Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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In the Matter of the Application of
Arisleda Duarte,

For an Order Pursuant to Article 78 of
the New York Civil Practice Law and Rules,

Petitioner,

- against -

New York City Department of Correction; Vanessa Singleton, Warden, Rose M. Singer Center; Willie J. Taylor, Deputy Warden of Programs, Rose M. Singer Center; Mark A. Scott, Deputy Warden of Security, Rose M. Singer Center; Merle Gunn, Nursery Director, Rose M. Singer Center; Lewis S. Finkelman, Deputy Commissioner for Legal Matters, New York City Department of Correction, Nadine Pinnock, Deputy General Counsel, New York City Department of Correction, and Dora B. Schiriro, Commissioner, New York City Department of Correction,

Respondent.

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Index Number: 7627/11

Motion Date: 4/19/11

Motion Cal. Number: 4

Motion Seq. No.: 1

The following papers numbered 1 to 14 read on this petition for an order of mandamus to review.

	Papers Numbered
Order to Show Cause-Affirmation-Exhibits.....	1-3
Verified Answer-Affidavits-Exhibits.....	4-9
Affidavit of Arisleida Duarte-Exhibits-Reply.....	10-12
Affirmation of Valentina Morales.....	13
Stipulation.....	14

Upon the foregoing papers it is ordered that the petition is decided as follows:

As a preliminary matter, pursuant to the stipulation of

counsel for the parties dated April 15, 2011, petitioner has discontinued the instant proceeding against all of the individual respondents, with prejudice, and the parties have consented to amend the caption of the proceeding to substitute the City of New York as the sole respondent, in place and stead of the New York City Department of Corrections. The caption is, therefore, amended accordingly.

The amended caption shall be:

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In the Matter of the Application of
Arisleda Duarte, Index
For an Order Pursuant to Article 78 of Number: 7627/11
the New York Civil Practice Law and Rules,

Petitioner,

- against -

The City of New York,

Respondent.
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This is a petition, pursuant to CPLR Article 78, in the nature of mandamus to review the determination of the Warden of the Rose M. Singer Center (RMSC), the women's prison at Rikers Island Correctional Facility, denying the administrative appeal of petitioner, an inmate at RMSC, of the determination of the Deputy Warden of Programs denying her application for admission to the Nursery Program at RMSC upon the delivery of her child, and for an order directing the City to admit petitioner to the Nursery Program upon the birth of her child.

Section 611 of the Correction Law concerns births to inmates of correctional institutions and care of said children. With respect to the care of a child born to an inmate, §611(2) provides, in relevant part, "A child so born may be returned with its mother to the correctional institution in which the mother is confined unless the chief medical officer of the correctional institution shall certify that the mother is physically unfit to care for the child...A child may remain in the correctional institution with its mother for such period as seems desirable for the welfare of such child, but not after it is one year of age...The officer in charge of such institution may cause a child cared for therein with its

mother to be removed from the institution at any time before the child is one year of age..." (Emphasis added).

The New York City Department of Corrections instituted a Nursery Program at RMSC on February 25, 1985 in order to implement the provisions of §611. The procedures governing the program were set down in a Command Level Order issued by the Warden of RMSC,(annexed to the petition as Exhibit "2" and hereinafter referred to as the Nursery Order), which procedures included, inter alia, the application process and criteria for participation in the program, and the procedure for appeal of a decision denying an application.

An inmate's written application is delivered to the Deputy Warden of Programs, who is responsible for rendering the decision as to whether the applicant will be accepted into the program. The Nursery Program Director then initiates the processing of the application by forwarding evaluation forms to "Health Services" and "Mental Health" for their evaluation of the applicant's appropriateness for participation in the Nursery Program. The applicant must be interviewed by Mental Health staff. The Nursing Director thereafter forwards the documents to the Programs Captain for review, who also obtains any infraction history before rendering a recommendation. The documents thereafter are forwarded to the Deputy Warden of Security, who also renders a recommendation as to the appropriateness of the applicant to participate in the Nursery Program.

Petitioner, in accordance with the procedures set forth in the Nursery Order, filed an application for admission to the Nursery Program in October 2010. However, notwithstanding that the Nursery Order mandates that a decision on an application be rendered within 10 days of receipt of the application, it is undisputed that petitioner did not receive a decision until the first week of December 2010. It is undisputed that she first received a memorandum from the Deputy Warden of Programs, dated November 8, 2010, informing her, "Your application for the R.M.S.C. Nursery Program has been received and approved." It is also undisputed that later that same week, she received a second memorandum from the Deputy Warden of Programs apparently rescinding the acceptance letter that was first sent to her, stating, "Your application for the R.M.S.C. Nursery Program has been received. However, in accordance with the Nursery Order Procedures, I regret to inform you that your original application has been rejected based upon the following: VIOLENT CRIMINAL RECORD(Attempted Murder), Extensive Infraction History." This denial was based upon the evaluation of the Deputy Warden of Security who indicated on the evaluation form dated October 28, 2010 that petitioner was not acceptable for the

Nursery Program predicated solely upon the reason set forth by him in his comment, "Inmate charged with attempted murder & extensive infraction history." The Court notes that this second rejection letter was dated November 3, 2010. The Deputy Warden has refused to admit petitioner to the Nursery Program, pursuant to the November 3rd memorandum. Petitioner, thereafter, filed an administrative appeal on December 10, 2010 in accordance with the procedures set forth in the Nursery Order. Notwithstanding that the Nursery Order requires the Warden to render a decision within five business days of receipt of the appeal, petitioner did not receive a decision until March 10, 2011. The memorandum of the Warden to petitioner, dated March 10, 2011, merely states that "in accordance with the Nursery Program Procedures, I regret to inform you that your appeal has been denied."

The only issues that may be considered by the court in an Article 78 proceeding based upon mandamus to review an administrative determination are those set forth in CPLR 7803(3), namely, "whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (see Scherbyn v Wayne-Finger Lakes Bd. Of Co-op. Educational Services, 77 NY 2d 753 [1991]).

The sole criterion set forth in §611(2) of the Correction Law for the return of a newborn to its inmate mother in a correctional facility and its remaining in the care of its mother in prison is the welfare of the child (see Bailey v Lombard, 101 Misc 2d 56 [Sup Ct Monroe County 1979]; Agpar v Beauter, 75 Misc 2d 439 [Sup Ct, Tioga County 1973]). The only basis for denial of an inmate's request to care for her child in prison, under §611(2), is a finding by the chief medical officer of the correctional institution that the mother is physically unfit to care for the child.

No assessment was made as to whether petitioner was unfit to care for the child or whether placement of her newborn into her care at the Nursery would be detrimental to the welfare of the child. Rather, the only stated basis for denial of petitioner's request to be admitted with her child to the Nursery Program was that she is charged with attempted murder and has an extensive infraction history. This determination was in harmony with the Nursery Order which lists several criminal charges, including murder, that automatically preclude an applicant from participation in the Nursery Program. The Nursery Order also lists the applicant's "current infraction history" as a factor which "may preclude participation in the Nursery Program".

However, said Nursery Order, issued by the Warden, to the

extent that it disqualifies an inmate from nursing her child at RMSC purely upon the basis of the criminal charges against her is not in harmony with the statute, which admits of no such automatic disqualifiers and which only allows rejection of an inmate's request that her newborn be returned with her to prison upon the basis of the welfare or best interest of the child. Indeed, the Nursery Order acknowledges that the Nursery Program was instituted to comply with §611 of the Correction Law. Therefore, to the extent that the Nursery Order issued by the Warden excludes an inmate from the Nursery Program purely on the basis of the criminal charges proffered against her and not upon the welfare of the child, said Order and the subject denial of petitioner's application based solely upon the fact that she is charged with attempted murder and that she committed infractions at RMSC is contrary to law and an abuse of discretion.

Although §611 states that the warden "may" cause the child to be removed at any time, and thus is couched in discretionary language, there is no indication, and it is not argued, that such discretion is not subject to the arbitrary and capricious standard of review of Article 78 of the CPLR.

In her affidavit annexed to the City's answer, Vanessa Singleton, Warden of RMSC, avers that she affirmed the denial of petitioner's application for admission to the Nursery Program based upon her criminal history which included a conviction for second degree gang assault with intent to cause serious physical injury, her current pending charges consisting of attempted murder, depraved indifference, two charges of gang assault in the first and second degrees, first degree assault with a weapon, two second degree assault charges and three related misdemeanor charges including weapons possession, and upon her infraction history which consisted of a charge of graffiti and assaulting another inmate. She avers that the foregoing shows that petitioner poses a threat to the safety and security of her (then) unborn child and of the other mothers and babies in the Nursery Program.

However, contrary to said averments, the only bases for denial of petitioner's application articulated in the memorandum to petitioner dated November 3, 2010 were simply the charge against her of attempted murder and infractions. None of the other charges or the conviction listed in Singleton's affidavit was set forth as a reason for the denial. Even were they also the basis of her affirmation of the denial of petitioner's application, such fact alone, without reference to the welfare of the child, as heretofore stated, would not be a proper basis under §611 of the Correction Law for refusal to allow petitioner into the Nursery Program. Singleton's contention in her affidavit that petitioner's past conviction and the current charges against her, as well as her

infractions, "show that she poses a threat to the safety and security of her unborn child as well as the other mothers and their babies in the Nursery Program" and that the "welfare of all the children in the Program (as well as their mothers) would be jeopardized if the Court were to overturn DOC's decision to deny Petitioner's application" is, in this Court's view, merely an argument crafted for the purpose of opposing the instant petition and was not a basis for denial of petitioner's application. Review of an administrative determination is limited to the grounds invoked by the agency for its determination (see Scherbyn v Wayne-Finger Lakes Bd. Of Co-op. Educational Services, 77 NY 2d 753, supra).

Therefore, the denial of petitioner's application for enrollment in the Nursery Program based solely upon a criminal charge against her and infractions, without articulating how this charge and the infractions of graffiti-writing and assault upon a fellow inmate bear upon the welfare of her child, was arbitrary, capricious and an abuse of discretion. In this regard, the Court notes that in her evaluation dated October 26, 2010, Elizabeth Murphy, the Mental Health Unit Chief of RMSC, found petitioner acceptable for the Nursery Program, finding that petitioner was "not a risk to self or others." In addition, Lisa Choleff, the Chief Physician of RMSC, in her evaluation dated October 26, 2010, found petitioner acceptable for admission to the Nursery Program. Also, Abenai Sanders, Prenatal Care Coordinator for the New York City Department of Health and Mental Hygiene at RMSC, in an open letter of support of petitioner's admission to the Nursery Program, states that petitioner has been a patient at the prenatal clinic at RMSC since September 10, 2010 and has been a model patient. Therefore, there is no basis in fact for Singleton's averment in her affidavit that petitioner's criminal history would pose a threat to the welfare of her child, or to the other children in the Nursery Program. As heretofore stated, the denial of petitioner's application was not based upon a consideration of the welfare of the child.

Likewise, Singleton's referral to the custody proceeding involving Petitioner's first child and an order of protection obtained against her by the father of that child and, allegedly, of the newborn at issue, is irrelevant to the present inquiry.

The Court finds no rational basis for denial of petitioner's application, based upon the reasons proffered for said denial, that would comport with the statutory standard of the best interests of the child. No facts have been proffered to show that petitioner would endanger the welfare of her child or of any other children in the Nursery Program. Indeed, the only evidence in this regard, on this record, is the evaluations of the Mental Health Unit Chief and

the Chief Physician of RMSC who found petitioner to be appropriate for admission to the Nursery Program, which evaluations were apparently ignored in favor of denial of petitioner's application based solely upon a current charge of attempted murder and her history of infractions which included two counts of defacing prison property and one count of assault upon a fellow inmate.

The Court notes that the Nursery Program is fully equipped for the care of an infant with medical staff. The record on this petition indicates that the Nursery, while equipped for ten mothers and infants, currently contains only one mother and infant. Moreover, pursuant to §611(2), the warden has the discretion to remove the infant from the mother at any time, should there be any compelling reason to do so.

The City's argument that petitioner cannot be admitted to the Nursery Program because she has yet to complete the remaining 15 days of a 50-day sentence to solitary confinement for her infractions is without merit, since there is no reason why petitioner cannot complete her solitary confinement term after her child is eventually removed from her care.

Equally without merit is the City's only remaining argument that the petition must be dismissed because the child's father is a necessary party. Section 611 of the Correction Law does not provide the father of a child born to an incarcerated person the right to oppose the mother's application for her newborn to return with her to prison. Moreover, the only inquiry before this Court is whether the decision of the Warden of RMSC which denied petitioner's appeal and affirmed the decision of the Deputy Warden of Programs to deny petitioner's application for admission to the Nursery Program was arbitrary, capricious and an abuse of discretion. The issue of the custody of the child, if a claim for custody is asserted by the father in the future, is not before this Court.

Since the determinations of the Warden and Deputy Warden of Programs at RMSC denying petitioner's application for admission to the Nursery Program were arbitrary, capricious and an abuse of discretion, the Court need not reach, and will not decide, the remaining issues presented, including whether respondent violated petitioner's Equal Protection rights.

Accordingly, the petition is granted. It is hereby ORDERED that petitioner's newborn child return with her to RMSC, upon her discharge from hospital, purssuant to §611(2) of the Correction Law, and that she be admitted to the Nursery Program thereat forthwith.

Dated: April 20, 2011

KEVIN J. KERRIGAN, J.S.C.