

1 UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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3 M.G. et al,

4 Plaintiff,

5 -against-

7:19-cv-00639-CS-LMS

BENCH RULING

6 ANDREW CUOMO, et al,

VIA TELECONFERENCE

7 Defendants.

8 -----x

9 United States Courthouse  
White Plains, New York

10 September 25, 2020

11 B e f o r e :

12 HONORABLE JUDGE CATHY SEIBEL,  
13 United States District Judge

14 A P P E A R A N C E S :

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PROCEEDINGS

THE DEPUTY CLERK: M.G. et al v. Cuomo, et al.

THE COURT: All right. Good afternoon, everyone.

I apologize for keeping you waiting. I just extricated myself from a Zoom meeting.

Let me remind counsel if you're going to say anything, the first word out of your mouth must be your last name. Please don't say "This is Elena Landriscina for Plaintiff." Just say "Landriscina." Don't worry about sounding brusque or impolite. We have a court reporter and it's very important that she knows right up front who is speaking. In fact, if you don't start by saying your last name, she'll probably interrupt you and what you say will be lost. So please, it doesn't come naturally, I know, but please try to do that.

I have spent quality time with the motion papers. I'm going to ask a question. If you don't ask have an answer, just stay silent. If you do, say your last name and pipe up.

Does anybody have anything to add that's not covered by the motion papers? Okay.

Let me tell you where I come out and also I want to put on the record before we start, one of the lawyers on the Plaintiffs' team who is a former law clerk of mine is getting married imminently and I will be performing the ceremony. I just wanted everybody to be aware of that.

1           The motion before me is Defendants' motion to dismiss  
2 the first amended class action complaint, which I'm going to  
3 call the FAC.

4           Because this case has been the subject of lots of  
5 briefing and argument and lots of paper, I'm -- rather than  
6 taking time to summarize what's in the FAC, I'm going to assume  
7 the parties' familiarity with factual record. In summary  
8 fashion, Plaintiffs are individuals with serious mental illness  
9 who are indigents. They originally brought this lawsuit to  
10 challenge their institutionalization in New York's prison  
11 system.

12           The defendants includes Governor Andrew Cuomo in his  
13 official capacity; the New York State Office of Mental Health,  
14 or OMH; Commissioner Ann Marie Sullivan in her official  
15 capacity; the Department of Corrections and Community  
16 Supervision, or DOCCS; Commissioner Anthony Annucci in his  
17 official capacity, actually acting commissioner; and Ann Marie  
18 McGrath in her official capacity as DOCCS. Plaintiffs allege  
19 that defendants held them in prison past their lawful release  
20 dates due to their failure to make available the  
21 community-based housing and supportive services Plaintiffs  
22 require upon relief.

23           Plaintiffs purport to represent two classes. A  
24 general class of people with serious mental illness who  
25 defendants hold in secure prisons past their release dates,

1 including the end of their prison sentences, their approved  
2 conditional release dates and their open dates for parole  
3 release due to the inadequate capacity of community-based  
4 mental health housing programs. And a second class called the  
5 RTF Subclass. "RTF" stands for Residential Treatment Facility.  
6 The RTF Subclass is general class members who have been  
7 incarcerated past the maximum expiration dates of their  
8 court-imposed prison sentences. Plaintiffs allege that the  
9 RTFs where they are held are prisons where they are treated  
10 just like prisoners.

11           The plaintiffs filed their original complaint on  
12 January 23, 2019. We had a conference in May. I gave  
13 Plaintiffs leave to amend. They filed the FAC on June 3rd. On  
14 August 2nd of last year I referred the case to Magistrate Judge  
15 Smith for general pretrial supervision. The parties bundled  
16 their motion papers, so the defendants filed this motion, which  
17 is Docket Entry 79. Their supporting memorandum of law, which  
18 is Docket Entry 80, which I'm going to call defendant's memo,  
19 as well their reply memorandum, Docket Entry 90, which I'm  
20 going to call Defendants' Reply, at the same time as Plaintiffs  
21 filed their opposition, Docket Entry 82, which I'm going to  
22 call Plaintiffs' memo. And that was all on December 16.

23           Both parties also filed attorney declarations  
24 attaching various documents. And the named Plaintiffs also  
25 filed sworn declarations which are found at Docket Entries 81,

1 83 through 89, 114, 115, 117 and 121. Defendants filed sworn  
2 declarations from OMH and DOCCS's staff at Docket Entry 91 and  
3 92. And both parties filed sur-replies in March of this year.  
4 Plaintiffs' sur-reply is 113 and Defendants is 120.

5 Then on August 10 of this year, Plaintiffs requested  
6 a pre-motion conference with Judge Smith in anticipation of  
7 amending the FAC, principally to add a "Discharge Class" of  
8 Plaintiffs who are unnecessarily placed in segregated settings  
9 or put at risk of institutionalization upon their discharge  
10 from prison.

11 In their letter, which is Docket Entry 125, Plaintiff  
12 explained that, quote, the proposed amendment would not impact  
13 the Court's resolution of the pending motion to dismiss,  
14 unquote. That's at page 2. After a conference, Judge Smith  
15 issued an opinion and order, which is Docket Entry 133, and  
16 allowed Plaintiffs to file the Second Amended Complaint, or  
17 SAC, which is Docket Entry 134.

18 She noted in her decision at page 10, as follows:  
19 Quote, Contrary to Plaintiffs' assertions, the new claims do  
20 appear to change the tenor of the case. For example, the  
21 addition of the proposed named Plaintiffs as the Discharge  
22 Class expands the focus of the dispute from persons being held  
23 in prison past their release dates due to their severe mental  
24 illness to persons with severe mental illness denied  
25 community-based housing in the most integrated setting

1 appropriate to their needs and/or who face a substantial risk  
2 of institutionalization.

3 Judge Smith also explained, based on her reading of  
4 the SAC, that Plaintiffs also add facts to the pleadings which  
5 do not specifically relate to the Discharge Class or which  
6 include allegations about the previously named Plaintiffs under  
7 sections nominally related to the Discharge Class which may  
8 affect the Court's decision on Defendants' motion to dismiss.  
9 That's also at page 10.

10 Accordingly, while this motion has been pending for  
11 some time, I have to examine whether it would still be  
12 appropriate for me to rule on the arguments the parties have  
13 briefed or if those arguments are affected by the SAC in such a  
14 way that they require more briefing and are better reserved for  
15 a future motion to dismiss or for summary judgment. So I'll  
16 touch on that as we go along.

17 But let me tell you where I come out. I assume  
18 you're all going to be ordering the transcript. If you're not,  
19 you'll want to take detailed notes and do make yourself  
20 comfortable because this is going to take a while.

21 The first I'm going to address is Subject Matter  
22 Jurisdiction: I have subject matter jurisdiction over cause of  
23 action only when I have authority to adjudicate the cause  
24 pressed in the complaint. *Arar v. Ashcroft*, 532 F.3d 157, 168.  
25 Reversed en banc on other grounds, 585 F.3d 559.

1           Quote, Determining the existence of subject matter  
2 jurisdiction is a threshold inquiry, and a claim properly  
3 dismissed for lack of subject matter jurisdiction under Rule  
4 12(b) (1) when district courts lacks the statutory or  
5 constitutional power to adjudicate it, unquote, RR at 168.

6           That case goes on to say, quote, When jurisdiction is  
7 challenged, the Plaintiff bears the burden of showing by a  
8 preponderance of the evidence that subject matter jurisdiction  
9 exists and the district court may examine evidence outside of  
10 the pleadings to make this determination.

11           Quote, the Court must take all facts alleged in the  
12 complaint as true and draw all reasonable inferences in favor  
13 of Plaintiff, but jurisdiction must be shown affirmatively and  
14 that showing is not made by drawing from the pleadings  
15 inferences favorable to the party asserting it, unquote.  
16 *Morrison v. National Australian Bank*, 547 F.3d, 160, 170.  
17 Affirmed on other grounds, 561 U.S. 247.

18           When a Defendant moves to dismiss both for lack of  
19 subject matter jurisdiction and on other grounds such as  
20 failure to state a claim, the Court must address the issue of  
21 subject matter jurisdiction first. See *Rhulen Agency v.*  
22 *Alabama Insurance*, 896 F.2d 674, 678. I won't take the time to  
23 recite the standards applicable to a motion to dismiss for  
24 failure to state the claim. Everybody is familiar with the  
25 standards of *Iqbal*, 556 U.S. 662 and *Twombly* 550 U.S. 544.



1           Where matters outside the pleading are presented on a  
2 12(b)(6) motion and not excluded, the motion must be treated as  
3 one for summary judgment under Rule 56. See Rule 12(d). The  
4 requirement of conversion is mandatory and unless the  
5 additional materials are excluded, the portion of the  
6 Defendants' motion that relies on those materials in connection  
7 with Rule 12(b)(6) must be treated as a summary judgment  
8 motion. *Global Network v. City of New York*, 458 F.3d 150, 155.  
9 The Court, obviously, only grants summary judgment when  
10 resolving all ambiguities and join all permissible factual  
11 inferences in favor of the party against whom summary judgment  
12 is sought. The moving party shows no genuine dispute as  
13 material fact -- as to any material fact and that the moving  
14 party is entitled to judgment as a matter of law. See Rule  
15 56(a) in *Holcomb v. Iona College*, 521 F.3d 130, 137. So those  
16 are the general legal standards.

17           I turn first to the issue of Governor Cuomo as  
18 Defendant: Federal courts are permitted under *Ex parte Young*,  
19 209 U.S. 123, to grant prospective injunctive relief against  
20 state officials "to prevent a continuing violation of federal  
21 law." *Green v. Mansour*, 474 U.S. 64, 68. See *Verizon Maryland*  
22 *v. Public Service Commission of Maryland*, 535 U.S. 635, 645 to  
23 48.

24           For a specific state official to be a proper  
25 Defendant for injunctive relief under the *Ex parte Young*

1 doctrine, the state official, quote, must have some connection  
2 with the enforcement of the act, unquote. *In re Dairy Mart*  
3 *Convenience Stores*, 411 F.3d 367, 372 to 373. Plaintiffs  
4 oversimplify the standard by stating that all *Ex parte Young*  
5 requires is, quote, some connection, unquote, between the  
6 governor and the violation of federal law. That's in  
7 Plaintiffs' memo at 22 to 23. By omitting the phrase, quote,  
8 with the enforcement, unquote, they propose a significantly  
9 broader and more tenuous connection than set forth in *Dairy*  
10 *Mart*. The quote, official against whom the action is brought  
11 must have a direct connection to or responsibility for the  
12 alleged action, unquote. *Davidson v. Scully*, 148 F. Supp.2d  
13 249, 254, (S.D.N.Y. 2001). See *CSX v. New York State*, 306 F.3d  
14 87, 99 and *Jackson v. Connecticut*, 2019 Westlaw 2193464, at  
15 page 4, (District of Connecticut May 21, 2019.)

16 Let me ask everybody to put themselves on mute,  
17 because I'm getting a lot of background and beeping and things  
18 like that. And I think if it's distracting me, it's probably  
19 distracting the court reporter.

20 So as I said, I'm going to be talking for a long  
21 time, so if everybody else could please mute. Continuing on  
22 now.

23 A mere recitation of an official's  
24 responsibilities -- does anybody know what that beeping is?  
25 All right. Let me go on.

1           That is really distracting. Walter, do you know what  
2 that is?

3           MR. RICCIARDI: I have no idea.

4           THE COURT: I'm talking to Walter Clark. Maybe he's  
5 left us. One hundred percent of the people on this call have  
6 to be on mute. If anybody doesn't know how to mute -- hold on,  
7 let me find out.

8           Maybe my law clerk knows. Ryan, do you know?

9           THE LAW CLERK: No, I'm not sure. Walter usually has  
10 it pulled up on his computer where he can mute everybody.

11          THE COURT: Hold on one second. I'm going to walk in  
12 there and see if I can get him to mute it. Hold on.

13          He's stepped out. I think he'll be able to mute  
14 everybody. But hopefully the beeping has stopped. When he  
15 comes back, my other law clerk will let him know.

16          Somebody is not muted right now because I can hear  
17 noise. I wish I knew how to tell you how to mute. Maybe  
18 somebody who is successfully can unmute. Ryan, my law clerk,  
19 how did you mute yourself?

20          THE LAW CLERK: I'm on my cell phone. Just a button  
21 that says "mute."

22          THE COURT: So you did it on your phone. You didn't  
23 do it through this AT&T system like star seven or something  
24 like that?

25          THE LAW CLERK: Right.

1           THE COURT: All right. I know there's way to do it,  
2 but I don't know what it is.

3           All right. I'm going to press on and it's going to  
4 be -- that beeping is so annoying. Okay. I'm pressing on.

5           Okay. Whoever is in the car, we really don't want to  
6 listen to Waze or Google Maps or whatever that is. You should  
7 be able to mute the call via your cell phone. Okay.

8           A mere recitation of an official's responsibilities  
9 to safely execute the law is an insufficient basis to permit a  
10 suit to go forward against that official because, quote, the  
11 proper Defendants are the government officials charged with the  
12 administration and enforcement, unquote, of the purported  
13 illegal conduct. *Curtis v Pataki*, 1997 Westlaw 614285 at page  
14 6 (Northern District October 1, 1997); See *Pugh v. Goord*, 571  
15 F. Supp.2d 477, 517 to 18 (S.D.N.Y. 2008).

16           When the governor of a state is named as a Defendant,  
17 district courts in this circuit have often found an  
18 insufficient enforcement connection between the governor and  
19 the complained-of conduct, and that other state officials are  
20 more appropriate Defendants. See *Disability Rights New York v.*  
21 *New York State*, 2019 Westlaw 2497907 at pages 23 to 24,  
22 (Eastern District June 14, 2019).

23           Governors are usually dismissed as a Defendant when  
24 they lack direct involvement in the enforcement of the alleged  
25 illegal conduct. See, for example, *Spiteri v. Russo*, 2013

1 Westlaw 4806960 at page 18, (Eastern District September 7,  
2 2013), affirmed 622 F. App. 9. There the governor had no  
3 direct involvement in Plaintiffs' classification as a sex  
4 offender. Also see *Nolan v. Cuomo*, 2013 Westlaw 168674 at page  
5 9, (Eastern District January 16, 2013), which held that the  
6 governor's duty to ensure that the law is enforced is not  
7 sufficient to make him a proper party, and *Curtis* at page 6,  
8 where in a suit against the DOCCS commissioner and the  
9 governor, only the DOCCS commissioner was a proper Defendant.

10 By failing to show how Governor Cuomo has a  
11 connection to the enforcement of the challenged conduct at  
12 issue here, Plaintiffs have fallen short of what the law  
13 requires. They argue that they have alleged sufficient, quote,  
14 active involvement, unquote, by the governor to withstand a  
15 motion to dismiss by describing his efforts to, quote, address  
16 the putative class's community-based housing needs, unquote.  
17 That's in their memo at 23. While Plaintiffs are correct, as  
18 they say at that same page, that they need not show that the  
19 governor was involved in the minutiae of Plaintiffs' discharge  
20 plans, they recite only responsibilities attributed to the  
21 Governor in the general discharge of his office, such as  
22 appointing the leadership of and receiving reports from certain  
23 agencies, commissions and cabinets that address issues  
24 implicated in this case. See the FAC in paragraph 179 to 87.

25 Plaintiffs fail to allege that the governor had a

1 direct enforcement role of any kind in any of the conduct that  
2 forms the basis for their lawsuit. While Plaintiffs argue that  
3 access to the state's capital budget is necessary for full  
4 relief in this case, that is not necessarily so. And in any  
5 event, Governor Cuomo shares the responsibility for allocating  
6 funds with the assembly and the senate. If this Court were to  
7 grant injunctive relief directed at DOCCS and OMH, their  
8 compliance would not be excused based on budgetary reasons. So  
9 Plaintiffs have not shown that the governor is necessary for  
10 full relief, even if it might be he who needs to take the bull  
11 by the horns to allocate responsibility among the two agencies  
12 if this case is to settle.

13 Plaintiffs rely on out-of-circuit district court  
14 cases that are not persuasive here, especially because one  
15 in-circuit case they do cite, *Nassau & Suffolk County Taxi*  
16 *Owners Association v. State*, 336 F.Supp. 3d 50 at 68, 69,  
17 (Eastern District 2018), dismissed the governor as a Defendant  
18 precisely because he had no enforcement connection to the  
19 alleged ongoing violations of federal law. While *Disability*  
20 *Advocates v. Patterson*, 598 F.Supp. 289, 356, 57 (Eastern  
21 District 2009), declined to dismiss the governor in a suit  
22 involving claims similar to those in this action, the Court in  
23 that case analyzed the governor's status as a party under the  
24 far more liberal Rule 21 joinder standard. Here, I find the *Ex*  
25 *parte Young* analysis controls because Plaintiffs have failed to

1 specify Governor Cuomo's enforcement connection to the alleged  
2 violations of federal law, he is not a proper Defendant and is  
3 dismissed as a party.

4 Ryan, can you do me a favor. Can you text Walter and  
5 just ask him what the instructions are for people on the call  
6 to mute themselves or if he's able to come back. If they can't  
7 do it themselves, if he's able to come back and mute them for  
8 me, that would be great.

9 THE LAW CLERK: Will do, Judge. I just want to note  
10 if you're on a land line, if you hit Star 6, that should mute  
11 yourself.

12 THE COURT: Oh, that's good. All right. Everybody  
13 do that.

14 THE LAW CLERK: But I'll text Walter to see if he can  
15 do it on his end as well.

16 THE COURT: Maybe that's the way he would say to do  
17 it. Okay.

18 Turning now to Eleventh Amendment Immunity: In their  
19 initial memorandum of law at pages 17 to 20, Defendants argue  
20 that the Eleventh Amendment bars Plaintiffs' claims against  
21 DOCCS and OMH under Title II of the Americans with Disabilities  
22 Act, or ADA. After Plaintiff served their opposition, however,  
23 Defendants changed their position, noting that they, quote,  
24 agree with Plaintiffs that the Court need not reach the  
25 constitutional argument implicated by the question of sovereign

1 immunity as Plaintiffs have asserted a claim under Section 504  
2 of the Rehabilitation Act. That's at page 12 of their reply.  
3 The parties appear to be in agreement on this point and -- but  
4 out of an abundance of caution, I will examine whether it is,  
5 in fact, appropriate for me to put off a ruling on this issue.

6 A state is, quote, immune from suits brought in  
7 federal courts by her own citizens as well as by citizens of  
8 another state absent that state's consent or a valid abrogation  
9 by congress, unquote. *Employees of the Department of Public*  
10 *Health & Welfare v. Department of Public Health & Welfare*, 411  
11 U.S. 279, 280; see *Allen v. Cooper*, 140 Supreme Court 994,  
12 1000, 1001, and *Pennhurst v. Halderman*, 465 U.S. 89, 100.

13 It is undisputed that OMH and DOCCS are both agencies  
14 of New York State, and as such are, quote, entitled to assert  
15 the state's Eleventh Amendment immunity where, for practical  
16 purposes, the agency is the alterego of the state --

17 All right. So somebody is in a car. That's a car  
18 door noise. Whoever you are, mute your cell phone. Sorry.

19 Quote, entitled to assert the state's Eleventh  
20 Amendment immunity where, for practical purposes, the agency is  
21 the alterego of the state and the state is the real party in  
22 interest, unquote. *Santiago v. New York State, DOCCS*, 945 F.2d  
23 25, 28, Note 1. Accordingly, the key question for analysis is  
24 whether Congress validly abrogated that immunity under Title II  
25 of the ADA.



1           The Supreme Court's decision *United States versus*  
2 *Georgia*, 546 U.S. 151, held that the ADA validly abrogates  
3 sovereign immunity when a claim includes both a Title II  
4 violation and alleged Fourteenth Amendment violation, but left  
5 unresolved the question of whether Title II validly abrogates  
6 sovereign immunity for a cause of action based on conduct that  
7 allegedly violates Title II, but not a specific constitutional  
8 provision. See *Dean v. University of Buffalo*, 804 F.3d 178,  
9 194 and *Bolmer v. Oliveira*, 594 F.3d 134, 148. As such, it is  
10 an open question whether sovereign immunity would prohibit a  
11 Title II claim against DOCCS and OHM.

12           There's a well-settled policy set by the Supreme  
13 Court, however, for federal courts to avoid deciding  
14 constitutional questions except where necessary. *Blair v.*  
15 *United States*, 250 U.S. 273, 279. Quote, Considerations of  
16 propriety, as well as long-established practice, demand that  
17 courts refrain from passing on the constitutionality of the law  
18 unless obliged to do so in the proper performance of our  
19 judicial function, where the question is raised by a party  
20 whose interest entitles them to raise it, unquote. That's  
21 *Blair* 279. See *Lyng v. Northwest Indian Cemetery Protective*  
22 *Association*, 485 U.S. 439, 445 to 46, which discussed the  
23 quote, fundamental and longstanding principal of judicial  
24 restraint that requires courts to avoid reaching constitutional  
25 questions in advance of the necessity of deciding them.

1           Here, Plaintiffs also bring a Rehabilitation Act  
2 claim against the state agency Defendants, and the remedies  
3 available to Plaintiffs under Title II and the Rehabilitation  
4 Act, or RA, are identical. See 42 U.S. Code Section 12133.  
5 Further, it's clear that Section 504 constitutes a clear  
6 expression of Congress' intent to condition acceptance of  
7 federal funds on a state's waiver of its Eleventh Amendment  
8 immunity. *Garcia V. S.U.N.Y* at 113. RA claims are thus not  
9 barred by the Eleventh Amendment because New York has waived  
10 sovereign immunity as to such claims. *Keitt v. New York City*,  
11 882 F.Supp.2d 412, 425 (Southern District 2011). Defendants do  
12 not challenge that the RA claims in this case can proceed  
13 without implicating the Eleventh Amendment.

14           Finally, the Second Circuit has indicated that courts  
15 should decide whether immunity applies at the pleadings stage  
16 particularly where, if successful, quote, the state would be  
17 exempted from participating in any pretrial procedures. *Smith*  
18 *v. Reagan*, 841 F.2d 28, 31. Here as extensive paper discovery  
19 has already occurred and as the discovery going forward will be  
20 the same regardless of whether it is aimed at the ADA claim or  
21 the RA claim, that is not an issue here. See *Smith* at 30 where  
22 the Courts said, quote, The purpose of an early determination  
23 of -- sorry. The purpose of early determinations of immunity  
24 defenses is, after all, to lift the burdens of litigation from  
25 a Defendant who should not be a party at all, unquote.

1           Accordingly, I need not resolve the sovereign  
2 immunity issue at the pleadings stage and agree with the  
3 parties that it would be inappropriate to do so. There is no  
4 need to decide the constitutionality of Title II's abrogation  
5 of sovereign immunity because the rights and remedies under  
6 Title II are the same as under the RA, and deciding the  
7 immunity question now would not prevent the state defendants  
8 from being "haled into court." *Smith* at 30. See *Ross v. CUNY*,  
9 211 F. Supp. 3d, 518, 528 (E.D.N.Y. 2016). Deciding the issue  
10 now will not change the course of this litigation or the  
11 ultimate judgment to which Defendants may be subject. *T.W. v.*  
12 *New York State Board of Law Examiners*, 2019 Westlaw 6034987 at  
13 page 3, (Eastern District November 14, 2019). And accordingly,  
14 the motion to dismiss the ADA claims against DOCCS and OMH on  
15 sovereign immunity grounds is denied.

16           I now discuss the allegedly Redundant Claims:  
17 Defendants argue that the ADA and RA claims against Defendants  
18 Sullivan, Annucci and McGrath, who are sued in their official  
19 capacity, should be dismissed because they're redundant with  
20 the claims against the state entities themselves.

21           The Second Circuit recognizes that ADA and RA suits  
22 for prospective injunctive relief may proceed against state  
23 officers in their official capacities. See *Henrietta D. v.*  
24 *Bloomberg*, 331 F.3d 261, 289. Because no matter what, quote,  
25 the real party in interest in an official-capacity suit is the

1 government entity. It is irrelevant whether the judgment would  
2 impose individual liability on the officer sued since the suit  
3 is, in effect, against the public entity, unquote. *Harris v.*  
4 *Mills* 572 F.3d 66, 72. Plaintiffs may assert ADA claims  
5 against institutional Defendants or by naming individuals as  
6 Defendants in their representative or official capacities.  
7 *Duprey v. Prudential*, 910 F.Supp. 879, 884 (Northern District  
8 1996). A Plaintiff might choose to sue an individual in that  
9 person's official capacity rather than a state institution to  
10 avoid Eleventh Amendment and sovereign immunity issues.  
11 *Hallett v. New York State Department of Correctional Services*,  
12 109 F. Supp.2d 190, 199 to 200 (Southern District 2000).

13 But courts in the circuit will often dismiss official  
14 capacity Defendants when the Plaintiff can sue the government  
15 entity directly. *Candelaria v. Cunningham*, 2000 Westlaw 798636  
16 at page 3 (Southern District June 20, 2000). See *Loadholt v.*  
17 *DOCCS*, 2009 Westlaw, 4230132 at page 3 (Western District  
18 November 24, 2009). And *Hallett* 109 F. Supp.2d at 199 to 200.  
19 Courts are not required, however, to dismiss these claims  
20 against official capacity Defendants as redundant with those  
21 against the state agency. See, for example, *Askins v. MTA*,  
22 2020 Westlaw 1082423 at page 7 (Southern District March 5,  
23 2020). *Maioriello v. New York State OPDD*, 2015 Westlaw 5749879  
24 at page 19 to 20, (Western District September 30, 2015).  
25 *Askins v. New York City*, 2013 Westlaw 142007 at pages 3 to 5

1 (Southern District January 8, 2013.) And *Butterfield v.*  
2 *New York*, 1998 Westlaw 401533 at pages 16 to 17 (Southern  
3 District July 15, 1998). Lastly, courts will typically dismiss  
4 claims against the official capacity Defendants only when there  
5 are no other separate claims pending against those individuals.  
6 See *Fox v. S.U.N.Y.*, 497 F. Supp.2d 446, 451 (Eastern District  
7 2007) where the Court said, quote, Because the state is the  
8 real party in interest for the Plaintiffs' claims against the  
9 individual Defendants in official capacities, it would be  
10 redundant to permit these claims to proceed when the plaintiff  
11 already has a cause of action against the state and the  
12 remaining claims against the individual Defendants have been  
13 dismissed, unquote.

14 Here, as I will discuss shortly, other claims against  
15 the official capacity Defendants survive this motion to  
16 dismiss. So by necessity, those Defendants must remain in the  
17 case. I leave unresolved the question of sovereign immunity as  
18 to the Title II claims, so there is an additional reason why  
19 those claims against the official capacity Defendants should  
20 remain. That is because it's unclear at this stage whether  
21 Plaintiffs may or may not sue the government entity directly on  
22 the ADA Title II claim as set forth in *Candelaria* at 3. It may  
23 be that the official capacity Defendants are the only valid  
24 avenue through which to pursue this claim. Lastly, dismissal  
25 of the official capacity Defendants would not promote any

1 economy of resources at this stage of the litigation and  
2 because the parties don't dispute that the real party in  
3 interest in an official-capacity suit is the government entity,  
4 the effect of any eventual judgment will be the same on the  
5 official capacity and institutional Defendants. *Harris* at 72.  
6 So Defendants' motion to dismiss the claims against the  
7 official capacity Defendants as redundant is thus denied.

8           Turning now to Mootness: That is a, quote, doctrinal  
9 restriction stemming from the Article III requirement that  
10 federal courts decide only live cases or controversies. A case  
11 is moot if the parties lack a legally cognizable interest in  
12 the outcome of the case. *In re Zarnel*, 619 F.3d 156, 162. See  
13 *Powell v. McCormack*, 395 U.S. 486, 496. The Supreme Court,  
14 however, has long recognized exceptions to this doctrine. See,  
15 for example, *U.S. Parole Commission v. Geraghty*, 455 U.S. 388,  
16 399. These exceptions, quote, are particularly applicable in  
17 class action cases in the ... civil rights arena, unquote.  
18 *Samele v. Zucker*, 324 F. Supp. 3d, 313, 328 (Eastern District  
19 2018).

20           Defendants present two arguments for why this case  
21 should be dismissed as moot. The first is that, quote, the  
22 transfer of ... the named Plaintiffs to residences in the  
23 community constitutes an intervening circumstance that deprives  
24 these Defendants of a personal stake in the outcome of the  
25 litigation, unquote. And, quote, mitigates the concern that,

1 absent injunctive relief, they will be subject to allegedly  
2 unconstitutional conduct in the future, unquote. That's at  
3 Defendants' memo at page 10. And the second is that, quote,  
4 DOCCS has issued a policy memorandum advising responsible  
5 supervisory staff at statewide, that inmates within the  
6 definitions of the putative classes here will not be held past  
7 their respective release dates because of an unmet need for  
8 mental health housing, unquote. That's in Defendants' reply at  
9 4. Plaintiffs, conversely, argue that several exceptions to  
10 mootness apply here, and the Defendants have failed to satisfy  
11 their formidable burden to show mootness.

12 First I'm going to discuss the release of the  
13 individual Plaintiffs and then I'll turn to the memorandum.

14 Defendants first argue that to the extent Plaintiffs  
15 C.J., M.J., J.R., D.R. and M.G. seek release from RTFs or  
16 prison or seek to assert claims on behalf of either putative  
17 class, their claims are moot because they have been released.  
18 That's in Defendants' memo at 7. This argument also presumably  
19 now includes Plaintiffs PC, according to Defendants' letter of  
20 May 8, 2020, which is Docket Entry 124. Defendants' argument  
21 posits that the transfer of the named Plaintiffs to residences  
22 in the community is an intervening circumstance that deprives  
23 these Plaintiffs of a personal stake in the outcome of the  
24 litigation and the concern that they'll be subject to  
25 unconstitutional conduct in the future. See *Shannon v.*

1 *Venettozzi*, 749 F. App 10,13, citing *Salahuddin v. Goord*, 467  
2 F.3d 263, 272. Defendants contend that the claims asserted by  
3 these named Plaintiffs in the general class and the RTF  
4 Subclass, (collectively, I'm going to call these people the  
5 original named Plaintiffs) are no longer alive because they now  
6 lack legally cognizable interest in resolution of this matter.

7 I understand Judge Smith's concerns about the  
8 potential for the new facts and allegations in the SAC to  
9 change the calculus for deciding Defendants' motion on this  
10 point. To the extent the allegations in the SAC relate to the  
11 claims of the original Plaintiffs, I should await full briefing  
12 addressed to the SAC. But to the extent the new facts and  
13 allegations apply to the new Discharge Class and not the  
14 general class and the RTF Subclass, mootness has been briefed.  
15 In addition to the RTF class's claims under the Eighth and  
16 Fourteenth Amendments, the general class's claim and,  
17 therefore, the claim of all the original named Plaintiffs in  
18 the FAC, is that under the ADA and the RA, the Defendants are  
19 obligated to see to it that Plaintiffs receive services in the  
20 most integrated setting appropriate to their needs and that  
21 Defendants have not done so because they have caused Plaintiffs  
22 to be institutionalized and segregated in state prisons, rather  
23 than provided adequate residential placements in the most  
24 integrated setting that's appropriate. That's from the FAC  
25 paragraph 408. See also paragraph 419, where it's alleged that



1 Defendants caused Plaintiffs to receive programs and services  
2 in the institutionalized and segregated setting of state  
3 prisons, rather than in the most integrated setting appropriate  
4 to their needs.

5           The gist of the general class's claim looks to me  
6 they are being held in prison too long. While the new claims  
7 for the discharged claim specifically address the conditions in  
8 which those who have been discharged now find themselves, and  
9 the allegedly inadequate level of integration in those  
10 settings, the claims of the original named Plaintiffs in both  
11 the SAC and the FAC do not seem to focus, at least not  
12 primarily, on the argument that the places they were eventually  
13 put are inadequate. The claims saying that Defendants have  
14 discriminated against Plaintiffs by placing them in segregated  
15 settings like shelters, see SAC paragraphs 762 and 773, are  
16 advanced mainly in connection with the new discharge class  
17 Plaintiffs. Accordingly, while the SAC explicitly includes new  
18 facts about some of the original named Plaintiffs, see  
19 paragraphs 46, 48 through 64 and 82 through 89, and expands the  
20 scope of facts and allegations regarding segregated settings  
21 into which Plaintiffs are discharged, see, for example,  
22 paragraphs 390 to 391, 398 to 419, 457, 486 to 90, 495, 636 to  
23 37, 656, 659 and 699, I do not believe this has hindered by  
24 ability to rule on Defendants' motion to the extent the claim  
25 is that the original Plaintiffs were held in prison too long.

1 To the extent their claim is that the conditions into which  
2 they were released are not sufficiently integrated, the new  
3 allegations that facts in the SAC change the scope and nature  
4 of the claims and because their effects on Defendants' mootness  
5 arguments have not been briefed, Defendants' motion is denied  
6 without prejudice to renewal to that extent.

7 To the extent Plaintiffs' claims relate to their being  
8 held in prison too long, I'm going to address the claim.  
9 Defendants say that release of a named Plaintiff has mooted  
10 these claims, plaintiffs say that three exceptions to mootness  
11 apply: Voluntary cessation, picking off of the named  
12 Plaintiffs, and the inherently transitory nature of the claims.  
13 As I'll discuss momentarily, I find that at least the  
14 inherently transitory exception applies, at least at this  
15 stage.

16 The mootness doctrine has, quote, weathered a complex  
17 history, unquote, in the context of class actions *Eckert v.*  
18 *Equitable Life* 227, F.R.D., 60, 63 (Eastern District 2005), and  
19 thus presents the court with special concerns. Although the  
20 mootness inquiry is intensely factual and situational, *Eckert*  
21 at 63, as a general rule, if the claims of a named Plaintiff  
22 are resolved before the Court certifies the class, the entire  
23 action is mooted. *Comer v. Cicneros* 37 F.3d 775, 798. See  
24 *Jobie O. v. Spitzer*, 2007 Westlaw 4302921, at page 4, (Southern  
25 District December 5, 2007). Quote, class certification acts as

1 a lifeboat for a claim that would otherwise be moot due to the  
2 resolution of Plaintiffs' claims, unquote, because the class,  
3 quote, acquires a legal status separate from the interest  
4 asserted by the named plaintiff, unquote, *Eckert* at 63, see  
5 *Jobie O.* at 5, but where no class has been certified, generally  
6 the class claims do not survive.

7 Quote, Where class claims are inherently transitory,  
8 however, the termination of the class representative's claim  
9 does not moot the claims of the unnamed members of the class,  
10 unquote. *Robidoux v. Celani*, 987 F.2d, 931, 938 to 39. This  
11 is because, quote, some claims are so inherently transitory  
12 that the trial court will not have ... enough time to rule on a  
13 motion for class certification before the proposed  
14 representative's individual interest expires, unquote. *Mental*  
15 *Disability Law Clinic v. Hogan*, 2008 Westlaw 4104460 at page 9,  
16 (Eastern District August 28, 2008). Quote, under this mootness  
17 exception, a case will not be moot, even if the controversy as  
18 to the named Plaintiffs has been resolved, if: (1), it is  
19 uncertain that a claim will remain live for any individual who  
20 could be named as a Plaintiff long enough for the Court to  
21 certify the class; and (2), there will be a constant class of  
22 persons suffering the deprivation complained of in the  
23 complaint, unquote. *Salazar v. King*, 822 F.3d 61, 73. When  
24 these criteria are met, quote, courts permit the class  
25 certification to relate back to filing of the complaint and

1 hold that the Plaintiffs have properly preserved the merits of  
2 the case for judicial resolution, unquote. *Comer*, 37 F.3d at  
3 799.

4 Defendants assert that for Plaintiffs to be entitled to  
5 this mootness exception, Plaintiffs must have filed a motion  
6 for class certification while they have live claims. That's in  
7 Defendants' reply at 2. Several district courts in this  
8 circuit, however, have concluded that Second Circuit has no  
9 such requirement. See, for example, *Bellin v. Zucker*, 2020  
10 Westlaw 2086009 at pages 3 to 4, (Southern District April 30,  
11 2020); *Hogan* 2008 Westlaw 4104460 at page 9; *Eckert* 227 F.R.D.  
12 at 63 to 64; and *German v. Federal Home Loan Mortgage Corp.* 896  
13 F.Supp. 1385, 1399 (Southern District 1995). Instead, these  
14 courts have found that the case can move forward, quote, in  
15 situations where a Plaintiff has not yet had a reasonable  
16 opportunity to file a motion for class certification; namely,  
17 where there has been no undue delay, the Court retains subject  
18 matter jurisdiction despite the Plaintiffs' failure to move for  
19 class certification, unquote. *Eckert* at 63, 64.

20 I find these cases convincing. I don't believe that  
21 Plaintiffs must file a motion for class certification with the  
22 class complaint or early on in discovery, particularly where  
23 any such motion would have to be bare-bones, just to avoid  
24 mootness. Requiring the motion to avoid mootness is especially  
25 inappropriate here where Defendants have always maintained that

1 Plaintiffs' status in prison was temporary until housing became  
2 available. See Defendants' reply at 10. Plaintiffs' release  
3 was entirely within Defendants' control and Defendants seem to  
4 have strategically released Plaintiffs in response to the  
5 lawsuit. Additionally, discovery in this case is ongoing.  
6 Plaintiffs have sought discovery on issues relevant to class  
7 certification and in a case of this complexity, the delay in  
8 moving for class certification is not excessive. See *Greif v.*  
9 *Wilson Elser*, 258 F. Supp.2d, 157, 161 (Eastern District 2003)  
10 where the Court declined to apply the relation back doctrine  
11 when after a 20-month delay, the plaintiff did not indicate  
12 that she was prevented from commencing discovery or moving for  
13 class certification. In that case, Plaintiff hadn't even  
14 sought discovery. So there was undue delay. But here,  
15 discovery has been ongoing.

16 In short, although many of the cases applying the relation  
17 back doctrine have done so after a motion to certify the class  
18 has been previously been filed, I do not see the filing of such  
19 a motion as a requirement. As long as a, quote, justiciable  
20 controversy exists some point prior to class certification,  
21 unquote, and Plaintiffs have not, unquote, unduly delayed,  
22 unquote, the relation back doctrine will serve to preserve the  
23 action if the requirements of the inherently transitory  
24 exception are met. *Crisci v. Shalala*, 169 F.R.D. 563, 567  
25 (S.D.N.Y., 1996). I note that the second circuit is

1 considering this issue in the Bellin case, so that decision  
2 could change things sooner or later.

3       Turning now to whether the requirements of the inherently  
4 transitory doctrine are met, I find the first prong is easily  
5 satisfied here, as plaintiffs were held in temporary status due  
6 to the unavailability of community-based mental health housing.  
7 Defendants concede that this was meant to be a short-term  
8 solution to a housing shortage, which meant that Plaintiffs  
9 could be released at any time once housing became available.  
10 See Defendants' reply at 10. Furthermore, Plaintiffs have  
11 shown that Defendants had discretion for when and where to  
12 release plaintiffs, and as demonstrated by the evidence  
13 provided by Plaintiffs, prioritized the release of named  
14 Plaintiffs after this litigation was filed. See evidence  
15 summarized in Plaintiffs' memorandum at page 5 and notes 4  
16 through 7.

17       It is clearly uncertain, therefore, that a claim could  
18 remain live for any individual who could be named as a  
19 Plaintiff long enough for the Court to certify a class. See  
20 *Salazar* at 73.

21       The second prong of the analysis, that there will be a  
22 constant class of persons suffering the deprivation complained  
23 of in the complaint, is more difficult for Plaintiffs to show  
24 at this stage, in light of Defendants' policy memorandum which  
25 Defendants argue in the challenge to practice. When the action

1 was commenced and before Defendants issued their purported  
2 policy change, however, Plaintiffs clearly could show and  
3 Defendants could not dispute that there were a, quote,  
4 fluctuating number of people in prison past their ... release  
5 dates, unquote. Plaintiffs' memorandum at 11. See Rosenthal  
6 Declaration, Exhibit 87 at 4, 5, 8, 9 through 10 and 11.  
7 Plaintiffs' ability to demonstrate this constant class or not  
8 is now inextricably tied to Defendants' purported voluntary  
9 cessation of the challenged conduct. If the practice has  
10 stopped, there will not be a constant class. And if it has not  
11 stopped, there will be. As I will discuss in a moment,  
12 Defendants have not sufficiently shown here that they have  
13 actually stopped this practice, at least not yet. Because, as  
14 I will explain, I find that the memorandum and policy change do  
15 not show that the challenged conduct has, in fact, ceased, and  
16 that there may be a reasonable expectation that the challenged  
17 conduct will recur, I think it is plausible that there is or  
18 will be a constant class of persons suffering the deprivation.

19 Because Plaintiffs have shown that the claims at issue  
20 here are inherently transitory and they have not unduly delayed  
21 in bringing the motion for class certification, the motion as  
22 to mootness is denied as it relates to the claims of the  
23 original named Plaintiffs.

24 Turning now to the Policy Memorandum: Defendants argue  
25 that the allegations in the FAC are moot because DOCCS has,

1 quote, committed to discontinue the practices complained of in  
2 the amended complaint, unquote. And, quote, issued a policy  
3 memorandum advising responsible supervisory staff statewide  
4 that inmates within the definitions of the putative classes  
5 here will not be held past their respective release dates  
6 because of an unmet need for mental health housing, unquote.  
7 Defendants' reply at page 4. I believe this argument has been  
8 sufficiently briefed, including with the sur-replies that I may  
9 rule on it.

10 A Defendant's voluntarily cessation of challenged conduct  
11 will only moot a lawsuit if, quote, the challenged conduct has,  
12 in fact, ceased, unquote. Quote, there is no reasonable  
13 expectation that the alleged violation will recur, unquote.  
14 And, quote, interim relief or events have completely and  
15 irrevocably eradicated the effects of the alleged violation,  
16 unquote. *American Freedom v. MTA*, 815 F.3d 105, 109; see  
17 *Seidemann v. Bowen*, 499 F.3d 119, 128; *Ciaramella v. Zucker*,  
18 2019 Westlaw 4805553, at page 5, (Southern District  
19 September 30, 2019).

20 Usually, a party's, quote, voluntary cessation of  
21 allegedly unlawful conduct ... does not suffice to moot a case,  
22 unquote. *N.Y. Pub v. Whitman*, 321 F.3d 316, 327, quoting  
23 *Friends of the Earth v. Laidlaw*, 528 U.S.167, 174. A party,  
24 quote, claiming that its voluntary compliance moots a case  
25 bears the formidable burden of showing that it is absolutely



1 clear that the allegedly wrongful behavior could not reasonably  
2 be expected to occur, unquote. *Seidemann* 499 F.3d at 128,  
3 because, quote, a party should not be able to evade judicial  
4 review ... by temporarily altering questionable behavior,  
5 unquote. *City News v City of Waukesha*, 531 U.S. 278, at 284,  
6 Note 1. This is of particular concern in cases where  
7 Plaintiffs are, quote, prisoners, who are at the mercy of their  
8 keepers, unquote. *Inmates of Attica v. Rockefeller* 453 F.2d  
9 12, 23 to 24.

10 DOCCS alleges that this policy change, and the half-page  
11 memorandum sent to "All Superintendents and Community  
12 Supervision Bureau Chiefs" -- I'm quoting that from Exhibit 1  
13 of the Enright Declaration -- satisfies their burden to show  
14 that the effects of their actions are completely and  
15 irrevocably eradicated, that the conduct has ceased, and that  
16 there's no reasonable expectation that the alleged violation  
17 will recur. I cannot agree at this stage.

18 First, Defendants have not demonstrated they have in fact  
19 ceased the practice of prolonging the institutionalization of  
20 members of the putative classes in prison, and in circumstances  
21 such as these, this memorandum alone does not convince me that  
22 the practice has in fact changed. See *Salem versus Pompeo*, 432  
23 F. Supp. 3d, 222 at 234, Eastern District, 2020. Where  
24 evidence of noncompliance with a new policy weighed against  
25 mootness. It appears from the record that the same practices

1 could and may well continue either because Defendants obtained,  
2 quote/unquote, waivers of release from seriously mentally ill  
3 prisoners, see Rosenthal Declaration Exhibit 105 and Exhibit  
4 103 at 119, for which there's no formal process other than  
5 signing a statement, Rosenthal Declaration Exhibit 103 at 19,  
6 or because of delays in release for, quote, unforeseen  
7 circumstances, unquote, as referenced in the Enright  
8 declaration, Document 92 paragraph 14, and Defendants'  
9 interrogatory responses. While Defendants assure the Court  
10 that these, quote, unforeseen circumstances, unquote, would  
11 only, quote, temporarily, unquote, delay an individual's  
12 release, giving examples such as, quote, unexpected medical  
13 issues, transportation problems, extreme weather, or a severe  
14 psychiatric episode that requires observation, unquote, they  
15 conclude this list by including, seemingly as an afterthought,  
16 a, quote, temporary delay in housing availability (such as a  
17 fire or other event), unquote. That's Docket Entry 114-1 at  
18 15. The entire crux of Plaintiffs' complaint arises from  
19 temporary delays in housing availability. Defendants have not  
20 shown that there is no possibility that a seriously mentally  
21 ill prisoner will be kept in prison beyond his release date  
22 when they have not disavowed seeking waivers and when they  
23 reserve the right to prolong incarceration due to unforeseen  
24 circumstances.

25 Beyond these loopholes in the new policy, Defendants have

1 not -- Defendants have shown that the memorandum has been  
2 issued, but have not shown that it has, in fact, been  
3 implemented to ensure that Defendants no longer hold  
4 individuals with serious mental illness in prison past their  
5 release date or that all Defendants named in this case have  
6 foreclosed the possibility of continuing the practice.

7 Defendant Sullivan, the OMH Commissioner, stated  
8 unequivocally in her interrogatory responses, that, quote, no  
9 OMH policies, rules, practices, procedures, systems, et cetera,  
10 were changed as a result of the DOCCS implementation of its  
11 policy as set forth in the DOCCS memorandum. This memorandum  
12 set forth a DOCCS policy that has not changed or required a  
13 change to any OMH policy or procedure, unquote. Rosenthal  
14 Declaration Exhibit 104 at 4. Additionally, DOCCS did not  
15 require any training or other mechanisms to ensure that staff  
16 actually implement the memorandum and policy change properly.  
17 Rosenthal Declaration Exhibit 103 at 11 and Exhibit 116 at 6.  
18 And, in fact, DOCCS decided that no new training was required  
19 to implement the policy change beyond the memorandum, Rosenthal  
20 Declaration Exhibit 103 at 10, despite the fact that large  
21 numbers of Defendants' staff, spread out across a large and  
22 diverse system throughout the state, are tasked with its  
23 implementation, and it represents a significant change from  
24 past practice.

25 It is also of concern that throughout the litigation,

1 including in their briefs on this motion, Defendants have  
2 continued to justify their decision to hold indigent  
3 individuals with serious mental illness past their lawful  
4 release dates by reference to unspecified, quote, penological  
5 justifications and safety concerns, unquote. For example,  
6 Docket Entry 80 at 2, and 21 to 22, Defendants' reply at 10,  
7 Document 103 at 3, and Document 114-1 at 7 to 8. These types  
8 of arguments do not inspire confidence that the complained-of  
9 conduct is completely and irrevocably eradicated, or that it  
10 might not recur upon a change of administration, change of  
11 policy, or change of mind, particularly because the change in  
12 policy appears to be at least an intentional response to the  
13 lawsuit and perhaps an effort to moot the lawsuit. See  
14 *Edelhertz v. City of Middletown*, 2013 Westlaw 4038605 at pages  
15 3 to 4 (Southern District May 6, 2013) which found a case was  
16 not moot where the statute was changed in response to the  
17 lawsuit and nothing prevented the Defendants reenacting it if  
18 the case were dismissed.

19 Defendants, to refute these concerns, point to my decision  
20 in *Inside Connect v. Fischer*, 2014 Westlaw 2933221, at pages 8  
21 to 9, from June 30, 2014, where I dismissed an action for  
22 injunctive relief against DOCCS officials. In that case,  
23 however, the evidence presented clearly showed that the  
24 challenged conduct had, in fact, ceased a year before. The  
25 underlying reason that motivated the challenged conduct in the

1 first place no longer existed, and the Plaintiff offered  
2 nothing more than baseless speculation that DOCCS was  
3 continuing the challenged conduct.

4 While Defendants are correct that there's nothing  
5 suspicious about their making efforts to resolve the  
6 problematic conduct on their own, see Defendants sur-reply at  
7 page 7, in order to moot a claim, Defendants must demonstrate  
8 both that they have ended the conduct and that the conduct will  
9 not resume once the Court is no longer looking over their  
10 shoulders. I am reminded of the *NYPIRG* case where The Second  
11 Circuit found that the state agency's implementation of a  
12 commitment letter to halt the challenged conduct was, quote,  
13 indicative of a degree of good faith, unquote, but nevertheless  
14 failed to show that it was, quote, absolutely clear that the  
15 allegedly wrongful behavior could not reasonably be expected to  
16 recur, unquote. 321 F.3d at F27. As both the Supreme Court  
17 and The Second Circuit have stated, merely disclaiming any  
18 intention to resume challenged conduct is insufficient to moot  
19 a case. *United States v. W.T. Grant*, 345 U.S. 629, 633 and  
20 *Dean v. Blumenthal*, 577 F.3d 60, 65. Here, in circulating a  
21 half-page memorandum with a broad exception, while continuing  
22 to justify the policy reasons behind their original practice,  
23 Defendants here have failed to satisfy their burden and the  
24 motion is therefore denied as to the policy memorandum.

25 That said, it is plain to me that Defendants, with the

1 guidance of the Attorney General's office, recognize and are  
2 trying to rectify the problems this lawsuit has highlighted and  
3 they may yet demonstrate to my satisfaction that the conduct  
4 has, in fact, ceased as the policy change is further  
5 implemented. I hope the parties will continue to work on  
6 whether a negotiated solution is possible, recognizing on the  
7 one hand that Defendants may be able to show mootness in the  
8 future and recognizing that the state budget is in worse shape  
9 than ever, and on the other hand recognizing that the rights of  
10 disabled people are at stake.

11 Turning now to Failure to Exhaust: Defendants argue that  
12 Plaintiffs' claims must be dismissed for failure to exhaust  
13 their administrative remedies as required by federal law.  
14 Exhaustion is an affirmative defense, not a pleading  
15 requirement; thus, inmate Plaintiffs need not, quote,  
16 specifically plead or demonstrate exhaustion in their  
17 complaints, unquote. *Jones v. Bock*, 549, U.S.199 at 216.  
18 Instead, Defendants must demonstrate lack of exhaustion. *Colon*  
19 *v. DOCCS*, 2017 Westlaw 4157372 at page 4 (Southern District  
20 September 15, 2017). Because of the extraneous evidence  
21 involved, Defendants' exhaustion requirement must be converted  
22 to a motion for summary judgment under Rule 12(d).

23 Under the Prison Litigation Reform Act, or PLRA, quote, no  
24 action shall be brought with respect to prison conditions under  
25 ... any federal law, by a prisoner confined in any jail,

1 prison, or other correctional facility until such  
2 administrative remedies as are available are exhausted,  
3 unquote. 42 U.S. Code Section 1997e(a). By the plain terms of  
4 the statute, the administrative exhaustion requirement applies  
5 only to, quote, prisoners, unquote. See *Greig v. Goord*, 169  
6 F.3d 165, 167, where the Second Circuit held that litigants who  
7 file prison condition actions after their release from  
8 confinement are no longer prisoners for purposes of Section  
9 1997 e(a) and, therefore, need not satisfy the exhaustion  
10 requirement.

11 Plaintiffs do not dispute that the general class  
12 Plaintiffs are prisoners within the meaning of the PLRA and,  
13 thus, are required to exhaust. But they argue in their memo at  
14 page 13 that the RTF Plaintiffs are not because their sentences  
15 have fully ended. The PRLA defines a prisoner as, quote, any  
16 person incarcerated or detained in any facility who is accused  
17 of, convicted of, sentenced for, or adjudicated delinquent for  
18 violations of criminal law or the terms and conditions of  
19 parole, probation, pretrial release, or diversionary programs,  
20 unquote. That's 42 U.S. Code Section 1997e(h). The Second  
21 Circuit has clarified that exhaustion applies only to  
22 facilities in which people are, quote, held involuntarily as a  
23 result of violating the criminal law, unquote. *Ruggiero v.*  
24 *County of Orange*, 467 F.3d 170 at 174 to 75. This definition  
25 applies to, quote, suits filed by all litigants who could be

1 characterized as prisoners regardless of the type of facility  
2 in which they are imprisoned, unquote. *Ruggiero* at 175.

3 In asserting that Plaintiffs are prisoners required to  
4 exhaust, Defendants incorrectly state that the PLRA's  
5 exhaustion requirement applies to, quote, all facilities in  
6 which individuals are held involuntarily, unquote. That's in  
7 their brief -- in their memorandum at pages 12 to 13. But what  
8 the phrase actually is, is facilities where individuals are,  
9 quote, held involuntarily as a result of violating the criminal  
10 law. By Defendants' own definition, the RTF Plaintiffs were  
11 not so held on the day they filed this lawsuit. Defendants  
12 concede that the RTF Plaintiffs were being held not because  
13 they owed any more time on the violation of criminal law that  
14 landed them in prison, but because there was, in Defendants'  
15 view, no suitable place to which to release them. Because the  
16 RTF Plaintiffs were not prisoners when they filed, exhaustion  
17 was not required.

18 *Ruggiero*, on which Defendants rely, is easily  
19 distinguishable from this case, as the Plaintiff there was  
20 confined because of a parole violation which arises from  
21 failing to abide by conditions of early release from a criminal  
22 sentence and is unambiguously a sentence resulting from a  
23 violation of the criminal law. See *Ruggiero* at 175. In  
24 contrast, the RTF Subclass, having completed the entirety of  
25 the determinate sentences when they filed this complaint, were



1 not confined because of a violation of the criminal law. They  
2 were explicitly held past those sentences by Defendants' own  
3 admission to, quote, protect the safety and continuity of care  
4 of Plaintiffs as well as the safety of the community, unquote,  
5 and because there was no community-based mental health housing  
6 available. Defendants' memorandum at 21 to 22. Therefore, I  
7 find the RTF Plaintiffs are not prisoners within the meaning of  
8 the PLRA. I also note that, interestingly, when arguing  
9 exhaustion, Defendants assert that Plaintiffs are prisoners for  
10 purposes of the PLRA, in their memorandum at 12, but for  
11 purposes of the Eighth Amendment claim, which I'll discuss  
12 below, Defendants claim that conditions in the RTF are not  
13 punishment for a violation of criminal law. That's at page 21  
14 of their brief.

15       Although I find the exhaustion requirement does not apply  
16 to the RTF Subclass, Plaintiffs do not dispute that it does  
17 apply to M.G. and P.C., who are the general class Plaintiffs.  
18 Out of an abundance of caution, I will also address whether all  
19 Plaintiffs, not just M.G. and P.C., did, in fact, exhaust their  
20 administrative remedies before filing suits. Defendants here  
21 only challenge whether Plaintiffs adequately appealed their  
22 grievances to the Central Office Review Committee, or "CORC,"  
23 and whether they adequately waited until CORC rendered a  
24 decision before bringing this lawsuit and they reserved their  
25 rights to dispute other issues regarding administrative

1 exhaustion at a later time. See Defendants' Memo at 15, Note  
2 7. As such, I will confine my analysis to that issue.

3 In order to exhaust under the PLRA, a prisoner must follow  
4 the administrative procedures that are available to them;  
5 namely, the prison's grievance policy. *Jones* 549 U.S. at 218.  
6 The individual must, quote, use all steps that the agency holds  
7 out and do so properly, unquote. *Woodford v. Ngo*, 548 U.S.81  
8 at 90. That includes complying with an agency's deadlines and  
9 other critical procedure rules. *Woodford* at 90.

10 DOCCS's grievance regulations provide two procedural paths  
11 that are relevant in this instance. For complaints regarding  
12 disability-based discrimination, which the regulations say are,  
13 quote, of particular concern, unquote, to DOCCS, the agency  
14 provides for an expedited two-step adjudication process found  
15 at 7 NYCRR Section 701.9. Discrimination grievances must be  
16 sent directly to the facility superintendent for adjudication.  
17 If the superintendent denies the grievance, the grievant may  
18 appeal directly to the final level, which is CORC. CORC must  
19 render a decision within 30 days of receipt. See 7 NYCRR  
20 Section 701.9, which incorporates Section 701.5(d)(3)(ii).  
21 Complaints that do not allege unlawful discrimination, on the  
22 other hand, are subject to a three-step process. These  
23 complaints are adjudicated by the Inmate Grievance Resolution  
24 Committee, or "IGRC." If the IGRC denies the grievance, the  
25 grievant must appeal to the superintendent. And if the

1 superintendent denies the appeal, the grievant must appeal to  
2 CORC, which must adjudicate the appeal within 30 days. That's  
3 all in Section 701.5.

4 Under either of these procedural paths, CORC must obtain  
5 the individual's written consent if it requires more than 30  
6 days to adjudicate the appeal. See Section 701.6(g)(2), which  
7 says, quote, time limit extensions may be requested at any  
8 level of review, (e.g., time limits for holding an IGRC hearing  
9 answering a grievance or an appeal, et cetera). But such  
10 extensions may be granted only with a written consent of the  
11 grievant, unquote. And at any level of review, quote, matters  
12 not decided within the time limits may be appealed to the next  
13 step, unquote. That's all from 701.6(g)(2).

14 The regulations, quote, provide no mechanism for enforcing  
15 the requirement that the CORC issue a decision in 30 days,  
16 unquote. *Couvertier v. Jackson*, 2014 Westlaw 2781011, at page  
17 4, (Northern District May 22, 2014). Indeed, courts have  
18 struggled with the question of what to do in situations where  
19 CORC does not comply with the 30-day deadline. As, quote,  
20 there is no clear answer as to how a court should proceed under  
21 the PLRA when it appears that an inmate Plaintiff has followed  
22 all the requirements of his institution's administrative  
23 procedures, but the final review panel is delinquent in its  
24 response to his appeal, unquote. This is because courts try to  
25 balance two competing sentiments that, quote, an inmate

1 Plaintiff should not be penalized for their institution's  
2 failure to follow its own administrative procedures, unquote.  
3 But, quote, in light of the PLRA's purpose, courts should  
4 hesitate to decide the underlying action, unquote, before  
5 allowing CORC to have its say. *Fuentes v. Furco*, 2014 Westlaw,  
6 4792110 at page 3 (Southern District September 25, 2014).

7 The Second Circuit has not addressed this issue, but  
8 district courts in the Circuit have fashioned solutions that  
9 attempt to balance the PLRA's goal of allowing institutions the  
10 first opportunity to address an inmate's grievances, against  
11 the inmate's right to a federal forum when they have complied  
12 with all of the procedural requirements. I will attempt to do  
13 so here.

14 Under the PLRA, only those administrative remedies that,  
15 quote, are available, unquote, must be exhausted. That's  
16 1997e(a). "Availability" means that the incarcerated person,  
17 quote, is required to exhaust those, but only those, grievance  
18 procedures that are capable of use to obtain some relief for  
19 the action complained of, unquote. *Ross v. Blake*, 136 Supreme  
20 Court 1850, 1859. *Ross* outlined three circumstances under  
21 which a prison's administrative remedies are unavailable:  
22 First, when an administrative procedure, quote, operates as a  
23 the simple dead end, unquote; next, when, quote, an  
24 administrative scheme might be so opaque that it becomes,  
25 practically speaking, incapable of use, unquote; and finally,

1 when, quote, prison administrators thwart inmates from taking  
2 advantage of a grievance process through machination,  
3 misrepresentation or intimidation. That's *Ross* at 1859 to 60.

4 While The Second Circuit, quote, has not adopted the  
5 position ... that delay in responding to a grievance  
6 demonstrates per se unavailability, unquote, *Mateo v. O'Connor*,  
7 2012 Westlaw 1075830, at page 7 (Southern District March 29,  
8 2012), many district courts have held that a delay in some  
9 circumstances may constitute unavailability that would excuse a  
10 Plaintiff from exhausting. See, for example, *Smith v.*  
11 *Lioidice*, 2020 Westlaw 1033644, at page 4 (Southern District  
12 March 2nd, 2020); *Bell v. Napoli*, 2018 Westlaw 6506072, at page  
13 7 (Northern District December 11, 2018); *Peoples v. Fischer*,  
14 2012 Westlaw 1575302, at page 9 and Note 125 (Southern District  
15 May 3, 2012). I find these cases convincing, especially  
16 because DOCCS's own regulations specify that, at every level of  
17 the process, quote, matters not decided within the time limits  
18 may be appealed to the next step, unquote. That's Section  
19 701.6(g)(2). To hold otherwise would incentivize prisons to  
20 ignore the deadlines in the regulations in an effort to prevent  
21 prisoners from seeking redress in federal courts. This holding  
22 comports with the Supreme Court's command that an inmate  
23 Plaintiff's compliance with prison grievance procedures is all  
24 that's required by the PLRA to properly exhaust. *Jones* 549  
25 U.S. at 218.

1           Considering that view of the legal question and the  
2 factual record before me, Defendants have not demonstrated that  
3 they are entitled to summary judgment based on failure to  
4 exhaust. Based on the factual record and exhibits submitted,  
5 many of which are under seal, it's apparent that all of the  
6 Plaintiffs have at least raised fact issues as to whether  
7 they've adequately exhausted all available remedies. Exhibit A  
8 to the Sequin Declaration, Document 81-1, shows that CORC has  
9 records of appeals from D.R. and J R. CORC received D.R.'s  
10 appeal on November 19, 2018 and informed him in writing,  
11 without his consent, that his appeal would be resolved in  
12 approximately one year, more than 12 times the allotted 30  
13 days. Neither D.R. nor J.R., whose appeal to CORC was received  
14 on November 27, 2018, got a response from CORC by the time the  
15 briefs for this motion were filed in late 2019 and early 2020.  
16 CORC thus seems to be a simple dead end in their cases. So  
17 summary judgment is not warranted.

18           Defendants' allegation that C.J. did not file his CORC  
19 appeal until after the filing of this lawsuit, see Sequin  
20 Declaration paragraph 6, is incorrect, although it is true that  
21 CORC did not receive his appeal until February 2019, after the  
22 lawsuit was filed on January 23, 2019. C.J. says he filed two  
23 CORC appeals, on November 28, 2018 and again on December 3rd,  
24 2018. This is in his declaration. When CORC failed to  
25 respond, according to C.J., he wrote two separate letters to

1 the Green Haven Grievance Program Supervisor, seeking  
2 confirmation under Section 701.5(d)(3)(i) that his appeals were  
3 transmitted. In response, the grievance clerk orally assured  
4 C.J. that he had personally handed the appeals to the grievance  
5 program supervisor for transmittal to CORC, and that the  
6 supervisor had done so. Despite these assurances, the  
7 supervisor inexplicably waited over two months to actually  
8 transfer the appeal to CORC. To me, the false reassurance and  
9 the unexplained and seemingly needless delay falls within the  
10 Ross exception where administrative processes become  
11 unavailable due to prison administrators thwarting inmates  
12 through machination or misrepresentation. Because C.J.'s  
13 account, if true, could show that he has exhausted, summary  
14 judgment in Defendants' favor is inappropriate.

15 Turning to M.J. According to him, on October 18, 2018,  
16 while incarcerated in the Fishkill Correctional Facility, he  
17 filed his original grievance. And by the way, the C.J.  
18 declaration covers this in paragraphs 18 through 21. The M.J.  
19 declaration, which I'm going to refer to now, discusses this in  
20 paragraphs 11 through 21.

21 M.J. was at Fishkill when he filed his initial grievance,  
22 but before he got a response, DOCCS transferred him to Green  
23 Haven. Fishkill did not forward any response to M.J. there,  
24 leaving him confused about how to exhaust because he didn't  
25 receive the denial of his Fishkill grievance within the

1 regulatory time limit and did not have an appeal form on which  
2 to submit his appeal. On November 17, 2018, he mailed a letter  
3 to the Fishkill grievance clerk, stating his intent to appeal  
4 the constructive denial of his grievance. On December 2nd, he  
5 received the Fishkill superintendent's denial of his appeal and  
6 the next day he mailed the CORC appeal to the Fishkill  
7 grievance clerk. He never received confirmation from Fishkill  
8 that he they received his appeal or transferred it to CORC and  
9 his letters following up went unanswered.

10 P.C. similarly says he filed a discrimination grievance at  
11 the Sullivan Correctional Facility, and he got the Defendant --  
12 the superintendent's denial on December 3rd, 2018. The next  
13 day he signed and submitted his CORC appeal. Despite sending a  
14 follow-up letter to the grievance staff after 30 days, he never  
15 heard back.

16 Assuming the truth of M.J.'s and P.C.'s accounts as I must  
17 on a motion for summary judgment, by failing to transmit their  
18 appeals or even respond to their inquiries to confirm transfer,  
19 the administrative processes as applied to them plainly  
20 operated as a simple dead end or were so opaque that they  
21 became, practically speaking, incapable of use. As set forth  
22 in *Ross* at 1859 to 60. Thus again, summary judgment for  
23 Defendants is not warranted.

24 Lastly, M.G. avers that he filed a grievance alleging  
25 discrimination on November 13, 2018 and that the agency



1 properly forwarded it to the superintendent directly on  
2 November 26, 2018. He got a denial, which stated that the  
3 grievance was forwarded to the OMH Unit Chief for, quote,  
4 whatever remedial action is deemed appropriate, unquote, and  
5 stated that, quote, this superintendent's response completes  
6 the grievance process and there is no further appeal available,  
7 unquote. Quackenbush Declaration Exhibit 102; and M.G.  
8 Declaration Paragraph 14. M.G., nevertheless, submitted a CORC  
9 appeal on the day that he received the denial. Quackenbush  
10 Declaration Exhibit 102, M.G. Declaration Paragraph 15. By  
11 telling M.G. that the superintendent's response completed the  
12 grievance process and there was no further appeal available,  
13 DOCCS staff told M.G., in essence, that he had exhausted the  
14 administrative process. Even if he had not, in fact, exhausted  
15 all of his appeals, this letter demonstrates that any further  
16 appeal would operate as a dead end or that prison officials  
17 prevented him from taking advantage of the grievance process  
18 through machination or misrepresentation.

19 Plaintiffs have all presented facts that, if true, would  
20 constitute or excuse exhaustion. Contrary to Defendants'  
21 arguments that a grievant must outwait CORC, it is, quote, the  
22 prison's requirements ... that define the boundaries of proper  
23 exhaustion. *Jones* 549 U.S. at 218. This rule is also  
24 consistent with The Second Circuit's holding that remedies are  
25 unavailable in situations that the grievance regulations -- the

1 grievant's regulations did not contemplate. *Williams v.*  
2 *Correction Officer Priatno*, 829 F.3d 118 at 124. That is  
3 exactly where all the Plaintiffs found themselves after timely  
4 appealing grievances to CORC, which then failed to issue  
5 decisions within its regulatory time limit. The regulations  
6 required nothing more from Plaintiffs in order to satisfy the  
7 exhaustion requirement.

8 As an aside, I see this issue coming up more and more  
9 frequently in my cases with DOCCS. Because this particular  
10 case has the attention of higher-level officials at the AG's  
11 office and at DOCCS, maybe this is a good time to point out  
12 that CORC seems to be way behind in a lot of cases and that  
13 that is making more work both for the AG's office and  
14 ultimately DOCCS, not to mention the Court, due to motion  
15 practice and factual disputes. I understand that resources are  
16 tight, but CORC clearing that backlog would ultimately save  
17 resources. And I know we're in a pandemic, but this problem  
18 has been rearing its head well before that. So just a little  
19 editorial aside there.

20 Turning now to the Eighth Amendment: The FAC alleges that  
21 Defendants have violated the Eighth Amendment rights of the RTF  
22 Subclass. The Eighth Amendment's ban on cruel and unusual  
23 punishment bars punishment that is grossly disproportionate or  
24 that violates evolving standards of decency that marks the  
25 progress of a maturing society. *Rhodes v. Chapman*, 452 U.S.

1 337 at 346. Plaintiff has alleged Eighth Amendment violations  
2 under two different theories: Prolonged incarceration and  
3 criminalization of status. I will address each in turn.

4 Starting with Prolonged Incarceration: Courts have noted  
5 that holding an offender beyond, quote, the maximum expiration  
6 date of their sentence may, in some circumstances, unquote,  
7 give rise to a claim under the Eighth Amendment. *Washington v.*  
8 *New York State Parole*, 2019 Westlaw 1877343, at page 2  
9 (Southern District April 26, 2019). See *Wright v. Kane*, 1997  
10 Westlaw 746457 at page 4, (Southern District December 2nd,  
11 1997). Consignment that exceeds a term of imprisonment  
12 violates the Eighth Amendment if (1) the alleged deprivation  
13 is, in objective terms, sufficiently serious. And (2)  
14 Defendants acted with a sufficiently culpable state of mind.  
15 *Francis v. Fiacco*, 942 F.3d 126, 150. See *Calhoun v. New York*,  
16 999 F.2d 647, 652, which looked at whether the length of added  
17 confinement inflicted, quote, a harm of ... magnitude, unquote.

18 The requisite state of mind is deliberate indifference.  
19 See, for example, *Calhoun* at 654. In this context, it requires  
20 a showing that official knows the risk of unwarranted  
21 punishment, failed to act or took only ineffectual action, and  
22 that there's a causal connection between the official's  
23 response and the unjustified detention. *Rivera v. Carroll*,  
24 2009 Westlaw 2365240, at page 6 (Southern District August 3rd,  
25 2009).

1 Defendants placed the RTF Plaintiffs' in RTF between 246  
2 and 502 days past the end of their sentences. See FAC  
3 paragraphs 54, 90, 119 and 148. These are lengths of time that  
4 I find to be sufficiently serious and a harm of magnitude.

5 See *Calhoun* at 654, and *Rivera*, 2009 Westlaw 2365240 at  
6 page 3 and 7 to 8, which found a sufficiently serious harm from  
7 over-detention of 47 days.

8 Defendants point out that no case has found state  
9 Defendants liable, quote, where the state Defendants weighed  
10 the proper course of action, acted in accordance with a  
11 reasonable understanding of a complicated area of state law,  
12 and relayed the legal basis for their actions, unquote, to the  
13 Plaintiff. And they're quoting *Francis*, 942 F.3d at 150.

14 I find *Francis* to be easily distinguishable. The Court in  
15 *Francis* found the individual Defendants sued in their personal  
16 capacities were entitled to qualified immunity, which is not an  
17 issue where the Defendants are sued only in their official  
18 capacities. In addition, Plaintiff there was challenging how  
19 officials had calculated his sentence in the unique individual  
20 circumstances of his case. He was not like Plaintiffs here,  
21 challenging a concerted policy decision applied intentionally  
22 in case after case. Further, *Francis* was decided on summary  
23 judgment. While the record here may some day show that  
24 Defendants did their best to comply with the complicated  
25 statutory regime, Plaintiffs have plausibly alleged that they

1 did not. Plaintiffs allege that Defendants were well aware of  
2 their required release dates, their housing needs, and the  
3 systemic deficiencies in housing, and nonetheless decided to  
4 continue their incarceration past their release dates in  
5 circumstances essentially indistinguishable from prison. See,  
6 for example, FAC paragraphs 230, 273 to 75, 279 to 80, 283, 354  
7 to 59, 367 to 369 and 373. While facts may certainly arise as  
8 the litigation proceeds that shed further light on Defendants'  
9 conduct and state of mind, I agree with the reasoning in *Murphy*  
10 *v. Raoul*, 380 F. Supp. 3d, 731, 765 (Northern District of  
11 Illinois 2019), that Plaintiffs have at this stage alleged  
12 facts sufficient to plausibly plead deliberate indifference.  
13 Plaintiffs having adequately alleged that, quote, the  
14 Defendants knew of this problem and the risk that they were  
15 inflicting unwarranted punishment, unquote, that, quote, they  
16 failed to act or took ineffectual action, unquote, to address  
17 that problem and, quote, their response caused the unjustified  
18 detention, unquote, because, quote, they chose to confine these  
19 individuals past their release date, unquote, which plausibly,  
20 quote, amounts to reckless disregard of constitutional rights,  
21 unquote. *Murphy* at 765. I cannot conclude on the basis of the  
22 FAC that the Defendants were not deliberately indifferent.

23 While the thrust of Defendants' argument is that  
24 Plaintiffs' prolonged incarceration was, quote, penologically  
25 justified to protect the safety and continuity of care of

1 Plaintiffs as well as the safety of the community, unquote,  
2 that's from Defendants' brief at 21 to 22, they offer no Second  
3 Circuit authority for why I should consider these supposed  
4 justifications in my analysis in the context of a claim of  
5 over-incarceration. While the existence or not of a  
6 penological justification makes sense in the context of  
7 determining whether the imposition of a sentence or the  
8 conditions of confinement amount to cruel and unusual  
9 punishment, it does not make sense in the context of a claim  
10 that the sentence and, therefore, any legitimate penological  
11 purpose has ended, but the Plaintiff was not released. The  
12 most recent Circuit case on prolonged incarceration, *Francis*,  
13 makes no mention of penological justification, and district  
14 courts in the circuit have found the concepts inapplicable to a  
15 claim that a prisoner's incarceration exceeded what was  
16 justified by his sentence. See *Francis*, 2018 Westlaw 1384499,  
17 at page 10 (Northern District March 16, 2018), reversed and  
18 remanded on other grounds, 942, F.3d 126; *Brunson v. Duffy*, 14  
19 F. Supp. 3d 287, 292 (Southern District 2014). See also  
20 *Campbell v. Peters* 256 F.3d, 695, 700 (Seventh Circuit 2001),  
21 which held that if a prisoner serves the correct amount of  
22 time, he has not been confined without penological  
23 justification; and if he serves too much time, he has been  
24 confined without penological justification. Even *Sample v.*  
25 *Diecks*, 885 F.2d 1099 at 1108, (Third Circuit 1989), which

1 Defendants rely in their reply at page 10, does not support  
2 application of the concept of penological justification in the  
3 context of prolonged incarceration. It acknowledged that there  
4 is no penological justification for keeping a prisoner beyond  
5 his date of release because, quote, any deterrent and  
6 retributive purposes served by his time in jail were fulfilled  
7 as of that date, unquote. That's Sample at 1108. While it  
8 goes on to suggest that there might arguably be a penological  
9 justification where a prisoner is erroneously kept too long due  
10 to miscalculation of his sentence, in the sense that having an  
11 error-free prison system would be prohibitively costly or even  
12 impossible. See Sample at 1108 to 09. It never began to  
13 suggest that knowingly and intentionally keeping a prisoner  
14 beyond his term could be penologically justified. I find that  
15 where prison officials know that a prisoner has reached the end  
16 of, quote, the term established by the state, unquote, Sample  
17 at 1108, any penological justification the state might have for  
18 keeping him incarcerated would expire at the time. In other  
19 words, there is penological justification for holding a  
20 prisoner to the date at which he is entitled to be released,  
21 but not beyond it.

22 I'm realizing I was about to discuss penological  
23 justification for the general class, but the general class does  
24 not bring the Eighth Amendment claim. So I think I can skip  
25 over that part.

1 I also note, however, that I could not find at this stage  
2 on the present record that the safety of the prisoner or of the  
3 community are in fact the reasons for holding Plaintiffs too  
4 long or that these justifications would suffice. It may be  
5 that those are the actual reasons or more likely part of the  
6 actual reasons, but I cannot so conclude from the FAC which  
7 plausibly attributes the challenged actions to the state's  
8 failure to provide sufficient community-based housing and  
9 supportive services. Factual development and revisiting the  
10 issue on summary judgment would be necessary. And I am dubious  
11 that the proffered safety rationale would suffice in any event.  
12 Potentially dangerous people, and sick people, are released  
13 from prison every day. If that were enough to hold someone  
14 beyond his sentence, there are many prisoners who would be  
15 imprisoned indefinitely at the whim of corrections officials.  
16 Further, Defendants' argument amounts to the claim that the  
17 state can detain people indefinitely because the state has  
18 determined that they need a type of housing that's not  
19 available to them. That would seem to create a Catch 22 that  
20 would be a large enough loophole to swallow the Eighth  
21 Amendment and their liberty.

22 So the motion to dismiss the Eighth Amendment claim on the  
23 prolonged incarceration theory is denied.

24 The Eighth Amendment also bars punishment of a status or  
25 condition and involuntary conduct that is inseparable from that



1 status or condition. See *Robinson v. California*, 370 U.S. 660  
2 at 666 to 67, which noted that penalizing mental illness is  
3 universally thought to be cruel and unusual. See also Justice  
4 White's concurring opinion in *Powell v. Texas*, 392 U.S. 514,  
5 551 to 52, addressing involuntary conduct.

6 Defendants rightly point out that the majority of cases  
7 Plaintiffs cite, including *Robinson v. California*, 370 U.S.  
8 660, involve statutes that impermissibly criminalize  
9 status or involuntary conduct related to that status, whether  
10 or not the person charged otherwise engaged in substantive  
11 criminal conduct. For example, in the Fourth Circuit case  
12 cited by Plaintiffs, *Manning v. Caldwell*, 930 F.3d 264 (Fourth  
13 Circuit 2019), the Court found that the Plaintiffs stated an  
14 Eighth Amendment claim where a Virginia statute made it a  
15 criminal offense for, quote, habitual drunkards, unquote, to  
16 possess, consume or purchase alcohol. See *Manning* at 284. The  
17 Fourth Circuit in that case stressed the narrow impact of its  
18 holding, noting that Plaintiffs did not challenge the  
19 constitutionality of any restrictions imposed after conviction  
20 of a crime, because, unquestionably, courts may restrict an  
21 individual's liberty pursuant to a criminal sentence. And in  
22 some cases may do so after the formal sentence has concluded.  
23 Here, by contrast, the extension of the prison term is not  
24 mandated by a statute that explicitly makes status or  
25 involuntary conduct a crime. Plaintiffs allege rather that

1 they are subject to restrictions which unconstitutionally  
2 lengthen a prison sentence imposed after conviction and  
3 imprisonment for an underlying crime.

4 Plaintiffs again point to *Murphy v. Raoul*, however, to  
5 support their assertion that the conduct alleged here  
6 nevertheless impermissibly criminalizes status and involuntary  
7 conduct. See 380 F. Supp. 3d at 765. In *Murphy*, the state  
8 prison system would not release prisoners who had no address to  
9 which to go and would not approve shelters as housing, which  
10 kept homeless prisoners incarcerated indefinitely, effectively  
11 punishing their status as homeless. The *Murphy* court reasoned  
12 that for these Plaintiffs, the failure to secure housing was,  
13 quote, not voluntary conduct merely related to or derivative of  
14 the status of homelessness, but is entirely involuntary conduct  
15 that is inseparable from their status of homelessness, unquote.  
16 That's *Murphy* at 765. There the Defendants also maintained  
17 that criminalization of status was inapplicable because the  
18 state was not charging the Plaintiffs with a crime of being  
19 homeless under a statute as the other jurisdictions did in the  
20 case law. The *Murphy* court disagreed, calling the effort to  
21 distinguish the cases, quote, a distinction without a  
22 difference, unquote, because, quote, all the Eighth Amendment  
23 calls for is punishment, unquote, not a new charged crime.  
24 *Murphy* at 264. I agree.

25 While I note that this theory likely presents a steeper

1 climb for the Plaintiffs than the prolonged incarceration line  
2 of cases, I believe they have plausibly shown that Defendants  
3 have kept them locked up due to their status as seriously  
4 mentally ill inmates, coupled with the fact they have no good  
5 place to go, similar to *Murphy*. For this reason, Defendants'  
6 motion to dismiss the criminalization of status claims is  
7 denied.

8 Finally, turning to Substantive Due Process: Plaintiffs  
9 also allege that Defendants' conduct violates -- I'm going to  
10 abbreviate it SDP under the Fourteenth Amendment. SDP exists  
11 to prevent the government from infringing those immunities,  
12 quote, implicit in the concept of ordered liberty, unquote,  
13 and, quote, so rooted in the traditions and conscience of our  
14 people as to be ranked as fundamental, unquote. *Rochin v.*  
15 *California* 342 U.S. 165, 169, 172; See *U.S. v. McLaurin*, 731  
16 F.3d 258, 261. Further, for strict scrutiny to apply, the  
17 challenged conduct must, quote, shock the contemporary  
18 conscience. *County of Sacramento v. Lewis*, 523 U.S. 833, 847,  
19 Note 8. But, quote, if a constitutional claim is covered by a  
20 specific constitutional provision, such as the ... Eighth  
21 Amendment, the claim must be analyzed under the standard  
22 appropriate to that specific provision, not under the rubric of  
23 substantive due process, unquote. *Lewis* at 843. See *Graham v.*  
24 *Connor*, 490 U.S. 386, 394. Quote, this is so because ... the  
25 guideposts for responsible decision making in the unchartered

1 area of substantive due process are scarce and open ended,  
2 unquote, causing the Supreme Court to, quote, limit the  
3 availability of substantive due process claims to those which  
4 are not covered under other amendments, unquote. *Holland v.*  
5 *City of New York*, 197 F. Supp. 3d 529, 547 (Southern District  
6 2016). Quote, where another provision of the Constitution  
7 provides an explicit textual source of constitutional  
8 protection, a court must assess a Plaintiff's claims under that  
9 explicit provision and not under the more generalized notion of  
10 substantive due process. *Kia P. v. McIntyre*, 235 F.3d, 749,  
11 757 to 58. See *Velez v. Levy*, 401 F.3d, 75, at 94. Where the  
12 court said, quote, where a specific constitutional provision  
13 prohibits government action, Plaintiffs seeking redress for  
14 that prohibited conduct in a Section 1983 suit cannot make  
15 reference to the broad notion of substantive due process. And  
16 *Doyle v. Santiago*, 2019 Westlaw 5298147, at page 5 (District of  
17 Connecticut October 18, 2019) where the Court said, quote, If  
18 the plaintiff's confinement ... is conscious-shocking, it would  
19 violate the Eighth Amendment. Thus his claim should be  
20 considered under the Eighth Amendment, not the Substantive Due  
21 Process clause, unquote. Quote, in other words, what would  
22 serve to raise Defendants' actions beyond the wrongful to the  
23 unconscionable and shocking are facts, which, if proven, would  
24 constitute in themselves specific constitutional violations,  
25 unquote. *Velez*, 401 F.3d at 94.

1           Although I note that the allegations in the FAC likely  
2 satisfy the standards for SDP, I am foreclosed from analyzing  
3 these allegations through SDP because the claims are, quote,  
4 subsumed in the more particular allegations, unquote, of the  
5 Eighth Amendment claim. *Velez* 94.

6           So to sum up. Governor Cuomo is dismissed as a Defendant.

7           Defendants' motion to dismiss on mootness grounds is  
8 denied without prejudice to renewal to the extent Plaintiffs  
9 claim the conditions into which they were released are not  
10 sufficiently integrated.

11           Defendants' motion to dismiss is granted as to the  
12 Substantive Due Process claim and otherwise denied.

13           The Clerk is to terminate Docket Motion No. 79 and to  
14 terminate Governor Cuomo as a party.

15           I think we have October 2nd as a date for Defendants to  
16 either answer the SAC or submit another pre-motion letter; am I  
17 right about that? And remember to say your name before you  
18 answer.

19           MR. HARBEN: I'm sorry. There was some yelling. The  
20 electricity just went out in my house.

21           THE COURT: Am I right that October 2nd is the date  
22 for either your answer or pre-motion letter addressed to the  
23 SAC?

24           (Reporter interruption)

25           THE COURT: Yes. Mr. Harben, you've got to say --

1 every time you speak, you've got to say your name, the first  
2 word out of your mouth.

3 MR. HARBEN: I think we'd like to be able to order  
4 this decision expedited so we can read it and just parse it out  
5 a little bit. It's very long. There has to be -- because  
6 there was a part about possibly the additional facts dealing  
7 with some of the claims that you addressed today.

8 So I'm just -- the current deadline is October 2nd.  
9 I'm wondering if we can get a little more time to process that  
10 so we can -- at least can get -- review this transcript before  
11 we finalize anything?

12 THE COURT: What date do you propose?

13 MR. HARBEN: Could we get another two weeks beyond  
14 that?

15 THE COURT: Any objection on Plaintiffs' side to  
16 October 16?

17 MS. LANDRISCINA: No objection, your Honor.

18 THE COURT: All right. So Defendants' answer or  
19 pre-motion letter with respect to the Second Amended Complaint  
20 will be due October 16. And if it's a premotion letter, I'll  
21 set another conference.

22 In the meantime, sad to say we're losing Judge Smith  
23 next Wednesday where she, a little too happily, is going into  
24 retirement. No, I shouldn't say that. She's not 100 percent  
25 happy about it. In fact, to the point where she volunteered to

1 stay on a little longer if her replacement isn't cleared in  
2 time.

3 But you will be transitioning to the new magistrate  
4 judge and continuing to roll along with paper discovery. So I  
5 don't think I need to -- I don't need to get involved with  
6 that.

7 Is there anything else anybody wants to say before we  
8 ring off?

9 MR. HARBEN: I guess on the issue of discovery, with  
10 the new claims as we've written in the past about, we haven't  
11 even gotten to the point of responding on that yet. That's  
12 something we wanted to raise with the new magistrate and  
13 potential stay.

14 THE COURT: Yeah, I mean, when we -- when we met way  
15 back when, we agreed, I thought, that we were going to hold off  
16 on depositions but proceed on paper discovery. And if there's  
17 some reason why that's changed, you can take it up with the  
18 magistrate judge.

19 But let me also -- I know this whole call is public.  
20 But so I guess there's no point in going off the record, but  
21 this is a good juncture, I think, in which the parties should,  
22 again, try to resolve it. You know, the state says that  
23 it's -- at least the original claims, the state says it's not  
24 doing it anymore. I've just found that the record at this  
25 stage is not sufficient for me to conclude that it's not

1 happening anymore and it won't recur, but that could change  
2 sooner rather than later. And the plaintiffs will have  
3 achieved an important part of what they've asked for. I  
4 recognize that the other part of what they've asked for, which  
5 is to be released not into shelters or other undesirable  
6 places, but into housing that actually addresses their needs,  
7 is sort of now the new part two of the case.

8           But I think Plaintiffs also have to be realistic  
9 about where the money is going to come from to solve these  
10 problems. I don't doubt that OMH would be perfectly happy if  
11 it had a blank check to create sufficient housing for released  
12 prisoners with serious mental illness. But I don't see any  
13 likelihood that there's a pot of gold for that in the short  
14 term.

15           So I hope that when you start anew with Magistrate  
16 Judge Krause, and even before that, that you'll discuss amongst  
17 yourselves resolving at least some of the issues. If  
18 Defendants can demonstrate to Plaintiffs that since this  
19 briefing has occurred, things have changed in a way that would  
20 satisfy them, maybe at least we can narrow the issues, if not  
21 resolve the whole thing.

22           So I hope you'll continue to talk. I do think  
23 there's a vibe here that the Defendants were trying to pick off  
24 the named Plaintiffs. But at the same time, they did stop --  
25 or they say they've stopped -- the challenged practice and



1 that's really the gold ring here.

2           So I hope Plaintiffs, you know, don't lose the forest  
3 for the trees. And if persuaded that that change has really  
4 been made, they will have accomplished what they set out to  
5 accomplish, at least, with the first two complaints and should  
6 be pleased with that.

7           So I hope both sides will continue to talk and that  
8 when you resume with the new magistrate judge, maybe you can  
9 get somewhere. And I will await October 16, and see if we get  
10 an answer or a promotion letter.

11           Anything else we should talk about? All right. I  
12 hope everybody is healthy and remains so. Have a good weekend,  
13 all. Take care.

14           (Proceedings concluded)

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