Pro Se

Vol. 23 No. 5 October 2013 **Published by Prisoners' Legal Services of New York**

Transgender Prisoners and the Law

On May 20, 2013, DOCCS updated its policy on when transgender prisoners are eligible for gender-confirming clothing and hormone therapy. See, Health Services Policy Manual (HSPM) 1.31 (dated 5/20/13). In addition, several case decisions have also recently affirmed the rights of transgender people to access gender-related medical care in prison. This article describes the revisions to the DOCCS policy and summarizes several recent decisions impacting the rights of transgender prisoners.

Transgender People and Gender Dysphoria/ Gender Identity Disorder (GID)

Transgender is an umbrella term for people whose gender identity differs from the gender they were assigned at birth. For example, a transgender woman is a woman who was **designated** (labeled) male at birth but whose gender is female. Some transgender people may qualify for a psychiatric diagnosis called Gender Dysphoria. Gender Dysphoria is listed in the Diagnostic and Statistical Manual V (DSM-V), the manual medical professionals use to classify mental health conditions. Prior editions of the DSM called the condition Gender Identity Disorder (GID). DOCCS still uses the term GID. People with Gender Dysphoria/GID experience clinically significant distress or impairment in social, occupational, or other areas of functioning because their gender identity does not match the gender they were assigned at birth.

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A Message From the Executive Director – Karen L. Murtagh

Dear *Pro Se* Subscriber:

First, I would like to thank those subscribers who donated to our annual *Pro Se* appeal last year. The donations, totaling $1,019.00, helped to offset the increased costs of publishing and mailing *Pro Se* and allowed us to continue to provide *Pro S*e free of charge to incarcerated individuals.

As you know, for more than 25 years, *Pro Se*, now a bi-monthly publication, has provided invaluable information, free of charge, to prisoners in New York State. *Pro Se* covers issues involving changes in the law, statutory and regulatory requirements, and legal practice issues that relate directly to prisoners. Although we do post each issue of *Pro Se* on our website at www.plsny.org, the majority of our readers do not have Internet access and cannot take advantage of the web posting, thus a personal mailing of each issue is necessary. **Publishing and mailing one issue of *Pro Se* costs approximately $7,800.00; our annual cost of providing six issues of *Pro Se* to our readers is approximately $46,800.00.**

PLS has historically paid for the majority of the costs associated with *Pro Se* from our operational funds, with supplemental grant funding from various foundations. However, for the past few years, due to the poor economic environment, we have not received any grant money to help offset our costs. Our subscriber list has increased dramatically (now at over 8,500 individuals and organizations) and as a result it is very difficult for us to continue to provide *Pro Se* to incarcerated individuals free of charge. **However, we are still committed to doing so.**

In light of this, we are asking those readers who are able to, to make a donation to *Pro Se*. **Your donation will help offset the costs associated with the increase in distribution of *Pro Se* and will allow PLS to continue to provide *Pro Se*, free of charge, to incarcerated individuals throughout New York State.**

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We would like to thank you in advance for your generous contribution to *Pro Se.*

Sincerely yours,
Karen L. Murtagh, Esq

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Health Services Policy Manual 1.31

Recent changes to DOCCS medical policy are promising for transgender people. Previously, DOCCS had a "freeze frame" policy that said a transgender person could not get treatment for Gender Dysphoria unless he or she had been getting the same treatment from a doctor before coming to prison. The new policy explicitly states that any prisoner who "presents with complaints or symptoms consistent with GID" should be sent for a diagnostic evaluation from a mental health professional with specific expertise in Gender Dysphoria. If the mental health professional diagnoses the prisoner with GID and recommends hormone treatment, the prisoner should be sent to an endocrine specialist (a doctor who specializes in the treatment of the glands and hormones of the body and their related disorders) to **initiate** (start) hormone therapy and other appropriate medications.

The policy also provides that transgender women prisoners who have been diagnosed with GID may receive state-issued bras. According to the policy, DOCCS will issue six bras to a transgender woman prisoner, two of which may be sports bras. To obtain bras, a transgender woman prisoner should make a request through her facility Health Unit. The policy provides that to determine the correct bra size, the prisoner will measure herself at the facility Health Unit in front of a health care professional who will complete the forms to order the bras. When the bras arrive, the prisoner will pick them up at the facility Health Unit and will also be issued a medical permit to possess and wear bras.

The policy does not allow transgender women to receive bras through the package room or to purchase them. Only state-issue bras are allowed. The policy also does not mention access to other gender-specific clothing such as underpants, cosmetics, grooming, or hygiene products.

Appealing Denials of Treatment

Under a prior DOCCS policy, prisoners who requested gender-confirming medical care such as hormone therapy were told they were not eligible unless they had a diagnosis and a doctor's prescription before entering prison. The new policy makes clear that neither a prior diagnosis nor a pre-existing prescription for hormones is necessary in order to obtain treatment for Gender Dysphoria.

In the event that your request for treatment is denied, you should file a grievance and/or contact the organizations listed below for help.

If you need gender-confirming medical treatment and your request for treatment is denied, you should file a grievance requesting *both* (1) a referral to a specialist qualified to make a diagnosis of Gender Dysphoria/GID pursuant to DOCCS Health Services Policy Manual #1.31 *and* (2) appropriate hormone therapy or other treatment for Gender Dysphoria/GID. You should initiate these requests through appropriate sick call channels. If the requests are denied, you can file a grievance through the I.G.R.C. If the grievance is not granted, you should file an appeal to the Superintendent within the designated time frame. You should appeal the I.G.R.C. decision to the Superintendent even where the I.G.R.C. responds that it does not have jurisdiction over health care matters or directs you to write someone else. Some people have been told that this is an issue for the Office of Mental Health (OMH), but OMH does not evaluate or treat Gender Dysphoria, so the only way to get treatment is through DOCCS sick call requests. If the Superintendent denies your appeal, you should file an appeal to the Central Office Review Committee (C.O.R.C.). Be sure to file appeals within the time periods stated on the decisions that you receive.

In your grievance, to the best of your ability, document (1) from whom you requested treatment, (2) where and how the request was made, (3) how many times your request was denied and (4) the distress you are experiencing. If you were denied an evaluation or treatment at a previous facility, you should include that in the grievance. Title each grievance clearly to show the treatment being denied (for example, "Denial of GID Specialist" or "Denial of Medically Necessary Hormone Therapy"). Attach copies of any written requests you made and responses you received.

If you need information on how to use the DOCCS grievance system, you can write to PLS and request the memo entitled "The Inmate Grievance Program."

Legal Claims For Gender-Confirming Treatment

The U.S. Supreme Court established in Estelle v. Gamble, 429 U.S. 97 (1976), that "deliberate indifference" to a prisoner's "serious medical needs" violates that prisoner's Eighth Amendment right to be free from cruel and unusual punishment. Many courts have held that GID is a serious medical need under the Eighth Amendment. Depending on the facts of the particular case, denying a prisoner treatment for Gender Dysphoria/GID may be unconstitutional.[1] In Brooks v. Berg, 289 F. Supp.2d 286, 287 (N.D.N.Y 2003), for example, the court found that prison officials violated the Eighth Amendment by denying a transgender prisoner hormone therapy to treat GID.

Recently, courts in other parts of the country have held that under certain circumstances, prisoners experiencing Gender Dysphoria may be entitled to sex-reassignment surgery in addition to hormone therapy. Ophelia Azriel De'lonta sued the Virginia Department of Corrections after officials refused to consider sex-reassignment surgery for her Gender Dysphoria even though other treatments did not relieve her overwhelming urge to castrate herself. The district court dismissed her case, but the Fourth Circuit Court of Appeals reinstated the lawsuit, holding that failure to consider providing genital surgery could potentially violate the Eight Amendment's prohibition against cruel and unusual punishment if other treatments were not adequate to prevent self-mutilation. De'Lonta v. Johnson, 708 F.3d 520 (4th Cir. 2013).

Similarly, Michelle Kosilek sued Massachusetts prison officials because they refused to provide her with gender-confirming genital surgery. Ms. Kosilek was designated male at birth and is incarcerated in a men's prison. Prison officials had treated her Gender Dysphoria with hormone therapy and allowed her to live as a woman but she continued to suffer serious psychological distress. Her doctors said that sex reassignment surgery was medically necessary. In Kosilek v. Spencer, 889 F.Supp.2d 190 (D. Mass. Sept. 4, 2012), a federal court in Massachusetts found that surgery is the "only adequate treatment" for Kosilek and that "there is no less intrusive means to correct the prolonged violation of Kosilek's Eighth Amendment right to adequate medical care." The judge ordered the Massachusetts Department of Corrections to provide Ms. Kosilek with surgery. The case is currently on appeal.

As yet there are no cases in New York or the Second Circuit holding that transgender prisoners are entitled to gender-confirming surgery.

Gaining access to gender specific clothing, cosmetics, grooming, and hygiene products is also very important for many transgender inmates as these products are often a significant **component** (part) of an individual's gender presentation. As noted above, DOCCS' policy

[1] A serious medical need, in the context of an Eighth Amendment claim based on inadequate medical care, is, among other things, one that has been diagnosed by a physician as mandating treatment. See, e.g., Kosilek v. Spencer, 889 F.Supp.2d 190, 229 (D. Mass. Sept. 4, 2012).

regarding treatment of GID/Gender Dysphoria does not provide for access to underwear, cosmetics, or grooming products. While advocates for transgender prisoners argue that being able to dress, groom, and present in accordance with one's gender identity may be a part of medically necessary treatment for Gender Dysphoria, to date no court has agreed that denying a transgender prisoner access to clothing, cosmetics, or grooming to confirm his or her gender identity is an Eighth Amendment violation.

An alternative approach for challenging the denial of access to gender specific clothing, cosmetics, and grooming products is to challenge the denial as "arbitrary and capricious" under New York Civil Practice Law and Rules Article 78. Using this approach, the prisoner would argue that the prison's denial was arbitrary and capricious as well as an abuse of discretion. The court will look at the justifications that the prison gave for the denial at the time it was made and decide whether the decision was (a) made without a reason or (b) without regard to the facts. Prior to bringing such a case, the prisoner would have to exhaust his or her administrative remedies by using all of the procedures provided by the Inmate Grievance Program.

Lastly, DOCCS' failure to permit a transgender person to dress and groom in accordance with his or her gender identity may violate the New York Human Rights Law's prohibition on disability discrimination. One New York court found that failing to allow a transgender person in state foster care to dress in accordance with her gender identity qualifies as disability discrimination under the New York State Human Rights Law. In Doe v. Bell, Jean Doe, a transgender girl who was living in an all-male foster care group home challenged a clothing policy that prohibited her from wearing "female clothing." See Doe v. Bell, 754 N.Y.S.2d 846 (Sup. Ct. 2003). The court held that (1) GID is a disability within the meaning of the Human Rights Law; (2) the policy is neutral on its face and does not discriminate based on disability outright; but (3) the foster care program failed to reasonably accommodate Ms. Doe's disability by not allowing her to wear skirts and dresses.

Recently, a transgender woman denied access to women's underwear filed an Article 78 action against DOCCS and obtained a settlement providing her with access to state-issued female undergarments. See So-Ordered Stipulation of Settlement, Matter of Manning v. Fisher, No. 2012-1144 (Sup. Ct. Cayuga Co. Apr. 9, 2013).

Resources to Contact if You Are In Need of Assistance

Transgender prisoners who are denied gender-confirming medical care or treatment for Gender Dysphoria can contact the following organizations for help:

a. Prisoners' Legal Services of New York
See the last page of this issue of *Pro Se* to determine which PLS office handles legal issues at the prison where you are residing.

b. Sylvia Rivera Law Project
147 W. 24th Street
Fifth Floor
New York, NY 10011
Telephone: (212) 337-8550
Email: infor@srlp.org
Web: www.SRLP.org

c. Cornell Law School LGBT Clinic
Cornell Clinical Programs
Myron Taylor Hall
Ithaca, NY 14853
Telephone: (607) 255-4196
Email: lgbt-clinic@cornell.edu

This article was written by Ashley Hughes, a third year law sutdent at Cornell Law School.

Pro Se Victories!

Scott Morehouse v. State of New York, Court of Claims, Claim No. 116598. Scott Morehouse's claim that DOCCS employees were responsible for the loss or destruction of his glasses was successfully resolved when a Court of Claims judge, after trial, ruled in his favor. The court found that the claimant had demonstrated, "by the preponderance of the evidence," that the State was liable for the value of his eyeglasses which he had given to the defendant when he reported to the infirmary. The court found that the plaintiff had shown that the glasses had a value of $200.00. The court also awarded $500.00 in damages for the plaintiff's pain and suffering relating to his sensitivity to light, an aspect of the plaintiff's vision problem which, the court concluded, was undisputedly severe.

Pro Se Victories! *features descriptions of successful unreported pro se litigation. In this way, we recognize the contribution of pro se litigants. We hope that this feature will encourage our readers to look to the courts for assistance in resolving their conflicts with DOCCS. The editors choose which unreported decisions to feature from the decisions that our readers send us. Where the number of decisions submitted exceeds the amount of available space, the editors make the difficult decisions as to which decisions to mention. Please submit copies of your decisions as Pro Se does not have the staff to return your submissions.*

STATE COURT DECISIONS

Disciplinary & Administrative Segregation

Court Finds Witness Was Relevant to Retaliation Defense

In Matter of Deboue v. Fischer, 968 N.Y.S.2d 260 (3d Dep't 2013), the petitioner argued that the hearing officer at his Tier III hearing had violated his right to call witnesses. This case arose when the Imam at Marcy C.F. accused the petitioner of aggressive and undermining behavior. The petitioner was given an administrative segregation recommendation. At the hearing, the petitioner requested that an inmate be called as a witness. According to the petitioner, the witness had overheard a conversation during which the Imam admitted that he had sought the administrative segregation recommendation as a means of retaliating against the petitioner. The hearing officer refused to call the witness because, according to the hearing officer, a conversation that took place after the incident is not relevant.

The court held that the testimony would be relevant and thus the request was improperly denied. As such, the court ruled, the hearing officer's ruling was a violation of petitioner's regulatory right to call witnesses.

Eric Deboue represented himself in this Article 78 proceeding.

Relief Granted in Spite of Petitioner's Release from Prison

In Matter of Deboue v. Fischer, 968 N.Y.S.2d 260 (3d Dep't 2013) (see preceding article) the petitioner had been released to parole supervision before the appellate division decided whether he was entitled to the relief that he was seeking. The court found that

because Mr. Deboue was no longer in prison, his request to be released from administrative segregation was moot. Mootness is a doctrine that allows a court not to decide an issue that is otherwise properly before it when the plaintiff will no longer benefit from the relief. Thus, in Mr. Deboue's case, the court found that because he had been released from prison, he no longer needed the relief of being released from administrative segregation and as to this request for relief, his petition was moot. However, citing Matter of Cross v. Selsky, 706 N.Y.S.2d 746 (3d Dep't 2000), the court found that Mr. Deboue's release from prison did not render moot his request for expungement of the administrative segregation recommendation from his institutional record. Thus, the court decided to issue a decision in his case rather than dismissing it on mootness grounds.

In an unusual addition to the relief granted, noting that the remedy for a "good faith" denial of a witness is to remit the matter for a new hearing, the court concluded that because the petitioner was no longer in prison, remittal was not possible. For this reason, the court ordered that the charges be expunged without prejudice to the respondent, reconsidering the underlying facts at a new administrative segregation hearing should the petitioner be returned to prison.

Eric Deboue represented himself in this Article 78 proceeding.

Failure to Call Officer Witness Leads to Reversal of Hearing

The petitioner was accused in two misbehavior reports of being loud and disruptive during two incidents. The reports were written because of comments that petitioner allegedly made first, while an officer was packing up the petitioner's property, and second, while the petitioner was being escorted from the property room to his cell. At the hearing, petitioner requested that the hearing officer call as a witness an officer who had observed petitioner's behavior as he was being escorted to his cell. The hearing officer refused. This refusal, the court found in Matter of Cahill v. Prack, 964 N.Y.S.2d 781 (3d Dep't 2013), deprived petitioner of his constitutional right to call witnesses. With respect to the misbehavior report charging petitioner with misconduct during the walk from the property room to his cell, the court reversed the determination of guilt and ordered the charges expunged.

Robert Cahill represented himself in this Article 78 proceeding.

H.O.s' Failure to Question Witnesses About Refusal Leads to Reversal

In Matter of Dickerson v. Fischer, 962 N.Y.S.2d 823 (3d Dep't 2013), the petitioner argued that the hearing officer had violated his right to call witnesses when he failed to find out the reason that a witness had refused to testify. In this case, the petitioner was found guilty of possession of contraband, smuggling, possession of drugs, and violating facility visiting procedures. The petitioner told his employee assistant that he wanted to call another inmate, whom he identified by name, as a witness. The employee assistant wrote on the witness refusal form, "Inmate refuses to testify." At the petitioner's hearing, when the petitioner requested the inmate be called as a witness, the hearing officer transferred this notation to the hearing record sheet. Citing Matter of Pitts v. Fischer, 948 N.Y.S.2d 923 (3d Dep't 2012) and Matter of McFadden v. Bezio, 937 N.Y.S.2d 702 (3d Dep't 2012), the court found that such a notation by the hearing officer, without any attempt to find out the reason for the witness's refusal, is not a sufficient basis upon which to deny the petitioner's right to call the witness. Concluding

that this was a regulatory violation (as opposed to a constitutional violation), the court ordered that the matter be remitted for a second hearing.

Similarly, in Matter of Sorrentino v. Fischer, 964 N.Y.S.2d 918 (3d Dep't 2013), where the petitioner was found guilty of possession of heroin which was found in a room that 3 other inmates also occupied, the court held that the petitioner's right to call witnesses was violated when the hearing officer failed to find out the reason that the three roommates had, according to the employee assistant, refused to testify. In Sorrentino, the decision states that none of the three witnesses had signed the witness refusal form, nor was any reason for refusing noted on any of the forms. Rather, the employee assistant noted on each form only that the witness had refused to testify. Here the court found that because the record did not contain any reason for the witnesses' refusal or indicate that the hearing officer tried to verify their refusals, the petitioner's regulatory right to call witnesses had been violated. In this case, the court relied on Matter of Barnes v. LeFevre, 511 N.Y.S.2d 591 (1986), in reaching this result. The court remitted the proceeding for a second hearing.

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Torrance Dickerson and Patrick Sorrentino each represented himself in their respective Article 78 proceedings.

Court Finds Denial of Witness to Be a Regulatory Violation

At issue in Matter of Morris-Hill v. Fischer, 960 N.Y.S.2d 273 (3d Dep't 2013), was whether the hearing officer's failure to try to contact the witness that the petitioner had requested was a violation of the petitioner's constitutional or regulatory rights. Based on an urinalysis test, the petitioner was charged with using a controlled substance. At the hearing, he asked that the correction officer who conducted the test be called as a witness. The hearing officer denied the request because the officer had retired.

The court, citing Matter of Lopez v. Fischer, 952 N.Y.S.2d 694 (3d Dep't 2012), noted that inmates have a conditional right to call witnesses at disciplinary hearings providing that their testimony would not **jeopardize** (threaten) prison safety or correctional goals. An outright denial of a witness without a stated good-faith reason, or lack of any effort to obtain the requested witness's testimony, constitutes a clear constitutional violation. See, Matter of Alvarez v. Goord, 813 N.Y.S.2d 564 (3d Dep't 2006). Where a good faith reason for the denial appears on the record, the failure to call a witness amounts to a regulatory violation requiring that the matter be sent back to DOCCS for a new hearing. See, Matter of Santiago v. Fischer, 908 N.Y.S.2d 139 (2010).

Applying these principles to this case, the court found that during the hearing, the hearing officer had **articulated** (stated) a good-faith reason for the denial; that is, that the proposed correction officer witness could not testify because he had retired. In fact, the respondent argued, and the court agreed, this was only a violation of the petitioner's regulatory right to call witnesses. Under the circumstances, the court held, the hearing officer should have made further inquiry as to whether the officer was available to testify. As he had made no such effort, the court found that the matter must be reversed and ordered the matter sent back to DOCCS for a new hearing.

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David Morris-Hill represented himself in this Article 78 proceeding.

Witness Allowed to Correct Clerical Error on Drug Testing Forms

After his urine tested positive for a controlled substance, the petitioner in Matter of Johnson v. Fischer, 960 N.Y.S.2d 560 (3d Dep't 2013), was charged with drug use. At his hearing, the petitioner argued that the test

results were not reliable because the expiration date for the reagent that was written on the drug testing forms had passed before the sample had been tested. The officer who had conducted the test testified that he had made an error in filling out the form when he wrote that the reagent expiration date was 2/28/11. In fact, he testified, the expiration date was 2/28/12. The officer also brought to the hearing the box from which the reagent was taken. The expiration date on the box was 2/28/12. The court found that the officer had adequately explained the **discrepancy** (the difference between what he wrote on the form and the actual expiration date) and that this explanation did not undermine the validity of the test results. Based on this conclusion, the court found that the misbehavior report, positive urinalysis test results and related documentation, together with the testimony of the correction officer, provided substantial evidence supporting the determination of guilt.

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Shakeim Johnson represented himself in this Article 78 proceeding.

For the Purpose of Rule 113.10, a Pen is a Dangerous Instrument

A misbehavior report claimed that during a cell extraction, the petitioner reached through his cell hatch and stabbed an officer with a pen. Following a Tier III hearing at which he was found guilty of possession of a dangerous instrument, petitioner filed an Article 78 proceeding arguing that possession of a pen does not violate Rule 113.10. Rule 113.10 provides that an inmate may not possess a dangerous instrument. Dangerous instrument is defined as "any instrument, article or substance which, under the circumstances in which it is used . . . is readily capable of causing bodily harm." In Matter of Ferguson v. Fischer, 967 N.Y.S.2d 253 (3d Dep't 2013), the court held that under the circumstances of petitioner's use, the pen was capable of causing bodily harm to the correction officer in violation of the rule.

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Colin Ferguson represented himself in this Article 78 proceeding.

Court Finds Insufficient Notice of Charges as to Charge of Possession of Marijuana

After allegedly finding a clear plastic bag containing a green leafy substance in a pocket of the petitioner's jacket, an officer had the substance tested and, based on the test results, the petitioner was charged with possession of marijuana. The petitioner was found guilty and his appeal was denied. In his Article 78 proceeding, the petitioner claimed that the Misbehavior Report did not comply with the particularity requirements of 7 N.Y.C.R.R. 251-3.1(c). This section of the regulations provides that a misbehavior report must set forth the date, time and place of the offense, the disciplinary rule allegedly violated and the factual basis for the charge with enough **particularity** (details) to enable the inmate to prepare a defense.

In Matter of Simmons v. Fischer, 963 N.Y.S.2d 609 (3d Dep't 2013), the court observed that the misbehavior report, which was written by the officer who tested the marijuana, simply stated that the substance, which had been given to him by another officer, had tested positive for marijuana. The report did not say who gave the testing officer the marijuana or where it had been found. Adding additional confusion, the court wrote, the report listed the location of the incident as "the chart office." Thus, beyond placing the petitioner's name and number in the designated lines on the top of the report, the misbehavior report failed to establish a connection between the marijuana and the petitioner. Under these circumstances, the court held, the misbehavior report failed to provide petitioner with adequate notice of the

charge to enable him to prepare a defense. Citing Matter of Hakeem v. Coombe, 650 N.Y.S.2d 819 (3d Dep't 1996), the court annulled the determination of guilt and ordered all references to the charges expunged from petitioner's institutional records.

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Christopher Simmons represented himself in this Article 78 proceeding.

Substantial Evidence Supports Charges of Unauthorized Possession of Departmental Records

Roger Reddish, chairperson of a facility Inmate Liaison Committee, was charged with possessing grievances which the report alleged he had asked other inmates to file. The misbehavior report charged the violation of two rules:

1. Possessing grievance documents belonging to other inmates in violation of Rule 113.27; and

2. Distributing departmental documentation without authorization in violation of Rule 116.12.

The documents came to light when DOCCS employees in the facility mail room found 24 grievances signed by different inmates in an envelope. An investigation resulted in the charges against petitioner.

In Matter of Reddish v. Fischer, 967 N.Y.S.2d 245 (3d Dep't 2013), the court noted that petitioner admitted having written the grievances and having placed them in the envelope. The court held that that petitioner's defense that he was merely assisting other inmates and did not intend to deceive anyone presented an issue of credibility. An issue of credibility is presented when a hearing officer must decide whether a witness is telling the truth. As a decision of this type – determining whether a witness is telling the truth − is one which is entrusted to the hearing officer, the court found that there was no basis for reversing the hearing. The court therefore confirmed the decision of the lower court dismissing the petition.

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Roger Reddish represented himself in this Article 78 proceeding.

Parole

Parole Denial Reversed: Court Finds BOP Failed to Apply Written Guidelines

In 2011, the N.Y.S. Legislature amended Executive Law §259-c(4) to require that the Parole Board establish written procedures to use in making parole decisions. The revised law also requires that the new procedures:

1. incorporate risk and needs principles to measure the rehabilitation of persons appearing before the Board and the likelihood of success of such persons upon release;

2. assist the Parole Board in determining which inmates may be released to parole supervision.

The effective date of this amendment was October 1, 2011.

Advocates of parole reform argue that the adoption of an explicit requirement that the Board of Parole establish and be guided by procedures that require it to evaluate an individual's rehabilitation and his or her likelihood of success if released signals a critical reform and modernization of parole practices. Agreeing with the parole reform advocates, one court wrote that the new procedures require that Parole Board members

focus on who the applicant is at the time that he or she appears before the Board and on whether he or she can succeed in the community after release. See, Matter of Thwaites v. NYS Board of Parole, 934 N.Y.S.2d 797 (Sup. Ct. Orange Co. Dec. 21, 2011). The court contrasted the revised statute with the former procedures used by the Board of Parole, which, the court stated, focused on who the person was many years earlier when he or she committed the crime that resulted in a sentence of imprisonment.

In Matter of Garfield v. Evans, 968 N.Y.S.2d 262 (3d Dep't 2013), the Third Department issued an opinion that discusses the procedures that the Board of Parole has adopted in response to the Executive Law's requirement that the Board establish written procedures for its use in making parole decisions. According to the Division of Parole, the procedures, known as the COMPAS Risk and Needs Assessment instrument, was introduced to the Board in July 2011, prior to the date of the petitioner's parole hearing which was held in October 2011. Nonetheless, the Board failed to use the COMPAS instrument at the petitioner's hearing.

The court found no justification for the Board's failure to use the COMPAS instrument at Petitioner's hearing and agreed with petitioner that he is entitled to a new hearing. For this reason, the court reversed the judgment of the court below and remitted the matter to the Board of Parole for further proceedings.

Andre Garfield represented himself in this Article 78 proceeding.

Third Department Rules that Revised Executive Law 259-c(4) is Not Retroactive

One question that arose after the adoption of revised Executive Law §259-c(4) was whether the revision applies only to people whose applications the Board considers after the effective date of the statute. See preceding article for a description of the revision to §259-c(4). Several prisoners who were denied parole release prior to October 1, 2011, but whose administrative or judicial appeals were pending on that date, argued in Article 78 actions that their applications for parole release should have been decided under the criteria of the revised law. The court in Matter of Thwaites v. NYS Board of Parole, 934 N.Y.S.2d 797 (Sup. Ct. Orange Co. Dec. 21, 2011), agreed with this argument, holding that **remedial** legislation should be given retroactive effect in order to **effectuate** (achieve) its **beneficial** (helpful) purpose. A remedial statute provides a remedy or a means to enforce a right and/or is enacted to correct an existing law or **redress** (remedy) an existing grievance.

Other courts, however, disagreed with Thwaites as to whether the revised Executive Law §259-c(4) should be applied retroactively. See, e.g., Matter of Hamilton v. NYS Division of Parole, 943 N.Y.S.2d 731 (Sup. Ct. Albany County 2012). The parole denial in petitioner Hamilton's case was issued on November 9, 2010. The Hamilton court did not expressly consider whether the legislation was remedial. Rather, it cited a **doctrine** (a rule) in support of its decision that the revision should not be given retroactive effect. The doctrine applies to statutory construction. Statutory construction is the process by which a court determines how a statute should be applied.

The court applied the fundamental rule that statutes should not be given retroactive effect. Thus, a statute will not be found to be retroactive unless the **language** (words used) in the statute expressly or by **necessary implication** (there is no other way to read the statute) *require* the court to apply the statute retroactively. In the case of Executive Law §259-c(4), the Hamilton court found that because the legislature expressly stated that the effective date of the revision was October 1, 2011, as opposed to making the statute effective upon enactment, the legislature did not intend

that the statute apply until that date and to applications that were decided by the Board of Parole on or after that date.

In Matter of Davidson v. Evans, 960 N.Y.S.2d 756 (3d Dep't 2013), the Third Department rejected the analysis used by Thwaites with respect to the retroactivity of revised Executive Law §259-c(4). In Davidson, the Third Department adopted the reasoning and result of the Howard court, holding that by **specifying** (stating) an effective date of the revision, the legislature **evinced** (showed) its intent that the provision only be applied prospectively.

Ronald Davidson represented himself in this Article 78 proceeding.

Miscellaneous

Visitation Denied; Letters Ordered

Clarence Brown is the father of three children. He is serving a 15 year determinate term. He filed a petition seeking visitation with his three children but modified the petition to seek visitation with only two of the children when he learned that one of the children might suffer emotionally from visiting him in prison. The family court denied the petition but ordered that the petitioner be allowed to communicate in writing with two of the children. The petitioner appealed from that order.

In Matter of Brown v. Terwilliger, 968 N.Y.S.2d 779 (4th Dep't 2013), the Appellate Division considered whether the family court had erred in denying visitation. The court first noted that there is a **rebuttable presumption** (an assumption that a party can overcome with evidence to the contrary) in favor of visitation and that this presumption applies when the parent seeking visitation is in prison. Here, though, the court found, the parent having custody of the children had rebutted the presumption with evidence that visitation with the incarcerated father would be harmful to the children. First, the court wrote, a parent's failure to seek visitation with a child for a prolonged period of time is a relevant factor in in determining whether visitation is **warranted** (justified). In this case, the petitioner had never met his daughter or son and had not tried to arrange visits with them before filing the petition seeking visitation. Thus, the court found, the father is a stranger to his children.

Further, the daughter's counselor gave detailed testimony on how visits with the father would harm her and the mother testified that the son is afraid of seeing the petitioner and has gone into therapy since learning that the petitioner wants the children to visit.

Whether visitation is appropriate is generally left to the discretion (judgment) of the family court whose findings, the court wrote, "will remain undisturbed unless lacking a sound basis in the record." Applying that principle to the facts before it, the appellate court found that there was a substantial basis in the record to support the family court's determination that visitation with petitioner is not in the children's best interest.

Practice Point: Visitation petitions are more likely to be successful where prior to entering prison the parent seeking visitation had a meaningful relationship with his or her children and upon entering prison, continued to build on the relationship by writing and telephoning the child and by seeking visitation. See, e.g., Matter of Granger v. Misercola, 967 N.Y.S.2d 872 (2013) (finding that family court order requiring visitation had sound and substantial basis in the record), reported in Pro Se, Volume 23, No. 3.

Not Arbitrary and Capricious to Only Offer Sex Offender Programming to Inmates Within 3 Years of Release

In Matter of Wakefield v. Fischer, 968 N.Y.S.2d 255 (3d Dep't 2013), the Court considered whether the Department's decision to limit sex offender treatment programs to prisoners who are within 3 years of release was **arbitrary and capricious** (illogical). The case arose when petitioner asked to take one of the programs in order to prepare for his first parole board appearance in 2015. The Department refused, saying that he would be offered a treatment program three years before his conditional release date in 2026. The petitioner then filed a grievance, challenging the denial and seeking to have references from a 2003 refusal to participate in sex offender counseling deleted from his quarterly evaluations. The grievance was denied and the denial upheld by the Central Office Review Committee (C.O.R.C.). Petitioner then filed an Article 78 proceeding challenging the denial and seeking an order directing that he be given the opportunity to participate in the sex offender treatment program. The Supreme Court dismissed the petition.

Correction Law §622(1) provides that DOCCS shall make available a sex offender treatment program for inmates who are serving sentences for felony sex offenses. The primary purpose of the program is to reduce the likelihood of re-offending. The statute also requires that the Department make the program available sufficiently in advance of the time of an inmate's consideration by the case review team (CRT). (Inmates who have been convicted of sex offenses are required to be reviewed by the CRT prior to their release for a determination of whether they need to be civilly committed or subject to strict and intensive supervision).

To comply with the statute, the Department has guidelines for offering the treatment program. The guidelines, the court wrote, recognize the need to use limited resources in a fair way. They offer high risk participants the chance to be in the program 36 months before their conditional release date.

According to the court, deciding when an inmate can most benefit from being in a sex offender treatment program, given the limited therapeutic resources available in prison, falls within the Department's discretionary authority. Under these circumstances, the court found, the decision to delay petitioner's participation in the treatment program was not arbitrary and capricious.

The court also found that petitioner's request to have his 2003 refusal to participate in sex offender treatment deleted from his institutional records was **moot** (had been resolved) as the respondent had stricken the references from petitioner's quarterly evaluations.

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Daniel Wakefield represented himself in this Article 78 proceeding.

Court Rejects Challenge to Denial of Legal Mail Advance

In Matter of Churchill v. Fischer, 963 N.Y.S.2d 603 (3d Dep't 2013), the court was called upon to decide whether the Department's denial of a prisoner's request for a postage advance for legal mail was unreasonable. The issue arose when the petitioner requested a $3.79 advance for special handling of his legal mail. The request was denied, as were his subsequent grievance and appeals of the grievance denial. After exhausting his administrative remedies, the petitioner brought an Article 78 proceeding alleging that the denial did not have a rational basis and/or was arbitrary and capricious.

In deciding the case, the court observed that DOCCS Directive 2788 requires that to receive a postage advance for special handling, an inmate must state what statute or court rule requires the special handling. Petitioner's request failed to state what statute or court rule required the special handling. Accordingly, the court found, the denial of petitioner's grievance had a rational basis and was not **arbitrary and capricious** (illogical and unreasonable).

Leigh Churchill represented himself in this Article 78 proceeding.

Court Finds that Denial of Request for Temporary Release Violated Statute

In Matter of Rondos v. Ledbetter, 962 N.Y.S.2d 882 (Sup. Ct. Sullivan Co. Mar. 20, 2013), the court reviewed the respondent's decision to deny petitioner's participation in the work release program. The factor which weighed heavily in the respondent's denial was petitioner's conviction which was based on a plea of guilty to numerous counts of grand larceny, offering false instruments and engaging in a scheme to defraud. The facts underlying the conviction were that the petitioner, an attorney, stole client funds. He had access to this money through his position as court appointed guardian for the seriously mentally and/or physically impaired victims

During his incarceration, the court noted, the petitioner completed all required programs, had no disciplinary history, and had no criminal convictions other than the conviction that resulted in his current imprisonment. Petitioner turned himself in when he learned that he was being investigated and admitted his guilt. Because he has been disbarred, petitioner must learn a new trade prior to his release from prison or he will leave prison with no new skills.

Petitioner received a very high score on the work release application and the score made him eligible for work release. Nonetheless, the Temporary Release Committee (TRC) denied petitioner's application for work release based on the nature of his offense, "which involved dishonesty to the court and theft of millions of dollars from incapacitated, disabled and vulnerable clients while serving as a court appointed guardian." This decision was affirmed on administrative appeal, which mentioned petitioner's theft of millions of dollars of incapacitated clients' funds and the serious nature of petitioner's instant offenses as the basis of the denial.

The court began its analysis by noting that participation in work release is a privilege not a right: "it is a privilege granted at the **discretion** (the power to use one's own judgment to make a decision) of DOCCS personnel." Thus, **judicial** (court) review of a denial of an application for work release is limited to determining whether the denial "violated any positive statutory requirement or denied a constitutional right of the inmate and whether it is affected by irrationality bordering on impropriety." Citing Matter of Lapetina v. Fischer, 906 N.Y.S.2d 648 (3d Dep't 2010), the court noted that the TRC's reliance on the extent and severity of an inmate's criminal history and instant offense is not irrational and is well within accepted guidelines.

Seven N.Y.C.R.R. §1900.4(1) and (2) require that the TRC consider any factors besides the items in the point system, which in their best judgment, they find significant. Correction Law §855.4 also requires that the TRC consider whether an inmate's participation in work release will be consistent with the safety of the community and the welfare of the applicant. Most important to the court was the requirement in 7 N.Y.C.R.R. §1900.4 that the TRC is under no requirement to grant an application because the inmate scored high on the point system; before granting an application,

the TRC must find that an applicant is suitable for the program.

The court went on to state that an analysis of whether a denial of a work release application is arbitrary and capricious does not begin and end with questioning whether a denial was based on factors which DOCCS was allowed to consider. Rather, the court held, while the TRC and the Central Office of DOCCS have considerable discretion and may indicate that they have considered all of the required factors, a decision to deny work release must make sense in light of consideration of those criteria. In addition, the court noted, "it is necessary that the decision to deny work release to an otherwise qualified inmate should be sufficiently detailed so as to inform the inmate of why his instant offenses caused him to be ineligible for work release."

Thus, in Matter of Wallman v. Joy, 760 N.Y.S.2d 560 (3d Dep't 2003), the court upheld the dismissal of a petition seeking the reversal of a denial of a work release application where DOCCS had concluded that because of his crimes, the petitioner, an attorney who had been convicted of stealing $4.7 million of his clients' funds, was a threat to public safety. In Wallman, the court held that the nature of petitioner's crimes raised serious doubts as to whether the petitioner was sufficiently trustworthy to take part in a temporary release program and whether his release posed a threat to community safety.

The Rondos court contrasted the reason for the denial given in Wallman to that given to petitioner Rondos. Here, the court stated, while the crimes that petitioner Rondos committed were similar to those committed by petitioner Wallman, the basis for the denials in the two cases were quite different. The denial in Wallman's case stated that his described crimes raised serious doubts as to whether he was sufficiently trustworthy to participate in the temporary release program. The denial that petitioner Rondos received stated that denial was based on his instant offenses which were described in the decision. The Central Office appeal decision affirmed the TRC decision because of the nature of the petitioner's instant offense. Thus, as noted by the court, neither the TRC decision nor the Central Office appeal decision indicated why the serious nature of petitioner Rondos' offenses rendered him ineligible for work release, nor did either decision indicate in any manner that petitioner's participation in work release would be a threat to public safety.

Seven N.Y.C.R.R. §1900.4(1)(4) states that inmates should be denied temporary release if their presence in the community would pose an unwarranted threat to their own or public safety, if public reaction is such that the inmate's successful participation in the program would be made difficult and public acceptance of the temporary release program would be jeopardized, or if there is substantial evidence to indicate that the inmate cannot successfully complete his requested temporary release program.

While the court found that the petitioner's crimes were appalling, the court found that there was nothing in either of the decisions denying the petitioner work release which informed petitioner or the court as to why the serious nature of the crimes renders the petitioner unsuitable for work release. "Simply **reiterating** [repeating] the shocking and upsetting nature of the instant offenses," the court wrote, "is insufficient to satisfy the statutory requirements and rules for rendering a denial of work release." For this reason, the court found that the determination to deny petitioner's application for temporary release violated the statutory requirement to state on what basis the denial rests. The court therefore granted the petition and remitted the matter to the respondents for reconsideration, and if denied, for additional statements as to the reasons supporting their final disposition.

Steven Rondos represented himself in this Article 78 proceeding.

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COPY EDITING AND PRODUCTION: ALETA ALBERT, DANIELLE WINTERTON