SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

FUQUAN FIELDS, LUIS GARCIA, and JIMMY BARNER, on behalf of themselves and all similarly situated individuals, Plaintiffs-Petitioners, v. DANIEL F. MARTUSCELLO III, in his official capacity as Acting Commissioner of the New York State Department of Corrections and Community Supervision, Defendant-Respondent.	Index No. 902997-23 Bryant, J.

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS-PETITIONERS' MOTION TO COMPEL DISCOVERY AND COMPLETION OF THE ADMINISTRATIVE RECORD

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PRELIMINARY STATEMENT

Over a year after Plaintiffs[1] filed this case challenging the Department of Corrections and Community Supervision's ("DOCCS") k(ii) Confinement Policy of placing people in restrictive confinement settings without the individualized findings required by the Humane Alternatives to Long-Term Solitary Confinement Act ("HALT"), Defendant has submitted no evidence refuting its promulgation and implementation of this policy. And rather than providing evidence to contest or otherwise explain this policy, Defendant submitted, and apparently rests on, a bare and incomplete administrative record limited to the three disciplinary hearings of the named Plaintiffs. To ensure the parties and the Court have the information material and necessary for the adjudication of this matter, Plaintiffs now request the Court's intervention. On their declaratory judgment claim, they seek the discovery to which they are entitled as of right. And on their Article 78 claims, they seek completion of the administrative record or else decision of their claims on the record DOCCS has repeatedly claimed is complete.

BACKGROUND

Plaintiffs began this hybrid declaratory judgment action and Article 78 proceeding over a year ago, on April 5, 2023, and amended their pleadings on May 26, 2023 (NYSCEF Doc No. 1, petition; NYSCEF Doc No. 24, amended petition). Plaintiffs seek a declaratory judgment under CPLR 3001 that DOCCS's k(ii) Confinement Policy violates the HALT Act (amended petition at 18). The k(ii) Confinement Policy is DOCCS's policy and practice of categorically deeming

[1] Though the parties to this hybrid declaratory judgment action and Article 78 proceeding are technically Plaintiffs-Petitioners and Defendant-Respondent, for ease of reading, this memorandum refers to them as "Plaintiffs" and "Defendant," respectively.

charges adjudicated in a Tier III disciplinary hearing to qualify for so-called k(ii) confinement[2] rather than making the mandatory, individualized determinations required by that provision before placing individuals in k(ii) confinement (*see* Correction Law § 137 [6] [k] [ii]; amended petition ¶ 5). Plaintiffs also assert Article 78 claims under CPLR 7801 (1) and (3) and seek an order: (1) compelling DOCCS to comply with Correction Law § 137 (6) (k) (ii); (2) annulling and enjoining DOCCS's unlawful k(ii) Confinement Policy; and (3) reversing and expunging disciplinary confinement sanctions imposed under that policy (amended petition at 18).

Defendant answered the Amended Petition and Complaint on June 23, 2023, and simultaneously moved to dismiss Plaintiffs' declaratory judgment cause of action (NYSCEF Doc No. 41, answer). Defendant's answer asserted that, as a matter of law, Plaintiffs-Petitioners' Article 78 claims could not be pursued on a class-wide basis (*id.* ¶ 89).

As for Plaintiffs' factual allegations about the k(ii) Confinement Policy, Defendant's Answer admitted that DOCCS has not developed or disseminated any specific objective criteria for determining whether misbehavior is "heinous or destructive" for purposes of the HALT Act, (amended petition ¶ 33; answer ¶ 33), but denied that DOCCS has adopted a categorical approach by which all charges adjudicated in a Tier III disciplinary hearing automatically qualify as one the seven specifically listed k(ii) acts, irrespective of the nature of the particular act in question and without any individualized written findings that the conduct satisfies the k(ii) standard for extended disciplinary confinement (answer ¶¶ 24–29). Defendant did not submit any affidavits or other written proof supporting these denials of the Petition and Complaint's factual allegations about the k(ii) Confinement Policy. Instead, the only documents annexed to Defendant's Answer were three

[2] "k(ii) confinement" refers to confinement for which DOCCS's compliance with Correction Law § 137 (6) (k) (ii) is required (*see* amended petition ¶¶ 17–22 [describing k(ii) confinement]).

disciplinary hearing packets relating to the named Plaintiffs, and two affidavits that relate solely to these discrete Tier III hearings (*id.* ¶ 96). Defendant's Answer states these documents "constitute the entire administrative record in this matter" (*id.* ¶ 97).

On June 30, 2023, Plaintiffs moved for class certification, which Defendant opposed (NYSCEF Doc No. 49, MOL in support of class cert mot; NYSCEF Doc No. 57, MOL in opp to class cert mot). On September 12, 2023, the Court issued a Decision and Order denying Defendant's motion to dismiss and certifying the class of all individuals in DOCCS custody who are or will be placed in segregated confinement for more than three days, or six days in any 60-day period or in any other unit for which compliance with Correction Law § 137 (6) (k) (ii) is required before placement (NYSCEF Doc No. 59, decision and order). In reaching this conclusion, the Court noted that Defendant claimed the specific acts committed by the named petitioners "warranted the type of discipline that was administered," but held that Defendant failed to "directly address the allegations that [DOCCS] ha[s] adopted" the challenged policy and that Plaintiffs claims about that policy remained "uncontested" (*id.* at 9–10).

Since the Court's September 12 ruling and notwithstanding multiple status conferences in the intervening months, this case remains at a standstill, with thousands of class members still in unlawful disciplinary confinement under the challenged k(ii) Confinement Policy and scores of new members entering the class each week (*see e.g.* DOCCS HALT Semi-Annual Report, November 1, 2023–April 1, 2024, available at https://doccs.ny.gov/system/files/documents/2024/04/halt-semi-annual-report-2023-november-2024-april.pdf [last accessed April 11, 2024] [reflecting monthly changes in Special Housing Units and Residential Rehabilitation Units]).

On January 3, 2024, Plaintiffs served discovery requests on Defendant relating to their declaratory judgment claim (NYSCEF Doc No. 67, plaintiffs' discovery requests). These requests seek information on the promulgation, implementation, and scope of the k(ii) Confinement Policy (*id.*)—the same type of information required to afford this Court intelligent review of the administrative record. On January 23, at Defendant's request, Plaintiffs extended Defendant's time to respond to those requests to February 22, 2024 (NYSCEF Doc No. 70, Gemmell aff ¶ 5). On February 20, however, counsel for Defendant informed Plaintiffs' counsel that Defendant would not respond to Plaintiffs' discovery requests in light of his understanding that "the Court is disinclined to allow much discovery" (*id.* ¶ 6).

Soon after, on February 23, Defendant notified the Court that the exhibits submitted in support of Defendant's Answer to the Article 78 portion of this case constitute the complete administrative record for Defendant's decisions at issue and that Defendant therefore rests on those submissions (NYSCEF Doc No. 65, defendant's letter to court dated Feb 23, 2024).

On March 1, 2024, Plaintiffs filed a response letter notifying the Court of omissions from Defendant's administrative record, updating the Court on the status of the litigation, and requesting that the Court order Defendant to complete the administrative record and respond to Plaintiffs' outstanding discovery requests (NYSCEF Doc No. 66, plaintiffs' letter to court dated March 1, 2024). Then, in a letter to the Court on March 11, Defendant requested that the Court deny both requests (NYSCEF Doc No. 68, defendant's letter to court dated March 11, 2024).

On March 12, 2024, in response to these letters, chambers notified counsel for the parties by email that "the [C]ourt will not address the issues raised by counsel except by formal application on notice with relevant authority" (Gemmell aff ¶ 7). Plaintiffs now move for discovery and to complete the administrative record.

ARGUMENT

I. The Court Should Order DOCCS to Respond to Plaintiffs' Discovery Requests.

The Court should permit discovery to proceed so this case can progress without further delay. As binding precedent confirms, discovery is available as of right on the declaratory judgment portion of Plaintiffs' claims; The hybrid nature of this case does not change that fact. And even if that were not so, the Court should exercise its discretion to permit discovery here. An opposite result would foreclose any meaningful relief for vast swaths of the class by depriving them of relevant information they need to pursue their claims.

Under the plain language of the CPLR, Plaintiffs have a right to pursue discovery on their claim for declaratory relief. As with any statute, "[w]e start with the text" in interpreting the CPLR's requirements (*Matter of Brookford, LLC v N.Y. State Div. of Hous. & Community Renewal,* 31 NY3d 679, 690 [2018]). Section 3101 provides, "[t]here *shall* be full disclosure of all matter material and necessary in the prosecution or defense of an action" (CPLR 3101 [a] [emphasis added]). As the Court of Appeals has emphasized, the right to discovery under this provision must be "interpreted liberally . . . ." (*Allen v Crowell-Collier Pub. Co*., 21 NY2d 403, 406 [1968]; *see also Forman v Henkin*, 30 NY3d 656, 661 [2018] [recognizing CPLR 3101 "embodies the policy determination that liberal discovery encourages fair and effective resolution of disputes on the merits, minimizing the possibility for ambush and unfair surprise" (cleaned up)]). The Court has no reason to depart from the statutory text or binding precedent here: Because Plaintiff brought their claim for declaratory relief in an "action" within the meaning of CPLR 3101(a), they have a right to pursue discovery as of right (*see* amended petition ¶ 83).

Nor does the hybrid nature of this case demand any different result. Courts routinely allow for discovery in cases, like this one, involving claims for declaratory judgment alongside those for Article 78 relief (*see e.g. Young v Vil. Bd. Of Vil. Of Gouverneur*, 64 Misc 3d 1221(A), *10 [Sup

Ct, Lawrence County 2019] ["[D]iscovery is proper in a combined article 78 and declaratory judgment proceeding where there is 'demonstrated need.'" (citing *Matter of Lally v Johnson City Cent. School Dist.*, 105 AD3d 1129, 1132 [3d Dept 2013] and collecting cases)]; *see also Cobleskill Stone Prod., Inc. v Town of Schoharie*, 222 AD3d 1122, 1123–24 [3d Dept 2023] [noting discovery had been conducted in a hybrid Article 78 and declaratory judgment action]; *Fernandez v Town of Benson*, No. 2018-7464 [Sup Ct, Hamilton County, Mar. 7, 2019] [ordering discovery in a hybrid Article 78 and declaratory judgment action]). For these hybrid actions, courts "apply the usual rules relating to discovery to [the Article 78 and declaratory judgment portions] as if they were separate matters" (*Price v New York City Bd. Of Educ.*, 16 Misc 3d 543, 550 [Sup Ct, NY County 2007]). "Thus, discovery under each must be considered solely with respect to the propriety of discovery vis a vis the issues and claims under such rubric" (*id.*). Here, the fact that Plaintiffs seek information material and relevant to their declaratory judgment claim justifies discovery here.

Blocking discovery here would hamstring Plaintiffs' ability to pursue a declaratory judgment, imposing an enormous barrier to meaningful relief for vast swaths of the class. Through their outstanding discovery requests, Plaintiffs seek information about the existence and scope of the policy both before and after the filing of this suit — matters of central importance in their challenge the k(ii) Confinement Policy here (*see* plaintiffs' discovery requests). Without access to this basic information through discovery about the contours of the k(ii) Confinement Policy, Plaintiffs will be unable to identify all potential members of the class or to assess how, if at all, DOCCS has altered the policy in the months since Plaintiffs filed this case. Because this would deny Plaintiffs the "full disclosure" of "material and necessary" matter to which the CPLR entitles them on their declaratory judgment claim, the Court should allow Plaintiffs to proceed with discovery and order DOCCS to respond to their outstanding discovery requests.

II. The Court Should Order DOCCS to Complete Its Deficient Administrative Record Or Else Decide Plaintiffs' Article 78 Claims on the Record DOCCS Has Twice Claimed Is Complete.

On top of declining to respond to discovery requests on Plaintiffs' declaratory judgment claim, DOCCS has consistently failed to produce a complete administrative record as required on Plaintiffs' Article 78 claims: Twice now, DOCCS has represented that its administrative record in this systemic challenge to the k(ii) policy is complete (*see* answer ¶ 97; defendant's letter to court dated February 23, 2024 at 1). Yet the scant record DOCCS has produced here is limited to the disciplinary proceedings of the three named plaintiffs, leaving the Court to guess why and how DOCCS implemented the k(ii) policy and foreclosing the possibility of meaningful review. Consistent with the ordinary course when an agency attempts to support challenged action with a deficient administrative record, the Court should require DOCCS to complete that record to permit meaningful review of Plaintiffs' Article 78 claims. Or, given DOCCS repeated representations that the administrative record is complete, the Court instead may resolve Plaintiffs' Article 78 claims based on that record.

When its actions are challenged under Article 78, an agency must explain itself by producing an administrative record (CPLR 7804 [e]). At a minimum, that record must permit the reviewing court both to "discern the rationale" behind and "undertake intelligent review" of the challenged actions (*Off. Bldg. Assocs., LLC v Empire Zone Designation Bd.*, 95 AD3d 1402, 1405 [3d Dept 2012]). If an agency falls short of this baseline, the court may require the agency to correct the deficiency by completing the administrative record (*see e.g. Richmond Children's Center, Inc. v Delaney*, 190 AD3d 1129, 1130 [3d Dept 2021] [concluding that trial court should have directed respondent to complete an administrative record that had been "insufficient to discern whether respondents' determination had a rational basis or whether it was arbitrary and capricious"]).

Here, DOCCS's purported administrative record precludes meaningful review by this Court of the policy at issue in this suit. DOCCS has failed to produce even a single record explaining why or how the agency implemented its k(ii) Policy in response to the requirements of the HALT Act contained in CL § 137 (6) (k) (ii). Instead, DOCCS has opted to confine its administrative record to disciplinary proceedings against the three named Plaintiffs, ignoring altogether Plaintiffs' broader challenge to the k(ii) Confinement Policy.[3] But as this Court already recognized, Plaintiffs' Article 78 claims have never been so limited. From the start, Plaintiffs brought those claims as a systemic challenge on behalf of thousands of individuals subject to the same policy at prisons across the state (amended petition ¶¶ 4, 75). And the Court rejected the notion that Plaintiffs could not proceed as a class on those claims, denying DOCCS's motion to dismiss

[3] Moreover, even if Plaintiffs' Article 78 challenge were limited to the named Plaintiffs' three individual disciplinary proceedings — and it is not — DOCCS still has fallen short: In answering Plaintiffs' Article 78 claims, for example, DOCCS failed even to produce the transcripts from the named plaintiffs' disciplinary hearings (*see* CPLR 7804 [e] [requiring the agency to "file with the answer a certified transcript of the record of the proceedings under consideration . . . ."]).

and certifying the class (decision and order at 8).[4] Yet even after those rulings, DOCCS has doubled down, declining to amend or supplement its pleadings[5] and opting instead to rest on the narrow administrative record it originally submitted relating to the named Plaintiffs (*see* defendant's letter to court dated February 23, 2024 at 1).

Here, a complete administrative record should encompass, for example, information DOCCS considered in arriving at the k(ii) Confinement Policy; materials describing or explaining the policy DOCCS ultimately adopted;[6] any alternatives DOCCS considered to the k(ii) Confinement Policy, including the reasons for rejecting those alternatives; and materials DOCCS developed to implement the policy, such as training materials and policy guidance. At the very least, that record must enable the Court to assess whether DOCCS's decision to implement the k(ii) Confinement Policy was both reasonable and reasonably explained (*see Koch v Sheehan,* 21 NY3d 697 [2013] [affirming annulment of the agency's determination because the agency did not explain the rationale for its decision] *Kuppersmith v Dowling*, 93 NY2d 90, 96 [1999] [a state action must

[4] DOCCS claims "the Court did not specify whether class action status applied to both the Article 78 claims, the declaratory judgment claims, or both" (defendant's letter to court dated March 11, 2024 at 3). But that assertion is baseless. The propriety of an Article 78 class was *precisely* the issue the Court considered in denying DOCCS's motion to dismiss (*see* answer at 11; MOL in opp to class cert mot. at 4–6; decision and order at 8–10). And the Court granted in full Plaintiffs' motion for class certification, which did not exclude their Article 78 claims (*see* amended petition ¶¶ 75–80; decision and order at 8–10).

[5] In declining to address Plaintiffs' broader challenge to the k(ii) Confinement Policy in its answer, DOCCS also runs afoul of CPLR 7804 (d), which requires that DOCCS's answer "state pertinent and material facts showing the grounds of the respondent's actions complained of."

[6] For example, the administrative record should include materials supporting and explaining DOCCS's determination that "[a]ll current Tier III charges qualify as a k(ii) offense" (*see* NYSCEF Doc No. 3, review officer training manual at *6).

have "a rational basis" and not be "unreasonable, arbitrary, capricious or contrary to the statute under which it was promulgated"]).[7]

To the extent DOCCS would attempt to justify its meager administrative record here by denying the existence of the k(ii) Confinement Policy, the Court should reject that unsupported claim. In challenging the k(ii) Confinement Policy, Plaintiffs proffered a wealth of evidence establishing both the policy's existence and its harmful impact across the class (*see generally* NYSCEF Doc No. 36, MOL in support of amended petition). In response, DOCCS denied the existence of the k(ii) Confinement but declined to substantiate that position with a single shred of evidence (*see generally* answer). DOCCS is of course entitled to contest any aspect of Plaintiffs' allegations here. But Article 78 requires more than the mere say-so of agency officials. Instead, an agency must "submit with the answer affidavits or other written proof" supporting its position on any allegations it denies (*see* CPLR 7804 [e]). With no evidentiary submission by DOCCS, the Court should not accept DOCCS's bald assertion that the challenged policy does not exist; and the Court should reject any attempt by DOCCS on that basis to justify its deficient administrative record.[8]

Alternatively, with DOCCS now having confirmed — twice — that its administrative record here is complete, it would also be appropriate for the Court to decide Plaintiffs' Article 78 challenge to the k(ii) Confinement Policy based on that record. This is so despite the deficiency of that record — and even if the only logical result of that deficiency is to grant the petition and vacate

[7] Materials sought by Plaintiffs in their outstanding discovery requests overlap substantially with materials that a complete administrative record for the k(ii) Confinement Policy likely would include.

[8] Moreover, any remaining question as to the existence of the k(ii) Confinement Policy would only bolster Plaintiffs' claim that discovery is appropriate in this case.

the k(ii) Confinement Policy — because Article 78 does not afford an agency unlimited time or unlimited opportunities to proffer an administrative record to substantiate its actions. Indeed, as this Court has recognized, an agency's failure to proffer an administrative record sufficient to justify its challenged conduct does not preclude a court from ruling under Article 78 (*see Leafly Holdings, Inc. v New York State Office of Cannabis Management*, Sup Ct, Albany County, April 4, 2024, Bryant, J., index No. 908706-23, at 12 [granting petition where "Respondents [] failed to cite to any evidentiary support in the administrative record to contradict Petitioners claims"]).The Court need chart no different course in reviewing Plaintiffs' Article 78 challenge to DOCCS's k(ii) policy here.

CONCLUSION

For all these reasons, the Court should grant this motion, ordering DOCCS to respond to Plaintiffs' outstanding discovery requests; and either ordering DOCCS to complete the administrative record for the k(ii) Confinement Policy or else ruling on Plaintiffs' Article 78 claims using the record DOCCS repeatedly has claimed is complete.

Dated: April 11, 2024
New York, New York

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH 22 NYCRR §202.8-b

I hereby certify that this Memorandum of Law in Support of Plaintiffs-Petitioners' Motion to Compel and Completion of the Administrative Record complies with the word count limitation of 22 NYCRR §2 02.8-b because the total word count of all printed text in the body of the memorandum, excluding the parts exempted by section 202.8-b, is 3,634 words according to the word-count function of Microsoft Word, the word processing program used to prepare this document.

Dated: April 11, 2024
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