 1791, 1794 (1995) “[These facilities] remain ill-equipped to provide children living in them with the education, behavior modification, counseling, substance abuse treatment, and the mental and physical health care they need.” *See also* Youngberg, 457 U.S. at 324.

⁵⁵ *See In re Gault*, 387 U.S. 1, 15-16 (1967).

⁵⁶ Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America’s Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 152-54 (2008) (discussing *Minix v. Pazera*, 2005 WL 1799538 no page numbers (N.D. Ind. July 27, 2005)).

⁵⁷ *See* *Christina A. v. Bloomberg*, 315 F.3d 990, 994-95 (8th Cir. 2003); *Alexander S. v. Boyd*, 113 F.3d 1373, 1383-85 (4th Cir. 1997) (Both holding that the PLRA limits on attorneys’ fees applies to cases brought by juveniles adjudicated delinquent). *See also*, *Doe v. Cook Cty.*, 1999 WL 1069244, at *3 (N.D. Ill. Nov. 22, 1999) (rejecting plaintiffs arguments that the PLRA doesn’t apply to juveniles detained before adjudication as delinquents).

criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program.”⁵⁸ It further defines the term “prison” broadly to mean “any Federal, State, or local facility that incarcerates or detains *juveniles* or adults accused of, convicted of, sentenced for, or *adjudicated delinquent* for, violations of criminal law.”⁵⁹ The PLRA in the juvenile justice context applies to juvenile detainees and those adjudicated delinquent sentenced to confinement in juvenile facilities.⁶⁰

A. THE PLRA’S EXHAUSTION REQUIREMENT

A central feature of the PLRA is its “exhaustion requirement.”⁶¹ The PLRA provides, in relevant part, that “[n]o 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.”⁶² “Administrative remedies” are typically defined in intricate prison grievance policies.⁶³ Whether by design or otherwise, such multi-layered grievance policies are difficult to maneuver, and unless adhered to strictly, they can easily lead to the dismissal of otherwise legitimate and compelling civil rights claims.⁶⁴ Essentially, incarcerated youth are expected to fully comply with the layers and time frames imposed by their facilities of residence, or face dismissal of their federal constitutional

⁵⁸ 42 U.S.C.A. § 1997e (emphasis added).

⁵⁹ 18 U.S.C. § 3626 (g)(5) (emphasis added).

⁶⁰ See *Christina A. ex rel. Jennifer A. v. Bloomberg*, 315 F.3d 990, 994-95 (8th Cir. 2003), and *Alexander S. v. Boyd*, 113 F.3d 1373, 1383-85 (4th Cir. 1997) both held that the PLRA limits on attorneys’ fees applies to cases brought by juveniles adjudicated delinquent; see also, *Doe v. Cook Cty.*, 1999 WL 1069244, at *3 (N.D. Ill. Nov. 22, 1999) (rejecting plaintiffs’ arguments that the PLRA doesn’t apply to juveniles detained before adjudication as delinquents).

⁶¹ 18 U.S.C.A. § 3626 (g)(3) (West 2008). In addition to the exhaustion requirement, the PLRA has several other provisions that are of great concern and limit youth from seeking protections from the court in conditions litigation. The PLRA imposes limitation on prospective relief. See 18 U.S.C. § 3626 (2000). The PLRA limits relief for emotional and mental injury to only occasions where the plaintiff can demonstrate physical injury. See 42 U.S.C. § 1997e(e); see, e.g., *Al-Amin v. Smith*, 637 F.3d 1192, 1199 (11th Cir. 2011). But see *Thompson v. Carter*, 284 F.3d 411, 418 (2d Cir. 2002). See also VIOLENCE AGAINST WOMEN REAUTHORIZATION ACT OF 2013, PL 113-4, March 7, 2013, 127 Stat 54, amending § 7(e) of the Civil Rights of Institutionalized Persons Act (42 U.S.C. 1997e(e)) to add “the commission of a sexual act” to the physical harm requirement. The PLRA also restricts the amount of attorneys’ fees, rather than allow for market rates. See *Alexander S. v. Boyd*, 113 F.3d 1373 (4th Cir. 1997). The PLRA requires prisoners who file *in forma pauperis* to pay the full filing fee, which is several hundred dollars. See 28 U.S.C. § 1915(a)(1)-(b).

⁶² 18 U.S.C. § 3626(g)(5). The definition of “prison” includes a facility “that incarcerates or detains juveniles.”

⁶³ *Jones v. Bock*, 544 U.S. 199, 218 (2007). “The level of detail necessary in a grievance to comply with the grievance procedures will vary from system to system and claim to claim, but it is the prison’s requirements, and not the PLRA, that defines the boundaries of roper exhaustion.”

⁶⁴ See M.C. (juveniles required to comply with a 5 step grievance policy.).

claims.

Exhaustion is not a jurisdictional prerequisite⁶⁵ and therefore not a pleading requirement. Non-exhaustion, however, is an affirmative defense⁶⁶ likely to be raised by defendants who bear the burden of pleading and proving it.⁶⁷ Courts may dismiss claims *sua sponte* for non-exhaustion, but not without first giving the plaintiff notice and opportunity to be heard on the issue of exhaustion.⁶⁸ In the Second Circuit for example, dismissal with prejudice is the remedy for non-exhaustion if the administrative remedies are no longer available.⁶⁹ The exhaustion requirement however, is applicable only to suits brought by “prisoners.”⁷⁰ Therefore, once a prisoner has been released from confinement, “exhaustion” is no longer required.⁷¹

Strict adherence to the PLRA exhaustion requirement has been shown to lead to unjust results and to essentially bar juveniles from bringing suit even under circumstances where the grievance procedure “ha[d] never been used” by any juvenile.⁷² In Brock v. Kenyon County, Ky.,⁷³ a juvenile who had a stun gun used on him and was “grabbed by the testicles” by a guard was barred from filing a section 1983 claim for abuse.⁷⁴ In Brock, the young man asserted that he “[had] never received any information on how to file a grievance,” and that therefore the grievance procedure was “unavailable” to him. Further, he asserted that the grievance procedure was

⁶⁵ *Woodford v. Ngo*, 548 U.S. 81, 101 (2006); *Richardson v. Goord*, 347 F.3d 431 (2d Cir. 2003).

⁶⁶ *Jones v. Bock*, 549 U.S. 199 (2007); *Johnson v. Testman*, 380 F.3d 691, 695 (2d Cir. 2004); *Jenkins v. Haubert*, 179 F.3d 19, 28-29 (2d Cir. 1999).

⁶⁷ *Haubert*, 179 F.3d at 28-29; *Roberts v. Barreras*, 484 F.3d 1236, 1240-41 (10th Cir. 2007).

⁶⁸ *Mojias v. Johnson*, 351 F.3d 606 (2d Cir. 2003) (overruling *Neal v. Goord*, 267 F.3d 116, 123-24 (2d Cir. 2001) (holding that notice and hearing are left to the district court’s discretion)); *accord* *Giano v. Goord*, 380 F.3d 670, 675 (2d Cir. 2004).

⁶⁹ *Berry v. Kerik*, 366 F.3d 85, 87-88 (2d Cir. 2004); *but see* *Armstrong v. Scribner*, 350 F. App’x. 186, 187 (9th Cir. 2009) (vacating in part district court’s order dismissing action with prejudice for failure to exhaust administrative remedies and remanding the case for dismissal without prejudice); *Aggers v. Tyson*, 2011 WL 2458083, at *5-6 (E.D. Cal. June 16, 2011), 2011 WL 3319622, at *1 (E.D. Cal. Aug. 1, 2011) (adopting report and recommendation), *aff’d*, 481 F. App’x 404, 405 (9th Cir. 2012).

⁷⁰ *See, e.g.*, *Greig v. Goord*, 169 F.3d 165, 167 (2d Cir. 1999) (“[L]itigants . . . who file prison condition actions after release from confinement are no longer ‘prisoners’ for purposes of § 1997e(a) and, therefore, need not satisfy the exhaustion requirements of this provision”); *Ahmed v. Dragovich*, 297 F.3d 201, 210 (3d Cir. 2002) (finding that the exhaustion requirement did not apply to a prisoner who had been released and opining that “[a]ny other view would also be inconsistent with the spirit of the PLRA, which was designed to deter frivolous litigations by idle prisoners”); *Janes v. Hernandez*, 215 F.3d 541, 543 (5th Cir. 2000); *Kerr v. Puckett*, 138 F.3d 321, 323 (7th Cir. 1998); *Harris v. Garner*, 216 F.3d 970, 981 (11th Cir. 2000); *Arms-Adair v. Black Hawk Cnty., Iowa*, No. C13-2008, 2013 WL 2149614, at *2-3 (N.D. Iowa May 16, 2013).

⁷¹ *Arms-Adair v. Black Hawk Cnty., Iowa*, No. C13-2008, 2013 WL 2149614, at *4 (N.D. Iowa May 16, 2013).

⁷² *Brock v. Kenyon Cnty., Ky.*, No. 02-5442, 2004 WL 603929 (6th Cir. Mar. 23, 2004).

⁷³ *Id.*

⁷⁴ *Id.* *See generally* Title 42 U.S.C. § 1983.

not functionally available as “it had never been used by *any* juvenile offender.”⁷⁵ The court rejected his argument, and dismissed his claims of abuse, stating that it did not have the “discretion to waive exhaustion as it did prior to the [PLRA].”⁷⁶

The district court in M.C. ex rel. Crider v. Whitcomb,⁷⁷ also took a strict compliance approach to the exhaustion requirement. In M.C., the plaintiff, a teen who had been adjudicated delinquent, claimed that the state failed to protect him from assault by other residents and “caused him to be placed in unsafe housing despite knowing that he needed more protection” in two separate facilities. Despite the seriousness of the allegations, his young age and his purported demonstrated need for greater protection, the federal court dismissed M.C.’s claims because he had not complied with the *5-step grievance process* at each facility (emphasis added). Following at least one incident, M.C. was placed in segregation without writing materials. However, the court expected him to ask for the necessary grievance materials. And, despite the fact that M.C. maintained that “he was unaware of the exhaustion requirement or the exhaustion procedure,”⁷⁸ the court refuted his assertion, relying on a document that M.C. had signed which purported that he *knew* about the facilities’ grievance processes⁷⁹ (emphasis added). The court then went a step further and stated that even if M.C. was unaware of the exhaustion requirement or the grievance processes, his failure to exhaust would still not have been excused.⁸⁰ Simply put, the M.C. court decided that once it was established that the “institution ha[d] an internal administrative grievance procedure” and that the “administrative process [was] in place”, then all inmates, juveniles

⁷⁵ *Id.* at 797 (emphasis added).

⁷⁶ *Id.* at 799.

⁷⁷ 2007 WL 854019 (S.D. Ind. Mar. 2, 2007). M.C. ex rel. Crider v. Whitcomb 207 WL854019 (S.D. Ind. Mar. 2, 2007) (citing Dole v. Chandler, 438 F.3d 804, 809 (7th Cir.2006). The Supreme Court has held that “exhaustion in § 1997e(a) cases is now mandatory.” Porter v. Nussle, 534 U.S. 516, 524 (2002). The 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. As the Court stated: “[W]e stress the point ... that we will not read futility or other exceptions into [PLRA’s] statutory exhaustion requirements.” Booth v. Churner, 532 U.S. 731, 741 n. 6 (2001). The filing of administrative remedies is mandatory because the PLRA “eliminated the [district courts’] discretion to dispense with [it].” *Id.*, at 739. Nonetheless, “[p]rison officials may not take unfair advantage of the exhaustion requirement, [] and a remedy becomes ‘unavailable’ if prison employees do not respond to a properly filed grievance or otherwise use affirmative misconduct to prevent a prisoner from exhausting.” Dole, 438 F.3d at 809).

⁷⁷ 2007 WL854019 (S.D. Ind. Mar. 2, 2007).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* (citing Yousef v. Reno, 254 F.3d 1214, 1221 (10th Cir. 2001). “Section 1997e(a) says nothing about a prisoner’s subjective knowledge of the existence or workings of a grievance process.” *Id.*

included, are required to exhaust, any lack of knowledge about the requirement or the process notwithstanding.⁸¹ There was no discussion about the actual grievance processes at issue⁸² or whether such a multi-tiered grievance process was a reasonable requirement for juveniles generally or M.C., in particular. Moreover the court did not address whether M.C. evinced an understanding of the process or had the capacity to negotiate it.

Unlike M.C. where no grievances were made, in *Minix v. Pazera*⁸³ the youth's mother made multiple complaints to several government officials about the abuse her son endured while in custody. Yet her efforts to protect her son fell short of the formal exhaustion requirement, thus resulting in the dismissal of his federal court claims.⁸⁴ In *Minix*, the youth complained to his mother about horrific abuses. He told her that staff would sometimes "handcuff [him] so other juvenile detainees could beat him."⁸⁵ She observed bruises on him. He also told her, among other things, that he had been repeatedly beaten and was once raped by other residents. In what the court deemed "heroic efforts," she complained to facility staff, the superintendent of various facilities, the Deputy Department of Corrections Commissioner, and finally the Governor, all in an effort to protect her son. Inexplicably, her efforts were found to be insufficient to satisfy the PLRA. In its dismissal, the district court judge stated that he did not "wish to demean Mrs. Minix's efforts on her son's behalf: she did what she could do . . . [but s]he hadn't exhausted her son's available administrative remedies."⁸⁶

81 *Id.* (quoting *Massey v. Helman*, 196 F.3d 727, 733-34 (7th Cir. 1999)).

82 *Id.*

83 *Minix v. Pazera*, 2005 WL 1799538, (N.D. Ind., July 27, 2005).

84 *Id.*, But see in contrast to *Minix*, in *Lewis v. Gagne*, 281 F.Supp.2d 429, 434-35 (N.D.N.Y. 2003) the district court denied the State's claim of non-exhaustion where the plaintiff's mother had complained to institutional officials, contacted an attorney, the family court, and the state Child Abuse and Maltreatment Register to report abuses against her son. The court in *Gagne* found "reasonable that plaintiffs believed that at least one effort [the mother] took accomplished the same result that filing through the formal process would have produced." *Id.* The resident manual at issue in *Lewis v. Gagne* was the same resident manual in *G.B. et al. v. Carrión et al.* and *Lewis v. Mollette*, *infra.*, which allowed residents multiple options with regard to complaining about treatment, none of which is mandatory. *Cf. Hunter v. Corr. Corp. of Am.*, 441 F. Supp. 2d 78, 80 (D.D.C. 2006) (dismissing 16-year old's claims that he was sexually assaulted by an adult inmate because although he had reported the abuse to his case manager, the court determined that he had not exhausted his available administrative remedies).

85 *Minix*, 2005 WL 1799538, at *2.

86 *Woodford*, 548 U.S. at 121-22 (Stevens, J., dissenting), Stevens mentions the *Minix* decision as an example of the extreme injustice that rigid procedural exhaustion requirements can bring about, and notes that interpreting the exhaustion requirement to require such rigidity might expose the PLRA to constitutional challenges.

B. EXCEPTIONS TO THE EXHAUSTION REQUIREMENT

Other courts however have taken a more nuanced approach to the exhaustion requirement and found exceptions to avoid unjust results like the ones in Brock, M.C., and Minix.⁸⁷

In J.P. v. Taft, a class action challenging the lack of access to counsel for juvenile inmates, the court noted that:

T.M.'s status as a juvenile inmate [was] an integral element to its exhaustion analysis. . . juvenile inmates differ from adult prisoners in that their young age, their lack of experience with the criminal system, and their relatively short period of confinement entitle them to greater protection from the state. . . .⁸⁸

In addition to T.M.'s status as a juvenile inmate, "this Court finds that under the circumstances, T.M.'s request that his assault claim be resolved 'in court' meets the PLRA's administrative exhaustion requirements."⁸⁹

Further, in Molina v. New York, the district court gave due consideration to the plaintiff's juvenile and *pro se* status at the time of the incident, denying the state's motion for summary judgment based on non-exhaustion.⁹⁰

C. SECOND CIRCUIT: THE HEMPHILL EXCEPTIONS

The Second Circuit has established other exceptions to the exhaustion requirement.⁹¹ For example, if the plaintiff can show that: (1) administrative remedies were "unavailable"; (2) defendant waived, forfeited or should be estopped from raising the defense of failure to exhaust; or (3) "special circumstances" exist, thus excusing exhaustion.⁹²

⁸⁷ Hemphill v. New York, 380 F.3d 680 (2d Cir. 2004).

⁸⁸ J.P. v. Taft, 439 F.Supp.2d 793, 826 (S.D. Ohio 2006) (quoting John L. v. Adams, 969 F.2d 228, 234 (6th Cir. 1992); see, e.g., Lewis v. Mollette, 752 F. Supp. 2d 233 (N.D.N.Y. 2010).

⁸⁹ J.P. 349 F.Supp.2d at 826. J.P. case was decided just under a month after Woodford, and does not address the Woodford decision and how that decision would affect its analysis of the exhaustion requirements, if at all.

⁹⁰ Molina v. New York, 697 F. Supp. 2d 276, 282 (N.D.N.Y. 2010).

⁹¹ The Second Circuit has not addressed whether the Woodford v. Ngo "proper exhaustion" rule invalidates any part of the Hemphill multi-pronged analysis, but it appears it does not. Justice Breyer's concurrence in Woodford, which is cited the Second Circuit decision Giano v. Goord with approval as an example of the fact that the exhaustion requirement, is not absolute. Woodford, 548 U.S. at 104 (Breyer, J., concurring). In addition, district courts in the Second Circuit have continued to apply the Hemphill test after the Woodford decision.

⁹² Hemphill, 380 F.3d at 688.

1. AVAILABILITY OF ADMINISTRATIVE REMEDIES

In deciding whether an administrative remedy is “available,”⁹³ courts must examine the facility’s grievance policy, both plaintiff’s and defendant’s respective actions and inaction, and the circumstances surrounding the incidents which gave rise to plaintiff’s complaints. For example, threats by staff can render all or some remedies “functionally unavailable” to a prisoner.⁹⁴ The standard for assessing claims of non-exhaustion because of threats is whether “a similarly situated individual of ordinary firmness’ [would] have deemed [remedies] available,” in the face of such threats.⁹⁵ Since the PLRA does not say when a process is “available,” the court will apply the ordinary meaning of the term.⁹⁶ Thus when the “prisoner causes the unavailability of the grievance process by simply not filing a grievance in a timely manner, the process is not unavailable, but rather forfeited.⁹⁷ However, if the facility does not provide the young person with the necessary grievance forms⁹⁸ or if an administrative remedy is “unknown and unknowable” it is “unavailable.”⁹⁹ Additionally, some courts outside the Second Circuit have excused exhaustion by finding that administrative remedies were not available to adult inmates who lacked the capacity to utilize them by reason of mental illness or developmental disability, impaired literacy or lack of education.¹⁰⁰ All courts should do the same for juveniles.

In *G.B. et al. v. Carrión et al.*,¹⁰¹ a putative class action seeking: (1) prospective relief to prevent unlawful physical restraints and to improve mental health treatment on behalf of the class; and (2) damages for the

⁹³ *Abney v. McGinnis*, 380 F.3d 663, 668 (2d Cir. 2004); see also *Hemphill*, 380 F.3d at 686. (Emphasis added).

⁹⁴ *Hemphill*, 380 F.3d at 688.

⁹⁵ *Id.*

⁹⁶ *M.C. ex rel. Crider v. Whitcomb*, 2007 WL 854019 (S.D. Indiana Mar. 2, 2007) (citing *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187, 115 S.Ct 788, 130 L.Ed.2d 682 (1995)).

⁹⁷ *Id.*

⁹⁸ See *Mitchell v. Horn*, 318 F.3d 523, 29 (3d Cir. 2003); see also *Troy D. v. Mickens*, 806 F. Supp.2d 758, 767 (D.N.J. 2011).

⁹⁹ *Goebert v. Lee County*, 510 F.3d 1312, 1323 (11th Cir. 2007); *Jackson v. Ivens*, 2007 WL2261552, *4 (3d Cir. 2007); *Westefer v. Snyder*, 422 F.3d 570, 580 (7th Cir 2005) (holding that defendants did not show remedies were available where there was no “clear route” for challenging certain decisions). *Cf. Brock v. Kenyon County, Ky.*, 2004 WL 603929 (6th Cir. 2004).

¹⁰⁰ See, e.g., *Cole v. Sabina*, 2007 WL 4460617, * 7 (W.D. Pa., Dec 19, 2007) (refusing to dismiss for non-exhaustion where plaintiff alleged mental disabilities which could account for his non-compliance with grievance procedures); see also *Langford v. Ifediora*, 2007 WL 1427423, *3-4 (E.D. Ark, May 11, 2007) (holding plaintiff’s advanced age, deteriorating health, and lack of general education, combined with failure to provide him assistance in preparing grievances, raised factual issues concerning the availability of the remedy to him).

¹⁰¹ *G.B. et al. v. Carrión et al.*, 09 Civ 10582 (S.D.N.Y.) (J. Crotty).

individual named plaintiffs, the court held that the named plaintiffs were excused from the exhaustion requirements under all of the Hemphill v. New York¹⁰² exceptions.¹⁰³ In G.B., the court deemed the grievance policy unavailable, among other things, largely because the state advised youth in its Resident Manual that the grievance process was one of many options that youth could use to make complaints, none of which were mandatory.¹⁰⁴

2. ESTOPPEL

The application of estoppel in this context prevents those defendants who have engaged in misconduct aimed at preventing plaintiffs from pursuing administrative claims, such as threatening the use of force or other harm, from then seeking a dismissal based on non-exhaustion.¹⁰⁵ Estoppel may be applied broadly and not just to the particular defendants who engaged in the misconduct.¹⁰⁶ Prison staff who have engaged in making threats and/or intimidating inmates or youth from participating in the relevant grievance procedures will be estopped from asserting the defense of non-exhaustion.¹⁰⁷

3. SPECIAL CIRCUMSTANCES

The court may also excuse failure to exhaust on the ground that “special circumstances” have been “plausibly alleged” that justify the plaintiff’s “failure to comply with administrative procedural requirements.”¹⁰⁸ As

¹⁰² 380 F.3d. 680 (2d Cir. 2004).

¹⁰³ *Id.* (denying the State’s motion to dismiss on summary judgment grounds for non exhaustion, for the following reasons: (1) the administrative remedies put forth by defendant were unavailable; (2) defendant was estopped from asserting a non -exhaustion defense; and (3) special circumstances applied. (Judge Crotty’s Order dated July 27, 2011).

¹⁰⁴ *Id.* See also Lewis v. Mollette, 752 F. Supp. 2d 233, 241 (N.D.N.Y. 2010) (denying the state’s motion for summary judgment, referring to the same Resident Manual as in G.B. on the ground that the State’s grievance policy was “unavailable.” In Mollette, the court explicitly gave weight to factors such as plaintiff’s young age, (fifteen), and the fact that at the time of the incident he was being held in the facility’s mental health unit.

¹⁰⁵ Hemphill v. New York, 380 F.3d at 686, 688-89; Benjamin v. Comm. of Corr. Dep’t., 375 Fed. Appx. 114, 115. (2d Cir. April 29, 2010) (summary order).

¹⁰⁶ Brown v. Koenigsmann, 2005 WL 1925649, at *2 (S.D.N.Y., Aug. 10, 2005) (“Nothing in Ziamba, however, requires that the action or inaction which is the basis for the estoppel be that of the particular defendant in the prisoner’s case”) (interpreting Ziamba v. Wezner, 366 F.3d 161, 163-64 (2d Cir. 2004).

¹⁰⁷ Hemphill, 380 F.3d at 690 (noting that the standard is whether a similarly situated individual of “ordinary firmness” would have been deterred from pursuing regular procedures).

¹⁰⁸ *Id.* at 686. See Braham v. Clancy, 425 F.3d 177, 184 (2d Cir. 2005) (remanding for consideration whether the prisoner’s receipt of the relief he had requested without filing a formal grievance constituted a “special circumstance” that might reasonably lead to a conclusion that he had

previously stated, the applicable rules for exhausting administrative remedies are found in the prison's own requirements.¹⁰⁹ Where the grievance procedure is not provided to youth, or where it is provided in an ambiguous manner, "special circumstances" exist and the exhaustion requirement can be excused.¹¹⁰ Additional circumstances that may provide justification for non-exhaustion include, but are not limited to: reliance on a reasonable interpretation of the grievance rules,¹¹¹ procedural irregularities, obstruction in the grievance process,¹¹² psychiatric reasons,¹¹³ or where the nature of the relief sought by plaintiff is beyond the power of the custodial agency.¹¹⁴

Additional "special circumstances" include traits or disabilities that make it difficult or nearly impossible for prisoners to effectively carry out a multi-tiered grievance process. Such traits include young age, emotional, mental and educational disabilities, developmental delays, mental retardation, and lack of access to counsel or advocates.¹¹⁵ Should the court conclude that a juvenile in custody evincing any one or more of the aforementioned traits has failed to exhaust, it should find that the failure was justified by "special circumstances."¹¹⁶

prevailed in the grievance process); *Rivera v. Pataki*, 2005 WL 407710, at *12 (S.D.N.Y., Feb. 7, 2005) (finding special circumstances where the prisoner "did the best he could to follow DOCS regulations while responding to an evolving legal framework"; noting the plaintiff had filed at a time when it appeared that his claim need not be exhausted, and had tried to exhaust after dismissal for non-exhaustion mandated by the subsequent Supreme Court *Porter v. Nussle* decision).

¹⁰⁹ *Jones v. Bock*, 549 U.S. 199, 218 (2007).

¹¹⁰ See *Lewis v. Gagne*, 281 F. Supp. 2d 429, 434 (2003); see also *Lewis v. Mollette*, 752 F. Supp. 2d 233, 241 (year).

¹¹¹ *Giano v. Selsky*, 380 F.3d 670, 676 (year) (rejecting procedural default rule, which requires strict compliance with rules, and finding plaintiff's interpretation of rules reasonable even if incorrect); *Hemphill v. New York*, 380 F.3d 680, 68990 (year) (holding plaintiff's claim that, under the harassment grievance procedure, exhausting by writing to the Superintendent at least reflected a reasonable interpretation of the rules, was not "manifestly meritless" and should be considered on remand).

¹¹² *Brownell*, 446 F.3d at 312-13 (2d Cir. 2006) (failure of prison staff to follow prison system's rules); *Tyree v. Zenk*, 2007 WL 527918, at *9-10 (E.D.N.Y., Feb. 14, 2007) (confusing and ambiguous instructions by prison staff) (citing *Giano*, 380 F.3d at 678); *Hairston v. LaMarche*, 2006 WL 2309592, at *9-11 (S.D.N.Y., Aug. 10, 2006) (referral by Superintendent to the Inspector General, the failure of either to provide the plaintiff with a decision, lack of clarity how he could take the process any further); *Roque v. Armstrong*, 392 F.Supp.2d 382, 391 (D. Conn. 2005) neither the prisoner nor the grievance system entirely followed the rules but the prisoner had received a response from the Commissioner, the final grievance authority);

¹¹³ *Petty v. Goord*, 2007 WL 724648, at *8 (S.D.N.Y., Mar. 5, 2007) (prisoner was transferred to a mental hospital after filing a grievance and missed the final deadline; the court notes lack of evidence of his mental state at the time, and holds that two months plus in a mental hospital constituted special circumstances). But see *Johnson v. Dist. of Columbia*, 869 F. Supp. 2d 34 (D.D.C. 2012) (finding that prisoner's alleged inability to read, his mental retardation and the prison staff's failure to inform him of his grievance process did not excuse his failure to exhaust).

¹¹⁴ See *Handberry v. Thompson*, 92 F. Supp.2d 244, 247-48 (S.D.N.Y. 2000).

¹¹⁵ See *J.P. v. Taft*, 439 F. Supp. 2d 793, 826 (S.D. Ohio 2006) (status as a juvenile "integral element" in exhaustion analysis).

¹¹⁶ See *Giano*, *supra* note 102, at 675; see also *Brownell v. Krom*, 446 F.3d 305, 312-13 (2d Cir.

Failure to exhaust was also excused, for example, where the court found that the Federal Bureau of Prisons had “predetermined the issue before it” and therefore any attempt by the youth to exhaust would have been futile.¹¹⁷ The aforementioned exceptions are discretionary and hotly litigated by experienced counsel. So long as the PLRA includes juveniles in its definition of prisoner, marginalized youth who suffer harm in jails or prisons will continue to be prevented from seeking protections and compensation in federal courts.

IV. ADOLESCENT DEVELOPMENT AND EXHAUSTION¹¹⁸

“[I]t would be misguided [from a moral standpoint] to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor’s character deficiencies will be reformed.”¹¹⁹ Anyone who lives with a teen can attest to the fact that they think differently than adults and often require concerted support and guidance to make sound decisions.¹²⁰ The Supreme Court has aptly stated “youth is more than chronological fact . . . It is a time and condition of life when a person may be most susceptible to influence and to psychological damage.”¹²¹ In the last thirty years or so, scientific research on adolescent brain development has emerged to support the conventional wisdom and to illustrate how adolescent brains differ from those of adults.¹²²

In recent years, citing findings in adolescent brain development research, the Supreme Court has held in several decisions – Roper v. Simmons,¹²³

2006).

¹¹⁷ See *A.C.H. v. United States*, 2006 WL 3487116, at *3 (D. Minn. 2006).

¹¹⁸ This is not a pun.

¹¹⁹ *Roper v. Simmons*, 543 U.S. 551, 570 (2005)

¹²⁰ “[A]s any parent knows and as the scientific and sociological studies respondent and [Simmons’] *amici* cite tend

to confirm, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often

than in adults and are more understandable among the young. These qualities often result in impetuous and ill considered actions and decisions.” *Roper v. Simmons* (citing *Johnson v. Texas*, 509 U.S. 360, 367; see also *Eddings v. Oklahoma*, 455 U.S. 104, 115–116 (“Even the normal 16-year-old customarily lacks the maturity of an adult”).

¹²¹ *Roper v. Simmons*, *Amicus Curiae* brief at 21 (quoting *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 (1982) (quoting *Bellotti v. Baird*, 443 U.S. 622, 635 (1979)).

¹²² *Roper*, *Amicus Curiae* brief prepared on behalf of Respondent Simmons by the American Medical Association, American Psychiatric Association, American Society for Adolescent Psychiatry, American Academy of Child & Adolescent Psychiatry; American Academy of Psychiatry and the Law; National Association of Social Workers, Missouri Chapter of the National Association of Social Workers, and National Mental Health Associations. See also Anna Rapa, *Comment, One Brick Too Many: The Prison Litigation Reform Act As a Barrier to Legitimate Juvenile Lawsuits*, 23 T.M. COOLEY L. REV 263, 276-77. (2006). See also *J.D.B. v. North Carolina*, 131 S.Ct. 2394, 2397 (2011).

¹²³ 543 U.S. 551 (2005) (holding that the Eighth Amendment’s declaration against “cruel and

Miller v. Alabama,¹²⁴ and Graham v. Florida,¹²⁵ – that youth are entitled to greater protections in sentencing considerations. The Court in Miller v. Alabama articulated (in reference to the mandatory penalty schemes of imposing life without the possibility of parole on juvenile offenders) a founding principle from Graham and Roper: “that imposition of a State’s most severe penalties on juvenile offenders cannot proceed as though they were not children.”¹²⁶ The same should be true for any blanket law that seeks to include juvenile offenders with adult offenders as the PLRA does.

Brain development research reveals among other things that “[t]he difference between teenage and adult behavior ‘lies in what scientists have characterized as ‘deficiencies in the way adolescents think,’ and their inability to perceive and weigh risks and benefits *accurately*.”¹²⁷ So-called “normal adolescents cannot be expected to operate with the level of maturity, judgment, risk aversion or impulse control of an adult. Adolescents cannot be expected to transcend their own psychological or biological capacities . . . [and] an adolescent who has suffered brain trauma, a dysfunctional family life, violence or abuse [as many incarcerated youth have] cannot be presumed to operate even at standard levels for adolescents.”¹²⁸ Further brain development research reveals that adolescents “put greater emphasis on short-term consequences and discount future consequences more than adults. Additionally, stress and emotions affect cognition in teens, further influencing decision-making.¹²⁹ It is difficult to imagine a setting that is more stressful and emotion-inducing than a prison or jail. Incarcerated youth face multiple stressors day in and day out, including confrontations, violence, restraints and isolation, to name a few.

Additionally, youth are vulnerable to social pressure from staff and/or other youth, both of whom may discourage reporting, whether by explicit threat of retaliation or by name calling and intimidation. The scientific research tells us that “[t]he typical adolescent is . . . more vulnerable to

unusual punishment” prohibits the execution of individuals whose capital offense(s) were committed before the age of 18, specifically that “juvenile offenders cannot with reliability be classified among the worst offenders.”).

¹²⁴ 132 S.Ct. 2455 (2012) (holding that the Eighth Amendment prohibits *mandatory* sentencing of life imprisonment without parole for individuals whose qualifying offenses were committed before the age of 18) (emphasis added).

¹²⁵ 560 U.S. 48 (2010) (holding that the Eighth Amendment prohibits the sentencing of life imprisonment without parole for individuals who commit non-homicide offenses before the age of 18).

¹²⁶ Miller v. Alabama, 132 S. Ct. 2455, 2458 (2012).

¹²⁷ Roper, *Amicus Curiae* brief at 6.

¹²⁸ Roper, *Amicus Curiae* brief at 20.

¹²⁹ Roper, *Amicus Curiae* brief at 8.

peer pressure than an adult.”¹³⁰ S/he will seek the acceptance of his/her peers, thus avoid doing things that would undermine their approval, such as “snitching” on staff or other youth by filing a grievance. Youth may not report abuses because the grievance processes fail to assure confidentiality. Many youth report being labeled a “snitch” for filing a grievance.¹³¹ And being labeled a “snitch” has real consequences inside. It can lead to a lack of privileges such as phone calls or rewards or it can lead to taunting and physical aggression from other youth and staff.

Adolescent brain development, overwhelming social pressures, and the stress of being incarcerated conspire to increase the likelihood that incarcerated youth will fail to satisfy exhaustion requirements. Furthermore, the scientific literature suggests that incarcerated youth are ill-equipped to understand the consequences of that failure, which include forfeiting the ability to bring a future federal claim.

V. SHINING A LIGHT, THE NEED FOR INDEPENDENT OVERSIGHT¹³²

Juvenile justice agencies that house children frequently lack independent, external oversight. These agencies largely police themselves through internal mechanisms, with some oversight by other governmental agencies.¹³³ American Bar Association Resolution 104b calls for all jurisdictions to “establish independent monitoring entities for all prisons, jails and juvenile detention facilities.”¹³⁴ In addition to external oversight, post-sentencing advocacy by juvenile defenders is critical to among other things ensure (1) compliance with court orders; (2) access to appropriate educational and/or other services; and (3) humane treatment and appropriate conditions of confinement for youth.¹³⁵

¹³⁰ Roper, *Amicus Curiae* brief at 8.

¹³¹ Roper, *Amicus Curiae* brief at 7. [D]efficiencies in the adolescent mind and emotional and social development are especially pronounced when other facts—such as stress, emotions and peer pressure—enter the equation.” These factors work on the adolescent’s mind with “special force.” *Id.*

¹³² Michele Dietch, *Distinguishing the Various Functions of Effective Prison Oversight*, 30 PACE L. REV. 1438 (2010). Oversight is a means of achieving the twin objectives of transparency of public institutions and accountability for the operation of safe and human prisons and jails. *Id.* at 1439.

¹³³ It is important that prisons and jails have their own internal mechanisms—“for identifying problems, informing management about those concerns, and addressing wrongdoings” however these internal mechanisms do not allow for public accountability, and by design remain confidential. *Id.* See also Civil Rights of Institutional Persons Act (CRIPA); Violent Crime Control and Law Enforcement Act of 1994. See also 9 N.Y.C.R.R. 168 *et seq.*

¹³⁴ Monitoring Conditions from the Inside and Out: Developing Comprehensive Quality Assurance and External Oversight Systems, May 22, 2013, at 10, available at www.nc4yc.org (citing ABA Resolution 104b (2008)).

¹³⁵ The American Bar Association Juvenile Justice Standards and the National Juvenile Defense Standards call for representation following dismissal or the entry of a final disposition in a variety of

The Department of Justice (DOJ) Special Litigation Unit is one entity that has oversight of juvenile facilities. It investigates and monitors conditions of confinement in many juvenile detention and correctional facilities under the Civil Rights of Institutional Persons Act (CRIPA).¹³⁶ However, the DOJ is limited in its capacity and scope¹³⁷ to investigate and remedy unsafe conditions. There are thousands of juvenile facilities nationwide, and countless adult facilities housing juveniles, yet in a ten year span the DOJ had enforced less than a hundred legally required conditions of confinement cases in juvenile justice facilities.¹³⁸ Thus, thousands of young people are inevitably left without the protections afforded by the CRIPA statute.

A host of other local, state and federal agencies possess varying degrees of oversight responsibilities for incarcerated youth. The Office of Juvenile Justice and Delinquency Prevention,¹³⁹ American Correctional Association,¹⁴⁰ State Commission on Corrections,¹⁴¹ Performance-based Standards,¹⁴² the Justice Center for the Protection of People with Special

matters. Juvenile Justice Standards Annotated A Balanced Approach, American Bar Association's Center for Criminal Justice Part X Representation After Disposition 1996; National Juvenile Defense Standards Part VII Role of Juvenile Defense Counsel After Disposition 2012.

¹³⁶ 42 U.S.C. § 1997 ("CRIPA"), and the Violent Crime Control and Law Enforcement Act of 1994, 42 U.S.C. § 14141 ("Section 14141"). See also footnote 11 *supra*.

¹³⁷ See Ana Rapa, *One Brick Too Many: The Prison Litigation Reform Act As a Barrier to Legitimate Juvenile Lawsuits*, 23 T.M. COOLEY L. REV. 263, 276-77. (2006). The DOJ is only statutorily authorized to investigate claims involving patterns and practices and not individual claims. *Id.* at 300 (citing 42 U.S.C. § 1997a).

¹³⁸ NATIONAL CENTER FOR YOUTH IN CUSTODY CREATING AND SUSTAINING IMPROVED CONDITIONS FOR YOUTH IN CUSTODY, September 12, 2012. See also The U.S. Census Bureau notes that "CJRP [Census of Juveniles in Residential Placement] collects data from over 3100 public and private juvenile facilities that hold juvenile delinquents and/or status offenders. *Data Resources Program 2013: Funding for Analysis of Existing Data*, U.S. DEPT. OF JUSTICE, OMB No. 1121-0329, p. 6 (2013) available at <https://www.ncjrs.gov/pdffiles1/nij/sl001029.pdf>.

¹³⁹ Juvenile Justice and Delinquency Prevention Act. Congress enacted the Juvenile Justice and Delinquency Prevention (JJDP) Act (Pub. L. No. 93-415, 42 U.S.C. § 5601 *et seq.*) in 1974. The legislation established the OJJDP to support local and state efforts to prevent delinquency and improve the juvenile justice system. On November 2, 2002, Congress reauthorized the JJDP Act. <http://ojjdp.gov/about/legislation.html>.

¹⁴⁰ American Correctional Association Standards for Juvenile Facilities." Adult and juvenile correctional agencies should provide community and institutional programs and services that offer a full range of effective, just, humane and safe dispositions and sanctions for accused and adjudicated offenders. To assure accountability and professional responsibility, these programs and services should meet accepted professional and performance-based standards and obtain accreditation." <http://www.aca.org/government/policyresolution/view.asp?ID=44>.

¹⁴¹ Among other things, the New York State Commission on Corrections evaluates, investigates, and oversees correctional facilities. In 1996, the role of the New York State Commission of Correction was expanded to include oversight of the management and operations of the secure facilities operated by the Office of Children and Family Services. <http://www.scoc.ny.gov/>

¹⁴² The Council of Juvenile Correctional Administrators in a national non-profit entity created to improve programs and practices within juvenile justice systems. <http://pbstandards.org/about-us>.

Needs,¹⁴³ Protection and Advocacy Systems, Ombudsman programs,¹⁴⁴ Quality Assurance and Improvement programs¹⁴⁵ and legislative bodies, are just a few in New York State alone. While plentiful in number, these entities lack independence, coordination and authority, and consequently do not offer necessary external oversight. Effective external oversight would consist of the following features: (1) Regulation; (2) Audit; (3) Accreditation; (4) Investigation; (5) Legal (the use of courts and the legal process); (6) Reporting; and (7) Inspection and Monitoring.¹⁴⁶ Oversight agencies can work cooperatively to accomplish all of these aims, as “it would be a mistake to seek to combine all these functions within one entity”, as “[n]o one entity can meaningfully serve every function.”¹⁴⁷

Harmful conditions exist in juvenile facilities across the country,¹⁴⁸ leaving countless youth vulnerable to harm and/or without necessary treatment. Independent, external oversight with a monitoring¹⁴⁹ component

¹⁴³ The New York State Protection of People with Special Needs Act went into effect on June 30, 2013. The law created a new state agency called the Justice Center for the Protection of People with Special Needs, to implement the standards and practices in the nation to protect the special needs community from abuse and neglect. It seeks to standardize oversight, reporting, and investigations involving adults and children in residential care, including will residential care facilities sentenced as juvenile delinquents and juvenile offenders.

¹⁴⁴ Ombudsman is a Swedish word for “representative.” An Ombudsman acts to “resolve citizen complaints against public officials.” See *Beyond the Wall* at 9.

¹⁴⁵ *Monitoring Conditions from the Inside and Out: Developing Comprehensive Quality Assurance and External Oversight Systems*, May 22, 2013. www.nc4yc.org.

¹⁴⁶ *Monitoring Conditions from the Inside and Out: Developing Comprehensive Quality Assurance and External Oversight Systems*, May 22, 2013, at 8. www.nc4yc.org; see also Michele Dietch, *Distinguishing the Various Functions of Effective Prison Oversight*, 30 PACE L. REV. 1438 (2010).

¹⁴⁷ *Id.* at 1440.

¹⁴⁸ New York State prior to the recent reform efforts is but one example. In 2008, the DOJ embarked on an extensive investigation into four OCFS facilities to examine, among other things, the agency’s use of force and restraints practices and its mental health treatment. The DOJ investigation began not long after the 2006 tragic death of a 15 year old boy who died following a physical restraint by staff at the OCFS Tryon Residential Center, located in upstate New York more than three hours from the teen’s Bronx County home. In its findings letter following its investigation, the DOJ concluded, among other things, that OCFS “[s]taff at the four facilities [under investigation] consistently used a high degree of force to gain control in nearly every type of situation,” and that “restraints are used frequently and result in a high number of injuries.” See also DOJ findings letter dated August 14, 2009). The DOJ also concluded that mental health care at the facilities “substantially depart[ed] from generally accepted professional standards.” *Id.* As a result, in 2010, DOJ filed and immediately settled a lawsuit against New York State to address these constitutional violations. See *United States v. New York*, 10-CV-00858 (N.D.N.Y. 2010). Soon thereafter, the New York State Governor’s Task Force on Transforming Juvenile Justice created to assess the treatment of youth in OCFS custody determined that the problems identified in the DOJ findings letter existed throughout the statewide system. See <http://www.modelsforchange.net/newsroom/106>. To date, OCFS continues to work with DOJ and its monitors to address the constitutional violations and to improve the conditions for young people in some of its facilities.

¹⁴⁹ Monitoring involves an entity outside of the corrections/detention agency with the power and the mandate to routinely inspect institutions and to report on how people within that facility are treated. *Id.* at 9.

is critical for ensuring a credible assessment of what is happening inside facilities. Robust external oversight would allow administrators and the public-at-large to properly evaluate facility programs and the needs of both staff and incarcerated youth. Furthermore, such oversight is a prerequisite for the creation and implementation of policies and practices that are both effective at reducing recidivism and ensuring humane treatment.

VI. CONCLUSION

The following cases are illustrative of the harms incarcerated youth face and the call for greater protections. They exemplify the lack of accountability and independent oversight in juvenile facilities. A few days after arriving at the facility, 14-year-old J.M.¹⁵⁰ became involved in an argument with another youth. The two teens were separated and told to go to their rooms. J.M. went to his room. Shortly thereafter, a staff member came to J.M.'s door, threatened him and without further warning, grabbed him, picked him up and dropped him to the floor face first. As he was holding J.M. down, the staff member forcibly twisted J.M.'s arm behind his back until it broke, while another staff member held his legs. J.M. complained that he couldn't breathe throughout the restraint.

15-year-old L.E.¹⁵¹ refused to get out of bed one morning. A staff member pulled him out of bed by his arm and forced him to his feet. A supervisor joined the staff member and the two men yelled at L.E. When L.E. attempted to turn away from the two men, one of the men grabbed L.E.'s hand, swung him around and slammed him to the ground face first, cracking his front teeth, causing his mouth to bleed, and causing him significant pain to his arm, face and body.

Neither J.M nor L.E filed a grievance. Despite the severity of the injuries inflicted, the staff involved were never punished for their excessive force and violations of restraint policies.

As previously stated, incarcerated youth are vulnerable due to a variety of interrelated factors. They are marginalized from their own families, communities, counsel and the courts in facilities that lack independent oversight. Adolescents, as a result of their brain development, are particularly susceptible to peer pressure and their own immature decision making, while lacking the capacity to recognize the need to report and the long term benefit of reporting grievances. In addition, many adolescents

¹⁵⁰ 2012 Interview with J.M.

¹⁵¹ 2012 Interview with L.E.

suffer from cognitive, psychological and developmental impairments, thus impeding their ability to file grievances. Despite calls for post sentencing advocacy for youth, incarcerated youth have limited access to counsel and legal information, they often fear retaliation for reporting abuse, and lastly, they face the daunting obstacles created by the PLRA.

As noted, it is the responsibility of the adults to protect incarcerated youth from harm, but they are failing to do so. Congress can no longer turn a blind eye to the harms that incarcerated youth face, and must amend the PLRA to exempt all youth, whether prosecuted and sentenced as juveniles or adults from its requirements. It is not enough that certain courts have established exceptions to the exhaustion requirement, the legislature must follow suit and amend the PLRA to create an exception for youth. Without greater post sentencing access to counsel and the courts, and more robust independent oversight, incidents like the ones described by J.M. and L.E. will continue to occur and will go unreported, thus allowing abusive staff and deliberately indifferent administrators to act with impunity.