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COURT OF APPEALS  
STATE OF NEW YORK

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ALCANTARA,

Appellant,

-against-

NO. 32

ANNUCCI,

Respondent.

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20 Eagle Street  
Albany, New York  
March 12, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Next matter on the calendar  
2 is Alcantara v. Annucci - - - Alcantara - - - sorry - - -  
3 v. Annucci.

4 MR. FREIMUTH: May it please the court, Your  
5 Honor. Matthew Freimuth on behalf of the appellant. I'd  
6 like to reserve three minutes of my time, if I could, for  
7 rebuttal.

8 CHIEF JUDGE WILSON: Yes.

9 MR. FREIMUTH: I think it's important to put this  
10 case in the context of the other Court of Appeals'  
11 decisions on residential treatment facilities. There was  
12 Gonzalez in 2018 that took up the question of whether DOCCS  
13 was adequately providing housing assistance.

14 There was Johnson that considered whether an RTF  
15 needed to be a home-like environment. And then there was  
16 McCarty on the same day that held that persons on post-  
17 release supervision after six months can be held in  
18 residential treatment facilities pending their ability to  
19 locate SARA-compliant housing.

20 Now here we are. What is a residential treatment  
21 facility? This appeal presents the question of whether  
22 Fishkill satisfies the requirements of a residential  
23 treatment facility or whether DOCCS has the discretion  
24 under the New York penal code to operate the Fishkill RTF  
25 without providing access to community-based programming and

1 in a way that is largely indistinct - - -

2 JUDGE SINGAS: Can I just ask you - - -

3 MR. FREIMUTH: - - - from a present - - -

4 JUDGE SINGAS: - - - are you arguing that  
5 Fishkill could never satisfy the RTF or are you saying  
6 that, as currently constituted, they couldn't?

7 MR. FREIMUTH: We are saying, as currently  
8 constituted, they do not, principally because they do not  
9 offer any community-based programming.

10 JUDGE HALLIGAN: So suppose they made an attempt  
11 and - - - and I'm going to ask your adversary about whether  
12 they have or haven't. But suppose they made an attempt to  
13 place individuals who are in the RTF because they're there  
14 awaiting SARA-compliant housing and they were not able to  
15 do so, when the record show that there were, you know, good  
16 faith efforts made, what then of your claim?

17 MR. FREIMUTH: So if they made an attempt to  
18 locate or - - - or to provide community-based programming -  
19 - -

20 JUDGE HALLIGAN: They went out. They looked for  
21 opportunities. They - - -

22 MR. FREIMUTH: In and around Fishkill and they  
23 could not find any?

24 JUDGE HALLIGAN: Yes.

25 MR. FREIMUTH: Then Fishkill would be a non-

1 compliant RTF.

2 JUDGE HALLIGAN: And so in that event, is your  
3 view that DOCCS would have to put them in another facility?

4 MR. FREIMUTH: DOCCS would need to put them in a  
5 facility that met the definition of an RTF where there were  
6 community-based programming.

7 JUDGE HALLIGAN: And - - -

8 MR. FREIMUTH: The - - -

9 JUDGE HALLIGAN: Go ahead.

10 MR. FREIMUTH: The notion of community-based  
11 programming is definitional to what an RTF is.

12 JUDGE HALLIGAN: So what I'm wrestling with is  
13 this. I take it that your argument is a combination of the  
14 definitional section in 2(6) and the provisions in section  
15 73, which relate to permission to leave and so forth,  
16 right?

17 MR. FREIMUTH: Correct.

18 JUDGE HALLIGAN: If - - - if there is an attempt  
19 made and it's not successful, it seems to me that reading  
20 those provisions to require DOCCS to locate the facility in  
21 a different place or to move the individuals from that  
22 facility to another facility where those opportunities are  
23 available, I would think maybe we would want to look for  
24 some clearer instruction from the legislature, especially  
25 because it might be that with these individuals, it's

1 difficult to place them in community opportunities. So can  
2 you help me with that?

3 MR. FREIMUTH: Sure. I think - - - number one, I  
4 want to be clear that there is no record here that DOCCS  
5 has ever - - -

6 JUDGE HALLIGAN: I understand that.

7 MR. FREIMUTH: - - - made an attempt.

8 JUDGE HALLIGAN: Yeah.

9 MR. FREIMUTH: And that - - - that is our  
10 fundamental - - -

11 JUDGE HALLIGAN: Trying to understand your  
12 statutory argument though.

13 MR. FREIMUTH: Right. So - - - so look, section  
14 - - - or 2.6 is the definitional - - -

15 JUDGE HALLIGAN: Yes.

16 MR. FREIMUTH: - - - statute, right? It says,  
17 from our perspective, that an RTF must be in a community  
18 that has to be a community where educational and employment  
19 opportunities are - - -

20 JUDGE HALLIGAN: And was that enacted - - -

21 MR. FREIMUTH: - - - readily accessible.

22 JUDGE HALLIGAN: - - - before the SARA housing  
23 requirements were clearly in place?

24 MR. FREIMUTH: It - - - it was enacted before the  
25 SARA housing requirements are in place.

1 JUDGE HALLIGAN: So what I'm wrestling with is is  
2 it clear that the legislature anticipated, you know,  
3 whatever set of challenges may attend this group? Maybe  
4 your answers doesn't matter because the language is clear  
5 enough.

6 MR. FREIMUTH: I don't think the - - - if my sort  
7 of timeline is right, when the RTFs were created and  
8 defined, I don't think SARA had been enacted, right?

9 JUDGE HALLIGAN: I believe that's right.

10 MR. FREIMUTH: So they could not have, sort of,  
11 anticipated it. But the fact that SARA has - - -

12 JUDGE TROUTMAN: And with respect to the off-site  
13 opportunities, it also requires that there's a willingness  
14 of providers to have those opportunities made available to  
15 specific people, correct?

16 MR. FREIMUTH: You - - - you would have to have a  
17 - - - a - - - a willingness of providers, but there's not  
18 specificity in the statute about who those providers are or  
19 whether other state agencies might provide.

20 JUDGE TROUTMAN: But it goes back to what Judge  
21 Halligan said. If you're - - - they at least go out and  
22 they attempt to find engagement for, let's say, a specific  
23 person that's in the program. That they don't lump them  
24 all together but they do actually exercise the discretion  
25 that it appears that they have, but they can't find a

1 willing participant.

2 MR. FREIMUTH: So look, I think that that raises,  
3 obviously, the question of if they don't have a willing  
4 participant, does this sort of definitionally meet the  
5 statutory requirements of an RTF?

6 JUDGE GARCIA: And I thought you said it  
7 wouldn't.

8 MR. FREIMUTH: I - - - I - - - I think, based on  
9 the definition of 2.6, you would have to say that in order  
10 to be - - - be an RTF, there has to be sort of community-  
11 based programming.

12 JUDGE GARCIA: Now, that would apply - - - you're  
13 talking about - - - let's call them SARA - - - people - - -  
14 obviously, it's SARA. But this would apply to anyone in  
15 RTF, right? Statutes don't distinguish.

16 MR. FREIMUTH: The statutes do not distinguish.

17 JUDGE GARCIA: So if you had someone who came and  
18 had a certain record, and they - - - they just couldn't  
19 place them in Fishkill, that wouldn't be an RTF for this  
20 particular person in - - - in that RTF facility? It  
21 wouldn't qualify for that - - - that person?

22 MR. FREIMUTH: I - - - I think - - - I think  
23 whether a facility is - - - meets the definition of an RTF  
24 is not specific to - - - to an individual.

25 JUDGE GARCIA: So - - -

1 JUDGE HALLIGAN: What's the number?

2 JUDGE GARCIA: - - - what would it be?

3 JUDGE HALLIGAN: Sorry.

4 MR. FREIMUTH: Yes.

5 JUDGE GARCIA: Yeah. It's the question. So what  
6 would it be specific to?

7 MR. FREIMUTH: It would be specific to the issue  
8 of whether there are or are not community-based programming  
9 - - -

10 JUDGE HALLIGAN: So what if there's enough for -  
11 - -

12 MR. FREIMUTH: - - - available - - -

13 JUDGE HALLIGAN: - - - for thirty persons?

14 MR. FREIMUTH: - - - for the residents.

15 JUDGE CANNATARO: Yeah. What - - - what if there  
16 aren't enough? They - - - they are in community-based  
17 programs. I think this - - -

18 JUDGE HALLIGAN: Yes.

19 JUDGE CANNATARO: - - - is the question.

20 JUDGE HALLIGAN: Yes.

21 MR. FREIMUTH: Right.

22 JUDGE CANNATARO: But you have a hundred, I  
23 think, SARA people at - - - at Fishkill right now. What if  
24 they are only thirty?

25 MR. FREIMUTH: I think our position would be that



1 that would meet the definitional requirement of a - - - of  
2 an RTF - - -

3 JUDGE CANNATARO: Why?

4 MR. FREIMUTH: - - - pursuant to section 2.6  
5 because there are community-based opportunities. DOCCS  
6 might then have discretion - - -

7 JUDGE GARCIA: What percentage would it have to  
8 be to meet the definition?

9 MR. FREIMUTH: What - - - what percentage of  
10 individuals have to have access to that program for it to  
11 be - - -

12 JUDGE GARCIA: What percentage - - - you said - -  
13 - we said thirty percent. What percentage - - -

14 JUDGE CANNATARO: What brings you into  
15 compliance?

16 JUDGE GARCIA: Yeah.

17 MR. FREIMUTH: The - - - the - - - the existence  
18 of community-based opportunities - - -

19 JUDGE HALLIGAN: How about ten percent?

20 MR. FREIMUTH: - - - for some portion of the  
21 residents of the - - -

22 JUDGE CANNATARO: Would - - - would five be  
23 enough to do it?

24 MR. FREIMUTH: So you're - - - you're  
25 hypothesizing a situation where there are community-based

1 opportunities that only five RTF residents can take  
2 advantage of?

3 JUDGE CANNATARO: Yeah. I'm just trying to  
4 understand the - - - the - - - the scope of the requirement  
5 that you're in compliance.

6 MR. FREIMUTH: I - - - I - - - I think the scope  
7 of the requirement is that there must be some community-  
8 based opportunities. The statute doesn't specify how many  
9 or - - - or what percentage, but the record is clear here  
10 there are - - -

11 JUDGE TROUTMAN: You also have to - - -

12 MR. FREIMUTH: - - - there are none.

13 JUDGE TROUTMAN: You also have to take into  
14 consideration who those individuals are. The programming  
15 is supposed to be made available for their re-entry based  
16 on their circumstances.

17 So these particular individuals in this program,  
18 they - - - they have some unique circumstances that have to  
19 be dealt with to satisfy the community part.

20 But there's also an internal component where  
21 there's programming made available. So are you disputing  
22 that they've done nothing or that the programming is  
23 partially compliant or not?

24 MR. FREIMUTH: So I think our position is that  
25 with respect to the community-based aspect, they're

1           statutorily non-compliant. And we also take the position  
2           that, with respect to the programming offered within the  
3           facility, that that also is non-compliant.

4                       CHIEF JUDGE WILSON: And why is that non-  
5           compliant?

6                       MR. FREIMUTH: The - - - the - - - the statute  
7           requires that the programming be specifically tailored, as  
8           Her Honor pointed out, to the individuals to meet their  
9           specific goals of rehabilitation and reentry into the  
10          community.

11                      And what the record below establishes here is  
12          that the programming offered really doesn't meet that  
13          requirement. There's not any specifically tailored  
14          programming. Most of the programming that's offered to RTF  
15          residents is programming that was available in their - - -  
16          the tail end of their determinant sentence, if you will,  
17          and so that they're failing for the reasons we stated in  
18          our paper.

19                      JUDGE CANNATARO: I've had the impression that  
20          the programming taught budgeting, you know, managing your  
21          financial resources, interviewing skills, and those all  
22          seem to be tailored to - - - to re-entry to the community.  
23          Is there something I'm missing?

24                      MR. FREIMUTH: I - - - I - - - I think the record  
25          is clear that there's - - - there was nothing specifically

1 tailored for individuals who were, you know, facing  
2 challenges obtaining SARA-compliant housing or other  
3 challenges that - - - that chose - - - that particular  
4 class of persons, I guess.

5 JUDGE TROUTMAN: So are you suggesting that in  
6 order for the programming to be sufficient, it has to meet  
7 certain minimum qualifications or - - - or have a certain  
8 minimum curriculum? Because it does. As Judge Cannataro  
9 pointed out, there are things that do seem appropriate for  
10 people who are re-entering society.

11 MR. FREIMUTH: I - - - I think, certainly, one  
12 point is - - - is 73(3), which talks about specific  
13 programming being tailored to individual - - - individuals'  
14 residences - - - residence in - - - in the RTF. I think  
15 the record is clear that there is none of that.

16 JUDGE HALLIGAN: Can we come back to your answer  
17 to Judge Cannataro's question about the five percent? So -  
18 - - so 2(6) says that - - - it defines an RTF as one where  
19 these opportunities are readily available for persons,  
20 okay? So - - - so how do you square that?

21 I - - - I take it from your response to Judge  
22 Cannataro, your position is that if the RTF makes a good  
23 faith effort - - - I appreciate your comment that there's  
24 nothing on the record about that - - - a good faith effort  
25 and is able to secure off-facility opportunities only for

1 five percent, that that suffices to meet the statutory  
2 obligation. Is that readily available? What work does  
3 that do?

4 MR. FREIMUTH: I think it's a good point with  
5 respect to the - - - what - - - what the work is that the  
6 word readily does. I think it could be a question as to  
7 whether five percent - - - if they only had five positions  
8 open and fifty people in an RTF, whether that would - - -  
9 would meet the requirement of - - -

10 JUDGE HALLIGAN: I took Judge Cannataro - - -

11 MR. FREIMUTH: - - - community-based - - -

12 JUDGE HALLIGAN: I don't want to put words in his  
13 mouth, but to mean five out of a hundred, which is the  
14 number there. And that's what I was - - -

15 MR. FREIMUTH: Right. Five percent.

16 JUDGE HALLIGAN: - - - five percent would - - -

17 MR. FREIMUTH: Right. I - - - I - - - I think  
18 there's a - - - a - - - a good argument that that would not  
19 meet the requirement of - - - of readily available for the  
20 number - - -

21 JUDGE TROUTMAN: So if it doesn't meet the  
22 requirement, then are you saying they have to take them out  
23 of that facility, put them in another?

24 MR. FREIMUTH: I think they have to move them to  
25 a - - - if it is an individual who belongs in an RTF, for

1 example, an individual like, let's say the petitioner in  
2 McCarty, who is now post, you know, release, six months - -  
3 - you know, being held there beyond the - - - the six-month  
4 requirement, the only statutory basis to hold that person  
5 is in a residential treatment facility. It must meet the  
6 definition of a residential treatment facility. Otherwise,  
7 you're talking about incarcerating a person who served  
8 their time and - - - and for which the state has no basis  
9 to hold.

10 JUDGE TROUTMAN: And by your definition,  
11 treatment is inside and outside the facility. It has fit  
12 both components?

13 JUDGE GARCIA: But what if - - -

14 MR. FREIMUTH: Correct, Your Honor.

15 JUDGE GARCIA: - - - them and they don't get  
16 placed in the next facility? They try but no placement in  
17 the - - - what happens and they have to move them again?

18 MR. FREIMUTH: If - - - I'm not sure what you  
19 mean by if they don't get placed in the next - - -

20 JUDGE GARCIA: They don't get placed in a  
21 community environment or anything, you know. That's still  
22 the same situation. They try, but, you know, no, they're  
23 still in the RTF.

24 MR. FREIMUTH: They must be placed in something  
25 that meets the definition of - - -

1 JUDGE GARCIA: And the - - -

2 MR. FREIMUTH: - - - an RTF, which - - -

3 JUDGE GARCIA: There's no opportunities in the  
4 next one. So that doesn't qualify as an RTF for them  
5 either then, right?

6 MR. FREIMUTH: Again, we're - - - we're sort of -  
7 - - I don't think the - - - whether this is an RTF for them  
8 or not is - - - is exactly the question because whether - -  
9 -

10 JUDGE GARCIA: Well, it's at least for the five  
11 percent that got placed, right?

12 JUDGE HALLIGAN: Is your point that the right  
13 doesn't flow to the individual? In other words, that if I  
14 - - - if I'm in an RTF and I don't get placed that, you  
15 know, I don't have a specific right. But when we look at  
16 whether the facility itself qualifies, we look as a general  
17 matter at the rights available?

18 MR. FREIMUTH: Yeah. I mean, that is essentially  
19 the issue. It's a definitional - - -

20 JUDGE GARCIA: And then when - - -

21 JUDGE HALLIGAN: But when I say - - -

22 MR. FREIMUTH: - - - issue about the facility.

23 JUDGE GARCIA: - - - you shut the RTF, so then  
24 the RTF would shut for everyone if it doesn't qualify as an  
25 RTF if it's not an individual right? I don't understand

1           that point.

2                       MR. FREIMUTH:  If it doesn't qualify as an RTF,  
3           then - - - then persons who are - - - should be placed in  
4           an RTF, I think.  Again, persons after six months of their  
5           post-release supervision present the starkest example.

6                       JUDGE RIVERA:  Okay.

7                       MR. FREIMUTH:  Then - - -

8                       JUDGE RIVERA:  Do - - - do we have to answer any  
9           of those questions if - - - if the record - - - if we agree  
10          that the record is devoid as to - - - or lacks any  
11          information regarding what are the opportunities available  
12          near Fishkill?  Or do you think the record is set on that?  
13          It's clear that there are no opportunities.  It's not a  
14          question of whether or not they tried or not.  There are  
15          just none.

16                      MR. FREIMUTH:  I think the record is clear that  
17          there are no community-based opportunities at Fishkill  
18          within the meaning of 2.6.

19                      JUDGE HALLIGAN:  So - - - so just to - - - to  
20          clarify, is your position that an RTF needs to make  
21          opportunities available for some percentage, maybe five is  
22          sufficient, maybe it's not, I don't know what the number  
23          might be or how we would identify it, and that the other  
24          individuals for whom the opportunities are not available  
25          can stay?  Or is it your position that if I am at an RTF



1 and there is no opportunity for me, DOCCS must move me?

2 MR. FREIMUTH: My position is if - - - is really  
3 a definitional position, which is to say, if I am an - - -  
4 an individual who should be in an RTF and I am at a  
5 facility where there are community-based programs  
6 available, then I - - - I meet the - - - I'm at an RTF.  
7 Whether that specific community-based program that I'm  
8 talking about - - -

9 JUDGE HALLIGAN: Even if not available to me?

10 MR. FREIMUTH: - - - is available to me, I think,  
11 is - - - is not - - - not the - - - not this case, Your  
12 Honor.

13 JUDGE RIVERA: Well, not - - -

14 MR. FREIMUTH: It - - -

15 JUDGE RIVERA: I'm sorry. So just to go a little  
16 further on that point, then you're saying the - - - the  
17 universe is whether or not the RTF, Fishkill in this case,  
18 has in the vicinity - - - in its surrounding environment,  
19 possible opportunities for anyone who fits within that  
20 definition even if everyone who is a SORA individual would  
21 not end there.

22 So it fits within the definition but, right, they  
23 are listed and registered under SORA, even if none of them  
24 could find a placement or DOCCS could not arrange - - -

25 MR. FREIMUTH: I think - - -

1 JUDGE RIVERA: - - - a placement for them - - -

2 MR. FREIMUTH: I think that's right, Your Honor.

3 JUDGE RIVERA: Okay. So if all the others could  
4 find a placement, you would say it does or does not satisfy  
5 the definition? Just to be clear.

6 MR. FREIMUTH: I - - - I think if there is  
7 community-based programming available to some readily  
8 available, then it meets the - - - meets the definition.

9 JUDGE RIVERA: Even if it means someone who is a  
10 SORA registrant would not find a placement?

11 MR. FREIMUTH: Well - - -

12 JUDGE RIVERA: That's what I'm - - - that's what  
13 I'm asking.

14 MR. FREIMUTH: Yeah.

15 JUDGE RIVERA: I'm sorry if I wasn't clear.

16 MR. FREIMUTH: I - - - I think if - - - if there  
17 are - - - if there are a class - - -

18 JUDGE RIVERA: Yes.

19 MR. FREIMUTH: - - - for which there's nothing  
20 available - - -

21 JUDGE RIVERA: Yes.

22 MR. FREIMUTH: - - - then as to that group of  
23 individuals, it doesn't meet the definition.

24 CHIEF JUDGE WILSON: Thank you.

25 MS. GREENWALD: Good afternoon. Blair Greenwald

1 on behalf of the respondents. I'd just like to jump right  
2 in and answer the question that has been raised here about  
3 DOCCS's efforts.

4 Again - - - well, not on this record, to my  
5 knowledge, DOCCS has not made any specific efforts to  
6 secure outside employment opportunities because it believes  
7 it is not obligated to do so given the permissive language  
8 of the statute and given the fact that it doesn't have  
9 legal authority to secure third-party cooperation.

10 It has focused the tools that it does have to get  
11 people out to community housing more quickly, which has  
12 successfully ended in a drastic reduction - - -

13 JUDGE TROUTMAN: So - - -

14 MS. GREENWALD: - - - of the people at - - -

15 JUDGE TROUTMAN: - - - your view is DOCCS doesn't  
16 have to do anything other than what they've been doing here  
17 - - - the - - - the on-campus programming, but there is no  
18 community aspect to the - - - to the RTF.

19 MS. GREENWALD: So there is a community aspect  
20 and - - - as the definition requires that it be community-  
21 based in the sense of serving the general purpose of  
22 providing for rehabilitation and the goals of community  
23 reintegration. But that - - - that can be accomplished  
24 with programming inside and outside the facility as the  
25 statute contemplates.



1 JUDGE CANNATARO: But 2(6) refers to a community  
2 where employment, educational, and training opportunities  
3 are readily available. You seem to be - - - I don't know -  
4 - - downplaying that part of the statutory language.

5 I don't know if it's a command on DOCCS. And you  
6 can argue that it's not a command to DOCCS to seek out and  
7 secure those opportunities for the people in the RTF, but  
8 it certainly sounds like it's more than just, you know,  
9 being near a community.

10 MS. GREENWALD: So while certainly there is a  
11 siting requirement and that siting requirement does serve  
12 the purpose of removing at least one obstacle to DOCCS  
13 being able to exercise its authority to secure outside  
14 opportunities, we also agree that the definition does use  
15 the term community based as a fairly broad descriptor that  
16 refers to the RTF residence as being based on or being  
17 about the goals of rehabilitation and community  
18 reintegration. But it's very normal - - -

19 JUDGE RIVERA: That's not what it says. I'm - -  
20 - I'm sorry. You're not even close. You have read out of  
21 the statute the language. This is operative language,  
22 community-based residence in or near a community with the  
23 listed types of opportunities are readily available. Why -  
24 - - why would the legislature - - - right? Why - - - why  
25 would you have that - - -

1 MS. GREENWALD: Right. So just to address both  
2 of those - - -

3 JUDGE RIVERA: - - - if - - - if it means within  
4 the confines of the facility?

5 MS. GREENWALD: So - - -

6 JUDGE RIVERA: And so I - - - that's how I  
7 understood your argument. As long as it's within the  
8 confines of the facility, if it's got rehabilitative goals,  
9 then that fits within the section. But then you wouldn't  
10 have any language about community.

11 MS. GREENWALD: So the definition requires that  
12 it be in or near a community where these opportunities are  
13 readily available as a general matter and not impossible  
14 due to lack of proximity to a community. So, you know, a  
15 very isolated RTF, that just would have absolutely no  
16 possibility of outside opportunities.

17 JUDGE RIVERA: Then how could it be an RTF?

18 MS. GREENWALD: Right. So that would not be an  
19 RTF. And the reason why the legislature included the  
20 siting requirement - - -

21 JUDGE RIVERA: Right.

22 MS. GREENWALD: - - - was to remove that hurdle,  
23 right? Because they wanted to make sure that DOCCS had the  
24 discretion to exercise its authority to provide outside  
25 opportunities.

1 JUDGE HALLIGAN: Has DOCCS made an effort to  
2 secure opportunities outside a facility at any RTFs - - -

3 MS. GREENWALD: So - - -

4 JUDGE HALLIGAN: - - - only not at Fishkill?

5 MS. GREENWALD: So to my knowledge, not outside  
6 opportunities that are not DOCCS facilities, and that is -  
7 - - that is what petitioners are asking for here. So - - -

8 JUDGE HALLIGAN: I take DOCCS - - - just to be  
9 clear, I take petitioners to be asking for DOCCS to attempt  
10 to secure opportunities that are outside the property of  
11 the facility itself. Do you agree?

12 MS. GREENWALD: I think both got - - -

13 JUDGE HALLIGAN: In the community.

14 MS. GREENWALD: Yes, in the community.

15 JUDGE HALLIGAN: Yeah. And so - - -

16 MS. GREENWALD: And - - -

17 JUDGE HALLIGAN: Go ahead.

18 MS. GREENWALD: I just wanted to say that DOCCS  
19 has focused its efforts with the tools it has to get these  
20 people out to the community, and that is why now Fishkill  
21 has an RTF - - -

22 JUDGE HALLIGAN: So what do mean in terms of - -  
23 - of securing them - - - helping them secure - - -

24 MS. GREENWALD: SARA.

25 JUDGE HALLIGAN: - - - SARA compliance - - -



1 MS. GREENWALD: Yes. SARA-compliant housing,  
2 which is why Fishkill now only has nineteen RTF residents.

3 JUDGE HALLIGAN: Understood. But - - - and  
4 you're - - - I take it you're saying that at no - - - well,  
5 let me ask first, how many RTFs are there?

6 MS. GREENWALD: I'm - - - I'm sorry, I don't know  
7 the exact number. I think it's around seven.

8 JUDGE HALLIGAN: Okay. And so your understanding  
9 is that at none of those facilities designated as RTFs has  
10 DOCCS or is DOCCS attempting to secure any opportunities in  
11 the community to work or have some employment training  
12 opportunity while they're in the RTF, setting aside the  
13 SARA-compliant housing?

14 MS. GREENWALD: That's - - - that's correct, Your  
15 Honor. Fishkill - - - I will note that Fishkill is  
16 certainly the largest RTF, so that is why the - - - the  
17 focus was - - -

18 JUDGE HALLIGAN: So - - - so I take it DOCCS  
19 doesn't know what the challenges or opportunities might be,  
20 should it choose to - - - to pursue that since it hasn't  
21 done so?

22 MS. GREENWALD: Not as a - - - you know, factual  
23 matter as of right now. But the important point here is  
24 that we're interpreting the statute - - -

25 JUDGE RIVERA: I understand.

1 MS. GREENWALD: - - - and what the legislature  
2 would have anticipated.

3 JUDGE RIVERA: So just to be clear, before  
4 identifying a facility as an RTF, no one makes an  
5 assessment whether or not it could comply with the  
6 community-based opportunities requirement?

7 MS. GREENWALD: It does, Your Honor. So the RTFs  
8 have to be - - - have to be near a community where - - -

9 JUDGE RIVERA: So - - - so there's an assessment  
10 that goes on before it is so labeled? That was my  
11 question.

12 MS. GREENWALD: Yes.

13 JUDGE RIVERA: As opposed to label it an RTF,  
14 then we'll figure it out.

15 MS. GREENWALD: So an RTF on a remote island  
16 would not fit the definition here out of - - -

17 CHIEF JUDGE WILSON: So - - - so I realized none  
18 of this is in the record, but I just want to be sure that  
19 you're sure about what you've told us. My understanding is  
20 there are RTFs - - - there's two RTFs in New York City; is  
21 that wrong?

22 MS. GREENWALD: There are two RTFs where New York  
23 City is designated as sufficiently - - -

24 CHIEF JUDGE WILSON: Located - - -

25 MS. GREENWALD: - - - close to be - - -



1 CHIEF JUDGE WILSON: Located - - -

2 MS. GREENWALD: - - - considered the community.

3 CHIEF JUDGE WILSON: - - - in New York City.

4 Located within the five boroughs. Is that not right?

5 MS. GREENWALD: The - - - the - - - I think the  
6 two closest RTFs to New York City are Fishkill and  
7 Queensboro.

8 CHIEF JUDGE WILSON: And where's - - -

9 MS. GREENWALD: The second - - -

10 CHIEF JUDGE WILSON: Where's Queensboro?

11 MS. GREENWALD: Queensboro is actually further  
12 from New York City than - - - than - - -

13 CHIEF JUDGE WILSON: Okay.

14 MS. GREENWALD: - - - Fishkill is.

15 CHIEF JUDGE WILSON: And so there's nothing in  
16 the city itself, you think?

17 MS. GREENWALD: Not that has any substantial - -  
18 -

19 CHIEF JUDGE WILSON: You're not sure.

20 MS. GREENWALD: - - - portion of - - -

21 CHIEF JUDGE WILSON: Okay.

22 MS. GREENWALD: - - - individuals at least.

23 CHIEF JUDGE WILSON: Okay.

24 JUDGE CANNATARO: I - - - I want to ask a - - -  
25 I'm sorry, Chief.

1 CHIEF JUDGE WILSON: Go ahead.

2 JUDGE CANNATARO: I want to ask a - - - a related  
3 question to what the Chief was just asking you. My  
4 understanding as well was that Fishkill was the RTF most  
5 closely located to New York City, putting it in my mind in  
6 the greater New York City metropolitan area.

7 Now, I don't know how many - - - you said there  
8 might be seven other RTFs. I'm wondering whether you have  
9 a sense, because I'm worried that if there aren't  
10 sufficient community-based opportunities around Fishkill,  
11 which is the closest to the major metropolitan city, that  
12 the other RTFs are almost, by default, going to offer even  
13 less of those community resources.

14 So my question is: do you have a sense that if -  
15 - - if - - - if Fishkill wasn't compliant because, you  
16 know, there weren't - - - there weren't sufficient number  
17 of community-based opportunities or they couldn't secure  
18 them, would there be another RTF where there are more  
19 community-based opportunities or greater opportunities to  
20 secure them?

21 MS. GREENWALD: So I think Your Honor's concern  
22 about having opportunities available nearby is not so much  
23 related to Fishkill's distance from New York City because  
24 the - - - the, you know, Beacon, Poughkeepsie, around  
25 Fishkill, those are also used to meet the - - - the



1 geographic siting requirement.

2 What we are concerned with here is that it both  
3 meet that definition of being near enough a community that,  
4 as a general matter, has opportunities available, and the  
5 legislature's understanding that for certain populations of  
6 - - - of the RTF at different times, it may be impossible  
7 for DOCCS to secure such opportunities, and correctional  
8 assessments - - -

9 JUDGE TROUTMAN: But you're - - - are you saying  
10 it just has to be near a community but no actual  
11 opportunities have to be made available?

12 MS. GREENWALD: So there have to be opportunities  
13 that are generally available as the definition - - -

14 JUDGE TROUTMAN: Generally available to whom?

15 MS. GREENWALD: To - - - to people on community  
16 release or eligible for community release. And this shows  
17 the legislature's aspirational goals of allowing DOCCS to  
18 the extent - - -

19 JUDGE TROUTMAN: And what's DOCCS's  
20 responsibility with respect to set availability?

21 MS. GREENWALD: So DOCCS's responsibility is to  
22 secure these opportunities regardless of their location.  
23 So that is - - -

24 JUDGE RIVERA: I thought you said that - - -

25 JUDGE TROUTMAN: What does that mean?



1 MS. GREENWALD: That is in - - - that is in  
2 section 73(2).

3 CHIEF JUDGE WILSON: I think one of the things -  
4 - -

5 MS. GREENWALD: And the - - -

6 CHIEF JUDGE WILSON: - - - you said at the very  
7 beginning when you were going really, really fast, so I may  
8 have missed it, was that DOCCS has no legal authority to  
9 work with outside third parties.

10 MS. GREENWALD: Sorry. No legal authority to - -  
11 - to force private parties, generally, to cooperate.

12 CHIEF JUDGE WILSON: Oh, but you're not - - -  
13 you're not saying you don't - - - you don't have an  
14 obligation to try. You just can't compel them.

15 MS. GREENWALD: Well, we also believe that  
16 there's no - - - there's no language in the statute that  
17 obligates DOCCS to try. And the legislature knows how to  
18 do that. In section 201(5), which the court looked at in  
19 matter of Gonzalez, that talks about DOCCS's - - - DOCCS  
20 shall assist - - -

21 JUDGE TROUTMAN: So it's correct - - -

22 MS. GREENWALD: - - - these individuals - - -

23 JUDGE TROUTMAN: - - - that you're focusing on  
24 the location of the RTF near a community where  
25 opportunities are generally available? As long as that's

1 done, DOCCS doesn't have to lift one finger to even try to  
2 help even one person. Is that what you're saying?

3 MS. GREENWALD: So that is correct. But that's  
4 because the legislature wanted to make sure that DOCCS's  
5 authority wasn't just entirely a nullity just because of  
6 this lack of proximity - - -

7 JUDGE RIVERA: Okay. So - - - so then what was  
8 section 73 - - - because you had mentioned it before - - -  
9 2 mean when it says, the Department shall - - - shall? It  
10 doesn't say may - - - not could decide on its own  
11 discretionary - - - shall be responsible for securing - - -  
12 securing appropriate education, on the job training, and  
13 employment for incarcerated individuals transferred to  
14 RTFs. You're saying that that training doesn't have to be  
15 community-based? Is that the way you read that? Just to  
16 clarify what you think the point is of 73(2).

17 MS. GREENWALD: So it's - - - it's - - - it's  
18 community-based only in the sense that it's directed toward  
19 these goals of rehabilitation and reintegration. It  
20 doesn't - - -

21 JUDGE RIVERA: Okay. So then what's the point -  
22 - - what's the point of the second sentence? The  
23 Department - - -

24 MS. GREENWALD: Right.

25 JUDGE RIVERA: - - - also shall supervise such

1           incarcerated individuals during the participation  
2           activities outside any such facilities and at all times  
3           while they are outside any such facilities?

4                   MS. GREENWALD:   Exactly.  So - - - so section 2 -  
5           - -

6                   JUDGE RIVERA:  You're securing the opportunities  
7           and you got to supervise them if they're outside the  
8           facility.

9                   MS. GREENWALD:  So section 2 imposes these fairly  
10          burdensome obligations on DOCCS to secure the opportunities  
11          and to supervise them at all times while outside.  And to  
12          compensate for those burdensome obligations, the  
13          legislature made permissive the fact that DOCCS may secure  
14          these opportunities outside.  And the permissive language -  
15          - -

16                   JUDGE RIVERA:  So where is it permissive?  That's  
17          what I'm saying.  Where is it permissive?

18                   MS. GREENWALD:  In 72(6) and in 72(1).  So the  
19          two places where they talk about what - - - individuals  
20          being able to go outside.  In section 73(1), it says that  
21          the - - - such person may be allowed to go outside the  
22          facility, that is, regarding DOCCS's authority to allow  
23          them outside.  And 72(6) talks about an incarcerated  
24          individual of an RTF may be permitted to leave such  
25          facility in accordance with the provisions of section 73.

1 JUDGE TROUTMAN: But isn't that - - -

2 CHIEF JUDGE WILSON: I did a little - - -

3 JUDGE TROUTMAN: - - - essentially making - - -  
4 making sure there is discretion available to DOCCS for  
5 appropriate individuals, not just having discretion that  
6 you don't utilize?

7 MS. GREENWALD: That - - - that broad  
8 discretionary language is both entirely in line with what  
9 the legislature normally does when granting agencies  
10 authority to design and operate programs, and particularly  
11 in the context of Corrections, where Department has - - -

12 JUDGE TROUTMAN: No. That - - - that is clearly  
13 understood. DOCCS doesn't have to let just anybody out  
14 into the - - - into a program after an individual  
15 assessment where they find that they would be inappropriate  
16 to participate in a particular program because of either a  
17 danger to the community, something in their background, or  
18 something that occurred on the facility. They don't just  
19 have to let them out. But what you're suggesting is they  
20 don't ever have to let anyone participate in anything or  
21 supervise them anywhere.

22 MS. GREENWALD: That is correct according to the  
23 language of the statute. And what Your Honor mentions  
24 about, you know, a particular individual not being  
25 appropriate, that actually is in separate - - - a separate

1 provision of 73. That is in 73(4), where DOCCS may suspend  
2 such program for such an individual.

3 JUDGE HALLIGAN: I want to make sure I understand  
4 what you're telling us DOCCS's process is. So what I took  
5 you to say is that in the course of selecting an RTF site,  
6 that DOCCS does assess whether there are opportunities to  
7 go outside the facility into the community and engage in  
8 employment or training; is that right?

9 MS. GREENWALD: So yes, but I want to be clear  
10 that the - - - the general analysis is that it be near a  
11 community. And any - - -

12 JUDGE HALLIGAN: So those are very different. Is  
13 there any - - - I understand near a community. That's a  
14 question of proximity. But is there any analysis that  
15 DOCCS does of whether there are, in fact, potential  
16 opportunities out there for individuals to leave the  
17 facility and work or be trained? If you know.

18 MS. GREENWALD: In the sense that the community,  
19 as a general matter, would have, you know, jobs available -  
20 - -

21 JUDGE HALLIGAN: So - - - so DOCCS is assuming  
22 because there are different kinds of commercial, you know,  
23 stores, whatever, operations that there might be  
24 opportunities?

25 MS. GREENWALD: Essentially, yes. So DOCCS



1 doesn't do a targeted search to make sure that the  
2 particular individuals at the RTF at that time will be able  
3 to access or, you know, be able to secure particular  
4 opportunities in that community at that time.

5 And that, again, makes sense with what the  
6 legislature intended here because it's, you know, not clear  
7 at any one time, what type of population is going to be in  
8 the RTF, what type of opportunities DOCCS will be able to  
9 secure. And DOCCS is held to a more onerous standard of  
10 actually securing those opportunities.

11 JUDGE CANNATARO: I just want to get back to  
12 73(2) for a second. Is it your position here that DOCCS  
13 complies with its obligations under 73(2) by providing  
14 education, on the job training, and employment entirely on  
15 - - - at the facility and not in the community?

16 MS. GREENWALD: Yes. As long as it meets all of  
17 the other requirements under section 73.

18 CHIEF JUDGE WILSON: Thank you.

19 MR. FREIMUTH: Just a few points to address  
20 fairly quickly. A common thread through many of the  
21 questions was the difficulties that DOCCS may face in  
22 locating or identifying community-based programs.

23 With all due respect, that is not a basis,  
24 difficulty or not, to shirk what is a statutory  
25 requirement, which is to provide RTF residents or - - - or

1 define an RTF as something that includes community-based  
2 programming.

3 And also there is no record to support that  
4 either DOCCS has attempted to do so or that it was  
5 difficult.

6 JUDGE GARCIA: But would it be enough to - - -

7 JUDGE SINGAS: Is that really a statutory  
8 requirement? I mean, 72 and 73 say residents may be  
9 allowed to leave the facility. So shouldn't we just let  
10 the legislature amend that to must if that's really what  
11 they meant?

12 MR. FREIMUTH: I think you can read 72 and 73 and  
13 the use of the word may, entirely consistently with the  
14 definitional requirement that an RTF include community-  
15 based programming.

16 JUDGE GARCIA: But my understanding - - -

17 MR. FREIMUTH: 72 - - -

18 JUDGE GARCIA: - - - is that you are saying must  
19 in terms of must have a placement, not must make reasonable  
20 efforts, right?

21 MR. FREIMUTH: There must be community-based  
22 opportunities, correct.

23 JUDGE GARCIA: So would it be enough to say they  
24 have to make all reasonable efforts to secure community-  
25 based opportunities or no?

1 MR. FREIMUTH: I don't think that would be  
2 enough.

3 JUDGE RIVERA: Why not? Why isn't - - -

4 MR. FREIMUTH: Because - - -

5 JUDGE RIVERA: Why isn't the effort enough?

6 MR. FREIMUTH: Because the - - - the section 2.6  
7 says that those community-based opportunities must be  
8 readily available. If it - - -

9 JUDGE TROUTMAN: So what about the - - -

10 MR. FREIMUTH: If those community - - -

11 JUDGE TROUTMAN: - - - component that the - - -  
12 that DOCCS doesn't have control over, which is private  
13 industry?

14 MR. FREIMUTH: If the community-based  
15 opportunities are not readily available, then it doesn't  
16 meet the statutory definition of an RTF.

17 JUDGE TROUTMAN: So do they close the facility?

18 MR. FREIMUTH: They can't label it an RTF.  
19 Because at that point it is essentially a general  
20 confinement facility that they've labeled an RTF.

21 JUDGE GARCIA: But if - - -

22 MR. FREIMUTH: There must be a difference between  
23 that - - -

24 JUDGE GARCIA: - - - five people in that RTF  
25 can't be placed because there are just - - - there are no

1 opportunities for them, they have to close the RTF for  
2 everyone?

3 MR. FREIMUTH: No. I think that gets to the  
4 question of whether the opportunities are readily available  
5 at that facility.

6 JUDGE HALLIGAN: There's also authority, I  
7 thought, that DOCCS has to say that some individual person  
8 is not appropriate to participate in the program and  
9 presumably if there is an individual.

10 But tell me if you have a different view. An  
11 individual who, for whatever reason, is someone for whom  
12 DOCCS cannot find a placement that - - - that - - - isn't  
13 there an argument that would fit within that exception?

14 MR. FREIMUTH: Yeah. I mean, I think that that  
15 gets to the issue of DOCCS's discretion, right? We don't  
16 dispute that DOCCS has some discretion around the  
17 circumstances and conditions - - -

18 JUDGE HALLIGAN: So you're not saying - - -

19 MR. FREIMUTH: - - - that an individual can be in  
20 the community, right? That's - - - that's effectively what  
21 73 establishes.

22 JUDGE HALLIGAN: So - - - so therefore, it seems  
23 to me that - - - that it's not the case that every  
24 individual at an RTF would have to, in fact, be placed for  
25 it qualify as an RTF, or - - - or do you - - -

1 MR. FREIMUTH: Correct. I agree with that.

2 JUDGE GARCIA: But what position - - -

3 JUDGE TROUTMAN: What you take - - - is it  
4 correct that what you take exception to and what it appears  
5 that the respondent acknowledged that they - - - they don't  
6 have any obligation and they are not making available  
7 across the board? Is - - - is that the problem?

8 MR. FREIMUTH: That is exactly the - - - the core  
9 issue. They cannot exercise discretion to such an extent  
10 as they have done that effectively redefines an RTF into  
11 something that's not recognizable under the statute.

12 CHIEF JUDGE WILSON: Thank you.

13 MR. FREIMUTH: Thank you.

14 (Court is adjourned)

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C E R T I F I C A T I O N

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of Alcantara v. Annucci, No. 32 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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