

To be Argued by:  
MATTHEW FREIMUTH  
(Time Requested: 15 Minutes)

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**New York Supreme Court**  
**Appellate Division—Third Department**

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

**Case No.:**  
**531036**

*Petitioners-Respondents-Cross Appellants,*

– against –

ANTHONY J. ANNUCCI, ACTING COMMISSIONER,  
NEW YORK STATE DEPARTMENT OF CORRECTIONS  
AND COMMUNITY SUPERVISION, TINA M. STANFORD,  
COMMISSIONER, 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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**REPLY BRIEF FOR PETITIONERS-  
RESPONDENTS-CROSS APPELLANTS**

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## **PRELIMINARY STATEMENT**

Respondents-Cross Appellants (“RTF Parolees”) submit this reply in further support of their cross appeal challenging Supreme Court’s holding that DOCCS’s internal programming at Fishkill was “minimally adequate.” Petitioners’ Answering Br. at 2 (citing R. at 28). RTF Parolees contend that Supreme Court incorrectly accepted at face value DOCCS’s own designation of Fishkill as a residential treatment facility (“RTF”) rather than appropriately scrutinize whether the Fishkill facility, in practice and design, satisfied the statutory requirements governing RTFs. The record below demonstrates that it does not. Petitioners’ Answering Br. at 35-41.

In response, DOCCS contends (1) that the offering of a single program for incarcerated individuals at the Fishkill RTF satisfies Correction Law § 73(3)’s command that such individuals be placed in an appropriate program, (2) the court below correctly applied the relevant statutory standard in holding that the in-facility offerings available at Fishkill were “minimally adequate,” (3) testimony from DOCCS employees tasked with creating and implementing various policies used at the Fishkill RTF is irrelevant, and (4) evidence of indistinguishable treatment of RTF residents and their comingling with the general population of Fishkill is likewise irrelevant to the Court’s

consideration of whether the facility complies with the Correction Law.<sup>1</sup> For the reasons set forth below, each of these arguments is without merit.

First, Correction Law § 73(3) establishes a dual requirement that more than one program be made available at residential treatment facilities and that DOCCS exercise its discretion on an individualized basis to provide incarcerated individuals with the most appropriate program available. A sole program does not meet that standard. Second, the court below failed to consider other applicable standards in Correction Law § 73 that require in-facility offerings to be appropriate to the RTF population, and it further failed to provide any analysis explaining how Fishkill met all of the applicable statutory standards governing RTFs. Third, testimonial evidence from DOCCS employees in charge of setting up and running the Fishkill “RTF” is relevant to the question of whether Fishkill’s operations as an “RTF” are statutorily compliant. Fourth, Correction Law § 70(4) requires that co-located correctional facilities segregate their populations except under certain limited circumstances. Accordingly, record evidence regarding the treatment of

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<sup>1</sup> During this appeal’s pendency, the Legislature replaced the use of the term “inmate” in state laws, including in the Correction Law, with the term “incarcerated individual.” 2021 N.Y. AB 2395.

incarcerated individuals at Fishkill is also relevant to the question of the facility's compliance with governing statutes.

## ARGUMENT

### **A. The Fishkill Prison Does Not Meet the Statutory Requirements For a Residential Treatment Facility**

#### **1. Correction Law §73(3) Provides Clear Requirements and Instructions that Require Fishkill to Offer More Than One Program**

DOCCS contends that Fishkill's offering of a single program satisfies the requirements of Correction Law § 73(3) because the law does not mandate "that each resident at a given facility must be assigned an individualized program crafted for that resident and that resident alone, or, indeed, that any one resident be assigned a program that differs at all from the program assigned to any other resident." Appellants' Reply Br. at 23-24. But Section 73(3) plainly requires DOCCS to make available to RTF residents "programs," plural, and *also* to conduct an individualized assessment to determine which "specific program" is appropriate for *each* incarcerated individual. Moreover, DOCCS's rebuttal misconstrues RTF Parolees' position in a manner that exaggerates the implications of RTF Parolees' reading of the statute, which is, in fact, more limited than the State suggests.

First, DOCCS’s defense of its lone program fails because Section 73(3) is clear: at RTFs, “[p]rograms...shall be established” and “[e]ach incarcerated individual shall be assigned a specific program.” Corr. Law § 73(3). The statute does not mandate a particular number of programs, but it does require that more than one program “directed toward the rehabilitation and total reintegration into the community of persons transferred to a residential treatment facility” be established. *Id.* Furthermore, the statute requires DOCCS to exercise its discretion to decide the appropriateness of a “specific program” for “each incarcerated person.” *Id.* Properly understood, Section 73 compels DOCCS to identify appropriate pathways for education, job training, and employment and then exercise its discretion, on an individualized basis, to place incarcerated individuals on a path appropriate for that individual.

Fatal to DOCCS’s position here is the fact that Fishkill offers a single program, and that precludes any exercise of discretion with respect to the appropriateness of that program for incarcerated individuals. Furthermore, DOCCS’s discretion to decide what number of (two or more) programs to offer does not allow for DOCCS to select only a single program. Where, as here, there is only one option, there is no discretion to be exercised, and

therefore, the second sentence of Section 73(3), requiring “*each* incarcerated individual . . . be assigned a *specific* program,” has been given no effect. *Id.* (emphasis added).

Accordingly, DOCCS’s argument that a lone program at each RTF satisfies the statute, Appellant’s Reply Br. at 24, must fail because it would nullify the required individualized assessment. Moreover, DOCCS’s other contention that Section 73(3) “means only that each RTF resident must be assigned a particular, identifiable program,” *id.*, must also fail because if it were acceptable to have only one program, the word “specific,” as used in the statute (as well as the State’s own words, “particular” and “identifiable”) would be mere surplusage.

In sum, Section 73(3) requires that both two or more programs be made available to incarcerated individuals at RTFs and an individualized assessment. DOCCS’s use of a single program at Fishkill and its abdication of the exercise of discretion in favor of a categorical decision violates the plain language of the statute.

Second, DOCCS’s entire argument is premised on a mischaracterization of RTF Parolees’ position. In this cross appeal, RTF Parolees argue that an RTF must make available more than one program to

residents and must exercise discretion with respect to individual residents. Petitioners’ Answering Br. at 34-35. That view does not require “individualized programs” nor does it speak to whether programs available at different facilities must be distinct from one another, as suggested by the State’s brief. Appellants’ Reply Br. at 23-24. Simply put, RTF Parolees contend that DOCCS must make available to each individual incarcerated at an RTF more than one program and also conduct an individualized assessment as to which of the programs is best suited for that individual. These two mandates, that DOCCS develop more than one program and that it assign a specific program to each RTF resident, are incompatible with the reality at Fishkill where one curriculum is assigned to every resident without modification. *See* Petitioners’ Answering Br. at 11 (citing R. at 518).

2. Supreme Court Did Not Evaluate Fishkill’s Claims of Compliance with Correction Law § 73 Under the Correct Statutory Standard

Supreme Court issued a split decision, deciding that the programming DOCCS had made available to RTF Parolees within the facility was overall “minimally adequate,” and also that the lack of opportunities outside the facility violated Correction Law § 73. (R. at 58-64.) Because the court below considered the overall *adequacy* of the in-facility opportunities rather than the

*appropriateness* of the opportunities available to incarcerated individuals, RTF Parolees contend that the lower court did not apply the correct statutory standard and also issued its ruling without sufficient explanation.

DOCCS contends that Supreme Court’s decision satisfies the proper statutory standard because “‘adequate’ and ‘appropriate’ are essentially synonyms” and accordingly, the Court should simply assume the lower courts meant appropriate. Appellants’ Reply Br. at 24-25. However, ‘adequate’ and ‘appropriate’ are distinguishable, and the lower court’s opinion stands out for its failure to correctly identify the relevant governing standards, explain what they mean and require, and illustrate how Fishkill’s offerings satisfy those standards. Where a lower court fails to adequately explain the basis for its order, the appellate division exacts a special scrutiny. *See e.g., Matter of Amber AA.*, 754 N.Y.S.2d 387, 390 (3d Dep’t 2003) (remitting the matter for further proceedings where the lower court failed to provide an adequate explanation as to how the termination of parental rights served the children’s best interests).

Supreme Court initially erred by grounding its analysis of the offerings available to RTF residents at Fishkill wholly in terms Correction Law § 73(3), and as such, it incorrectly held that “the programming as a whole” was

“minimally adequate” because its mere existence satisfied the requirement that DOCCS establish such offerings. (R. at 58-60 (citing Correction Law § 73(3)).) However, Section 73(2) is critical to the consideration of statutory compliance here because it qualifies DOCCS’s responsibilities and clarifies that “[t]he department shall be responsible for securing appropriate education, on-the-job training and employment” for all incarcerated individuals transferred to an RTF. Nowhere in the lower court’s opinion did it consider the application of this standard to opportunities available *within* the Fishkill facility.

Indeed, this error is made all the more apparent because Supreme Court does consider the application of Section 73(2) in considering the appropriateness of out-of-facility opportunities for education, training, and employment. (R. at 61 (citing Correction Law § 73(2)).) Properly considered, as Supreme Court does with respect to out-of-facility opportunities, DOCCS cannot meet its burden to demonstrate compliance with both Sections 73(2) and 73(3) with respect to Fishkill’s offerings on the record below.

Rather than address the governing statutory language, DOCCS insists that this oversight is harmless because ‘adequate’ and ‘appropriate’ are essentially synonyms and it should be assumed that the lower court intended

to convey that Fishkill's offerings were also appropriate. Appellants' Br. at 24-25. This argument fails for two reasons. First, adequate and appropriate are meaningfully distinguishable in ways that are pertinent to RTF Parolees' claims, and second, the lower court's analysis is plainly insufficient to support the assumption DOCCS asks the Court to make.

Section 73(2)'s command that DOCCS secure appropriate opportunities obligates DOCCS to consider the particular needs of the individuals "transferred to residential treatment facilities." In that sense, the use of the term 'appropriate' has particular meaning as it requires DOCCS to understand the population in its care, identify needs that are suitable for that population, and finally to secure appropriate opportunities that address the identified needs of that population. Although DOCCS has some discretion in fulfilling these obligations, the statutory standard nonetheless provides a framework suitable for judicial review here.<sup>2</sup> Accordingly, to determine whether DOCCS's offerings at Fishkill satisfy the commands of Correction Law § 73, the Court can (and should) analyze whether DOCCS properly understood, considered, and acted upon the particular needs of this specific

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<sup>2</sup> As demonstrated in RTF Parolees' answering brief, Sections 2(6) and 73(3) prescribe particular requirements that the Legislature has determined must be made available to RTF transferees. Petitioners' Answering Br. at 18-21.

population. *Compare Appropriate*, The American Heritage Dictionary (5th ed.) (“suitable for a particular person, condition, occasion, or place”) *with Adequate*, The American Heritage Dictionary (5th ed.) (“sufficient to satisfy a requirement or meet a need”).<sup>3</sup> The court below did not do so.

Finally, the lower court considered Fishkill’s in-facility offerings “as a whole” in rendering its decision. (R at 59.) In doing so, the court below failed to analyze, and make plain on the record, whether individual components of Fishkill’s offerings were appropriate for RTF residents (or even “minimally adequate”). Because Section 73(2) requires DOCCS to secure appropriate education, on-the-job training, *and* employment, it is unclear whether the lower court’s holistic assessment included a determination that offerings within one or more of these three categories failed to meet the statutory standard. RTF Parolees are entitled to appropriate opportunities in all three categories, and without that, or indeed, any analysis at all, the Court cannot take comfort that the judgment below was correctly rendered.

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<sup>3</sup> Consider the example of a family with adults, children, and toddlers. In any number of categories (e.g., meals, entertainment, clothing), what one would consider “minimally adequate” for all three groups would differ from what one would consider appropriate for each group.

3. Testimony from DOCCS Employees Is Relevant to Considering Whether Fishkill Is Noncompliant with the RTF Requirements of Correction Law §§ 2(6) and 73

DOCCS contends that record testimony provided by its employees is irrelevant because such testimony does “not bear on whether the Fishkill RTF in fact functions as an RTF.” Appellants’ Reply Br. at 26-29. But this is incorrect because the statute requires DOCCS employees to perform certain duties, including some with discretion, in service of pursuing specific statutory goals. As such, the testimony of the employees tasked with those duties is entirely probative of whether DOCCS is complying with the governing statutory requirements.

In relevant part, Correction Law §§ 73(2) and (3) require DOCCS to secure “appropriate education, on-the-job training and employment” for RTF residents and must also establish “[p]rograms directed toward the rehabilitation and total reintegration into the community” of such residents.

As the State itself recognizes, compliance with the Correction Law should be ascertained by comparing those standards with “the Fishkill RTF’s actual operation and program activities.” Appellants’ Reply Br. at 26. The record testimony included in RTF Parolees’ cross appeal directly discusses the actual operation of the Fishkill “RTF” and oversight of the program made

available to incarcerated individuals. Petitioners' Answering Br. at 10-12. As RTF Parolees have demonstrated, the record is replete with examples of DOCCS employees failing to explain the very purpose of their facility. *Id.* at 12, 39. Critically, DOCCS employees revealed the curriculum used was not updated, as had been the expectation of the curriculum's author, and other employees could not explain or demonstrate how their work aligned with or *even satisfied* statutory requirements. *Id.* at 11-12, 35-40. Although such statements may not be determinative here, it is clear they are relevant to the question of whether the "actual operation and program activities" at Fishkill are aligned with governing statutes.

4. The Treatment of Fishkill's General Population and RTF Population Is Relevant to DOCCS's Compliance with Correction Law § 70

DOCCS also contends that similarities in treatment between RTF residents and Fishkill's general population are irrelevant because "the Correction Law does not require DOCCS to treat RTF residents differently" from the general population with respect to the examples provided by RTF Parolees. Appellants' Reply Br. at 27. But this claim similarly fails because Correction Law § 70(4) specifically conditions the co-location of "two or more correctional facilities," as Fishkill purports to do, on keeping separate

and apart from each other “at all times” the incarcerated individuals of each facility. At no time has DOCCS claimed that Fishkill’s operations fall within the limited exceptions contained in Correction Law § 70(4), and even were it to do so, record evidence suggests that the facility may even lack the capacity to separate the two populations. *See* Petitioners’ Answering Br. at 12 (citing R. at 546 (McNamara Aff., Ex. M (Urbanski Tr. 27:11-29: 20)); *see also* R. at 525-26 (McNamara Aff., Ex. K (Heady Tr. 41:16-43:19)). Again, the commands of the Correction Law are clear, and just as clearly, DOCCS fails to heed them at Fishkill.

**B. *Matter of Gonzalez* Does Not Foreclose Relief Here**

The Court can take action to grant RTF Parolees’ requested relief. DOCCS contends that *Matter of Gonzalez* forecloses RTF Parolees’ claims because the Court of Appeals has found different claims, addressing a different facility, “statutorily compliant.” Appellants’ Reply Br. at 20-23. DOCCS is wrong here for three reasons: (1) DOCCS misconstrues the relevant holding in *Gonzalez* because the Court of Appeals never held that the Woodbourne facility was statutorily compliant; (2) Supreme Court, in recognizing that this case addressed a different facility on different facts, distinguished this case on the basis of the factual record—a contention

DOCCS does not directly challenge; and (3) the Court of Appeals has permitted this case to continue to a ruling on its merits.

First, as RTF Parolees have explained, the Court of Appeals in *Gonzalez* did not find that the programming at Woodbourne was statutorily compliant. Petitioners' Answering Br. at 28 (citing *Gonzalez v. Annucci*, 32 N.Y.3d 461, 475 (2018)). Indeed, it did not even reach the question of whether the programmatic offerings at Woodbourne were "statutorily compliant" in a manner foreclosing other suits against other facilities. Instead, the Court of Appeals held that there was a failure of proof on account of "insufficient record evidence to establish . . . the conditions of [petitioner's] placement at that facility were in violation of the agency's statutory or regulatory obligations." *Id.* Accordingly, DOCCS's rebuttal argument here rests on a reading of *Gonzalez* that is unsupported by the opinion itself.

Second, DOCCS's contention that "[t]here are no material legal or factual distinctions to be drawn" is belied by Supreme Court's finding that "the record in *Gonzalez* is factually distinct from the record before this Court." (R. at 32.) In seeking to distract the Court from this finding, DOCCS exclusively relies upon comments from an amicus brief submitted by co-counsel noting that the claims in this matter "closely parallel" the claims in

*Gonzalez*. But DOCCS makes no claim that Supreme Court’s appraisal of the record in this case (and its concomitant finding that the record is distinguishable from *Gonzalez*) was flawed in any manner. This critical failure to identify any error in Supreme Court’s finding, let alone support any such claim of error, merely underscores that Supreme Court’s finding on this issue is unchallenged and conclusive. *See Matter of Goodhue Wilton Props., Inc. v. Assessor of the Town of Wilton*, 121 A.D.3d 1360, 1362 (2014) (finding that because “Supreme Court’s factual finding is explained and supported by the record, it is entitled to deference”).

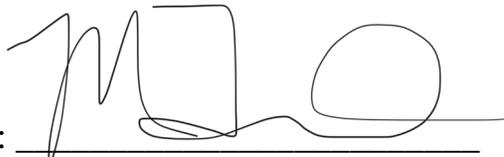
Finally, the Court of Appeals specifically noted the existence of this suit challenging the Fishkill Correctional Facility in *Gonzalez* and did nothing to preclude resolving this suit on its merits. Petitioners’ Answering Br. at 28 (citing *Gonzalez*, 32 N.Y.3d at 475 n.6). If anything, this decision by the Court of Appeals forecloses DOCCS’s argument here, not RTF Parolees’. In close, the Court of Appeals decision in *Gonzalez* in no way precludes resolving this litigation on its own record and merits.

### **CONCLUSION**

For the foregoing reasons, petitioners respectfully request that the Court enter an order reversing the Decision as to whether DOCCS has met its

obligations to provide “appropriate” opportunities to RTF residents within the Fishkill prison or, in the alternative, vacate Supreme Court’s grant of summary judgment to DOCCS and remand for further proceedings on the question of DOCCS’s compliance with Correction Law § 73 at Fishkill.

Dated: January 13, 2022  
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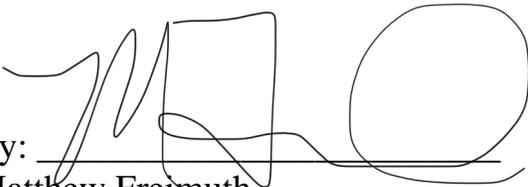
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**PRINTING SPECIFICATIONS STATEMENT  
PURSUANT TO 22 N.Y.C.R.R. § 1250.8[J]**

The foregoing brief was prepared on a computer using double-spaced, 14-point Times New Roman font. It consists of 3,078 words, excluding those excepted under 22 N.Y.C.R.R. § 1250.8(f)(2).

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