In the

United States Court of Appeals

For the Seventh Circuit

No. 21-3047

HOWARD SMALLWOOD,

Plaintiff-Appellant,

v.

DON WILLIAMS, *et al*.

Defendants-Appellees.

Appeal from the United States District Court for the
Southern District of Indiana, Indianapolis Division.
No. 1:20-cv-00404-JPH-DML — **James P. Hanlon**, *Judge*.

ARGUED SEPTEMBER 9, 2022 — DECIDED FEBRUARY 3, 2023

Before ROVNER, HAMILTON and SCUDDER, *Circuit Judges*.

ROVNER, *Circuit Judge*. Howard Smallwood, an Indiana inmate, alleged physical and sexual abuse, excessive force, and mistreatment at the hands of prison employees and independent contractors associated with the Indiana Department of Correction (IDOC). The district court dismissed his suit on the defendants' motion for summary judgment, holding that Smallwood had failed to exhaust the prison grievance procedures—a necessary prerequisite to filing a lawsuit in federal

court over prison conditions. Because we find that there are unresolved, material factual questions regarding Smallwood's ability to make use of the grievance procedure, we vacate the grant of summary judgment and remand to the district court for further proceedings.

I.

This case comes to us on a motion for summary judgment, therefore we recite the facts in the light most favorable to Smallwood. *Gupta v. Melloh*, 19 F.4th 990, 997 (7th Cir. 2021). On October 22, 2017, correctional staff found Smallwood unresponsive in his cell and brought him to the prison medical facility where he was given two doses of Narcan as a response to a presumed overdose. When he awoke and the nurse inquired about what drugs he had taken, Smallwood assured her that he had not taken any, and reminded her that he is diabetic and had been found similarly unresponsive in his cell before, and, in that event, an outside hospital treated him for respiratory distress, not an overdose. Nevertheless, defendant Dr. Paul Talbot, an employee of Wexford of Indiana, LLC, with whom IDOC contracts to provide medical care, ordered a urinalysis to screen Smallwood for illegal drugs. Smallwood consented to the urinalysis and the results were negative.

Despite the negative result, Dr. Talbot ordered a blood test to further screen for drugs. Smallwood asked for a standard form to refuse the blood draw, reasoning that the urinalysis was negative, and he had not, in fact, been using drugs. The prison guards, however, declined to provide him with one, and informed him that he did not have the option to refuse. When Smallwood continued to ask for a refusal form, the prison guards called for backup guards who twisted his hands and wrists, placed him in a head lock, and held a taser

to his chest while they placed him in restraints. They then forced Smallwood into a chair and held him down while a lab technician drew his blood. The blood test results revealed that there were no illegal drugs in Smallwood's system.

After the forced blood draw, Smallwood alleges that the officers brought him to an observation cell where they threw him onto a bed, placed him in a chokehold, pulled his shirt over his head, and punched him. The officers then pulled Smallwood's pants down, placed a knee on his back, and inserted a cold object into his rectum. After the assault, the officers left him naked in the observation cell.

One hour later, two guards working in the hospital found Smallwood injured and curled up in the corner of his cell and called a nurse to assess him. The nurse gave Smallwood aspirin for his pain, ice for the swelling in his neck and wrist, and submitted a referral for Dr. Talbot to examine him. The next day, Dr. Talbot gave Smallwood a shot for pain, but ignored his requests for an X-ray or MRI. Guards then placed Smallwood in segregation for physically resisting staff members in the performance of their duties. As a result of this use of force and sexual abuse, Smallwood alleged that he continues to have pain and discomfort in his shoulder, wrists, back, and neck.

Smallwood filed a grievance about the event, but it is undisputed that he did not properly make use of the grievance procedures outlined in the IDOC Manual of Policy and Procedures, Offender Grievance Process (Grievance Manual). The question presented in this appeal is whether that grievance procedure was available to Smallwood.

IDOC's formal grievance process consists of three main steps, but before a prisoner can begin this formal process, he must first attempt to informally resolve the problem—a step we will call "step 0." On appeal, Smallwood's newly appointed counsel points out an exception to the informal resolution requirement—one that had not been acknowledged by the defendants, or the formerly unrepresented Smallwood heretofore: a grievant need not make an informal attempt at resolution before filing a formal grievance when the grievant alleges sexual abuse. It is unclear whether informal resolution of a grievance would be required in a mixed situation such as this one where the prisoner submits one grievance alleging that he was the victim of excessive force, followed immediately by a sexual assault, and then inadequate treatment of his injuries.[1] For our purposes, however, we can leave that question for another day. In any event, where informal attempts at resolution are required but fail, the inmate must file a formal grievance within ten business days of the incident (step 1). A grievance specialist screens each submission for compliance with the requirements of the Grievance Manual, returning non-compliant grievances with an explanation of the reason for the rejection, and giving the inmate five days to correct and re-submit the grievance. Grievances that meet all of the requirements go to a staff member who must investigate and respond to the grievance within fifteen business days. If the inmate is not satisfied with the response or does not receive a

[1] Of course in many cases excessive force, sexual assault, and the ensuing injuries will be inextricably entwined such that it would not be possible to separate out each act and engage in informal resolution of some parts of the grievance and not others. Again we leave this question open for another day.

response within twenty business days, he may appeal to the warden within five business days (step 2). If that response is also untimely or unsatisfactory, the grievant may appeal to the ultimate decision maker—IDOC's grievance manager (step 3).

On November 1, 2017, ten days after the forced blood draw event, Smallwood filed a timely formal grievance which stated: "I was sexually abused by 5/6 custody officers 10-22-17 Sunday in the infirmary … I also was forced into taking a blood test against my will—I was hurt during the process … wrist, back, neck and hip. I contacted Sgt. Dinkin and Officer William—Filed a grievance 10-23-17." R. 59-4 (first ellipsis added, second ellipsis in original).

Five days later, the grievance specialist returned Smallwood's grievance for failing to show that he had completed step 0—proof that he had tried to informally resolve his complaint before filing the grievance. The "Return of Grievance Form" made no mention of the fact that a prisoner is not required to use an informal grievance process to resolve an alleged incident of sexual abuse. The form also instructed Smallwood that he had five days to either begin the informal resolution process or return the grievance form with an indication that he had already attempted to resolve the matter informally. Smallwood did not resubmit the grievance.

Smallwood made other written complaints about the incident—in appeals of other grievances or through letter writing, but none that complied with the steps outlined in the grievance procedure. And during at least one of his other unrelated grievance attempts, Smallwood expressed frustration with his ability to understand the grievance process, stating that he was "incompetent to understanding the procedures."

R. 46-2 at 54. And indeed, despite approximately twenty-one tries, Smallwood has never navigated the IDOC grievance process to completion.

On November 5, 2018, about a year after the alleged incident, Smallwood attempted to informally resolve his grievance by submitting a request-for-interview form regarding the events of October 22, 2017. The grievance specialist rejected it as untimely the same day. Smallwood then proceeded to file another grievance about the October 2017 incident, followed by two appeals, all of which were rejected as untimely.

Having failed at filing a successful grievance, Smallwood turned to a writ writer to help him file a complaint in the district court.[2] Smallwood brought an action pursuant to 42 U.S.C. § 1983, alleging that the defendants violated his Eighth and Fourteenth Amendment rights by denying him the right to refuse medical treatment, sexually abusing him, and using excessive force against him resulting in serious injuries that were inadequately treated.[3] The defendants moved for summary judgment, arguing that Smallwood had not exhausted his administrative remedies. In response, Smallwood proffered evidence that he has a low IQ and therefore could not understand the requirements of the grievance procedure. He

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[2] In *Johnson v. Avery*, the Supreme Court upheld the right of inmates to receive legal assistance from fellow inmates who are sometimes called "jailhouse lawyers" or "writ writers." 393 U.S. 483, 490 (1969).

[3] The defendants in this case are IDOC employees Don Williams, Boyd Lunsford, Cory Conlon, Erick Hammond, and Robert Daugherty, along with Wexford of Indiana, LLC. the company providing healthcare services to IDOC, and Dr. Paul Talbot, who, at the relevant times, was an employee of Wexford.

noted his difficulties with informal attempts to resolve his complaint and stated that his placement in restrictive housing after the incident meant he was unable to have someone assist him with filing a grievance. The district court determined that Smallwood did not timely complete the grievance process, that he did not show at the time he filed his formal grievance that he had attempted to informally grieve his complaint, and that there was no evidence in the record that Smallwood was incapable of following the instructions on the returned grievance form. Consequently, the district court found that Smallwood failed to exhaust his administrative remedies and granted the defendants' summary judgment motion. Smallwood filed this appeal.

II.

Access to the federal courts by prisoners is not automatic. It is restricted by the prerequisites set forth in the Prison Litigation Reform Act (PLRA), which serve the purpose of giving prison administrators notice and an opportunity to resolve issues internally before a prisoner turns to the courts. *Schillinger v. Kiley*, 954 F.3d 990, 995 (7th Cir. 2020). The PLRA instructs 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." 42 U.S.C.A. § 1997e(a). The Supreme Court has refused to disrupt Congress' intent by deviating from this textual mandate requiring exhaustion. *Ross v. Blake*, 578 U.S. 632, 639–40 (2016). And this court has also made clear that we require strict compliance with the exhaustion requirement. *See, e.g., Williams v. Rajoli*, 44 F.4th 1041, 1045 (7th Cir. 2022).

Nevertheless, despite the strict exhaustion requirements, the Supreme Court has pointed out that the language of the PLRA demands that the administrative remedy must be actually "available" to the prisoner. *Ross*, 578 U.S. at 642; (*citing* 42 U.S.C. § 1997e(a)). The Court has defined "available," as "capable of use to obtain some relief for the action complained of." *Id.* (internal citations omitted). This availability requirement has teeth. "The PLRA exhaustion requirement does not 'demand the impossible.' 'Remedies that are genuinely unavailable or nonexistent need not be exhausted.'" *Lanaghan v. Koch*, 902 F.3d 683, 688 (7th Cir. 2018) (*quoting Pyles v. Nwaobasi*, 829 F.3d 860, 864 (7th Cir. 2016)); *see also Ross*, 578 U.S. at 642.

The Supreme Court in *Ross* set forth several examples of ways in which a grievance system might be unavailable, including if the administrative scheme is "so opaque that it becomes, practically speaking, incapable of use." *Ross*, 578 U.S. at 643–44. Consequently, whether a remedy is available to exhaust is a fact-specific inquiry. *Lanaghan*, 902 F.3d at 688.

That fact-specific inquiry looks generally at whether the "procedures [were] knowable by an ordinary prisoner in [the plaintiff's] situation, or was the system so confusing that no such inmate could make use of it?" *Ross*, 578 U.S. at 648. More specifically, when assessing whether the grievance process could have been understood by a particular prisoner, the inquiry must consider individual capabilities. *Ramirez v. Young*, 906 F.3d 530, 535 (7th Cir. 2018). And so, for example, a grievance system manual that is written in English and then explained in English to a Spanish-speaking prisoner with little, if any, English comprehension, is not a process that is available to that prisoner. *Id.* at 540. Likewise, an inmate with severe

physical limitations, who could not write on his own and yet was denied access to a place where he could be assisted by a fellow inmate in writing a grievance, did not have an administrative remedy available to him. *Lanaghan*, 902 F.3d at 689. Nor was a remedy available to an inmate incapacitated by a stroke, *Hurst v. Hantke*, 634 F.3d 409, 412 (7th Cir. 2011), or serious mental health issues. *Weiss v. Barribeau*, 853 F.3d 873, 874–75 (7th Cir. 2017) (Fact issues precluded dismissal on summary judgment where an inmate claimed his ability to file a grievance was impaired by serious mental health issues and the accompanying "mind altering psychotropic drugs."). Speaking more categorically, we have made clear that a remedy that is available to the majority of inmates may not be available to those who are illiterate, blind, or whose individual circumstances otherwise render the procedures unavailable to them. *Lanaghan*, 902 F.3d at 688. Indeed, IDOC's Grievance Manual is in concert with these holdings stating, "[t]he Warden/designee shall ensure that the offender grievance process is explained to offenders whose primary language is other than English, or has a visual, hearing, or mental impairment. There shall be mechanisms in place to ensure that the offender grievance process is understood by all offenders." R. 59-2 at 7.

Remedies may be unavailable to prisoners for other fact-specific reasons unrelated to physical health or mental capacity, in particular where the prison acts in a manner that causes the grievance procedure to be unavailable—for example, where the process exists in theory but operates as a dead end, or where prison administrators thwart the use of the process through "machination, misrepresentation, or intimidation." *Ross*, 578 U.S.at 644. We explore these reasons further below, but we stress here that a grievance procedure might be

unavailable even in the absence of affirmative misconduct by prison officials. *Lanaghan*, 902 F.3d at 688.

To be certain, the PLRA does not excuse a failure to exhaust based on a prisoner's ignorance of administrative remedies where a prison has done an adequate job of informing the prisoner about the grievance procedure. *Ramirez*, 906 F.3d at 538. Nor does it excuse noncompliance because of a prisoner's subjective lack of awareness of a grievance procedure, (*Id.*) or when he is simply mistaken about the meaning of the prison's grievance procedures. *Ross*, 578 U.S. at 644 ("The procedures need not be sufficiently 'plain' as to preclude any reasonable mistake or debate with respect to their meaning."). But when a prisoner's ignorance of the process is not within his control—that is, because he has not been informed of the process, whether due to misconduct by prison employees, or because his personal circumstances preclude him from being able to make use of the process, it is not available to him.

In this case, we are evaluating the availability of the grievance process within the framework of the defendants' motion for summary judgment, where, in our de novo review, we construe the facts in the light most favorable to Smallwood. *McIntosh v. Wexford Health Sources, Inc.*, 987 F.3d 662, 666 (7th Cir. 2021); *Pyles*, 829 F.3d at 864. Moreover, we must bear in mind that failure to exhaust is an affirmative defense, and as such the burden of proof is on the defendants to establish that administrative remedies were not exhausted, and not on the prisoner to show that administrative remedies were unavailable. *Gooch v. Young*, 24 F.4th 624, 627 (7th Cir. 2022); *Lanaghan*, 902 F.3d at 688; *Hernandez v. Dart*, 814 F.3d 836, 840 (7th Cir. 2016).

Because summary judgment is appropriate only when there is no dispute of material fact and the moving party is entitled to judgment as a matter of law, a grant of summary judgment in favor of the prison is not appropriate where there exists a question of material fact regarding whether a prisoner's individual circumstances rendered him unable to exhaust the prison grievance system. *See Weiss*, 853 F.3d at 875 (Dismissal on summary judgment was premature where there were fact questions regarding the prisoner's incapacitation due to his mental health hospitalization.); *see also Pyles*, 829 F.3d at 869 (On summary judgment, the magistrate's credibility and factual determinations regarding exhaustion of the grievance procedures were inappropriate.); *Lynch v. Corizon, Inc.*, 764 F. App'x 552, 554 (7th Cir. 2019) (nonprecedential decision) (A prisoner's detailed and specific affidavit attesting to the fact that prison employees altered his medication thus leaving him too confused to complete the grievance process was competent evidence to prevent summary judgment and warrant an evidentiary hearing.).[4]

In this circuit, we have determined that disputed factual questions that bear on exhaustion can be resolved by a district

[4] We have included several non-precedential decisions in the opinion as additional examples of instances in which factual ambiguity regarding a prisoner's ability to make use of a grievance system precluded use of the summary judgment procedure. The fact that many of these cases are resolved in non-precedential orders reflects the fact that prisoners often bring these claims without counsel in cases that do not have fully developed adversarial records. Although we need not rely on any of these decisions as authority, they do provide helpful illustrations and reminders of our singular task at summary judgment of determining whether there are material disputes of facts that require resolution at a *Pavey* hearing or trial. *See Weiss*, 853 F.3d at 875.

court judge (rather than a jury) as a preliminary matter, in what is known as a "*Pavey* hearing." *Pavey v. Conley*, 544 F.3d 739, 742 (7th Cir. 2008), *as amended on denial of reh'g and reh'g en banc* (Sept. 12, 2008). In short, if there are contested facts as to whether a prison grievance process was available (keeping in mind that the burden of proof is on the defendants to show a lack of exhaustion), summary judgment is not appropriate and this gateway factual determination must be made in a *Pavey* hearing.

Our inquiry then is whether there were contested facts material to the question of whether the grievance process was available to Smallwood. Taking the facts in the light most favorable to Smallwood, he alleges that he was unable to exhaust the grievance process because his low IQ and lack of access to anyone who might help him made it impossible for him to understand and make use of the procedures and requirements of the administrative process. As evidence of this, he points to his school record documenting his IQ as 75, the fact that he was in restrictive housing and without access to the assistance of writ writers on whom he usually depended during the time period in which the grievance had to be filed, and the fact that, although he had attempted to file twenty-one grievances between 2005 and 2020, not once had he successfully navigated a grievance through to exhaustion.

The defendants, on their part, allege that Smallwood was not so impaired, claiming that he demonstrated no evidence that he was incapable of meeting the requirements of the grievance process or that prison officials were aware of any impediment to his understanding of the process. Under the defendants' version of events, there is no evidence that any prison official knew of any reason why Smallwood could not

understand the grievance process. The defendants also claim that his isolation in restricted housing did not prevent him from properly following the grievance procedures. The district court agreed, finding that Smallwood failed to attach any proof that he had tried to informally grieve his complaint, and that "[a]side from the 40-year-old IQ estimates, there is no evidence in the record that Mr. Smallwood was incapable of following the instructions on the returned grievance." R. 67 at 7. To the contrary, the court noted, "[h]is filings in this case have been coherent and he has responded appropriately to orders from the Court." *Id.*

The district court, however, was obligated to accept the plaintiff's factual averments as true for the limited purposes of evaluating the motion for summary judgment. Smallwood's low IQ score may have been old, but contrary to the defendants' claim that he presented no evidence of incapacity, his low IQ score was certainly some amount of evidence of an inability to understand a dense grievance process. According to the American Association on Intellectual and Developmental Disabilities, an IQ score between 70 and 75 indicates significant limitations in intellectual functioning.[5] A

[5] Am. Assoc. on Intellectual and Developmental Disability, *Defining Criteria for Intellectual Disability*, https://www.aaidd.org/intellectual-disability/definition; *see also* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed., 2013), at 37 (DSM-V). The IQ score was, indeed, old—dating from his elementary school years, in 1971. Nevertheless, Smallwood points to research indicating that IQ remains relatively stable throughout life. Smallwood Brief at 32, *citing* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed., text revision 2000), at 42; *see also* DSM-V at 38–39 ("After early childhood, the disorder is generally lifelong, although severity may change over time.").

factfinder might consider the age and source of the IQ score when deciding how much weight to give that evidence, but the factfinder could certainly conclude from Smallwood's allegations both that Smallwood had an IQ between 70 and 75, and that he was unable to understand IDOC's grievance process. After all, the process is described in a fifteen-page, single-spaced grievance manual that has multiple cross references, and sentences such as the following: "No grievance shall be rejected because an offender seeks an improper or unavailable remedy, except that a grievance shall be rejected if the offender seeks a remedy to a matter that is inappropriate to the offender grievance process." R. 59-2 at 6. According to the Brief Amici Curiae of The American Civil Liberties Union *et. al.*, the grievance policy is ranked "difficult to read" (college level) by the Flesch Reading Ease Score. *See* Brief Amici Curiae of The American Civil Liberties Union *et. al.* at 7–9 & n.16 (describing the Flesch Reading Ease evaluation and the complexity of IDOC's grievance process, including examples of minor technical errors that have proven fatal to prisoner claims). *See also Davis v. Moroney*, 857 F.3d 748, 752 (7th Cir. 2017) (discussing the Flesch Reading Ease Readability Formula and applying it to district court orders as a helpful heuristic to understand if a prisoner with intellectual disabilities

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Moreover, on appeal he points to expert testimony from his state court sentencing in 2001 in which an expert also estimated his IQ to be around 70 to 75. *See Smallwood v. State*, 773 N.E.2d 259, 262 (Ind. 2002). Smallwood did not place that evidence in the record in the district court where he was acting pro se, but because of a general ethos of generosity toward pro se filings, and the posture in which the case now stands, we simply note that the more recent state court evidence is corroborative of the older IQ score. *See United States v. Hassebrock*, 21 F.4th 494, 498 (7th Cir. 2021) (noting that the court of appeals construes pro se submissions generously).

had a fair opportunity to prosecute his case).[6] In fact, as we explore later, it appears that even the defendants did not understand the requirements of their own grievance procedure, having insisted up until this appeal, that Smallwood was required to informally grieve his sexual assault claim.

The district court also viewed Smallwood's "coherent" and "appropriate" filings in the case before it as evidence of his ability to file a grievance. R. 67 at 7. In doing so, the district court overlooked Smallwood's claims that although he ordinarily receives assistance from writ writers and other competent fellow prisoners in writing grievances and filing court documents, that assistance was not available to him during the ten days he had to file a complaint after the October 22, 2017 incident, as he was in restrictive housing and moved from cell to cell. For example, the complaint and amended complaint filed in the district court both indicate that they were prepared by writ writers. *See* R. 1 at 16, R. 15 at 19. Smallwood also indicated in an earlier filing asking for an extension of time in which to file his response to the defendants' motion for summary judgment that he

> had to seek out the assistance of a Law Library Clerk … to assist him in responding to the Motion for Summary Judgment because Smallwood does not have the Legal skills to perfect a response to the Attorney General's Motion. Smallwood's I.Q. is about 75 and has disabilities

[6] Flesch readability scores have been available on Microsoft Word for at least a decade. For further discussion of Flesch Readability scores in legal writing, see Norma Otto Stockmeyer, *Using Microsoft Word's Readability Program*, Mich. Bar J., Jan. 2009, at 46.

> with understanding legal terms, researching and how to draft out responses in the correct Legal terms.

R. 61 at 2 (capitalization in original).

As for the claim that there was no evidence in the record that the prison knew that Smallwood was unable to make use of the grievance system, nothing in the text of the PLRA requires that prison officials know that the grievance process is unavailable. As we have explained, unavailability "does not include any requirement of culpability on the part of the defendant." *Lanaghan*, 902 F.3d at 688. Even if it did, Smallwood points to evidence both that he could not navigate the grievance system, and that the defendants knew he could not. For example, on June 7, 2018, (a few months before his second round of attempts at filing a grievance regarding the underlying incident), he filed a grievance about another matter in which he informed the prison grievance officers, "I am not familiar with the policy and administrative procedures … because I am incompetent to understanding [sic] the procedures." R. 46-2 at 54. Smallwood also notes that the defendants' own evidence compellingly demonstrated his inability to navigate the grievance procedure. According to the prison's grievance log, despite approximately twenty-one tries, Smallwood had never navigated the IDOC grievance process to completion. R. 46-2 at 1–4. In the twenty-one grievances that made it to step one of the process (and thus were recorded in the log), only one made it to step two. *Id.* None made it through all three steps. *Id.* Moreover, the defendants' own evidence also contained a record of eighteen attempts in which Smallwood failed to reach even the first step of filing. Eight of the grievances were returned because Smallwood

failed to indicate that he tried to informally resolve the complaint. *Id.* at 33, 37, 39, 43, 55, 58, 62, 70. Seven were filed too late; *Id.* at 41, 43, 45, 48, 50, 64, 66, 68; Two were returned because he tried to appeal before his grievance was accepted, *Id.* at 53, 60, and one was returned because the issue had already been addressed. *Id.* at 35. The defendants, not Smallwood, placed this evidence into the record, but the district court's job was to construe the facts in the light most favorable to Smallwood, and to do so liberally in light of Smallwood's pro se status in the district court. *See Parker v. Four Seasons Hotels, Ltd.*, 845 F.3d 807, 811 (7th Cir. 2017). Sometimes the facts most favorable to the party opposing summary judgment will be facts entered into the record by the party moving for summary judgment. *See Gupta*, 19 F.4th at 997. A court conducting a *Pavey* hearing could certainly find that the defendants' own records were evidence that Smallwood could not navigate the administrative grievance procedures effectively.

Once Smallwood pointed to sufficient factual allegations demonstrating a genuine dispute as to whether the administrative remedies were available to him, the district court was obligated to conduct a *Pavey* hearing to resolve the factual dispute. *See Roberts v. Neal*, 745 F.3d 232, 234 (7th Cir. 2014) (*citing Pavey*, 544 F.3d at 741–42) (a district court must resolve contested facts at a *Pavey* hearing). A court can grant a motion for summary judgment without holding a *Pavey* hearing only if, after taking the facts in the light most favorable to the nonmovant (Smallwood), the court determines that there are no genuine issues of material fact, and the defendants met their burden of establishing that the grievance process was available to Smallwood as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see also, e.g.*, *Roberts*, 745 F.3d at 234; *Kaba v. Stepp*, 458 F.3d 678, 686 (7th Cir. 2006)

(Summary judgment is inappropriate where there are unresolved factual disputes as to the availability of the grievance process.); *Gaines v. Prentice*, No. 21-1588, 2022 WL 2304227, at *2 (7th Cir. June 27, 2022) (Where the prisoner's "declaration created a genuine dispute whether administrative remedies were 'available' to him, the district court was obligated to conduct a *Pavey* hearing to resolve the dispute."); *Lynch*, 764 F. App'x at 554 (Once the prisoner provided sufficient evidence to create a question as to whether administrative remedies were available to him, the court was obligated to conduct an evidentiary hearing to resolve this fact dispute.); *Owens v. Funk*, 760 F. App'x 439, 442 (7th Cir. 2019) (nonprecedential decision) (Remanding where the district court did not properly assess the prisoner's statement about the availability of the grievance process.); *Schaefer v. Bezy*, 336 F. App'x 558, 560 (7th Cir. 2009) (nonprecedential decision) ("Because the prison employees bear the burden on exhaustion, they must do more than point to a lack of evidence in the record; rather they must 'establish affirmatively' that the evidence is so one-sided that no reasonable factfinder could find that [the prisoner] was prevented from exhausting his administrative remedies."). We cannot say that, as a matter of law, the defendants met their burden of demonstrating that the grievance process was available to Smallwood. Smallwood pointed to evidence sufficient for a factfinder to determine both that he could not understand or make use of the grievance process. Additional evidence submitted by the defendants themselves supports his allegations. The prison nevertheless disputes his evidence, and thus we have before us a factual dispute that cannot be resolved at summary judgment and must be resolved at a *Pavey* hearing.

It is true, as the defendants argue, that Smallwood did not have any physical incapacitation that prevented him from following the grievance process, as did the defendants in *Lanaghan* and *Pavey*. *Lanaghan*, 902 F.3d at 688–89; *Pavey v. Conley*, 170 F. App'x 4, 8 (7th Cir. 2006) (nonprecedential decision). But of course a mental or intellectual impairment can make a grievance process as unavailable as physical incapacitation. *See Weiss*, 853 F.3d at 875 (finding that a factual resolution was needed to determine whether the grievance procedure was available to a prisoner with mental health issues.); *Lynch*, 764 F. App'x at 554 (same). And if we look by analogy to the ADA context, a prison must accommodate both physical and mental impairments, as defined by the ADA, in the same manner. *See* 42 U.S.C. § 12102(1)(A); *Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 210 (1998) (applying ADA to prisons). *See also Hamm v. Reeves*, 142 S. Ct. 743, 743–44 (2022) (Kagan, J., *dissenting*) (noting that it is a violation of the ADA to deny a prisoner with a cognitive disability access to a prison process.)

Because we remand for the district court to conduct a *Pavey* hearing to resolve the factual dispute, we need not make any separate determinations about exhaustion of the sexual assault claims, as the district court can consider this matter on remand. It is worth noting, however, a few things about Smallwood's sexual assault claim.

First, the prison administration has defended this lawsuit by arguing that Smallwood failed to exhaust all of his claims through the prison grievance system, including by failing to informally resolve his concerns at what we have called step 0, and by arguing that the statute of limitations for all of his claims had passed. *See* State Defendants' Memorandum in Support of their Motion for Summary Judgment as to Issue of

Exhaustion, R. 58 at 3, 4, 7, 8, 9–12. According to the Grievance Manual, however, there is no requirement to informally resolve a sexual assault claim before filing a grievance. Grievance Manual, R. 59-2 at 5 ("The Department shall not require an offender to use any informal grievance process, or to otherwise attempt to resolve with staff, an alleged incident of sexual abuse."). In addition, the Grievance Manual "remov[es] the standard time limits on submission for a grievance regarding an allegation of sexual abuse." *Id.*[7] Because these are IDOC's own rules we can assume that they were known to the defendants both at the time Smallwood filed his grievance and during the time the state defendants were defending the suit in the district court. It was not until this appeal, when Smallwood received appointed counsel, however, that Smallwood's counsel brought to the attention of this court the fact that the prison had erroneously required Smallwood to comply with this requirement.

It is no wonder that Smallwood did not raise this issue while in prison or raise the issue in the district court. The prison administrators themselves told him just the opposite—first, that they would not entertain his grievance as he failed

[7] These same exceptions appear in the regulations implementing the Prison Rape Elimination Act, 34 U.S.C. § 30301 *et. seq. See* 28 C.F.R. § 115.52(b)(3) ("The agency shall not require an inmate to use any informal grievance process, or to otherwise attempt to resolve with staff, an alleged incident of sexual abuse."); 28 C.F.R. § 115.52(b)(1) ("The agency shall not impose a time limit on when an inmate may submit a grievance regarding an allegation of sexual abuse."). State corrections facilities are not required to adopt the federal PREA, *see J.K.J. v. Polk Cnty.*, 960 F.3d 367, 384 (7th Cir. 2020), *cert. denied sub nom. Polk Cnty., v. J.K.J.*, 141 S. Ct. 1125 (2021), but IDOC's grievance manual mirrors PREA on at least these two requirements.

to attempt to informally resolve the matter, and then, a second time, because he filed the grievance too late. R. 59-5, & 59-7; *see also* State Defendants' Memorandum in Support of their Motion for Summary Judgment as to the Issue of Exhaustion, R. 58 at 3, 4, 7, 8, 9–12. And as we noted above, the Supreme Court instructs that administrative remedies are not available where, although a process exists, officers are unable or unwilling to provide any relief, or prison administrators "thwart inmates from taking advantage of a grievance process through machination, misrepresentation, or intimidation." *Ross*, 578 U.S. at 644. *See, e.g., Kaba*, 458 F.3d at 686 (noting that the grievance procedure would not be available if prison personnel denied the prisoner forms, intimidated him into not pursuing formal grievances, and solicited other inmates to attack him in retaliation for filing grievances). *Ebmeyer v. Brock*, 11 F.4th 537, 542–43 (7th Cir. 2021) (Remedies are considered unavailable when a correctional officer tells the prisoner that he cannot file a grievance when, in fact, he can.); *Thomas v. Reese*, 787 F.3d 845, 847–48 (7th Cir. 2015) (same); *Swisher v. Porter Cnty. Sheriff's Dep't*, 769 F.3d 553, 555 (7th Cir. 2014) (A prisoner need not exhaust a grievance procedure where the warden told the prisoner not to file a grievance because the prison would resolve the issue informally and then refused to issue a blank grievance form.); *Curtis v. Timberlake*, 436 F.3d 709, 712 (7th Cir. 2005) (When "prison officials encourage, or even invite, noncompliance with written procedure," they cannot then assert that a prisoner has failed to properly exhaust that procedure.). The prison officials' misinformation thus thwarted Smallwood from resolution of his sexual assault complaint both in prison and in the district court.

Finally, in addition to the sexual assault statute of limitations question, there is a broader time limit issue. Along with

their exhaustion argument, the defendants argue, in the alternative, that Smallwood filed his lawsuit after the statute of limitations had run. The district court ordered briefing only as to the exhaustion claim, stayed all other proceedings, and then decided the case only on the issue of exhaustion without addressing the statute of limitations. R. 43 at 2, R. 67 at 1, n.1. We will not consider the statute of limitations issue before the district court has had an opportunity to address it first on remand. *See, e.g., Bourke v. United States*, 25 F.4th 486, 490 (7th Cir. 2022) (declining to address the statute of limitations question which had not been considered by the district court in the first instance).

We VACATE the decision of the district court and REMAND for further proceedings consistent with this opinion.

SCUDDER, *Circuit Judge*, concurring in the judgment. I agree with the majority's bottom-line determination to remand the case to the district court for a hearing to determine whether the defendant prison officials demonstrated that Howard Smallwood failed to exhaust administrative remedies within Indiana's Pendleton Correctional Facility. But I reach that conclusion by traveling a different path of reasoning.

I.

The case begins and ends for me with the grievance form Smallwood prepared and submitted from a restricted housing cell on November 1, 2017. All indications are that he completed the form in his own hand with a ballpoint pen, as the signature matches other documents he signed on different occasions.

In no uncertain terms, Smallwood complained that he "was sexually abused by 5/6 custody officers [on] 10-22-17 Sunday in the infirmary [upon] returning back to my cell" after being "forced into taking a blood test against my will" and being "hurt during the process—[on my] wrist, back, neck and hip." Smallwood added that he had "contacted Sgt. Dinkin and Officer William" about these matters and urged some "independent person to review videotapes regarding [the] sexual[ ] abuse and excessive force," observing further that the prison should "stop forcing inmates into taking blood test[s] against their will."

In equally clear terms, the Indiana Department of Correction Offender Grievance Process tells prisoners that they are "not require[d] … to use any informal grievance process, or to otherwise attempt to resolve with staff, an alleged incident

of sexual abuse." The same Grievance Manual also "remov[es] the standard time limits on submission for a grievance regarding an allegation of sexual abuse."

As best I can tell, the Department—and by extension, the defendants—have never explained why this provision of the Grievance Manual did not excuse Smallwood from pursuing the so-called step zero measure of seeking informally to resolve his sexual-abuse complaint. To take a contrary position and require informal resolution is at complete odds with the language of the policy, so much so that compelling a prisoner to follow that course would prove the grievance process at best unworkable and at worst implemented in something less than good faith. See *Ross v. Blake*, 578 U.S. 632, 643–44 (2016) (explaining that remedies are not "available" within the meaning of the PLRA when a prison's policy is an administrative "dead end" or prison administrators "thwart" filings through misrepresentation).

I would stop there and remand to allow the district court to hold a hearing to determine why, in the prison's view, Smallwood's November 1 grievance was insufficient to excuse any informal effort to resolve his complaint with his alleged attackers. Something seems amiss with the Pendleton Correctional Facility's grievance process, and the district court ought to get to the bottom of it. What Smallwood alleged in his grievance is as awful as it is clear, and the Department's policy of not forcing victims of sexual assault to confront their abusers seems directly on point. Smallwood is entitled to the same protection under the Department's policy as any other inmate who suffers sexual assault by prison staff. See generally *J.K.J. v. Polk County*, 960 F.3d 367 (7th Cir. 2020) (en banc).

Everything on paper points to Pendleton officials mishandling Smallwood's grievance. Perhaps one or another defendant will have some explanation and be able to put everything in a more clarifying and acceptable light. The current record does not supply the answers, though. The majority is right to return the case to the district court to allow an evidentiary hearing under the procedure we established in *Pavey v. Conley*, 544 F.3d 739, 742 (7th Cir. 2008).

II.

Nothing about my reasoning hinges on any conclusion about Smallwood's IQ, ability to understand or navigate the Department's grievance process, or access to other inmates to assist with preparing and submitting any required paperwork. Indeed, to my eye, Smallwood's initial grievance was admirable for its concision and clarity: anyone reading it would see an inmate complaining of being sexually assaulted and experiencing other harms in connection with a broader incident involving a forced blood draw.

No doubt the majority opinion is right to struggle with how to define when a failure to exhaust can be excused because of a prisoner's intellectual limitations. The questions we should explore in future cases are many, including (to name but a few):

- At what point do intellectual limitations (manifesting, for example, in the form of illiteracy or diminished writing skills or a very limited formal education) become so severe as to inhibit compliance with an otherwise objectively reasonable administrative grievance process?

- What must prisons affirmatively do to show that administrative remedies are available to prisoners with intellectual limitations?
- How should courts distinguish between prisoners with subjective unawareness of an institution's grievance process and inmates with intellectual limitations significant enough to prevent their compliance with exhaustion requirements imposed by a prison?

Howard Smallwood seems to have done everything required of an inmate who advances an allegation of sexual assault by a prison guard. If the district court reaches that same conclusion, we can save these and other hard questions about where to draw the lines with prisoners with intellectual disabilities for another case and day.

For these reasons, I concur in today's judgment.