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# Supreme Court of the State of New York Appellate Division – Third Department

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RICHARD ALCANTARA, LESTER CLASSEN, JACKSON METELLUS,  
CESAR MOLINA, CARLOS RIVERA, AND DAVID SOTOMAYOR,

*Petitioners-Respondents-Cross Appellants,*

v.

Case No.  
531036

ANTHONY J. ANNUCCI, ACTING COMMISSIONER, NEW YORK STATE  
DEPARTMENT OF CORRECTIONS AND COMMUNITY SUPERVISION, AND  
TINA M. STANFORD, CHAIRPERSON, NEW YORK STATE BOARD OF PAROLE,

*Respondents-Appellants-Cross Respondents,*

and

STEVEN R. BANKS, COMMISSIONER, NEW YORK CITY HUMAN RESOURCES  
ADMINISTRATION AND DEPARTMENT OF SOCIAL SERVICES,

*Respondent.*

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## OPENING BRIEF FOR APPELLANTS ANNUCCI AND STANFORD

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## **PRELIMINARY STATEMENT**

Fishkill Correctional Facility is an institution run by the New York State Department of Corrections and Community Supervision (“DOCCS”) both as a general correctional facility for the long-term housing of persons serving terms of imprisonment and as a residential treatment facility (“RTF”) for the temporary housing of persons who have been formally placed on community supervision but have not yet obtained suitable living arrangements in the community. For periods of time between 2014 and 2017, petitioners Richard Alcantara, Lester Classen, Jackson Metellus, Cesar Molina, Carlos Rivera, and David Sotomayor were housed at Fishkill as RTF residents while they were on community supervision for sex offenses but unable to find accommodations in the community that complied with applicable sex-offender residency restrictions. While at Fishkill, each petitioner was assigned an individualized version of the program that DOCCS has established for the facility’s RTF residents, which consists of a collection of activities designed to assist with rehabilitation and re-entry into the community.

Petitioners commenced this action as a C.P.L.R. article 78 proceeding in Supreme Court, Albany County, alleging, among other

things, that the Fishkill RTF program did not meet the RTF programming standards set by Correction Law § 73. After converting the proceeding to a declaratory judgment action following petitioners' release from Fishkill RTF residency, the court (Hartman, A.J.) granted summary judgment to the State in part, finding the Fishkill RTF program adequate insofar as it provided activities inside the facility that were directed toward rehabilitation and reintegration into the community, including opportunities for education, training, and employment. The court, however, granted summary judgment in part to petitioners, concluding that the program was statutorily required to provide education, training, and employment opportunities *outside the facility*, and that the out-of-facility opportunities provided in that regard were insufficient.

For either of two reasons, Supreme Court's grant of summary judgment to petitioners should be reversed, and summary judgment should be entered for the State dismissing the petition in its entirety. First, Correction Law § 73 only authorizes, but does not require, that out-of-facility opportunities be provided in RTF programs. Under that statute, an RTF resident "*may* be allowed to go outside the facility during reasonable and necessary hours to engage in any activity reasonably



related to his or her rehabilitation” by the terms of his or her individual program. That is, DOCCS “may” formulate and assign to an RTF resident a program that provides outside activities, including out-of-facility opportunities for education, training, and employment. And indeed, DOCCS consistently endeavors to make such opportunities available. But DOCCS is not statutorily required to do so.

Second, even if Correction Law § 73 were read to require that RTF programs provide education, training, and employment outside the facility, the Fishkill RTF program would satisfy that requirement. The out-of-facility activities provided in the Fishkill program are substantially similar to those of an RTF program that the New York Court of Appeals in *Matter of Gonzalez v. Annucci*, 32 N.Y.3d 461 (2018), found adequate.

### **QUESTIONS PRESENTED**

1. Does Correction Law § 73 authorize—but not require—the Fishkill RTF program to provide residents with opportunities for education, training, and employment outside the facility?
2. Does the Fishkill RTF program provide sufficient out-of-facility opportunities in any event?

## STATEMENT OF THE CASE<sup>1</sup>

### A. Statutory Background on Correctional Facilities Designated as Residential Treatment Facilities

DOCCS has long operated correctional facilities as institutions for the general confinement of persons serving terms of imprisonment. In 1970, the Legislature authorized DOCCS to operate any correctional facility simultaneously as a general confinement facility and as a “residential treatment facility”: a “correctional facility consisting of a community based residence in or near a community where employment, educational and training opportunities are readily available for persons who are on parole or conditional release and for persons who are or who will soon be eligible for release on parole who intend to reside in or near that community when released.” Correction Law § 2(6); *see id.* § 70(6)(b) (both provisions added by L. 1970, ch. 476). DOCCS “is authorized to use any residential treatment facility as a residence for persons who are on community supervision,” among others. *Id.* § 73(10). Today, correctional facilities designated as RTFs are often used for the temporary housing of persons who have been formally placed on community supervision but

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<sup>1</sup> All facts set forth herein are undisputed unless otherwise noted.

have not yet obtained suitable accommodations in the community. (*See* R. 539, 576, 608.)

Under Correction Law § 73, DOCCS must institute certain measures to help prepare RTF residents for their return to non-custodial life. DOCCS must establish “[p]rograms directed toward the rehabilitation and total reintegration into the community of persons transferred to a residential treatment facility,” and each resident “shall be assigned a specific program.” *Id.* § 73(3). Exactly what rehabilitative and reintegrative content each RTF resident’s program must contain is left largely, but not entirely, to DOCCS’s discretion. DOCCS “shall be responsible for securing appropriate education, on-the-job training and employment for inmates transferred to residential treatment facilities,” so the program must make available activities that fulfill those specific functions. *See id.* § 73(2).

In creating and assigning RTF programs, DOCCS is expressly authorized by section 73 to incorporate activities that take place outside the facility. Namely, an RTF resident “may be allowed to go outside the facility during reasonable and necessary hours to engage in any activity reasonably related to his or her rehabilitation and in accordance with the

program established for him or her.” *Id.* § 73(1). “While outside the facility he or she shall be at all times in the custody of the department and under its supervision.” *Id.* Thus, DOCCS “shall supervise such inmates during their participation in activities outside any such facility and at all times while they are outside any such facility.” *Id.* § 73(2).

### **B. Petitioners’ RTF Residency at Fishkill Correctional Facility**

Among the correctional facilities that DOCCS operates simultaneously as a general confinement facility and as an RTF is Fishkill Correctional Facility. (R. 526, 546.) Located in Dutchess County about 60 miles from New York City, Fishkill is a medium-security institution comprised of dormitory-style accommodations rather than traditional cells. (R. 525-526, 545.) Fishkill has functioned as a general confinement facility since the 1970s; DOCCS began operating it also as an RTF in 1991. (R. 1146.)

At any one time, anywhere from 60 to 100 of the 1,800 individuals housed at Fishkill are classified as RTF residents, and nearly all of those RTF residents are sex offenders who have been placed on community supervision but have not yet obtained suitable housing in their communities. (R. 89, 539, 576, 1502-1503.) Finding such housing can be

challenging because the Sexual Assault Reform Act (“SARA”) prohibits certain persons on community supervision for sex offenses from living within 1,000 feet of a school.<sup>2</sup> Executive Law § 259-c(14). SARA-compliant housing in the greater New York City area is particularly scarce, and Fishkill is the largest compliant facility nearby. (R. 576, 587, 1582-1583.) DOCCS thus often uses Fishkill to temporarily house SARA-restricted sex offenders who are having difficulty obtaining outside housing in the New York City area. (*See* R. 587.)

Petitioners Richard Alcantara, Lester Classen, Jackson Metellus, Cesar Molina, Carlos Rivera, and David Sotomayor are sex offenders who for various periods of time between 2014 and 2017 were housed at Fishkill as RTF residents. (R. 80-82, 155.) Each petitioner was housed there temporarily while serving a term of post-release supervision (“PRS”)—a form of community supervision, akin to parole, that follows

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<sup>2</sup> SARA applies to persons on community supervision for one or more specified sex offenses who also satisfy at least one of two criteria: either they committed their offense or offenses against a minor or they have been adjudicated level-3 sex offenders under the Sex Offender Registration Act (“SORA”), signifying that “the risk of repeat offense is high and there exists a threat to the public safety,” Correction Law § 168-1(6)(c). *See generally* *People ex rel. Negron v. Superintendent, Woodbourne Corr. Facility*, 36 N.Y.3d 32 (2020).

the completion of a determinate term of imprisonment, *see generally* Penal Law § 70.45—but unable to obtain SARA-compliant living accommodations in New York City.<sup>3</sup> (R. 80.)

While at Fishkill, each petitioner was assigned an individual version of the standard program established for the facility’s RTF residents. The Fishkill RTF program consists of a collection of activities designed to assist residents with rehabilitation and re-entry into the community, including coursework, employment, and more. Most of the evidence submitted in this case addresses the program generally, although petitioners Alcantara and Sotomayor testified about some of their particular program experiences.

### **1. The Therapeutic Group Course**

As part of the Fishkill RTF program, residents are enrolled in a “therapeutic group”: a classroom-style course designed to help them gain insight into their behavior and build practical skills that they can use

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<sup>3</sup> The record does not disclose the full details of petitioners’ sex offenses and SORA risk-level adjudications, but there is no dispute that SARA applied to them.

once in the community.<sup>4</sup> (R. 312, 1358-1359, 1406, 1547-1548.) The course was created under the supervision of Shelley Mallozzi, formerly the coordinator of DOCCS's sex offender counseling and treatment program. (R. 1479-1481.) She intended it to prepare participants for, among other things, the challenges that sex offenders often face upon re-entering the community. (R. 1492, 1497.) Petitioners Alcantara and Sotomayor both took the course during their Fishkill RTF stays. (R. 240-241, 289.)

The therapeutic course consists of nine units, called "modules": sex offender registration obligations, employment, healthy relationships and activities, life skills, available community resources, core values and beliefs underlying behavior, understanding feelings, problem-solving, and relapse prevention. (R. 313-315.) Each module is outlined in a comprehensive curriculum workbook. (R. 313, 318-389.) The modules are presented by an offender rehabilitation coordinator, and in some instances by two such coordinators working together, using a

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<sup>4</sup> Certain testimony and documents refer to the therapeutic group course as the Fishkill RTF "program." However, unless otherwise noted, this brief uses that term in its technical, statutory sense: to refer to the entirety of the "program" that individual residents are assigned pursuant to Correction Law § 73, which encompasses the therapeutic course as well as a variety of other activities described below.

combination of lectures, handouts, discussions, and written assignments. (R. 908-909, 1002, 1021, 1023-1024, 1150, 1216-1217.)

For example, the employment module is designed to help RTF residents obtain work following release. (R. 323.) As part of that module, residents complete self-assessments of their professional strengths in order to determine what types of jobs might be right for them. (R. 324-325, 327, 1034-1035, 1222-1223, 1381-1382.) They are advised of different kinds of job-search resources. (R. 330.) They learn how to complete a resume and then receive feedback on draft resumes that they prepare. (R. 313, 328, 331-332, 1033-1034, 1224.) And they are taught job-interview skills, sit for mock interviews, and participate in one-on-one and group discussions concerning strategies for answering particularly difficult or sensitive interview questions. (R. 313, 335-336, 1038-1039, 1224-1229.)

The therapeutic course meets three hours a day, four days a week, for seven weeks. (R. 1004, 1154-1155.) Generally, 16 residents may take the course at any one time, although occasionally two sections of the course have been offered simultaneously, increasing the capacity to 32. (R. 312, 1003, 1154-1155.) Additionally, residents who for one reason or



another are not authorized to take the course in-person are given copies of the curriculum workbook so that they may complete the course on their own, periodically meeting with instructors one-on-one to assess their progress. (R. 1512-1513.)

Therapeutic course participants are given a stipend of \$5 per day. (R. 530.) Of that amount, 80 percent is held in escrow and shielded from garnishment until it is disbursed to the participants upon their release from Fishkill. (R. 313.)

## **2. Education**

The Fishkill RTF program offers several types of traditional educational opportunities. Residents can visit Fishkill's general-purpose library. (R. 258, 950.) They also can visit the facility's law library, which petitioner Sotomayor did often. (R. 258, 287, 950, 1001.) Additionally, residents can take academic classes.

Fishkill RTF residents can take classes put on by DOCCS staffers that lead to the award of a high school equivalency degree. (R. 1376-1377.) And, at least in general, residents can pursue higher education, as well. They can apply to colleges, and if accepted they can take university-

level coursework on a correspondence basis.<sup>5</sup> (R. 1001, 1052-1053, 1239-1240, 1376-1377.)

### **3. Employment and Training**

RTF residents may work inside Fishkill as part of the “porter pool” janitorial staff, which petitioner Alcantara did but which petitioner Sotomayor opted out of because of back ailments. (R. 242, 306, 531.) Porter pool participants work five days a week, approximately three hours a day, cleaning and handling related tasks within the facility. (R. 244, 531.) They are paid \$5 a day, 80 percent of which is held in escrow and shielded from garnishment until their release. (R. 313, 1016, 1161.)

Fishkill also maintains a “work crew” of RTF residents who work at the facility storehouse, a supply room located on Fishkill property several hundred feet outside the facility’s perimeter security fence.

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<sup>5</sup> The record is somewhat opaque regarding whether petitioner Alcantara in particular had the opportunity to pursue college coursework during his Fishkill stay. When asked at his deposition whether college coursework was available to him, he answered “No,” but he did not explain what he meant by that conclusory response. (R. 255.) He did not clarify, for instance, whether he simply did not know he could apply for college courses, whether he did know and attempted to apply but was prevented by DOCCS from doing so, or whether he applied but had his application rejected by the college.

(R. 548, 1366-1367.) The work crew's main task is loading and unloading trucks. (R. 548.) This includes manual labor as well as the operation of heavy machinery, for which training is provided. (R. 285-286.)

Petitioner Alcantara never sought a work crew position, but petitioner Sotomayor joined the work crew during one of his two Fishkill stays. (R. 242-243, 284-285.) Sotomayor's back ailments prevented him from doing manual heavy lifting. (R. 286.) To accommodate his limitation, work crew supervisors taught him to use a power jack—a type of motorized forklift—and assigned him tasks that could be accomplished using that equipment. (R. 285-286.)

The work crew consists of eight RTF residents. (R. 534, 548.) They work five days a week, six hours a day. (R. 285.) Work crew participants are paid \$10 a day, subject to the same escrow arrangement as porter pool earnings. (R. 313, 316, 530, 1016, 1160-1161.)

In addition to employment, vocational coursework and instruction are also available to Fishkill RTF residents. Residents may, for example, enroll in business courses or courses in computer operation. (R. 1377-1378.) Additionally, they may learn one or more trades, including painting, floor covering, and small-engine repair. (R. 1240-1241.)

#### **4. Housing Assistance**

Approximately once every two weeks—and more frequently, when needed—Fishkill RTF residents have one-on-one meetings with the facility’s offender rehabilitation coordinators. (R. 998-999, 1400-1401.) During these meetings, which generally last anywhere from five minutes to half an hour, residents can discuss any issues for which they feel the need for a sounding board. (R. 1178-1179, 1400-1401.)

One issue that is central to these meetings is housing. In nearly every meeting, the coordinator will ask the resident whether the resident has identified any possible living arrangements in the community and will forward to the relevant parole officer any options that are proposed. (R. 1061, 1065, 1142, 1178, 1402.) The parole officer will then investigate those options for suitability, including SARA compliance, and report back. (R. 1178, 1413-1414.)

In some instances, RTF residents on the work crew meet with offender rehabilitation coordinators more sporadically. (R. 298.) But, they are transported every week to the parole office in Poughkeepsie, approximately 15 miles from Fishkill, to discuss housing issues directly with parole officers stationed there. (R. 298, 545, 940-941, 1181-1182.)

Fishkill RTF residents who are unable to secure private SARA-compliant living arrangements are placed on a waiting list of DOCCS inmates in need of compliant housing in the New York City Department of Homeless Services (“NYCDHS”) shelter system. (R. 558.) NYCDHS has a limited number of SARA-compliant shelter beds, and at any one time demand greatly exceeds supply. (R. 557-558.<sup>6</sup>) NYCDHS has agreed to reserve SARA-compliant beds for, and accept into its shelter system, 10 new inmates from the DOCCS waiting list each month. (R. 557, 592.)

### **C. Proceedings in Supreme Court**

In 2016, while still housed at Fishkill as RTF residents, petitioners commenced this case by filing a C.P.L.R. article 78 petition in Supreme Court, Albany County, against DOCCS Acting Commissioner Anthony J. Annucci and Chairperson of the New York State Board of Parole Tina M. Stanford (collectively, “the State”), along with Commissioner of the New York City Human Resources Administration and Department of

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<sup>6</sup> The record is not fully developed on this issue, but submissions in other cases indicate that at any one time nearly 300 DOCCS inmates might be in need of SARA-compliant NYCDHS shelter housing. See *People ex rel. Johnson v. Superintendent, Adirondack Corr. Facility*, 174 A.D.3d 992, 996 (3d Dept. 2019) (Garry, P.J., concurring).

Social Services Steven R. Banks (“the City”). Petitioners claimed that Fishkill was not being operated properly, in that (1) RTF residents were treated like general-population inmates rather than residents of a bona fide “RTF,” as that term is defined in Correction Law § 2, (2) the standard program to which RTF residents were assigned did not comply with Correction Law § 73, (3) RTF residents were not receiving assistance in their searches for SARA-compliant community housing, as required under Correction Law § 201, and (4) in all events, RTF residents were being held in violation of Penal Law § 70.45 because more than six months had transpired since their initial placement on community supervision. (R. 103-111.) Petitioners also claimed that the City was acting unlawfully by not agreeing to accept more than 10 DOCCS inmates per month into its SARA-compliant shelter housing. (R. 106.)

Petitioners sought injunctive relief, including release from Fishkill, and declaratory relief as well. (R. 112.)

### **1. The 2017 Decision and Order**

Petitioners moved to proceed on behalf of a class of similarly situated inmates. The State and the City opposed, and also moved to dismiss, asserting among other things that petitioners’ claims had

become moot because they were no longer Fishkill RTF residents.<sup>7</sup> In 2017, Supreme Court issued a decision and order resolving the motions. (R. 405-437.)

Although petitioners were no longer Fishkill RTF residents, and their claims were therefore moot, Supreme Court decided to consider the claims under the exception for issues that are capable of repetition yet likely to evade review. (R. 412-413.) On the merits, the court dismissed petitioners' claim against the City. (R. 428-431.) It likewise dismissed their claim that the State was confining Fishkill RTF residents in violation of Penal Law § 70.45, as well as the claim that the State failed to assist Fishkill RTF residents in obtaining housing as required by Correction Law § 201. (R. 415-424.) The court declined to dismiss petitioners' remaining claims, however. (R. 424-428.)

Recognizing that article 78 relief was no longer available, the court converted those remaining claims into a declaratory judgment action.

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<sup>7</sup> Petitioners Alcantara, Classen, and Sotomayor had been released from Fishkill altogether into SARA-compliant housing in New York City. (R. 398-399, 412.) Petitioners Metellus, Molina, and Rivera remained at Fishkill but were no longer RTF residents; they had been reclassified as "detainees" after violations of their release conditions resulted in their PRS being revoked. (R. 398-399, 412.)

(R. 424, 428.) It denied class certification as unnecessary, finding that any declaratory judgment petitioners might obtain would adequately protect the rights of similarly situated persons. (R. 431-435.)

## **2. The 2019 Decision and Judgment**

Thereafter, the State moved for summary judgment dismissing petitioners' remaining claims. Petitioners opposed, and also requested, but did not formally cross move for, summary judgment in their favor. In 2019, Supreme Court issued a decision and judgment granting the State summary judgment in part and, after searching the record, also granting summary judgment in part to petitioners. (R. 40-65.)

The court granted the State summary judgment on petitioners' claim that Fishkill RTF residents were treated like general-population inmates rather than residents of a true "RTF" under Correction Law § 2. Because the statute makes clear that an RTF is still a correctional facility, there is nothing unlawful about treating RTF residents like general-population inmates in certain respects, the court observed. (R. 55-57.) Further, Fishkill is "community based" relative to New York City, notwithstanding the fact that it is located 60 miles away. (R. 57.)



As for petitioners' claim of inadequate programming under Correction Law § 73, Supreme Court split the claim in two: one claim related to program activities inside Fishkill, and another related to program activities outside the facility. The court granted summary judgment to the State on the former and to petitioners on the latter.

The court concluded that the Fishkill RTF program was adequate insofar as it included activities inside the facility that were directed toward rehabilitation and reintegration into the community. Among the rehabilitative and reintegrative activities were opportunities for education, employment, and on-the-job training, the court noted. Fishkill RTF residents could enroll in "educational programming for college or high school equivalency courses," they could obtain jobs "working as a porter or on the Facility Storehouse crew," and on those jobs, as well as through vocational coursework, they could "learn or reinforce their skills related to employment, such as being on time, taking direction, and completing tasks as directed."<sup>8</sup> (R. 58-59.)

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<sup>8</sup> Supreme Court acknowledged that the Facility Storehouse crew works outside Fishkill proper but appears to have grouped it with the activities that take place inside the facility because the crew nevertheless works on Fishkill premises. (*See* R. 49.)

However, Supreme Court additionally concluded that the Fishkill RTF program was inadequate with respect to the activities taking place outside the facility. Specifically, the court determined that the Correction Law required DOCCS to provide residents with out-of-facility opportunities for education, training, and employment. (R. 60-61.) And in the court's view, Fishkill RTF residents' admittedly limited opportunities in that regard were, as a matter of law, insufficient. (R. 61-64.)

The State appealed from Supreme Court's final judgment (R. 4-5), and petitioners cross appealed (R. 6-39).

## ARGUMENT

Preliminarily, the State does not contest Supreme Court's determination (R. 412-413) that this case was properly considered under the exception to mootness for issues that are capable of repetition but likely to evade review. RTF residency is usually limited in duration, and because it takes time to develop the sort of record needed to mount a fact-dependent challenge like petitioners' here, such challenges can evade review. *Cf. People ex rel. Johnson v. Superintendent, Adirondack Corr. Facility*, 36 N.Y.3d 187, 195-96 (2020).

Upon review of Supreme Court's decision, this Court should reverse the partial grant of summary judgment to petitioners, and enter summary judgment for the State, on the claim that the Fishkill RTF program violates Correction Law § 73 by failing to provide sufficient opportunities for education, training, and employment outside the facility. Contrary to Supreme Court's conclusion, the Correction Law authorizes, but does not require, that RTF residents be provided with such out-of-facility opportunities. And even if the Correction Law did require the provision of out-of-facility activities, the Fishkill program would satisfy that requirement.

## **POINT I**

### **CORRECTION LAW § 73 AUTHORIZES, BUT DOES NOT REQUIRE, THE FISHKILL RTF PROGRAM TO PROVIDE RESIDENTS WITH OPPORTUNITIES FOR EDUCATION, TRAINING, AND EMPLOYMENT OUTSIDE THE FACILITY**

Supreme Court erred in holding that Correction Law § 73 not only authorizes but requires DOCCS to offer RTF residents, including those at Fishkill, activities taking place outside the facility. Because the plain text and context of the relevant statutes establish otherwise, petitioners' challenge to the adequacy of the Fishkill RTF program's out-of-facility

opportunities necessarily fails, and the State was entitled to summary judgment on that claim.

Statutory interpretation is a search for the intent of the enacting legislature, and “the best evidence of legislative intent” is “the text itself.” *Matter of Comptroller of City of New York v. Mayor of City of New York*, 7 N.Y.3d 256, 264 (2006); accord, e.g., *Matter of Retired Pub. Employees Assn., Inc. v. Cuomo*, 123 A.D.3d 92, 94 (3d Dept. 2014). Thus, “when the statutory language is clear and unambiguous, it should be construed so as to give effect to the plain meaning of the words used.” *Matter of National Energy Marketers Assn. v. New York State Pub. Serv. Commn.*, 33 N.Y.3d 336, 348, rearg. denied, 33 N.Y.3d 1130 (2019); accord, e.g., *Matter of Liberius v. New York City Health & Hosps. Corp.*, 129 A.D.3d 1170, 1171 (3d Dept. 2015). Construing Correction Law § 73 in this manner shows that DOCCS is authorized, but not required, to create and assign RTF programs that include activities taking place outside the facility, and therefore that the Fishkill RTF program does not violate the statute simply because its out-of-facility activities are, admittedly, limited in scope.

The starting point is actually Correction Law § 72, which provides that every person in DOCCS custody, including every RTF resident, “shall be confined in institutions maintained by the department until paroled, conditionally released, transferred to the care of another agency or released or discharged in accordance with the law,” absent an exception appearing elsewhere in section 72. *Id.* § 72(1). There is such an exception for RTF residents: Another part of section 72 permits them to leave their facilities “in accordance with the provisions of section seventy-three.” *Id.* § 72(6).

Correction Law § 73, in turn, authorizes DOCCS to make out-of-facility activities part of the programs assigned to RTF residents. Namely, “in accordance with the program established for him or her,” an RTF resident “*may* be allowed to go outside the facility during reasonable and necessary hours to engage in any activity reasonably related to his or her rehabilitation.” *Id.* § 73(1) (emphasis added). That is, DOCCS “may” formulate and assign to an RTF resident a program that includes activities taking place outside of his or her facility.

But DOCCS is not thereby *required* to do so. “May” is a “permissive word” indicating a decision “left to the discretion” of the relevant actor,

not a “flat, unvarying duty” with which the actor is bound to comply. *Matter of New York State Socy. of Surgeons v. Axelrod*, 77 N.Y.2d 677, 682-83 (1991). That something “may” happen means that the specified outcome is “no more than a possibility.” *County of Broome v. Badger*, 55 A.D.3d 1191, 1193 (3d Dept. 2008). Accordingly, under Correction Law § 73(1), although DOCCS “may” include out-of-facility activities in RTF programs, it is not obligated to do so.

While this meaning of Correction Law § 73(1) is plain on its face, any lingering doubt is resolved by the provision’s concomitant use of “shall”—a term ordinarily employed to signify obligation—in relation to other matters. Indeed, it would be particularly inappropriate to “presume that the Legislature meant ‘shall’ when it said ‘may’” in section 73(1), because the Legislature used “shall” repeatedly throughout section 73. *Matter of GE Cap. Corp. v. State Div. of Tax Appeals*, 2 N.Y.3d 249, 255 n.1 (2004); *see also New York State Elec. & Gas Corp. v. Aasen*, 157 A.D.2d 965, 967 (3d Dept. 1990) (applying same principle for purposes of contract interpretation).

“Shall” appears more than a dozen times in Correction Law § 73. For example:

- “Programs directed toward the rehabilitation and total reintegration into the community of persons transferred to a residential treatment facility *shall be established.*” Correction Law § 73(3) (emphasis added).
- Each RTF resident “*shall* be assigned a specific program.” *Id.* (emphasis added).
- If the facility superintendent suspends any program activities, he or she “*shall* promptly notify the commissioner” of DOCCS to that effect. *Id.* § 73(4) (emphasis added).
- RTF residents who are on community supervision “*shall* be subject to conditions of community supervision” prescribed by the Board of Parole. *Id.* § 73(10) (emphasis added).
- Should an RTF resident escape or abscond prompting the issuance of an arrest warrant, the warrant “*shall* have the same force and effect, and *shall* be executed in the same manner, as a warrant issued for violation of community supervision.” *Id.* § 73(6) (emphases added).

This repeated use of “shall” in section 73 gives good reason to think that, had the Legislature intended to require out-of-facility activities in RTF programs, it would have provided that, as part of their programs, residents “*shall* be allowed to go outside the facility” for rehabilitative and reintegrative activities. The fact that the Legislature actually provided only that, as part of their programs, residents “*may* be allowed to go outside the facility” for such activities strongly supports the conclusion that out-of-facility activities need not be incorporated.

Further support comes from contrasting the statutory regime governing RTF programs with that governing programs of “temporary release”: work release, furloughs, leaves of absences, and other alternatives to general-population confinement that *do* necessarily include out-of-facility activities. *Cf. Dutchess County Dept. of Soc. Servs. ex rel. Day v. Day*, 96 N.Y.2d 149, 153-15 (2001) (explaining that statutes related to the same general subject matter “must be construed together”); *Matter of Piccolo v. New York State Tax Appeals Trib.*, 108 A.D.3d 107, 110 (3d Dept. 2013) (same). The temporary release regime illustrates the litany of safeguards, procedures, and other requirements the Legislature demands of programs that invariably entail an inmate’s participation in activities outside the facility, and thus the inmate’s potential interaction with members of the general public. But those safeguards, procedures, and requirements are largely absent from the RTF regime.

To begin, inmates serving sentences for certain offenses are deemed categorically ineligible for one or more types of temporary release programs from the get-go. Correction Law §§ 851(2), 855(1)-(2). Further, an inmate who is eligible for a temporary release program cannot be assigned to the program unless and until a “temporary release



committee” comprised of persons appointed by the DOCCS Commissioner determines that the inmate’s participation therein is “consistent with the safety of the community.” *Id.* §§ 851(11), 855(4). If that determination is made, the committee must then prepare, and the superintendent of the facility in which the inmate is housed must approve, a memorandum detailing, among other things, the inmate’s “extended bounds of confinement”: “the area in which [the] inmate participating in a temporary release program may travel, the routes he or she is permitted to use, the places he or she is authorized to visit, and the hours, days or specially defined period during which he or she is permitted to be absent from the premises of the institution.” *Id.* §§ 851(10), 855(5). After completion of a temporary release program, “a full report of the inmate’s performance in such program shall be prepared,” including, but not limited to, the inmate’s “adjustment to release.” *Id.* §§ 856(5). DOCCS must also collect and maintain nine categories of statistical data concerning the administration of temporary release programs statewide. *Id.* § 853.

The Legislature has not imposed similar requirements on RTF programs. This suggests that the Legislature did not intend to require

that such programs include out-of-facility activities, and instead intended to leave the decision whether to include any such activities to DOCCS's case-by-case discretion.

Indeed, Correction Law § 73(2)—which specifically addresses RTF program opportunities for education, training, and employment, on which Supreme Court focused—gives DOCCS significant freedom to apply its experience and expertise to structure those aspects of an RTF program as it sees fit. Tellingly, that provision does not purport to require that RTF programs offer education, training, and employment satisfying any specific criteria.

Section 73(2) does not set forth any requirements related to the subject matter of the requisite opportunities for education, training, and employment in RTF programs. It does not state, for example, that educational activities must offer coursework in one or more particular fields of study, or that training and employment must include opportunities in one or more particular types of work. Nor does the provision set forth any requirements related to timing or duration, such as how many hours per day or days per week the activities must occupy. And it most certainly does not set forth any requirements related to

geography, including any requirement that the activities must be offered, in whole or in part, outside the facility. The absence of a specific requirement for programming outside the facility makes sense because DOCCS cannot control the availability of such opportunities in the community at large.

The only criterion that Correction Law § 73(2) sets forth is that the education, training, and employment components of an RTF program must be “appropriate”—a word that conveys latitude, not limitation. The Legislature’s use of “appropriate” belies an intent to impose the strict out-of-facility location requirement Supreme Court found. The term “appropriate” is “deliberately expansive.” *Associated Builders & Contrs. of Texas v. NLRB*, 826 F.3d 215, 222 (5th Cir. 2016) (citing *Inland Empire Dist. Council v. Millis*, 325 U.S. 697, 706, *reh’g denied*, 326 U.S. 803 (1945)). It shows an intent to give DOCCS “broad discretion” to consider the totality of the circumstances when designing an RTF program and to include any education, training, and employment activities that advance the program’s overall rehabilitative and reintegrative purpose, regardless of where, geographically, those activities take place. *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 369 (1985).

Notably in that regard, Supreme Court did not find that the education, training, and employment components of the Fishkill RTF program as a whole suffered from any substantive defect.

Supreme Court was also mistaken in apparently relying upon Correction Law § 2(6), the RTF definitional provision, to conclude that the Fishkill RTF program was required to offer education, training, and employment opportunities outside the facility. Preliminarily, as noted earlier, the Legislature has made clear that RTF residents “shall be confined” in their facilities except “in accordance with the provisions of section seventy-three.” *Id.* § 72(1), (6). The scope of RTF residents’ permission to leave their facilities is therefore fixed by section 73, and thus is not enlarged by section 2(6).

But even on its own terms, Correction Law § 2(6) does not support Supreme Court’s conclusion. It defines an RTF as a “correctional facility consisting of a community based residence in or near a community where employment, educational and training opportunities are readily available for persons who are on parole or conditional release and for persons who are or who will soon be eligible for release on parole who intend to reside in or near that community when released.” This long,

unpunctuated provision is most reasonably read—as DOCCS reads it—to require that an RTF be located in or near a community where employment, educational, and training opportunities are generally available to parolees and other supervised persons *who live in the community*, such that those opportunities likely will be available to RTF residents *upon their release*. The statute should not be read to demand that out-of-facility opportunities be readily available to RTF residents, and be provided to them via RTF programming, *during their RTF residency*. The criteria for education, training, and employment opportunities during RTF residency are set forth in Correction Law § 73(2), which statute, as discussed above, requires only that they be “appropriate.”

In sum, the statutes addressing RTF programming do not require that RTF programs include activities taking place outside the facility. The Legislature “did not incorporate such assumption[] expressly into the statute[s], instead allowing DOCCS leeway to design its RTF programs” on a case-by-case basis, with or without out-of-facility activities as DOCCS, in its sound judgment, determines. *Johnson*, 36 N.Y.3d at 206-07 (rejecting the notion that the Legislature “intended RTFs to be

shelter-like, rather than prison-like, correctional facilities, from which residents would be free to depart”).

## POINT II

### **TO THE EXTENT RTF PROGRAMS ARE REQUIRED TO PROVIDE OUT-OF-FACILITY ACTIVITIES, THE FISHKILL PROGRAM SATISFIES THAT REQUIREMENT**

Even if the governing statutes do require that RTF programs include some measure of education, training, and employment outside the facility, the State would still be entitled to reversal and entry of summary judgment in its favor. This is because the out-of-facility activities that are part of the Fishkill RTF program are substantially similar to those offered by the RTF program at the Woodbourne Correctional Facility, and the Court of Appeals approved the Woodbourne program in *Matter of Gonzalez*.

In that case, Gonzalez, a SARA-restricted sex offender, was an RTF resident at Woodbourne, a correctional facility located about 100 miles from New York City in Sullivan County. 32 N.Y.3d at 467. He filed an article 78 petition alleging, among other things, that the RTF program to which he was assigned was statutorily inadequate. *Id.* The evidence in that case showed that Gonzalez participated in only two activities outside

of Woodbourne: (1) a work crew, in which he was on-call five days a week for six and a half hours a day to perform maintenance at the facility and help incoming inmates unload their property upon arrival, and for which he earned \$10 per day, 80 percent of which was held in escrow for him, and shielded from garnishment, until his release, and (2) while assigned to that work crew, weekly trips to Poughkeepsie to meet with parole officers there and discuss his housing situation.<sup>9</sup>

The Court of Appeals did not address whether RTF programs are statutorily required to offer activities that take place outside the facility. The Court did, however, review the adequacy of the program at Woodbourne based on the record before it. And for that purpose it found “insufficient record evidence to establish that DOCCS’ determination to

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<sup>9</sup> This evidence is most clearly presented in the record on appeal in *Matter of Gonzalez* filed in this Court when the case was before it, see Record on Appeal at 63-64, 437, 584-585, *Matter of Gonzalez*, 149 A.D.3d 256 (3d Dept. 2017), which this Court may judicially notice. See *Matter of Kathleen E. v. Charles F.*, 86 A.D.3d 669, 670 n.\* (3d Dept.), *lv. denied*, 17 N.Y.3d 713 (2011). The evidence is also discussed in varying levels of detail in the opinions the case generated at each level of the court system. See 32 N.Y.3d 461 (majority opinion, opinion concurring in part and dissenting in part, and dissenting opinion); 149 A.D.3d 256 (majority opinion and opinion concurring in part and dissenting in part); 56 Misc. 3d 1203(A), 2015 WL 13446663 (Sup. Ct. Albany County July 9, 2015) (unreported table decision).

place [Gonzalez] at the Woodbourne RTF was irrational or that the conditions of his placement at [Woodbourne] were in violation of the agency's statutory or regulatory obligations." 32 N.Y.3d at 475. Thus, even if some out-of-facility activities were required, the two in which Gonzalez participated were sufficient under governing law.

*Matter of Gonzalez* requires reversal and entry of summary judgment for the State here. As compared to Woodbourne's out-of-facility activities, the out-of-facility activities available as part of the Fishkill RTF program are materially identical, if not more robust.

Fishkill maintains a "work crew" of RTF residents who work at the facility storehouse, a supply room located on Fishkill property outside the facility's perimeter security fence. (R. 548, 1366-1367.) The work crew's main task is loading and unloading trucks. (R. 548.) This includes manual labor as well as the operation of heavy machinery, for which training is provided when needed. (R. 285-286.) For example, petitioner Sotomayor was taught to use a power jack—a type of motorized forklift—and assigned loading and unloading tasks that could be accomplished using that equipment. (R. 285-286.)



The work crew consists of eight RTF residents. (R. 534, 548.) They work five days a week, six hours a day. (R. 285.) Work crew participants are paid \$10 a day, 80 percent of which is held in escrow, and shielded from garnishment, until their release. (R. 313, 316, 530, 1016, 1160-1161.) Further, Fishkill work crew participants are transported weekly to Poughkeepsie to discuss housing issues with parole officers stationed there. (R. 298, 545, 940-941, 1181-1182.)

To be sure, these out-of-facility offerings provided by the Fishkill RTF program are, in an absolute sense, limited. But they are sufficient under *Matter of Gonzalez*.<sup>10</sup> Reversal, and entry of summary judgment for the State, is required.

Supreme Court noted that *Matter of Gonzalez* is “highly instructive,” but found it “not dispositive” because “the majority acknowledged in a footnote that ‘similar claims relating to Fishkill

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<sup>10</sup> Although not binding upon petitioners here, two of the law firms representing petitioners in this matter filed an *amicus* brief in *Matter of Gonzalez* referencing the present case, stating as to Fishkill and Woodbourne that “the available evidence establishes that the ‘RTF’ operations at the two prisons are almost the same,” and asserting that “[t]he ultimate decision on this issue”—the issue of adequacy of RTF programming—“will inevitably apply to each of DOCCS’ ‘Residential Treatment Facilities.’” (R. 217.)

Correctional Facility as an RTF are pending in discovery proceedings before Albany County Supreme Court,' citing this case." (R. 54-55.) Supreme Court's reliance on that *Matter of Gonzalez* footnote was mistaken. The discovery proceedings referenced in the footnote have since been completed, and the resulting evidence has been presented in court. The sum-total of that evidence shows without material factual dispute that—even if the State is wrong about its primary argument and some out-of-facility activities are indeed statutorily required to be part of an RTF program—the outside activities offered as part of the Fishkill program are sufficiently similar to those offered as part of the Woodbourne program approved in *Matter of Gonzalez* to entitle the State to judgment as a matter of law.

## CONCLUSION

This Court should reverse the grant of summary judgment to petitioners, and enter summary judgment for the State, on the claim under Correction Law § 73 that the Fishkill RTF program fails to provide residents with sufficient opportunities for education, training, and employment outside the facility.

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