Albany County Clerk's Index No. 2534-16
Appellate Division–Third Department Case No. 531036

Court of Appeals

of the

State of New York

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

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.

MOTION FOR LEAVE TO APPEAL

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– and –

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COURT OF APPEALS STATE OF NEW YORK

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

Petitioners-Respondents-Cross Appellants,

v.

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

Respondents-Appellants-Cross Respondents.

A.D. No. 531036

NOTICE OF MOTION FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE that upon the annexed affirmation of Matthew Freimuth, the undersigned will move this Court, at a term thereof to be held at the Court of Appeals Hall, 20 Eagle Street, Albany, New York, on August 29, 2022, or as soon thereafter as counsel can be heard, for an order granting Petitioners-Respondents-Cross Appellants Richard Alcantara, Lester Classen, Jackson Metellus, Cesar Molina, Carlos Rivera, and David Sotomayor leave to appeal the March 31, 2022 Order of the Supreme Court, Appellate Division, Third Department,

which granted Respondents-Appellants-Cross Respondents' motion for summary judgment in its entirety and dismissed the complaint.

PLEASE TAKE NOTICE that the motion will be submitted on the papers without oral argument.

Dated: August 15, 2022
New York, New York

By: 

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COURT OF APPEALS STATE OF NEW YORK

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

Petitioners-Respondents-Cross Appellants,

v.

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

Respondents-Appellants-Cross Respondents.

A.D. No. 531036

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

MATTHEW FREIMUTH, an attorney admitted to practice before the courts of this State, affirms the following under penalty of perjury:

1. I am an attorney admitted to practice before the courts of the State of New York and a partner of the law firm of Willkie Farr & Gallagher LLP, located at 787 Seventh Avenue, New York, New York 10019, counsel to Petitioners-Respondents-Cross Appellants Richard Alcantara, Lester Classen, Jackson Metellus, Cesar Molina, Carlos Rivera, and David Sotomayor in this appeal.

2. I respectfully submit this Affirmation in support of Petitioners-Respondents-Cross Appellants' motion for leave to appeal to the Court of Appeals (the "Motion") pursuant to 22 NYCRR § 500.22.

3. In 2016, Petitioners, individuals under post-release supervision and held at the Fishkill Correctional Facility, filed a CPLR Article 78 proceeding alleging, among other things, that they had been illegally confined at Fishkill and that Respondents Annucci and Stanford had failed to perform the duties required of them by statute because they did not provide adequate educational and vocational programming, nor did they provide assistance in securing housing compliant with the Sexual Assault Reform Act.

4. Respondents answered and moved to dismiss the Article 78 petition. Supreme Court denied their motion and converted the case to a declaratory judgment action. *See Alcantara v. Annucci (Alcantara I)*, 55 Misc. 3d 1216(A), 2017 N.Y. Slip Op. 50610(U) at 4, 8 (Sup. Ct. Albany Cnty. 2017).

5. Following discovery, Petitioners filed a note of issue seeking a trial without jury on the remaining claims, and Respondents moved for summary judgment. In a decision and order issued on December 20, 2019, Supreme Court granted partial summary judgment to both parties. *Alcantara v. Annucci (Alcantara II)*, 66 Misc. 3d 850, 852 (Sup. Ct. Albany Cnty. 2019). A true and correct copy of

Supreme Court's decision is attached as Exhibit A, and a true and correct copy of the notice of entry, served via USPS, is attached as Exhibit B.

6. Both sides appealed Supreme Court's decision and in an order entered on March 31, 2022, the Appellate Division, Third Department, issued its decision and judgment granting summary judgment in favor of Respondents and dismissing the complaint. A true and correct copy of the Appellate Division's decision and order (the "Order") is attached as Exhibit C.

7. On April 27, 2022, Petitioners were served with the notice of entry of the Order via NYSCEF. A true and correct copy of the Notice of Entry is attached as Exhibit D.

8. On May 27, 2022, Petitioners sought leave to appeal to this Court from the Appellate Division pursuant to CPLR 2221 and 5602(b)(1) and 22 NYCRR § 1250.16. A true and correct copy of the Petitioners' motion and corresponding NYSCEF confirmation notice is attached as Exhibit E.

9. On July 14, 2022, the Appellate Division issued an order denying leave to appeal the Order. A true and correct copy of the Appellate Division's decision and order is attached as Exhibit F.

10. On July 15, 2022, Petitioners were served with the notice of entry of the Appellate Division order denying leave to appeal with notice of entry via NYSCEF. A true and correct copy of the notice of entry is attached as Exhibit G.

11. The Motion is timely, as it is being served and filed within 30 days of the Notice of Entry of the Appellate Division's order denying leave to appeal. CPLR 5513(b).

12. Petitioners seek leave to appeal from an order of the Appellate Division which finally determines the action and which is not appealable as of right, and as such, this Court has jurisdiction of the Motion and of the proposed appeal. CPLR 5602(a)(1)(i).

13. In the Motion, Petitioners seek leave to appeal to the Court of Appeals for a determination of the following legal issues of public importance:

a. Whether the Fishkill Correctional Facility satisfies the criteria governing residential treatment facilities as established by Correction Law § 2(6).

b. Whether the Fishkill Correctional Facility satisfies the criteria governing residential treatment facilities as established by Correction Law § 73.

c. Whether individuals held at a residential treatment facility under Correction Law § 73(10) can be held at the Fishkill Correctional Facility without the Department of Corrections and Community Supervision permitting or facilitating access to community-based employment, educational, and training opportunities for those residents.

14. Good cause to grant leave for this appeal exists because Petitioners, individuals who are on *post-release supervision* but held in a medium-security correctional facility and those similarly situated, are fully at the mercy of state authorities and it is incumbent upon the judiciary to ensure the Department of Corrections and Community Supervision ("DOCCS") is held accountable and responsible for its treatment of citizens in its care.

15. In this litigation, both Supreme Court and the Appellate Division have relied upon the significant discretion granted to DOCCS under the Correction Law to operate residential treatment facilities to grant relief to the State. In doing so, they have relied upon language in Correction Law § 73 that specifically applies to inmates—now incarcerated individuals. 2021 N.Y. AB 2395.

16. But Petitioners' briefing before both Supreme Court and the Appellate Division demonstrated that DOCCS's authority over Petitioners and those similarly situated arises from Correction Law § 73(10), which permits DOCCS to use residential treatment facilities as *residences* for those under *parole supervision*. Petitioners' Opposition to Respondents' Motion for Summary Judgment at 6; Respondents-Cross Appellants' Answering Brief at 7. A true and correct copy of Petitioners' Opposition to Respondents' Motion for Summary Judgment is attached as Exhibit H, and a true and correct copy of Respondents-Cross Appellants' Answering Brief is attached as Exhibit I.

17. As Petitioners explained, Section 73(10) of the Correction Law was amended in 2011 to clarify that DOCCS's authority was not limited to parolees released by the Parole Board but included individuals with the concurrent ability to reside in the community, such as those on post-release supervision. Ex. I at 22-23.

18. Petitioners' briefing before the Appellate Division also highlighted this Court's decision in *People ex rel. McCurdy v. Warden, Westchester Cnty. Corr. Facility*, reiterating that "RTF residents and inmates are accorded different rights under Correction Law § 73," and noting that "individuals temporarily residing in an RTF under Correction Law § 73(10) are subject only to the conditions of community supervision imposed on them." 36 N.Y.3d 251, 260-61 (2020); *see* Ex. I at 39.

19. Despite this, the Appellate Division granted relief to DOCCS and failed to explain why DOCCS's discretion with respect to incarcerated individuals assigned to a residential treatment facility and co-located with a general confinement facility likewise extended to Petitioners who were not similarly situated and who were remanded to DOCCS's custody under the limited authorization contained in Correction Law § 73(10). *See McCurdy*, 36 N.Y.3d at 261 ("Thus, respondents properly concede that DOCCS had no authority to require petitioner to continue to reside in an RTF after he obtained suitable housing.").

20. Petitioners' principal contention before Supreme Court and the Appellate Division was that DOCCS's limited custodial authority only applied to

fully compliant residential treatment facilities, and based on the significant evidence in the record, the Fishkill Correctional Facility was a residential treatment facility "in name only." Ex. H at 13-14; Ex. I at 33. Briefing focused on the programmatic requirements for residential treatment facilities established in a definitional section, Correction Law § 2(6), which requires residential treatment facilities to be located where community-based "employment, educational and training opportunities are readily available for persons who are on parole or conditional release," as well as provisions focused on incarcerated individuals in Correction Law § 73 describing the programmatic offerings that must be made available at a residential treatment facility. But these illustrations of DOCCS's failure to meet certain statutory requirements were in service of Petitioners' argument that DOCCS had failed to accord Petitioners the rights afforded to them as residents of a residential treatment facility on community supervision, "as opposed to an inmate." *McCurdy*, 36 N.Y.3d at 261 (quoting *Gonzalez v. Annucci*, 32 N.Y.3d 461, 475 (2018)).

21. As such, the Appellate Division erred in failing to address a central issue in this matter: whether the conditions of placement at Fishkill are suitable for "persons who are on community supervision," not incarcerated individuals, who are residents under the authority granted to DOCCS under Correction Law § 73(10).

22. The Appellate Division further erred in finding that Correction Law § 2(6) establishes only locational, and not programmatic, requirements for residential

treatment facilities, and in determining that the conditions at Fishkill fell within the discretion granted under certain provisions of Correction Law § 73 governing the treatment of incarcerated individuals, without considering whether they were appropriate for the needs of residential treatment facility residents on community supervision. Order at 3.

23. This Court specifically left open the question of what rights apply to residential treatment facility residents on community supervision in both *Gonzalez v. Annucci*, 32 N.Y.3d 461 (2018) and *McCurdy*, 36 N.Y.3d 251 (2020), and because it remains unaddressed in the Order, this case will present the Court of Appeals with an opportunity to address this urgent issue of public importance.

Dated: August 15, 2022
New York, New York

Matthew Freimuth

EXHIBIT A

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DENISE A. HARTMAN
Acting Justice of the Supreme Court

EMILY LUSIGNAN
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JOANNE LOCKE
Secretary

December 20, 2019

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Re: Alcantara et al. v Annucci, et al.
Index No. 2534-16

Dear Counselor:

Enclosed is the executed Decision and Judgment with regard to the above matter. The original is being forwarded to you for filing and service. A copy of the decision and the original supporting papers have been sent to the County Clerk for placement in the file.

Very truly yours,

Joanne Locke

Joanne Locke
Secretary to Judge

Enc.
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COPY

STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

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

Plaintiffs,

DECISION AND JUDGMENT

-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,

Defendants.

Hon. Denise A. Hartman, AJSC

Index No. 2534-16
(RJI No. 01-16-ST7826)

December 20, 2019

APPEARANCES:

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Hartman, J.

Plaintiffs commenced this proceeding against defendants Anthony J. Annucci, Acting Commissioner of the New York State Department of Corrections and Community Supervision (DOCCS), and Tina M. Stanford, Commissioner of the New York State Board of Parole (collectively, State defendants), claiming that they were illegally confined at the Fishkill Correctional Facility, designated a Residential Treatment Facility (RTF), beyond the six-month period prescribed by Penal Law § 70.45 (3); that DOCCS provided inadequate assistance in finding suitable post-release housing; and that the Fishkill RTF is not a community-based facility that provides programming and reintegration opportunities required by Correction Law § 73.

In its decision and order dated February 24, 2017, this Court denied plaintiff's claims that DOCCS unlawfully detained them at the Fishkill RTF and provided them inadequate assistance in finding suitable post-release housing. But the Court held that plaintiffs raised material questions of fact regarding their claim that the Fishkill RTF is not community-based and does not offer programming and reintegration opportunities in compliance with Correction Law § 73. The Court also held that, while moot as to the named plaintiffs, the claim qualifies as an exception to the mootness doctrine. It

converted the proceeding to a declaratory judgment action and allowed the remaining claim to proceed to discovery.[1]

The parties have now completed discovery. According to plaintiffs, the State defendants produced thousands of pages of documents responsive to their interrogatories and document requests. And plaintiffs deposed thirteen current or former DOCCS employees, including offender rehabilitation counselors (ORCs), parole officers, program directors, and deputy commissioners. Plaintiffs Alcantara and Sotomayor were also deposed. On November 27, 2018, the Court of Appeals decided *Matter of Gonzalez v Annucci*, 32 NY3d 461 [2018]), which addressed and rejected a similar claim that the Woodbourne RTF failed to comply with statutes governing residential treatment facilities. Plaintiffs have filed a certificate of trial readiness.

Now pending before the Court is the State defendants' motion for summary judgment, which plaintiffs oppose. The Court heard oral argument on the motion on September 25, 2019. For the reasons discussed below, the Court grants the State defendants partial summary judgment. Plaintiffs have not shown that the conditions and program opportunities within the Fishkill RTF are non-compliant with the statute. However, after searching the record,

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[1] The Court in its February 24, 2017 decision and order also denied the petition insofar as it sought relief against the New York City respondents for their failure to provide enough SARA-compliant housing at shelter locations in New York City to accommodate the release of sex offender parolees.

the Court grants partial summary judgment to plaintiffs and declares that DOCCS is failing to provide for RTF parolees adequate community-based work and educational opportunities outside the Fishkill Correctional Facility environs as required by statute.

Background

Plaintiffs Richard Alcantara, David Sotomayor, Jackson Metellus, Cesar Molina, Carlos Rivera, and Lester Classon were convicted of sex offenses that resulted in determinate prison sentences followed by post-release supervision. After completing their determinate terms of imprisonment, they were detained in DOCCS's custody at the Fishkill RTF pursuant to Penal Law § 70.45 (3). Plaintiffs contend that while they were residents in the Fishkill RTF, they were treated as inmates in a prison-like setting, far from the communities where they intend to return; that they were not offered meaningful programming or work opportunities; and that their mandated programs merely repeated the classes offered in prison. They aver that RTF parolees are subject to the same institutional rules and disciplinary proceedings as inmates in general confinement, and share the same gym, exercise yard and mess hall. Plaintiffs assert that the only employment offered to RTF parolees is a "porter pool," where they can perform menial janitorial jobs and a limited ability to work at the Correctional Facility Storehouse. They claim they have no opportunities to participate in work assignments in a community setting.

The State defendants counter that they are committed to providing education and training to RTF parolees, and they point to Directive No. 0051, which lists the programs available at the facility. Defendants assert that they offer RTF parolees work opportunities not available to inmates, where RTF parolees are paid $10 per day, a rate far higher than that paid to inmates. Specifically, they argue, RTF parolees are eligible to participate in a work assignment at the Correctional Facility Storehouse located outside the facility confines and are transported from the facility once each week to visit parole officers.

Statutory Background

The relevant statutes are as follows. Correction Law § 2 (6) defines "residential treatment facility" as:

> "6. 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."

And Correction Law § 73 (1), (2), and (3) provide:

> "1. The commissioner may transfer any inmate of a correctional facility who is eligible for community supervision or who will become eligible for community supervision within six months after the date of transfer or who has one year or less remaining to be served under his or her sentence to a residential treatment facility and such person 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. While outside the facility he or she shall be at all times in the custody of the department and under its supervision."

"2. The department shall be responsible for securing appropriate education, on-the-job training and employment for inmates transferred to residential treatment facilities. The department also shall supervise such inmates during their participation in activities outside any such facility and at all times while they are outside any such facility."

"3. Programs directed toward the rehabilitation and total reintegration into the community of persons transferred to a residential treatment facility shall be established. Each inmate shall be assigned a specific program by the superintendent of the facility and a written memorandum of such program shall be delivered to him or her."

DOCCS has designated the Fishkill Correctional Facility, a medium security facility located in the City of Beacon in Dutchess County, as a "general confinement facility," a "work release facility," and a "residential treatment facility" (7 NYCRR 100.90 [c] [3]; Directive No. 0051). DOCCS officials have stated that Fishkill Correctional Facility was designated a residential treatment facility based on its relative proximity to New York City and other communities where offenders intend to return, programming availability, and the adequacy of staffing for work crews.

The State Defendants' Summary Judgment Motion

In support of their motion for summary judgment, the State defendants argue that the Court of Appeals decision in *Matter of Gonzalez v Annucci* (32 NY3d 461 [2018]) is dispositive of plaintiffs' claims. They also proffer evidence in support of their position that the Fishkill RTF provides adequate educational and rehabilitative services geared toward helping RTF parolees reintegrate into the community. The State defendants rely heavily on the affirmation of Beverly Lockwood,[2] an ORC who works at the Fishkill RTF, and the deposition testimony of plaintiffs Alcantara and Sotomayor.

Ms. Lockwood averred that DOCCS offers RTF parolees a 28-day RTF Program, attaching the official 2014 Residential Treatment Facility Curriculum. The RTF Program consists of nine modules, entitled: (1) Sex Offender Registration Act Procedures, (2) Employment, (3) Healthy Relationships and Activities, (4) Life Skills, (5) Available Community Resources, (6) Core Values and Beliefs, (7) Understanding Feelings, (8) Problem-Solving, and (9) Relapse Prevention. She explained that the RTF program is delivered in a 16-participant group setting during a three-hour

[2] Plaintiffs complain that DOCCS did not disclose the identity of Ms. Lockwood during discovery, and they had no opportunity to depose her. Defendants assert that Ms. Lockwood was recently hired, and her identity was disclosed during another ORC's deposition testimony well before plaintiffs filed their notice of trial readiness, but plaintiffs chose not to depose her. The Court will consider Ms. Lockwood's affidavit, along with the deposition testimony of other ORCs submitted by plaintiffs and defendants in reply.

session, four days per week. ORCs provide worksheets, teach techniques, and facilitate discussions in furtherance of each module. Parolees are paid to participate in the Program. The RTF Program is not available to DOCCS inmates and, according to Ms. Lockwood, it differs from other correctional re-entry programs in that it is "tailored to the challenges that sex offenders are likely to face when released to the community." Plaintiffs Alcantara and Sotomayor testified that they attended portions of the 28-day Program, but they found it not useful, not tailored to sex offenders, and duplicative of a re-entry program that they attended before being paroled to the Fishkill RTF.

Ms. Lockwood further averred that some RTF parolees are assigned to crews that work outside the facility at the Facility Storehouse. RTF parolees are paid $50 per week for their work there, 80% of which is automatically saved in a housing fund and cannot be garnished. Only RTF parolees, not inmates, may participate in this work assignment. Parolees who participate in the Facility Storehouse work assignment are transported weekly to meet with their parole officers in Poughkeepsie. Plaintiff Sotomayor admitted that during his confinement at the Fishkill RTF, he worked on a crew at the Facility Storehouse five days per week from 8 a.m. to 2 p.m., was transported to meet with his parole officer in Poughkeepsie, and was paid $10 per day for his work at the Facility Storehouse. Plaintiff Alcantara testified at his deposition that while he was confined at the Fishkill RTF he worked as a porter five days per

week for 3 ½ to 7 hours per day, and that he was paid at a rate higher than prison inmates. He did not apply to work on the Storehouse work crew because working outside of the facility would have caused him to feel frustrated at his lack of freedom.

Plaintiffs oppose the State defendants' motion claiming that the evidence proffered by defendants about the 28-day RTF Program and RTF work opportunities fall far short of demonstrating compliance with the statutes. Regardless, plaintiffs argue, disputed issues of fact about how these programs are implemented preclude summary judgment at this stage of proceedings. Plaintiffs submitted deposition testimony of numerous DOCCS employees, including ORCs, program managers, parole officers, and deputy superintendents, as well as other evidence in support of their claims of non-compliance.

Plaintiffs submitted the deposition testimony of Stephen Urbanski, Deputy Superintendent of Security at Fishkill Correctional Facility, and Mark Heady, a supervising ORC at the Fishkill RTF, who stated that there are virtually no opportunities for RTF parolees for employment, training, or programming outside the facility in Poughkeepsie, Beacon, or other nearby communities. The only exception is a work assignment at the Facility Storehouse, located less than one-tenth of a mile outside the prison fence, but on the Fishkill Correctional Facility property. The work at the Facility

Storehouse mainly involves loading and unloading deliveries to the Correctional Facility and groundskeeping. Only eight RTF parolees are assigned to work there at any time, generally from 8 a.m. to 2 p.m. RTF parolees assigned to the Storehouse work crew were being transported to visit parole officers in Poughkeepsie, but that practice may have diminished because parole officers from Poughkeepsie now come to the RTF to meet with them. According to Urbanski, RTF parolees are not permitted to participate in work release or furlough programs in the nearby communities, even though such programs are available to the general inmate population. As for work programs within the Correctional Facility, plaintiffs produced deposition testimony showing limited work opportunities for RTF parolees. Some RTF parolees are assigned porter jobs, which pay $5 per day, but RTF parolees are effectively excluded from many work-related opportunities within the facility available to the general inmate population.

Plaintiffs acknowledge that DOCCS offers a 28-day RTF Program for RTF parolees. But they argue that the deposition testimony shows that the 28-day Program is inadequate and redundant of programming provided to inmates before their release to the RTF as parolees. While the first module of the 28-day Program is specifically designed for sex offenders, plaintiffs submitted the deposition testimony of several ORCs who stated that the other modules were not particularly tailored to issues encountered by sex offender

parolees. These and other depositions provided to the Court suggest that discussion of the RTF Program topics as they relate to sex offender paroles is uneven, and depends on the training and orientation of the ORC conducting the classes and facilitating the group discussions, as well as the interests of the attending RTF parolees in discussing the topics during the assigned classes. Relying on the deposition testimony of Jeff McCoy, Deputy Commissioner of Program Services, and Shelly Mallozzi, both of whom were involved in the creation of the RTF Program, plaintiffs contend that the 28-day Program is a duplicative, "condensed version" of the sex offender programs offered to those serving their sentences. Plaintiffs argue further that the modules related to employment and housing do not include up-to-date materials reflecting current housing and employment opportunities in the communities where RTF parolees intend to reside. According to Ms. Mallozzi, the original housing and employment ads used to facilitate exercises in the relevant modules should have been updated but have not been since the Program's creation in 2014.

Finally, plaintiffs contend that the general conditions of confinement for RTF parolees are the same as inmates. In their words, the Fishkill RTF "is a prison in all but name only." According to the deposition testimony provided by Deputy Superintendent Urbanski and Mark Heady, Supervising ORC, RTF parolees wear green uniform pants, dine and exercise with general population

inmates, and are subject to the same rules regarding visitation, discipline, and grievance processes as general population inmates. Although there is a designated dorm that provides housing for about 28 RTF parolees, most RTF parolees live in dorms also housing the general inmate population. According to Mr. Heady, about 85 to 100 RTF parolees were assigned to the Fishkill RTF at the time of his deposition. But the deposition testimony shows that there are few distinctions between the designated sex offender dorm and the dorms occupied by general population inmates.

Analysis

The proponent of a summary judgment motion must "ma[k]e a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Matter of Eighth Jud. Dist. Asbestos Litig.*, 33 NY3d 488, 196 [2019], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "[T]he facts must be viewed in the light most favorable to the non-moving party, and every available inference must be drawn in the non-moving party's favor" (*id.* [internal quotation marks, brackets, and citations omitted]; *see De Lourdes Torres v Jones*, 26 NY3d 742, 763 [2016]; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). "If the moving party meets this burden, 'the burden then shifts to the non-moving party to establish the existence of material issues of fact which require a trial of the action'" (*id.* [internal quotation marks and citations

omitted]; *see Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]; *Vega v Restani Constr. Corp.*, 18 NY3d at 503). And, as plaintiffs suggest, the Court has the authority to search the record and grant summary judgment to the nonmoving party (*see* CPLR 3212 [b]; *Digesare Mech., Inc. v U.W. Marx, Inc.*, 176 AD3d 1449, __, 2019 NY Slip Op 07668, *4 [3d Dept 2019]; *Matter of Shambo*, 138 AD3d 1215, 1216 [3d Dept 2016]).

***Matter of Gonzalez v Annucci* Is Instructive, But Not Dispositive of Plaintiffs' Claims.**

The State defendants contend that the Court of Appeals decision in *Matter of Gonzalez v Annucci* (32 NY3d 461 [2018]) is dispositive of this case. This Court disagrees. In *Gonzalez*, petitioner similarly claimed that he was being incarcerated in a facility "that was not community-based as it was well outside of the Manhattan community to which he planned to return"; that "he was confined under the same restrictions as inmates who were serving their prison sentences at that same medium security facility"; and that "he did not receive any rehabilitative programming directed toward his reintegration into the community while at Woodbourne as required by Correction Law § 73" (*Matter of Gonzalez v Annucci*, 32 NY3d at 467-468). Petitioner conceded that he participated in Woodbourne's RTF Program for a portion of his stay at that facility, but claimed that "the program was no different from the 'Phase Three' program he had already completed as part of his sentence of imprisonment – a

program that was required to be completed by all inmates prior to their release from incarceration" (*id.* at 468). Petitioner also admitted that he was assigned to an outside work crew for some period of time. The majority at the Court of Appeals concluded that petitioner had not shown a violation of DOCCS's statutory obligations:

> [W]e agree with the Appellate Division that there was insufficient record evidence to establish that DOCCS' determination to place petitioner at the Woodbourne RTF was irrational or that the conditions of his placement at that facility were in violation of the agency's statutory or regulatory obligations. Notably, the record adequately establishes that, based on institutional considerations, Woodbourne was the closest available RTF in which to place petitioner. Additionally, the record demonstrates that petitioner was accorded the rights of a resident of an RTF, as opposed to an inmate (*id.* at 475).

Importantly, however, the majority acknowledged in a footnote that "similar claims relating to Fishkill Correctional Facility as an RTF are pending in discovery proceedings before Albany County Supreme Court," citing this case (*id.* at 475 n 6). This Court construes the majority's footnote as permitting, not foreclosing, a fuller development of the record in this case concerning conditions and programming at the Fishkill RTF.

The State defendants further argue that the *Alcantara* plaintiffs "concede[d] that *Gonzalez* is dispositive" of their claim in their submissions amici curiae to the Court of Appeals in *Gonzalez*. It is true that plaintiffs argued that the available evidence establishes that the conditions at the two

facilities are "almost the same" and that a decision in one would "inevitably" apply to both. But in its prior decision, this Court held, at the State defendants' urging, that petitioners lacked standing to raise their RTF-compliance with regard to the Woodbourne RTF, either individually or in a representative capacity, because the petition lacked allegations that any of the petitioners were confined to the Woodbourne RTF. The Court reasoned that factual questions about conditions at each facility undermine any argument that a decision regarding their Fishkill RTF-compliance claim would be determinative of the Woodbourne RTF-compliance claim and, therefore, dismissed all claims related to the Woodbourne RTF.

In short, preclusion principles do not apply because the *Alcantara* plaintiffs were not parties to the *Gonzalez* litigation, only amici, and because the factual record in this case differs from the record before the Court in *Gonzalez* (*see Matter of Dunn,* 24 NY3d 699, 704 [2015]; *Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 455-456 [1985]). While the Court of Appeals decision in *Gonzalez* is not dispositive, however, it constitutes highly instructive authority for analyzing plaintiffs' Fishkill RTF-compliance claim, as discussed below.

Plaintiffs' Claim that DOCCS Unlawfully Treats RTF Parolees as Inmates Still Serving Their Sentences Lacks Merit.

Correction Law § 2 (6) defines "residential treatment facility" 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 released on parole who intend to reside in or near that community when release" (emphasis added). The Legislature plainly contemplated that a residential treatment facility be a "correctional facility," or an area within a "correctional facility" (*see also* Correction Law § 70 [6] [b] [ii] [RTF serves a "function" within a correctional facility]). Given the express authorization to locate residential treatment facilities at correctional facilities, the fact that RTF parolees are treated much the same as general population inmates, particularly within the confines of a medium security correctional facility where parolees are afforded more freedoms than more secure correctional facilities, does not violate the statute.

The record discloses that Fishkill Correctional Facility is a medium security facility. RTF parolees are required to wear the same clothing and are subject to the same disciplinary rules and procedures and constraints as inmates who reside at the medium security facility. Plaintiffs and similarly situated sex offender parolees may, upon notifying appropriate correction officials, visit the library and gym facilities without escort. And while Fishkill contains only 28 beds in the sex offender dorm, the entire facility is classified as medium security and plaintiffs testified at their depositions that some sex offenders prefer to live in the general population to avoid the stigma associated

with sex offenders. These facts do not demonstrate that plaintiffs were not accorded the rights of a resident of an RTF (*see Matter of Gonzalez v Annucci*, 32 NY3d at 474 [finding with respect to similar factual allegations about conditions at Woodbourne RTF that "the record demonstrates that petitioner was accorded the rights of a resident of an RTF, as opposed to an inmate"]; *Matter of Allen v Annucci*, Sup Ct, Albany County, May 8, 2018, Platkin, J., index No. 8224-17 at p 9 [holding conditions plaintiffs complain about "are inherent in DOCCS's lawful decision to co-locate an RTF within a medium security correctional facility"]).

Nor does the fact that the RTF at Fishkill Correctional Facility is located 60 miles from New York City violate the statute's command that the RTF be "community-based." In *Matter of Gonzalez v Annucci*, the Court of Appeals rejected petitioners' similar argument that the Woodbourne RTF was not "community-based as it was well outside of the Manhattan community to which he planned to return" (32 NY3d at 468, 474). The Woodbourne RTF is located more than 100 miles from New York City, where most RTF parolees plan to return. Perforce, the Fishkill RTF, which is nearer to New York City than Woodbourne RTF, is not non-compliant merely because of its distance from New York City. Thus, the Court rejects plaintiffs' claim that the RTF at Fishkill Correctional Facility is not community-based in the sense that it is too far from New York City, where RTF parolees intend to return.

Plaintiffs Have Not Raised a Question of Material Fact as to Whether DOCCS Is Failing to Provide Adequate Programming to RTF Parolees Within the Facility.

Correction Law § 73 (3) requires DOCCS to establish "[p]rograms directed toward the rehabilitation and total reintegration into the community of persons transferred to a residential treatment facility." Each inmate must be "assigned a specific program by the superintendent of the facility and a written memorandum of such program shall be delivered to him or her." Plaintiffs have not established otherwise or raised a question of fact as to whether DOCCS offers programming for RTF parolees within the Correctional Facility in compliance with the statute.

The evidence provided shows that, upon arriving at the Fishkill RTF, RTF parolees participate in an orientation program and meet with their ORC to discuss program assignments. The ORC then coordinates with programming staff to finalize a program for each parolee. RTF parolees are generally assigned to the 28-day RTF Program for 7 or 8 weeks, simultaneously with or followed by a work assignment. RTF parolees, upon request, may also be assigned to educational programming for college or high school equivalency courses. The evidence shows that working as a porter or on the Facility Storehouse crew are the primary job assignments for RTF parolees. But the testimony shows that RTF parolees can also be assigned to other vocational programming inside the Fishkill Correctional Facility, although these

assignments appear to be available only upon request and some programming available to general population inmates may not be available to RTF parolees. These opportunities provide some amount of training for soon-to-be-released parolees to learn or reinforce their skills related to employment, such as being on time, taking direction, and completing tasks as directed. RTF parolees are paid at significantly higher rates than general population inmates for their participation in programming. Their earnings are set aside for use upon release and not subject to garnishment, reinforcing the value of earning and saving money. And the evidence shows that RTF parolees have access to ORCs and local parole officers, who in turn coordinate with parole officers in the communities where RTF parolees intend to live upon release to the community.

Viewing the programming as a whole, the Court finds that the State defendants have met their burden, prima facie, of establishing that the programs offered to RTF parolees within the facility or on facility grounds are at least minimally adequate and do not violate DOCCS's obligations under the Correction Law. DOCCS must be given substantial leeway to develop and implement programs in furtherance of penological and rehabilitative objectives for inmates and parolees in its custody (*see Turner v Safley*, 482 US 78, 84-85 [1987]; *Matter of Bezio v Dorsey*, 21 NY3d 93, 104 [2013]; *Matter of Griffin v Coughlin*, 88 NY2d 674, 710 [1996], *cert denied* 519 US 1054 [1997]). And the programming opportunities must be evaluated in the context of the short-term

and indefinite duration of most RTF residencies, notwithstanding plaintiffs' evidence that some are required to stay longer when they have difficulty finding SARA compliant housing. The courts are ill-equipped to micromanage the programming offered in correctional facilities. Nor are the courts in a position to oversee the management and training of ORCs and parole officers. Nothing in the Correction Law requires programming tailored to sex offenders, or the use of current newspaper ads for teaching RTF parolees how to find jobs and housing when they are released to the community, or as tools to teach budgeting in a more abstract sense. Thus, plaintiffs' complaints about the efficacy of the 28-day RTF Program, even taken as true, do not raise a question of fact about whether DOCCS is complying with its statutory obligations to establish "[p]rograms directed toward the rehabilitation and total reintegration into the community of persons transferred to a residential treatment facility" (Correction Law § 73 [3]).

DOCCS Does Not Provide Adequate Opportunities for Reintegration Programs Outside the Facility

The State defendants have not established that DOCCS complies with its statutory obligation to provide community-based opportunities for RTF parolees to help them reintegrate into the community. Reading the controlling sections of the Correction Law together, they reflect an unmistakable legislative intent to provide community-based programming for RTF parolees

in furtherance of the statutory objective to help them reintegrate into the community. Correction Law § 2 (6) expressly defines "residential treatment facility" as a correctional facility consisting of a "community-based residence in or near a community where employment, educational and training opportunities are readily available." Correction Law § 73 (1) provides that a person who has been transferred to an RTF "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," albeit in "the custody of the department and under its supervision." And Correction Law § 73 (2) provides that DOCCS "shall be responsible for securing appropriate education, on-the-job training and employment for inmates transferred to residential treatment facilities. The department also shall supervise such inmates during their participation in activities outside any such facility and at all times while they are outside any such facility."

The State defendants argue that the opportunity for RTF parolees to work at the Facility Storehouse satisfies its obligation to provide "community-based" job training and employment. This Court disagrees. The Facility Storehouse is located on the Fishkill Correctional Facility grounds, less than one tenth of a mile outside of the correctional facility fence. Except for the drivers of the delivery trucks, the work crew has no opportunity to interact

with non-facility personnel, and certainly not in a community setting. And only eight of the nearly 100 RTF parolees can be assigned to the Facility Storehouse work crew at a time. Assuming a two-month assignment, a maximum of 24 RTF parolees can be assigned to work at the Facility Storehouse in any six-month period – the maximum period of residency unless SARA-compliant housing is not found.

Even if the Facility Storehouse work crew could be considered "community-based," the State defendants have proffered no evidence that RTF parolees can avail themselves of other "employment, educational and training opportunities" in the communities of Fishkill, Beacon, Poughkeepsie, or other nearby communities. According to Mr. Urbanski, the Deputy Superintendent of Security at Fishkill, who oversees the work program for RTF parolees, RTF parolees are never "permitted to work off of the prison grounds" and he has "never seen anybody with official work outside the community project storehouse." The fact that DOCCS must supervise RTF parolees who work or train in the community does not mean that DOCCS has the authority to deny all supervised program assignments. The deposition testimony submitted by both parties shows that RTF parolees cannot even participate in work or training assignments or work furloughs available to the general inmate population.

The Court of Appeals' decision in *Matter of Gonzalez* does not require the Court to resolve this issue in the State defendants' favor. There, Gonzalez himself had worked on an "outside work crew" (*Matter of Gonzalez v Annucci*, 32 NY3d 461, 468 [2018]). He claimed that he and the other RTF parolees assigned to the "outside work crew" were stigmatized because it also included inmates serving their original sentences who were aware that RTF parolees were sex offenders being paid at a higher rate than the general population inmates (*see Matter of Gonzalez v Annucci*, 56 Misc3d 1203[A], at * 3 [Ct Cl 2015], *mod* 149 AD3d 256 [3d Dept 2017], *affd as mod* 32 NY3d 461 [2018]). Gonzalez further alleged that he was never allowed to leave the Woodbourne RTF, but DOCCS replied that he never asked to leave (*see Matter of Gonzalez v Annucci*, 32 NY3d at 486-487 [Wilson, J., dissenting]). Thus, the record in *Gonzalez* is factually distinct from the record before this Court, and appears to have been incomplete about the nature and location of the "outside work crew" and the availability of other true, community-based opportunities (*see id.*). On the other hand, the record here is clear and unequivocal that RTF parolees are not permitted to leave facility grounds for employment and the vast majority of RTF parolees have absolutely no opportunity for community-based "employment, educational and training opportunities."

In short, the State defendants have not met their burden on a motion for summary judgment of showing compliance with their statutory obligation to

provide community-based assignments that would further RTF parolees' post-release reintegration into the community where they intend to live. And searching the record, the Court agrees with plaintiffs that summary judgment should be granted in their favor on this aspect of their claim.

Accordingly, it is

ORDERED and ADJUDGED that the State defendants' motion is granted to the extent that the Court declares that plaintiffs have not shown that DOCCS is failing to comply with its obligations under Correction Law § 73 concerning the location, conditions of confinement, and rehabilitative programming within the Fishkill Correctional Facility; and it is

ORDERED and ADJUDGED that the State defendants' motion is denied and summary judgment is granted to plaintiffs to the extent the Court declares that plaintiffs have demonstrated that DOCCS is failing to comply with its obligations under Correction Law § 73 to provide community-based programming and educational, vocational and employment opportunities in the communities outside the Fishkill Correctional Facility environs.

This constitutes the Decision and Judgment of the Court. The original Decision and Judgment is being transmitted to plaintiffs' counsel. All other papers are being transmitted to the County Clerk for filing. The signing of this Decision and Judgment does not constitute entry or filing under CPLR 2220 or

5016, and counsel is not relieved from the applicable provisions of those rules respecting filing and service.

Dated: Albany, New York
December 20, 2019

Denise A. Hartman
Acting Supreme Court Justice

Papers Considered

1. Notice of Motion, dated May 30, 2019;
2. Attorney Affirmation in Support of Defendants' Motion for Summary Judgment, dated May 30, 2019, with Exhibits 1-8;
3. Affidavit of Beverly Lockwood, dated May 30, 2019, with Exhibit A;
4. Memorandum of Law in Support of Defendants' Motion for Summary Judgment, dated May 30, 2019;
5. Affirmation of Christopher J. McNamara, Esq. in Support of Plaintiff's Opposition to Defendants' Motion for Summary Judgment, dated July 17, 2019, with Exhibits A-X;
6. Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment, dated July 17, 2019;
7. Reply Affirmation of Mark G. Mitchell, Esq., dated July 31, 2019, with Exhibits 1-5;
8. Reply Memorandum of Law, dated July 31, 2019;
9. Examination Before Trial of Shelley M. Mallozzi, received September 30, 2019.

EXHIBIT B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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

Plaintiffs,

v.

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

Defendants.

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Index No. 02534-16

Hartman, J.

NOTICE OF ENTRY

PLEASE TAKE NOTICE THAT the within is a true copy of the Decision and Judgment which was duly entered and filed in the Office of the Clerk of the County of Albany, State of New York on the 8th day of January, 2020.

Dated: January 8, 2020
Albany, New York

PRISONERS' LEGAL SERVICES
OF NEW YORK

By: _____
James Bogin

41 State St.
Suite M112
Albany, NY 12207
Tel: (518) 438-8046
jbogin@plsny.org

Attorneys for Plaintiffs

EXHIBIT C

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: March 31, 2022 531036

RICHARD ALCANTARA et al.,
Respondents-
Appellants,
v

ANTHONY J. ANNUCCI, as Acting Commissioner of Corrections and Community Supervision, et al.,
Appellants-
Respondents.

MEMORANDUM AND ORDER

Calendar Date: February 16, 2022

Before: Egan Jr., J.P., Aarons, Pritzker, Reynolds Fitzgerald and Ceresia, JJ.

Letitia James, Attorney General, Albany (Brian D. Ginsberg of counsel), for appellants-respondents.

Willkie Farr & Gallagher LLP, New York City (Kyle Mathews of counsel), for respondents-appellants.

Aarons, J.

Cross appeals from a judgment of the Supreme Court (Hartman, J.), entered January 8, 2020 in Albany County, which, among other things, partially denied defendants' motion for summary judgment dismissing the complaint.

Plaintiffs are residents at Fishkill Correctional Facility, which is a medium security institution administered by the Department of Corrections and Community Supervision (hereinafter DOCCS) and is designated as, among other things, a "general confinement facility" and a "residential treatment facility" (hereinafter RTF) (7 NYCRR 100.90 [c] [1], [3]). Plaintiffs were housed at Fishkill as RTF residents while they were on postrelease supervision for sex offenses but could not find housing that complied with sex offender residency requirements. Plaintiffs commenced this action raising various claims related to their confinement at Fishkill.[1] Following joinder of issue and discovery, defendants moved for summary judgment dismissing the complaint. Plaintiffs opposed and requested that Supreme Court grant them summary judgment upon a search of the record. The court partially granted defendants' motion and, upon a search of the record, awarded summary judgment on a claim to plaintiffs. These appeals ensued.

As to the claim that the rehabilitative program for Fishkill RTF residents did not comply with Correction Law § 73, Supreme Court found that the program and opportunities provided within Fishkill complied with the statute and, therefore, summary judgment was granted to defendants to this extent. The court, however, also found that that Fishkill failed to provide sufficient opportunities that were community based and outside of the facility and, accordingly, upon a search of the record, summary judgment was granted to plaintiffs to this extent. Turning first to the latter finding, defendants concede that any opportunities provided by Fishkill outside of the facility were limited in scope. They nonetheless contend that the statutory scheme merely authorizes, and does not mandate, that DOCCS provide opportunities outside of Fishkill.[2] Plaintiffs counter that Fishkill, as an RTF, was required to secure various

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[1] Although originally commenced by plaintiffs as a CPLR article 78 proceeding, Supreme Court converted the proceeding into a declaratory judgment action.

[2] We disagree with defendants' further contention that plaintiffs' claims are foreclosed by Matter of Gonzalez v Annucci (32 NY3d 461 [2018]).

opportunities in the community where it was situated. We agree with defendants.

A resident in an RTF "may be permitted to leave such facility in accordance with the provisions of [Correction Law § 73]" (Correction Law § 72 [6]). To that end, DOCCS "shall be responsible for securing appropriate education, on-the-job training and employment" for RTF residents (Correction Law § 73 [2]). Furthermore, "[p]rograms 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]). That said, nothing in Correction Law § 73 (2) or (3) states specifically where the opportunities provided in a rehabilitative program established by DOCCS or where the education, training or employment to be secured by DOCCS must be located. In other words, there is no statutory mandate providing that DOCCS's obligations under Correction Law § 73 be outside the confines of Fishkill.

It is true that an RTF is defined 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" (Correction Law § 2 [6]). Correction Law § 2 (6), however, speaks to where an RTF must be located. It does not govern DOCCS's obligations in establishing a rehabilitation program or in securing various opportunities for RTF residents. Although it would seem that the purposes behind a rehabilitative program would be served by having such program or employment, training or education take place in the actual community and outside of an RTF, DOCCS is best suited to make this determination given its "leeway to design its RTF programs and facilities" (People ex rel. Johnson v Superintendent, Adirondack Corr. Facility, 36 NY3d 187, 207 [2020]).

Of note, 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" (Correction Law § 73 [1]). Once again, this subsection does not speak to DOCCS's obligations in establishing a rehabilitative program. It merely provides that an RTF resident may leave a facility for the purposes of partaking in a rehabilitative program or opportunity. Moreover, in that situation, DOCCS's statutory obligation merely extends to supervising the RTF resident while he or she is outside the facility (see Correction Law § 73 [1], [2]). Accordingly, Supreme Court erred in granting partial summary judgment in favor of plaintiffs on the claim that DOCCS did not create an appropriate RTF program outside the confines of Fishkill, and summary judgment should have instead been awarded to defendants dismissing this claim.

Turning to plaintiffs' cross appeal, plaintiffs argue that the rehabilitation program provided within Fishkill for RTF residents did not comply with Correction Law § 73. Defendants submitted evidence indicating that the Fishkill RTF program was a 28-day program designed to prepare RTF residents for re-entry into the community and that it had different units covering various topics, including, among other things, sex offender registration procedures, employment and life skills, community resources and relapse prevention. RTF residents could meet with program coordinators for multiple hours in a day. Coordinators engaged with RTF residents and helped them look for apartments, find roommates and create cover letters and budgets. There was a work program for RTF residents that was directed toward the rehabilitation and reintegration into the community of such residents. RTF residents were also paid for their participation in these RTF programs at a higher rate than what general population incarcerated individuals were paid. RTF residents had access to Fishkill's general library, and they could take high school equivalency classes. Viewing the programming as a whole, defendants satisfied their burden of showing that the RTF program complied with Correction Law § 73.

Plaintiffs' complaints about the efficacy of the RTF program or the lack of training or guidance to create one do not suffice to raise an issue of fact. Additionally, even if we

agreed with plaintiffs that Supreme Court erred in assessing Fishkill's program as to whether it was adequate, as opposed to appropriate, our review of the record confirms that the Fishkill RTF program satisfied the dictates of Correction Law § 73. Accordingly, Supreme Court correctly granted summary judgment in defendants' favor to this extent.

Plaintiffs also argue that Fishkill was not fulfilling its obligations as an RTF because RTF residents were treated the same as general population incarcerated individuals. As mentioned, Fishkill functions as a general confinement facility and an RTF, among other things (see 7 NYCRR 100.90 [c] [1], [3]). Subject to certain exceptions, "[t]wo or more correctional facilities may be maintained or established in the same building or on the same premises so long as the incarcerated individuals of each are at all times kept separate and apart from each other" (Correction Law § 70 [4]). As Supreme Court noted, although an RTF is defined as a "correctional facility" (Correction Law § 2 [6]), it may also be an area within a correctional facility in view of the function that it serves (see Correction Law § 70 [6] [b] [ii]). Indeed, the designation and classification of correctional facilities throughout the state are set forth in 7 NYCRR part 100 – of which Fishkill, and not its RTF, is one (see 7 NYCRR 100.90). Accordingly, for purposes of Correction Law § 70 (4), Fishkill's general confinement facility and its RTF are not to be considered as separate correctional facilities.

That said, the record discloses that RTF residents at Fishkill were afforded separate housing and privileges compared to general population incarcerated individuals. The fact that RTF residents and general population incarcerated individuals were subject to the same daily count, wore similar clothes or ate in the same mess hall does not violate the applicable regulatory and statutory scheme. Supreme Court therefore correctly concluded that plaintiffs' claim that they were unlawfully treated as general population incarcerated individuals was without merit.

Egan Jr., J.P., Pritzker, Reynolds Fitzgerald and Ceresia, JJ., concur.

ORDERED that the judgment is modified, on the law, without costs, by reversing so much thereof as partially denied defendants' motion for summary judgment and granted partial summary judgment to plaintiffs, upon a search of the record; partial summary judgment to plaintiffs denied, defendants' motion granted in its entirety and complaint dismissed; and, as so modified, affirmed.

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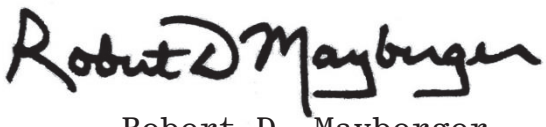

Robert D. Mayberger
Clerk of the Court

EXHIBIT D

NEW YORK SUPREME COURT
APPELLATE DIVISION : THIRD DEPARTMENT

RICHARD ALCANTARA, et al.,

RESPONDENTS-APPELLANTS,

NOTICE OF ENTRY

v.

A.D. No. 531036

ANTHONY J. ANNUCCI,
Acting Commissioner, New York State Department of Corrections and Community Supervision, et al.

APPELLANTS-RESPONDENTS.

PLEASE TAKE NOTICE that the within is a true and complete copy of the **MEMORANDUM AND ORDER** duly entered in the above-entitled matter in the Office of the Clerk of the Supreme Court, Appellate Division, Third Department on March 31, 2022.

Dated: Albany, New York
April 27, 2022

LETITIA JAMES
Attorney General of the
State of New York
Attorney for Appellants-Respondents
The Capitol
Albany, New York 12224

BY: Brian D. Ginsberg
BRIAN D. GINSBERG
Assistant Solicitor General
Telephone (518) 776-2040

TO: All Registered Parties
VIA NYSCEF

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: March 31, 2022 531036

RICHARD ALCANTARA et al.,
Respondents-
Appellants,

v

ANTHONY J. ANNUCCI, as Acting Commissioner of Corrections and Community Supervision, et al.,
Appellants-
Respondents.

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Of note, 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" (Correction Law § 73 [1]). Once again, this subsection does not speak to DOCCS's obligations in establishing a rehabilitative program. It merely provides that an RTF resident may leave a facility for the purposes of partaking in a rehabilitative program or opportunity. Moreover, in that situation, DOCCS's statutory obligation merely extends to supervising the RTF resident while he or she is outside the facility (see Correction Law § 73 [1], [2]). Accordingly, Supreme Court erred in granting partial summary judgment in favor of plaintiffs on the claim that DOCCS did not create an appropriate RTF program outside the confines of Fishkill, and summary judgment should have instead been awarded to defendants dismissing this claim.

Turning to plaintiffs' cross appeal, plaintiffs argue that the rehabilitation program provided within Fishkill for RTF residents did not comply with Correction Law § 73. Defendants submitted evidence indicating that the Fishkill RTF program was a 28-day program designed to prepare RTF residents for re-entry into the community and that it had different units covering various topics, including, among other things, sex offender registration procedures, employment and life skills, community resources and relapse prevention. RTF residents could meet with program coordinators for multiple hours in a day. Coordinators engaged with RTF residents and helped them look for apartments, find roommates and create cover letters and budgets. There was a work program for RTF residents that was directed toward the rehabilitation and reintegration into the community of such residents. RTF residents were also paid for their participation in these RTF programs at a higher rate than what general population incarcerated individuals were paid. RTF residents had access to Fishkill's general library, and they could take high school equivalency classes. Viewing the programming as a whole, defendants satisfied their burden of showing that the RTF program complied with Correction Law § 73.

Plaintiffs' complaints about the efficacy of the RTF program or the lack of training or guidance to create one do not suffice to raise an issue of fact. Additionally, even if we

agreed with plaintiffs that Supreme Court erred in assessing Fishkill's program as to whether it was adequate, as opposed to appropriate, our review of the record confirms that the Fishkill RTF program satisfied the dictates of Correction Law § 73. Accordingly, Supreme Court correctly granted summary judgment in defendants' favor to this extent.

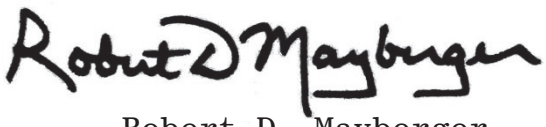
Plaintiffs also argue that Fishkill was not fulfilling its obligations as an RTF because RTF residents were treated the same as general population incarcerated individuals. As mentioned, Fishkill functions as a general confinement facility and an RTF, among other things (see 7 NYCRR 100.90 [c] [1], [3]). Subject to certain exceptions, "[t]wo or more correctional facilities may be maintained or established in the same building or on the same premises so long as the incarcerated individuals of each are at all times kept separate and apart from each other" (Correction Law § 70 [4]). As Supreme Court noted, although an RTF is defined as a "correctional facility" (Correction Law § 2 [6]), it may also be an area within a correctional facility in view of the function that it serves (see Correction Law § 70 [6] [b] [ii]). Indeed, the designation and classification of correctional facilities throughout the state are set forth in 7 NYCRR part 100 – of which Fishkill, and not its RTF, is one (see 7 NYCRR 100.90). Accordingly, for purposes of Correction Law § 70 (4), Fishkill's general confinement facility and its RTF are not to be considered as separate correctional facilities.

That said, the record discloses that RTF residents at Fishkill were afforded separate housing and privileges compared to general population incarcerated individuals. The fact that RTF residents and general population incarcerated individuals were subject to the same daily count, wore similar clothes or ate in the same mess hall does not violate the applicable regulatory and statutory scheme. Supreme Court therefore correctly concluded that plaintiffs' claim that they were unlawfully treated as general population incarcerated individuals was without merit.

Egan Jr., J.P., Pritzker, Reynolds Fitzgerald and Ceresia, JJ., concur.

ORDERED that the judgment is modified, on the law, without costs, by reversing so much thereof as partially denied defendants' motion for summary judgment and granted partial summary judgment to plaintiffs, upon a search of the record; partial summary judgment to plaintiffs denied, defendants' motion granted in its entirety and complaint dismissed; and, as so modified, affirmed.

ENTER:



Robert D. Mayberger
Clerk of the Court

EXHIBIT E

FILED: APPELLATE DIVISION - 3RD DEPT 05/27/2022 10:18 AM 531036
NYSCEF DOC. NO. 66 RECEIVED NYSCEF: 05/27/2022

New York Supreme Court

Appellate Division—Third Department

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

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.

Case No.: 531036

MOTION FOR LEAVE TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

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Albany County Clerk's Index No. 2534-16

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – THIRD DEPARTMENT

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

Respondents-Cross Appellants,

v.

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

Appellants-Cross Respondents.

A.D. No. 531036

NOTICE OF MOTION FOR LEAVE TO APPEAL

PLEASE TAKE NOTICE that upon the annexed affirmation of Matthew Freimuth, the undersigned will move this Court, at a term thereof to be held at the Robert Abrams Building for Law and Justice, on June 13, 2022, or as soon thereafter as counsel can be heard, for an order granting Respondents-Cross Appellants Richard Alcantara, Lester Classen, Jackson Metellus, Cesar Molina, Carlos Rivera, and David Sotomayor leave to appeal the March 31, 2022 Order of the Supreme Court, Appellate Division, Third Department, which granted Appellants-Cross Respondents' motion for summary judgment in its entirety and dismissed the complaint.

PLEASE TAKE NOTICE that the motion will be submitted on the papers without oral argument.

Dated: May 27, 2022
New York, New York

By: _____

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Attorneys for Respondents-Cross Appellants

TO (**via ECF**):

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Office of the Solicitor General of the State of New York
The Capitol
Albany, NY 12224
Tel: (518) 776-2040

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – THIRD DEPARTMENT

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

Respondents-Cross Appellants,

v.

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

Appellants-Cross Respondents.

A.D. No. 531036

AFFIRMATION IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

MATTHEW FREIMUTH, an attorney admitted to practice before the courts of this State, affirms the following under penalty of perjury:

1. I am an attorney admitted to practice before the courts of the State of New York and a partner of the law firm of Willkie Farr & Gallagher LLP, located at 787 Seventh Avenue, New York, New York 10019, counsel to Respondents-Cross Appellants Richard Alcantara, Lester Classen, Jackson Metellus, Cesar Molina, Carlos Rivera, and David Sotomayor in this appeal.

2. I respectfully submit this Affirmation in support of Respondents-Cross Appellants' motion for leave to appeal to the Court of Appeals (the "Motion") pursuant to CPLR 2221(d)(2) and 5602(b)(1) and 22 NYCRR § 1250.16.

3. In an order entered on March 31, 2022 (the "Order"), this Court issued its decision and judgment granting Defendants' motion for summary judgment in its entirety and dismissing the complaint. (ECF No. 64.)

4. On April 27, 2022 Respondents were served with the Notice of Entry of the Order. (ECF No. 65.) True and correct copies of the Notice of Entry and Decision and Order are attached hereto as Exhibit A.

5. The Motion is timely, as it is being served and filed within 30 days of the Notice of Entry of the Order. CPLR 5513(b).

6. In the Motion, Respondents seek leave to appeal to the Court of Appeals for a determination of the following legal issues:

a. Whether the Fishkill Correctional Facility satisfies the criteria governing residential treatment facilities as established by Correction Law § 2(6).

b. Whether the Fishkill Correctional Facility satisfies the criteria governing residential treatment facilities as established by Correction Law § 73.

c. Whether individuals held at a residential treatment facility under Correction Law § 73(10) can be held at Fishkill without the Department of Corrections and Community Supervision permitting or facilitating access to community-based employment, educational, and training opportunities for those residents.

7. In granting Appellants' motion for summary judgment in its entirety and dismissing the complaint, this Court's Order permits the Department of Corrections and Community Supervision ("DOCCS") to incarcerate Respondents, individuals who are on post-release supervision, in a medium-security correctional facility.

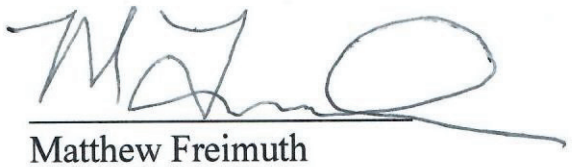
8. This Court's Order did not, however, address whether DOCCS's discretion with respect to residential treatment facilities permits this outcome when the only basis for DOCCS's custody of Respondents is Correction Law § 73(10), which authorizes the use of a residential treatment facility, not a general confinement facility, as a residence. Before Supreme Court and in briefing before this Court, Respondents argued that evidence in the record indicated the Fishkill facility did not satisfy the statutory requirements governing residential treatment facilities.

9. This Court erred in finding that Correction Law § 2(6) establishes only locational, and not programmatic, requirements for residential treatment facilities, and in determining that the conditions at Fishkill fell within the discretion granted

under certain provisions of Correction Law § 73 governing the treatment of incarcerated individuals. This Court did not address the central issue in this matter: whether the conditions of placement at Fishkill are suitable for "persons who are on community supervision," not incarcerated individuals, who are residents under the authority granted to DOCCS under Correction Law § 73(10).

10. The Court of Appeals specifically left open this question in both *Gonzalez v. Annucci*, 32 N.Y.3d 461 (2018) and *People ex rel. McCurdy v. Warden, Westchester Cnty. Corr. Facility*, 36 N.Y.3d 251 (2020), and because it remains unaddressed in the Order, this case will present the Court of Appeals with an opportunity to address this urgent and important issue.

Dated: May 27, 2022
New York, New York



Matthew Freimuth

EXHIBIT A

NEW YORK SUPREME COURT
APPELLATE DIVISION : THIRD DEPARTMENT

RICHARD ALCANTARA, et al.,

RESPONDENTS-APPELLANTS,

NOTICE OF ENTRY

v.

A.D. No. 531036

ANTHONY J. ANNUCCI,
Acting Commissioner, New York State Department of Corrections and Community Supervision, et al.

APPELLANTS-RESPONDENTS.

PLEASE TAKE NOTICE that the within is a true and complete copy of the **MEMORANDUM AND ORDER** duly entered in the above-entitled matter in the Office of the Clerk of the Supreme Court, Appellate Division, Third Department on March 31, 2022.

Dated: Albany, New York
April 27, 2022

LETITIA JAMES
Attorney General of the
State of New York
Attorney for Appellants-Respondents
The Capitol
Albany, New York 12224

BY: Brian D. Ginsberg
BRIAN D. GINSBERG
Assistant Solicitor General
Telephone (518) 776-2040

TO: All Registered Parties
VIA NYSCEF

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: March 31, 2022 531036

RICHARD ALCANTARA et al.,
Respondents-
Appellants,

v

ANTHONY J. ANNUCCI, as Acting Commissioner of Corrections and Community Supervision, et al.,
Appellants-
Respondents.

MEMORANDUM AND ORDER

Calendar Date: February 16, 2022

Before: Egan Jr., J.P., Aarons, Pritzker, Reynolds Fitzgerald and Ceresia, JJ.

Letitia James, Attorney General, Albany (Brian D. Ginsberg of counsel), for appellants-respondents.

Willkie Farr & Gallagher LLP, New York City (Kyle Mathews of counsel), for respondents-appellants.

Aarons, J.

Cross appeals from a judgment of the Supreme Court (Hartman, J.), entered January 8, 2020 in Albany County, which, among other things, partially denied defendants' motion for summary judgment dismissing the complaint.

Plaintiffs are residents at Fishkill Correctional Facility, which is a medium security institution administered by the Department of Corrections and Community Supervision (hereinafter DOCCS) and is designated as, among other things, a "general confinement facility" and a "residential treatment facility" (hereinafter RTF) (7 NYCRR 100.90 [c] [1], [3]). Plaintiffs were housed at Fishkill as RTF residents while they were on postrelease supervision for sex offenses but could not find housing that complied with sex offender residency requirements. Plaintiffs commenced this action raising various claims related to their confinement at Fishkill.[1] Following joinder of issue and discovery, defendants moved for summary judgment dismissing the complaint. Plaintiffs opposed and requested that Supreme Court grant them summary judgment upon a search of the record. The court partially granted defendants' motion and, upon a search of the record, awarded summary judgment on a claim to plaintiffs. These appeals ensued.

As to the claim that the rehabilitative program for Fishkill RTF residents did not comply with Correction Law § 73, Supreme Court found that the program and opportunities provided within Fishkill complied with the statute and, therefore, summary judgment was granted to defendants to this extent. The court, however, also found that that Fishkill failed to provide sufficient opportunities that were community based and outside of the facility and, accordingly, upon a search of the record, summary judgment was granted to plaintiffs to this extent. Turning first to the latter finding, defendants concede that any opportunities provided by Fishkill outside of the facility were limited in scope. They nonetheless contend that the statutory scheme merely authorizes, and does not mandate, that DOCCS provide opportunities outside of Fishkill.[2] Plaintiffs counter that Fishkill, as an RTF, was required to secure various

---

[1] Although originally commenced by plaintiffs as a CPLR article 78 proceeding, Supreme Court converted the proceeding into a declaratory judgment action.

[2] We disagree with defendants' further contention that plaintiffs' claims are foreclosed by Matter of Gonzalez v Annucci (32 NY3d 461 [2018]).

opportunities in the community where it was situated. We agree with defendants.

A resident in an RTF "may be permitted to leave such facility in accordance with the provisions of [Correction Law § 73]" (Correction Law § 72 [6]). To that end, DOCCS "shall be responsible for securing appropriate education, on-the-job training and employment" for RTF residents (Correction Law § 73 [2]). Furthermore, "[p]rograms 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]). That said, nothing in Correction Law § 73 (2) or (3) states specifically where the opportunities provided in a rehabilitative program established by DOCCS or where the education, training or employment to be secured by DOCCS must be located. In other words, there is no statutory mandate providing that DOCCS's obligations under Correction Law § 73 be outside the confines of Fishkill.

It is true that an RTF is defined 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" (Correction Law § 2 [6]). Correction Law § 2 (6), however, speaks to where an RTF must be located. It does not govern DOCCS's obligations in establishing a rehabilitation program or in securing various opportunities for RTF residents. Although it would seem that the purposes behind a rehabilitative program would be served by having such program or employment, training or education take place in the actual community and outside of an RTF, DOCCS is best suited to make this determination given its "leeway to design its RTF programs and facilities" (People ex rel. Johnson v Superintendent, Adirondack Corr. Facility, 36 NY3d 187, 207 [2020]).

Of note, 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" (Correction Law § 73 [1]). Once again, this subsection does not speak to DOCCS's obligations in establishing a rehabilitative program. It merely provides that an RTF resident may leave a facility for the purposes of partaking in a rehabilitative program or opportunity. Moreover, in that situation, DOCCS's statutory obligation merely extends to supervising the RTF resident while he or she is outside the facility (see Correction Law § 73 [1], [2]). Accordingly, Supreme Court erred in granting partial summary judgment in favor of plaintiffs on the claim that DOCCS did not create an appropriate RTF program outside the confines of Fishkill, and summary judgment should have instead been awarded to defendants dismissing this claim.

Turning to plaintiffs' cross appeal, plaintiffs argue that the rehabilitation program provided within Fishkill for RTF residents did not comply with Correction Law § 73. Defendants submitted evidence indicating that the Fishkill RTF program was a 28-day program designed to prepare RTF residents for re-entry into the community and that it had different units covering various topics, including, among other things, sex offender registration procedures, employment and life skills, community resources and relapse prevention. RTF residents could meet with program coordinators for multiple hours in a day. Coordinators engaged with RTF residents and helped them look for apartments, find roommates and create cover letters and budgets. There was a work program for RTF residents that was directed toward the rehabilitation and reintegration into the community of such residents. RTF residents were also paid for their participation in these RTF programs at a higher rate than what general population incarcerated individuals were paid. RTF residents had access to Fishkill's general library, and they could take high school equivalency classes. Viewing the programming as a whole, defendants satisfied their burden of showing that the RTF program complied with Correction Law § 73.

Plaintiffs' complaints about the efficacy of the RTF program or the lack of training or guidance to create one do not suffice to raise an issue of fact. Additionally, even if we

agreed with plaintiffs that Supreme Court erred in assessing Fishkill's program as to whether it was adequate, as opposed to appropriate, our review of the record confirms that the Fishkill RTF program satisfied the dictates of Correction Law § 73. Accordingly, Supreme Court correctly granted summary judgment in defendants' favor to this extent.

Plaintiffs also argue that Fishkill was not fulfilling its obligations as an RTF because RTF residents were treated the same as general population incarcerated individuals. As mentioned, Fishkill functions as a general confinement facility and an RTF, among other things (see 7 NYCRR 100.90 [c] [1], [3]). Subject to certain exceptions, "[t]wo or more correctional facilities may be maintained or established in the same building or on the same premises so long as the incarcerated individuals of each are at all times kept separate and apart from each other" (Correction Law § 70 [4]). As Supreme Court noted, although an RTF is defined as a "correctional facility" (Correction Law § 2 [6]), it may also be an area within a correctional facility in view of the function that it serves (see Correction Law § 70 [6] [b] [ii]). Indeed, the designation and classification of correctional facilities throughout the state are set forth in 7 NYCRR part 100 – of which Fishkill, and not its RTF, is one (see 7 NYCRR 100.90). Accordingly, for purposes of Correction Law § 70 (4), Fishkill's general confinement facility and its RTF are not to be considered as separate correctional facilities.

That said, the record discloses that RTF residents at Fishkill were afforded separate housing and privileges compared to general population incarcerated individuals. The fact that RTF residents and general population incarcerated individuals were subject to the same daily count, wore similar clothes or ate in the same mess hall does not violate the applicable regulatory and statutory scheme. Supreme Court therefore correctly concluded that plaintiffs' claim that they were unlawfully treated as general population incarcerated individuals was without merit.

Egan Jr., J.P., Pritzker, Reynolds Fitzgerald and Ceresia, JJ., concur.

ORDERED that the judgment is modified, on the law, without costs, by reversing so much thereof as partially denied defendants' motion for summary judgment and granted partial summary judgment to plaintiffs, upon a search of the record; partial summary judgment to plaintiffs denied, defendants' motion granted in its entirety and complaint dismissed; and, as so modified, affirmed.

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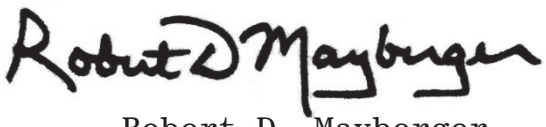

Robert D. Mayberger
Clerk of the Court

NYSCEF Confirmation Notice

Appellate Division - 3rd Dept

The NYSCEF website has received an electronic filing on 05/27/2022 10:18 AM. Please keep this notice as a confirmation of this filing.

531036

Richard Alcantara et al v. Anthony J. Annucci et al

Documents Received on 05/27/2022 10:18 AM

Doc #	Document Type
66	NOTICE OF MOTION

Filing User

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787 7th Ave, New York, NY 10019

Authorized Agent

Counsel Press | Christine E. Stout
NYSCEF@counselpress.com | 212-685-9800
460 West 34th Street 4th Floor, New York, NY 10001

E-mail Notifications

An email regarding this filing has been sent to the following on 05/27/2022 10:18 AM:

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EXHIBIT F

FILED: APPELLATE DIVISION - 3RD DEPT 07/14/2022 11:54 AM 531036
NYSCEF DOC. NO. 68 RECEIVED NYSCEF: 07/14/2022

State of New York
Supreme Court, Appellate Division
Third Judicial Department

Decided and Entered: July 14, 2022 531036

RICHARD ALCANTARA et al.,
Respondents-
Appellants,

v

DECISION AND ORDER
ON MOTION

ANTHONY J. ANNUCCI, as Acting
Commissioner of Corrections and
Community Supervision, et al.,
Appellants-
Respondents.

Motion for permission to appeal to the Court of Appeals.

Upon the papers filed in support of the motion and the papers filed in opposition thereto, it is

ORDERED that the motion is denied, without costs.

Egan Jr., J.P., Aarons, Pritzker, Reynolds Fitzgerald and Ceresia, JJ., concur.

ENTER:

Robert D. Mayberger
Clerk of the Court

EXHIBIT G

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – THIRD DEPARTMENT

RICHARD ALCANTARA,

Respondent-Appellant,

v.

ANTHONY J. ANNUCCI,

Appellant-Respondent.

No. 531036

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the attached is a true and correct copy of the Decision and Order on Motion entered in this action in the Office of the Clerk of the Supreme Court of the State of New York, Appellate Division, Third Judicial Department, on July 14, 2022.

Dated: New York, New York
July 15, 2022

LETITIA JAMES
Attorney General
State of New York
Attorney for Appellant-Respondent

By: Blair J. Greenwald

Blair J. Greenwald
Assistant Solicitor General
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TO: Matthew Freimuth
Willkie Farr & Gallagher LLP
Counsel for Respondent-Appellant

Robert Newman
The Legal Aid Society
Counsel for Respondent-Appellant

EXHIBIT H

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

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

Plaintiffs,

v.

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

Defendants.

Index No. 02534-16

Hartman, J.

ORAL ARGUMENT REQUESTED

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Attorneys for Plaintiffs

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Case **Page(s)**

Statutes

Other Authorities

Plaintiffs, by and through their undersigned counsel, respectfully submit this memorandum of law in opposition to Defendants' Motion for Summary Judgment.

PRELIMINARY STATEMENT

Plaintiffs claim that the Fishkill Correctional Facility's Residential Treatment Facility (the "Fishkill RTF") fails to comply with multiple provisions of Correction Law §§ 2 and 73, which define and govern RTFs, because (1) the Fishkill RTF does not offer adequate programming or employment opportunities to the individuals residing there (the "RTF Parolees") and (2) the Fishkill RTF is not "community based"—i.e., "in or near the community" to which the RTF Parolees intend to reside when released. *See* Correction Law §§ 73, 2(6). In other words, RTF Parolees are treated as prison inmates and are not provided reintegration programming as required by law.

Yet DOCCS now argues that "the record demonstrates that Fishkill Correctional Facility's Residential Treatment Facility offers adequate programming and employment opportunities, and plaintiffs cannot raise a triable issue of fact."[1] By "the record," DOCCS means the affidavit of one Beverly Lockwood, sworn to on May 30, 2019 (the "Lockwood Affidavit"). DOCCS failed to disclose Ms. Lockwood in their written discovery responses as a person with knowledge of Plaintiffs' claims, and thus Ms. Lockwood was never deposed during discovery. It is revealing that DOCCS is now relying on this untested evidence at the summary judgment stage, particularly since more than a dozen current and former employees of DOCCS have provided testimony on the very issues central to this dispute. DOCCS's introduction of Ms. Lockwood's affidavit at this stage is an affront to the discovery efforts of Plaintiffs, and is an improper attempt to jettison or otherwise sanitize the record in this case.

[1] Defendants' Opening Brief ("DOB") at 1.

In any event, the record here is replete with testimony that contradicts or otherwise severely undercuts the assertions in the Lockwood Affidavit, rendering summary judgment in DOCCS's favor inappropriate. At a given time, only a fraction of the RTF Parolees "participate" either in the "RTF Program" or the "RTF Work Program," both of which, as explained below, fall well short of DOCCS's statutory obligations to secure "appropriate education, on-the-job training and employment for inmates transferred to residential treatment facilities" and establish programs "directed toward the rehabilitation and total reintegration into the community of persons transferred to [an RTF]." Correction Law § 73(2)-(3). Even though these deficiencies have been highlighted during depositions in this case, many of which were attended by DOCCS's counsel, it is clear (and regrettable) that DOCCS will continue on the path of least resistance, ignoring its statutory obligations absent a court order.

What is more, the facts asserted in the Lockwood Affidavit—even if taken at face value—do not suffice to meet DOCCS's burden at the summary judgment stage, because the facts therein do nothing to address the statutory requirements that the Fishkill RTF must consist of "**a community based residence <u>in or near a community</u> 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 <u>when released</u>**." Correction Law § 2(6) (emphasis added). DOCCS's opening brief is entirely silent on this point. This serves as an independent basis for the Court to deny summary judgment.

As an alternative ground for summary judgment, Defendants argue that the Court of Appeals' decision in *In re Gonzalez v. Annucci*, 32 N.Y.3d 461 (2018) renders Plaintiffs' claims unviable. But DOCCS's reliance on *Gonzalez* is misplaced. The *Gonzalez* decision does not

foreclose Plaintiffs' claims. The *Gonzalez* Court addressed, among other claims, a challenge to the statutory compliance of the RTF at the Woodbourne Correctional Facility, **not** the Fishkill RTF. In *Gonzalez*, the majority concurred with the Appellate Division that the record in that case was insufficient to establish that DOCCS had not met its statutory or regulatory obligations with respect to Woodbourne.[2] It is beyond dispute that Plaintiffs in this case have compiled a much more extensive record with respect to the Fishkill RTF.

Plaintiffs are prepared to present evidence in support of its claim—some of which is discussed herein—that the Fishkill RTF is statutorily deficient. We respectfully submit that this Court should swiftly and soundly reject DOCCS's latest effort to silence Plaintiffs and others similarly situated, many of whom continue to wait for their day in court while languishing in prison.[3]

Because Defendants cannot meet their burden of demonstrating the absence of any material issues of fact, and because, alternatively, Plaintiffs have established the existence of material issues of fact which require a trial, we respectfully submit that Defendants' motion for summary judgment should be denied.

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[2] In its opinion, the Court of Appeals specifically cited this case as pending in discovery proceedings. *Gonzalez*, 32 N.Y.3d at 475 n.6.

[3] This Court has previously expressed "concerns" about "whether DOCCS should be doing more when an offender languishes unreasonably long" in a designated RTF. Affirmation of Christopher J. McNamara ("McNamara Aff."), Ex. B at 19. These concerns remain legitimate. For example, the vast majority of RTF Parolees at the Fishkill RTF intend to return to New York City, which is 60 miles south of the Fishkill RTF. The reality for these individuals is that they are confined for many months, and in some cases more than a year, beyond their release date, while they wait patiently to reach the top of an increasingly long wait list managed by DOCCS. Once they reach the top of the list, only then will they be released into a homeless shelter.

FACTUAL BACKGROUND

A. The Statutory and Regulatory Regime

By way of background, under the New York Penal Law, all persons convicted of a felony sex offense must be sentenced to a term of post-release supervision ("PRS") between three and twenty-five years, depending on the offense committed. Penal Law § 70.45(2-a). The term of PRS begins once an incarcerated person is released from a sentence of imprisonment. Penal Law § 70.45(5). While on PRS, the parolee must abide by conditions set by the Board of Parole, and is supervised by parole officers who are employees of DOCCS.

One purpose of PRS is to foster the "reintegration" of former inmates into society "by [providing] services to the offender, such as assistance with employment or housing." Donnino, Practice Commentary, McKinney's Cons. Laws of N.Y., Penal Law § 70.45. This is in keeping with New York state policy that "to reduce recidivism it is important that offenders be able to reenter society and become productive and law-abiding citizens whenever possible. A stable living situation and access to employment and support services are important factors that can help offenders to successfully re-enter society." 9 N.Y.C.R.R. § 8002.7(d)(4).

B. The Sexual Assault Reform Act

The Sexual Assault Reform Act ("SARA"), enacted in 2000 and amended in 2005, requires—as a mandatory condition of PRS—that certain sex offenders "refrain from knowingly entering into or upon any school grounds . . . or any other facility or institution primarily used for the care or treatment of persons under the age of eighteen[.]" Exec. Law § 259-c(14). Penal Law Section 220.00(14) defines "school grounds" as:

> (a) in or on or within any building, structure, athletic playing field, playground or land contained within the real property boundary line of a public or private elementary, parochial, intermediate, junior high, vocational, or high school, or (b) any area accessible to the public located within one thousand feet of the real property

> boundary line comprising any such school or any parked automobile or other parked vehicle located within one thousand feet of the real property boundary line comprising any such school. For the purposes of this section an "area accessible to the public" shall mean sidewalks, streets, parking lots, parks, playgrounds, stores and restaurants.

Penal Law § 220.00(14). In other words, as the law has been interpreted, sex offenders subject to SARA are prohibited from residing within 1,000 feet of school grounds.

C. The Use Of RTFs As De Facto Prisons

Following the enactment of SARA, DOCCS continued to permit individuals subject to SARA who had completed their sentences to reside briefly at homeless shelters—many of which were within 1,000 feet of a public school, daycare or the like—while they located long-term SARA-compliant housing. In particular, individuals were allowed to reside briefly at the 30th Street Intake Center of the New York City Department of Homeless Services, a preliminary step for entry into the City's shelter system, even though that center is located within 1000 feet of school grounds. Then, in 2014, DOCCS formalized a policy prohibiting individuals subject to SARA from being released to shelters within 1,000 feet of school grounds, and no longer permitted these individuals to reside at the 30th Street Intake Center even briefly. This change of policy created a massive backlog of parolees who were unable to pay for whatever limited SARA-complaint housing was available in New York City.

To address the loss of New York City shelter residences, DOCCS designated certain prisons as RTFs—including Fishkill—and began transferring individuals subject to SARA who were approaching their maximum expiration date ("ME Date") to such prisons unless and until they were able to provide DOCCS with an address at which they intended to reside that was both SARA-compliant and was otherwise approved by Parole authorities.

New York Penal Law enables the Board of Parole to require persons on PRS to reside in an RTF for up to six months following their release from the underlying term of imprisonment.[4] Penal Law § 70.45(3).[5] An RTF is defined 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." Correct. Law § 2(6) (emphasis added). Parolees who were convicted of sexual offenses have invariably ended up in RTFs due to the difficulty in obtaining SARA-compliant housing by the end of their determinate sentences.

While residing in the RTF, such persons are "subject to conditions of parole or release imposed by the [Board of Parole]." Correct. Law § 73(10). RTFs were intended by the legislature to serve as transitional facilities whose residents are already to some extent "integrated" into the community. Correction Law § 73 states that RTF Parolees "may be allowed to go outside the facility during reasonable and necessary hours to engage in any activity reasonably related to [their] rehabilitation"—a provision clearly meant to distinguish RTF Parolees from prisoners. *Id*. § 73(1). RTF residents are also entitled to "appropriate education, on-the-job-training and employment," which DOCCS is responsible for securing. *Id*. §§ 73(2), (3). While DOCCS is permitted to use RTFs as residences for those under parole supervision, DOCCS must establish for such persons programs directed toward "the rehabilitation and total reintegration into the community." Correct. Law §§ 73(3), 73(10).

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[4] Hereinafter, individuals on PRS that have been transferred to an RTF shall be referred to as "RTF Parolees."

[5] Whether Correction Law § 73(10) permits more extensive residence in an RTF is currently before the Court of Appeals in *People ex rel. McCurdy v. Warden*, 164 A.D.3d 692 (2d Dep't 2018), *leave to appeal granted*, 32 N.Y.3d 1084 (Dec. 11, 2018).

D. The Record in this Case

In May of 2016, Plaintiffs (then petitioners)—individuals subject to SARA who, at various times, resided at the Fishkill RTF—commenced this action as an Article 78 proceeding. (*See* Mitchell Affirmation, Ex. 1 (Verified Petition).) Plaintiffs alleged, among other things, that they and a class of similarly situated individuals were being illegally confined at the Fishkill RTF (as well as the RTF at the Woodbourne Correctional Facility), and that respondents Annucci and Stanford failed to perform the duties enjoined upon them by law because they did not provide adequate educational and vocational programming, nor did they provide assistance in securing SARA-compliant housing, to the RTF Parolees at Fishkill. (*Id*. ¶¶ 82-114.) The respondents answered and moved to dismiss the Article 78 petition. (McNamara Aff., Ex. A (Answer and MTD).)

By Decision and Order dated February 24, 2017 (the "Order"), this Court denied respondents' motion to dismiss the claim that the Fishkill RTF "fails to comply with the statutes governing residential treatment facilities because it does not offer adequate programming or employment opportunities," which the Court converted to a declaratory judgment action. (McNamara Aff., Ex. B (Order at 31-32).) The Court also ordered a fact-finding hearing to be held on March 31, 2017. (*Id*.) In lieu of such a hearing, however, the parties' proceeded to discovery. Plaintiffs efforts in this regard have been significant.

Plaintiffs propounded 24 interrogatories and 13 requests for production (together with the interrogatories, the "Discovery Requests" or "Requests") upon each Defendant. (McNamara Aff., Ex. C (interrogatories to Annucci); Ex. D (document requests to Annucci); Ex. E (interrogatories to Stanford); Ex. F (document requests to Stanford); Ex. G (Affirmation of Service).) In response to Plaintiffs' Discovery Requests, Defendants produced—on a rolling basis from June 2, 2017 through March 11, 2019—just under six thousand pages of documents and

information. Based on information they learned in response to the Discovery Requests, Plaintiffs noticed fourteen current and former DOCCS employees for depositions. The depositions took place in Albany between October 2017 and February 2018. Specifically, Plaintiffs deposed:

- Three Fishkill RTF Offender Rehabilitation Coordinators ("ORCs")—Anna Iccari, Kristi Greenberg, and Christina Gonzalez—each of whom were tasked with assisting RTF Parolees in securing SARA-complaint housing and with administering the 28-day course referred to as the "RTF Program" in the Lockwood Affidavit. (*See* Lockwood Aff. ¶ 3; McNamara Aff., Ex. H (Iccari Tr. 19:15-20:10); Ex. I (Greenberg Tr. 18:7-21); Ex. J (Gonzalez Tr. 30:15-31:22).)

- Mark Heady, a Supervising ORC ("SORC") at the Fishkill RTF. Mr. Heady oversees the ORCs at the Fishkill RTF. (McNamara Aff., Ex. K (Heady Tr. 18:17-23).)

- David Santiago, a Senior Parole Officer ("SPO") in the Poughkeepsie field office of DOCCS. Mr. Santiago supervises a group of seven parole officers ("POs"), including the PO purportedly tasked with working with Fishkill RTF Parolees. (McNamara Aff., Ex. L (Santiago Tr. 17:6-24).)

- Stephen Urbanski, Deputy Superintendent of Security at Fishkill. Mr. Urbanski oversees the work program for RTF Parolees referred to in the Lockwood Affidavit as the "RTF Work Program." (*See* Lockwood Aff. ¶ 14; McNamara Aff., Ex. M (Urbanski Tr. 13:11-14, 43:7-25).)

- Seiveright Miller, Superintendent of Edgecombe Correctional Facility and formerly the Re-Entry Services Manager of the Manhattan/Staten Island Region for DOCCS. (McNamara Aff., Ex. N (Miller Tr. 16:7-18, 22:10-23:8, 25:2-19).)

- Christina Hernandez, Director of Re-Entry Services for DOCCS, who oversees the statewide re-entry operations of DOCCS. (McNamara Aff., Ex. O (Hernandez Tr. 16:21-17:16).)

- Shelley Mallozzi, Grievance Director for DOCCS. Ms. Mallozzi was the principal author of the RTF Program curriculum, which was drafted in October 2014. (McNamara Aff., Ex. P (Mallozzi Tr. 12:22-14:3).)

- Steven Claudio, Deputy Commissioner of Community Supervision. Mr. Claudio supervised a team of assistant commissioners and oversaw the internal operations of the parole division within DOCCS. (McNamara Aff., Ex. Q (Claudio Tr. 15:13-17:4).)[6]

[6] After Mr. Claudio retired, Plaintiffs sought to depose his successor, but DOCCS's counsel declined to make her available.

- Jeff McKoy, Deputy Commissioner of Program Services for DOCCS. Mr. McKoy was tasked by DOCCS Commissioner Annucci to create the RTF Program at the Fishkill RTF. (McNamara Aff., Ex. R (McKoy Tr. 22:4-25:5).)

- Anne Marie McGrath, Associate Commissioner of DOCCS. Ms. McGrath is responsible for population management, which includes inmate intake and movement of inmates between correctional facilities. (McNamara Aff., Ex. S (McGrath Tr. 15:10-16:3).)

- William Hogan, an Assistant Commissioner of DOCCS. Mr. Hogan oversees the day to day community supervision operations for Manhattan, the Bronx, Brooklyn, and Staten Island. (McNamara Aff., Ex. T (Hogan Tr. 16:12-25).)

- Cheryl Wallace, a PO assigned to the Fishkill RTF.

Defendants also deposed two of the named Plaintiffs, Richard Alcantara and David Sotomayor.

From this extensive deposition record, Plaintiffs have either uncovered or confirmed a number of facts which raise material questions as to the statutory compliance of the Fishkill RTF. Specifically, the evidence shows that the Fishkill RFT is not "community based", as is required by Section 2(6). This is because the Fishkill RTF is 60 miles away from New York City, where the vast majority of RTF Parolees intend to return.

The evidence further shows that the Fishkill RTF does not offer adequate programming and employment opportunities. The two principal aspects of the Fishkill RTF's "programming and employment opportunities" are the "RTF Program" and the "RTF Work Program", respectively. As discussed in greater detail below, both "programs" fall well short of DOCCS's statutory obligations. Moreover, the vast majority of RTF Parolees at the Fishkill RTF at a given time are not in either the RTF Program or the RTF Work Program; rather, they are at most doing the same work as the general population inmates, while many of them await their turn on a lengthy list to be released to a New York City shelter.

1. The Fishkill RTF Is Not "Community Based"

Senior leadership of DOCCS confirmed that the Fishkill RTF was not designed to meet the specific needs of the RTF Parolees, despite the mandates of Correction Law §§ 2(6) and 73. Deputy Commissioner Claudio conceded that the current RTF system was created to house a "backlog" of sex offender parolees who could no longer be placed in New York City Department of Homeless Services shelters, but that the roles and responsibilities of parole officers within Fishkill did not adjust to reflect this. (McNamara Aff., Ex. Q (Claudio Tr. 43:10-46:25).) Anne Marie McGrath testified that Fishkill was selected as an RTF in part because of its relative proximity to New York City, since that is where the majority of RTF Parolees plan to return. (McNamara Aff., Ex. S (McGrath Tr. 88:15-19).) But Fishkill is 60 miles away from New York City, and there is evidence that alternatives in or around the New York City area have been considered. (*See* McNamara Aff., Ex. T (Hogan Tr. 42:23-47:11).)

RTF Parolees are not permitted to work jobs beyond the prison grounds, nor do they travel within the local community. (McNamara Aff., Ex. M (Urbanski Tr. 45:24-46:1; 59:9-21; 62:16-23).) They will not leave the Fishkill grounds unless, in some cases, they are being escorted by correctional officers to meet with a parole officer in Poughkeepsie. (McNamara Aff., Ex. M (Urbanski Tr. 19:21-20:8; 59:9-21).)[7] The few RTF Parolees who do perform work outside the prison fences do so at a storehouse that is "on facility property or grounds" and which is "less than a tenth of a mile" from the main prison building. (McNamara Aff., Ex. M (Urbanski Tr. 45:2-11).)

[7] Even this limited transportation out of the prison may have ceased after POs were hired to work with the RTF Parolees. (McNamara Aff., Ex. U (Wallace Tr. 17:2-20:24) (PO Wallace explaining that she and another PO work exclusively with Fishkill RTF Parolees).)

2. The Fishkill RTF Does Not Offer Adequate Programming Or Employment Opportunities

Section 73(3) of the Correction Law provides that DOCCS shall be responsible for "securing appropriate education, on-the-job training and employment for inmates transferred to residential treatment facilities." The evidence shows that DOCCS has failed across the board.

Jeff McKoy, the Deputy Commissioner of Program Services for DOCCS, had been tasked by Commissioner Annucci to create the RTF Program, but was hard-pressed to recall any specifics of the program itself. (McNamara Aff., Ex. R (McKoy Tr. 24:7-13; 27:16-25).) Mr. McKoy conceded that the RTF Program was intentionally redundant in some respects of the Transitional Phase III program that is available to general population prisoners, and which most RTF Parolees—including Plaintiffs—have completed prior to entering the RTF Program. (McNamara Aff., Ex. R (McKoy Tr. 118:21-119:11).)

Shelly Mallozzi, one of the authors of the RTF Program, testified that she and her team only had two weeks to write the program. (McNamara Aff., Ex. P (Mallozzi Tr. 26:5-11).) Ms. Mallozzi confirmed that the curriculum, drafted in 2014, has never been updated. (McNamara Aff., Ex. P (Mallozzi Tr. 37:4-8).)[8] She testified that, to the extent the program dealt with the particular needs of sex offenders, it was a condensed version of the longer-term Sex Offender Counseling and Treatment Program, which most RTF Parolees had completed before their entry into the RTF. (*Id*. at Tr. 147:8-149:14.)

Ms. Mallozzi further testified that the Fishkill facility staff was supposed to update the housing and job ads used in Module Four of the RTF Program, and that she could not "imagine they could be using the same newspaper ads from three years ago. I would hope they've been

[8] Plaintiffs note that DOCCS exhibited the same "RTF Workbook" in both its motion to dismiss from 2017 and in this Motion. As indicated on the cover page, this document is dated **2014**.

updating it because, obviously, prices change." (McNamara Aff., Ex. P (Mallozzi Tr. 62:16-18).) Ms. Iccari, one of the ORCs tasked with "facilitating"—a.k.a. teaching—the RTF Program, confirmed that the housing and job ads are never updated. (McNamara Aff., Ex. H (Iccari Tr. 126:16-25; 152:20-153:2).)

Despite DOCCS's protestations in both its opening brief and in the Lockwood Affidavit, each of the ORCs deposed by Plaintiffs confirmed that the Fishkill RTF Program is not tailored to the needs of RTF Parolees. ORC Gonzalez admitted that nothing in the 28-day RTF Program workbook was specific to the reintegration or rehabilitation of sex offender RTF Parolees. (McNamara Aff., Ex. J (Gonzalez Tr. 113:7-114:6).) ORC Greenberg was equally unable to identify anything in the RTF Program workbook that had to do with the unique challenges of sex offender RTF Parolees in regards to finding employment or SARA-compliant housing. (McNamara Aff., Ex. I (Greenberg Tr. 54:8-58:22).)

ORC Iccari testified that she does not cover issues specific to sex offenders when teaching the RTF Program to participants. (McNamara Aff., Ex. H (Iccari Tr. 148:13-150:6, 150:13-153:16).) Perhaps this is because the ORCs did not receive any meaningful training specific to the needs of sex offender RTF Parolees. (McNamara Aff., Ex. H (Iccari Tr. 28:15-17); Ex. I (Greenberg Tr. 24:21-25:16) ("It wasn't a significant training. If anything, it was a portion of a day of a seminar. But even the contents of it aren't sticking out, so nothing significant.").)

Fishkill RTF personnel similarly confirmed that the RTF Work Program was not tailored to needs of RTF Parolees. The work that is currently performed by the outside work crew on the prison grounds was previously handled by general population inmates prior to Fishkill's establishment of its RTF in 2014, which further confirms that the "RTF Work Program" was not

designed to meet the unique rehabilitation and reintegration needs of sex offender RTF Parolees. (McNamara Aff., Ex. K (Heady Tr. at 133:6-133:17).)

Only eight to ten RTF Parolees—a fraction of the total RTF population at the Fishkill RTF—have the opportunity to work outside the prison fences. (McNamara Aff., Ex. K (Heady Tr. at 120:17-121:12).) Those few RTF Parolees who do perform work outside the prison walls do so at a storehouse that is "on facility property or grounds" and which is "less than a tenth of a mile" from the main prison building. (McNamara Aff., Ex. M (Urbanski Tr. 45:2-11).) The rest of the RTF Parolees are only able to do work that is also available to general population inmates at the prison facility. (McNamara Aff., Ex. K (Heady Tr. at 92:11-17; 101:11-24).) To be clear, RTF Parolees never perform work off of prison grounds. (McNamara Aff., Ex. M (Urbanski Tr. at 45:24-46:2).)

At the time of his deposition in October 2017, SORC Heady estimated that there were approximately 85 RTF Parolees at the Fishkill RTF. (McNamara Aff., Ex. K (Heady Tr. at 23:22-24:10).)[9] It thus stands to reason that at any given time, most of the RTF Parolees are receiving no programming or employment opportunities whatsoever, since only sixteen are in the RTF Program and only eight to ten are in the RTF Work Program, both of which, as described above and below, are woefully inadequate. (McNamara Aff., Ex. H (Iccari Tr. 112:3-18).)

3. The Fishkill RTF Is A Prison In All But Name Only

Fishkill RTF personnel confirmed that the educational and vocational opportunities available to Fishkill RTF Parolees are indistinguishable from those available to general population

[9] On June 25, 2019, an associate counsel from DOCCS confirmed to The Legal Aid Society that 176 persons were being held in RTFs past their ME date. The Legal Aid Society has endeavored to confirm the number of those individuals who are currently confined to the Fishkill RTF, though it is clear from testimony in this case that the majority of RTF parolees are held at the Fishkill RTF. (*See* McNamara Aff., Ex. Q (Claudio Tr. 45:11-46:13).)

inmates. (McNamara Aff., Ex. K (Heady Tr. 107:10-25).) In fact, the record shows that RTF Parolees are afforded even fewer educational and vocational opportunities than general population inmates. (*See, e.g.*, Ex. M (Urbanski Tr. 70:2-71:6 (general population inmates are permitted to pursue employment off Fishkill grounds through the work release program that allows eligible inmates—but not RTF Parolees—to "leave the facility…and [] go work within the community.").) This lack of tailored programming is consistent with the overall treatment of Fishkill RTF Parolees, who—after completing their prison sentences and being "released" on PRS—are housed together with general population inmates,[10] assigned the same uniforms,[11] given the same facility orientation,[12] subject to the same visitation rules,[13] required to eat meals with general population inmates and get yard access at the same time,[14] and are visually indistinguishable from inmates serving active prison sentences at Fishkill.[15] The reality is that the parolees housed at the Fishkill RTF are prison inmates in every way but name only.

This Court has previously found that Correction Law § 73 "appears to allow DOCCS to use the residential treatment facility as a stop-gap residence" for certain parolees, but that it "does not allow long-term mandatory confinement" in an RTF. (McNamara Aff., Ex. B (Order at 14).) Discovery has shown, and Plaintiffs anticipate that additional evidence elicited at an evidentiary hearing will further demonstrate, that the Fishkill RTF is being used for long-term confinement of an increasing number of individuals.

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[10] McNamara Aff., Ex. M (Urbanski Tr. 27:11-23).

[11] McNamara Aff., Ex. K (Heady Tr. 47: 2-11).

[12] McNamara Aff., Ex. K (Heady Tr. 76:18-22).

[13] McNamara Aff., Ex. K (Heady Tr. 41:16-42:11).

[14] McNamara Aff., Ex. M (Urbanski Tr. 28:6-30:17; 31:2-18).

[15] McNamara Aff., Ex. K (Heady Tr. 47: 2-48:18; 80:19-81:2).

Further, the vast majority of the RTF Parolees at the Fishkill RTF intend to return to New York City (McNamara Aff., Ex. S (McGrath Tr. 127:24-128:19)), which is 60 miles away from the Fishkill RTF. These individuals are placed on a DOCCS waiting list for a SARA-compliant shelter bed. (McNamara Aff., Ex. N (Miller Tr. 29:1-34:15).) But DHS has limited the number of RTF parolees released into New York City shelters to ten per month. (McNamara Aff., Ex. T (Hogan Tr. 28:25-29:18).) Both DOCCS employees and the RTF Parolees are resigned to this reality, and the half-hearted effort by DOCCS to demonstrate to this Court that it is complying with its statutory obligations is mere window dressing.

LEGAL STANDARD

A party moving for summary judgment must demonstrate that "the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment" in the moving party's favor. *Jacobsen v. New York City Health & Hosps. Corp*., 22 N.Y.3d 824, 833 (2014). "Summary judgment is a drastic remedy, to be granted only where the moving party has 'tender[ed] sufficient evidence to demonstrate the absence of any material issues of fact[.]'" *Vega v. Restani Constr. Corp*., 18 N.Y.3d 499, 503 (2012) (quoting *Alvarez v. Prospect Hosp*., 68 N.Y.2d 320, 324 (1986)); *see also Ronder & Ronder, P.C. v. Nationwide Abstract Corp.*, 99 A.D.2d 608, 608 (3d Dep't 1984) ("It has been long and well established that summary judgment is a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue."). "This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party." *Jacobsen*, 22 N.Y.3d at 833 (quoting *William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 N.Y.3d 470, 475 (2013)) (quotation marks omitted). "If an issue is arguable, a trial is needed and the case may not be disposed of summarily." Siegel, N.Y. Prac. § 278 (6th ed. 2019).

Summary judgment may be granted "only if, upon the moving party's meeting of [its] burden, the non-moving party fails to establish the existence of material issues of fact which require a trial of the action." *Vega v. Restani Constr. Corp*., 18 N.Y.3d 499, 503 (2012) (quoting *Alvarez v. Prospect Hosp*., 68 N.Y.2d 320, 324 (1986)) (internal quotation marks omitted). Furthermore, the moving party's "[f]ailure to make [a] prima facie showing [of entitlement to summary judgment] requires a denial of the motion, *regardless of the sufficiency of the opposing papers*." *Id*. (quoting *Alvarez v. Prospect Hosp*., 68 N.Y.2d 320, 324 (N.Y. 1986)) (internal quotation marks omitted).

ARGUMENT

I. SUMMARY JUDGMENT IS INAPPROPRIATE BECAUSE MATERIAL ISSUES OF FACT ARE IN DISPUTE REGARDING THE STATUTORY COMPLIANCE OF THE FISHKILL RTF

A. Defendants Have Not Met Their Burden Of Making A *Prima Facie* Showing That There Are No Material Issues Of Fact As To Plaintiffs' Claims

Defendants have failed to make a prima facie showing that they are entitled to summary judgment. To make such a showing, Defendants must introduce evidence sufficient to establish, as a matter of law, that the Fishkill RTF complies with applicable New York statutes and regulations governing RTFs. *Jacobsen v. New York City Health & Hosps. Corp*., 22 N.Y.3d 824, 833 (2014). Specifically, Defendants must prove that DOCCS satisfies Correction Law §§

73 (1),[16] (2),[17] and (3),[18] as well as the basic definition of an RTF in Correction Law § 2(6).[19] Defendants have failed to introduce evidence sufficient to show that the Fishkill RTF meets any of these statutory or regulatory requirements.

Ignoring the entire factual record that Plaintiffs have built in this case, Defendants attempt to demonstrate on summary judgment that the Fishkill RTF is statutorily compliant through untested and conclusory statements – *e.g.*, the "Fishkill Correctional Facility's RTF offers adequate programming and employment opportunities."[20] (DOB at 1.) Where they can,

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[16] "1. The commissioner may transfer any inmate of a correctional facility who is eligible for community supervision or who will become eligible for community supervision within six months after the date of transfer or who has one year or less remaining to be served under his or her sentence to a residential treatment facility and such person **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.** While outside the facility he or she shall be at all times in the custody of the department and under its supervision." Correct. Law § 73(1).

[17] "2. **The department shall be responsible for securing appropriate education, on-the-job training and employment for inmates transferred to residential treatment facilities**. The department shall also supervise such inmates during their participation in activities outside any such facility and at all times while they are outside any such facility." Correct. Law § 73(2).

[18] "3. Programs directed toward the rehabilitation and total reintegration into the community of persons transferred to a residential treatment facility shall be established. Each inmate shall be assigned a specific program by the superintendent of the facility and a written memorandum of such program shall be delivered to him or her." Correct. Law § 73(3).

[19] Defining "Residential treatment facility" to mean: "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**." Correct. Law § 2(6) (emphasis added).

[20] Defendants cite several cases holding that deference to an agency's statutory interpretation is sometimes warranted, apparently to suggest that the Court should defer to DOCCS' interpretation of the RTF statutes, and the agency's view on whether the Fishkill RTF complies with those statutes. (DOB at 7.) Such deference is not warranted here, because "the question [of the Fishkill RTF's statutory compliance] is one of pure legal interpretation of statutory terms." *In re Gonzalez v. Annucci*, 32 N.Y.3d 461, 471 (2018) (declining to defer to DOCCS' interpretation of Correct. Law § 201(5) governing RTFs when construing the statutory compliance of the Woodbourne RTF) (citation and internal quotation marks omitted).

Defendants rely exclusively on the affidavit of Beverly Lockwood, an ORC at Fishkill who was not among the fourteen DOCCS witnesses who were deposed on this very issue. The Lockwood Affidavit carries little weight relative to the extensive deposition testimony in the record. *See State v. Metz*, 241 A.D.2d 192, 200 (1st Dep't 1998) ("Testimony by deposition is a higher order of proof than an affidavit. An affidavit, usually prepared by a lawyer, and signed by the affiant, is hardly the equivalent in value of a deposition by question and answer, especially when the questioning is done by the adverse attorney.") (citations omitted); *see also Cerutti v. A.O. Smith Water Prod. Co*., 60 Misc. 3d 1228(A) (Sup. Ct. N.Y. Cty. 2018) ("[I]n the context of a motion for summary judgment . . . [depositions] are no less admissible and perhaps more reliable than affidavits.").

Neither the Lockwood Affidavit nor the Defendants' opening brief makes any mention of the myriad documentary and testimonial evidence elicited from DOCCS and its employees. Plaintiffs submit that this is either an egregious oversight or a tacit acknowledgment that DOCCS's litigation strategy is better served by relying on an untested, boilerplate affidavit, rather than deposition testimony that was subject to cross-examination by Plaintiffs' counsel. As described in detail below, the contemporaneous documents and the deposition testimony of Defendants' own employees directly contradict the most important factual points of the Lockwood Affidavit. These contradictions alone underscore the material nature of the disputes and thus counsel strongly against summary judgment.

Finally, the Lockwood Affidavit essentially duplicates material contained in Exhibit V of Defendants' Verified Answer, dated August 8, 2016. (McNamara Aff., Ex. V (Exhibit V of Defendants' Verified Answer).) This Exhibit described the same RTF Program referred to in the Lockwood Affidavit. *Id.* The Court ordered an evidentiary hearing

notwithstanding all of the information contained in Exhibit V, and Plaintiffs submit that there is simply nothing in the Lockwood Affidavit that would obviate the need for a hearing.

1. RTF Parolees Do Not Leave Fishkill Except To Visit Their Parole Officers

Defendants argue that, "unlike inmates serving a term of incarceration, RTF residents are permitted to leave the facility to engage in activities reasonably related to their rehabilitation, in accordance with their programs (*see* Correct. Law § 73 [1])." (DOB at 9.) On this point, Defendants rely on the language of the statute and point to the deposition testimony of named Plaintiff David Sotomayor, whose testimony Defendants characterize as supporting their interpretation, saying that he was allowed to leave "the facility several times per week as part of a work crew that performed work outside the prison walls, as well as to meet with his parole officer at the Poughkeepsie parole office." (DOB at 9.)

Defendants mischaracterize Mr. Sotomayor's testimony. While it is true that Mr. Sotomayor participated in the "work crew," none of this work takes place off of prison grounds. SORC Mark Heady testified that only eight to ten RTF Parolees have the opportunity to work outside the prison walls. (McNamara Aff., Ex. K (Heady Tr. at 120:17-121:12).)[21] The rest of the RTF Parolees are only able to do work that is also available to general population inmates at the prison facility. (McNamara Aff., Ex. K (Heady Tr. at 92:11-17; 101:11-24).) Those few RTF Parolees who do perform work outside the prison walls do so at a storehouse that is "on facility property or grounds" and which is "less than a tenth of a mile" from the main prison building. (McNamara Aff., Ex. M (Urbanski Tr. 45:2-11).) RTF Parolees never perform work off of prison

[21] Mr. Heady estimated that at that time there were approximately 85 parolees at the Fishkill RTF, nearly all of whom were sexual offenders. (McNamara Aff., Ex. K (Heady Tr. at 23:22-24:10).) As mentioned previously, *see supra* at 13 n.9, an e-mail advisory from DOCCS's counsel on June 25, 2019 revealed that, on that date, 176 persons were held in RTFs past their ME Date (with the majority residing at the Fishkill RTF).

grounds. (*Id*. at 45:24-46:2.) Moreover, this work that is currently performed by the outside work crew on the prison grounds was previously handled by general population inmates prior to Fishkill's establishment of its RTF in 2014, which further confirms that the "RTF Work Program" was not designed to meet the unique rehabilitation and reintegration needs of sex offender RTF Parolees.

Mr. Sotomayor testified that while he served on the outside work crew, he was not allowed to perform other kinds of jobs that were available to general population inmates. (McNamara Aff., Ex. X (Sotomayor Tr. 15:13-20; 16:3-17:8).) Mr. Alcantara testified that he did not even apply to serve on the outside work crew because being outside the prison, but still on the facility grounds, painfully reinforced that he was still incarcerated. (McNamara Aff., Ex. W (Alcantara Tr. 19:15-20:21)) (explaining that it was "frustrating when I'm supposed to get out to my house and just get out and just see the freedom right there, but you're not free.")

To be clear, there are zero opportunities for RTF Parolees to work beyond the grounds of Fishkill, much less to leave the prison for other rehabilitative activities, as required by Correction Law § 73(1). (McNamara Aff., Ex. K (Heady Tr. 110:3-9).) In this regard, RTF Parolees are afforded <u>fewer</u> privileges than general population inmates, who are permitted to pursue employment off Fishkill grounds through the work release program that allows eligible inmates—but not RTF Parolees—to "leave the facility…and [] go work within the community." (McNamara Aff., Ex. M (Urbanski Tr. 70:2-71:6).) Deputy Superintendent Urbanski confirmed that RTF Parolees never work outside of Fishkill, nor are they generally permitted to travel to or within the nearby community of Beacon, New York. (McNamara Aff., Ex. M (Urbanski Tr. 45:24-46:2; 62:16-23).) For DOCCS to argue that the Fishkill RTF is meeting its statutory obligations by allowing some RTF Parolees to work on Fishkill prison grounds and to visit their parole officer,

while being guarded by Fishkill correctional officers, is both insulting and inconsistent with the language and spirit of the statutes.

On this point, Plaintiffs deposed William Hogan, an Assistant Commissioner of DOCCS. Mr. Hogan testified that he had written a proposal for a Residence and Employment Program (the "RED Proposal") that would create an RTF for sex offenders in New York City to "facilitate RTF inmates' integration back into New York City." (McNamara Aff., Ex. T (Hogan Tr. 42:23-47:11).) Mr. Hogan does not know why this proposal was ultimately abandoned by DOCCS, but, unlike at the Fishkill RTF, the Red Proposal expected that parolees would receive day passes on weekends, which would allow them to engage in prosocial leisure activities. (*Id.* at 45-46 ("they would have actually been engaged in the activity").) During the week, parolees would have been able to meet with their parole officers, engage in programming, or otherwise search for potential SARA-compliant residences. (*Id.* at 47.) While more discovery would be needed, the RED Proposal appears to be much more aligned with the legislature's goals for the RTF program, and further highlights the inadequacies of the prison-like existence that the RTF Parolees are subjected to in the Fishkill RTF. In particular, Correction Law §§ 2(6) and 73 show a legislative intent to facilitate release—i.e., to help those not yet released begin to access the outside community. Defendants are turning the concept of an RTF on its head, using it not to facilitate release, but to prevent it.

2. The "RTF Program" Does Not Meet The Statutory Requirements Of The Correction Law

Defendants point to the "RTF Program" as proof that the Fishkill RTF has "educational and rehabilitative services geared toward RTF residents' reintegration into the community." (DOB at 8.) The Lockwood Affidavit attempts to provide a 30,000 foot view of the RTF Program, describing it as a 28-day curriculum consisting of "9 modules that cover [the] Sex

Offender Registration Act (SORA) procedures, employment, health relationships and activities, life skills, available community resources, core values and beliefs, understanding feelings, problem-solving exercises, and relapse prevention." (DOB at 8.)

Defendants argue that the "RTF Program differs from other correctional re-entry programming in that it is **specifically tailored to the challenges sex offenders like plaintiffs are likely to face when released to the community**." (DOB at 8-9 (emphasis added).) DOCCS relies exclusively on the Lockwood Affidavit in support of this proposition.

Shelly Mallozzi, the principal author of the RTF Program, testified that a substantial amount of its tailoring to sex offenders would come in the form of group discussion, as opposed to the actual text of the workbook. (McNamara Aff., Ex. P (Mallozzi Tr. 74:18-24 ("Q. Would you leave it to the ORCs to sort of explain this in the [group] session? A. Yes. Q. If they were just, for instance, reading from the curriculum from the page, that wouldn't come up; right? A. No.")).) ORC Gonzalez, who actually taught the RTF Program, testified that she simply read what was in the workbook. (McNamara Aff., Ex. J (Gonzalez Tr. 94:6-95:14).)

ORC Gonzalez further acknowledged that nothing in the 28-day RTF Program workbook was specific to the reintegration or rehabilitation of sex offender RTF Parolees.[22] (McNamara Aff., Ex. J (Gonzalez Tr. 113:7-114:6).) Kristi Greenberg, an ORC at the Fishkill RTF who taught the RTF Program, could not identify anything in the RTF Program workbook that had to do with the unique challenges of sex offender RTF Parolees in regards to finding employment or SARA-compliant housing. (McNamara Aff., Ex. I (Greenberg Tr. 54:8-58:22).)

[22] The RTF Program workbook contains a basic description of the registration requirements for offenders subject to SORA, but no DOCCS witness testified that this aspect of the workbook was directed to RTF participants' "rehabilitation and total reintegration into the community." Correct. Law §§ 73(3), 73(10).

ORC Iccari affirmed that she does not cover issues specific to sex offenders—such as housing and employment challenges—when teaching the RTF Program to participants. (McNamara Aff., Ex. H (Iccari Tr. 148:13-150:6, 150:13-153:16).) When asked if Ms. Iccari informed the RTF Parolees that they are ineligible for certain jobs because of their sex offender status, she replied, "I don't. I mean they will communicate amongst each other . . . . but I don't really get into that subject with them." (McNamara Aff., Ex. H (Iccari Tr. 149:4-12).) ORC Gonzalez, who trained ORC Iccari (*see* Ex. H (Iccari Tr. 17:8-11), confirmed that she also did not address eligibility issues for certain jobs with her RTF Parolees. (McNamara Aff., Ex. J (Gonzalez Tr. 113:19-23).)

Ms. Mallozzi, while confirming that the 2014 workbook has never been updated (McNamara Aff., Ex. P (Mallozzi Tr. 37:4-8)), said that Fishkill facility staff was supposed to update the housing and job ads and that she could not "imagine they could be using the same newspaper ads from three years ago. I would hope they've been updating it because, obviously, prices change." (McNamara Aff., Ex. P (Mallozzi Tr. 62:16-18).) Ms. Iccari, one of the ORCs tasked with facilitating the RTF Program, confirmed that the housing and job ads, like the workbook itself, are <u>never</u> updated. (McNamara Aff., Ex. H (Iccari Tr. 126:16-25; 152:20-153:2).)

In further contradiction to the Lockwood Affidavit's assertion that Module 4 of the RTF Program "is adapted to the unique challenges of the sex offender in regards to the identifications of affordable and SARA complaint housing," Lockwood Aff. ¶ 9, both Ms. Iccari and Ms. Mallozzi testified that the housing ads used in Module 4 were not designed in any way to help RTF Parolees actually locate SARA-compliant housing, but were merely designed to teach "budgeting" skills that would be useful to any individual following his release. (McNamara Aff., Ex. H (Iccari Tr. 150:16-153:16) (updating the housing ads in Module 4 of the RTF Program would

not be helpful "[b]ecause the purpose is just to show them how to create a budget."); Ex. P (Mallozzi Tr. 63:5-15; 67:7-69:11).)

Testimony from the Plaintiffs who resided in the Fishkill RTF further calls into question DOCCS's credibility. In their opening brief, Defendants cherry-picked excerpts of the named Plaintiffs' deposition testimony to establish that they participated in the RTF Program and the RTF Work Program, even though the core issue is the adequacy of the programs under the law. (*See* DOB at 9-11.) With respect to the RTF Program, Plaintiff Alcantara testified that there were parts of the RTF Program workbook that he had never seen before. (McNamara Aff., Ex. W (Alcantara Tr. 22:12-27:22).) Plaintiff Sotomayor testified that he complained at the time that the RTF Program was the same as the Transitional Phase III curriculum that he completed as an inmate, and was told by ORC Gonzalez to just do the paperwork and "get this over with." (McNamara Aff., Ex. X (Sotomayor Tr. 21:5-18; 22:2-11); *see also* McNamara Aff., Ex. R (McKoy Tr. 118:21-119:11) (acknowledging redundancies between the RTF Program and the Transitional Phase III curriculum).)

Irrespective of the aforementioned disputed issues of fact, and even assuming the Lockwood Affidavit could be taken at face value, Defendants cannot meet their burden of proving that the Fishkill RTF complies with Correction Law §§ 2(6) and 7(1) by rote citation to the purported benefits of the RTF Program. As the Lockwood Affidavit itself makes clear, the RTF Program is administered entirely inside the prison. (*See* Lockwood Aff. ¶¶ 1, 3.) It is not—and has never been—a "community based" program that is "in or near a community" in which RTF Parolees intend to reside when released. Correction Law § 2(6). Regardless of the content of the RTF Program, the RTF Parolees who participate in it are not "allowed to go outside the facility during reasonable and necessary hours to engage in any activity reasonably related to [their]

rehabilitation." Correction Law § 73(1). This basic fact—combined with the aforementioned testimony establishing that RTF Parolees do not leave prison grounds, *see supra* at 10, 19-21—renders the Fishkill RTF statutorily noncompliant.

B. Even If Defendants Could Meet This Burden, The Record To Date Demonstrates The Existence Of Material Issues Of Fact

Summary judgment would be inappropriate even if Defendants could make a *prima facie* showing of entitlement to summary judgment based on the Lockwood Affidavit, as the record contains ample evidence to rebut Defendants' assertions and demonstrate the existence of material issues of fact concerning the Fishkill RTF's statutory compliance. *Jacobsen v. New York City Health & Hosps. Corp*., 22 N.Y.3d 824, 833 (2014); Siegel, N.Y. Prac. § 278 (6th ed. 2019).

First, under New York law, an RTF is defined 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**." Correct. Law § 2(6) (emphasis added). But the evidence demonstrates that Fishkill is not in or near the community where virtually all of the RTF Parolees intend to reside: New York City. Fishkill is in between the towns of Beacon and Fishkill, and it takes about one hour and 20 minutes to drive from Fishkill to New York City. (McNamara Aff., Ex. H (Iccari Tr. 40:2-10).) Additionally, ORC Iccari testified that she had no training specific to inmates or parolees who want to return to New York City. (McNamara Aff., Ex. H (Iccari Tr. 28:18-29:4).)

Second, the provision in Correction Law § 73(1) that RTF Parolees "may be allowed to go outside the facility during reasonable and necessary hours to engage in any activity reasonably related to [their] rehabilitation" bespeaks legislative intent that such activity be the

norm, not the exception. But the evidence demonstrates that Fishkill RTF Parolees are not allowed to leave prison grounds. As highlighted above, only the small fraction of the Fishkill RTF Parolees who serve on the outside work crew are able to go outside the prison fences. *Supra* at 19-21. And even these RTF Parolees do not leave the Fishkill facility for work; they perform their work on Fishkill grounds. *Id*. The outside work crew members only leave the facility grounds to meet with a PO at the Poughkeepsie parole office. *Id.* Even these visits with the Poughkeepsie PO office are cursory. During these visits, the PO takes an "office report" and then sends the work crew members back to Fishkill. (McNamara Aff., Ex. L (Santiago Tr. 21:3-7).) The office report involves a 15 to 30-minute meeting with each RTF parolee, in which the PO administers a drug test, ensures they are meeting requirements, and records any proposed changes of residence. (McNamara Aff., Ex. L (Santiago Tr. at 21:19-22:7).) The Poughkeepsie POs do not show RTF Parolees any housing resource guides during the office visits. (McNamara Aff., Ex. L (Santiago Tr. 66:17-68:4).) Plaintiffs submit that DOCCS's interpretation of Section 73(1)—that the use of the word "may" grants Defendants discretion to set up an RTF Program in which RTF Parolees are never permitted to leave the facility—is inconsistent with legislative intent and is not a fair reading of the statute. (*See* DOB at 9-10.)

Third, DOCCS has a general obligation to "assist inmates eligible for community supervision and inmates who are on community supervision to secure employment, educational, or vocational training, and housing." Correct. Law § 201(5). RTF Parolees are also entitled to "appropriate education, on-the-job-training and employment," which DOCCS is responsible for securing. Correct. Law §§ 73(2), (3); *see also* Correct. Law § 2(6) (an RTF is "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."). But the evidence demonstrates that RTF Parolees are not afforded any unique educational or vocational opportunities.

SORC Mark Heady testified that the educational and vocational opportunities available to Fishkill RTF Parolees are indistinguishable from those available to general population inmates. (McNamara Aff., Ex. K (Heady Tr. 107:10-25).) In fact, the record shows that RTF Parolees are afforded even *fewer* educational and vocational opportunities than general population inmates. (*See, e.g.*, Ex. M (Urbanski Tr. 70:2-71:6 (general population inmates are permitted to pursue employment off Fishkill grounds through the work release program that allows eligible inmates—but not RTF Parolees—to "leave the facility…and [] go work within the community.").) This lack of tailored programming is consistent with the overall treatment of Fishkill RTF Parolees, who—after completing their prison sentences and being "released" on PRS—are housed together with general population inmates,[23] assigned the same uniforms,[24] given the same facility orientation,[25] subject to the same visitation rules,[26] required to eat meals with general population inmates and get yard access at the same time,[27] and are visually indistinguishable from inmates serving active prison sentences at Fishkill.[28] The reality is that the parolees housed at the Fishkill RTF are prison inmates in every way but name only.

Despite the volume of evidence showing the Fishkill RTF's noncompliance with the applicable statutes, Defendants nonetheless claim that "Plaintiffs' allegations that the Fishkill

[23] McNamara Aff., Ex. M (Urbanski Tr. 27:11-23).

[24] McNamara Aff., Ex. K (Heady Tr. 47: 2-11).

[25] McNamara Aff., Ex. K (Heady Tr. 76:18-22).

[26] McNamara Aff., Ex. K (Heady Tr. 41:16-42:11).

[27] McNamara Aff., Ex. M (Urbanski Tr. 28:6-30:17; 31:2-18).

[28] McNamara Aff., Ex. K (Heady Tr. 47: 2-48:18; 80:19-81:2).

RTF shares characteristics common to correctional institutions, and that the programming is similar to the programming inmates are required to take prior to their release from incarceration, fail to support a statutory violation." (DOB at 10.) The cases cited by Defendants in support of this proposition are inapposite—not one case cited by Defendants involved a full evidentiary record, let alone meaningful deposition testimony from DOCCS's employees. *See In re Gonzalez v. Annucci*, 32 N.Y.3d 461, 487 (2018) (Wilson, J. dissenting) (highlighting the "limited record evidence" in that case); *In re Allen v. Annucci*, Index No. 8224-17, at *20 (Sup. Ct. Albany Cty., May 8, 2018) (Platkin, A.J.) (considering only pleadings and affirmations). As this Court has recognized, "[o]n the other hand, at least one judge has held *after an evidentiary hearing* that Fishkill Correctional Facility did not meet the statutory requirements for a residential facility." *Alcantara v. Annucci*, 55 Misc. 3d 1216(A), 57 N.Y.S.3d 674 (Sup. Ct. Albany Cty. 2017) (emphasis added) (citing *People ex rel. Scarberry v. Connolly*, Index No. 3963/14, at *4 (Sup. Ct. Dutchess Cty., Nov. 21, 2014) (Rosa, J.); *People ex rel. Simmons v. Superintendent, Fishkill Corr. Facility*, Index No. 3803/14 (Sup. Ct. Dutchess Cty., Aug. 15, 2014) (Rosa, J.)); *see also People ex rel. Ross v. Superintendent, Fishkill Corr. Facility*, Index No. 647/19 (Sup. Ct. Dutchess Cty., June 27, 2019) (Rosa, J.).

Defendants cannot avoid the evidence in this case by simply ignoring it. Plaintiffs have diligently marshalled an extensive record that contradicts each of Defendants' claims regarding the Fishkill RTF's statutory compliance, or lack thereof. Accordingly, Defendants' motion for summary judgment should be denied.

II. THE COURT OF APPEALS' DECISION IN *GONZALEZ V. ANNUCCI* DOES NOT FORECLOSE PLAINTIFFS' CLAIM REGARDING THE STATUTORY COMPLIANCE OF THE FISHKILL RTF

Defendants contend that the Court of Appeals' decision in *In re Gonzalez v. Annucci*, 32 N.Y.3d 461 (2018) forecloses Plaintiffs' claims. (*See* DOB at 5). This argument fails

for two principal reasons. First, *Gonzalez* involved a challenge to the statutory compliance of the RTF at Woodbourne Correctional Facility (the "Woodbourne RTF"), and thus the Court of Appeals' decision in that case has no direct bearing on the question before this Court: whether the Fishkill RTF affords adequate programming and employment opportunities to RTF Parolees as required by statute and regulation. Second, the factual record in *Gonzalez* was far more limited than the record now before this Court, and as explained more fully in Point I above, Plaintiffs have developed a robust record demonstrating the existence of numerous material issues of fact, rending summary judgment inappropriate.

The petitioner in *Gonzalez* was convicted of rape in the second degree, and was sentenced to 2.5 years' imprisonment followed by 3 years' PRS. *Gonzalez*, 32 N.Y.3d at 466. The petitioner was subject to SARA, and as a result, his supervisory release was subject to SARA's 1,000 foot restriction. *Id*. The petitioner was unable to provide DOCCS with a SARA-compliant address at which he intended to reside following his release, and so once he reached his ME Date, he was transferred to the Woodbourne RTF. *Id*. at 467. Several months later, the petitioner commenced an Article 78 proceeding asserting, among other things, that the Woodbourne RTF "did not comply with the statutory requirements of an RTF under Correction Law §§ 2 and 73 and that he was therefore being held in an illegal RTF." *Id*.

The Court of Appeals held that this claim had been properly dismissed by the Third Department, explaining: "there was insufficient record evidence to establish that DOCCS' determination to place petitioner at the Woodbourne RTF was irrational or that the conditions of his placement at that facility were in violation of the agency's statutory or regulatory obligations." *Id*. at 475. However, the Court of Appeals noted that "similar claims relating to Fishkill Correctional Facility as an RTF are pending in discovery proceedings before Albany County

Supreme Court," referring to the instant matter. *Id*. at 480 n.6. A fair and, we submit, correct reading of this statement is that the Court of Appeals acknowledged that, although the record before it was insufficient to support the petitioner's claims, a more developed factual record might compel a different conclusion. As explained more fully in Point I above, the evidence that Plaintiffs have gathered to date raises material issues of fact concerning the statutory compliance of the **Fishkill RTF,** and so *Gonzalez* does not control.

Defendants erroneously contend that "Plaintiffs concede that *Gonzalez* is dispositive of their claim here." (DOB at 6.) Not so. The Legal Aid Society and Prisoners' Legal Services of New York, which are among the legal counsel to Plaintiffs in this case, urged the Court of Appeals "to let pending litigation proceed without prejudgment as to what facts are and are not sufficient to demonstrate DOCCS' non-compliance with the statutory requirements for operation of an 'RTF'." *Amici* explained:

> Depositions have been taken in *Alcantara v. Annucci* from numerous DOCCS employees involved in the creation, supervision and operation of the Fishkill 'RTF,' as well as two former inmates of the RTF. Thousands of pages of documents have been produced in discovery. The record is already more extensive than the limited record in the *Gonzalez* matter and is likely to continue to develop further . . . . It would be unjust, and improvident, to issue a dispositive ruling based on a meager undeveloped record.

(*Id*. at 25-26.)

Neither Plaintiffs nor *amici* argued—much less conceded—that a decision in *Gonzalez* would be dispositive of this case, and the outcome of *Gonzalez* does not make it so. Rather, *amici* were rightfully concerned that *Gonzalez* was not the ideal vehicle to examine the statutory compliance or non-compliance of the Woodbourne RTF—let alone the Fishkill RTF—because the petitioner there was not able to develop a factual record to support his claim. In this case, Plaintiffs have utilized the discovery this Court has permitted, and adduced a comprehensive

record that strongly supports Plaintiffs' claims. Defendants point to no authority suggesting that Plaintiffs are precluded from advancing their claims.

For the foregoing reasons, Defendants are wrong on both the law and the facts. The *Gonzalez* decision does not foreclose Plaintiffs' claims here; rather, a natural reading of *Gonzalez* suggests the opposite is true—the parties in this case have participated in meaningful discovery, and Plaintiffs' claim is ripe for an evidentiary hearing before this Court.

III. SHOULD THE COURT FAIL TO FIND THAT MATERIAL ISSUES OF FACT ARE IN DISPUTE, SUMMARY JUDGMENT SHOULD BE GRANTED IN FAVOR OF THE PLAINTIFFS.

Plaintiffs respectfully submit that there are material issues of fact in dispute, and that a hearing is required to resolve these issues. Alternatively, should the Court fail to find such issues of fact, summary judgment should be granted to *Plaintiffs* on the strength of the factual record to date, pursuant to CPLR 3212(b) ("If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."). In particular, the record demonstrates conclusively that the Fishkill RTF fails to comply with Correction Law §§ 2(6) and 73(1) because the facility is not a "community based" facility that is "in or near a community" to which RTF Parolees intend to reside when released, nor are the RTF Parolees residing there "allowed to go outside the facility during reasonable and necessary hours to engage in any activity reasonably related to [their] rehabilitation." *See* Correction Law §§ 2(6) and 73(1); *supra* at 10, 19-21. Putting aside the other disputed issues, these facts alone render the Fishkill RTF non-statutorily complaint, and warrant a grant of summary judgment in Plaintiffs' favor.

CONCLUSION

Accordingly, this Court should deny Defendants' Motion for Summary Judgment, and grant summary judgment in favor of Plaintiffs.

Dated: New York, New York
July 17, 2019

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EXHIBIT I

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

New York Supreme Court

Appellate Division—Third Department

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.

ANSWERING BRIEF FOR PETITIONERS-RESPONDENTS-CROSS APPELLANTS

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PRELIMINARY STATEMENT

The issues facing this Court boil down to straightforward questions of statutory interpretation. New York has tasked its Department of Corrections and Community Supervision ("DOCCS") with implementing a statutory scheme designed to appropriately house, rehabilitate, and ultimately reintegrate parolees and other individuals who have served their sentence of incarceration and who are under post-release supervision ("PRS"). To accomplish this, the Correction Law provides for DOCCS to establish and run residential treatment facilities ("RTFs"). These facilities must be placed within or near communities where educational and vocational opportunities that would aid in the rehabilitation and reintegration of residents are available to them. DOCCS is also obligated to establish multiple programs designed to facilitate the rehabilitation and reintegration of RTF residents and to ensure that each resident is assigned to an appropriate program, including access to community-based opportunities.

Despite the non-discretionary nature of these obligations, plain language of the statute, and legislative history detailing the important role that RTFs play in providing an intermediate step between the isolation and limitations of prison and full release into the community, DOCCS maintains that it has the discretion to confine individuals who are on post-release

supervision ("PRS") at the Fishkill Correctional Facility without providing access to community-based opportunities or programs that meet the requirements and purpose of the statutory scheme devised by the Legislature.

Respondents/Cross Appellants (the "RTF Parolees"), individuals subject to the Sexual Assault Reform Act ("SARA") who are on post-release supervision and were confined by DOCCS to Fishkill, challenge DOCCS's use of Fishkill as a residential treatment facility in light of DOCCS's failure to satisfy the statutory requirements attendant to such facilities. The court below agreed with RTF Parolees that the failure to offer community-based opportunities was in violation of the Correction Law. This Court should affirm that ruling and require DOCCS to comply with the Legislature's command.

The court below also found, however, that DOCCS's treatment of RTF Parolees fell within the Department's discretion because RTF residents resided in a facility co-located with a prison and also that RTF residents' inclusion in the prison's programming and provision of one hastily created curriculum was "minimally adequate." (R. at 28.) But the court below misidentified the proper question here. It should have asked and analyzed whether the offerings made available to RTF residents at Fishkill satisfy the

statutory requirements for a residential treatment facility. Specifically, the court below did not find that (or consider whether):

- Fishkill offers multiple programs;
- RTF residents at Fishkill are assigned a specific program, from among those created and designed by DOCCS to facilitate their rehabilitation and reintegration; and
- DOCCS had secured *appropriate* educational and vocational opportunities for RTF residents.

On the basis of the record below, there is only one answer. They do not. This Court should reverse the grant of summary judgment to DOCCS on this issue or, in the alternative, vacate it so the court below may reconsider the evidence in the record to determine whether these requirements of the Correction Law are met at Fishkill.

QUESTIONS PRESENTED

1. Correction Law § 2(6) defines an RTF as a residence in or near a community where employment, educational, and training opportunities are available for parolees. RTF residents at Fishkill are not permitted to work off the facility's grounds and have virtually no opportunity to interact with non-facility personnel. Did Supreme Court correctly conclude that Fishkill does not meet the statutory requirements for an RTF by failing to provide community-based assignments to RTF residents?

2. Correction Law § 73 requires that an RTF provide each resident with a program directed toward their rehabilitation and reintegration into the community as well as appropriate education, on-the-job training, and employment opportunities. Did Supreme Court err in finding the programs offered at Fishkill were minimally adequate without determining what programs met the statutory guidelines or the appropriateness of the opportunities offered to RTF residents?

STATEMENT OF THE CASE

A. The Statutory Regime Governing the Placement of Individuals into Residential Treatment Facilities

All persons convicted of a felony sex offense must be sentenced to a term of post-release supervision lasting between three and twenty-five years, depending on the offense committed. Penal Law § 70.80, 70.45(2-a). Post-release supervision begins once an incarcerated person has completed their sentence of imprisonment, a date known as the maximum expiration date, and is released from prison. Penal Law § 70.45(5). No longer an inmate, a parolee on PRS must abide by conditions set by the Board of Parole and is supervised by parole officers who are employees of DOCCS.

Post-release supervision is intended to foster the "reintegration" into society of people who have been incarcerated "by [providing] services to the offender, such as assistance with employment or housing." Donnino, Practice Commentary, McKinney's Cons. Laws of N.Y., Penal Law § 70.45. A stable living situation and "access to employment and support services are important factors that can help offenders to successfully re-enter society." 9 N.Y.C.R.R. § 8002.7(d)(4).

Under the Sexual Assault Reform Act, it is a mandatory condition of PRS that people convicted of certain sex offenses are prohibited from residing within 1,000 feet of school grounds. Exec. Law § 259-c(14). This restriction

severely limits the ability of individuals on PRS to find housing that can be approved by parole authorities.

The Board of Parole may require that a person on PRS "be transferred to and participate in the programs of a residential treatment facility [RTF]" for up to six months following their release from the underlying term of imprisonment. Penal Law § 70.45(3). For individuals on PRS who must find SARA-compliant housing, the Court of Appeals has held that DOCCS may require they "reside" in an RTF facility beyond the six-month period until such persons locate compliant housing. Corr. Law § 73(10), *construed in People ex rel. McCurdy v. Warden, Westchester Cnty. Corr. Facility*, 36 N.Y.3d 251, 262 (2020).

An RTF is a specialized type of correctional facility designed to facilitate the reintegration of incarcerated individuals into society through their involvement with community-based educational and vocational opportunities upon release. Correction Law § 2(6) defines a "residential treatment facility" as:

> A correctional facility consisting of a <u>community based residence in or near a community where employment, educational and training opportunities are readily available</u> 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.

(emphasis added).

RTFs may also be made available as a residence for individuals on PRS (i.e., community supervision). Correct. Law § 73(10). RTFs may house both individuals eligible for or soon to become eligible for parole who have not yet been released but have been transferred from a different facility, as well as other residents who are on parole but have yet to find SARA-compliant housing.

The legislative scheme makes clear that RTFs were intended to serve as transitional facilities whose residents are in the process of "integrating" into the community. Correction Law § 73(3) requires DOCCS to establish programs directed toward "the rehabilitation and total reintegration into the community" of RTF residents. Correction Law § 73(1) states that RTF residents "may be allowed to go outside the facility during reasonable and necessary hours to engage in any activity reasonably related to [their] rehabilitation." RTF residents are also entitled to "appropriate education, on-the-job-training and employment," which DOCCS is responsible for securing. *Id*. §§ 73(2), (3). Collectively, these provisions make clear that the legislature intended time spent in an RTF to bridge the gap between time spent serving a sentence of incarceration and time rebuilding one's life in the community.

B. The RTF Parolees' Imprisonment at Fishkill

Until approximately 2014, individuals subject to SARA were allowed to reside briefly at the 30th Street Intake Center of the New York City Department of Homeless Services, a preliminary step for entry into the City's shelter system, even though that center is located within 1,000 feet of school grounds. *People ex rel. Johnson v. Superintendent*, *Fishkill Corr. Facility,* 47 Misc. 3d 984, 987 (Sup. Ct. Dutchess Cty. 2015). In 2014, DOCCS prohibited individuals subject to SARA from being released to shelters within 1,000 feet of school grounds, even briefly, and no longer permitted these individuals to reside at the 30th Street Intake Center. (*See* R. at 130–37.) This policy change created a massive backlog of parolees on PRS who were unable to pay for the limited SARA-compliant housing available in New York City and could no longer readily access the City's shelter system. (*See* R. at 576.)

To address the loss of New York City shelter residences, DOCCS decided to utilize certain prisons as RTFs—including Fishkill—and ordered the transfer of individuals subject to SARA who were approaching their maximum expiration date to such prisons unless and until they were able to provide DOCCS with an address at which they intended to reside that was both SARA-compliant and otherwise approved by parole authorities. (R. at 89; Joseph Goldstein, Housing Restrictions Keep Sex Offenders in Prison

Beyond Release Dates, N.Y. TIMES, Aug. 21, 2014, at A18.) As understood by DOCCS' employees, the current RTF system was created to house a "backlog" of parolees convicted of sex offenses who could no longer be placed in New York City Department of Homeless Services shelters. (R. at 576–77) (McNamara Aff., Ex. Q (Claudio Tr. 43:10–46:25).)

1. The Lack of "Community Based" Integration Opportunities at Fishkill

Fishkill was not designed to meet the specific needs of the RTF Parolees, despite the mandates of Correction Law §§ 2(6) and 73. RTF residents are not permitted to work beyond the prison grounds, nor do they travel within the local community. (R. at 548–51) (McNamara Aff., Ex. M (Urbanski Tr. 45:24–46:1; 59:9–21; 62:16–23).) They were unable to leave the Fishkill grounds unless escorted by correctional officers to meet with a parole officer in Poughkeepsie. (R. at 545; 550) (McNamara Aff., Ex. M (Urbanski Tr. 19:21–20:8; 59:9–21).) The few RTF residents who do perform work outside of the prison's walls still do so "on grounds" at a storehouse that is "less than a tenth of a mile" from the main prison building. (R. at 548) (McNamara Aff., Ex. M (Urbanski Tr. 45:2–11).) And work at the prison's storehouse does not entail more than de minimis contact with members of the community. (R. at 531; 1623) (McNamara Aff., Ex. K (Heady Tr. 100:6–15); Mallozzi Tr. 156:5–19.) The remaining population of RTF residents must

work in the Fishkill prison facility alongside general population inmates. (R. at 530–31) (McNamara Aff., Ex. K (Heady Tr. at 92:11–17; 101:11-24).)

2. The Lack of Employment and Educational Opportunities at Fishkill

Fishkill offers few employment and educational opportunities. No work assignments are tailored to RTF residents and RTF residents never perform work off prison grounds. (R. at 548–49) (McNamara Aff., Ex. M (Urbanski Tr. at 45:24–46:2).) The work that is currently performed by the outside work crew on the prison grounds was previously handled by general population inmates prior to Fishkill's establishment of its RTF in 2014. (R. at 535) (McNamara Aff., Ex. K (Heady Tr. at 133:6–17).) Aside from the storehouse assignment, RTF residents are permitted to work in certain prison facilities. (R. at 531) (*Id*. at 100:16–101:23.) None of these jobs engage with members of the community. (R. at 533) (*Id.* at 110:3–9.) Some jobs available to general population inmates at Fishkill are not available to RTF residents, including RTF Parolees. (*See, e.g.*, R. at 552) (McNamara Aff., Ex. M (Urbanski Tr. 70:2–71:6) (general population inmates are permitted to pursue employment off Fishkill grounds through the work release program that allows eligible inmates—but not RTF Parolees—to "leave the facility…and [] go work within the community.").) These include positions involving interactions with members of the community. (R. at 552) (*Id.*)

Educational opportunities are similarly lacking. RTF residents participate in a general orientation to the facility alongside general population inmates. (R. at 528) (McNamara Aff., Ex. K (Heady Tr. 76:18–22).) And theoretically, the same educational opportunities available to general population inmates at Fishkill are also available to RTF residents. (R. at 532) (*Id.* at 107:10–108:21.)

Beyond that, DOCCS created a curriculum in 2014 that purports to address the particular needs of people convicted of sex offenses. (R. at 317–89.) This curriculum is provided, without modification, to every RTF resident at Fishkill. (R. at 518) (McNamara Aff., Ex. J (Gonzalez Tr. 94:17–96:12).)

Shelly Mallozzi, an author of the RTF Program, testified that the Fishkill staff were supposed to update housing and job ads from 2014 used in the curriculum. (R. at 569) (McNamara Aff., Ex. P (Mallozzi Tr. 62:16–18).) But, Ms. Iccari, one of the offender rehabilitation coordinators ("ORCs") tasked with teaching the curriculum at Fishkill, confirmed that the housing and job ads are never updated. (R. at 506; 508) (McNamara Aff., Ex. H (Iccari Tr. 126:16–25; 152:20–153:2).) The curriculum used at Fishkill contains no content specific to RTF residents and the unique challenges they face in reintegrating to society or otherwise participating in a rehabilitatory program. (R. at 317–89.) DOCCS employees are well aware of this oversight. Each of

the ORCs deposed confirmed that the curriculum used at Fishkill is not tailored to the needs of RTF residents. ORC Gonzalez admitted that nothing in the 28-day workbook was specific to the reintegration or rehabilitation of RTF residents subject to SARA. (R. at 519–20) (McNamara Aff., Ex. J (Gonzalez Tr. 113:7–114:6).) ORC Greenberg was equally unable to identify anything in the curriculum addressing the unique challenges of RTF Parolees convicted of sex offenses finding employment or SARA-compliant housing. (R. at 513–14) (McNamara Aff., Ex. I (Greenberg Tr. 54:8–58:22).)

3. Treatment of RTF Parolees at Fishkill

Despite the fact that RTF Parolees have completed their term of imprisonment and are on PRS, residential life at Fishkill commingles RTF residents with general population inmates. (R. at 546) (McNamara Aff., Ex. M (Urbanski Tr. 27:11–23).) RTF residents are assigned the same uniforms, (R. at 527) (McNamara Aff., Ex. K (Heady Tr. 47: 2–11), are subject to the same visitation rules, (R. at 525–26) (McNamara Aff., Ex. K (Heady Tr. 41:16–42:11), are required to eat meals and get yard access at the same time as general population inmates (R. at 546–47) (McNamara Aff., Ex. M (Urbanski Tr. 28:6–30:17; 31:2–18), and are visually indistinguishable from inmates serving active prison sentences at Fishkill, (R. at 527; 529)

(McNamara Aff., Ex. K (Heady Tr. 47: 2–48:18; 80:19–81:2). The reality is there is no "RTF" at Fishkill, only a prison.

PROCEDURAL HISTORY

A. Supreme Court Proceedings

More than five years ago, in May 2016, Richard Alcantara, Lester Classen, Jackson Metellus, Cesar Molina, Carlos Rivera, and David Sotomayor (together, the Petitioners-Respondents-Cross Appellants or "RTF Parolees") were individuals under post-release supervision and held at Fishkill, purportedly as residential housing. (*See* R. at 71–137) (Mitchell Affirmation, Ex. 1 (Verified Petition).) They commenced this action as an Article 78 proceeding, alleging that they and a class of similarly situated individuals were being illegally confined at Fishkill (as well as the RTF at the Woodbourne Correctional Facility), and that Appellants-Cross Respondents Annucci and Stanford had failed to perform the duties required of them by statute because they did not provide adequate educational and vocational programming, nor did they provide assistance in securing SARA-compliant housing, to the RTF Parolees at Fishkill. (R. at 103–11) (*Id*. ¶¶ 82–114.) In response, the State on behalf of Annucci and Stanford answered and moved to dismiss the Article 78 petition. (R. at 395–403) (McNamara Aff., Ex. A (Answer and MTD).)

On February 24, 2017, Supreme Court denied Respondents' motion to dismiss on the claim that Fishkill "fails to comply with the statutes governing residential treatment facilities because it does not offer adequate programming or employment opportunities," and then converted the case to a declaratory judgment action (the "Order"). (R. at 435–36) (McNamara Aff., Ex. B (Order at 31–32).) The court below also ordered a fact-finding hearing but, in lieu of such a hearing, the parties proceeded to discovery. (R. at 435–36) (*Id*.)

Discovery in this case was extensive. The RTF Parolees propounded 24 interrogatories and 13 requests for production upon each Appellant-Cross Respondent. (R. at 438–51; 452–66; 467–80; 481–95; 496–98) (McNamara Aff., Ex. C (interrogatories to Annucci); Ex. D (document requests to Annucci); Ex. E (interrogatories to Stanford); Ex. F (document requests to Stanford); Ex. G (Affirmation of Service).) In response, they produced to RTF Parolees—on a rolling basis from June 2, 2017 through March 11, 2019—just under six thousand pages of documents and information. RTF Parolees then deposed fourteen current and former DOCCS employees who held significant supervisory experience at Fishkill, as well as a detailed knowledge of the facility's treatment of RTF residents.

On February 5, 2019, RTF Parolees filed their Note of Issue seeking a trial without jury on the remaining claims. And on May 30, 2019, the State

moved for summary judgment dismissing petitioners' remaining claims. RTF Parolees opposed DOCCS's motion.

B. The Decision and Judgment in the Court Below

On December 20 2019, Supreme Court granted partial summary judgment to both the RTF Parolees and the State. (R. 40–65.) The decision essentially bifurcated the petitioners' claims into two aspects: those related to the treatment of the RTF residents outside of Fishkill and those related to the treatment of RTF residents within the prison.

As to the treatment of RTF residents outside of the facility, Supreme Court granted summary judgment to RTF Parolees, holding DOCCS was not complying with its statutory obligation to provide RTF residents with out-of-facility opportunities for education, training, and employment. (R. at 60–61.) RTF Parolees have almost "no opportunity to interact with non-facility personnel" and no ability to avail themselves of community-based programming outside the facility. (R. at 61–64.)

Supreme Court, however, also granted summary judgment to the State with respect to the RTF residents' treatment within the Fishkill prison. The court below held that the petitioners had not raised a genuine dispute of fact as to whether the programming, vocational and educational opportunities for RTF Parolees within the Fishkill RTF facility complied with the requirements

of Correction Law § 73(3). Further, Supreme Court ruled that Fishkill is "community-based" relative to New York City, notwithstanding the fact that it is located 60 miles away. (R. at 57.)

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

STANDARD OF REVIEW

This Court's review of Supreme Court's order granting and denying summary judgment to the parties below is de novo. *Rothouse v. Ass'n of Lake Mohegan Park Prop. Owners, Inc*., 15 A.D.2d 739 (1st Dep't 1962). Under this standard of review, the issue before the Appellate Division is the same as confronted the court below: whether "upon all the papers and proof submitted, the cause of action or defense [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." CPLR 3212(b); *Myer v. Jova Brick Works, Inc*., 38 A.D.2d 615 (3d Dep't 1971).

ARGUMENT

A. The Court Should Affirm Supreme Court's Holding that the Correction Law Requires DOCCS to Provide RTF Residents With Access to Employment, Educational, and Training Opportunities in Communities Surrounding the Facility

The court below correctly found—and the State does not dispute—that "the State defendants have proffered no evidence that RTF parolees can avail

themselves of other 'employment, educational, and training opportunities' in the communities of Fishkill, Beacon, Poughkeepsie, or other nearby communities." (R. at 31.) This Court should affirm the lower court's ruling that this failure violates Sections 2(6) and 73 of the Correction Law, which provide that an RTF must be a "community based facility" located where "employment, educational and training opportunities are readily available" for persons who are on parole and that there must exist the possibility of going "outside the facility during reasonable and necessary hours to engage in any activity reasonably related to his or her rehabilitation." (R. at 30.) DOCCS's obligations arise from the plain meaning of the controlling statutes, which "reflect an unmistakable legislative intent to provide community-based programming for RTF parolees in furtherance of the statutory objective to help them reintegrate into the community." (R. at 29–30.)

Rather than confront this inconvenient fact, the State embarks on an expansive tour of the Correction Law to arrive at the simple but incorrect point that the Legislature's use of the word "may" in Section 73(1) provides DOCCS with complete discretion whether or not to create opportunities to leave a facility designated as an RTF. But one word cannot negate an entire statutory scheme, and the Legislature did not enable DOCCS to undermine its "unmistakable . . . intent" that RTFs provide access to community-based

opportunities. Just as parolees must follow inconvenient laws, so too must DOCCS.

1. Correction Law §§ 2(6) and 73 Establish that a Residential Treatment Facility Must Provide Meaningful Access to Community-Based Opportunities Outside of Prison Walls

The starting point for "any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." *McCurdy*, 36 N.Y.3d at 257 (quotations omitted) (citing *People v. Anonymous*, 34 N.Y.3d 631, 636 (2020)). Furthermore, the statute "must be construed as a whole" and "its various sections must be considered together and with reference to each other." *Id*. (citations and quotations omitted). Here, the starting point is Correction Law § 2(6) which, in relevant part, defines an RTF as a "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."

Correction Law § 73 then articulates the authorities and responsibilities specific to residential treatment facilities. Section 73(2) establishes DOCCS's obligation to secure "appropriate education, on-the-job training and employment for inmates transferred to residential treatment facilities." Section 73(3) requires DOCCS to establish programs "directed toward the[ir] rehabilitation and total reintegration into the community." And other sections

contemplate regular offsite excursions by RTF residents. RTF residents "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." Corr. Law § 73(1); *see also id*. § 73(4) (permitting modification of a resident's activities if "any aspect of the program assigned to an individual is inconsistent with the welfare or safety of the community or of the facility or its inmates"); *id*. § 73(7) (noting "provisions of this chapter relating to good behavior allowances" apply to "behavior on the premises and outside the premises of such facility").

These words mean what they say. To qualify as an RTF, a facility must be located within or near a community where employment, educational, and training opportunities are "readily available" for parolees, including those on PRS and subject to SARA. If those opportunities do not exist or are not "readily available" for parolees, the facility does not satisfy the statutory requirements for a residential treatment facility. Furthermore, it is DOCCS's responsibility to secure "appropriate education, on-the-job training and employment" for RTF residents. *Id*. § 73(2). Section 73 further confirms that RTF residents are permitted to leave the facility to participate in such opportunities and it distinguishes RTF residents' interactions within the facility from those in the community. Whatever discretion may be

permissible under the Correction Law, the basic framework establishes that an RTF *must* be positioned to enable not just the *availability* of educational and job-related opportunities in a local community but also *access* to those opportunities by RTF residents. A failure to satisfy these statutory requirements is a failure of the facility to qualify as a residential treatment facility.

As the court below recognized, these words and their commands are clear; however, the factual record below shows a complete failure to provide *any* access to opportunities based in the surrounding communities, or that reasonably approximate the "appropriate education, on-the-job training and employment" DOCCS is tasked with securing. (R. at 29–31.)

Beyond the plain meaning of individual provisions of a statute, "courts must harmonize the various provisions of related statutes and [] construe them in a way that renders them internally compatible." *McCurdy*, 36 N.Y.3d at 257 (internal quotations and citations omitted). Such a construction should give "effect to each component and avoid[] a construction that treats a word or phrase as superfluous." *Lemma v. Nassau Cnty. Police Indemn. Bd.*, 31 N.Y.3d 523, 528 (2018). Correction Law § 2 defines no fewer than fourteen types of correctional facilities and emphasizes that an RTF is "a community based residence in or near a community" where opportunities are available for

parolees "who intend to reside in or near that community when released." Corr. Law § 2(6). The use of the word 'community' three times in the definition, the most of any subsection, must mean *something,* and it must also meaningfully differentiate RTFs from other types of correctional facilities to give effect to the statute. The most natural reading is that it means RTFs must be situated to (and in practice do) provide meaningful access to opportunities based in the local community or communities surrounding the facility.

2. Supreme Court's Construction of the Correction Law Is Supported by Legislative Intent and the Overall Statutory Scheme's Focus on Rehabilitation and Community Reintegration

"When presented with a question of statutory interpretation, a court's primary consideration is to ascertain and give effect to the intention of the Legislature." *Lemma*, 31 N.Y.3d at 528 (internal quotations and citations omitted). The Legislature's purpose in ensuring access to community-based programming is its determination that interactions with the community will aid in RTF residents' rehabilitation.

RTFs were created fifty-five years ago, nearly to the day, when New York committed itself to establishing and operating a new type of facility in order to aid the successful reintegration back into society of people serving sentences of incarceration. In approving the bill, Governor Nelson Rockefeller wrote, "[t]he establishment of the Residential Treatment Facility

opens a new dimension in the State's penal system, *intermediate between prison isolation and community freedom*." Governor's Approval Mem, Bill Jacket, L 1966, ch 655 at 2, 1966 NY Legis Ann at 349 ("1966 Governor's Approval Mem") (emphasis added). Shortly thereafter, the State passed a comprehensive package of laws intended to fund and reform the correctional system. These bills were "the direct result of the nationally significant work of the Governor's Special Committee on Criminal Offenders and incorporate many of the findings and recommendations contained in the pioneering report made by the Committee." Governor's Approval Mem, Bill Jacket, L 1970, ch 475 at 62, 1970 NY Legis Ann at 498. And the 1970 revisions further solidified New York's commitment to "merge the concepts of parole and incarceration by permitting 'inmates' to be transferred to a special residential facility that would be operated by the State Department of Correction and such 'inmates' would be permitted to leave the institution, under parole supervision, 'to engage in rehabilitory activities.'" Preliminary Report of the Governor's Special Committee on Criminal Offenders, June 1968, at 157.

With this in mind, the language of Correction Law § 73(10) was slightly modified in 2011 to clarify that DOCCS's authority to use an RTF as a residence was not limited to parolees released by the Parole Board and those on conditional release but also included individuals with the concurrent ability

to reside in the community such as those on PRS and other forms of "community supervision." *See* Laws of 2011, ch. 62, § 8 (Part C, Subpart B). The direct references to RTFs as an "intermediate" step between incarceration and residents' liberty in the community require the Court to reject DOCCS's claim of unfettered authority to maintain RTFs as places of "prison isolation" without meaningful access to community-based opportunities.

Indeed, access to the community is a central purpose and one of the distinctive elements of an RTF, and community access underscores the Legislature's intent to distinguish life in an RTF from life in other types of correctional institutions. *Compare* Corr. Law § 2(6) *with* §§ 2(8) (correctional camp), 2(9) (diagnostic and treatment center), 2(17) (alcohol and substance abuse treatment facility).

And as discussed above, Correction Law § 73 includes several requirements for RTFs, including access to community-based opportunities, designed to further the Legislature's goal of providing RTF residents with "[p]rograms directed toward the rehabilitation and total reintegration into the community." Corr. Law §§73(2), (3). This overall focus on rehabilitation and community integration confirms that Section 73(1) serves that legislative purpose by ensuring the availability of and access to community-based educational and employment opportunities to aid in acclimating individuals

to post-release life. Here, the court below correctly recognized that absent the availability of community-based opportunities, Fishkill did not satisfy the minimum requirements of an RTF.

3. Supreme Court Correctly Rejected the State's Argument that DOCCS Has Discretion to Ignore the Community-Based Opportunities Requirement

The State first contends that the Legislature's use of the word "may" rather than "shall," grants DOCCS complete discretion whether to allow RTF residents to engage in off-grounds activities. State's Br. at 21–26. But the more common-sense reading of this language – and the one more consistent with clear legislative intent – is that the word "may" conveys only the discretion to decide whether to allow individuals to engage in activities outside the facility on a case-by-case basis "in accordance with the program established for him or her." (R. at 31.) DOCCS cannot rely on this individualized discretion to deny access to community-based activities to *all* RTF residents as the record below demonstrated. (R. at 31.)

Section 73(1) permits DOCCS to decide whether "*such person* may be allowed to go outside the facility," (emphasis added), but it does not permit DOCCS to decide categorically that *no* person shall be permitted to leave the facility to participate in community-based opportunities. Under the State's logic, permission to take a vacation at one's discretion would also permit one

to never work. Life does not work that way and neither does Correction Law § 73. The exercise of discretion with respect to individuals granted in Section 73(1) does not eliminate the need for DOCCS to comply with Section 73(2); the State must secure "appropriate education, on-the-job training, and employment" in the community.

DOCCS next compares Correction Law § 73 to temporary release programs that "necessarily include out-of-facility activities" and contends the absence of the detailed standards governing temporary release programs in Section 73 indicates the Legislature did not require RTF programs include off-grounds activities. State's Br. at 26–28. DOCCS provides no support for this conclusion. And "those safeguards, procedures, and requirements are largely absent from the RTF regime" for good reason; RTFs are designed with an entirely different population in mind.

From their inception, RTFs held a position "intermediate between prison isolation and community freedom" and involve concurrent supervision of residents' interactions in the community. 1966 Governor's Approval Mem. at 349. It strains credulity to conclude the Legislature would create such an "intermediate" facility and not intend any greater access to the community than normal "prison isolation." Furthermore, inmates participating in temporary release programs are presumed to be incarcerated; but, by statute,

RTF residents include those already on parole and under community supervision. Corr. Law § 73(10); *see also* Corr. Law § 2(31) (defining persons on PRS as being "released into the community").

Further, even if DOCCS's interpretation were correct, it concedes that the Legislature "intended to leave the decision whether to include any such activities to DOCCS's case-by-case discretion." State's Br. at 28. But DOCCS does not exercise case-by-case discretion at Fishkill. (R. at 30–31.) Accordingly, the court below correctly concluded DOCCS is not in "compliance with their statutory obligation to provide community-based assignments that would further RTF parolees' post-release reintegration into the community where they intend to live." (R. at 32–33.)

Finally, the State seeks to downplay the significance of understanding what an RTF is and how it fits into the statutory scheme by arguing that Section 2(6) adds nothing to the provisions of Section 73. State's Br. at 30. The State goes so far as to argue that the definition of an RTF as "a community based residence where employment, educational and training opportunities are readily available" refers exclusively to the opportunities available "to RTF residents upon *their release*" and not "provided to them via RTF programming, *during their RTF residency*." *Id*. at 31 (emphasis in original). This narrow interpretation confuses rather than clarifies the role and function

of an RTF. If an RTF need not differ from a prison facility, what function does it serve? No answer DOCCS provides to this question is consistent with *all* the provisions of the statutory scheme.

It would serve no identifiable purpose to place an RTF in a community with "readily available" educational and employment opportunities but no ability to access them until after release. Nor is there any apparent reason for the Legislature to provide unlimited discretion whether to provide access to offsite opportunities only to then limit DOCCS's discretion in selecting physical *locations* for an RTF. If RTF residents are not able to avail themselves of community-based opportunities, the Legislature would be unconcerned with whether RTFs are situated within or near communities where opportunities are available. Simply put, the DOCCS's interpretation of the Correction Law cannot be squared with the statute's definition of an RTF as a "community-based facility" in a community where educational and employment opportunities are "readily available." Correction Law §2(6).

As the court below noted, at best "only eight of the nearly 100 RTF parolees can be assigned" to the sole work assignment located outside of the prison's fences (but still on Fishkill's grounds). (R. at 30–31.) This total lack of access to opportunities outside the facility and in the community does not reflect the kind of discretionary assessment envisioned in Correction Law §

73(1), but instead shows that DOCCS has fully abdicated its responsibilities to secure offsite opportunities in direct contravention of the requirements of Correction Law § 73(2).

4. The Court of Appeals Specifically Left Open this Issue for Lower Courts to Decide

The State's final contention is that the Court of Appeals decision in *Gonzalez v. Annucci*, 32 N.Y.3d 461 (2018), requires reversal of the lower court's opinion. State's Br. at 32–36. In particular, the State contends that because "Woodbourne's out-of-facility activities" and Fishkill's "are materially identical," the Court of Appeals' ruling on the adequacy of the programs available at Woodbourne forecloses the court below from the granting of summary judgment to the RTF Parolees on this issue. *Id*. *Gonzalez* made no such decision and does not foreclose the relief granted to the RTF Parolees. The Court of Appeals found "there was insufficient record evidence to establish that DOCCS's determination to place petitioner at the Woodbourne RTF was irrational or that the conditions of his placement at that facility were in violation of the agency's statutory or regulatory obligations." 32 N.Y.3d at 475. The Court of Appeals then immediately noted with regards to this case, "similar claims relating to Fishkill Correctional Facility as an RTF are pending in discovery proceedings before Albany County Supreme Court." *Id*. at n.6. No judgment was made regarding this case, and the Court of

Appeals' limited ruling was based only on an "insufficient record." Supreme Court was correct to find "the record in *Gonzalez* is factually distinct from the record before this Court." (R. at 32.)

B. The Fishkill Prison Is Not a Residential Treatment Facility for Reasons that Go Beyond the Lack of Community-Based Opportunities

DOCCS's statutory authority to designate and co-locate an RTF on the grounds of another correctional facility is well established. But when it does so, the designated facility must meet the basic statutory requirements of an RTF. Even beyond the question of providing access to the surrounding community, the record below illustrated that DOCCS's designation that Fishkill is an RTF is "merely a fiction." *Arroyo v. Annucci*, 61 Misc. 3d 930, 939 (Sup. Ct. Albany Cnty. 2018). To both begin and end an analysis of whether DOCCS is meeting its statutory requirements on the basis of its own designations, as the court below did, wrongly elevates form over substance and allows DOCCS to warehouse RTF Parolees in what amounts to an unlawfully extended prison sentence.

1. Supreme Court Gave Unwarranted Deference to DOCCS's Claims of Compliance with Correction Law §§ 2(6) and 73

In granting summary judgment to DOCCS on the basis of its conclusory assertions and discretion granted to it by the Legislature, the court below

reached two flawed legal conclusions. First, it concluded that RTF Parolees' rights were not violated by receiving treatment "much the same as general population inmates" in a medium security correctional facility. (R. at 25.) Second, it concluded that the programming available at Fishkill was "minimally adequate." (R. at 28.) Both conclusions are flawed.

The court below first claims that because Correction Law § 2(6) defines an RTF, in part, as a "correctional facility," the Legislature contemplated the co-location of facilities, and accordingly, equivalent treatment between RTF parolees and "general population inmates" in a medium security correctional facility does not violate the statute.[1] (R. at 24–26.) In support of this contention, the court below cites to Correction Law § 70(6)(b)(ii) to note that an RTF "serves a 'function' within a correctional facility." (R. at 25.) Rather than support Supreme Court's conclusion here, however, Correction Law § 70 confirms RTF Parolees' contention that Fishkill is not a statutorily compliant RTF. Section 70(6) merely outlines "types of classifications," but Section 70(4) limits the co-location of multiple "correctional facilities" in the same building or premises to situations where "the inmates of each are at all times kept separate and apart from each other except that the inmates of one

[1] Even this finding gives DOCCS too much credit as it has also designated Green Haven, a maximum security prison, as an RTF. 7 N.Y.C.R.R. § 100.20(1)(c), as amended 12/5/16.

may be permitted to have contact with the inmates of the other in order to perform duties, receive therapeutic treatment, attend religious services and engage in like activities." Nothing in the record suggests DOCCS has satisfied this condition for co-locating a residential treatment facility at Fishkill. Indeed, plenty of record evidence suggests the opposite—that Fishkill commingles RTF residents with general population inmates, treats them interchangeably, and may even lack the capacity to separate them. *See supra* at 12.

The lower court's reliance on the use of "correctional facility" in Correction Law § 2(6) also fails under scrutiny. That section defines no fewer than fourteen types of "correctional facilities," several of which clearly require distinct treatment and specific configurations. For example, Section 2(9) covers correctional facilities "operated for the purpose of providing intensive physical, mental and sociological diagnostic treatment services," Section 2(15) covers correctional facilities "that may conduct a shock incarceration program," and Section 2(17) covers correctional facilities "designed to house medium security inmates . . . for the purpose of providing intensive alcohol and substance abuse treatment services." But the question of whether any facility qualifies under the appropriate subsection of Correction Law § 2 is answered not by similarities between the facilities and

their populations, which undoubtedly there will be, but by whether the facilities meet the specific statutory requirements governing the designation given to that facility by DOCCS. Here, the court below failed to fully consider this question because it misidentified the relevance to this analysis that, as explained below, Fishkill has done nothing to differentiate the experience and programs available to RTF residents to ensure that they are aligned with the Legislature's goals in establishing RTFs as "community based" facilities designed for the rehabilitation and imminent community reintegration of its residents. DOCCS's failure here is in failing to provide statutorily required opportunities to RTF Parolees as evidenced, in part, by their failure to ensure programming available at Fishkill was appropriate to the needs of RTF residents.

Furthermore, the lower court's elevation of form over substance is completely counter to the intent of revising the definition section of the Correction Law. Revisions in 1970 were designed to

> substantially increase the flexibility of the correctional system by eliminating artificial distinctions among types of State institutions. Under the bill, designations of institutions as 'prisons' and 'reformatories' will be abolished; all institutions will be known simply as 'correctional facilities', to be graded and classified administratively in accordance with rules promulgated.

Governor's Approval Mem, Bill Jacket, L 1970, ch 475 at 62, 1970 NY Legis Ann at 499. The meaningful distinctions between facilities are determined by

their classifications and not their title as a "correctional facility." This is precisely the opposite of what the court below concluded in interpreting Section 2(6).

Accordingly, the Court should find that DOCCS's designation of Fishkill as an RTF is one in name only and does not forestall an examination of the sufficiency of the RTF program at Fishkill.

Next, the court below found that the singular curriculum available to RTF residents at Fishkill in conjunction with on-site work opportunities and the theoretical availability of certain educational programming was "minimally adequate." (R. at 27–28.) But this tepid finding of programmatic sufficiency misconstrues the applicable statutory requirements.[2]

The court below mistakenly viewed the appropriate touchstone for analyzing the sufficiency of an RTF's programmatic offerings as "adequacy" or in this case minimal adequacy. Correction Law § 73(2) on the other hand establishes that that touchstone is appropriateness, not adequacy. The Legislature's command here is not just that DOCCS establish several programs and carefully assign one of them to each RTF resident; it also requires DOCCS to secure "appropriate education, on-the-job training and

[2] RTF Parolees do not contest the lower court's finding that *Gonzalez v. Annucci* forecloses their challenge to the geographically related statutory requirements for the Fishkill facility, (R. at 26), but plainly continue to contest the programmatic sufficiency of the facility.

employment" for individuals transferred to an RTF. Corr. Law § 73(2). The court below erred in failing to consider whether the limited "education, on-the-job training and employment" opportunities offered at Fishkill were *appropriate* to the rehabilitation of RTF residents, including RTF Parolees, as required by statute.

The court below also failed to analyze (and therefore decide) what distinguishes a program "directed toward the rehabilitation and total reintegration" from the community-based opportunities identified in the statute. It further failed to evaluate the relationship between the statutory requirements and in-facility programming available to general population inmates. Instead it concluded, without analysis, that "programs offered to RTF parolees" were sufficient. (R. at 27–28.)

Correction Law § 73 is designed to ensure that each RTF resident "shall be assigned a specific program," which shall be from among the "*programs* directed toward the rehabilitation and total reintegration into the community" that DOCCS is required to establish. The 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. *See supra* at 11. DOCCS has one curriculum that it assigns to every transferee. And the Correction Law makes clear each "readily available" opportunity does not

constitute an individual program. Section 73(2) clarifies that community based education, on-the-job training and employment opportunities constitute parts of the programs to be designed by DOCCS, but nowhere does the statute indicate such opportunities constitute separate programs themselves as the court below does.

DOCCS is required to develop multiple programs and to determine which of those programs is appropriate for each resident. This failure to determine what a program is and whether DOCCS has satisfied its burden to produce multiple programs and assign them on an individualized basis, as it is required to by Sections 73(1) and (3), forecloses the lower court's finding that the programs offered are minimally adequate.

Individually and together, these failures warrant vacatur of Supreme Court's grant of summary judgment to DOCCS.

2. The Record Establishes that DOCCS Did Not Design Fishkill to Meet the Statutory Requirements for an RTF

New York created RTFs to serve as an "intermediate" step between the confines of a prison and full release into a community. With Correction Law §§ 2(6) and 73, the Legislature has established a non-discretionary duty to establish multiple "programs," available to RTF residents, that provide "appropriate" opportunities for each resident's "rehabilitation and total reintegration into the community." The purpose, substance, and unique

characteristics of an RTF are established by law. Fishkill is nothing of the sort; it is a step backwards. In function, if not by design, it maintains the same carceral regime that general population inmates at Fishkill experience. And despite the Correction Law tasking DOCCS with the creation and maintenance of appropriate rehabilitatory programs for the individual residents transferred or otherwise remanded to RTFs, in practice, DOCCS uses them to warehouse people subject to SARA residency restrictions, as a way of avoiding the dilemma created by the lack of available appropriate housing for such individuals.

The use of RTFs and Fishkill in particular as a dorm rather than an RTF was confirmed by DOCCS employees, who almost universally seemed to view RTFs as designed for this specific purpose – not for the clear rehabilitative purposes the statute contemplates. Deposed DOCCS employees were unaware of the important rehabilitative purpose the RTF is meant to serve. (R. at 503; 523; 581; 1361–62) (McNamara Aff., Ex. H (Iccari Tr. 29:5–11); Ex. K (Heady Tr. 21:9–11); Ex. R (McKoy Tr. 28:2–22); Mitchell Aff., Ex. 4 (Greenberg Tr. 25:17–26:9).) No RTF-specific training for DOCCS employees at Fishkill was provided. (R. at 512; 551) (McNamara Aff., Ex. I (Greenberg Tr. 22:12–20); Ex. M (Urbanski Tr. 63:17–22).) Mark Heady, a Supervising Offender Rehabilitation Coordinator at Fishkill, and

thus someone charged with achieving the rehabilitative purpose of the facility, believed "the purpose of the RTF" was "to make sure the inmates have secure housing that's not near a res- -- a school building or something to that effect." (R. at 523) (McNamara Aff., Ex. K (Heady Tr. 18:3–14; 21:9–15).) David Santiago, a Senior Parole Officer who supervises parole officers handling RTF residents at Fishkill, similarly explained that the "RTF program is the task force where they place individuals who have SARA designations and requirements and are unable to obtain or have an approved residence that is SARA-compliant. So therefore they put a hold on these individuals." (R. at 539) (McNamara Aff., Ex. L (Santiago Tr. 19:16–21).) Shelley Mallozzi, who was the Sex Offender Coordinator for the State in 2014, did not know whether Fishkill had RTF programs prior to the decision to house RTF residents there in 2014, after it became impossible to house people with SARA residency restrictions in New York City shelters, and she added "[a]s far as I know, it was when it started." (R. at 1499) (Mallozzi Tr. 32:18–22.)

Furthermore, when tasked with designing the single RTF program used in New York, including at Fishkill, Mallozzi explained that there was no specific training provided by DOCCS in advance of creating the curriculum, (R. at 1496) (*Id.* at 29:7–19), and the only guidance provided was that the program "should be as different as possible from the other programs that were

being utilized for incarcerated individuals." (R. at 1487) (*Id.* at 20:9–23.) This testimony highlights the slapdash nature of DOCCS's approach to designating Fishkill as an RTF.

Mallozzi also testified that the sole curriculum used at Fishkill would use group discussion to address issues specific to RTF residents subject to SARA. (R. at 571) (McNamara Aff., Ex. P (Mallozzi Tr. 74:18–24 ("Q. Would you leave it to the ORCs to sort of explain this in the [group] session? A. Yes. Q. If they were just, for instance, reading from the curriculum from the page, that wouldn't come up; right? A. No.").)) But in practice, that did not happen. (R. at 518) (McNamara Aff., Ex. J (Gonzalez Tr. 94:6-95:14).)

Furthermore, individuals transferred to Fishkill under Correction Law § 73(10), such as some of the RTF Parolees, are "subject to conditions of community supervision imposed by the board." One of these conditions is that they must secure an approved, parole-compliant address. But the restrictions on freedom at Fishkill, including lack of internet access, prevent RTF residents from effectively securing the keys to their own release. Instead, they are reliant on assistance from DOCCS. As the record below made clear, such assistance is a fig leaf. Offender rehabilitation coordinators at Fishkill, parole officers, and DOCCS's Director of Re-Entry Services, Christina Hernandez, collectively could not identify anyone directly responsible for

finding parole-compliant housing for Fishkill residents, even as those residents are largely cut off from access to the outside world that would enable any self-help. (*See* R. at 562; 1403–04; 826; 860) (McNamara Aff., Ex. O (Hernandez Tr. 17:6–24); Mitchell Aff., Ex. 4 (Greenberg Tr. 67:2–68:19); Ex. 1 (Wallace Tr. 41:13–42:2; 75:4–8).)

These responses paint a disturbing picture. Key personnel in charge of setting up or running the Fishkill "RTF" and its "program" were unable to explain the very purpose of their facility, unable to demonstrate how their actions aligned with or satisfied statutory requirements, and refreshingly admitted that the purpose of the facility was not rehabilitatory but rather to accommodate a need to find SARA-compliant housing. As the Court of Appeals recently recognized in *McCurdy*, the ability to make an RTF available as a residence for those in need of SARA-compliant housing does not transform the purpose and function of an RTF. *See McCurdy*, 36 N.Y.3d 251, 260–61 (2020) (articulating limits and responsibilities applicable to DOCCS when housing parolees in an RTF under Penal Law § 70.45(3) or Correction Law § 73(10) in part based on the statute affording different "rights" to different categories of residents).

Indeed, statements made by Heady and Mallozzi suggest that minimal, if any, changes occurred at Fishkill in conjunction with its post-2014 use as

an RTF for individuals subject to SARA and under PRS. The record is replete with examples of how RTF residents at Fishkill are treated nearly identically to general population inmates. *See supra* at 12. Indeed, another court found that SARA's geographical limitation violated a Fishkill RTF resident's right to substantive due process in part because it found that his lived experience in the Fishkill "RTF" amounted to a de facto extension of his prison sentence. In relevant part, Supreme Court found:

> Extended discussion of whether petitioner's liberty is a fundamental right at stake in this ligation is hardly necessary. Despite his having fully served the incarceratory portion of his sentence, petitioner remains in prison. That his prison has been designated an RTF is, for this petitioner, merely a fiction. His freedom of movement is as restricted now as it was before his putative "release" to PRS; nothing about his surroundings, options or opportunities has changed from when he was an inmate at Fishkill Correctional Facility to now, when he is on "community supervision" in name only. "The Constitution is not to be satisfied with a fiction."

Arroyo v. Annucci, 61 Misc. 3d 930, 938–39 (Sup. Ct. Albany Cnty. 2018) (quoting *Hyde v. United States*, 225 U.S. 347, 390 (1912) (Holmes, J., dissenting)).

The *Arroyo* plaintiff's experience is not unique. *See* Allison Frankel, *Pushed Out and Locked In: The Catch 22 For New York's Disabled, Homeless Sex-Offender Registrants*, 129 Yale L.J. Forum 279, 294 (2019) ("And, while DOCCS ostensibly transfers people who have completed their maximum

prison terms to residential "treatment" facilities, such facilities are, in reality, simply prison cells by another name."). Indeed,

> [i]f an individual with a sentence that carries PRS has not found housing by their maximum release date, DOCCS places them in facilities called 'Residential Treatment Facilities,' or RTFs, during their PRS. RTFs are ostensibly "community based residence[s]" that provide job training, education, and assistance finding housing, akin to a halfway house. But in reality, life in an RTF is indistinguishable from prison.
>
> DOCCS has administratively designated wings of thirteen state prisons as RTFs. There, prisoners remain "behind razor-wire fences" in medium-and maximum-security facilities far from their communities. They are "treated much the same as inmates in the general population," wearing the same "prison uniform," using "the same commissary, mess hall, and sick hall as the rest of the population," and, like other prisoners, they are forbidden from leaving the prison grounds.

Id. at 296 (citations omitted). The import of these findings in the record, law, and academia is that whatever the Fishkill facility is, it is not a statutorily compliant residential treatment facility. (*See also* R. at 29–31, 170–171.) DOCCS' administrative designations may not elevate form over substance to evade effective review of its compliance with the Legislature's mandates, and the courts of New York "are not required to exhibit a naiveté from which ordinary citizens are free." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)).

C. This Court Is Equipped to Provide an Effective Remedy

This case, like *Gonzalez* and others, represents a consistent failure of DOCCS to address and resolve a problem of its own creation. But despite clear statutory guidelines and evidence of an ability, if not a willingness, to improve conditions, DOCCS has opted instead to tie up the State's resources and RTF residents' lives in litigation after litigation. It is an unfortunate situation and also an intolerable one.

However, to break this logjam and make progress, courts need not "micromanage the programming offered in correctional facilities" as the court below feared. (R. at 29.) The Court can call a spade a spade. The Fishkill facility is simply not a residential treatment facility. It is a medium security prison, euphemistically re-designated as a facility with a co-located "RTF" that facilitates the long-term expulsion of individuals subject to SARA from New York City instead of enabling their "rehabilitation and reintegration."

So declared, the Court has among its options the ability to require that DOCCS take seriously its responsibilities and, with an intention and thoughtfulness not on display in the record, organize Fishkill to meet the statutory requirements of a residential treatment facility. The Court can remand with instructions to enter an order requiring DOCCS to develop minimum standards for the Fishkill RTF that comply with the statutory

requirements outlined above, without dictating what those standards are. Here, the Correction Law does provide administrable standards. But neither RTF Parolees nor the Court can take comfort from DOCCS's track record that the Legislature's mandates will be given proper expression. The Court can take action to grant relief to RTF Parolees and ensure DOCCS's treatment of RTF residents is not arguably inadequate but instead statutorily compliant. At a minimum, the Court should recognize that, just as the emperor has no clothes, neither is Fishkill a residential treatment facility.

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the Court enter an order affirming the Decision by the court below to the extent it granted summary judgment to Respondents-Cross Appellants. The Court should also reverse the Decision as to whether DOCCS has met its obligations to provide "appropriate education, on-the-job training and employment" and other programs "directed toward the rehabilitation and total reintegration into the community" to Fishkill RTF Parolees. In the alternative, the Court should vacate the lower court's grant of summary judgment to DOCCS and remand for further proceedings on the question of DOCCS's compliance with Correction Law § 73.

Dated: July 1, 2021
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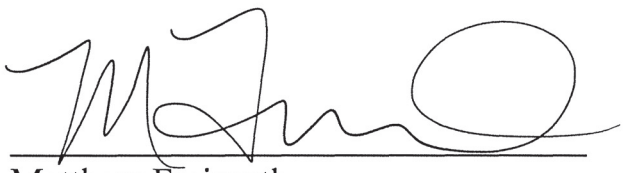
By: 

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STATE OF NEW YORK)		**AFFIDAVIT OF SERVICE**
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I, Tyrone Heath, 2179 Washington Avenue, Apt. 19, Bronx, New York 10457, being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above.

On: August 15, 2022

deponent served the within: **Motion for Leave to Appeal**

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Sworn to before me on August 15, 2022

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Commission Expires March 30, 2026

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