

STATE OF NEW YORK
COURT OF APPEALS

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, Chairperson, New York State
Board of Parole,

Respondents-Appellants-Cross Respondents,

STEVEN R. BANKS, Commissioner, New York
City Human Resources Administration and
Department of Social Services,

Respondent.

Mot. No. 2022-632

Appellate Division
Third Department
No. 531036

Supreme Court
Albany County
Index No. 2534-16

**MEMORANDUM OF LAW IN OPPOSITION
TO MOTION FOR LEAVE TO APPEAL**

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PRELIMINARY STATEMENT

Respondents Anthony J. Annucci, acting commissioner of the Department of Corrections and Community Supervision (DOCCS), and Tina M. Stanford, chairwoman of the Board of Parole, submit this memorandum in opposition to petitioners' motion for leave to appeal the order of the Appellate Division, Third Department. The Third Department unanimously granted summary judgment to respondents and dismissed petitioners' complaint challenging the sufficiency of the educational and vocational programming offered at the residential treatment facility (RTF) at Fishkill Correctional Facility. As further explained below, the Court should deny leave because petitioners' motion identifies neither a conflict between the Third Department's decision and any decision of this Court or of another department of the Appellate Division, nor a novel issue of public importance warranting this Court's review.

BACKGROUND

A more complete statement of the facts is set forth in respondents' brief filed in Third Department. *See* Opening Br. for Appellants (Br.) at 4-20. The following summary is provided for the Court's convenience.

Petitioners Richard Alcantara, Lester Classen, Jackson Metellus, Cesar Molina, Carlos Rivera, and David Sotomayor are sex offenders who completed their terms of imprisonment and began serving terms of community supervision before securing housing compliant with the Sexual Assault Reform Act of 2000 (SARA). *See id.* at 7-8. SARA requires qualifying sex offenders to reside at least one thousand feet from school grounds during a term of community supervision. *See* Executive Law § 259-c(14); *Matter of Gonzalez v. Annucci*, 32 N.Y.3d 461, 466 (2018); *see also* Penal Law § 220.00(14). Accordingly, DOCCS exercised its authority under Correction Law § 73(10) to temporarily house petitioners at Fishkill's RTF until they could secure SARA-compliant housing in the community. *See People ex rel. McCurdy v. Warden, Westchester County Corr. Facility*,

36 N.Y.3d 251, 262 (2020). By 2017, all petitioners had been released from the RTF. *See Br.* at 7, 17 n.7.

While at Fishkill’s RTF, petitioners were assigned to an RTF program that included activities designed to facilitate rehabilitation and reintegration into the community. The program included a small-group course to gain behavioral insight and build practical and employment-related skills; a daily stipend of five dollars; access to libraries, business and academic courses, computer instruction, and practical trade opportunities; and paid employment inside and outside Fishkill’s perimeter security fence. RTF residents also received housing assistance from DOCCS staff both inside and outside the facility on a regular basis. *See id.* at 8-15.

In 2016, petitioners filed this lawsuit in Supreme Court, Albany County, claiming that the RTF program failed to meet the standards set forth in Correction Law § 73, and that the RTF residents were treated the same as general population incarcerated individuals in violation of Correction Law §§ 2(6) and 73. *See id.* at 15-16. Correction Law § 2(6) defines an RTF as a “correctional facility consisting of a community based residence,” which is located “in or near a

community where employment, educational and training opportunities are readily available for persons” serving terms of community supervision. Correction Law § 2(6). Correction Law § 73 authorizes DOCCS “to use any residential treatment facility as a residence for persons who are on community supervision,” *id.* § 73(10), and provides that DOCCS is “responsible for securing appropriate education, on-the-job training and employment for incarcerated individuals transferred to residential treatment facilities,” *id.* § 73(2).

Correction Law § 73 further provides that an individual housed at 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 or her.” *Id.* § 73(1) (emphasis added). “While outside the facility,” an RTF resident “shall be at all times in the custody of [DOCCS] and under its supervision.” *Id.* DOCCS is required to “supervise such incarcerated individuals during their participation in activities outside any such facility and at all times while they are outside any such facility.” *Id.* § 73(2).

Respondents moved for summary judgment, and Supreme Court (Hartman, J.) granted summary judgment to respondents in part. The court found that Fishkill's RTF provided adequate programming inside the facility and rejected petitioners' argument that RTF residents were treated the same as general population incarcerated individuals in violation of the Correction Law. *Alcantara v. Annucci*, 66 Misc. 3d 850, 859-63 (Sup. Ct. Albany County 2019). But Supreme Court granted summary judgment to petitioners in part, concluding that the Correction Law required DOCCS to establish RTF programming *outside* the facility and finding that Fishkill's RTF did not adequately do so. *Id.* at 863-66.

The Third Department unanimously reversed the latter ruling and granted summary judgment to respondents in full. *See Alcantara v. Annucci*, 203 A.D.3d 1483, 1487 (3d Dep't 2022). The Third Department explained that the RTF programming inside the facility satisfied Correction Law § 73 because the programming was directed toward rehabilitation and reintegration through appropriate education, on-the-job training, and employment. *Id.* at 1485-86; *see also*

Correction Law § 73(2)-(3). Like Supreme Court, the Third Department rejected petitioners' argument that the Correction Law requires RTFs to be maintained as completely separate facilities whose residents must be kept entirely separate and apart from general population incarcerated individuals. *Alcantara*, 203 A.D.3d at 1486-87. The Third Department further found that Fishkill's RTF residents "were afforded separate housing and privileges compared to general population incarcerated individuals" and held that the fact that RTF residents were treated like general population incarcerated individuals in some other respects did not violate the statutory scheme. *Id.* at 1486. Finally, the Third Department held that the Correction Law permits, but does not obligate, DOCCS to establish RTF programming in the community and therefore reversed Supreme Court's grant of summary judgment to petitioners on that issue. *Id.* at 1484-85. Although Correction Law § 2(6) defines an RTF as located "in or near a community where employment, educational and training opportunities are readily available," that definitional provision does not obligate DOCCS to provide RTF programming in the community. *Id.* at 1485 (quoting Correction Law § 2(6)). And

the plain language of Correction Law § 73(1) makes clear that DOCCS “may,” but is not required to, permit RTF residents to leave the facility for programming. *Id.*

The Third Department then unanimously denied petitioners’ motion for leave to appeal. This Court should do the same.

REASONS FOR DENYING LEAVE

Petitioners’ motion provides no basis to grant leave to appeal to this Court. Petitioners fail to identify any conflict between the Third Department’s decision below and any decision of this Court or another department of the Appellate Division. And petitioners fail to raise any issue of novel or public importance warranting review by this Court. *See* Rules of Ct. of Appeals (22 N.Y.C.R.R.) § 500.22(b)(4).

First, petitioners have not identified a conflict between the Third Department’s decision and any decision of this Court or any decision of the Appellate Division. *See* *Affirm. in Supp. of Mot. for Lv. to Appeal (Affirm.)* ¶¶ 13-23. Nor can petitioners do so. Indeed, decisions of this Court and other departments of the Appellate Division confirm the Third Department’s holding that Fishkill’s RTF

programming complied with Correction Law §§ 2(6) and 73. In *Matter of Gonzalez v. Annucci*, this Court rejected a challenge under Correction Law §§ 2(6) and 73 to the adequacy of materially identical programming at the Woodbourne Correctional Facility’s RTF. See 32 N.Y.3d at 467, 469, 475; see also *id.* at 475 n.6 (noting that “similar claims relating to Fishkill Correctional Facility as an RTF” were raised in this *Alcantara* lawsuit). And in *Matter of Alvarez v. Annucci*, the Appellate Division, Second Department likewise rejected the argument that the Queensboro Correctional Facility’s RTF programming failed to comply with Correction Law §§ 2(6) and 73. See 186 A.D.3d 704, 706 (2d Dep’t 2020), *aff’d*, 38 N.Y.3d 974 (2022).

Second, petitioners fail to identify any issue that is novel or of public importance warranting further review. Petitioners assert that the question whether Fishkill’s RTF program satisfies Correction Law §§ 2(6) and 73 is an issue of public importance warranting review by this Court. See *Affirm.* ¶ 13(a)-(b). But as discussed in the preceding paragraph, this Court and others have already reviewed

that question for RTFs with materially indistinguishable programming and rejected the same challenges to that programming as the Third Department did here.

Beyond that, petitioners improperly ask this Court to consider an argument raised for the first time in their motion, namely, that individuals placed at an RTF pursuant to DOCCS's authority under Correction Law § 73(10)—as opposed to individuals placed at the RTF pursuant to a different statutory authority—must be afforded RTF programming in the community beyond that required by Correction Law § 73(1)-(3), which petitioners now contend applies only to incarcerated individuals placed at the RTF.¹ *See id.* ¶¶ 13(c), 15-23. Petitioners failed to preserve any such argument for this Court's review, however, by failing to raise it below.

Petitioners did not argue in Supreme Court or the Third Department that the class of residents housed at an RTF pursuant to DOCCS's authority under Correction Law § 73(10) are entitled

¹ Notably, petitioners' leave motion does not challenge the Third Department's holding that the proper construction of Correction Law §§ 2(6) and 73 permits, but does not obligate, DOCCS to provide RTF programming in the community. *See Affirm.* ¶ 15.

to RTF programming different from or additional to that required by Correction Law § 73(1)-(3). Instead, petitioners consistently argued in those courts that RTF residents—including those housed at the RTF pursuant to Correction Law § 73(10)—are entitled to the programming required by Correction Law § 73(1)-(3). *See id.*, Ex. H, Pls.’ Mem. of Law in Opp’n to Defs.’ Mot. for Summ. J. at 16-17; *id.*, Ex. I, Answering Br. for Pet’rs-Resp’ts-Cross Appellants (Answering Br.) at 4. Even after this Court issued a decision in 2020 explaining that DOCCS could temporarily house individuals at an RTF under Penal Law § 70.45(3) or Correction Law § 73(10), *see McCurdy*, 36 N.Y.3d at 262, petitioners did not make any distinction between the type of RTF programming required under Correction Law § 73 for different classes of RTF residents.² Petitioners therefore failed to preserve for review by this Court an argument based on any such distinction. *See Bingham v. New York City Tr. Auth.*, 99 N.Y.2d 355,

² In the Third Department, petitioners’ sole argument highlighting the class of residents housed at an RTF under Correction Law § 73(10) related to the level of housing assistance required by Correction Law § 201(5), not the type of RTF programming required by Correction Law § 73. *See Affirm.*, Ex. I, Answering Br. at 38-39.

359 (2003); Arthur Karger, *The Powers of the New York Court of Appeals* § 17:1 (Sept. 2021 update) (Westlaw).

What petitioners did argue below was that residents housed at Fishkill’s RTF—regardless of the underlying statutory authority for that housing placement—necessarily receive insufficient RTF programming under Correction Law § 73 because they are treated the same as general population incarcerated individuals. *See Affirm.* ¶¶ 15-23. But that argument is neither novel nor of public importance. As the Third Department explained, the record here showed that Fishkill’s RTF residents were not treated the same as incarcerated individuals and were instead “afforded separate housing and privileges.” *Alcantara*, 203 A.D.3d at 1486; *see Alcantara*, 66 Misc. 3d at 861. And in any event, petitioners’ argument in this regard has been addressed by both this Court and the Second Department, both of which have reviewed similar RTF programs and rejected materially identical arguments that RTF residents necessarily received inadequate RTF programming because they were treated too much like incarcerated individuals. *See Matter of Gonzalez*, 32 N.Y.3d at 467, 469, 475 (assessing Woodbourne RTF); *Matter of*

Alvarez, 186 A.D.3d at 706 (assessing Queensboro RTF).³ Because this same argument has been repeatedly raised and rejected, including by this Court, it does not warrant further review here.

³ As apparent in the parties' briefing filed in the Second Department in *Matter of Alvarez*, the petitioner in that appeal argued—unsuccessfully—that his RTF program was insufficient because his job as a porter at the correctional facility and his assignment to a work crew that also included incarcerated individuals did not sufficiently distinguish him from the general population incarcerated individuals. Those briefs were filed in this Court in *Matter of Alvarez v. Annucci*, No. 50 SSM 35.

CONCLUSION

For the foregoing reasons, the Court should deny the motion for leave to appeal.

Dated: New York, New York
August 25, 2022

Respectfully submitted,

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/s/ Blair J. Greenwald

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