ADMINISTRATIVE LAW

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CONTENTS

INTRODUCTION

This Article reviews developments in administrative law and practice during 2009-2010 in the judicial and legislative branches of New York State government. Review of judicial activity focuses on eight decisions of the New York Court of Appeals. Review of legislative activity focuses on several amendments to the Open Meetings Law.

I. JUDICIAL BRANCH

A. Separation of Powers

In *Skelos v. Paterson*,[1] a member of the New York State Senate[2] challenged as unconstitutional the Governor's appointment of an

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1. 25 Misc. 3d 347, 884 N.Y.S.2d 812 (Sup. Ct. Nassau Cnty. 2009), *aff'd*, 65 A.D. 3d 339, 885 N.Y.S.2d 92 (2d Dep't 2009), *rev'd*, 13 N.Y.3d 141, 915 N.E.2d 1141, 886 N.Y.S.2d 846 (2009).

2. The action was originally commenced by Dean Skelos (R. Nassau Co.) and Pedro S. Estrada (D. Bronx); however, Mr. Estrada did not file a brief on appeal so the Court proceeded with only one plaintiff. *Skelos*, 13 N.Y.3d at 147 n.1, 915 N.E.2d at 1142 n.1, 886 N.Y.S.2d at 847 n.1.

individual to the Office of Lieutenant Governor vacated when previous Lieutenant Governor David Paterson became Governor in the wake of Governor Eliot Spitzer's resignation on March 17, 2008.[3] The suit also sought to enjoin the Governor permanently from appointing anyone to the position of Lieutenant Governor.[4] The Ravitch appointment and the subsequent lawsuit engendered much public commentary.[5]

The Governor had appointed Richard Ravitch as Lieutenant Governor when the vacancy in the office coupled with the Republican-Democratic split of the New York State Senate seats 31-31 left in doubt the question of who was the temporary President of the Senate.[6] The Lieutenant Governor is the President of the Senate with a casting vote.[7] When the office of the Lieutenant Governor is vacant, the Senate chooses a temporary President.[8] The political deadlock made legislative work and choosing a temporary President in the Senate virtually impossible. With the office filled, the Lieutenant Governor could preside over the Senate and break any tie votes.[9]

As part of the litigation, plaintiff moved in supreme court to enjoin preliminarily the putative nominee from taking office.[10] The supreme court granted the Senator's motion for a preliminary injunction, the appellate division affirmed,[11] granted the Governor leave to appeal, and certified a question to the Court of Appeals.[12]

The Court of Appeals faced two issues: (1) a legislator's standing to challenge the gubernatorial appointment; and (2) statutory interpretation of three related provisions of the public officers law regarding the Governor's authority to fill the vacant office.[13]

The Court had most recently addressed the question of a

3. *Id.* at 146-47, 915 N.E.2d at 1142, 886 N.Y.S.2d at 847.

4. *Id.* at 147, 915 N.E.2d at 1142, 886 N.Y.S.2d at 847.

5. *See, e.g.*, Richard Briffault, Skelos v. Paterson*: The Surprisingly Strong Case for the Governor's Surprising Power to Appoint a Lieutenant Governor*, 73 ALB. L. REV. 675, 675-83 (2010); Norman Olch, Skelos v. Paterson*: Judge Read's Vote*, FULL CT. PASS (Sept. 25, 2009, 11:01 AM), http://www.fullcourtpass.com/2009/09/skelos-v-paterson-judge-reads-vote.html.

6. *Skelos*, 13 N.Y.3d at 146-47, 915 N.E.2d at 1142, 886 N.Y.S.2d at 847.

7. N.Y. CONST. art. IV, § 6; N.Y. State Senate Rules R. I (2009-2010), *available at* http://www.nysenate.gov/rules.

8. N.Y. CONST. art. IV, § 6; N.Y. State Senate Rules R. II.

9. *Skelos*, 13 N.Y.3d at 147, 915 N.E.2d at 1142, 886 N.Y.S.2d at 847.

10. *Id.*

11. *Skelos v. Paterson*, 65 A.D.3d 339, 348, 885 N.Y.S. 2d 92, 99 (2d Dep't 2009), *rev'd*, 13 N.Y.3d 141, 915 N.E.2d 1141, 886 N.Y.S.2d 846.

12. *Skelos*, 13 N.Y.3d at 147, 915 N.E.2d at 1143, 886 N.Y.S.2d at 848.

13. *Skelos*, 65 A.D.3d 339, 349, 885 N.Y.S.2d 92, 99.

legislator's standing to challenge gubernatorial action in *Silver v. Pataki*.[14] *Silver* had discussed the capacity and standing of a member of the legislature to challenge gubernatorial action regarding the state budget.[15] According to article VII of the New York State Constitution,[16] estimates of the budgetary needs of the executive, judicial, and legislative branches of state government are submitted to the Governor who in turn submits a proposed budget to the legislature together with the bills containing "the proposed appropriations and related legislation."[17] The legislature can strike out or reduce items in the Governor's budget bills and add appropriations "provided that such additions are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose."[18] Any separate appropriations that the legislature adds to the Governor's budget bills are subject to the Governor's line-item veto power.[19]

Silver involved a challenge by a member of the New York State Assembly in both his capacity as member and as Speaker of the Assembly to the Governor's exercise of the line item veto power to modify non-appropriation bills.[20] Non-appropriation bills "commonly include sources, schedules and sub-allocations for funding provided by appropriation bills, along with provisions authorizing the disbursement of certain budgeted funds pursuant to subsequent legislative enactment."[21] The basis for Silver's argument was that while the Governor had the constitutional authority to line-item veto appropriation bills, the Governor did not have the constitutional authority to take individual action on non-appropriation bills; those bills

14. 274 A.D.2d 57, 58, 711 N.Y.S.2d 402, 404 (1st Dep't 2000), *aff'd in part and modified in part*, 96 N.Y.2d 532, 535-36, 755 N.E.2d 842, 845, 730 N.Y.S.2d 482, 485 (2001).

15. *Silver*, 96 N.Y.2d at 535-36, 755 N.E.2d at 845, 730 N.Y.S.2d at 485. The Court noted that unlike previous legal battles regarding the budget, the scope of the case in *Silver* was limited to the preliminary issue of standing. *Id.* at 536, 755 N.E.2d at 845, 730 N.Y.S.2d at 485 (citing N.Y. State Bankers Assn. v. Wetzler, 81 N.Y.2d 98, 612 N.E.2d 294, 595 N.Y.S.2d 936 (1993); People v. Tremaine, 281 N.Y. 1, 21 N.E.2d 891 (1939); People v. Tremaine, 252 N.Y. 27, 168 N.E. 817 (1929)).

16. N.Y. CONST. art. VII; *Silver*, 96 N.Y.2d at 536, 755 N.E.2d at 845, 730 N.Y.S.2d at 485.

17. *Silver*, 96 N.Y.2d at 536, 755 N.E.2d at 845, 730 N.Y.S.2d at 485 (citing N.Y. CONST. art. VII, §§ 1-3).

18. *Id.* (citing N.Y. CONST. art. VII, § 4).

19. *Id.* (citing N.Y. CONST. art. VII, § 7).

20. *Id.* at 535 n.1, 755 N.E.2d at 844 n.1, 730 N.Y.S.2d at 484 n.1. Assemblyman Silver did not assert taxpayer standing. *Id.* at 535 n.2, 755 N.E.2d at 844 n.2, 730 N.Y.S.2d at 484 n.2.

21. *Silver*, 96 N.Y.2d at 535 n.1, 755 N.E.2d at 844 n.1, 730 N.Y.S.2d at 484 n.1.

had to be accepted or rejected in their entirety.[22]

The Governor moved to dismiss on the grounds that Mr. Silver lacked capacity and standing to bring the action.[23] The Supreme Court, New York County, denied the motion.[24] The Appellate Division, First Department, split its decision.[25] The majority voted to reverse, concluding that the member lacked any express or inherent authority to challenge gubernatorial action, and that he had not suffered any individualized injury other than institutional harm.[26] The dissent concluded that a member of the legislature—"who has the power and responsibility to consider and vote on legislation—has the capacity to bring an action to vindicate the effectiveness of his or her vote."[27] The appellate division certified the question of the legislator's capacity and standing to maintain the action to the Court of Appeals.[28]

The Court of Appeals held that Mr. Silver had capacity to sue as a Member of the Assembly, and that he had suffered an injury in fact which gave him standing to sue.[29] The Court began its analysis by noting that while capacity and standing are allied concepts, in fact, they represent distinct issues.[30]

Capacity relates to the litigant's status or power to sue or be sued.[31] The power to sue may be expressly stated, or, in the absence of an express statement, may be inferred.[32] The inference can be drawn from an agency's powers and responsibilities, including when the agency has "'functional responsibility within the zone of interest to be protected.'"[33] The Court opined that a legislator "has the broad power and functional responsibility to consider and vote on legislation," with a continuing concern regarding the integrity of the votes.[34] "That responsibility necessarily includes continuing concern for protecting the

22. *Id.* at 535, 755 N.E.2d at 845, 730 N.Y.S.2d at 485.

23. *Id.*

24. *Id.*

25. *Id.* at 535-36, 755 N.E.2d at 845, 730 N.Y.S.2d at 485.

26. *Silver*, 96 N.Y.2d at 535-36, 755 N.E.2d at 845, 730 N.Y.S.2d at 485.

27. *Id.* at 536, 755 N.E.2d at 845, 730 N.Y.S.2d at 485.

28. Silver v. Pataki, 274 A.D.2d 57, 66, 711 N.Y.S.2d 402, 409 (1st Dep't 2000), *aff'd in part and modified in part*, 96 N.Y.2d 532, 535-36, 755 N.E.2d 842, 845, 730 N.Y.S.2d 482, 485 (2001).

29. *Silver*, 96 N.Y.2d at 542, 755 N.E.2d at 850, 730 N.Y.S.2d at 490.

30. *Id.* at 537, 755 N.E.2d at 846, 730 N.Y.S.2d at 486.

31. *Id.*

32. *Id.* (quoting Cmty. Bd. 7 v. Schaffer, 84 N.Y.2d 148, 156, 639 N.E.2d 1, 4, 615 N.Y.S.2d 644, 647 (1994)).

33. *Id.* (citation omitted).

34. *Silver*, 96 N.Y.2d at 542, 755 N.E.2d at 850, 730 N.Y.S.2d at 490.

integrity of one's votes and [that concern] implies the power to challenge in court the effectiveness of a vote that has allegedly been unconstitutionally nullified."[35] Noting that no other jurisdiction has concluded that a legislator lacks the capacity to sue, the Court concluded that to decide otherwise would in effect disenfranchise the legislators and their constituents from the budgetary process when confronted with illegal or unconstitutional actions.[36] Thus, it held that as a Member of the Assembly, Silver had capacity to bring a challenge to the line-item vetoes in question.[37] Using the same analysis on his capacity as Speaker, it held that he lacked capacity to sue in that role because the express authority of the Speaker is circumscribed; as a constitutional officer he does not represent the body over which he presides, and the legislative body had not passed a resolution that the Speaker represent it in the litigation.[38]

As to the Speaker's standing, the Court relied on the traditional litmus test for standing in New York: the party must demonstrate an injury-in-fact within the zone of interest at stake.[39] Recognizing that legislators' standing usually involves one of three different types of complaints—"lost political battles, nullification of votes and usurpation of power"—the Court noted that only the "latter two categories confer legislator standing."[40] The Court concluded that as a Member of the Assembly who cast a vote in favor of the provisions that the Governor vetoed, he "undoubtedly has suffered an injury in fact with respect to the alleged unconstitutional nullification of his vote sufficient to confer standing."[41]

While the analysis of *Silver* provides an interesting backdrop to the *Skelos* case, it sheds little light on how the Court might have ruled given its rather pro-forma treatment of the issue in *Skelos v. Paterson*. Although mindful of its decision in *Silver* narrowly construing the standing of a member of the legislature, the Court nevertheless concluded that it would not address the issue.[42] Rather, focusing on the

35. *Id.*

36. *Id.* at 537-38 n.4, 755 N.E.2d at 846 n.4, 730 N.Y.S.2d at 486 n.4.

37. *Id.* at 538, 755 N.E.2d at 847, 730 N.Y.S.2d at 487.

38. *Id.* at 538, 755 N.E.2d at 847, 730 N.Y.S.2d at 487.

39. *Silver*, 96 N.Y.2d at 539, 755 N.E.2d at 847, 730 N.Y.S.2d at 487. *See generally* 26 PATRICK J. BORCHERS & DAVID L. MARKELL, NEW YORK STATE ADMINISTRATIVE PROCEDURE AND PRACTICE § 7.3 (2d ed. 1998).

40. *Silver*, 96 N.Y.2d at 539, 755 N.E.2d at 847, 730 N.Y.S.2d at 487.

41. *Id.* at 539, 755 N.E.2d at 847-48, 730 N.Y.S.2d at 487-88.

42. Skelos v. Paterson, 13 N.Y.3d 141, 148, 915 N.E.2d 1141, 1143, 886 N.Y.S.2d 846, 848 (2009).

public interest in an expeditious resolution of the underlying question, it assumed for purposes of the case that Senator Skelos had standing to bring the challenge.[43] The dissent, on the contrary, viewed standing as a significant issue not easily dismissed.[44] The dissent expressly discussed Senator Skelos's standing to bring the challenge.[45] It found that his standing, while different from that shown in *Silver*, "is similarly legitimate."[46] Because the Court in *Silver* had expressly rejected the idea that only the majority of a legislative body could challenge a gubernatorial usurpation of power, Senator Skelos, like Member of the Assembly Silver, had standing to challenge the alleged overreaching of the appointment of a lieutenant governor.[47] Since the Lieutenant Governor serves as President of the Senate, an illegal appointment causes an injury to each individual senator.[48] The dissent also rejected any claim that the issue of the appointment was not ripe for review because the appointee had not presided over the Senate, ruled on a point of order, or cast any vote.[49] The dissent pointed out that in fact the appointee was enjoined from presiding over the Senate and that no point was served by delay.[50]

The Court in *Skelos* then turned its attention to the substantive argument. The background for the Court's decision can be found in article XIII, section 3, of the Constitution and three related statutes, sections 41, 42, and 43 of the Public Officers Law.[51] Section three of article XIII provides that "[t]he legislature shall provide for filling vacancies in office,"[52] and "expressly contemplates that vacancies in elective office may be filled by appointment."[53] According to the Court, the three sections of the Public Officer Law derive from that constitutional mandate.[54]

Section 41, "[v]acancies filled by legislature," provides that the method by which the legislature will fill the vacant positions of

43. *Id.* (citations omitted).
44. *Id.* at 155, 915 N.E.2d at 1148, 886 N.Y.S.2d at 853 (Pigott, J., dissenting).
45. *Id.* at 155-57, 915 N.E.2d at 1148-49, 886 N.Y.S.2d at 853-54.
46. *Id.* at 156, 915 N.E.2d at 1148, 886 N.Y.S.2d at 853.
47. *Skelos*, 13 N.Y.3d at 156, 915 N.E.2d at 1148-49, 886 N.Y.S.2d at 853.
48. *Id.* at 156, 915 N.E.2d at 1149, 886 N.Y.S.2d at 853.
49. *Id.* at 156-57, 915 N.E.2d at 1149, 886 N.Y.S.2d at 854.
50. *Id.* at 157, 915 N.E.2d at 1149, 886 N.Y.S.2d at 854.
51. N.Y. CONST. art. XIII, § 3; N.Y. PUB. OFF. LAW §§ 41-43 (McKinney 2008).
52. N.Y. CONST. art. XIII, § 3; *Skelos*, 13 N.Y.3d at 148, 915 N.E.2d at 1143, 886 N.Y.S.2d at 848 (quoting N.Y. CONST. art. XIII, § 3).
53. *Skelos*, 13 N.Y.3d at 148, 915 N.E.2d at 1143, 886 N.Y.S.2d at 848 (citing N.Y. CONST. art. XIII, § 3).
54. *Id.*

Attorney General and Comptroller.[55] Section 41 calls upon the legislature to vote on the candidates by joint ballot.[56] Section 42, "[f]illing vacancies in elective offices," governs the filling of vacancies in other elective offices,[57] but excludes the offices of Governor and Lieutenant Governor.[58] Section 43, "[f]illing other vacancies," involves filling other vacant elective or appointed offices.[59] The Court described it as a catch-all provision which provides that: "If a vacancy shall occur, otherwise than by expiration of term, with no provision of law for filling the same, if the office be elective, the governor shall appoint a person to execute the duties thereof until the vacancy shall be filled by an election."[60] The Governor used section 43 to appoint Mr. Ravitch as Lieutenant Governor.[61] Although a closely divided decision, the majority made the result seem very simple when it concluded that the appointment satisfied the criteria for the application of section 43.[62] First, the position of Lieutenant Governor was vacant and the vacancy occurred for reasons other than the expiration of the term.[63] Second, no other provision for filling the office was applicable.[64] Section 42 specifically excluded the office of Lieutenant Governor from its provisions calling for an election.[65] That exclusion, the Court noted, was created by the legislature in response to its 1943 decision interpreting section 42 to require that a vacancy in the Office of

55. *Id.*; N.Y. PUB. OFF. LAW § 41.

56. N.Y. PUB. OFF. LAW § 41.

57. N.Y. PUB. OFF. LAW § 42 (McKinney 2008); *see also Skelos*, 13 N.Y.3d at 148, 915 N.E.2d at 1143, 886 N.Y.S.2d at 848 (citing N.Y. PUB. OFF. LAW § 42(4-a)) (noting that section 42 generally provides that these vacancies be filled by means of election at the next general election but that in certain circumstance involving a vacancy in the office of United States Senator, the Governor may make a temporary appointment).

58. *Skelos*, 13 N.Y.3d at 148, 915 N.E.2d at 1143, 886 N.Y.S.2d at 848. The legislative exclusion of the governor and lieutenant governor was in response to a 1943 decision of the court of appeals interpreting the then-current section 42 as requiring that a vacancy in the lieutenant governor's office be filled at the next annual election. Concerned that the offices might be filled by individuals from different political parties having incompatible agendas, the legislature eliminated the offices of governor and lieutenant governor from the requirement of section 43 that certain offices be filled at a general election. *Id.* at 163, 915 N.E.2d at 1154, 886 N.Y.S.2d at 859 (Pigott, J., dissenting).

59. N.Y. PUB. OFF. LAW § 43 (McKinney 2008).

60. *Skelos*, 13 N.Y.3d at 149, 915 N.E.2d at 1143, 886 N.Y.S.2d at 848 (quoting N.Y. PUB. OFF. LAW § 43) (emphasis omitted).

61. *Id.* at 148, 915 N.E.2d at 1143, 886 N.Y.S.2d at 848.

62. *See id.* at 149, 915 N.E.2d at 1144, 886 N.Y.S.2d at 848, *but see id.* at 158-59, 915 N.E.2d at 1150-51, 886 N.Y.S.2d at 855 (Pigott, J., dissenting).

63. *Skelos*, 13 N.Y.3d at 149, 915 N.E.2d at 1143-44, 886 N.Y.S.2d at 848 (majority opinion).

64. *Id.*, 915 N.E.2d at 1144, 886 N.Y.S.2d at 848-49.

65. N.Y. PUB. OFF. LAW. § 42 (McKinney 2008).

Lieutenant Governor required an election with the possible consequence that a Lieutenant Governor of a different party could be elected and frustrate the goals of the existing administration.[66] The only other provision mentioning the vacancy is article IV, section 6 of the Constitution which involves the appointment of the temporary President of the Senate which occurs during the vacancy, not to fill the vacancy.[67] Since neither section 41 nor 42 were applicable in the Court's view, the Governor's appointment under section 43 must stand given that its application follows logically.[68]

The Court rejected the arguments of plaintiff as well as the dissent that the Governor was precluded from making such an appointment stating that while the interplay between section 43 of the Public Officers Law and article IV, section 6 of the Constitution "presented an open legal question," the fact that previous vacancies in the office of Lieutenant Governor, only three of which occurred after the amendment to section 42, were left unfilled could just have easily been the result of political considerations as they could have been because of the open legal question.[69]

B. Ultra Vires Actions

Many grounds are available for challenging agency actions and rules, among them that the agency was acting illegally or *ultra vires* as it had no authority to take the actions it did, that its rules were not promulgated in accordance with the requirements of the Constitution and the State Administrative Procedure Act, or that the rules are arbitrary and capricious.[70] *Walton v. New York State Department of Correctional Services* involved multiple constitutional and other challenges to a New York State contract with a telecommunications provider for a collect calling telephone service at state correctional facilities.[71] Pursuant to the agreement, MCI Worldcom

66. *Skelos*, 13 N.Y.3d at 151, 915 N.E.2d at 1145, 886 N.Y.S.2d at 850 (citing Ward v. Curran, 291 N.Y 642, 50 N.E.2d 1023 (1943), *aff'g*, Ward v. Curran, 266 A.D. 524, 44 N.Y.S.2d 240 (3d Dep't 1943)). The court also noted that subsequent amendments to the Constitution that require the Governor and Lieutenant Governor be elected on a single ballot effectively eliminated concerns about divided administrations. *Id.*

67. *Id.* at 149, 915 N.E.2d at 1144, 886 N.Y.S.2d at 848-49.

68. *Id.* at 152, 915 N.E.2d at 1146, 886 N.Y.S.2d at 850-51.

69. For a detailed discussion of the dissent's view, *see* Richard Briffault, *supra* note 5, at 687-96.

70. *See* BORCHERS & MARKELL, *supra* note 39, § 8.8.

71. 25 A.D.3d 999, 1000, 808 N.Y.S.2d 483, 484-85 (3d Dep't 2006), *aff'd as modified*, (*Walton I*), 8 N.Y.3d 186, 853 N.E.2d 1001, 831 N.Y.S.2d 749 (2007), *remanded to* 18 Misc.3d 775, 849 N.Y.S.2d 395 (Sup. Ct. Albany Cnty. 2007), *aff'd*, 57 A.D.3d 1180,

Communications, Inc. (MCI) provided Department of Correctional Services (DOCS) with an inmate calling plan that "allowed inmates to call family and legal services collect without using coins or operator assistance."[72] MCI's system also allowed DOCS to monitor calls and restrict access to calls as necessary.[73] MCI had won both a 1996 (initial) and a 2001 (second) contract pursuant to a competitive bidding process.[74] The 1996 rate for the collect call was variable.[75] In addition, in exchange for an exclusive contract, MCI paid DOCS a commission on each call, a practice relatively common among communications providers.[76] As required by law, approval of the variable rate and a commission of 60% to DOCS was sought from and granted by the Federal Communications Commission (FCC) and the Public Service Commission (PSC) for interstate and intrastate calls respectively.[77] The variable rate was approved for the second contract; however, the parties agreed to a reduced commission rate of 57.5%.[78] In 2003, DOCS determined that the variable rate was onerous on many families.[79] The parties agreed to amend the contract to provide for a flat rate of three dollar surcharge per collect call plus $.16 per minute and to continue the DOCS commission of 57.5%.[80] In 2003, PSC approved the new MCI rate, noting it to be less expensive than a similar service offered in the non-prison context which charged $2.25 per call plus $.30 a minute.[81] PSC declined to approve that portion of the agreement for the DOCS commission claiming that it lacked jurisdiction over DOCS which was a government agency, not a communications provider.[82] PSC directed that the customers be provided clear notice of which portion of the fee went to MCI and which to DOCS.[83]

Thereafter, two legal services providers representing prisoners and three individual recipients of collect calls from inmates who had paid

869 N.Y.S.2d 661 (3d Dep't 2008), *aff'd*, (*Walton II*), 13 N.Y.3d 475, 921 N.E.2d 145, 893 N.Y.S.2d 453 (2009).

72. *Walton II*, 13 N.Y.3d at 480, 921 N.E.2d at 147, 893 N.Y.S.2d at 455.

73. *Id.*, 921 N.E.2d at 147, 893 N.Y.S.2d at 455-56.

74. *Id.*, 921 N.E.2d at 148, 893 N.Y.S.2d at 456.

75. *Id.* at 481, 921 N.E.2d at 148, 893 N.Y.S.2d at 456.

76. *Id.* at 480-81, 921 N.E.2d at 148, 893 N.Y.S.2d at 456; *see also*, *In re* Implementation of Pay Tel. Reclassification & Comp. Provisions of Telecomm. Act of 1996, 17 FCC Rcd. 3248, 3253 n.34 (2002).

77. *Walton II*, 13 N.Y.3d at 481, 921 N.E.2d at 148, 893 N.Y.S.2d at 456.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Walton II*, 13 N.Y.3d at 481, 921 N.E.2d at 148, 893 N.Y.S.2d at 456.

83. *Id.* at 481-82, 921 N.E.2d at 148, 893 N.Y.S.2d at 456.

the total rate including the DOCS commission commenced an article 78 proceeding and a declaratory judgment action alleging that the DOCS commissions constituted a tax or improper fee which it had no legislative authority to impose, an unlawful governmental taking of recipients' property, an infringement of the recipients' equal protection rights, and an infringement of recipients' rights to communicate and associate with the inmates.[84] The petitioners sought refunds and a permanent injunction against the further collection of commissions by MCI and DOCS.[85]

These claims were dismissed by the supreme court as untimely and the dismissal was affirmed by the appellate division.[86] The petitioners also alleged several other challenges which were dismissed on other grounds.[87] Leave to appeal was granted.[88] The Court of Appeals reinstated the constitutional claims for refunds in *Walton I*.[89] On remittal the claims were dismissed by the supreme court,[90] and the dismissal was affirmed by the appellate division.[91] The recipients appealed as of right.[92]

The Court in *Walton II* began by commenting on petitioners' public policy argument that DOCS's collection of commission violated the very goals of the agency, namely the care and rehabilitation of inmates, because it inflated the cost of calls and inhibited the ability of inmates to maintain family ties, which in turn increased the risk of recidivism by inmates cut off from family.[93] The Court noted that

84. *Id.* at 482, 921 N.E.2d at 148-49, 893 N.Y.S.2d at 456-57.

85. *Id.*, 921 N.E.2d at 149, 893 N.Y.S.2d at 457.

86. Walton v. N.Y. State Dep't of Corr. Servs., 25 A.D.3d 999, 999-1002, 808 N.Y.S.2d 483, 484-86 (3d Dep't 2006), *aff'd as modified*, 8 N.Y.3d 186, 853 N.E.2d 1001, 831 N.Y.S.2d 749 (2007), *remanded to* 18 Misc.3d 775, 849 N.Y.S.2d 395 (Sup. Ct. Albany Cnty. 2007), *aff'd*, 57 A.D.3d 1180, 869 N.Y.S.2d 661 (3d Dep't 2008), *aff'd*, 13 N.Y.3d 475, 921 N.E.2d 145, 893 N.Y.S.2d 453.

87. *Walton II*, 13 N.Y.3d at 483 n.4, 921 N.E.2d at 149 n.4, 893 N.Y.S.2d at 457 n.4 (citing *Walton I*, 8 N.Y.3d at 194, 863 N.E.2d at 1005, 831 N.Y.S.2d at 753).

88. *Walton*, 25 A.D.3d at 999, 808 N.Y.S.2d at 483, *leave to appeal granted*, Walton v. N.Y. State Dep't of Corr. Servs., 7 N.Y.3d 706, 853 N.E.2d 244.

89. *Walton I*, 8 N.Y.3d at 191, 863 N.E.2d at 1003, 831 N.Y.S.2d at 751. During the pendency of *Walton I* before the Court of Appeals, DOCS discontinued collecting commissions as a result of a change in executive policy and legislation (Correction Law § 623) the parties agreed that the remaining issues concerned refunds. Because only the constitutional claims remained, MCI did not participate any further in the case. *Walton II*, 13 N.Y.3d at 483, 921 N.E.2d at 149, 893 N.Y.S.2d at 457.

90. *Walton II*, 13 N.Y.3d at 482-83, 921 N.E.2d at 149, 893 N.Y.S.2d at 457.

91. Walton v. N.Y. State Dep't of Corr. Servs., 57 A.D.3d at 1185, 869 N.Y.S.2d at 666.

92. *Walton II*, 13 N.Y.3d at 483, 921 N.E.2d at 150, 893 N.Y.S.2d at 458.

93. *Id.* at 483-84, 921 N.E.2d at 150, 893 N.Y.S.2d at 458.

petitioners raised a substantial policy argument, but that the Court need not address it as the DOCS policy was now defunct due in large measure to the advocacy of petitioners.[94] The Court then turned to its determination of the constitutional challenges.

The first issue was whether the commission constituted a tax.[95] The Court concluded that the commission was not a tax for several reasons. It emphasized that charging a commission such as the one at issue is a standard industry practice, which is not viewed as a separate tariff but rather as a business expense for access to the space to be occupied by the telephone equipment, and challenges to the practice have been uniformly unsuccessful in other jurisdictions.[96]

Second, the commission was the product of an agreement between DOCS and the telephone service provider, MCI, and it was imposed on MCI rather than the recipients.[97] The Court was not persuaded that MCI's intent to collect by passing it along to the consumers transformed it into a tax any more than passing along the cost of a private business renting property from a public entity through higher costs for its goods would transform that higher cost into a tax.[98]

Third, unlike some taxes such as sales and use taxes which can be collected from third parties should the taxpayer default, DOCS could not collect this commission from the consumer if MCI did not pay it.[99]

Fourth, the consumers were not compelled to use the telephone service and thus were not taxed.[100] Fifth, while DOCS was not obligated to seek a commission for access to DOCS facilities, it likewise was not constitutionally obligated to offer access to its facilities for free, and thus while DOCS decision was questionable for the reasons the Court noted at the outset, the commissions did not constitute a tax.[101] While the Court noted that the dissent was correct in stating that "expense associated with government regulation can be transformed into a tax if it substantially exceeds the costs incurred in administering the program or the government benefits received,"[102] the

94. *Id.* at 484, 921 N.E.2d at 150, 893 N.Y.S.2d at 458.

95. *Id.*; *see, e.g.*, Watergate II Apartments v. Buffalo Sewer Auth., 46 N.Y.2d 52, 56, 385 N.E.2d 560, 562, 412 N.Y.S.2d 821, 823 (1978) (alleging that certain sewer charges were a tax beyond the authority of the agency to impose).

96. *Walton II*, 13 N.Y.3d at 486 & n.7, 921 N.E.2d at 151-52 & n.7, 893 N.Y.S.2d at 459-60 & n.7.

97. *Id.* at 487, 921 N.E.2d at 152, 893 N.Y.S.2d at 460.

98. *Id.* at 489 & n.9, 921 N.E.2d at 153 & n.9, 893 N.Y.S.2d at 460 & n.9.

99. *Id.* at 487, 921 N.E.2d at 153, 893 N.Y.S.2d at 460.

100. *Id.* at 489, 921 N.E.2d at 153, 893 N.Y.S.2d at 461.

101. *Walton II*, 13 N.Y.3d at 489, 921 N.E.2d at 153, 893 N.Y.S.2d at 461.

102. *Id.* at 489 n.9, 921 N.E.2d at 153 n.9, 893 N.Y.S.2d at 460 n.9.

analysis was not applicable because DOCS was not administering a government telephone service, nor was it regulating the telephone service.[103]

Finally, even it were to be viewed as a tax, petitioners had failed to protest at the time of payment and failure to do so was not excusable under court precedent.[104]

The Court disposed of the second issue, whether the commission constituted an unlawful government taking, rather swiftly. Petitioners claimed that DOCS took their money in violation of article I, section 7(a) of the State Constitution which provides that "[p]rivate property shall not be taken for public use without just compensation."[105] The Court concluded that no government taking was involved because the telephone service was voluntary—the inmates and the call recipients were not acting under a compulsion; and in return for the fee, they were receiving telephone services.[106]

The third issue was whether the inmate calling plan impaired the rights of the inmate, and by extension, the rights of the inmates' families to free speech and association.[107] Noting that the call recipients must meet the same standard as an inmate because of the necessary restriction on the inmates' rights imposed by incarceration, the Court concluded that petitioners failed to show that "DOCS commission was so high that it substantially impaired the limited right of inmates to contact and associate with family members or legal services providers and that the commission bore no reasonable relationship to legitimate penological aims."[108] The Court described the law as clear regarding the limitations on inmates' communications with the outside world.[109] While they have the right to communicate, they do not have a constitutional right to a specific means of communication—such as a telephone—nor a right to a low cost calling plan.[110] The Court opined that in light of the alternative means of communication through the

103. *Id.*

104. *Id*. at 489, 921 N.E.2d at 153-54, 893 N.Y.S.2d at 461-62.

105. *Id.* at 489, 921 N.E.2d at 154, 893 N.Y.S.2d at 462.

106. *Walton II*, 13 N.Y.3d at 489-90, 921 N.E.2d at 154, 893 N.Y.S.2d at 462.

107. *Id.* at 490, 921 N.E.2d at 154, 893 N.Y.S.2d at 462.

108. *Id.* at 491, 921 N.E.2d at 155, 893 N.Y.S.2d at 463.

109. *Id.*

110. *Id.* at 491-92, 921 N.E.2d at 155-56, 893 N.Y.S.2d at 463-64. The court noted that another court in dicta stated that a right might exist but that "a rate-based challenge to an inmate calling system would be cognizable only where 'the rate charged is so exorbitant as to deprive prisoners of phone access altogether.'" *Walton II*, 13 N.Y.3d at 491-92, 921 N.E.2d at 155-56, 893 N.Y.S.2d at 463-64 (citing Johnson v. California, 207 F.3d 650, 656 (9th Cir. 2000)).

mails, including postage free mailings funded by the DOCS commission, and visitation, the rights of the inmates to communicate were not imperiled.[111]

Finally, the Court dismissed the equal protection argument that petitioners' rights had been violated because they were treated differently from other New Yorkers by virtue of having to fund the prison system through the payment of the DOCS commission for receipt of collect calls.[112] The Court pointed out that there was no other class comparable to recipients because all inmate collect calls were treated the same way.[113] The Court rejected a comparison with recipients of non-inmate collect calls as imperfect because DOCS does not oversee those calls, and, moreover, security reasons might increase the cost of inmate calls as compared with non-inmate collect calls although its examination of costs indicated that they were roughly equivalent.[114]

The Court concluded that its decision upholding the dismissal of petitioners' constitutional claims should not be interpreted as an endorsement of the DOCS commission plan, which it noted had been rejected by the executive and legislative branches as unsound public policy.[115]

In her concurrence, Justice Read voted to uphold the decision to dismiss on the alternate grounds provided by the appellate division, the filed rate doctrine which limits the ability of a customer to challenge a utility rate other than by asserting a claim against the regulatory agency which approved the rate.[116] The "filed rate" doctrine is designed to ensure the "primary jurisdiction of the regulatory agency over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant."[117] Thus, any claims regarding the reasonableness of the rate should have been raised in an article 78 proceeding against PSC, not collaterally in the action against DOCS.[118] Justice Read concluded that the failure of PSC to approve the DOCS portion of the rate did not undermine the filed rate doctrine because MCI was required to file the total rate which became binding.[119]

111. *Id.* at 492, 921 N.E.2d at 156, 893 N.Y.S.2d at 464.
112. *Walton II*, 13 N.Y.3d at 493, 921 N.E.2d at 156, 893 N.Y.S.2d at 464.
113. *Id.*
114. *Id.* at 493-94, 921 N.E.2d at 157, 893 N.Y.S.2d at 465.
115. *Id.* at 494, 921 N.E.2d at 157, 893 N.Y.S.2d at 465.
116. *Id.* at 494, 921 N.E.2d at 157, 893 N.Y.S.2d at 465 (Read, J., concurring).
117. *Walton II*, 13 N.Y.3d at 494, 921 N.E.2d at 157-58, 893 N.Y.S.2d at 465-66.
118. *Id.* at 497, 921 N.E.2d at 159, 893 N.Y.S.2d at 467.
119. *Id.* at 495-96, 921 N.E.2d at 158, 893 N.Y.S.2d at 466.

Justice Smith dissented both as to the application of the filed rate doctrine and as to the determination that there was no basis for a constitutional challenge to the DOCS commission.[120]

C. Freedom of Information Law

New York's Freedom of Information Law operates on a presumption of access.[121] All an agency's records are reviewable unless the agency can establish that the documents fall within one or more of the exemptions set out in the statute.[122]

Documents may fall within eleven exemptions.[123] The burden is on the person seeking the exemption.[124] As demonstrated by a recent decision of the Court of Appeals, this burden involves making clear the exemption sought.[125] The decision also shows that the conduct of the agency seeking an exemption is taken very seriously by the courts.[126] During major litigation over the Empire State Development Corporation's (ESDC) exercise of eminent domain to facilitate

120. *Id.* at 497-502, 921 N.E.2d at 160-63, 893 N.Y.S.2d at 468-71 (Smith, J., dissenting).

121. *See* BORCHERS & MARKELL, *supra* note 39, § 5.9.

122. N.Y. PUB. OFF. LAW § 87(2) (McKinney Supp. 2011).

123. These are documents which:

> (a) are specifically exempted from disclosure by state or federal statute; (b) if disclosure would result in an unwarranted invasion of personal privacy . . . ; (c) if disclosed, would impair present or imminent contract awards or collective bargaining negotiations; (d) are trade secrets or are submitted to an agency by a commercial enterprise or derived from information obtained from a commercial enterprise and which is disclosed would cause substantial injury to the competitive position of the enterprise; (e) are compiled for law enforcement purposes and would: (i) interfere with law enforcement investigations or judicial proceedings; (ii) deprive a person of a right to a fair trial or impartial adjudication; (iii) identify a confidential source or disclose confidential information relating to a criminal investigation; or (iv) reveal criminal investigative techniques or procedures, except routine techniques and procedures; (f) is disclosed could endanger the life or safety of any person; (g) are inter-agency or intra-agency materials which are not: (i) statistical or factual tabulations or data; (ii) instructions to staff that affect the public; (iii) final agency policy or determinations, or external audits; . . . ; h) are examination questions or answers which are requested prior to the final administration of such questions; (i) if disclosed, would jeopardize an agency's capacity to guarantee the security of its information technology assets, such assets encompassing both electronic information systems and infrastructures; or (j) are photographs, microphotographs, videotape or other recorded images prepared [pursuant to the vehicle and traffic law].

N.Y. PUB. OFF. LAW § 87(2)(a-j).

124. N.Y. PUB. OFF. LAW § 89(4)(b) (McKinney Supp. 2011).

125. *See* W. Harlem Bus. Grp. v. Empire State Dev. Corp., 13 N.Y.3d 882, 921 N.E.2d 592, 893 N.Y.S.2d 825 (2009).

126. *Id.*

Columbia University's proposed development of a new campus in West Harlem in New York City,[127] ESDC responded to several requests for documents under the Freedom of Information Law (FOIL) by businesses allegedly affected by the eminent domain procedure. In *West Harlem Business Group v. Empire State Development Corp*., the Court of Appeals evaluated that response.[128] Although the ESDC had apparently satisfied several of the requests made by the businesses, it declined to turn over certain documents relating to a June 2004 contract between itself and Columbia University in West Harlem asserting that the disclosure of the documents would, in the conclusory language of the statute, "'impair present or imminent contract awards or collective bargaining negotiations.'"[129] In an internal administrative appeal, ESDC upheld this determination.[130] Petitioner businesses then commenced a timely article 78 proceeding against ESDC.[131]

The FOIL litigation revealed a peculiarly unresponsive defendant. ESDC moved to dismiss the petition claiming that it had complied with all FOIL requests and asserted grounds for non-disclosure different from those adopted at the agency level.[132] It submitted to the trial court "a privilege log," classifying the undisclosed documents as "exempt either as intra- or inter-agency material or privileged attorney-client communications."[133] When the trial court ordered an in camera review of the documents, ESDC turned over the documents, but it did not categorize the documents by the applicable exemption; moreover, it acknowledged to the court that the "privilege log" did not address all the documents sought.[134] Consequently, it was left to the trial court to sort through the documents.[135] The trial court created its own log, classifying the documents into sections I through V, and ordered that all

127. *In re* Kaur v. N.Y. State Urban Dev. Corp., 72 A.D.3d 1, 6, 892 N.Y.S.2d 8, 13 (1st Dep't 2009), *rev'd*, 15 N.Y.3d 235, 933 N.E.2d 721, 907 N.Y.S.2d 122 (2010). FOIL requests are often a useful tool during litigation. *See, e.g.*, BORCHERS & MARKELL, *supra* note 39, § 5.10; *In re* Chatham Towers, Inc. v. N.Y. City Police Dep't, No. 111875/08, 2009 NY Slip Op. 51792(U), at 1 (Sup. Ct. N.Y. Cnty. 2009); *In re* Leyton v. City Univ. of N.Y., No. 112491/2007, 2009 NY Slip Op. 52089(U), at 1 (Sup. Ct. N.Y. Cnty. 2009); Herbin v. Henrich, No. 15712/2007, 2009 NY Slip Op. 51531(U), at 3 (Sup. Ct. Queens Cnty. 2009).

128. 13 N.Y.3d 882, 884, 921 N.E.2d 592, 593, 893 N.Y.S.2d 825, 827 (2009).

129. *Id.* at 883, 921 N.E.2d at 593, 893 N.Y.S.2d at 826 (citation omitted).

130. *Id.*

131. *Id.*

132. *Id.* at 884, 921 N.E.2d at 593, 893 N.Y.S.2d at 826.

133. *West Harlem Bus. Grp.*, 13 N.Y.3d at 884, 921 N.E.2d at 593, 893 N.Y.S.2d at 826.

134. *Id.*

135. *See id.*

documents be disclosed.[136] The appellate division affirmed.[137] At issue before the Court of Appeals were documents that ESDC argued were "'not intra or inter-agency and/or were disclosed to unidentified persons or non-agency individuals.'"[138] Although *West Harlem Business Group* was a memorandum decision, it is worth noting because the tenor of the Court of Appeals decision is its displeasure over ESDC's handling of the matter and its belief that agencies must comply with FOIL in a diligent manner rather than paying it lip service.

The Court begins by stating that the litigation would have been entirely avoidable if ESDC "had . . . in the first instance complied with the dictates of FOIL."[139] The Court then catalogued a list of ESDC's failings: 1) the agency's "parroting" the statutory exemption rather than providing real reasons for the exemption's applicability; 2) the agency's flip-flop between which exemption was applicable and the demonstrable superficiality of the agency's determination; 3) the agency's failure to provide specific basis for non-disclosure;[140] 4) the agency's failure to provide the trial court with an orderly presentation of documents and accompanying explanations for non-disclosure; and 5) the agency's burdening the trial court with the need to bring a semblance of order to the analysis of the documents.[141]

The Court concluded that the ESDC did not meet the burden of establishing exemptions for the undisclosed documents and found that its other arguments to withhold the documents at issue lacked merit.[142] Clearly, the decision sends a message to government agencies not to take FOIL lightly.

D. Agency Interpretation of the Law

It is axiomatic that an agency is entitled to deference in its interpretation of the laws it is charged with regulating.[143] However, if the law has a plain meaning that does not require a specialized expertise to interpret, the courts are not bound by an agency's interpretation.[144] The Department of Correctional Services' (DOCS) interpretation of

136. *Id.*

137. *Id.*

138. *West Harlem Bus. Grp.*, 13 N.Y.3d at 884, 921 N.E.2d at 593, 893 N.Y.S.2d at 826 (citation omitted).

139. *Id*. at 884, 921 N.E.2d at 593, 893 N.Y.S.2d at 826.

140. *Id*. at 884-86, 921 N.E.2d at 594-95, 893 N.Y.S.2d at 827-28.

141. *Id*. at 882, 884-85, 921 N.E.2d at 592, 593-95, 893 N.Y.S.2d at 825, 826-27.

142. *Id*. at 886, 921 N.E.2d at 594, 893 N.Y.S.2d at 828.

143. BORCHERS & MARKELL, *supra* note 39, § 8.3.

144. *Id.*

provisions of article 10 of the Mental Hygiene Law governing civil commitment of sex offenders was at issue in *People ex rel. Joseph II. v. Superintendent of Southport Correctional Facility.*[145]

In 1999, Joseph II was convicted of sodomy in the first degree and attempted robbery in the second degree.[146] For these crimes he received consecutive sentences of six years and two to four years respectively.[147] Relevant sections of the Penal Law[148] required that he also be sentenced to a term of post release supervision (PST) in addition to the penal sentences.[149] The sentencing court did not add the PST.[150]

In 2001, Humberto G. received a sentence of seven years for a conviction of attempted rape in the first degree.[151] The sentencing court likewise did not add the required PST.[152] Apparently, this was a common practice at the time and DOCS routinely sought to fill the void by administratively adding the PST.[153]

Thus, in both *Humberto* and *Joseph II*, DOCS administratively added PST to the offenders' sentences.[154] "Joseph [II] completed his prison sentence in August 2006 . . . Humberto completed his prison sentence in January 2007."[155] At the completion of his sentence, each was then admitted to a psychiatric facility to serve the PST under article 9 of the Mental Hygiene Law.[156] At the time these two men were committed, the state was using article 9 to address post sentence civil commitment of sex offenders.[157] While serving the PST, each man violated its conditions—one tried to escape and the other assaulted a fellow patient.[158] Consequently, they were both returned to prison and

145. 15 N.Y.3d 126, 130, 931 N.E.2d 76, 77, 905 N.Y.S.2d 107, 108 (2010).

146. People *ex rel.* Joseph II. v. Superintendent of Southport Corr. Facility, 59 A.D.3d 921, 921, 874 N.Y.S.2d 602, 602 (3d Dep't 2009).

147. *Id.*

148. Act of June 10, 1995, ch. 3, 1995 McKinney's Sess. Laws of N.Y. 109 (codified at N.Y. PENAL LAW § 70.06 (McKinney 2009)); Act of Aug. 6, 1998, ch. 1, 1998 McKinney's Sess. Laws of N.Y. 5 (codified at N.Y. PENAL LAW § 70.45 (McKinney 2009)).

149. *Joseph II.*, 15 N.Y.3d at 130, 931 N.E.2d at 77, 905 N.Y.S.2d at 108.

150. *Id.*

151. State v. Humberto G., 65 A.D.3d 690, 691, 885 N.Y.S.2d 312, 313 (2d Dep't 2009).

152. *Joseph II.*, 15 N.Y.3d at 130, 931 N.E.2d at 78, 905 N.Y.S.2d at 109.

153. *Id.* at 130, 931 N.E.2d at 77-78, 905 N.Y.S.2d at 108-09.

154. *Id.* at 130, 931 N.E.2d at 77, 905 N.Y.S.2d at 108.

155. *Id.*, 931 N.E.2d at 78, 905 N.Y.S.2d at 109.

156. *Id.* One of the men was involuntarily committed and the other one committed himself voluntarily. *Joseph II.*, 15 N.Y.3d at 130, 931 N.E.2d at 78, 905 N.Y.S.2d at 109.

157. *Id.* at 131, 931 N.E.2d at 78, 905 N.Y.S.2d at 109. *See* Sara E. Chase, *The Sex Offender Management and Treatment Act: New York's Attempt at Keeping Sex Offenders Off the Streets . . . Will it Work?*, 2 ALB. GOV'T L. REV. 277, 279-85 (2009).

158. *Joseph II.*, 15 N.Y.3d at 130-31, 931 N.E.2d at 78, 905 N.Y.S.2d at 109.

the custody of DOCS.[159]

While both men were confined in the system, a combination of decisions by the Court of Appeals and legislative action gave rise to a basis for their subsequent attempts to obtain judicial relief from their confinement. In 2006, the Court of Appeals held in *State of N.Y. ex rel. Harkavy v. Consilvio* (*Harkavy I*) that the State could not use article 9 of the Mental Hygiene Law to address post sentence commitment of sexual offenders; rather it was required to proceed under section 402 of the Corrections Law.[160] Section 402 concerns procedures for prisoners with mental illness. Responding to the Court of Appeals decision, in 2007 the New York State Legislature enacted the Sex Offender Management and Treatment Act, article 10 of the Mental Hygiene Law, which created a new procedure for civil management of sex-offenders to address concerns about the release of "sex offenders who are completing their prison terms."[161] In 2007, the Court of Appeals decided in *State of N.Y. ex rel. Harkavy v. Consilvio*, (*Harkavy II)*,[162] that article 10 superseded section 402 of the correction law and that future proceedings concerning those prisoners addressed in *Harkavy I* should be held under article 10.[163] In 2008, the Court of Appeals held in companion cases that a PST administratively imposed by DOCS was unlawful.[164] In response to this round of Court of Appeals decisions, the legislature amended the Corrections Law and Penal Law to require prosecutors either to seek re-sentencing or to forego the PST in cases where the PST had been added unlawfully by DOCS.[165] These events converged to create an issue regarding the continued confinement of Humberto and Joseph II whose prison terms had expired prior to the enactment of article 10.[166] In both cases, prosecutors chose to forego re-sentencing applications and DOCS decided to seek a civil

159. *Id.* at 131, 931 N.E.2d at 78, 905 N.Y.S.2d at 109.

160. 7 N.Y.3d 607, 610, 613-14, 859 N.E.2d 508, 509, 512, 825 N.Y.S.2d 702, 703, 706 (2006), *superseded by*, Act of March 14, 2007, ch. 7, 2007 McKinney's Sess. Laws of N.Y. 108 (codified at N.Y. MENTAL HYG. LAW §§ 10.01-10.13, 10.15, 10.17 (McKinney 2006 & Supp. 2011)).

161. Act of March 14, 2007, ch. 7, 2007 McKinney's Sess. Laws of N.Y. 108 (codified at N.Y. MENTAL HYG. LAW §§ 10.01-10.13, 10.15, 10.17).

162. 8 N.Y.3d 645, 870 N.E.2d 128, 838 N.Y.S.2d 810 (2007).

163. *Id.* at 648, 653, 870 N.E.2d at 129, 133, 838 N.Y.S.2d at 811, 815.

164. *Joseph II.*, 15 N.Y.3d at 130, 931 N.E.2d at 78-79, 905 N.Y.S.2d at 108-09 (citing *In re* Garner v. N.Y. State Dept. of Corr. Servs., 10 N.Y.3d 358, 889 N.E.2d 467, 859 N.Y.S.2d 590 (2008); People v. Sparber, 10 N.Y.3d 457, 889 N.E.2d 459, 859 N.Y.S.2d 582 (2008)).

165. *Joseph II*, 15 N.Y.3d at 132, 931 N.E.2d at 79, 905 N.Y.S.2d at 110.

166. *Id.* at 131, 931 N.E.2d at 78, 905 N.Y.S.2d at 109.

commitment under article 10.[167]

Subsequent to the men's return to prison, DOCS, acting as an "agency with jurisdiction" pursuant to article 10 provided the Office of Mental Health (OMH) and the Attorney General with notice that each man may be a detained sex offender who was nearing his anticipated release date.[168] Article 10 defines a "detained sex offender" as:

> [A] person who is in the care, custody, control, or supervision of an agency with jurisdiction, with respect to a sex offense or designated felony, in that the person is either: [convicted of a particular sex crime, stands charged with a sex crime or is determined to be a sex offender needing civil management].[169]

Article 10 defines an "agency with jurisdiction" as an "agency which, during the period in question, would be the agency responsible for supervising or releasing such person . . . ."[170] The agency may be "the department of correctional services, the office of mental health, the office for people with developmental disabilities, and the division of parole."[171]

OMH conducted an evaluation required under article 10, and thereafter the Attorney General brought an article 10 sex offender civil management petition.[172] In Humberto's case, the trial court dismissed

167. *Id.*

168. *Id.* at 132-33, 931 N.E.2d at 79, 905 N.Y.S.2d at 110; N.Y. MENTAL HYG. LAW § 10.03(a) (McKinney Supp. 2011).

169. N.Y. MENTAL HYG. LAW § 10.03(g) ("' Detained sex offender' means a person who is in the care, custody, control, or supervision of an agency with jurisdiction, with respect to a sex offense or designated felony, in that the person is either: (1) A person who stands convicted of a sex offense as defined in subdivision (p) of this section, and is currently serving a sentence for, or subject to supervision by the division of parole, whether on parole or on post-release supervision, for such offense or for a related offense; (2) A person charged with a sex offense who has been determined to be an incapacitated person with respect to that offense and has been committed pursuant to article seven hundred thirty of the criminal procedure law, but did engage in the conduct constituting such offense; (3) A person charged with a sex offense who has been found not responsible by reason of mental disease or defect for the commission of that offense; (4) A person who stands convicted of a designated felony that was sexually motivated and committed prior to the effective date of this article; (5) A person convicted of a sex offense who is, or was at any time after September first, two thousand five, a patient in a hospital operated by the office of mental health, and who was admitted directly to such facility pursuant to article nine of this title or section four hundred two of the correction law upon release or conditional release from a correctional facility, provided that the provisions of this article shall not be deemed to shorten or lengthen the time for which such person may be held pursuant to such article or section respectively; or (6) A person who has been determined to be a sex offender requiring civil management pursuant to this article.").

170. N.Y. MENTAL HYG. LAW § 10.03(a).

171. *Id.*

172. *Joseph II.*, 15 N.Y.3d at 131, 931 N.E.2d at 78, 905 N.Y.S.2d at 109.

the petition on the grounds that he was not a "detained sex offender," under article 10 because DOCS was not an "agency with jurisdiction" in light of the fact that it had unlawfully detained Humberto pursuant to an unlawful PST.[173] Joseph II's case was procedurally more complicated; however, the trial court dismissed his writ of habeas corpus proceeding.[174] The State appealed the result in *Humberto* and Joseph II appealed the dismissal of his habeas corpus proceeding.[175] The Appellate Division, Second Department affirmed the trial court's dismissal of the civil management petition.[176] The Third Department reversed the dismissal of the habeas corpus petition holding that Joseph II was unlawfully detained by DOCS pursuant to the administrative PST and, therefore, DOCS was not an agency with jurisdiction under article 10 for purposes of initiating a civil management plan.[177]

The Court of Appeals granted leave to appeal in both cases to address the key issue of whether the men were detained sex offenders under article 10.[178] The Court concluded that both men fit within subdivision (5) of section 10.03(g) which includes as "detained sex offenders,"

> [a] person convicted of a sex offense who is, or was at any time after September first, two thousand five, a patient in a hospital operated by the office of mental health, and who was admitted directly to such facility pursuant to article nine of this title or section four hundred two of the correction law upon release or conditional release from a correctional facility . . . .[179]

The Court noted, "[b]oth were patients in a hospital operated by the Office of Mental Health after September 1, 2005, and both were admitted to the hospital under Mental Hygiene Law article 9 'directly . . . upon release or conditional release from a correctional facility.'"[180]

173. *In re* State v. Humberto G., 65 A.D.3d 690, 691, 885 N.Y.S.2d 312, 313-14 (2d Dep't 2009).

174. People *ex rel*. Joseph II. v. Superintendent of Southport Corr. Facility, 59 A.D.3d 921, 922, 874 N.Y.S.2d 602, 603 (3d Dep't 2009).

175. *Humberto G.*, 65 A.D.3d at 691, 885 N.Y.S.2d at 313; *Joseph II.*, 59 A.D.3d at 922, 874 N.Y.S.2d at 603.

176. *Humberto G.*, 65 A.D.3d at 691, 885 N.Y.S.2d at 313.

177. *Joseph II.*, 59 A.D.3d at 922, 874 N.Y.S.2d at 603.

178. People *ex rel.* Joseph II. v. Superintendent of Sourthport Corr. Facility, 2009 WL 2779151, at *1 (N.Y. 2009).

179. People *ex rel.* Joseph II. v. Superintendent of Sourthport Corr. Facility, 15 N.Y.3d 126, 133, 931 N.E.2d 76, 79, 905 N.Y.S.2d 107, 110 (2010) (quoting N.Y. MENTAL HYG. LAW §10.03(g)(5) (McKinney Supp. 2011)).

180. *Id.*

The Court also noted that the men were in the custody of DOCS at the time the article 10 proceeding was commenced and rejected the argument that the unlawful nature of the PST vitiated the custody for purposes of article 10.[181] The Court acknowledged that while in certain instances it would be appropriate to distinguish between lawful and unlawful custody, such was not the case before it because article 10 applies to all detained individuals, distinguishing them generally, as the Court had done in *Harkavy I,* from individuals with mental illness who are not confined.[182] The Court further foreclosed an argument based on the legality of the custody by observing that Joseph and Humberto were attempting to have it both ways.[183] "If Joseph and Humberto had been involved in the *Harkavy I* litigation, they would likely have argued that they were persons 'undergoing a sentence of imprisonment'" to secure treatment under section 402 of the corrections law rather than article 9 of the mental hygiene law and now that article 10 governs them, they are attempting to be covered by article 9, finding the conditions of article 10 less desirable than article 9.[184] The Court did not decide whether article 10 contained any constitutional infirmities; rather it concluded that it could be applied to prisoners detained on a procedural error just as it could be assumed for purposes of the case, that it applied to validly detained prisoners.[185]

Judge Ciparick dissented, disagreeing with the majority's conclusion that the status of the prisoners' custody was irrelevant for purposes of determining whether an individual is a "detained sexual offender."[186] The judge reasoned that while *Harkavy I* and *Harkavy II* focused on the proper procedures for transferring mentally ill prisoners from a correctional facility to a mental hygiene facility, neither contemplated "whether the DOCS detention was or could be illegal."[187] And she observed that it was only later in 2008, that the Court determined that an administratively imposed PST was a nullity.[188] Hence, she concluded that "[a]n invalid term of PRS and a subsequent violation should not be permitted to serve as the basis for further proceedings under article 10, especially because such proceedings may

181. *Id.*, 931 N.E.2d at 79-80, 905 N.Y.S.2d at 110-11.
182. *Id.*, 931 N.E.2d at 80, 905 N.Y.S.2d at 111.
183. *Id.* at 134, 931 N.E.2d at 80, 905 N.Y.S.2d at 111.
184. *Joseph II.*, 15 N.Y.3d at 134, 931 N.E.2d at 80, 905 N.Y.S.2d at 111.
185. *Id.* at 135, 931 N.E.2d at 81, 905 N.Y.S.2d at 112.
186. *Id.* at 136, 931 N.E.2d at 81, 905 N.Y.S.2d at 112 (Ciparick, J., dissenting).
187. *Id.* at 137, 931 N.E.2d at 82, 905 N.Y.S.2d at 113.
188. *Id.*, 931 N.E.2d at 83, 905 N.Y.S.2d at 114.

result in a significant curtailment of liberty."[189] Justice Ciparick was particularly concerned that treating DOCS illegal action as irrelevant would serve to encourage and reward such conduct.[190]

E. Writ of Prohibition

The administrative remedy in the nature of a writ of prohibition under article 78 of the Civil Practice Law and Rules (CPLR) is an exception to the administrative doctrine that a party must exhaust any available administrative remedies before seeking relief from the court.[191] The exceptions to the exhaustion of administrative remedies are often difficult to distinguish.[192] A writ of prohibition is generally only available when "there is a clear legal right, and only when an officer acts without jurisdiction or in excess of powers in a proceeding over which there is jurisdiction 'in such a manner as to implicate the legality of the entire proceeding.'"[193] Normally, a party must await final agency determination.[194]

The difficulties associated with determining which exception to exhaustion is applicable and whether it should be applied are illustrated in the Court of Appeals most recent decision in *In re Chasm Hydro, Inc. v. New York State Department of Environmental Conservation.*[195] The Court of Appeals concluded that the normal rule of exhaustion of administrative remedies applied. Petitioners owned and operated a hydroelectric dam in Franklin County.[196] Hydroelectric dams are subject to the licensing authority of the Federal Energy Regulatory Commission (FERC) under the statutory authority of the Federal Power Act.[197] FERC has the ability to exempt "projects from the Act's licensing procedures."[198] States do exercise certain authority over such dams under the Clean Water Act, which requires that an applicant for a

189. *Joseph II.*, 15 N.Y.3d at 138, 931 N.E.2d at 83, 905 N.Y.S.2d at 114.

190. *Id.*

191. *See* BORCHERS & MARKELL, *supra* note 39, § 7.6.

192. *Id.* § 7.9.

193. *In re* Doe v. Axelrod, 71 N.Y.2d 484, 490, 522 N.E.2d 444, 447, 527 N.Y.S.2d 368, 371 (1988) (writ was not available to challenge an evidentiary ruling during the administrative proceeding); *see also In re* Rush v. Mordue, 68 N.Y.2d 348, 355, 502 N.E.2d 170, 174, 509 N.Y.S.2d 493, 497 (1986) (writ was available to assert immunity from prosecution); *In re* Vinluan v. Doyle, 60 A.D.3d 237, 244-45, 873 N.Y.S.2d 72, 78 (2d Dep't 2009) (writ available against the prosecution of immigrant nurses and their attorney in violation of their constitutional rights against servitude and free speech).

194. *See* BORCHERS & MARKELL, *supra* note 39, § 7.7.

195. 14 N.Y.3d 27, 923 N.E.2d 1137, 896 N.Y.S.2d 749 (2010).

196. *Id*. at 29, 923 N.E.2d at 1138, 896 N.Y.S.2d at 749.

197. *Id.*

198. *Id.*

license which results in the discharge into navigable waters must provide state certification "that the activities being licensed will not violate the state's water quality standards."[199] Petitioner had received such certification in 1980 prior to operating the dam.[200] The certification was subject to certain conditions, namely "that the dam receive DEC approval for any future construction, abide by applicable state law, and conduct any draining and refilling for repairs or maintenance gradually to avoid damage downstream."[201] In light of this certification, FERC issued petitioner an exemption from certain FPA requirements conditioned upon petitioner's compliance with any state certificate conditions.[202] Petitioners subsequently advised FERC and DEC that it intended to drain and clean the pond and repair the dam.[203] DEC issued the necessary certificates and permit for cleaning.[204] The water quality certificate was conditioned upon limitations on the amount of sediment removed (200 cubic yards), and the methods employed to remove it and "minimize downstream turbidity and sediment accumulation."[205] The permit specifically prohibited repairs to the dam.[206] FERC issued a permit authorizing dam repairs "with 'the understanding that'" petitioner meet the requirements of the DEC permit.[207] Petitioners subsequently opened the dam drain gate and "allegedly discharged approximately 4,000 cubic feet of sediment."[208] DEC thereupon commenced enforcement proceedings alleging violations of various provisions of the state's environmental protection law for "discharging sediment, sand, and paint into the river,"[209] "disturbing and removing material from the riverbed,"[210] "depositing sediment in the river without a stream disturbance permit,"[211] repairing

199. *Id.* at 29-30, 923 N.E.2d at 1138, 896 N.Y.S.2d at 749.

200. *In re Chasm Hydro, Inc.*, 14 N.Y.3d at 30, 923 N.E.2d at 1138, 896 N.Y.S.2d at 750.

201. *Id.*, 923 N.E.2d at 1138, 896 N.Y.S.2d at 750.

202. *Id.*

203. *Id.*

204. *Id.*

205. *In re Chasm Hydro, Inc.*, 14 N.Y.3d at 30, 923 N.E.2d at 1138-39, 896 N.Y.S.2d at 750.

206. *Id.*, 923 N.E.2d at 1139, 896 N.Y.S.2d at 750.

207. *Id.*

208. *Id.*

209. *Id.* at 31, 923 N.E.2d at 1139, 896 N.Y.S.2d at 750 (citing N.Y. ENVTL. CONSERV. LAW § 17-0501 (McKinney 2006); 6 N.Y. COMP. CODES R. & REGS. tit. 6, § 703.2 (2008)).

210. *In re Chasm Hydro, Inc.*, 14 N.Y.3d at 31, 923 N.E.2d at 1139, 896 N.Y.S.2d at 750 (citing N.Y. ENVTL. CONSERV. LAW § 15-0501(1) (McKinney 2006)).

211. *Id.* (citing N.Y. ENVTL. CONSERV. LAW § 15-0501(1)).

the dam without a permit,[212] and discharging "substances injurious to fish."[213]

Petitioners commenced an article 78 proceeding to enjoin enforcement claiming that DEC was acting outside its jurisdiction.[214] The supreme court dismissed the petition on the grounds that the issue was not "'ripe for review.'"[215] The Appellate Division, Third Department affirmed the holding that DEC was acting within its jurisdiction because, although FPA and FERC largely preempt state law regarding hydroelectric facilities, the state's authority to determine whether a project violates its own water quality standards is not preempted.[216]

The Court of Appeals granted leave to appeal.[217] It affirmed the dismissal of the article 78 proceeding, but on different grounds from ripeness and preemption.[218] The Court concluded that petitioners had not met the difficult burden of demonstrating that they have "a clear legal right to relief or that prohibition would provide a 'more complete and efficacious remedy' than the administrative proceeding and resulting judicial review."[219] The Court concluded that the administrative process should be used to determine the scope of DEC's authority in the first instance.[220] This conclusion is also consistent with the administrative principle that the court should have the benefit of the agency's interpretation of its statutes and regulations which require specific expertise.[221]

> The Court of Appeals had another occasion to examine the issue of agency interpretation of its governing statutes in *In re Bikman v. New York City Loft Board*.[222] *Bikman* involved an article 78 proceeding challenging the determination of the New York City Loft Board, an administrative body,[223] that petitioner estate was not entitled to be

212. *Id.* (citing N.Y. ENVTL. CONSERV. LAW § 15-0503 (McKinney 2006)).

213. *Id.* (citing N.Y. ENVTL. CONSERV. LAW § 11-0503 (McKinney 2005)).

214. *Id*.

215. *In re Chasm Hydro, Inc.*, 14 N.Y.3d at 31, 923 N.E.2d at 1139, 896 N.Y.S.2d at 750.

216. *Id.* (citing *In re* Chasm Hydro, Inc. v. N.Y. State Dep't of Envtl. Conservation, 58 A.D.3d 1100, 1101, 872 N.Y.S.2d 235, 236 (3d Dep't 2009)).

217. *In re* Chasm Hydro, Inc. v. N.Y. State Dep't of Envtl. Conservation, 2009 WL 1298960, at *1 (N.Y. 2009).

218. *In re Chasm Hydro, Inc.*, 14 N.Y.3d at 31, 923 N.E.2d at 1139, 896 N.Y.S.2d at 750.

219. *Id.*, 923 N.E.2d at 1139, 896 N.Y.S.2d at 751 (citation omitted).

220. *Id.* at 32, 923 N.E.2d at 1139-40, 896 N.Y.S.2d at 751.

221. *See* BORCHERS & MARKELL, *supra* note 39, § 7.9.

222. 14 N.Y.3d 377, 928 N.E.2d 393, 902 N.Y.S.2d 11 (2010).

223. *Id.* at 380 n.2, 928 N.E.2d at 395 n.2, 902 N.Y.S.2d at 13 n.2.

> compensated for improvements that the decedent had made to her loft prior to her death.[224] The case turned on the interpretation of section 286(6) of the Multiple Dwelling Law.[225] Section 286(6) provides that: Notwithstanding any provision of law to the contrary, a residential tenant qualified for protection pursuant to this chapter may sell any improvements to the unit made or purchased by him to an incoming tenant provided, however, that the tenant shall first offer the improvements to the owner for an amount equal to their fair market value.[226]

Decedent became a tenant of the loft space in 1974.[227] She was a protected tenant under article 7-C of the Multiple Dwelling Law.[228] She thereafter made improvements including a kitchen and bathroom valued at approximately $40,000.[229] Respondent Broadway Associates acquired the building in which the loft was located in 1981.[230] When respondent learned of decedent's death in 1999, it sought and obtained in 2001 a civil judgment of "possession and use and occupancy."[231] It also applied to the New York City Loft Board ("Loft Board") for an order of abandonment pursuant to section 2-10(f) of the Rules of the City of New York (RCNY).[232] Section 2-10(f)(ii) of RCNY permits the owner to seek an order of abandonment when possession of the loft space is relinquished by the death of a tenant when there is no family member who would have succession rights.[233] An administrative law judge (ALJ) in the New York City Office of Administrative Trials and Hearings presided over a hearing on the matter.[234] Petitioner estate opposed the order of abandonment on the grounds that an order of abandonment could only be granted after the estate had been compensated for the $40,000 in improvements the loft.[235] The ALJ recommended the granting of the abandonment order on the grounds

224. *Id.* at 379, 928 N.E.2d at 394, 902 N.Y.S.2d at 12.

225. *Id.* at 381, 928 N.E.2d at 395, 902 N.Y.S.2d at 13.

226. N.Y. MULT. DWELL. LAW § 286(6) (McKinney Supp. 2011).

227. *In re Bikman*, 14 N.Y.3d at 379, 928 N.E.2d at 394, 902 N.Y.S.2d at 12.

228. N.Y. MULT. DWELL. LAW § 280 (McKinney Supp. 2011). This law was enacted at a time when various commercial and business loft spaces were being rapidly converted to residential use. It was intended to legalize loft buildings and protect tenants. *In re Bikman*, 14 N.Y.3d at 379 n.1, 928 N.E.2d at 394 n.1, 902 N.Y.S.2d at 12 n.1.

229. *In re Bikman*, 14 N.Y.3d at 379, 928 N.E.2d at 394, 902 N.Y.S.2d at 12.

230. *Id.*

231. *Id.*

232. *Id.*

233. RULES OF THE CITY OF N.Y., tit. 29, § 2-10(f)(ii) (2008), *available at* http://24.97.137.100/nyc/rcny/Title29_2-10.asp.

234. *In re Bikman*, 14 N.Y.3d at 379, 928 N.E.2d at 394, 902 N.Y.S.2d at 12.

235. *Id.*

that right to sell the improvements to the loft under section 286(6) of the Multiple Dwelling Law was limited to the protected tenant.[236] The Loft Board adopted the ALJ's recommendation and denied the "petitioner's request for reimbursement of the value of the improvements."[237]

Petitioner commenced an article 78 proceeding after her request for reconsideration was denied.[238] The supreme court annulled the Loft Board's determination on the grounds that the case was governed by the decision in *In re Moskowitz v. Jorden.*[239] *Moskowitz* held that the estate of a loft tenant was entitled to compensation for tenant's improvements under section 286(6) of the multiple dwelling law and that the surrogate was not required to accord deference to a determination of the Loft Board to the contrary because "the administrative determination turned solely on statutory interpretation, not specialized knowledge and understanding of operational practices or an evaluation of factual data and inferences to be drawn therefrom."[240] The appellate division affirmed the decision of the supreme court stating that the determination of the Loft Board "was affected by an error of law."[241] The Court of Appeals granted leave to appeal and affirmed.[242] The Court agreed with the lower courts' interpretation of section 286(6) of the Multiple Dwelling Law and concluded that to decide otherwise would be contrary to the intent of the statute and would unfairly "deprive the estate of the value of property which would have enured to the benefit of the tenant, had the tenant lived."[243]

F. Agency Discretion

Hirschfeld v. Teller[244] raised an interesting question of the right of Mental Hygiene Legal Service (MHLS) to provide legal services to patients who had been discharged from "facilities licensed by the Office of Mental Health"[245] to nursing homes which are not licensed by OMH

236. *Id.* at 379-80, 928 N.E.2d at 394, 902 N.Y.S.2d at 12.

237. *Id.* at 381, 928 N.E.2d at 394, 902 N.Y.S.2d at 12.

238. *Id.* at 380, 928 N.E.2d at 395, 902 N.Y.S.2d at 13.

239. *In re Bikman*, 14 N.Y.3d at 380, 928 N.E.2d at 395, 902 N.Y.S.2d at 13 (citing 27 A.D.3d 305, 812 N.Y.S.2d 48 (1st Dep't 2006), *lv. dismissed*, 7 N.Y.3d 783, 820 N.Y.S.2d 545, 853 N.E.2d 1113 (2006)).

240. *In re Moskowitz*, 27 A.D.3d at 306, 812 N.Y.S.2d at 49 (citation omitted).

241. *In re* Bikman v. New York City Loft Bd., 57 A.D.3d 448, 449 869 N.Y.S.2d 507, 508 (1st Dep't 2008).

242. *In re Bikman*, 14 N.Y.3d at 379, 928 N.E.2d at 394, 902 N.Y.S.2d at 12.

243. *Id.* at 381, 928 N.E.2d at 395, 902 N.Y.S.2d at 13.

244. 50 A.D.3d 855, 856 N.Y.S.2d 209 (2d Dep't 2008), *aff'd*, 14 N.Y.3d 344, 927 N.E.2d 1042, 901 N.Y.S.2d 558 (2010).

245. *Id.* at 347, 927 N.E.2d at 1042, 901 N.Y.S.2d at 558.

but were operating discrete units for such patients.[246] The patients were receiving "psychiatric and psychosocial rehabilitative services."[247] MHLS, which is required by law to provide legal services to certain individuals receiving residential or other services provided by facilities operated or licensed by OMH,[248] sought access to these patients on the grounds that these nursing homes should have been licensed by OMH for the category of patients at issue. It sued several nursing homes located downstate to obtain access.[249] The supreme court dismissed the complaint finding that because the nursing homes were not licensed by OMH, MHLS did not have a right of access to its patients with mental illness.[250] The Appellate Division, Second Department remitted the matter to require the trial court to enter a judgment "declaring that MHLS does not have the right of access to the mentally ill residents."[251] The Court of Appeals affirmed.[252] Guided by MHLS's statutory mandate that limits its relevant jurisdiction to facilities licensed by OMH, the Court concluded that it could not have access to nursing homes which do not have such a license.[253] Moreover, in response to MHLS's argument that the nature of the activities provided at the nursing home to individuals with mental illness dictate that it be

246. *Id.*, 927 N.E.2d at 1043, 901 N.Y.S.2d at 559.

247. *Id.*, 927 N.E.2d at 1042, 901 N.Y.S.2d at 558.

248. The mandate of MHLS is found in section 47.01 of the Mental Hygiene Law which provides that:

> The service shall provide legal assistance to patients or residents of a facility as defined in section 1.03 of [t]he mental hygiene law], or any other place or facility which is required to have an operating certificate pursuant to article sixteen or thirty-one of this chapter, and to persons alleged to be in need of care and treatment in such facilities or places, and to persons entitled to such legal assistance as provided by article ten of this chapter.

N.Y. MENTAL HYG. LAW § 47.01(a) (McKinney Supp. 2011).

> [MHLS] is responsible for protecting and advocating for the rights of people who reside in, or are alleged to be in need of care and treatment in, facilities licensed to provide services for mental illness, developmental disabilities or chemical dependence, and to advocate for individuals wherever they may reside, who may otherwise become subject to substituted decision making, either by virtue of becoming a ward of the court, by guardianship proceeding, or by virtue of being made subject to other specific substitute decision making authority, or involuntary outpatient treatment, allowed and put in place by the laws of New York State.

History and Purpose, MENTAL HYG. LEGAL SERV., http://www.courts.state.ny.us/ad4/mhls/mhls_default.htm (last visited Mar. 4, 2011).

249. *Hirschfeld*, 14 N.Y.3d at 347, 927 N.E.2d at 1043, 901 N.Y.S.2d at 559.

250. *Id.* at 348, 927 N.E.2d at 1043, 901 N.Y.S.2d at 559 (citing Hirschfeld v. Teller, 2006 WL 6553722, at *5 (Sup. Ct. Nassau Cnty. 2006)).

251. Hirschfeld v. Teller, 50 A.D.3d 855, 855, 855 N.Y.S.2d 209, 210 (2d Dep't 2008).

252. *Hirschfeld*, 14 N.Y.3d at 349, 927 N.E.2d at 1044, 901 N.Y.S.2d at 560.

253. *Id.* at 348-49, 927 N.E.2d at 1043-44, 901 N.Y.S.2d at 559-60.

licensed, the Court observed that it is within OMH's discretion and expertise to make that very determination.[254] Since OMH had decided not to license such facilities, MHLS did not have access.[255] Finally, without passing on OMH's decision, the court noted a CPLR article 78 proceeding was the proper vehicle for challenging the OMH licensure decision.[256]

G. Government Liability

Brandy B. v. Eden Central School District involved two issues: 1) whether the claim that a school's negligent supervision when one student injured another student satisfied New York's two-part test to establish the school's liability; and 2) whether Erie County Child and Family Services had a duty to warn the offending student's foster parents of his need for close supervision.[257]

It is well established that schools have "a duty to adequately supervise the students in their charge and they will be held liable for foreseeable injuries proximately related to the absence of adequate supervision."[258] The duty arises out of the fact that the school has assumed custody of the students in the parents' or guardians' absence.[259] Such duty is described as the obligation to "exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances."[260] To determine whether the school breached the duty of adequate supervision in the context of injuries caused to one student by another, the party seeking relief must establish "that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused injury; that is, that the third-party acts could reasonably have been anticipated"[261] and that such negligence "was the proximate cause of the injuries sustained."[262]

The Court of Appeals held in *Brandy B.* that, as a matter of law, plaintiff had failed to satisfy this two part test against the school.[263] As to the county agency's duty to warn, the Court held that plaintiff had

254. *Id.* at 349, 927 N.E.2d at 1044, 901 N.Y.S.2d at 560.
255. *Id.*
256. *Id.*
257. 15 N.Y.3d 297, 300, 934 N.E.2d 304, 305, 907 N.Y.S.2d 735, 736 (2010).
258. Mirand v. City of N.Y., 84 N.Y.2d 44, 49, 637 N.E.2d 263, 266, 614 N.Y.S.2d 372, 375 (1994).
259. *Id.*
260. *Id.*
261. *Id.*
262. *Id.* at 50, 637 N.E.2d at 266, 614 N.Y.S.2d at 375.
263. *See Brandy B.*, 15 N.Y.3d at 303, 934 N.E.2d at 307, 907 N.Y.S.2d at 738.

failed to state a "prima facie case" of the agency's negligence.[264]

The Court recited a disturbing history of mental illness and the remarkable improvement of the alleged offending student, an eleven-year-old boy.[265] He had been removed from his home at the age of three because of parental neglect and possible physical abuse.[266] Thereafter the boy lived in foster care and then with his father. The child was subsequently hospitalized because he displayed severe aggressive behavior, including "'verbal aggression, aggression towards himself and others, threats with weapons, fire setting, hyperactivity, impulsivity, auditory hallucinations, history of stealing, temper tantrums, poor peer relations, academic problems, and history of suicidal injurious ideations.'"[267] This record of behavior seems to have been the low point of his life. He showed no signs of the aggressive behaviors while in the facility and thereafter he stepped down in the level of treatment until he was placed in foster care and enrolled in the Eden Central Elementary School.[268] The psychiatric facility recommended "'a lower level of care in the form of community residence.'"[269] Thereafter, the community residence reported that he was doing well while in its care.[270] He finally was transferred to the elementary school involved in case.[271] The Court observed that the child's "stated history predates his hospitalization."[272] An undated progress report from the school during the 2002-2003 academic year indicated him to be polite and friendly, but still needing social and psychological supports with individual and group counseling.[273] In March 2003, there was some interaction between the child and a five-year-old girl who sat with him on the school bus.[274] The girl told her mother that the child had called her his girlfriend, "exposed himself to her," and "forced her to touch him."[275] The girl's mother asked the school bus driver to not permit them to sit together on the bus and to call her to discuss the situation.[276] She then commenced a negligence

264. *Id.* at 300, 934 N.E.2d at 305, 907 N.Y.S.2d at 736.
265. *Id.* at 300-02, 934 N.E.2d at 305-06, 907 N.Y.S.2d at 737.
266. *Id.* at 300, 934 N.E.2d at 305, 907 N.Y.S.2d at 736.
267. *Id.* (quoting Crestwood Children's Center's evaluation of the boy).
268. *Brandy B.*, 15 N.Y.3d at 300-01, 934 N.E.2d at 305, 907 N.Y.2d at 736.
269. *Id.* at 300, 934 N.E.2d at 305, 907 N.Y.2d at 736.
270. *Id.* at 301, 934 N.E.2d at 305, 907 N.Y.S.2d at 736.
271. *Id.*
272. *Id.*
273. *Brandy B.*, 15 N.Y.3d at 301, 934 N.E.2d at 306, 907 N.Y.S.2d at 737.
274. *Id.* at 300, 934 N.E.2d at 305, 907 N.Y.S.2d at 736.
275. *Id.* at 301, 934 N.E.2d at 306, 907 N.Y.S.2d at 737.
276. *Id.* at 304, 934 N.E.2d at 308, 907 N.Y.S.2d at 739.

action against both the school district and the county agency which had placed the boy in foster care.[277] The trial court granted summary judgment for both defendants,[278] and the Appellate Division, Fourth Department, affirmed.[279] The Court of Appeals granted leave to appeal and affirmed.[280] The Court concluded that the alleged sexual assault was entirely unforeseen and could not have been anticipated by the school district because it had not specific knowledge or notice.[281] The Court commented on the child's record as one that showed improvement from an admittedly difficult beginning.[282] Moreover, no aggressive sexual behavior was reported in his record and for that reason the case had to fail.[283]

The dissent would have allowed the case against the school to go forward on the grounds that the contact between the girl's mother and the school bus driver about the incident was sufficient to put the school on notice of some problem.[284] The dissent agreed with the majority, however, that the case against the county agency must fail because there was no evidence that the agency had withheld any information from the foster family.[285]

II. LEGISLATIVE BRANCH

As set out in article 7 of the Public Officers Law,[286] the Open Meetings Law requirement that government bodies "conduct public business in public is an important external check on government behavior."[287] Section 103 of the Public Officers Law provides that "[e]very meeting of a public body shall be open to the public, except executive session of such body."[288] The term "public body" is defined broadly[289] and has been construed broadly by the courts.[290] When an

277. *Id.* at 302, 934 N.E.2d at 306, 907 N.Y.S.2d at 737.

278. *Brandy B.*, 15 N.Y.3d at 302, 934 N.E.2d at 306, 907 N.Y.S.2d at 737.

279. *Id.*; Brandy B. v. Eden Cent. Sch. Dist., 63 A.D.3d 1583, 1584, 880 N.Y.S.2d 431, 431 (4th Dep't 2009).

280. *Brandy B.*, 15 N.Y.3d at 302, 934 N.E.2d at 306, 907 N.Y.S.2d at 737.

281. *Id.*

282. *Id.*, 934 N.E.2d at 306-07, 907 N.Y.S.2d at 737-38.

283. *Id.*, 934 N.E.2d at 307, 907 N.Y.S.2d at 738.

284. *Id.* at 304, 934 N.E.2d at 308, 907 N.Y.S.2d at 739 (Ciparick, J., dissenting).

285. *Brandy B.*, 15 N.Y.3d at 305, 934 N.E.2d at 308, 907 N.Y.S.2d at 739.

286. N.Y. PUB. OFF. LAW §§ 100-111 (McKinney 2008 & Supp. 2011).

287. BORCHERS & MARKELL, *supra* note 39, § 5.13.

288. N.Y. PUB. OFF. LAW § 103(a) (McKinney Supp. 2011).

289. N.Y. PUB. OFF. LAW § 102(2) (McKinney Supp. 2008) ("'[p]ublic body' means any entity, for which a quorum is required in order to conduct public business and which consists of two or more members, performing a governmental function for the state or for an

open meeting is to be held, the public must be provided with notice of the meeting.[291] The meeting must be held in a location that can reasonably accommodate "barrier-free physical access to the physically handicapped."[292]

The legislature took several major steps in 2010 to reinforce the underlying intent that the public's business be conducted by government in an open manner, and that the public be afforded as much access as possible to government bodies. Section 103 was amended to add new subdivisions: (3), relating to a meeting's location, and (d), relating to webcasting. Section 107 was amended to enhance the enforcement provisions of the Open Meetings Law.

Effective on April 14, 2010, section 103 was amended to include a new subdivision (d), which provides further direction about the location of the meeting.[293] According to subdivision (d), "[p]ublic bodies shall make or cause to be made all reasonable efforts to ensure that meetings are held in an appropriate facility which can adequately accommodate members of the public who wish to attend such meetings."[294] As noted in the sponsor's memorandum, without this change it would "still [be] possible for members of the public to be shut out while the letter of the law is being observed" because the law does not provide any direction for the size of the room.[295] If a meeting location is changed to accommodate a larger audience, a notice of the new location may be required.[296]

New subdivision (d) permits the transactions of an open meeting to be "photographed, broadcast, webcast, or otherwise recorded and/or transmitted by audio or video means."[297] It also permits the public body to promulgate conspicuously posted rules governing the use of recording devices.[298] This amendment essentially codifies court

agency or department thereof, or for a public corporation . . . or committee or subcommittee or other similar body of such public body.").

290. BORCHERS & MARKELL, *supra* note 39, § 5.13.

291. *See* N.Y. PUB. OFF. LAW § 104(1)-(2) (McKinney Supp. 2011).

292. N.Y. PUB. OFF. LAW § 103(b) (McKinney Supp. 2011).

293. Act of Apr. 14, 2010, ch. 40, 2010 McKinney's Sess. Laws of N.Y. 85 (codified at N.Y. PUB. OFF. LAW § 103(d) (McKinney Supp. 2011)).

294. *Id.*

295. 2009 Legis. Bill Hist. N.Y. A.B. 5873 (legislative memorandum).

296. *Recent Amendments to the Open Meetings Law*, COMM. ON OPEN GOV'T, N.Y. DEP'T OF STATE, http://www.dos.state.ny.us/coog (last visited Mar. 4, 2011).

297. Act of Apr. 14, 2010, ch. 43, 2010 McKinney's Sess. Laws of N.Y. 115 (codified at N.Y. PUB. OFF. LAW § 103(d)).

298. *Id.* The Committee on Open Government has stated that it will prepare model rules to assist public bodies in this regard. *Recent Amendments to the Open Meetings Law*, *supra* note 296.

decisions which have permitted recording of open meetings so long as they are not disruptive.[299] While the amendment is not effective until April 1, 2011,[300] this case law continues to control.[301]

Although, under section 107 of the Open Meetings Law courts have had the authority to invalidate action taken by a public body in violation of the law,[302] public bodies have often been able to avoid the effect of section 107 by deliberating in private.[303] Section 107 was amended, effective June 14, 2010, to provide that a court may declare that a public body violated the Public Officers Law and/or declare the public body's action taken in violation of the law void, in whole or in part, without prejudice to reconsideration in compliance with the law.[304] The court may also "require the members of the public body to participate in a training session given by the committee on open government."[305]

CONCLUSION

In some of its decisions, the Court made what had obviously been tortuous paths of litigation seem so easily resolved. In others, it might puzzle us why the Court decided to address an issue that appeared to be resolved easily at a lower court level. Either way, it is always interesting to watch the Court at work. While the same may not always be said of the legislature, no matter how the members achieved consensus, the amendments to the Public Officers law solidify the state's interest in transparency of government.

299. *Recent Amendments to the Open Meetings Law*, *supra* note 296. For an interesting discussion of "One Man, One Camera, and the Open Meetings Law," see Debra S. Cohen, *Rebuilding Yonkers: How Open Government Laws Are Helping Level the Playing Field in the City of Hills*, N.Y. St. B.A. Gov't L. and Pol'y J., Apr. 1, 2009, at 16, 19.

300. Act of Apr. 14, 2010, ch. 43, 2010 McKinney's Sess. Laws of N.Y. 115 (codified at N.Y. PUB. OFF. LAW § 103(d)).

301. *Recent Amendments to the Open Meetings Law*, *supra* note 296.

302. 2010 McKinney's Sess. Law News A-67 (legislative memorandum).

303. *Id.* (citing *In re* Woll v. Erie Cnty. Legislature, 83 A.D.2d 792, 792, 440 N.Y.S.2d 146, 147 (4th Dep't 1981); *In re* Dombroske v. Bd. of Educ. of W. Genesee Cent. Sch. Dist., 118 Misc. 2d 800, 804, 462 N.Y.S.2d 146, 149 (Sup. Ct. Onondaga Cnty. 1983)).

304. *Id.*

305. Act of Apr. 14, 2010, ch. 44, 2010 McKinney's Sess. Laws of N.Y. 116 (codified at N.Y. PUB. OFF. LAW § 107(1) (McKinney Supp. 2011)).