ADMINISTRATIVE LAW

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CONTENTS

INTRODUCTION

This Article reviews developments in administrative law and practice during 2012 in the judicial, executive, and legislative branches of New York State government. The discussion focuses on decisions announced by the New York Court of Appeals, certain key initiatives of the Cuomo administration, and legislation which created a new state agency and improved the Open Meetings Law.

I. JUDICIAL BRANCH

The decisions of the Court of Appeals covered a wide range of topics in 2012, which included the Article 78 proceeding, ultra vires actions by agencies, the application of the statutes of limitations, an agency's interpretation of its governing statutes, decisional bias, and the Freedom of Information Law ("FOIL").

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A. Article 78 Proceedings

Article 78 proceedings under the Civil Practice Law and Rules ("CPLR") are the typical method for review of an agency determination.[1] Thus, it seems appropriate to begin a discussion of the 2012 decisions of the New York Court of Appeals with the issue presented in *People v. Liden*: must a registrability decision by the Board of Examiners of Sex Offenders be challenged in an Article 78 proceeding, or can the challenge be made in a judicial proceeding to assign a risk level that automatically follows a determination of registrability?[2]

The Sex Offender Registration Act ("SORA")[3] provides that individuals convicted of sex offenses whether in New York,[4] or in

1. People v. Liden, 19 N.Y.3d 271, 273, 969 N.E.2d 751, 752, 946 N.Y.S.2d 533, 533 (2012), *rev'g* 79 A.D.3d 598, 913 N.Y.S.2d 200 (1st Dep't 2010).

2. 19 N.Y.3d at 275, 969 N.E.2d at 753, 946 N.Y.S.2d at 535.

3. The provisions of SORA are found in Article 6 of New York's Corrections Law. *See generally* N.Y. CORRECT. LAW § 168 (McKinney Supp. 2013).

4. The statute defines a "sex offense" as

> (a)(i) a conviction of or a conviction for an attempt to commit any of the provisions of sections 130.20, 130.25, 130.30, 130.40, 130.45, 130.60, 230.34, 250.50, 255.25, 255.26 and 255.27 or article two hundred sixty-three of the penal law, or section 135.05, 135.10, 135.20 or 135.25 of such law relating to kidnapping offenses, provided the victim of such kidnapping or related offense is less than seventeen years old and the offender is not the parent of the victim, or section 230.04, where the person patronized is in fact less than seventeen years of age, 230.05 or 230.06, or subdivision two of section 230.30, or section 230.32 or 230.33 of the penal law, or (ii) a conviction of or a conviction for an attempt to commit any of the provisions of section 235.22 of the penal law, or (iii) a conviction of or a conviction for an attempt to commit any provisions of the foregoing sections committed or attempted as a hate crime defined in section 485.05 of the penal law or as a crime of terrorism defined in section 490.25 of such law or as a sexually motivated felony defined in section 130.91 of such law; or
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> (b) a conviction of or a conviction for an attempt to commit any of the provisions of section 130.52 or 130.55 of the penal law, provided the victim of such offense is less than eighteen years of age; or
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> (c) a conviction of or a conviction for an attempt to commit any of the provisions of section 130.52 or 130.55 of the penal law regardless of the age of the victim and the offender has previously been convicted of: (i) a sex offense defined in this article, (ii) a sexually violent offense defined in this article, or (iii) any of the provisions of section 130.52 or 130.55 of the penal law, or an attempt thereof; or
>
> (d) a conviction of (i) an offense in any other jurisdiction which includes all of the essential elements of any such crime provided for in paragraph (a), (b) or (c) of this subdivision or (ii) a felony in any other jurisdiction for which the offender is required to register as a sex offender in the jurisdiction in which the conviction occurred or, (iii) any of the provisions of 18 U.S.C. 2251, 18 U.S.C. 2251A, 18 U.S.C. 2252, 18 U.S.C. 2252A, 18 U.S.C. 2260, 18 U.S.C. 2422(b), 18 U.S.C. 2423, or 18 U.S.C. 2425, provided that the elements of such crime of conviction are substantially the same as those which are a part of such offense as of the date on which this subparagraph takes effect.

another state,[5] must register with New York's Division of Criminal Justice.[6]

When an individual has committed a relevant crime out of state, the Board of Examiners of Sex Offenders[7] submits a recommendation about the individual's registrability to the county court or supreme court, the district attorney ("DA") in the county of the individual's residence, and the individual.[8] The court is then required to hold a hearing to determine the level of risk, the concomitant community notification, and the duration of the registration.[9] The court's determination is based on the confidential recommendation of the Board of Examiners of Sex Offenders.[10]

At least thirty days prior to the risk level determination hearing, the individual receives notice that his or her case is under review and has the opportunity to submit information relevant to the review.[11] At least twenty days prior to the hearing, the individual, the DA, and the individual's counsel are notified of the hearing date and receive a copy of the Board of Examiners' recommendation and any statement of reasons accompanying the recommendation.[12]

There are three levels of risk assessment: Level 1—low risk of repeat offense; Level 2—moderate risk of repeat offense; and Level 3—high risk of repeat offense.[13] The assigned risk level governs the amount of information released to the public and the duration of the

> (e) a conviction of or a conviction for an attempt to commit any of the provisions of subdivision two, three or four of section 250.45 of the penal law, unless upon motion by the defendant, the trial court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that registration would be unduly harsh and inappropriate.

N.Y. CORRECT. LAW § 168-a(2). *See also New York State Sex Offender Registry Registerable Offenses*, N.Y. DIVISION OF CRIMINAL JUST. SERVICES (Mar. 22, 2012), http://www.criminaljustice.ny.gov/nsor/sortab1.htm.

5. N.Y. CORRECT. LAW § 168-a(2)(d); *see supra* note 3; *see also Sex Offender Registry*, *supra* note 4.

6. N.Y. CORRECT. LAW § 168-f; *see also About the New York State Sex Offender Registration Act (SORA)*, N.Y. DIVISION OF CRIM. JUST. SERVICES, http://www.criminaljustice.ny.gov/nsor/legalinfo.htm (last visited Jan. 1, 2013).

7. N.Y. CORRECT. LAW § 168-l.

8. *Id.* § 168-k.

9. *Id.*

10. *Id.* §§ 168-l, 168-n.

11. *Id.* § 168-n(3).

12. N.Y. CORRECT. LAW § 168-n(3).

13. *Id.*; *see also Risk Level & Designation Determination*, N.Y. DIVISION OF CRIM. JUST. SERVICES, http://www.criminaljustice.ny.gov/nsor/legalinfo.htm (last visited Feb. 17, 2013).

individual's registration.[14]

In 1996, Defendant Liden pled guilty to two counts of unlawful imprisonment in Washington State after he was charged with raping and kidnaping two teenage girls.[15] He later moved to New York and was subsequently convicted of a non-sexual crime.[16] In the course of that criminal proceeding, his prior record came to light and, in 2007, the Board of Examiners of Sex Offenders determined that the provisions of SORA required that he register in New York as a sex offender.[17] Liden did not seek review of this determination.[18]

At the subsequent judicial risk assessment hearing, Liden claimed that he should not be required to register.[19] He argued that the New York equivalent of his crime—unlawful imprisonment in the second degree—was a misdemeanor[20] and that, until 2002, New York defined a crime committed in another state as a "sex offense" only if it included "all of the essential elements" of a New York "felony."[21] Although the DA conceded that "the Board's determination requiring him to register was an error,"[22] the supreme court concluded that it did not have jurisdiction to review the Board's determination of registrability, relying on precedents in the Second, Third, and Fourth Departments, which held that the Board's determination is an administrative one for which the only avenue of review is an Article 78 proceeding.[23] The supreme court thereafter assigned Liden a Level 3 risk assessment.[24] The appellate division affirmed.[25] The Court of Appeals granted leave to appeal[26] and reversed.[27]

14. N.Y. CORRECT. § 168-n(3).

15. People v. Liden, 19 N.Y.3d 271, 274, 969 N.E.2d 751, 752, 946 N.Y.S.2d 533, 534 (2012).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Liden*, 19 N.Y.3d at 274, 969 N.E.2d at 752, 946 N.Y.S.2d at 534 (citing N.Y. PENAL LAW § 135.05 (McKinney 2008)).

21. *Liden*, 19 N.Y.3d at 274, 969 N.E.2d at 752, 946 N.Y.S.2d at 534 (comparing former Correction Law § 168–a (2)(b) and Correction Law § 168–a (2) as amended by L. 2002, ch. 11, § (1), which replaced "the word 'felony' with the word 'crime' and which applied 'only to offenses committed on or after its effective date.'").

22. *Id.*

23. *Id.* (citing People v. Williams, 24 A.D.3d 894, 895, 805 N.Y.S.2d 191, 192 (3d Dep't 2005); People v. Carabello, 309 A.D.2d 1227, 1228, 765 N.Y.S.2d 724, 725 (4th Dep't 2003); *In re* Mandel, 293 A.D.2d 750, 751, 742 N.Y.S.2d 321, 322 (2d Dep't 2002)).

24. *Liden*, 19 N.Y.3d at 274-75, 969 N.E.2d at 752, 946 N.Y.S.2d at 534.

25. People v. Liden, 79 A.D.3d 598, 598, 913 N.Y.S.2d 200, 201 (1st Dep't 2010).

26. People v. Liden, 16 N.Y.3d 872, 873, 947 N.E.2d 1186, 1186, 923 N.Y.S.2d 408,

The Court of Appeals began its opinion with a nod to the general rule in administrative proceedings that in order to obtain judicial review of an administrative agency action, a person must initiate a proceeding under CPLR Article 78.[28] Calling Article 78 "essentially an exclusive remedy,"[29] it also acknowledged that Article 78's position vis-à-vis administrative proceedings is so strong that an individual cannot circumvent the limitations inherent in an Article 78 review by using a different type of judicial challenge.[30]

The Court then turned to an examination of the risk assessment process. Section 168-k(2) of the Correction Law provides that if the Board of Examiners makes a determination adverse to the person affected, a judicial proceeding automatically follows.[31] Whether or not the affected person agrees with the initial determination, the Board must recommend the risk level of the alleged sex offender to a court in the county in which the offender resides.[32] Thus, the Court concluded that it was appropriate for the registrability challenge to be brought in the risk level proceeding.[33] In the risk level proceeding or a proceeding brought under Article 78, a court would review essentially the same facts.[34]

Recognizing its decision to be an extraordinary exception to the general rule,[35] the Court nevertheless opined that the exception was appropriate for two reasons. First, the exception would facilitate access to the courts for those who are more likely to have access to lawyers at the risk level assessment than at the registrability determination.[36] Second, the court would not have to struggle with the risk level assessment if it concluded that the alleged offender did not fall within the statute's coverage.[37]

B. Agency Jurisdiction and Ultra Vires

One basis for challenging agency actions and rules in an Article 78 proceeding is that the agency was acting illegally, or ultra vires, as it

408 (2011).

27. *Liden*, 19 N.Y.3d at 275, 969 N.E.2d at 752, 946 N.Y.S.2d at 534.
28. *Id.* at 275, 969 N.E.2d at 753, 946 N.Y.S.2d at 535.
29. *Id.* at 276, 969 N.E.2d at 753, 946 N.Y.S.2d at 535.
30. *Id.* (citing, for example, the short statute of limitations).
31. N.Y. CORRECT. LAW § 168-n(3) (McKinney Supp. 2013).
32. *Liden*, 19 N.Y.3d at 276, 969 N.E.2d at 753, 946 N.Y.S.2d at 535.
33. *Id.*
34. *Id*.
35. *Id.* at 277, 969 N.E.2d at 754, 946 N.Y.S.2d at 536.
36 *Id*.
37. *Liden*, 19 N.Y.3d at 276, 969 N.E.2d at 754, 946 N.Y.S.2d at 536.

had no jurisdiction or authority to take the actions it did.[38]

The Court addressed several cases involving the issue of lack of jurisdiction: the authority of the Nassau County Executive in *Sedacca v. Mangano*;[39] the jurisdiction of the State Division of Human Rights ("SDHR") in *North Syracuse Central School District v. New York State Division of Human Rights*;[40] and the relationship between the New York City Conflicts of Interest Board ("COIB") and the New York City Board of Education ("BOE") in *Rosenblum v. New York City Conflicts of Interest Board*.[41]

Sedacca v. Mangano involved the issue of whether the Nassau County Executive had the authority to dismiss members of the Nassau County Assessment Review Commission ("ARC") without cause prior to the expiration of their term.[42] Pursuant to section 523-b of the Real Property Tax Law, the New York State Legislature specifically authorized Nassau County to establish the Nassau County ARC to review and correct all assessments of real property.[43] The ARC replaced Nassau County's Board of Assessment Review to allow Nassau County to address an increasing number of tax grievances.[44] Unlike its previous Board of Assessment Review which met for only three months in any given year, the new ARC would function year-round reducing refunds and interest payments.[45]

The ARC was created with nine commissioners who are appointed by the County Executive, subject to the County Legislature's approval.[46] Pursuant to the statute, each commissioner serves for a term of five years, the initial appointees served staggered terms,[47] and no more than six commissioners can be enrolled in the same political party.[48] These provisions were incorporated into the Nassau County

38. *See generally* PATRICK J. BORCHERS & DAVID L. MARKELL, N.Y. STATE ADMINISTRATIVE PROCEDURE AND PRACTICE § 8.3 (2d ed. 1998).

39. 18 N.Y.3d 609, 612, 965 N.E.2d 257, 258, 942 N.Y.S.2d 30, 31 (2012).

40. 19 N.Y.3d 481, 488, 973 N.E.2d 162, 164, 950 N.Y.S.2d 67, 69 (2012).

41. *See generally* 18 N.Y.3d 422, 964 N.E.2d 1010, 941 N.Y.S.2d 543 (2012).

42. *See generally* 18 N.Y.3d 609, 965 N.E.2d 257, 942 N.Y.S.2d 30.

43. *Id.* at 612, 965 N.E.2d at 258, 942 N.Y.S.2d at 31 (citing N.Y. REAL PROP. TAX LAW § 523-b(2)(d) (McKinney 2008)).

44. *Sedacca*, 18 N.Y.3d at 612, 965 N.E.2d at 258, 942 N.Y.S.2d at 31 (citing N.Y. REAL PROP. TAX LAW § 523-b(1)).

45. *Sedacca*, 18 N.Y.3d at 612, 965 N.E.2d at 258, 942 N.Y.S.2d at 31.

46. *Id.* at 613, 965 N.E.2d at 258, 942 N.Y.S.2d at 31 (citing N.Y. REAL PROP. TAX LAW § 523-b(2)(a)).

47. *Sedacca*, 18 N.Y.3d at 613, 965 N.E.2d at 258, 942 N.Y.S.2d at 31 (citing REAL PROP. TAX LAW §523-b(2)(a), (c)).

48. *Sedacca*, 18 N.Y.3d at 613, 965 N.E.2d at 258, 942 N.Y.S.2d at 31.

Administrative Code.[49]

On December 24, 2009, the outgoing County Executive appointed new commissioners to serve out the remaining terms of six vacancies on the ARC.[50] On January 14, 2012, the newly elected County Executive had his counsel send letters to each of the nine existing commissioners informing them that they were being removed pursuant to section 203 of the Nassau County Charter.[51] Section 203 provides in relevant part:

> [t]he County Executive may at any time remove any person so appointed; provided that in the case of members of boards and commissions appointed for definite terms, no removal shall be made until the person to be removed has been serv[ed] with a notice of the reasons for such removal and given an opportunity to be heard, publicly if he or she desires, thereon by the County Executive.[52]

The letter stated that the County Executive was appointing his own commissioners in order to carry out his new administration's plans and to remove the influence of the former administration so that his policies and efforts would not be frustrated.[53] The letter also stated that, in accordance with section 203, the commissioners would be offered an opportunity to be heard, but that, in any event, the County Executive's decision was final.[54]

Eight of the nine commissioners requested that the County Attorney represent them in accordance with section 1102 of the County Charter.[55] They also requested a meeting with the County Executive.[56] The County Attorney declined to represent the commissioners because of a conflict of interest, given his representation of the County Executive, but advised them that he had retained independent special counsel for them.[57] Three of the commissioners met with the special counsel and, thereafter, decided to retain private counsel.[58]

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49. *Sedacca*, 18 N.Y.3d at 612, 965 N.E.2d at 258, 942 N.Y.S.2d at 31 (citing NASSAU CNTY., N.Y., ADMIN. CODE § 6-40.1 (2010)).

50. *Sedacca*, 18 N.Y.3d at 613, 965 N.E.2d at 258, 942 N.Y.S.2d at 31.

51. *Id.*

52. *Id.* at 614, 965 N.E.2d at 259, 942 N.Y.S.2d at 32 (citing NASSAU CNTY., N.Y., CHARTER § 203 (2010)).

53. *Sedacca*, 18 N.Y.3d at 613, 965 N.E.2d at 258, 942 N.Y.S.2d at 31.

54. *Id.* at 613, 965 N.E.2d at 258-59, 942 N.Y.S.2d at 31-32.

55. *Id.* at 613, 965 N.E.2d at 259, 942 N.Y.S.2d at 32 (section 1102 provides that the County Attorney may represent any government body within the county upon terms and conditions agreed upon between the County Executive and the government body (citing NASSAU CNTY., N.Y., CHARTER § 1102)).

56. *Sedacca*, 18 N.Y.3d at 614, 965 N.E.2d at 259, 942 N.Y.S.2d at 32.

57. *Id.*

58. Sedacca v. Mangano, 27 Misc. 3d 414, 418, 895 N.Y.S.2d 792, 796 (Sup. Ct.

These three commissioners then initiated a combined action for declaratory judgment and an Article 78 proceeding in the nature of a prohibition[59] for an order declaring that the County Executive did not have the authority to remove the commissioners during their terms without cause, enjoining the County Executive from firing them, and seeking attorneys' fees.[60] Three other commissioners were permitted to intervene in the action.[61] One commissioner was retained by the County Executive and two others resigned.[62]

The supreme court denied the petition, holding that there was no requirement that the County Executive show cause for firing the commissioners.[63] The court also denied the petitioners' application for attorneys' fees.[64]

The appellate division modified the supreme court's holding by adding a declaration that "the County Executive of the County of Nassau, notwithstanding the absence of cause, has authority to remove commissioners of the Nassau County Assessment Review Commission from their offices prior to the expiration of their statutory terms."[65]

The Court of Appeals granted leave to appeal,[66] and modified the holding of the Second Department.[67] Noting that while section 203 of the Nassau County Charter does not explicitly require cause for the removal of any commissioners, the Court opined that, more importantly, the legislative intent behind section 252-b of the Real Property Tax Law should be considered.[68] The Court observed that the intent was to shield the members of the ARC from political influence and wholesale change by different administrations as evidenced by the statutory design: staggered terms, commissioners from both political parties, and five year terms that exceeded the term of the County Executive.[69]

The Court concluded that the provision of the Nassau County Charter requiring that the notice of removal include a statement of

Nassau Cnty. 2010).

59. Sedacca v. Mangano, 78 A.D.3d 716, 717, 911 N.Y.S.2d 85, 85 (2d Dep't 2010).

60. *Sedacca*, 27 Misc. 3d at 415, 895 N.Y.S.2d at 793.

61. *Sedacca*, 18 N.Y.3d at 614 n.3, 965 N.E.2d at 259 n.3, 942 N.Y.S.2d at 32 n.3.

62. *Id.* at 613 n.2, 965 N.E.2d at 259 n.2, 942 N.Y.S.2d at 32 n.2.

63. *Id.* at 614, 965 N.E.2d at 259, 942 N.Y.S.2d at 32.

64. *Id.* (citing *Sedacca*, 27 Misc. 3d at 430, 895 N.Y.S.2d at 804).

65. *Sedacca*, 18 N.Y.3d at 614, 965 N.E.2d at 259, 942 N.Y.S.2d at 32 (citing *Sedacca*, 78 A.D.3d at 718, 911 N.Y.S.2d at 86).

66. *See generally* Sedacca v. Mangano, 16 N.Y.3d 705, 944 N.E.2d 658, 919 N.Y.S.2d 120 (2011).

67. *Sedacca*, 18 N.Y.3d at 614, 965 N.E.2d at 259, 942 N.Y.S.2d at 32.

68. *Id.* at 615, 965 N.E.2d at 260, 942 N.Y.S.2d at 33.

69. *Id.*

reasons was synonymous with cause.[70] The Court also concluded that its conclusion was consistent with the finding that cause was required for the removal of a member of the former Board of Assessment Review.[71] The Court held that denial of attorneys' fees was proper as the Nassau Administrative Code calls for the payment of attorneys' fees when the government employee must defend himself or herself against allegations of improper conduct, and not for affirmative actions taken by the employee against the County.[72] In a finishing touch, the Court modified the holding of the appellate division by inserting its own declaration that "in the absence of cause, the County Executive does not have authority to remove commissioners of the Nassau County Assessment Review Commission prior to the expiration of their statutory terms."[73]

At issue in *North Syracuse Central School District v. New York State Division of Human Rights*[74] was the jurisdiction of the SDHR to investigate claims of discrimination filed against two public school districts, an issue on which the SDHR had taken inconsistent positions.[75] The question turned on the statutory interpretation of the term "education corporation or association" as set out in section 296(4) of the Executive Law.[76] That subdivision provides that "[i]t shall be an unlawful discriminatory practice for *an education corporation or association which holds itself out to the public to be non-sectarian and exempt from taxation pursuant to [RPTL Article 4]* . . . to permit the harassment of any student or applicant, by reason of his race . . . [or] disability."[77]

SDHR's understanding of its jurisdiction raised a troubling example of an administrative agency's inconsistent application of the law. In a 2009 decision, the Second Department held that SDHR did not have jurisdiction over public schools;[78] leave to appeal that decision

70. *Sedacca*, 18 N.Y.3d at 615, 965 N.E.2d at 260, 942 N.Y.S.2d at 33.

71. *Id.* (citing NASSAU CNTY., N.Y., CHARTER § 203(1) (2010)).

72. *Sedacca*, 18 N.Y.3d at 616, 965 N.E.2d at 260, 942 N.Y.S.2d at 33.

73. *Sedacca*, 18 N.Y.3d at 616, 965 N.E.2d at 261, 942 N.Y.S.2d at 34. The matter was remitted to the appellate division for further proceedings necessitated by the Court's ruling. *Id.*

74. *See generally* 19 N.Y.3d 481, 973 N.E.2d 162, 950 N.Y.S.2d 67 (2012).

75. *Id.* at 488-89, 973 N.E.2d at 164, 950 N.Y.S.2d at 69.

76. N.Y. EXEC. LAW § 296(4) (McKinney 2010).

77. *N. Syracuse Cent. Sch. Dist.*, 19 N.Y.3d at 488-89, 973 N.E.2d at 164-65, 950 N.Y.S.2d at 69-70 (citing N.Y. EXEC. LAW§ 296(4)) (emphasis added).

78. E. Meadow Union Free Sch. Dist. v. N.Y. State Div. of Human Rights, 65 A.D.3d 1342, 1343, 886 N.Y.S.2d 211, 212 (2d Dep't 2009).

was denied by the Court of Appeals.[79] As a result of the decision in the Second Department, SDHR "no longer applie[d] the statute within the Second Department while continuing to process complaints against public school districts in the other Departments."[80] Thus, in 2012, the Court of Appeals agreed to hear two cases which raised SDHR's jurisdictional issue again.

Both the North Syracuse Central School District and the Ithaca School District commenced Article 78 proceedings against the SDHR in response to the SDHR's investigations of discrimination against students in the respective districts.[81] The students in both cases had filed complaints with the SDHR claiming that their school districts had violated Article 15 of the Executive Law ("Human Rights Law") by permitting harassment toward the students on the basis of race and/or disability.[82]

Each school district sought a writ of prohibition barring the SDHR from investigating the complaints on the ground that a public school district is not an "education corporation or association" as defined by section 296(4) of the Executive Law.[83]

The Onondaga County Supreme Court granted the petition barring the investigation in *North Syracuse Central School District v. New York State Division of Human Rights*.[84] The Appellate Division, Fourth Department, reversed the trial court's decision, holding that the hearing should have gone forward and the school district's challenge to the SDHR's jurisdiction should have been raised during administrative review.[85] In other words, the district was required to have exhausted its administrative remedies.[86] In reaching its decision, the court relied on the principle that "a writ of prohibition is not an appropriate vehicle to be used to bar [Respondent] from conducting an investigation because the '[r]emedy for asserted error of law in the exercise of [Respondent's]

79. *See generally* E. Meadow Union Free Sch. Dist. v. N.Y. State Div. of Human Rights, 14 N.Y.3d 710, 929 N.E.2d 1003, 903 N.Y.S.2d 768 (2010).

80. Ithaca City Sch. Dist. v. N.Y. State Div. of Human Rights, 87 A.D.3d 268, 276 n.1, 926 N.Y.S.2d 686, 692 n.1 (3d Dep't 2011) (Rose, J., dissenting), *rev'd,* 19 N.Y.3d 481, 973 N.E.2d 162, 950 N.Y.S.2d 67 (2012).

81. *N. Syracuse Cent. Sch. Dist.*, 19 N.Y.3d at 488, 973 N.E.2d at 164, 950 N.Y.S.2d at 69 (2012).

82. *Id.*

83. *Id.*; N.Y. EXEC. LAW § 296(4) (McKinney 2010).

84. 83 A.D.3d 1472, 920 N.Y.S.2d 564 (4th Dep't 2011), *rev'd,* 19 N.Y.3d 481, 973 N.E.2d 162, 950 N.Y.S.2d 67 (2012).

85. *Id.* at 1472-73, 920 N.Y.S.2d 565.

86. *Id.* at 1472, 920 N.Y.S.2d at 565 (quoting Newfield Cent. Sch. Dist. v. N.Y. State Div. of Human Rights, 66 A.D.3d 1314, 1315-16, 888 N.Y.S.2d 244, 245 (3d Dep't 2009)).

jurisdiction or authority lies first in administrative review.'"[87]

The Tompkins County Supreme Court denied the district's petition in *Ithaca City School District v. New York State Division of Human Rights*, holding that the SDHR could investigate the student's claims.[88] The case then proceeded to an administrative hearing.[89] The SDHR administrative law judge ("ALJ") held that the Ithaca School District had permitted racial discrimination and recommended that the district pay $500,000 each to the student and her mother, as well as make certain administrative changes in the district's practices and procedures to prevent future discrimination.[90] The award was reduced to $200,000 each by the Commissioner of Human Rights, but the remaining recommendations of the ALJ were adopted.[91]

The school district then sought judicial review under section 298 of the Executive Law.[92] The supreme court held that the SDHR did not have jurisdiction over the school district.[93] SDHR appealed from that ruling.[94] The appellate court deemed "it appropriate to vacate the order appealed from and review the matter de novo," noting that the supreme court erred in failing to transfer the matter immediately to the appellate division as required by section 298 of the Executive Law.[95]

As to the jurisdictional issue, the court reasoned that because the Human Rights Law is a remedial statute, it should be liberally construed

87. *Id.*

88. 87 A.D.3d 268, 271, 926 N.Y.S.2d 686, 688 (3d Dep't 2011), *rev'd*, 19 N.Y.3d 481, 973 N.E.2d 162, 950 N.Y.S.2d 67 (2012).

89. *Id.*

90. *Id.*

91. *Id.*

92. Section 298 of the Executive Law provides, in part:

> Any complainant, respondent or other person aggrieved by an order of the commissioner which is an order after public hearing, a cease and desist order, an order awarding damages, an order dismissing a complaint, or by an order of the division which makes a final disposition of a complaint may obtain judicial review thereof . . . in a proceeding as provided in this section.

N.Y. EXEC. LAW § 298 (McKinney 2005).

93. *Ithaca City Sch. Dist*., 87 A.D.3d at 271, 926 N.Y.S.2d at 689.

94. *Id.*

95. *Id.* at 271 n.2, 926 N.Y.S.2d at 689 n.2. The court distinguished the provisions for judicial review of section 298 of the Executive Law (requiring that the supreme court receiving the petition transfer it to the appellate division without consideration of any threshold issues) from those of section 7804(g) of the CPLR (requiring the supreme court receiving an Article 78 petition for judicial review based on a question of whether substantial evidence supports the agency determination to first consider threshold issues such as lack of jurisdiction, res judicata, statute of limitations, and other matters which could terminate the proceeding before reaching its merits). *See* N.Y. EXEC. LAW § 298; N.Y. C.P.L.R. 7804(g) (McKinney 2005).

"to accomplish its beneficial purposes—one of which is to eliminate discrimination in 'educational institutions'—and to spread its beneficial results as widely as possible.'"[96] The court held that the school districts were subject to the law, concluding that to exclude public school districts from the law's application would limit the rights of public school students to less comprehensive relief in the face of discrimination.[97]

After reviewing the proceedings in the case, the court decided that the decision of SDHR was supported by substantial evidence as was the $200,000 award to the student.[98] It also concluded that there was substantial evidence to support a separate award to the student's mother who had made futile attempts to get the school to address the discriminatory behavior.[99] The Court held, however, that her award should be reduced from $200,000 to $50,000 on the grounds that there was a lack of sufficient evidence of the mother's claim of emotional distress as compared with that of her daughter.[100] Finally, the court declined to disturb the SDHR's determination that the district should change its administrative practices and procedures to prevent future problems.[101]

Enter the New York State Court of Appeals. After briefly describing the procedures that brought the two cases before it, the court turned its attention to the term "educational corporation or association" in the Human Rights Law.[102]

Because the term is not defined in the Human Rights Law, the 2009 Second Department decision referenced earlier relied on section 110 of the General Construction Law to conclude that because a school district could not be an "'educational corporation' *within the meaning of Human Rights Law § 296(4)*" because a school district is "a municipal corporation" and therefore a "public corporation'" under the General Construction Law.[103] Acknowledging this decision, as well as the argument that the General Construction Law might not apply because the Executive Law was enacted well before the other statute, the Court

96. *Ithaca City Sch. Dist.*, 87 A.D.3d at 273, 926 N.Y.S.2d at 689-90.

97. *Id.*

98. *Id.* at 275, 926 N.Y.S.2d at 691.

99. *Id.* at 273-74, 926 N.Y.S.2d at 690-90.

100. *Id.* at 275-76, 926 N.Y.S.2d at 691-92.

101. *Ithaca City Sch. Dist.*, 87 A.D.3d at 275-76, 926 N.Y.S.2d at 691-92.

102. *Id.* at 273, 926 N.Y.S.2d at 690; N.Y. EXEC. LAW § 296(4) (McKinney 2005).

103. E. Meadow Union Free Sch. Dist. v. N.Y. State Div. of Human Rights, 65 A.D.3d 1342, 1343, 886 N.Y.S.2d 211, 212 (2d Dep't 2009) (citing N.Y. GEN. CONSTR. LAW § 66 (McKinney 2003)).

declined to take sides in that debate.[104] Instead, it looked to a rather convoluted legislative history of the Tax Law as a basis for concluding that the term "educational corporations and associations," found in the Executive Law, does not cover public schools.[105]

Exemptions found in section 4 of the Tax Law enacted in 1896 "expressly differentiated" the tax-exempt status of "'[p]roperty of a municipal corporation of the state held for a public use' . . . from the tax-exempt status of '[t]he real property of *a corporation or association* organized exclusively for . . . educational [purposes] . . . used exclusively for carrying out thereupon one or more of such purposes.'"[106] The property given tax exempt status under subdivision (7) was "private property ostensibly used to carry out a public purpose."[107]

In 1935, the legislature renamed subdivision (7), subdivision (6), and

> added the following proviso: 'No *education corporation or association* that holds itself out to the public to be non-sectarian and exempt from taxation pursuant to the provisions of this section shall deny the use of its facilities to any person otherwise qualified, by reason of his race, color or religion.'[108]

The Court then emphasized the exemption noted in a 1935 Report of the New York State Commission for the Revision of Tax Laws for real property owned by private corporations or associations used for educational purposes because they were private organizations providing a public service otherwise provided by the government.[109] The Court concluded that the use of the same term "educational corporation or association" in the Executive Law should be interpreted in the same manner as it had been in section 4(6) of the Tax Law, namely as private organizations.[110]

While public schools are tax exempt, they enjoy that status, according to the Court, by virtue of the fact that they are indeed *public* schools.[111]

104. N. Syracuse Cent. Sch. Dist. v. N.Y. State Div. of Human Rights, 19 N.Y.3d 481, 490, 973 N.E.2d 162, 165, 950 N.Y.S.2d 67, 70 (2012).

105. *Id.* at 493-94, 973 N.E.2d at 167, 950 N.Y.S.2d at 72.

106. *Id.* at 490-91, 973 N.E.2d at 165, 950 N.Y.S.2d at 70 (citing N.Y. TAX LAW § 4(3), (7) (McKinney 2005)).

107. *N. Syracuse Cent. Sch. Dist.*, 19 N.Y.3d at 491, 973 N.E.2d at 166, 950 N.Y.S.2d at 71.

108. *Id.*

109. *Id.* at 491-92, 973 N.E.2d at 166, 950 N.Y.S.2d at 71.

110. *Id.* at 493, 973 N.E.2d at 167, 950 N.Y.S.2d at 72.

111. *Id.* at 494, 973 N.E.2d at 168, 950 N.Y.S.2d at 73.

Although it concluded that public schools are not covered by SDHR, the Court nevertheless expressed its indignation over the conduct to which the students were subjected and listed several remedies of which the students could avail themselves, including remedies under federal law and remedies under sections 10 through 18,[112] and 310[113] of the Education Law.[114]

The dissent was not persuaded by the majority's interpretation.[115] In short order, the dissent pointed out that public schools meet the criteria of section 296(4) of the Education Law.[116] Namely, they are undeniably educational organizations, they hold themselves out as non-sectarian, and they are exempt from taxation.[117] The dissent pointed to the intent of the Human Rights Law: to afford "every individual within this state . . . an equal opportunity to enjoy a full and productive life."[118] as contradicted by the majority's holding and concluded that "[i]t is implausible that the Legislature intended to exempt public schools and the thousands of children who attend these schools from the protection of the Human Rights Law and the oversight of the SDHR."[119]

Jurisdiction of the COIB of New York City to discipline a city school teacher was an issue in *Rosenblum v. New York City Conflicts of*

112. Sections 10 through 18 of the Education Law are the enactment of the Dignity for All Students Act, L. 2010, ch. 482. *Id.* at 495, 973 N.E.2d at 169, 950 N.Y.S.2d at 73. This legislation was enacted to:

> afford all [public school] students an environment free of any harassment that substantially interferes with their education, regardless of the basis of the harassment, and free of discrimination based on actual or perceived race, color, weight, national origin, ethnic group, religion, disability, sexual orientation, gender, or sex.

Id. (quoting Sponsor's Mem., Bill Jacket, L. 2010, ch. 482).

113. Section 310(7) of the Education Law provides in part that:

> [a]ny party conceiving himself aggrieved may appeal by petition to the commissioner of education who is hereby authorized and required to examine and decide the same; and the commissioner of education may also institute such proceedings as are authorized under this article. The petition may be made in consequence of any action: [including] By any other official act or decision of any officer, school authorities, or meetings concerning any other matter under this chapter, or any other act pertaining to common schools.

N.Y. EDUC. LAW § 310(7) (McKinney 2009).

114. *N. Syracuse Cent. Sch. Dist.*, 19 N.Y.3d at 490, 973 N.E.2d at 164, 165, 950 N.Y.S.2d at 69, 70.

115. *Id.* at 496, 973 N.E.2d at 169, 950 N.Y.S.2d at 74 (Ciparick, J., dissenting).

116. *See id.* at 498-500, 973 N.E.2d at 170-72, 950 N.Y.S.2d at 75-77.

117. *Id.* at 498, 973 N.E.2d at 170, 950 N.Y.S.2d at 75.

118. *Id.* at 499, 973 N.E.2d at 171, 950 N.Y.S.2d at 76 (quoting N.Y. EXEC. LAW § 290(3) (McKinney 2010)).

119. *N. Syracuse Cent. Sch. Dist.*, 19 N.Y.3d at 500, 973 N.E.2d at 172, 950 N.Y.S.2d at 77 (Ciparick, J., dissenting).

Interest Board.[120] Sections 2600 through 2607 of the New York City Charter, the city's Conflicts of Interest Law, is applicable to all of the city's current and former officials, officers, and employees.[121] The statute contains various ethics rules "designed to preserve the trust placed in the public servants of the city, promote public confidence in government, protect the integrity of government decision-making and to enhance government efficiency."[122] The creation of the New York City COIB was approved by voters in 1988 for the purpose of enforcing the Conflicts of Interest Law.[123]

When the COIB receives a written complaint alleging a violation of the Conflicts of Interest Law, it can (1) dismiss the complaint; (2) refer the complaint to the City's Department of Investigation if the COIB determines that further information is necessary before it proceeds; (3) determine that probable cause exists to believe the law has been violated; or (4) refer the complaint to the employee's agency when it involves a minor violation, or related disciplinary charges are pending before the agency.[124]

If the COIB makes an initial determination of probable cause, it must provide the employee written notice of the alleged violation together with a statement of facts, the provisions of the law believed to be violated, and COIB's procedural rules.[125] The employee has an opportunity to respond and may be assisted by counsel or other representatives.[126] If, after considering any response from the employee, the Board determines that probable cause exists, the Board holds a hearing on the record.[127] The hearing may be conducted by the Board or by a Board member.[128] In the alternative, the hearing may be

120. 18 N.Y.3d 422, 425, 964 N.E.2d 1010, 1010-11, 941 N.Y.S.2d 543, 543-44 (2012).

121. *Id.* at 425, 964 N.E.2d at 1011, 941 N.Y.S.2d at 544. The coverage extends to all such individuals regardless of "whether they are paid or unpaid, whether they are full-time, part-time, or per diem, and regardless of their salary or rank." *About COIB*, N.Y.C. CONFLICTS OF INT. BOARD, http://www.nyc.gov/html/conflicts/html/about/about.shtml#covered (last visited Jan. 8, 2013).

122. *Rosenblum*, 18 N.Y.3d at 425, 964 N.E.2d at 1011, 941 N.Y.S.2d at 544 (quoting N.Y.C., N.Y., CHARTER § 2600 (2009)).

123. *Rosenblum*, 18 N.Y.3d at 425, 964 N.E.2d at 1011, 941 N.Y.S.2d at 544 (citing N.Y.C., N.Y., CHARTER §§ 2602-03).

124. *Rosenblum*, 18 N.Y.3d at 425-26, 964 N.E.2d at 1011, 941 N.Y.S.2d at 544 (citing N.Y.C., N.Y., CHARTER § 2603(e)(2)).

125. *Rosenblum*, 18 N.Y.3d at 426, 964 N.E.2d at 1011, 941 N.Y.S.2d at 544 (citing N.Y.C., N.Y., CHARTER § 2603(h)(1)).

126. *Rosenblum*, 18 N.Y.3d at 426, 964 N.E.2d at 1011, 941 N.Y.S.2d at 544.

127. *Id.* (citing N.Y.C. CHARTER § 2603(h)(2)).

128. *Rosenblum*, 18 N.Y.3d at 426, 964 N.E.2d at 1011, 941 N.Y.S.2d at 544 (citing

conducted by the Chief ALJ or an assigned ALJ from the Office of Administrative Trials and Hearings ("OATH"), which has jurisdiction over all city agencies.[129] If the employee is subject to the jurisdiction of a state law or collective bargaining agreement, the COIB can refer the case to the employee's agency.[130] If the COIB makes such a referral, the agency must conduct a hearing and must consult with the COIB before making its final decision.[131]

In the case of a COIB hearing, the hearing officer makes recommendations to the COIB which the Board can adopt.[132] Additionally, the Board can impose penalties[133] or recommend penalties to the employee's agency.[134] The city's charter also provides that the employee may be disciplined by his or her agency if the agency has the authority to do so; however, such action by the agency "'shall not preclude the board from exercising its powers and duties under [the Conflicts of Interest Law] with respect to the actions of any such public servant.'"[135]

Stephen Rosenblum was employed by the City BOE as a probationary principal at a middle school in Brooklyn.[136] The COIB received a complaint that Rosenblum had sought favored treatment for his son from the principle of another middle school where his son taught.[137] The son was at risk of being fired for alleged misconduct.[138] Six months after the alleged encounter, the COIB provided notice to Rosenblum that this conduct

> violated section 2604(b)(3) of the Conflicts of Interest Law, which prohibits a public servant from 'us[ing] or attempt[ing] to use his or her position as a public servant to obtain any . . . private or personal advantage, direct or indirect, for the public servant or any person or

N.Y.C. CHARTER § 2603(h)(2)).

129. *Rosenblum*, 18 N.Y.3d at 426, 964 N.E.2d at 1011, 941 N.Y.S.2d at 544; *see* N.Y.C., N.Y., CHARTER § 2602(h)(2); *see also* N.Y.C., N.Y., CHARTER §§ 1048-1049-A (jurisdiction of OATH).

130. *See* N.Y.C., N.Y., CHARTER § 2603(h)(2).

131. *See id.*

132. *See id.*

133. *Rosenblum*, 18 N.Y.3d at 426, 964 N.E.2d at 1011, 941 N.Y.S.2d at 544. The imposition of the penalty on an employee is done in consultation with the agency for which the employee serves or served; in the case of an agency head, in consultation with the mayor. *See* N.Y.C., N.Y., CHARTER § 2603(h)(2). Alternatively, the board can recommend penalties and leave their imposition to the agency or mayor as the case requires. *Id.*

134. *Rosenblum*, 18 N.Y.3d at 426, 964 N.E.2d at 1012, 941 N.Y.S.2d at 545.

135. *Id.* at 427, 964 N.E.2d at 1012, 941 N.Y.S.2d at 545 (quoting N.Y.C., N.Y., CHARTER § 2603 (h)(6)).

136. *Rosenblum*, 18 N.Y.3d at 427, 964 N.E.2d at 1012, 941 N.Y.S.2d at 545.

137. *Id.*

138. *Id.*

firm associated with the public servant.'[139]

Rosenblum denied that he had discussed his son's situation with the principal.[140] The COIB referred the matter to the city BOE which thereafter notified the COIB that it did not intend to discipline Rosenblum.[141]

The COIB proceeded with a petition requesting that OATH find that Rosenblum had violated the law and that it impose a $10,000 fine.[142] Rosenblum moved to dismiss, arguing that Education Law sections 3020, 3020-a, and 2590-j, as supplemented by the collective bargaining agreement with the BOE and the teachers' union, was the exclusive disciplinary process for tenured teachers.[143]

OATH's ALJ denied Rosenblum's motion, finding that the BOE's election not to discipline Rosenblum did not preclude COIB from taking separate action, and that the jurisdiction of COIB to enforce the Ethics Law is separate from the jurisdiction of the public servant's agency.[144] The ALJ also set a date for the hearing.[145] Rosenblum then initiated an Article 78 proceeding to prohibit the COIB and OATH from proceeding with the hearing.[146]

The supreme court granted Rosenblum's petition.[147] The Board

139. *Id.*

140. *Id.* at 427, 964 N.E.2d at 1012, 941 N.Y.S.2d at 545.

141. *Rosenblum*, 18 N.Y.3d at 428, 964 N.E.2d at 1012-13, 941 N.Y.S.2d at 545-46.

142. *Id.* at 427, 964 N.E.2d at 1013, 941 N.Y.S.2d at 546.

143. *Id.* at 428-29, 964 N.E.2d at 1013, 941 N.Y.S.2d at 546.

> Section 3020(1), entitled 'Discipline of teachers,' specifies that '[n]o person enjoying the benefits of tenure shall be disciplined or removed during a term of employment except for just cause and in accordance with the procedures specified in section three thousand twenty-a of this article or in accordance with alternate disciplinary procedures contained in a [CBA] covering his or her terms and conditions of employment' (*see also* Education Law § 3020[3] ['Notwithstanding any inconsistent provision of law, the procedures set forth in (Education Law § 3020–a) and (Education Law § 2590–j) may be modified or replaced by agreements negotiated between the city school district of the city of New York and any employee organization representing employees or titles that are or were covered by any memorandum of agreement executed by such city school district and (CSA)']).

Id., 964 N.E.2d at 1013, 941 N.Y.S.2d at 546.

> Section 2590–j (7)(a) concomitantly specifies that '[n]o member of the teaching or supervisory staff of schools who has served the full and appropriate probationary period prescribed by, or in accordance with law, shall be found guilty of any charges except after a hearing as provided by [Education Law § 3020–a].'

Id. at 429, 964 N.E.2d at 1013, 941 N.Y.S.2d at 546.

144. *Rosenblum*, 18 N.Y.3d at 428-29, 964 N.E.2d at 1013, 941 N.Y.S.2d at 546.

145. *Id.* at 429, 964 N.E.2d at 1014, 941 N.Y.S.2d at 547.

146. *Id.*

147. *Id.* (citing *Rosenblum v. N.Y.C. Conflicts of Interest Bd.*, No. 101121/09, 2009 NY Slip Op. 31073(U) (Sup. Ct. N.Y. Cnty. 2009)).

and OATH appealed unsuccessfully to the First Department.[148] Both the trial court and the appellate division concluded that the proposed fine sought by the COIB was a permissible form of discipline under the Education Law, making that statute the exclusive disciplinary avenue against Rosenblum.[149]

The Court of Appeals granted leave to appeal to the Board and OATH[150] and reversed.[151] After reviewing the facts and the proceedings thus far, the Court acknowledged that the Education Law is the exclusive means for the Board to discipline a teacher, including fines as a permissible penalty.[152] The Court pointed out that the COIB, however, is a separate statutory scheme designed for disciplinary action for an ethics violation against a public employee.[153] The Court noted that the use of the terms "disciplinary" and "discipline" in the Education Law were not intended to displace the ability of other actors to take action against teachers for various wrongful acts.[154]

The Court also referred to the legislative intent behind the creation of the COIB, which was to establish an independent enforcement agency with its own expertise in the area of ethics, making its jurisdiction with regard to such matters independent of the employee's agency.[155] Indeed, the Court described the COIB as an avenue of discipline to which other city agencies may defer in the interest of cost savings and efficiency.[156]

The dissent argued that the COIB was precluded from disciplining Rosenblum through the imposition of a fine because section 3020 of the Education Law provides that no tenured employee may be disciplined

148. *Rosenblum*, 18 N.Y.3d at 429, 964 N.E.2d at 1014, 941 N.Y.S.2d at 547 (citing *Rosenblum v. N.Y.C. Conflicts of Interest Bd.*, 75 A.D.3d 426, 427, 903 N.Y.S.2d 228, 228 (1st Dep't 2010)).

149. *Rosenblum*, 18 N.Y.3d at 429, 964 N.E.2d at 1014, 941 N.Y.S.2d at 547.

150. *See generally* Rosenblum v. N.Y.C. Conflicts of Interest Bd., 16 N.Y.3d 706, 944 N.E.2d 1152, 919 N.Y.S.2d 51 (2011).

151. *Rosenblum*, 18 N.Y.3d at 429, 964 N.E.2d at 1014, 941 N.Y.S.2d at 547.

152. *Id.*

153. *Id.* at 430-31, 964 N.E.2d at 1014, 941 N.Y.S.2d at 547.

154. *Id.* at 431-32, 964 N.E.2d at 1014-15, 941 N.Y.S.2d at 547-48. The Court pointed to the City's argument that:

> no one would seriously suggest, for example, that the district attorney could not prosecute a tenured pedagogue for a crime committed on school grounds simply because DOE might (or declined to) pursue a disciplinary action arising out of the same act. Likewise, COIB may impose a fine on a tenured pedagogue for an ethics violation even though DOE is authorized to penalize this employee pursuant to sections 3020 and 3020–a for the same act.

Id. at 432, 964 N.E.2d at 1015, 941 N.Y.S.2d at 548.

155. *Rosenblum*, 18 N.Y.3d at 432, 964 N.E.2d at 1012, 941 N.Y.S.2d at 545.

156. *Id.* at 433, 964 N.E.2d at 1016, 941 N.Y.S.2d at 549.

except in accordance with the Education Law or the employee's collective bargaining agreement.[157] The dissent argued that because the BOE declined to "discipline" the probationary principal, the COIB was barred from doing so by the plain language of the Education Law.[158]

What the dissent does not address is the fact noted by the majority opinion that "over 90% of the City's workforce is entitled to the civil service protections afforded by section 3020–a or similar provisions of State law."[159] If that is the case, the dissent's view would seemingly suggest that the COIB is an appendage rather than the heart of prosecution of ethics violations by the city's public servants.

C. Statutes of Limitations

Like jurisdiction, statutes of limitations may preclude any judicial review of an agency determination.[160] As they relate to administrative proceedings and other actions against government agencies and municipalities, statutes of limitations often present minefields to even the most astute attorneys.[161]

The cases before the Court of Appeals in 2012, *Kahn v. New York City Department of Education*,[162] *Nash v. New York City Board of Education*,[163] *Kosowski v. Donovan*,[164] and *Regional Economic Community Action Program, Inc. v. Enlarged City School District of Middletown*,[165] reflect the difficulties the various statutes may pose for individuals seeking judicial relief.

The first cases, *Kahn v. New York City Department of Education*, and *Nash v. New York City Board of Education*,[166] represent perhaps the most unsettling issue—when does an agency's determination become final and binding on an individual for purposes of the running of the statute of limitations if an agency administrative review process is provided?[167] Two probationary employees of the City of New York

157. *Id.* (Smith, J. dissenting).
158. *Id.* at 434, 964 N.E.2d at 1017, 941 N.Y.S.2d at 550.
159. *Id.* at 432, 964 N.E.2d at 1016, 941 N.Y.S.2d at 549.
160. BORCHERS & MARKELL, *supra* note 38.
161. *Id.*
162. *See generally* 18 N.Y.3d 457, 963 N.E.2d 1241, 940 N.Y.S.2d 540 (2012).
163. *See generally Id.* (note that the two separate cases of Plaintiffs Kahn and Nash against Defendant New York City Department of Education were combined before the Court of Appeals in 2012).
164. *See generally* 18 N.Y.3d 686, 967 N.E.2d 174, 943 N.Y.S.2d 796 (2012).
165. *See generally* 18 N.Y.3d 474, 964 N.E.2d 396, 941 N.Y.S.2d 25 (2012).
166. 18 N.Y.3d 457, 462, 963 N.E.2d 1241, 1242, 940 N.Y.S.2d 540, 541 (2012); No. 112365/08, 2009 NY Slip Op. 32531(U), at 6 (Sup. Ct. N.Y. Cnty. 2009).
167. *Kahn*, 18 N.Y.3d at 462, 963 N.E.2d at 1242, 940 N.Y.S.2d at 541; *Nash*, 2009 NY Slip Op. 32531(U), at 6.

Department of Education ("DOE") were caught in this quagmire when each appealed DOE termination decisions pursuant to the appeals process offered by the terms of their collective bargaining agreements before commencing an Article 78 proceeding.[168]

Petitioner Kahn was employed by the DOE as a social worker for a three-year probationary period that commenced on February 1, 2005.[169] Kahn was thereafter given an "unsatisfactory" review of her performance by the interim principal and the principal at the school to which she was assigned.[170]

On December 21, 2007, Kahn was notified that the community superintendent was denying Kahn a certification of completion of probation pursuant to section 2573(1) of the Education Law and that her appointment would terminate at the close of business on January 25, 2008;[171] Kahn was also advised that pursuant to the collective bargaining agreement between the DOE and the probationary employee's bargaining unit, she was entitled to review procedures outlined in Article 4 of the DOE bylaws.[172] Section 4.3.2 of the DOE's bylaws, entitled "[a]ppeals re: Discontinuance of Probationary Service" provides that:

> [a]ny person in the employ of the City School District who appears before the Chancellor, or a committee designated by the Chancellor, concerning the discontinuance of service during the probationary term, or at the expiration thereof, shall have a review of the matter before a committee which shall be designated in accordance with contractual agreements covering employees or by regulations of the Chancellor, as appropriate. After the review, the committee shall forward its advisory recommendation to the community superintendent or to the Chancellor in accordance with contractual agreements.[173]

Kahn elected to appeal the decision before the DOE Office of Appeals and Reviews, which recommended to the community superintendent "non-concurrence" with the discontinuation of Kahn's service.[174] The community superintendent then reaffirmed her original decision.[175]

Exactly four months after receipt of notification of the

168. *Kahn*, 18 N.Y.3d at 463, 963 N.E.2d at 1243, 940 N.Y.S.2d at 542; *Nash*, 2009 NY Slip Op. 32531(U), at 5.

169. *Kahn*, 18 N.Y.3d at 462, 963 N.E.2d at 1242, 940 N.Y.S.2d at 541.

170. *Id.*

171. *Id.* at 462-63, 963 N.E.2d at 1242-43, 940 N.Y.S.2d at 541-42.

172. *Id.*, 963 N.E.2d at 1243, 940 N.Y.S.2d at 542.

173. *Id.* at 463, 963 N.E.2d at 1243, 940 N.Y.S.2d at 542.

174. *Kahn*, 18 N.Y.3d at 463, 963 N.E.2d at 1243, 940 N.Y.S.2d at 542.

175. *Id.* at 464, 963 N.E.2d at 1243, 940 N.Y.S.2d at 542.

superintendent's reaffirmation, Kahn initiated an Article 78 proceeding alleging that the DOE failed to perform its duties enjoined by law, acted in an arbitrary and capricious manner, and violated the due process clauses of the federal and state constitutions.[176] She also alleged that her unsatisfactory rating and termination were violations of due process in accordance with federal and state law and 42 U.S.C. § 1983.[177] She sought orders vacating the DOE's decisions, permitting her to resume her position as a probationary DOE employee, and directing that future evaluations of her performance comply with the collective bargaining agreement's requirements specific to her position.[178]

The DOE cross-moved to dismiss Kahn's petition on the grounds that she had failed to file a notice of claim required by Education Law section 3813(1)[179] and that the Article 78 four-month statute of limitations barred the proceeding.[180]

Nash, employed by the DOE as a secretary beginning on September 3, 2002, worked first for two years at one school, and then transferred to another school.[181] At the second school, the principal evaluated her performance as unsatisfactory (a U-rating) in her annual professional performance review for 2004-2005 and recommended discontinuance of her probationary service on June 15, 2005.[182]

On the same day, Nash was notified by the local instructional superintendent that he was considering a discontinuance of her probationary employment effective on July 15, 2005, but she could submit a written response to this notice by July 8, 2005.[183] Nash did submit a written response on June 16, 2005; however, the superintendent notified Nash on July 15, 2005 that he was affirming the

176. *Id.* at 464, 963 N.E.2d at 1243-44, 940 N.Y.S.2d at 542-43.

177. *Id.*, 963 N.E.2d at 1244, 940 N.Y.S.2d at 543.

178. *Id.*

179. *Kahn*, 18 N.Y.3d at 464, 963 N.E.2d at 1244 & n.2, 940 N.Y.S.2d at 543 (citing N.Y. EDUC. LAW § 3813(1) (McKinney 2009), which provides in relevant part

> [n]o action or special proceeding, for any cause whatever . . . or claim against the district or any such school, or involving the rights or interests of any district or any such school shall be prosecuted or maintained against any school district, board of education . . . or any officer of a school district[or] board of education . . . unless it shall appear by and as . . . a written verified claim . . . presented to the governing body of said district or school within three months after the accrual of such claim).

180. *Kahn*, 18 N.Y.3d at 464, 963 N.E.2d at 1244, 940 N.Y.S.2d at 543. The school district also alleged that Kahn had not exhausted her administrative remedies; and that her petition did not state a cause of action under section 1983 because she had not been deprived of any property or liberty interest. *Id.* at 465, 963 N.E.2d at 1244, 940 N.Y.S.2d at 543.

181. Nash v. N.Y.C. Dep't of Educ., No. 112365/08, 2009 NY Slip Op. 32531(U), at 3 (Sup. Ct. N.Y. Cnty. 2009).

182. *Id.* at 3.

183. *Id.*

discontinuance of her probationary service as of close of business on that day.[184] He also informed her that she could appeal to the Office of Appeals and Reviews within 15 school days.[185]

On May 10, 2006, the appeals committee voted to recommend non-concurrence with the decision to discontinue Nash's probationary service.[186] Almost two years later, the superintendent notified Nash that the discontinuance was reaffirmed effective on May 14, 2008.[187] Then, Nash commenced her Article 78 proceeding, nearly three years after being notified of the superintendent's original decision to discontinue her employment.[188] She alleged that the hearing and determination to uphold the termination of her probationary employment were arbitrary, capricious, and contrary to law, and sought reinstatement to her probationary position with back pay and interest.[189]

The DOE moved to dismiss the petition alleging that her claims were barred by the statute of limitations because she did not sue within four months of the effective date of the termination of her probationary employment.[190]

At the heart of both these cases is the holding of the 1988 decision of the Court of Appeals in *Frasier v. Board of Education of City School District of the City of New York*.[191] Frasier was a probationary teacher in New York City who was advised by the Chancellor that his employment was terminated as of September 4, 1984.[192] After a review procedure, the Chancellor reversed his former decision and reinstated Frasier as a probationary employee.[193] The question before the Court of Appeals was whether the Chancellor's original determination was final and binding or whether it was nonfinal pending review and final decision so that Petitioner would be entitled to back pay and full benefits during the pendency of the administrative review.[194] The Court of Appeals held that probationary teachers have no statutory right to review the Chancellor's decision, the decision of the Chancellor is final, and the appeal/review process accorded to probationary teachers by

184. *Id.*
185. *Id.*
186. *Nash*, No. 112365/08, 2009 NY Slip Op. 32531(U), at 4.
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* DOE also argued that she had failed to exhaust her administrative and contractual remedies. *Nash*, No. 112365/08, 2009 NY Slip Op. 32531(U), at 7.
191. *See generally* 71 N.Y.2d 763, 525 N.E.2d 725, 530 N.Y.S.2d 79 (1988).
192. *Id.* at 765, 525 N.E.2d at 726, 530 N.Y.S.2d at 80.
193. *Id.*
194. *Id.*

virtue of the collective bargaining agreement does not postpone the decision.[195] The Court observed that to hold otherwise would have the "anomalous consequences" of having a teacher who had been validly removed from his or her position continue to receive pay while not providing services during the administrative review process, whatever its outcome.[196]

The supreme court in *Nash* held that the proceeding was time barred and dismissed the case[197] relying on the decision in *Frasier*.[198] The Appellate Division, First Department, unanimously affirmed.[199] Also relying on *Frasier*,[200] the First Department held that:

> [t]o the extent that petitioner challenges the termination, this claim is time-barred, since a petition to challenge the termination of probationary employment must be brought within four months of the effective date of termination, during which time the termination is deemed to become final and binding, and a petitioner's pursuit of administrative remedies does not toll the four-month statute of limitations.[201]

In *Kahn*, both the teacher and the DOE relied on *Frasier*.[202] The DOE argued that *Frasier* stands for the proposition that the initial determination is final and binding and as such starts the running of the statute of limitations which would bar Ms. Kahn's petition.[203] Petitioner relied on certain exceptions articulated in *Frasier* to claim that the statute of limitations did not begin to run until after the administrative appeal which affirmed the original decision.[204]

The supreme court in *Kahn* acknowledged that the debate over the application of *Frasier* is

> an interesting one which cries out for resolution by our higher courts; for while both the Second Department and the First Department have cited *Frasier* for the broad proposition that an administrative appeal does not extend the time to commence an Article 78 proceeding, a close look at *Frasier* indicates, in this Court's opinion, that the Court

195. *Id.* at 767, 525 N.E.2d at 727, 530 N.Y.S.2d at 81.
196. *Frasier*, 71 N.Y.2d at 767, 525 N.E.2d at 727, 530 N.Y.S.2d at 81.
197. Nash v. N.Y.C. Dep't of Educ., No. 112365/08, 2009 NY Slip Op. 32531(U), at 7 (Sup. Ct. N.Y. Cnty. 2009).
198. *Id.* (citing *Frasier*, 71 N.Y.2d at 767, 525 N.E.2d at 728, 530 N.Y.S.2d at 81).
199. Nash v. Bd. of Educ. of the City Sch. Dist. of N.Y., 82 A.D.3d 470, 470, 918 N.Y.S.2d 94, 95 (1st Dep't 2011).
200. *Id.*, 918 N.Y.S.2d at 95.
201. *Id.*
202. Kahn v. Dep't of Educ. of N.Y., 26 Misc. 3d 366, 373, 887 N.Y.S.2d 435, 441 (Sup. Ct. N.Y. Cnty. 2009).
203. *Id.*
204. *Id.*

> of Appeals did not dictate, or even suggest, such a sweeping and preclusive proposition of law.[205]

The supreme court held that Petitioner's Article 78 proceeding was not time barred, concluding that a broad interpretation of *Frasier* to bar petitions on the grounds that the statute of limitations begins to run with the Chancellor's original decision was never intended.[206]

The Appellate Division, again the First Department, reversed, making quick work of the petitioners' claims.[207] The court stated that "[a] petition to challenge the termination of probationary employment on substantive grounds must be brought within four months of the effective date of termination[;] [t]he time to commence such a proceeding is not extended by the petitioner's pursuit of administrative remedies."[208] The court held that Kahn's petition was untimely.[209]

The Court of Appeals granted leave to appeal in both cases[210] and affirmed the decisions of the First Department.[211] The Court also reaffirmed its decision in *Frasier*.[212] While noting that the effect of the decision was to preclude a terminated probationary teacher from collecting back pay while pursuing an optional administrative appeal,[213] the Court observed that:

> [t]he principal take-away from the decision, though, is not this conclusion, but rather the reason for it; namely, that the original decision to discontinue Frasier's employment was in all respects final as of the day his probationary appointment ended and was therefore not dependent upon exhaustion of the internal review to become effective. Because a determination pursuant to Education Law [section] 2573(1)(a) to discontinue a probationary employee's service becomes final and binding on that employee on his or her last day at work—as *Frasier* holds—CPLR 217(1) dictates that any suit to challenge the determination must be commenced within four months

205. *Id.*

206. *Id.* at 375, 887 N.Y.S.2d at 442.

207. Kahn v. N.Y.C. Dep't of Educ., 79 A.D.3d 521, 521, 915 N.Y.S.2d 26, 27 (1st Dep't 2010).

208. *Id.* at 522, 915 N.Y.S.2d at 27.

209. *Id.* (dismissing the claim that the notice was procedurally defective in that at most the defect would have resulted in her receiving "additional back pay had she filed a notice of claim and sought money damages").

210. Kahn v. N.Y.C. Dep't of Educ., 16 N.Y.3d 709, 709, 947 N.E.2d 163, 163, 922 N.Y.S.2d 271, 271 (2011); Nash v. Bd. of Educ. of the City Sch. Dist. of N.Y., 17 N.Y.3d 704, 704, 952 N.E.2d 1089, 1089, 929 N.Y.S.2d 94, 94 (2011).

211. Kahn v. N.Y.C. Dep't of Educ., 18 N.Y.3d 457, 461, 963 N.E.2d 1241, 1242, 940 N.Y.S.2d 540, 541 (2012).

212. *Id.* at 472, 963 N.E.2d at 1249, 940 N.Y.S.2d at 548.

213. *Id.*

after that date.[214]

The Court noted that the final nature of the Chancellor's decision has the benefit of allowing Petitioners with meritorious claims to seek immediate relief in court without having to wait for the administrative proceeding without pay.[215] Nevertheless, the administrative appeal for probationary teachers seems to be a trap for the unwary.

Petitioners in *Kosowski v. Donovan* were elected members of the Nassau County Committee of the Conservative Party.[216] At a County Committee meeting, Respondents were elected as officers of the party.[217] Certain Respondents filed a certificate of election, date stamped September 28, 2010 by the Nassau County Board of Elections.[218]

Petitioners initiated an Article 78 proceeding alleging that the election was unlawful because the County Committee lacked the requisite number of members under section 2-104 of the Election Law,[219] and that some of the members were not qualified.[220]

214. *Id.*

215. *Id.* at 472-73, 963 N.E.2d at 1250, 940 N.Y.S.2d at 549.

216. 18 N.Y.3d 686, 687, 967 N.E.2d 174, 174, 943 N.Y.S.2d 796, 796 (2012) (per curiam).

217. *Id.*

218. *Id.*, 967 N.E.2d at 174, 943 N.Y.S.2d at 796.

219. N.Y. ELEC. LAW § 2-104 (McKinney 2012) provides:

> 1. The county committee of each party shall be constituted by the election in each election district within such county of at least two members and of such additional members, not in excess of two, as the rules of the county committee of the party within the county or the statement filed pursuant hereto may provide for such district, proportional to the party vote in the district for governor at the last preceding gubernatorial election, or in case the boundaries of such district have been changed or a new district has been created since the last preceding gubernatorial election, proportional to the party vote cast for member of assembly or in the event there was no election for member of assembly, then proportional to the number of enrolled voters of such party in such district on the list of enrolled voters last published by the board of elections, excluding voters in inactive status. In a county in which no additional members are provided for by the rules of the county committee or the statement filed pursuant hereto the voting power of each member shall be in proportion to such party vote or, if the election district which such member represents was created or changed since the last election for member of assembly, proportional to such party enrollment. In a county in which additional members are so provided for, on the basis of the party vote or enrollment in election districts within such county, each member shall have one vote. Each member of a county committee shall be an enrolled voter of the party residing in the county and the assembly district from which or in the assembly district containing the election district in which such member is elected except that a member of a county committee who, as a result of an alteration of assembly district lines, no longer resides within such assembly district may continue to serve for the balance of the term to which he was elected.
>
> 2. If, pursuant to section one of article thirteen of the constitution, such committee

Respondent officers argued that Petitioners lacked standing to sue and that the proceeding was barred by the statute of limitations.[221] The supreme court assumed that the petition was filed in a timely manner, but dismissed the petition finding that the committee was comprised of a sufficient number of members.[222] The Appellate Division, Second Department, affirmed on a different ground, finding that the proceeding was untimely because it was commenced after the ten-day statute of limitations in section 16-102(2) of the Election Law.[223] The Court of Appeals granted leave to appeal[224] and affirmed the appellate division in a per curiam opinion.[225]

Section 16-102 of the Election Law provides in part that:

> The nomination or designation of any candidate for any public office or party position . . . or the election of any person to any party position may be contested in a proceeding instituted in the supreme court by any aggrieved candidate. . . . A proceeding with respect to a primary, convention, *meeting of a party committee*, or caucus shall be instituted within ten days after the holding of such primary or convention or the filing of the certificate of nominations made at such caucus or meeting of a party committee.[226]

The gist of Petitioners' argument was that the four-month statute of limitations under Article 78 should apply because section 16-201 applies only to meetings to elect candidates for public office rather than party officers.[227] The Court rejected that position,[228] pointing to the

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or a state convention of the party shall provide by rule for equal representation of the sexes on such committee, the rules of such committee relative to additional members, either from election districts or at large, shall be formulated and applied in such manner that the whole membership shall consist of an even number, equally divided between the sexes. When any such rule provides for equal representation of the sexes, the designating petitions and primary ballots shall list candidates for such party positions separately by sexes.

3. Notwithstanding the provisions of subdivision one of this section, a county committee of a party shall be legally constituted if twenty-five per centum of the committeemen required to be elected in such county, as provided in subdivision one of this section, have been elected.

220. *Kosowski*, 18 N.Y.3d at 688, 967 N.E.2d at 174, 943 N.Y.S.2d at 796.

221. *Id.* Respondents also challenged Petitioners' substantive allegations. *Id.*

222. Kosowski v. Donovan, 84 A.D.3d 1089, 1089, 923 N.Y.S.2d 850, 850 (2d Dep't 2011).

223. *Id.*; N.Y. ELEC. LAW §16-102(2) (McKinney 2009).

224. Kosowski v. Donovan, 17 N.Y.3d 714, 714, 957 N.E.2d 1159, 1159, 933 N.Y.S.2d 655, 655 (2011).

225. *Kosowski*, 18 N.Y.3d at 688, 967 N.E.2d at 175, 943 N.Y.S.2d at 797.

226. N.Y. ELEC. LAW §16-102(1)(2).

227. *Kosowski*, 18 N.Y.3d at 689, 967 N.E.2d at 174, 943 N.Y.S.2d at 796 (citing Town of Islip Town Comm. of the Conservative Party v. Leo, 71 A.D.2d 624, 624, 418 N.Y.S.2d 148, 149 (2d Dep't 1979)). The language in *Town of Islip* suggested as much.

1988 amendment of section 16-102 to include "meeting of a party committee."[229] The Court held that the application of the ten-day statute of limitations "is sensible and consistent with the Legislature's avowed purpose."[230]

In still yet another statute of limitations case, *Regional Economic Community Action Program, Inc. v. Enlarged City School District of Middletown*,[231] the Court granted leave to appeal the matter[232] to determine the applicable statute of limitations for a taxpayer refund suit against a school district, as well as the time of accrual of a claim for allegedly wrongfully assessed school taxes.[233]

As background for its decision, the Court explained the difficulty Regional Economic Community Action Program, Inc. ("RECAP"), a tax-exempt charitable organization, had experienced in obtaining a tax exemption from the City of Middletown, New York.[234] RECAP was the owner of properties in Middletown that were used as housing for participants in the organization's "Community Re-Entry Program."[235] When RECAP applied to Middletown for a charitable tax exemption in February, 2004, the city rejected its application.[236] The taxes subsequently assessed against RECAP became part of the school tax roll adopted by the Middletown School District.[237] In 2004, RECAP initiated an Article 78 proceeding against the city challenging the legality of the assessments, but did not serve notice on the school district at that time.[238]

See 71 A.D.2d at 624, 418 N.Y.S.2d at 149. The case involved an internal struggle for control of the town's Conservative Party's offices. *Id.* The Second Department declined to apply the provisions of section 16-102 of the Election Law, stating that "[s]ection 16-102 of the Election Law imposes a short limitation of 10 days in order *to meet the exigencies of preparing ballots and conducting elections for public office*. This is not such a case, and there is no necessity for haste in the determination of the dispute. Hence the action was timely brought." *Id.* at 624-25, 418 N.Y.S.2d at 149 (emphasis added).

228. *Kosowski*, 18 N.Y.3d at 689, 967 N.E.2d at 175, 943 N.Y.S.2d at 797.

229. *Id.* (citing Act of July 30, 1986, ch. 710, 2009 McKinney's Sess. Laws of N.Y. 1682 (to be codified at N.Y. ELEC. LAW § 16-102)).

230. *Kosowski*, 18 N.Y.3d at 689, 967 N.E.2d at 174, 943 N.Y.S.2d at 796. Given its holding, the Court did not address the substantive allegations of the petition. *Id.*, 967 N.E.2d at 175, 943 N.Y.S.2d at 797.

231. 18 N.Y.3d 474, 964 N.E.2d 396, 941 N.Y.S.2d 25 (2012).

232. Reg'l Econ. Cmty. Action Program v. Enlarged City Sch. Dist. of Middletown, 16 N.Y.3d 709, 946 N.E.2d 177, 921 N.Y.S.2d 189 (2011).

233. *Reg'l Econ. Cmty. Action Program*, 18 N.Y.3d at 477, 964 N.E.2d at 397, 941 N.Y.S.2d at 26.

234. *Id.* at 478, 964 N.E.2d at 397-98, 941 N.Y.S.2d at 26-27.

235. *Id.*

236. *Id.* at 478, 964 N.E.2d at 398, 941 N.Y.S.2d at 27.

237. *Id.*

238. *Reg'l Econ. Cmty. Action Program*, 18 N.Y.3d at 478, 964 N.E.2d at 398, 941

Throughout the pendency of the 2004 proceeding, RECAP paid the city property and school taxes it had been assessed under protest.[239] In 2008, the Court held that RECAP was entitled to the tax exemption and RECAP recovered the property taxes it had paid to the city.[240]

In 2009, RECAP demanded that the school district refund RECAP's school tax payments from 2003 through 2008, but the district refused.[241] RECAP then initiated an action for money had and received.[242] Both parties moved for summary judgment, and the district asserted that RECAP's cause of action was barred by the statute of limitations under Education Law section 3813(2-b).[243]

Section 3813(2-b) provides that any action or proceeding not sounding in tort must be commenced within one year after the cause of action arose.[244] Section 3813 also requires service of a notice of claim against the school district within three months after the accrual of a claim.[245]

The supreme court found that RECAP failed to comply with section 3813's requirements of giving the notice of claim and commencing the action within the one-year statute of limitations.[246] The appellate division affirmed for a different reason, holding that RECAP had failed to establish the "appropriate legal protest prior to or at the time of payment as a prerequisite to recovery in an action seeking refunds" because the "under protest" letter RECAP submitted with the tax payments referred only to city tax payments, and not school district tax payments.[247] The Court of Appeals granted leave to appeal.[248]

RECAP asserted that its claim for money had and received against the school district was governed by a six-year statute of limitations.[249]

N.Y.S.2d at 27.

239. *Id.*

240. *Id.* (citing Adult Home at Erie Station., Inc. v. Assessor & Bd. of Assessment Review of City of Middletown, 10 N.Y.3d 205, 217, 886 N.E.2d 137, 142, 856 N.Y.S.2d 515, 520(2008)).

241. *Reg'l Econ. Cmty. Action Program*, 18 N.Y.3d at 478, 964 N.E.2d at 398, 941 N.Y.S.2d at 27.

242. *Id.*

243. *Id.*

244. N.Y. EDUC. LAW § 3813(2-b) (McKinney 2009).

245. *Reg'l Econ. Cmty. Action Program*, 18 N.Y.3d at 478, 964 N.E.2d at 398, 941 N.Y.S.2d at 27.

246. *Id.*

247. Reg'l Econ. Cmty. Action Program v. Enlarged City Sch. Dist. of Middletown, 79 A.D.3d 723, 724-25, 912 N.Y.S.2d 301, 302 (2d Dep't 2010).

248. Reg'l Econ. Cmty. Action Program v. Enlarged City Sch. Dist. of Middletown, 16 N.Y.3d 709, 946 N.E.2d 177, 921 N.Y.S.2d 189 (2011).

249. *Reg'l Econ. Cmty. Action Program*, 18 N.Y.3d at 478-79, 964 N.E.2d at 398, 941 N.Y.S.2d at 27.

While the Court acknowledged the applicability of that statute in an ordinary wrongful tax assessment case, the Court concluded that it was not available to RECAP because the school district is entitled to rely on the one-year limit for claims against a school district in Education Law section 3813(2-b).[250] The Court held RECAP had to assert its cause of action within one year of the time the cause of action arose.[251]

The Court then considered when the cause of action had accrued.[252] Relying on Education Law section 3813, which states that accrual of a claim for monies due arising out of contract "shall be deemed to have occurred as of the date payment for the amount claimed was denied," RECAP argued that its claim accrued in 2009 when the district refused to refund the taxes.[253] The success of this argument depended on the existence of a contractual relationship between RECAP and the school district.[254] The Court concluded that the relationship between RECAP and the school district was not contractual, but merely an obligation created by law when one party retains money that belongs to another "in equity and good conscience."[255] Thus, it determined that the requirements of section 3813 regarding accrual and notice of claim did not apply.[256] RECAP's cause of action for money had and received accrued when it paid the taxes to the school district; because RECAP did not file its claim against the school district within one year of the payment, under section 3813(2-b), RECAP's claim was time-barred.[257]

D. Agency Interpretation of Statutes

A well-established principle of administrative law is the deference accorded to an agency's interpretation of the laws it is charged with regulating.[258] 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.[259] *Albany Law School v. New York State Office of Mental Retardation and Developmental Disabilities* involved two issues: (1) whether a state agency's interpretation of sections

250. *Id.*
251. *Id.*
252. *Id.* at 478-79, 964 N.E.2d at 398, 941 N.Y.S.2d at 27.
253. *Id.* at 479-80, 964 N.E.2d at 399, 941 N.Y.S.2d at 28.
254. *Reg'l Econ. Cmty. Action Program*, 18 N.Y.3d at 479, 964 N.E.2d at 399, 941 N.Y.S.2d at 28.
255. *Id.*
256. *Id.* at 479-80, 964 N.E.2d at 399, 941 N.Y.S.2d at 28.
257. *Id.*
258. *See generally* BORCHERS & MARKELL, *supra* note 38.
259. *Id.*

33.13(c)(4) and 45.09(b) of Mental Hygiene Law limiting Petitioner's access to clinical and other records was consistent with federal law; and (2) whether actively-involved family members could be deemed legal representatives for purposes of the federal and state access provisions.[260]

Petitioners Albany Law School and Disability Advocates, Inc. "provide protection and advocacy services to individuals with developmental disabilities pursuant to contracts with the New York State Commission on Quality of Care and Advocacy for Persons with Disabilities ("Commission"), an agency that oversees New York's protection and advocacy system."[261] The petitioners requested access to the clinical records of all individuals at two State-run facilities in order to investigate whether the residents were being denied the opportunity to live in less restrictive settings.[262] The investigation and request was prompted by a complaint about the discharge practices of the New York State Office of Mental Retardation and Developmental Disabilities (now called the Office for People with Developmental Disabilities, ("OPWDD")) at these facilities.[263] Petitioners' investigation fell within their advocacy mandate.[264]

Petitioners argued that their access to the records was unrestricted under sections 33.13(c)(4) and 45.09(b) of the Mental Hygiene Law.[265] OPWDD responded that the petitioners' access was limited because the two statutory provisions on which Petitioners relied had to be interpreted in conjunction with records access procedures established in the federal Developmental Disabilities Assistance and Bill of Rights Act.[266]

The federal statute provides funds for states to create protection and advocacy systems which provide services to "safeguard the rights of individuals with developmental disabilities."[267] The law also allows the organizations providing this protection and advocacy P and A organizations: to have access to the records of the individuals on behalf

260. *Albany Law Sch.*, 19 N.Y.3d 106, 112, 968 N.E.2d 967, 969, 945 N.Y.S.2d 613, 615.

261. *Id.*, 968 N.E.2d at 968-69, 945 N.Y.S.2d at 614-15. For a more detailed discussion of the protection and advocacy system in New York and recent reforms to the system underway in New York. *See infra* pp. 1050-53.

262. *Id.*, 968 N.E.2d at 969, 945 N.Y.S.2d at 615.

263. *Id.*

264. *Id.*

265. Albany Law Sch., 19 N.Y.3d at 112, 968 N.E.2d at 969, 945 N.Y.S.2d at 615.

266. *Id.*

267. *See id.* at 113-15, 968 N.E.2d at 970-71, 945 N.Y.S.2d at 616-17; 42 U.S.C. § 15043(a)(2)(J)(ii)(II), (I)(i) (2006).

of whom it advocates.[268] The access is categorized as follows: (1) access to personal records in emergency situations without consent; (2) access in nonemergency situations when there is probable cause to believe an individual's health or safety is in jeopardy and an individual or legal representative consents, or the legal representative fails or refuses to act; and (3) access in nonemergency situations when there is probable cause to believe an individual's health or safety is in jeopardy, and the individual is unable to give consent, and does not have a legal representative.[269]

When the federal statute was adopted, the New York State Legislature created the Commission to review the operations of the Department of Mental Hygiene and to investigate complaints pertaining to the treatment and care of patients.[270] The Commission administers its protection and advocacy responsibilities in part through independent P and A contractors such as Petitioners.[271]

OPWDD agreed to provide Petitioners with records of those individuals from whom Petitioners had obtained authorization (either by the individual residents or their legal representatives) and from those who were unable to provide authorization and lacked legal representatives.[272] It refused to provide records for those individuals whose consent Petitioners did not obtain.[273]

Petitioners maintained that they were entitled to unrestricted access to the records and declined to seek the consent of the individuals or their representatives.[274] Thereafter, Petitioners commenced an Article 78 proceeding and a plenary action under 42 U.S.C. § 1983 alleging "that OPWDD was neglecting the care of individuals residing at the two

268. *See Albany Law Sch.*, 19 N.Y.3d at 116, 968 N.E.2d at 971, 945 N.Y.S.2d at 617. Under federal law, each state is required to have a system of protection and advocacy that has the authority to "pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of such individuals within the State who are or who may be eligible for treatment, services, or habilitation, or who are being considered for a change in living arrangements, with particular attention to members of ethnic and racial minority groups; and (ii) provide information on and referral to programs and services addressing the needs of individuals with developmental disabilities;" and the authority to "investigate incidents of abuse and neglect of individuals with developmental disabilities if the incidents are reported to the system or if there is probable cause to believe that the incidents occurred[.]" 42 U.S. C. A. §15043(a)(2)(A)(B).

269. *See Albany Law Sch.*, 19 N.Y.3d at 113-15, 968 N.E.2d at 970-71, 945 N.Y.S.2d at 616-17; 42 U.S.C. § 15043(a)(2)(J)(ii)(II), (I)(i).

270. *Albany Law Sch.*, 19 N.Y.3d at 115, 968 N.E.2d at 971, 945 N.Y.S.2d at 617.

271. *Id.*

272. *Id.* at 112, 968 N.E.2d at 969, 945 N.Y.S.2d at 615.

273. *See id.*

274. *Id.*

facilities both through 'the denial of rights to live in less restrictive settings and the failure to provide necessary treatment that would prepare and enable individuals with disabilities to live in such settings'" and requesting that the court compel the disclosure of the records.[275] In the alternative, Petitioners sought an order "obligating OPWDD to provide the records of individuals without a legal representative."[276] Petitioners maintained that "actively-involved family members were not legal representatives for purposes of record access."[277]

OPWDD moved to dismiss on the grounds that Petitioners had failed to state a cause of action.[278] OPWDD included an affidavit from the Commission's chief operating officer stating that the Commission concurred with OPWDD's opinion that the access rights of P and A organizations under contract with the Commission were not the same as the Commission's access rights under section 45.09 of the Mental Hygiene Law.[279] Other advocacy groups also supported OPWDD's position.[280]

The Commission argued that section 45.09 provides two types of access: unlimited access to the Commission under subdivision (a), and limited access to the P and A contractors under subdivision (b).[281] Section 45.09(a) provides that:

> [t]he commission, any member or any employee designated by the chair, must be granted access at any and all times to any mental hygiene facility, or adult home or residence for adults . . . in order to carry out the functions of the commission . . . and to *all books, records, and data pertaining to any such facility* deemed necessary for carrying out the commission's functions, powers and duties.[282]

The Commission argued that subdivision (b) differs from subdivision (a) in that while it describes the P and A organizations as having access at any and all times "[p]ursuant to the authorization of the commission to administer the protection and advocacy system as provided for by federal law," their access must be based on a complaint by or on behalf of an individual with a disability and any limitations on the release of the information are applicable to the P and A

275. *Albany Law Sch.*, 19 N.Y.3d at 117-18, 968 N.E.2d at 973, 945 N.Y.S.2d at 619.
276. *Id.* at 118, 968 N.E.2d at 973, 945 N.Y.S.2d at 619.
277. *Id.*
278. *Id.*
279. *Id.*
280. *Albany Law Sch.*, 19 N.Y.3d at 118, 968 N.E.2d at 973, 945 N.Y.S.2d at 619.
281. *Id.*
282. N.Y. MENTAL HYG. LAW § 45.09(a) (McKinney 2012) (emphasis added).

organization.[283]

Section 33.13(c)(4) provides that "information about patients or clients reported to the offices, including the identification of patients or clients, clinical records or clinical information tending to identify patients or clients . . . shall not be a public record and shall not be released by [OMH] to any person or agency outside of [OMH]]."[284] The statute does list certain exceptions, including an exemption for the Commission and any P and A contractors "which provides protection and advocacy services pursuant to the authorization of the [C]ommission to administer the protection and advocacy system as provided for by federal law."[285]

The supreme court found that the provisions of the Mental Hygiene Law adopted the federal P and A access procedures, limiting the petitioners' access, and that a legal representative could include an actively-involved family member of a resident.[286] The appellate division differed in its interpretation of the two provisions in question. It concluded that section 33.13(c)(4) required Petitioners to comply with the federal scheme, but that section 45.09(b) should not be read to incorporate the federal access requirements, and that the provision authorized Petitioners' access if they received a complaint.[287] It also held that a family member could not be a legal representative because such a person could not make all decisions for the patient.[288]

The Court of Appeals focused on the requirements of the federal statute's access requirements for P and A providers.[289] In reviewing these provisions, the Court concluded that the federal statute is a careful balancing act between the protection of individuals with developmental disabilities and the consideration of the privacy interests of the individuals and the role of family.[290]

The Court concluded that contrary to the appellate division's interpretation, both sections 45.09 and 33.13 should be read as incorporating the federal records access provisions because each relates to the same subject matter, contains identical language, and was adopted at the same time.[291] It held that although section 45.09(a) gives the

283. *Id.* § 45.09(a)-(b).
284. *Id.* § 33.13.
285. *Id.* § 33.13(c)(4).
286. *Albany Law Sch.*, 19 N.Y.3d at 118-19, 968 N.E.2d at 973, 945 N.Y.S.2d at 619.
287. *Id.* at 119, 968 N.E.2d at 973-74, 945 N.Y.S.2d at 619-20.
288. *Id.*, 968 N.E.2d at 974, 945 N.Y.S.2d at 620.
289. *See id.* at 113-15, 968 N.E.2d at 970-71, 945 N.Y.S.2d at 616-17.
290. *Id.* at 115, 968 N.E.2d at 971, 945 N.Y.S.2d at 617.
291. *Albany Law Sch.*, 19 N.Y.3d at 121, 968 N.E.2d at 975, 945 N.Y.S.2d at 621.

Commission broad access to records so long as they relate to the Commission's functions, powers, and duties, section 45.09(b) ties the access rights of P and A organizations to the Commission's administration of the system as provided by federal law,[292] and the amendments to section 33.13(c)(4) include similar reference to federal law.[293]

The Court concluded that the context underlying the enactment of the provisions supported its interpretation because they were enacted in response to an amendment to the federal statute in 1984.[294] This amendment required states to grant their P and A organization access to records under certain circumstances as a condition of continued eligibility for funding.[295] Governor Mario Cuomo issued an assurance to the federal government that New York would enact amendments to its law ensuring P and A access consistent with the federal program.[296] In 1986, then Senator Padavan issued a memorandum affirming that the amendments to the Mental Hygiene Law were enacted to ensure the state's compliance with the federal program.[297] The Court noted that the legislative history of the amendments did not include any evidence that New York was adopting standards allowing P and A organizations access to patients' records broader than required by federal law.[298]

As to the second issue, whether an actively-involved family member could be a patient's "legal representative," the Court looked first to the federal law and then state law. The federal regulations establish two requirements for individuals to qualify as "legal representatives": (1) they must have sufficient decision-making authority; and (2) they must be appointed and regularly reviewed by a court or state agency.[299] The federal regulation relies on state law interpretation of both elements.[300]

Under New York law, an "actively involved" family member has decision-making authority.[301] He or she can make many critical decisions on behalf of individuals with developmental disabilities, including giving informed consent for medical procedures and deciding whether to withhold or withdraw life-sustaining treatment.

292. *Id.*
293. *Id.*
294. *Id.* at 122, 968 N.E.2d at 976, 945 N.Y.S.2d at 622.
295. *Id.*
296. *Albany Law Sch.*, 19 N.Y.3d at 122, 968 N.E.2d at 976, 945 N.Y.S.2d at 622.
297. *Id.*
298. *Id.* at 122-23, 968 N.E.2d at 976, 945 N.Y.S.2d at 622.
299. *Id.* at 124, 968 N.E.2d at 977, 945 N.Y.S.2d at 623.
300. *Id.*
301. *Albany Law Sch.*, 19 N.Y.3d at 124, 968 N.E.2d at 977, 945 N.Y.S.2d at 623.

Concerning appointment and review, OPWDD's regulations define "an actively involved adult family member" as someone who is eighteen or older, who is related to the particular person at the facility, has demonstrated significant and ongoing involvement in the person's life, and has a sufficient knowledge of the person's needs.[302] Because New York law permits an actively involved family member to make the most critical decisions for a developmentally disabled individual who lacks decision-making capacity, the Court concluded that an actively-involved family member can be an individual's "legal representative."[303]

New York State Psychiatric Association, Inc. v. New York State Department of Health involved a challenge to the Department of Health's ("DOH") interpretation of the level of reimbursement to which psychiatrists were entitled for treating patients eligible for both Medicare and Medicaid, known as "dual eligible."[304]

The challenge arose out of amendments to the Social Services Law for the years 2006 and 2007.[305] The amendments were part of the executive branch's budget bills dealing with enhanced Medicaid reimbursement for psychiatric services provided to dual eligibles—a term used to describe "[i]ndividuals who are entitled to Medicare Part A and/or Part B and are eligible for some form of Medicaid benefit."[306] The questions raised were whether the 2006 amendment was a one-time enhanced reimbursement for psychiatrists providing services to dual eligibles or a permanent increase in reimbursement rates, and whether the 2008 amendment retroactively terminating the enhanced reimbursement rates for psychiatrists was unconstitutional.[307]

As background, the Court described a series of amendments to the Social Services Law, including those at issue.[308] In 2003, the New York State Legislature amended Social Services Law section 367–a(1)(d) to limit the deductible and coinsurance payments for the majority of

302. *Id.* at 125-26, 968 N.E.2d at 978, 945 N.Y.S.2d at 624.

303. *Id.* at 125, 968 N.E.2d at 978, 945 N.Y.S.2d at 624.

304. *See* 19 N.Y.3d 17, 20, 968 N.E.2d 428, 428-29, 945 N.Y.S.2d 191, 191-92 (2012).

305. *Id.* at 20-21, 968 N.E.2d at 428, 945 N.Y.S.2d at 191.

306. Medicaid Coverage of Medicare Beneficiaries (Dual Eligibles) At a Glance, available at http://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/downloads/medicare_beneficiaries_dual_eligibles_at_a_glance.pdf; *N.Y. State Psychiatric Ass'n*, at 23 n.3, 968 N.E.2d at 430 n.3, 945 N.Y.S.2d at 193 n.3. "In New York State, claims for medical care for dual eligibles are first submitted to the Medicare Part B program and the balance, i.e., the deductible and the coinsurance amount is paid by Medicaid." *Id.* at 21, 968 N.E.2d at 429, 945 N.Y.S.2d at 192.

307. *Id.* at 20-21, 968 N.E.2d at 428, 945 N.Y.S.2d at 191.

308. *Id.* at 21-22, 968 N.E.2d at 429, 945 N.Y.S.2d at 192.

providers of services to dual eligibles to 20%, but retained 100% reimbursement for a limited number of providers in section 367-a(1)(d)(iii).[309] Psychiatrists were not among them.[310]

In 2005, the legislature amended section 367–a(1)(d)(iii) of the Social Services Law to add "physicians," to the limited list of health care providers which would receive 100% reimbursement, rather than the ordinary 20%, when treating patients eligible for both Medicare and Medicaid.[311] This coinsurance enhancement to physicians was capped at $5 million and was to be implemented from April 1, 2005 to June 1, 2006.[312]

At issue in the case was the 2006 amendment to section 367–a(1)(d)(iii) of the Social Services Law which included psychiatrists licensed under Article 131 of the Education Law.[313] The 100% reimbursement for licensed psychiatrists was capped, as the physicians' enhancement had been, but at the lower amount of $2 million for the period of April 1, 2006 to March 31, 2007—the 2006-2007 fiscal budget year.[314] The cap appeared in section 2 of the unconsolidated law that contained the amendment to the statute.[315]

The DOH distributed the funds to eligible psychiatrists during the

309. *Id.*, 19 N.Y.3d at 21, 968 N.E.2d at 429, 945 N.Y.S.2d at 192. The categories included "services provided by ambulance carriers, psychologists and certain claims certified by DOH or other state agencies." *N.Y. State Psychiatric Ass'n*, 19 N.Y.3d at 20 n.1, 968 N.E.2d at 429 n.1, 945 N.Y.S.2d at 192 n.1.

310. *Id.* at 21, 968 N.E.2d at 429, 945 N.Y.S.2d at 192.

311. *Id.* at 21-22, 968 N.E.2d at 429, 945 N.Y.S.2d at 192.

312. *Id.* at 22, 968 N.E.2d at 429, 945 N.Y.S.2d at 192 (citing Act of March 15, 2005, ch. 12, § 8, 2005 McKinney's Sess. Laws of N.Y. 113 (to be codified at N.Y. Soc. Serv. Law § 367-a(1)(d)(iii) (McKinney 2010))).

313. *N.Y. State Psychiatric Ass'n*, 19 N.Y.3d at 21-22, 968 N.E.2d at 429, 945 N.Y.S.2d at 192.

314. *Id.* at 22, 968 N.E.2d at 429, 945 N.Y.S.2d at 192.

315. N.Y. State Psychiatric Ass'n, Inc. v. N.Y. State Dep't of Health, No. 22256/07, 2009 NY Slip Op. 50607(U), at 17-18 (Sup. Ct. Nassau Cnty. 2009) (citing Act of June 23, 2006, ch. 109, § 2, 2006 McKinney's Sess. Laws of N.Y. 477 (to be codified at N.Y. Soc. Serv. Law § 367-a(1)(d)(iii)), which provides that:

> [n]otwithstanding any provision of law to the contrary, medical assistance payments made in compliance with the amendments made by section one of this act shall be calculated in accordance with the methodology set forth in this section. Any medical assistance payments made to psychiatrists during the period April 1, 2006 through March 31, 2007 for items and services provided under part B of title XVIII of the federal social security act to eligible persons who are also beneficiaries under such part and for such items and services provided to qualified Medicare beneficiaries under such part and which are made subject to the twenty percent of coinsurance liability provisions of subparagraph (iii) of paragraph (d) of subdivision 1 of section 367–a of the social services law that were in effect immediately preceding the effective date of this act shall be increased in an aggregate amount not to exceed two million dollars).

defined period, which because of the caps' pro-rata application amounted to a less than 100% reimbursement rate and, on April 1, 2007 resumed applying the default 20% reimbursement rate.[316]

In December 2007, the New York Psychiatrists Association[317] as well as four individual psychiatrists who treated dual eligibles after March 31, 2007, commenced a combined declaratory judgment/Article 78 proceeding for a declaration that eligible psychiatrists were entitled to 100% reimbursement going forward after the 2006 amendment because the $2 million dollar cap only applied to the 2006-2007 budget year.[318] Petitioners also sought full payment of coinsurance amounts for treatment provided after March 31, 2007.[319]

In April 2008, after the proceeding had been commenced, the legislature again amended section 367–a(1)(d)(iii) of the Social Services Law to eliminate its coverage of psychiatrists and to specifically provide that:

> [m]edical assistance payments shall not be made pursuant to the amendments made by section one of this act for services provided on and after April 1, 2007 by psychiatrists licensed under Article 131 of the education law, or as co-insurance enhancements to payments made to such psychiatrists on and after April 1, 2007.[320]

Plaintiffs amended their complaint to challenge the 2008 amendment as a violation of their due process rights for a retroactive deprivation of their property.[321]

Both Plaintiffs and Defendant DOH moved for summary judgment.[322] The supreme court dismissed the complaint, holding that the proceeding was time barred by the four-month statute of limitations applicable to Petitioners' claims, which were in the nature of a writ of prohibition under Article 78.[323] The court also concluded that Plaintiffs failed to demonstrate that they had a cognizable property interest to support a claim that the 2008 legislation deprived them of due

316. *N.Y. State Psychiatric Ass'n*, 19 N.Y.3d at 22, 968 N.E.2d at 429, 945 N.Y.S.2d at 192.

317. The association is "a statewide professional medical association providing[sic] that it represents over 4,800 psychiatrists practicing in New York." *N.Y. State Psychiatric Ass'n*, 2009 NY Slip Op. 50607(U), at 3-4.

318. Brief for Plaintiffs-Respondents, N.Y. State Psychiatric Ass'n v. N.Y. State Dep't of Health, No. 22256/07, 2011 WL 8170145, *12-14 (Sup. Ct. Nassau. Cnty. 2009).

319. *N.Y. State Psychiatric Ass'n*, 19 N.Y.3d at 22, 968 N.E.2d at 429, 945 N.Y.S.2d at 192.

320. *Id.*, 968 N.E.2d at 429-30, 945 N.Y.S.2d at 192-93.

321. *Id.* at 23, 968 N.E.2d at 430, 945 N.Y.S.2d at 193.

322. *N.Y. State Psychiatric Ass'n*, 2009 NY Slip Op. 50607(U), at 1-2.

323. *Id.* at 27.

process.[324]

The Appellate Division, Second Department, held that the 2006 amendment imposed a continuing duty on DOH to reimburse the psychiatrists who treated dual eligibles after March 31, 2007 at 100%, thus Plaintiffs claim was not time barred, and the retroactive effect of the 2008 amendment was an unconstitutional effort to divest Plaintiffs of a property right.[325] DOH appealed as a matter of right.[326]

The Court of Appeals set the record behind the legislation straight. Noting that construing all parts of a bill together often allows the legislative intent of a single provision of the bill, the Court pointed out that the 2006 amendment to the Social Services Law adding psychiatrists to the 100% reimbursement list in section 367–a(1)(d)(iii) was part of a 2006-2007 budget bill which was introduced "to implement the state fiscal plan for the 2006-2007 state fiscal year."[327] The first part of the relevant portion of the bill amended section 367–a(1)(d)(iii) to include psychiatrists on the list of those eligible for 100% reimbursement.[328]

> Immediately following the amendment to section 367–a(1)(d)(iii), contained in section 1 of part C of the [bill], there is a provision, section 2 of part C, that regulates the calculation of the '2006–2007 coinsurance enhancement.' Subdivision (a) of [section 2] begins: 'Notwithstanding any provision of law to the contrary, medical assistance payments made in compliance with the amendments made by section one of this act shall be calculated in accordance with the methodology set forth in this section.' Pursuant to that section—section two(a)—the enhancement, as directed by section one, was 'not to exceed two million dollars' and payments were to be made 'during the period April 1, 2006 through March 31, 2007.'[329]

Construing the two sections together produced for the Court a clear interpretation that the legislature intended the 100% reimbursement for psychiatrists to be temporary.[330] The Court found the petitioners' arguments to the contrary to be unavailing.[331] The omission of a sunset

324. *Id.*

325. N.Y. State Psychiatric Ass'n v. N.Y. State Dep't of Health, 71 A.D.3d 855, 898, 898 N.Y.S.2d 153, 157 (2d Dep't 2010).

326. *N.Y. State Psychiatric Ass'n*, 19 N.Y.3d at 23, 968 N.E.2d at 430, 945 N.Y.S.2d at 193.

327. *Id.* at 24, 968 N.E.2d at 431, 945 N.Y.S.2d at 194.

328. *Id.* at 23, 968 N.E.2d at 430, 945 N.Y.S.2d at 193.

329. *Id.* at 24-25, 968 N.E.2d at 431, 945 N.Y.S.2d at 194.

330. *Id.*

331. *New York State Psychiatric Ass'n*, 19 N.Y.3d at 25, 968 N.E.2d at 432, 945 N.Y.S.2d at 195.

provision similar to the one contained in the 2005 amendment adding physicians to section 367–a(1)(d)(iii) of the Social Services Law could not support the claim that the payments were a substantive change in the law.[332] The omission occurred because the 2005 amendment only lasted for three months rather than for the fiscal year as was the case in the 2006 amendment.[333] The claim that it was unnecessary to amend the Social Services Law to provide psychiatrists with a temporary enhancement was not persuasive because in 2005, the legislature proceeded in the same fashion to provide a temporary enhancement for physicians which was unarguably temporary.[334]

Although the Court acknowledged the possible merit of Petitioners' interpretation of the legislative enactment, it concluded that to adopt it would lead to fiscal consequences far beyond what the legislature intended at the time.[335] The Court declined to consider the constitutional argument that the 2008 amendment was an unconstitutional deprivation of Petitioners' property because the 2008 amendment had no substantive consequences; it merely confirmed the intention of the 2006 amendment.[336]

E. Bias

One of the elements of due process in an administrative proceeding is an impartial decision maker.[337] In the context of administrative hearings, the issue of bias is often raised, but is unlikely to be a successful challenge in all but a few cases.[338] The bias alleged in *Baker v. Poughkeepsie City School District* involved witnesses at an administrative hearing who were also subsequent decision makers.[339]

Eight charges of "misconduct and/or incompetence" were brought by the school district against the district's Business Manager, Jeffrey Baker.[340] The charges alleged that Baker had made errors calculating the gross pay of the former superintendent and a preliminary budget relied on for subsequent budgets, had failed to make a non-elective employer contribution and secure a disability insurance policy, had failed to follow certain directives and competitive bidding procedures,

332. *Id.* at 26, 968 N.E.2d at 432, 945 N.Y.S.2d at 195.
333. *Id.* at 26 n.4, 968 N.E.2d at 432 n.4, 945 N.Y.S.2d at 195 n.5.
334. *Id.* at 26, 968 N.E.2d at 432, 945 N.Y.S.2d at 195.
335. *Id.* at 25, 968 N.E.2d at 431, 945 N.Y.S.2d at 194.
336. *New York State Psychiatric Ass'n*, 19 N.Y.3d at 26, 968 N.E.2d at 432, 945 N.Y.S.2d at 195.
337. *See* Goldberg v. Kelly, 397 U.S. 254, 271 (1970).
338. *See generally* BORCHERS & MARKELL, *supra* note 38, §§ 3.17-3.18.
339. 18 N.Y.3d 714, 716, 968 N.E.2d 943, 944, 945 N.Y.S.2d 589, 590 (2012).
340. *Id.* at 717, 968 N.E.2d at 944, 945 N.Y.S.2d at 590.

and that specifically, he had attempted to solicit the support of Ellen Staino, the BOE President, for his preferred candidate for District Treasurer and for a plan to restructure the Business Office.[341]

A hearing officer was appointed by the BOE to preside over the disciplinary proceeding.[342] Ellen Staino and Raymond Duncan, another board member, testified against Baker.[343] Staino gave testimony in support of the charge involving their conversation, and Duncan testified that he had discovered Baker's calculation error.[344] The hearing officer recommended to the Board that Baker be found guilty of the charges and his service be terminated.[345] The Board adopted this decision with Staino and Duncan's participation.[346]

Baker filed an Article 78 proceeding to challenge the Board's disciplinary determination, and the appellate division granted the petition, annulling the determination and remitting the matter to the Board, but excluding Staino and Duncan from a review of the findings.[347] Leave to appeal was granted.[348] At issue was whether the individuals who had testified in the Civil Service Law section 75 disciplinary hearing were required to disqualify themselves from subsequently acting upon any of the charges related to that hearing.[349] Relying on the principle that individuals "'who are personally or extensively involved in the disciplinary process should disqualify themselves from reviewing the recommendations of a Hearing Officer and from acting on the charges,'"[350] the Court stated that disqualification of such individuals is "only required where the testimony of the official directly supports or negates the establishment of the charges [put forward] . . . [rendering] the decision-maker personally involved in the disciplinary process."[351] However, disqualification is inappropriate where the person is necessary to effectuate a decision.[352]

341. *Id.*
342. *Id.*
343. *Id.*
344. *Baker*, 18 N.Y.3d at 717, 968 N.E.2d at 944, 945 N.Y.S.2d at 590.
345. *Id.*
346. *Id.*
347. *Id.*
348. *Baker*, 18 N.Y.3d at 717, 968 N.E.2d at 944, 945 N.Y.S.2d at 590, *leave to appeal granted*, 16 N.Y.3d 706, 945 N.E.2d 1031, 920 N.Y.S.2d 780 (2011).
349. *Id.* at 716, 968 N.E.2d at 944, 945 N.Y.S.2d at 590.
350. *Id.* at 717-18, 968 N.E.2d at 945, 945 N.Y.S.2d at 591 (citing Ernst v. Saratoga Cnty., 234 A.D.2d 764, 767, 651 N.Y.S.2d 209, 212 (3d Dep't 1996)).
351. *Baker*, 18 N.Y.3d at 718, 968 N.E.2d at 945, 945 N.Y.S.2d at 591.
352. *Id.* (citing McComb v. Reasoner, 29 A.D.3d 795, 800, 815 N.Y.S.2d 665, 670 (2d Dep't 2006) (discussing the rule of necessity)); *see generally* Gen. Motors Corp.-Delco

The Court concluded that Staino could be considered to be personally extensively involved in the disciplinary process because Baker's communication with Staino was the basis for one of the charges, and she was called to testify about it.[353] The Court also concluded that Duncan was personally involved in the disciplinary process because his report of Baker's calculation error was included in the charges against Baker and because of his testimony regarding the documents involved in the budget discrepancy and communications with Baker's supervisor about his performance.[354] Based on their level of involvement and the fact that neither one's vote was needed to reach the Board's decision, the Court held that they should have disqualified themselves.[355]

The dissent argued that Staino and Duncan should not have been disqualified from participating in the review of the disciplinary action against Baker.[356] The dissent concluded that Staino was not personally or extensively involved in the disciplinary process to the extent requiring disqualification because she did not actually recommend the charges, that she was not the sole arbiter of whether the hearing officer's recommendation should be followed, and that her testimony was not contradicted.[357] As to Duncan, the dissent concluded that his testimony relative to the budget documents was limited to the fact that he often reviewed such documents in the ordinary course of his duties as a board member,[358] that his credibility was not at issue, and that no bias was evident.[359]

The dissent opined that the majority's decision which would encourage lawyers to pick members of governing boards as witness in disciplinary hearings just to disqualify them from participating in the final determination.[360]

F. Freedom of Information Law

FOIL operates on a presumption of access.[361] All of an agency's records are reviewable unless the agency can establish that the

Prods. Div. v. Rosa, 82 N.Y.2d 183, 624 N.E.2d 142, 604 N.Y.S.2d 14 (1993).

353. *Baker*, 18 N.Y.3d at 718, 968 N.E.2d at 945, 945 N.Y.S.2d at 591.

354. *Id.*

355. *Id.*

356. *Id.* at 719, 968 N.E.2d at 945, 945 N.Y.S.2d at 591 (Pigott, J., dissenting).

357. *Id.* at 720, 968 N.E.2d at 946, 945 N.Y.S.2d at 592 (Pigott, J., dissenting).

358. *Baker*, 18 N.Y.3d at 720, 968 N.E.2d at 946, 945 N.Y.S.2d at 592 (Pigott, J., dissenting).

359. *Id.*

360. *Id.*, 968 N.E.2d at 947, 945 N.Y.S.2d at 593.

361. *See* BORCHERS & MARKELL, *supra* note 38, § 5.9.

documents fall within one or more of the exemptions set out in the statute.[362] Documents may fall within ten exemptions.[363] These exemptions are narrowly construed and the burden is on the person claiming the exemption to prove that it applies.[364]

The FOIL cases before the Court this year examined exemptions related to personal privacy[365] in *Harbatkin v. New York City Department of Records and Information Services*,[366] criminal investigations[367] in *Lesher v. Hynes*,[368] and inter-agency and intra-agency communications[369] in *Town of Waterford v. New York State Dept. of Environmental Conservation.*[370]

The Town of Waterford gets its drinking water from the Hudson River.[371] In 1984, the United States Environmental Protection Agency ("EPA") put 200 miles of the Hudson River[372] on the National Priorities List for remediation due to the presence of PCBs (polychlorinated

362. *See* N.Y. PUB. OFF. LAW § 87(2) (McKinney 2008).

363. *Id.* § 87(2)(a)-(j). These are documents which:

a) are specifically exempted from disclosure by state or federal statute; b) . . . would constitute 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 [by] . . . or derived from information obtained from a commercial enterprise and . . . would cause substantial injury to the competitive position of the enterprise; e) are compiled for law enforcement purposes and . . . i) [would] 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 relative to a criminal investigation; iv) reveal criminal investigative techniques or procedures, except routine techniques and procedures; f) [could] if disclosed [] endanger the life or safety of any person; g) are inter-agency or intra-agency [communications] [except to the extent that such materials consist of] i) statistical or factual tabulations or data; ii) instructions to staff that affect the public; iii) final agency policy or determinations; iv) [or] external audits . . . ; h) are examination questions or answers [that] are requested prior to the final administration of such questions [that]; 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]. *Id.*

364. *See id.*

365. *See id.*

366. *See generally* 19 N.Y.3d 373, 971 N.E.2d 350, 948 N.Y.S.2d 220 (2012).

367. *See* N.Y. PUB. OFF. LAW § 87(2)(e)(i).

368. 19 N.Y.3d 57, 968 N.E.2d 451, 945 N.Y.S.2d 214 (2012).

369. *See* PUB. OFF. LAW § 87(2)(g).

370. *See generally* 18 N.Y.3d 652, 967 N.E.2d 652, 944 N.Y.S.2d 429 (2012).

371. *Id.* at 655, 967 N.E.2d at 652, 944 N.Y.S.2d at 429.

372. *Id.*, 967 N.E.2d at 653, 944 N.Y.S.2d at 430 (the portion of the river ran from Hudson Falls south to Manhattan).

biphenyls) in the water.[373] While the EPA, and New York State's Department of Environmental Conservation ("DEC"), and DOH have been engaged in jointly addressing the hazards presented by the contamination, the EPA functioned as the lead agency for the remediation efforts.[374] The EPA's lead status for the project was the result of a long standing collaboration between the DEC and the EPA.[375]

In 2002, the EPA approved a remediation plan to dredge the river in order to remove sediment contaminated with PCBs.[376] General Electric ("GE") agreed to perform the dredging under the terms of a consent decree with the EPA.[377] To address concerns about the impact of the dredging on the drinking water in Waterford as well as the Town of Halfmoon, which uses Waterford drinking water, the EPA directed GE to prepare a Water Supply Options Analysis with contingency plans if the PCB levels in the water were higher than acceptable.[378]

After the analysis was released, Waterford made a FOIL request to the DEC for documents relating to alternative water supplies available during the remediation, documents exchanged between the three agencies regarding permissible PCB levels in any water supply, documents regarding modifications by the DEC or any other state agency to governing "the acceptable level of PCB exposure," and "materials received or submitted by [the] DEC in response to GE's 'Water Supply Options Analysis.'"[379]

The DEC provided some documents and maintained that others were exempt under FOIL.[380] On administrative appeal, the DEC still maintained that some documents were exempt as "inter-agency or intra-agency deliberative materials" and still others were exempt under state or federal law as attorney/client communications or attorney work product, or were confidential settlement negotiations.[381]

Waterford commenced an Article 78 proceeding to challenge the decision.[382] The supreme court held that the EPA was not an agency

373. *Id.*

374. *Id.* Both the EPA and DEC have statutory responsibility for the site and DOH "shares responsibility for the integrity of the water supply and the possible adverse effects on human health." *Id.* The relevant authority for each agency can be found in their respective statutes: 42 U.S.C. §§ 9601-9628 (2008); N.Y. ENVTL. CONSERV. LAW § 17-030 (McKinney 2006); N.Y. PUB. HEALTH LAW §§ 201(1)(l), 1389-b(1)(a) (McKinney 2012).

375. *Town of Waterford*, 18 N.Y.3d at 656, 967 N.E.2d at 653, 944 N.Y.S.2d at 430.

376. *Id.* at 655, 967 N.E.2d at 653, 944 N.Y.S.2d at 430.

377. *Id.*

378. *Id.*

379. *Id.* at 655-56, 967 N.E.2d at 653, 944 N.Y.S.2d at 430.

380. *Town of Waterford*, 18 N.Y.3d at 656, 967 N.E.2d at 653, 944 N.Y.S.2d at 430.

381. *Id.*

382. *Id.*

within the meaning of the FOIL inter-agency or intra-agency exemption and directed disclosure of these records. The Court held that the remaining documents were properly withheld either as privileged or part of settlement negotiations.[383]

The appellate division modified the supreme court decision, finding that the communications between the EPA and the DEC could be considered intra-agency or inter-agency communications.[384] It reached this decision based on its interpretation of the exemption's fundamental purpose to allow for free exchange of opinions internally and between agencies prior to final determinations and the longstanding relationship between the three agencies in the formulation and implementation of the remediation plan.[385] The court also noted that "'inter-agency or intra-agency materials'" have been "interpreted to include communications between state agencies and outside entities which, like the EPA, do not fall within the literal definition of 'agency' contained in the statute."[386]

As to the documents withheld as part of settlement negotiations, Petitioner cross appealed and the appellate court concluded that the supreme court was in error.[387] The court opined that while CPLR 4547 limits the admissibility of evidence of settlement negotiations, it "does not provide that settlement discussions are confidential or would be otherwise exempt under FOIL."[388] The dissent objected to the expansion of the coverage of the intra-agency or inter-agency exemption to include the EPA, arguing that to do so would thwart the intent of FOIL that government documents are presumptively

383. *Id.* Under subdivision (3) of section 86 of the Public Officers Law, an "agency" is defined as "any state or municipal department, board, bureau, division, commission, committee, public authority, public corporation, council, office or other governmental entity performing a governmental or proprietary function for the state or any one or more municipalities thereof, except the judiciary or the state legislature." N.Y. PUB. OFF. LAW § 86(3) (McKinney 2008).

384. Town of Waterford v. N.Y. State Dep't of Envtl. Conservation, 77 A.D.3d 224, 235, 906 N.Y.S.2d 651, 661 (3d Dep't 2010).

385. *Id.* at 227, 906 N.Y.S.2d at 655. The court acknowledged that its decision was contrary to the opinion of the Committee on Open Government, and characterized the Committee's position as "misplaced." *Id.* at 230 n.5, 906 N.Y.S.2d at 657 n.5 (citing N.Y. DEP'T OF STATE, *FOIL—AO—12034*, COMMITTEE ON OPEN GOV'T (Apr. 5, 2000), http://docs.dos.ny.gov/coog/ftext/f12034.htm); *see also* N.Y. DEP'T OF STATE, *FOIL–AO–11985*, COMMITTEE ON OPEN GOV'T (Mar. 9, 2000), http://docs.dos.ny.gov/coog/ftext/f11985.htm.

386. *Town of Waterford*, 77 A.D.3d at 230-31, 906 N.Y.S.2d at 657 (citations omitted).

387. *Id.* at 233, 906 N.Y.S.2d at 659 (the issue of attorney-client privilege appeared to have been abandoned).

388. *Id.*

discloseable.[389]

The case was remitted to the supreme court for an in camera review to determine if the documents sought otherwise satisfied the intra-agency or inter-agency exemption.[390] The supreme court concluded that the documents satisfied the requirements of inter-agency or intra-agency communications and that they had been properly withheld.[391]

Petitioner appealed and the Court of Appeals modified the order of the appellate division.[392] At issue was whether the EPA is an "agency" for the purpose of FOIL or could be characterized as an "outside consultant" so that the intra-agency FOIL exemption could apply to the communications between it and the DEC.[393]

The Court began by stating two well recognized rules. First, FOIL should '"be liberally construed and its exemptions narrowly interpreted so that the public is granted maximum access to the records of government.'"[394] Second, an agency seeking an exemption from disclosure must establish that "'the material requested falls squarely within the ambit of one of [the] statutory exemptions.'"[395] With those principles as its backdrop, the Court moved quickly to the issue of whether the EPA met the statutory definition of an agency for FOIL, as defined in section 86(3) of the Public Officers Law.[396] The Court found that the statutory definition plainly did not include federal agencies and, thus, the exemption for "intra-agency" and "inter-agency" communications did not apply.[397] The Court concluded that the DEC's suggestion that the terms "intra-agency" and "inter-agency" contemplated a broader meaning was meritless.[398] However, it did note that "[t]o the extent that there is resonance to the argument that the

389. *Id.* at 234, 906 N.Y.S.2d at 660 (Egan, J., concurring in part and dissenting in part; Mecure, J., concurring in the dissent).

390. *Id.* at 233, 906 N.Y.S.2d at 659. They would not be exempt from disclosure if they were "statistical or factual tabulations or data; instructions to staff that affect the public; final agency policy or determinations; or external audits." N.Y. PUB. OFF. LAW § 87(2)(g) (McKinney 2008).

391. Town of Waterford v. N.Y. State Dep't of Envtl. Conservation, 18 N.Y.3d 652, 658, 967 N.E.2d 652, 655, 944 N.Y.S.2d 429, 432 (2012).

392. *Id.* at 659, 967 N.E.2d at 655, 944 N.Y.S.2d at 432.

393. *Id.*

394. *Id.* at 657, 967 N.E.2d at 654, 944 N.Y.S.2d at 431 (quoting Capital Newspapers v. Whalen, 69 N.Y.2d 246, 252, 505 N.E.2d 932, 936, 513 N.Y.S.2d 367, 371 (1987)).

395. *Town of Waterford*, 18 N.Y.3d at 652, 967 N.E.2d at 654, 944 N.Y.S.2d at 431 (quoting Newsday, Inc. v. Empire State Dev. Corp., 98 N.Y.2d 359, 362, 746 N.Y.S.2d 855, 856, 774 N.E.2d 1187, 1188 (2002)).

396. *Town of Waterford*, 18 N.Y.3d at 657, 967 N.E.2d at 654, 944 N.Y.S.2d at 432.

397. *Town of Waterford*, 18 N.Y.3d at 657, 967 N.E.2d at 654, 944 N.Y.S.2d at 431.

398. *Id.* at 658, 967 N.E.2d at 655, 944 N.Y.S.2d at 432.

exemption should apply in order to protect the pre-decisional joint deliberative process, that issue must be addressed to the Legislature."[399]

The Court also rejected the argument that the EPA was the equivalent of a consultant.[400] Distinguishing earlier decisions in which it had held that materials prepared for an agency by an outside consultant who was working on behalf of the agency could fall under the exemption for intra-agency or inter-agency communications, the Court stated that the EPA could not be considered "an outside consultant."[401] While the relationship between the DEC and the EPA is collaborative, working together toward the same goal, the EPA is the "lead agency for the dredging project."[402] Moreover, each agency represents different constituencies with possibly divergent interests.[403] In a not too subtle manner, the Court noted that it shared the previously declared opinion of the Committee on Open Government, that the "EPA cannot be characterized as a consultant 'retained' by DEC"[404] and as a federal agency, the EPA does not fall within FOIL's definition of "'agency.'"[405] The Court held that the DEC failed to meet its burden with respect to the exemption and that the order of the appellate division should be so modified.[406]

In *Harbatkin*, the petitioner, a freelance writer, was prompted by the personal history of her parents' experience as teachers in New York City during the 1950s, to conduct research on the city BOE's "Anti-Communist Investigations."[407] These DOE investigations began as early as 1936 and continued until as late as 1962.[408] During that time, an attorney from the office of the Corporation Counsel for New York City was assigned full time to investigate alleged Communists and unrepentant former Communists in the city's public school and

399. *Id.* at 657, 967 N.E.2d at 654, 944 N.Y.S.2d at 431.

400. *Id.* at 658, 967 N.E.2d at 655, 944 N.Y.S.2d at 432.

401. *Id.* at 655, 967 N.E.2d at 658, 944 N.Y.S.2d at 432 (citing N.Y. Times Co. v. City of N.Y. Fire Dep't, 4 N.Y.3d 477, 488, 829 N.E.2d 266, 272, 796 N.Y.S.2d 302, 308 (2005); Xerox Corp. v. Town of Webster, 65 N.Y.2d 131, 132, 490 N.Y.S.2d 488, 489, 480 N.E.2d 74, 75 (1985)).

402. *Town of Waterford*, 18 N.Y.3d at 658, 967 N.E.2d at 655, 944 N.Y.S.2d at 432.

403. *Id.*

404. *Id.*

405. *Id.*

406. *Id.*

407. Harbatkin v. N.Y.C. Dep't of Records & Info. Servs., 19 N.Y.3d 373, 378, 971 N.E.2d 350, 351-52, 948 N.Y.S.2d 220, 221-22 (2012); *see also Children of the Blacklist: Lisa Harbatkin*, DREAMERS & FIGHTERS, http://dreamersandfighters.com/cob/doc-harbatkin.aspx (last visited Jan. 22, 2013).

408. *Harbatkin*, 19 N.Y.3d at 377, 971 N.E.2d at 351, 948 N.Y.S.2d at 221.

university system.[409]

Approximately 1,100 interviews of teachers and other members of the community were conducted in order for the interviewees to answer questions and point out Communists in the community.[410] Appellant's mother was one of the interviewees.[411] During the interviews, the interviewer promised each interviewee absolute confidentiality, that no one would ever know the interview took place.[412]

Beginning in 2007, Harbatkin sought access to the City's records of these interviews.[413] The DOE granted access to some records, but not to the interviews that contained names and identifying details of people on the grounds that disclosure might amount to an invasion of privacy.[414] The DOE then adopted a rule that required the redaction of any names and other identifying information unless the particular individual had agreed to disclosure of the record.[415] The DOE offered Harbatkin access to non-redacted files on the condition that she not publish names, but she rejected this idea.[416]

Petitioner initiated an Article 78 proceeding to require the City to disclose the files without redaction.[417] The supreme court dismissed the petition on the grounds that the City was entitled to redact the names.[418] The appellate division affirmed.[419] Petitioner then appealed as of right to the Court of Appeals,[420] and also moved for permission to appeal.[421] After hearing oral argument, the Court dismissed the appeal as of right, granted the motion for leave to appeal and modified the appellate division's order, "permitting the City to redact only names and other identifying details relating to informants who were promised confidentiality."[422]

409. *Id.*
410. *Id.*
411. *Id.* at 378, 971 N.E.2d at 352, 948 N.Y.S.2d at 222.
412. *Id.*, 971 N.E.2d at 351, 948 N.Y.S.2d at 221.
413. *Harbatkin*, 19 N.Y.3d at 378, 971 N.E.2d at 352, 948 N.Y.S.2d at 222.
414. *Id.*
415. *Id.*
416. *Id.* at 379, 971 N.E.2d at 352, 948 N.Y.S.2d at 222.
417. *Id.*
418. *See generally* Harbatkin v. N.Y.C Dep't of Records & Info. Servs., No. 104933/09, NY Slip Op. 33774(U) (Sup.Ct. N.Y. Cnty. 2010) (citing N.Y. PUB. OFF. LAW § 87(2)(b) (McKinney 2008)).
419. *See* Harbatkin v. N.Y.C Dep't of Records & Info. Servs., 84 A.D.3d 700, 924 N.Y.S.2d 80 (1st Dep't 2011).
420. The appeal as of right was pursuant to CPLR 5601(b)(1), which permits such appeals "where there is directly involved the construction of the constitution of the state or of the United States." N.Y. C.P.L.R. 5601(b)(1) (McKinney 1995).
421. *See Harbatkin*, 19 N.Y.3d at 380, 971 N.E.2d at 352, 948 N.Y.S.2d at 222.
422. *Id.*

The Court resolved two issues: (1) whether the "'unwarranted invasion of personal privacy'" exception to FOIL applied to the interviews containing promises of confidentiality; and (2) whether the exception applies to names and identifying details of people mentioned in interviews but not interviewed themselves.[423]

Section 89(2)(b) of the Public Officers Law provides that an unwarranted invasion of personal privacy exception includes, but is not limited to, seven specified kinds of disclosure.[424] Because none of the seven listed exemptions applied in this case, the Court was required to decide whether any invasion of privacy is "'unwarranted' by balancing the privacy interests at stake against the public interest in the disclosure of the information."[425]

The Court first considered whether the people whose names and identifying details were included in the interviews, other than the people interviewed still had a privacy interest in nondisclosure of the information that would outweigh the public need for the information.[426] The Court concluded that FOIL's invasion of personal privacy exception did not apply to these people's names and characteristics because the incidents took place long ago and being named a "Communist" today does not mean nearly the same thing as it did at or around the time when the investigations were taking place.[427]

Then, the Court considered whether the privacy interest of the interviewees, in keeping their participation in the questioning secret, outweighed the public interest/need for the information.[428]

423. *Id.* (quoting N.Y. PUB. OFF. § 89(2)(b)).

424. *See* N.Y. PUB. OFF. LAW § 89(2)(b) ("An unwarranted invasion of personal privacy includes, but shall not be limited to: i. disclosure of employment, medical or credit histories or personal references of applicants for employment; ii. disclosure of items involving the medical or personal records of a client or patient in a medical facility; iii. sale or release of lists of names and addresses if such lists would be used for solicitation or fund-raising purposes; iv. disclosure of information of a personal nature when disclosure would result in economic or personal hardship to the subject party and such information is not relevant to the work of the agency requesting or maintaining it; v. disclosure of information of a personal nature reported in confidence to an agency and not relevant to the ordinary work of such agency; vi. information of a personal nature contained in a workers' compensation record, except as provided by section one hundred ten-a of the workers' compensation law; or vii. disclosure of electronic contact information, such as an e-mail address or a social network username, that has been collected from a taxpayer under section one hundred four of the real property tax law.").

425. *Harbatkin*, 19 N.Y.3d at 380, 971 N.E.2d at 352, 948 N.Y.S.2d at 222 (citing N.Y. Times Co. v. City of N.Y. Fire Dep't, 4 N.Y.3d 477, 485, 829 N.E.2d 266, 270, 796 N.Y.S.2d 302, 306 (2005)).

426. *Harbatkin*, 19 N.Y.3d at 380, 971 N.E.2d at 353, 948 N.Y.S.2d at 223.

427. *Id.*

428. *Id.* at 380, 971 N.E.2d at 353, 948 N.Y.S.2d at 223.

The Court decided that while it is important for history to have an accurate and unfettered record of incidents like the BOE Anti-Communist Investigations, the promise of confidentiality given by each interviewer to the interviewees was still significant and should still be honored.[429] Enough time had not passed for the government's promise of confidentiality to become meaningless to those involved, their family, or the government.[430]

The FOIL request in *Lesher* grew out of the attorney-author's interest in the criminal prosecution of Avrohom Mondrowitz, a man charged with crimes of sexual abuse involving young boys.[431] Mondrowitz fled to Israel in 1984 before he could be arrested.[432] Several attempts to extradite him to the United States failed because the extradition treaty between the United States and Israel did not include the crimes with which Mondrowitz was charged.[433]

In 1998, Lesher made a FOIL request to the DA of Kings County for documents relating to Mondrowitz.[434] The DA gave Lesher "police reports, statements edited to remove the names of victims and witnesses, and some correspondence with federal agencies."[435] In 2007, Lesher made a second FOIL request, seeking any correspondence between the DA's Office and the Department of Justice, the Department of State, or any other United States agencies, and any documents relating to Mondrowitz's case, from September 1, 1993 to 2007.[436] Almost a year later, the FOIL records access officer denied the request, relying on Public Officers Law section 87(2)(e)(i), the law enforcement exemption, explaining that the records pertained to an open case.[437]

Lesher appealed the denial administratively, arguing that the exemption was vitiated by the 1998 release of documents.[438] The FOIL appeals officer upheld the denial on the grounds that disclosure of the documents would interfere with a now viable prosecution of Mondrowitz's case because a new 2007 extradition treaty between the United States and Israel included Mondrowitz's crimes.[439]

429. *Id.*
430. *Id.* at 380-81, 971 N.E.2d at 353, 948 N.Y.S.2d at 223.
431. Lesher v. Hynes, 19 N.Y.3d 57, 60, 968 N.E.2d 451, 452-53, 945 N.Y.S.2d 214, 215-16 (2012).
432. *Id.* at 60, 968 N.E.2d at 453, 945 N.Y.S.2d at 216.
433. *Id.*
434. *Id.*
435. *Id.*
436. *Lesher*, 19 N.Y.3d at 61, 968 N.E.2d at 453, 945 N.Y.S.2d at 216.
437. *Id.*
438. *Id.*
439. *Id.*

Lesher then initiated an Article 78 proceeding to compel the DA and the appeals officer to comply with his records request alleging that the DA had not explained how the release of documents relating to a renewed extradition request would interfere with "law enforcement investigations or judicial proceedings" given that the only current judicial proceeding against Mondrowitz was taking place in Israel.[440] In response, the appeals officer argued that the agency could provide a generic statement that the documents were related to an ongoing investigation and was not obligated to advance a particularized statement regarding each document in an ongoing investigation.[441] Lesher countered that his request involved the extradition efforts, not the prosecution for the alleged crimes.[442]

The supreme court granted Lesher's petition to the extent that it sought documents and correspondence between the DA's Office and United States agencies relating to the extradition.[443] The DA moved to reargue, stating that releasing nearly half of the four boxes of documents relating to the Mondrowitz's prosecution would impair its efforts to prosecute Mondrowitz because the correspondence between the DA and the State Department in those boxes included "detailed information about Mondrowitz's crimes so that the State Department could prepare extradition requests" including "crime summaries, timelines of when and where each crime occurred, witness names and personal information, and witness statements."[444] The supreme court denied the motion to reargue and the DA's office appealed.[445] The Appellate Division, Second Department, reversed, holding that under the circumstances a generic statement that "disclosure would interfere with an ongoing law enforcement investigation was a sufficiently particularized justification."[446] The Court of Appeals granted leave to appeal[447] and, on appeal, affirmed the decision of the Second Department.[448]

The Court relied on the analysis of the exemption for investigatory

440. *Id.* at 62, 968 N.E.2d at 453-54, 945 N.Y.S.2d at 216-17.

441. *Lesher*, 19 N.Y.3d at 62, 968 N.E.2d at 454, 945 N.Y.S.2d at 217 (citing Pittari v. Pirro, 258 A.D.2d 202, 696 N.Y.S.2d 167 (2d Dep't 1999); Legal Aid Soc'y v. N.Y.C. Police Dep't, 274 A.D.2d 207, 713 N.Y.S.2d 3 (1st Dep't 2000)).

442. *Lesher*, 19 N.Y.3d at 62-63, 968 N.E.2d at 454, 945 N.Y.S.2d at 217.

443. *Id.* at 63, 968 N.E.2d at 454, 945 N.Y.S.2d at 217.

444. *Id.* at 63, 968 N.E.2d at 454-55, 945 N.Y.S.2d at 217-18.

445. *Id.* at 63, 968 N.E.2d at 455, 945 N.Y.S.2d at 218.

446. Lesher v. Hynes, 80 A.D.3d 611, 613, 914 N.Y.S.2d 264, 265-66 (2d Dep't 2011).

447. Lesher v. Hynes, 16 N.Y.3d 710, 947 N.E.2d 165, 922 N.Y.S.2d 273 (2011).

448. *Lesher*, 19 N.Y.3d at 64, 968 N.E.2d at 455, 945 N.Y.S.2d at 218.

or law enforcement proceedings under the federal Freedom of Information Act ("FOIA")[449] found in *NLRB v. Robbins Tire & Rubber Co.*[450] In *Robbins*, the United States Supreme Court explained that although FOIA's law enforcement exemption does not extend a blanket exception for investigatory files, it would be an error to conclude that

> no generic determinations of likely interference can ever be made. . . . Congress did not intend to prevent the federal courts from determining that, with respect to particular kinds of enforcement proceedings, disclosure of particular kinds of investigatory records [] while a case is pending would generally 'interfere with enforcement proceedings.'[451]

The Court of Appeals went on to state that adopting the *Robbins* analysis does not mean every law enforcement document is exempt:

> [t]he agency must identify the generic kinds of documents for which the exemption is claimed, and the generic risks posed by disclosure of these categories of documents. Put slightly differently, the agency must still fulfill its burden under Public Officers Law § 89(4)(b) to articulate a factual basis for the exemption.[452]

The Court concluded that the DA had properly identified the categories of documents and the generic risks posed by the disclosure of these categories of documents—the exposure of the DA's plan in prosecuting the case which was ongoing at the time the Article 78 proceeding was initiated.[453]

The Court went on to note that a 2010 decision of the Supreme Court of Israel made it unlikely that Mondrowitz will ever be extradited from Israel, or that he will ever stand trial for his alleged crimes unless he somehow returns to the United States on his own or goes to a country that will extradite him to the United States.[454] Consequently, the Court concluded that Lesher would be entitled to make another FOIL request for the same records he sought in 2007, which will likely be successful because the Israeli Supreme Court decision has practically foreclosed any pending or potential law enforcement or judicial proceeding in the United States against Mondrowitz.[455]

449. 5 U.S.C. § 552(b)(7)(A) (2008).

450. *Lesher*, 19 N.Y.3d at 64, 968 N.E.2d at 455, 945 N.Y.S.2d at 218 (citing NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214 (1978)).

451. *Lesher*, 19 N.Y.3d at 66-67, 968 N.E.2d at 457, 945 N.Y.S.2d at 220 (quoting *Robbins*, 437 U.S. at 228-29).

452. *Lesher*, 19 N.Y.3d at 67, 968 N.E.2d at 457, 945 N.Y.S.2d at 220.

453. *Id.* at 67-68, 968 N.E.2d at 458, 945 N.Y.S.2d at 221.

454. *Id.* at 68, 968 N.E.2d at 458, 945 N.Y.S.2d at 221.

455. *Id.*

II. EXECUTIVE BRANCH

Several of Governor Andrew Cuomo's 2012 initiatives are described below.[456] Two of his initiatives, the Justice Center for People with Special Needs ("Justice Center") and the Olmstead Plan Development and Implementation Cabinet, are worthy of mention as they relate to protection of vulnerable individuals, the area of concern behind the already noted Court of Appeals decision in *Albany Law School v. New York State Office of Mental Retardation and Developmental*.[457]

The third initiative described here relates to the Executive Branch's plan for future natural disasters like Hurricane Sandy. The Governor announced three commissions—NYS 2100, NYS Respond, and NYS Ready—charged with examining a comprehensive review of New York State's emergency preparedness and response capabilities and the state's infrastructure.[458]

A. Justice Center for People with Special Needs

In April 2012, a New York report entitled *The Measure of a Society: Protection of Vulnerable Persons in Residential Facilities Against Abuse & Neglect* was released in the wake of a series of allegations regarding the abuse and neglect of residents of programs operated or supported by New York State agencies.[459] The report exposed problems with residential treatment and care, reported incidents of abuse, neglect, and the disciplining of staff, and made numerous recommendations to improve the system.[460] In the wake of this report, the legislature proposed, and the Governor signed, a bill creating the Justice Center.[461] The primary purpose of the new Justice Center is to provide uniform oversight over all the residential and day treatment

456. The Executive branch had a very busy 2012, an entire description of which is beyond the scope of this Article. Details on these activities can be found at http://www.governor.ny.gov.

457. *See generally* 19 N.Y.3d 106, 968 N.E.2d 967, 945 N.Y.S.2d 613 (2012).

458. *See* Governor Cuomo Announces Commissions to Improve New York State's Emergency Preparedness and Response Capabilities, And Strengthen The State's Infrastructure to Withstand Natural Disasters (Nov. 15, 2012), *available at* http://www.governor.ny.gov/press/11152012-Emergency-Preparedness.

459. The report was authored by Clarence Sundram, the Governor's Special Advisor on Vulnerable Persons. *See* CLARENCE SUNDRAM, THE MEASURE OF A SOCIETY: PROTECTION OF VULNERABLE PERSONS IN RESIDENTIAL FACILITIES AGAINST ABUSE & NEGLECT (2012) [hereinafter THE MEASURE OF A SOCIETY], *available at* http://www.governor.ny.gov/assets/documents/justice4specialneeds.pdf.

460. *See* THE MEASURE OF A SOCIETY, *supra* note 459.

461. N.Y. MENTAL HYG. LAW (McKinney effective June 30, 2013).

programs operated or supported by a variety of state agencies.[462] The Justice Center will have an Inspector General and a Special Prosecutor with authority to prosecute concurrent with the Office of the DA, a statewide 24/7 free hotline for reporting abuse, and a central register for recording reports of abuse and neglect.[463] The Justice Center is charged with developing a code of conduct for employees with regular contact with vulnerable individuals, a code for incident management, and standards for training investigators.[464]

Only the passage of time will tell how this reform improves the lives of New York's most vulnerable citizens.

B. Olmstead Plan Development and Implementation Cabinet

On November 30, 2012, the Governor announced the creation of the Olmstead Plan Development and Implementation Cabinet.[465] Taking its name from the United States Supreme Court decision in *Olmstead v. L.C.*,[466] requiring states to provide individuals with disabilities with necessary support and services in the most integrated setting appropriate to their needs, the Cabinet[467] is charged with advising the Governor on the creation of a comprehensive Olmstead Plan.[468] The essential elements of the proposed plan include: identification of the essential requirements of compliance with *Olmstead* and the Americans with Disabilities Act; [469] assessment

462. *See* Governor Cuomo and Legislative Leaders Announce Agreement on Legislation to Protect People with Special Needs and Disabilities (June 17, 2012), *available at* http://www.governor.ny.gov/press/061712justice4specialneedsagreement. These agencies include OPWDD, the Office of Mental Health (OMH), the Office of Alcoholism and Substance Abuse Services (OASAS), the Office of Children and Family Services (OCFS), the DOH and the State Education Department (SED). *See id.*

463. *See id.*

464. *Id.*

465. Exec. Order No. 84 (November 30, 2012), *available at* http://www.governor.ny.gov/executiveorder/84.

466. 527 U.S. 581, 587 (1999).

467. The members of the Cabinet include:

> the Governor's Deputy Secretary for Health/Director of Healthcare Redesign; the Counsel to the Governor; the Director of the Budget; the Commissioner of Developmental Disabilities; the Commissioner of Health; the Commissioner of Labor; the Commissioner of Transportation; the Commissioner of Mental Health; the Commissioner of Alcoholism and Substance Abuse Services; the Commissioner of Children and Family Services; the Commissioner of Homes and Community Renewal; the Commissioner of Temporary and Disability Assistance; the Director of the State Office for the Aging; and the Chair of the Commission on Quality of Care and Advocacy for Persons with Disabilities.

Exec. Order No. 84, *available at* http://www.governor.ny.gov/executiveorder/84.

468. *See id.*

469. *See id.*

procedures and a coordinated assessment process for individuals with disabilities needing services; measurable goals to track progress in achieving integrated residential living and for successful community living; maximization of available resources to support the plan, coordinated strategy for plan implementation; and statutory and regulatory changes necessary for plan implementation.[470] The Governor directed all state agencies and authorities to assist the cabinet in its mission[471] and charged the Cabinet with working with all stakeholders.[472] The deadline for the Cabinet's final report is May 31, 2013.[473]

C. New York State 2100, New York State Ready, and New York State Response Commissions

After the devastation caused to the New York City and surrounding areas by Hurricane Sandy,[474] the Governor named three commissions "to review and make recommendations for New York State, to improve its preparedness and response capabilities, as well as to strengthen the state's infrastructure for the future."[475] The recommendations from all three commissions were due to the Governor by January 3, 2013.[476]

The first of the commissions, NYS 2100 is charged with examining "ways to improve the resilience and strength of the state's infrastructure in the face of natural disasters and other emergencies."[477] The Commission's nine major recommendations are that the state should "protect, upgrade, and strengthen existing systems; rebuild smarter: ensure replacement with better options and alternatives; create shared equipment and resource reserves; encourage the use of green and

470. *See id.*
471. *See id.*
472. *See* Exec. Order No. 84.
473. *Id.*
474. *See Hurricane Sandy: Covering the Storm*, N.Y. TIMES, Nov. 6, 2012, http://www.nytimes.com/interactive/2012/10/28/nyregion/hurricane-sandy.html.
475. Governor Cuomo Announces Appointments to Commissions to Improve New York State's Emergency Preparedness and Response Capabilities and Strengthen The State's Infrastructure to Withstand Natural Disasters (Appointments) (Nov. 28, 2012) [hereinafter Appointments], *available at* http://www.governor.ny.gov/press/11282012-commissions-improve-emergency-response-and-preparedness.
476. Governor Cuomo Announces Appointments to Commissions to Improve New York State's Emergency Preparedness and Response Capabilities, And Strengthen The State's Infrastructure to Withstand Natural Disasters (Nov. 15, 2012) [hereinafter Emergency Preparedness Commissions], *available at* http://www.governor.ny.gov/press/11152012-Emergency-Preparedness.
477. *Id.*

natural infrastructure; promote integrated planning and develop criteria for integrated decision-making for capital investments; enhance institutional coordination; improve data, mapping, visualization, and communication systems; create new incentive programs to encourage resilient behaviors and reduce vulnerabilities; expand education, job training and workforce development opportunities."[478]

The second commission, NYS Respond,[479] is charged with examining how to improve New York's response to "future weather-related disasters."[480] It will develop recommendations to improve

478. **Error! Main Document Only.**Recommendations to Improve the Strength and Resilience of the Empire State's Infrastructure, NYS 2100 Commission Report, *available at* http://www.governor.ny.gov/assets/documents/NYS2100.pdf; *see also* Emergency Preparedness Commissions, *supra* note 476.

479. *See id.* The co-chairs of the Commission are Judith Rodin, President, The Rockefeller Foundation; and Felix Rohatyn, Senior Advisor to Chairman and CEO, Lazard. *See id.* The other members include Richard T. Anderson, President, New York Building Congress; Dan Arvizu, Director and CEO, U.S. Department of Energy's National Renewal Energy Laboratory; Walter Bell, Former Chair, Swiss Re America Holding Company; Jo-Ellen Darcy, Assistant Secretary of the Army (Advisory Member); Isabel Dedring, Deputy Mayor for Transport, London, England; Lloyd Dixon, Senior Economist, RAND Corporation; Mortimer L. Downey, Vice Chair, Washington Metropolitan Area Transit Authority; Clark W. Gellings, Fellow, Electric Power Research Institute; Patricia Hoffman, Assistant Secretary for the Office of Electricity Delivery and Energy Reliability (Advisory Member); J. Robert Hunter, Insurance Director, Consumer Federation of America; Sudhakar Kesavan, Chair and CEO, ICF International; Roy Kienitz, Former Under Secretary for Policy, U.S. Department of Transportation; Timothy Killeen, President, SUNY Research Foundation and SUNY Vice-Chancellor for Research; Fred Krupp, President, Environmental Defense Fund; Sylvia Lee, Water Manager, Skoll Global Threats; Joe Lhota, Chair and CEO of the Metropolitan Transit Authority; Miho Mazereeuw, Lecturer, Massachusetts Institute of Technology; Guy J.P. Nordenson, Partner, Guy Nordenson and Associates; John Porcari, Deputy Secretary, U.S. Department of Transportation (Advisory Member); Robert Puentes, Senior Fellow Brookings Institute; Gil Quiniones, President and CEO, New York Power Authority; Jack Quinn, President, Erie Community College; Scott Rechler, Vice-Chair, Port Authority of New York and New Jersey; Jonathan F.P. Rose, President, Jonathan Rose Companies; Lisa Rosenblum, Executive Vice-President for Government and Public Affairs, Cablevision; John Shinn, USW District 4 Director, United Steelworkers; Mark Tercek, President and CEO, The Nature Conservancy; and Robert D. Yaro, President, Regional Plan Association (also member of the NY Works Task Force). *See* Appointments, *supra* note 475.

480. The co-chairs of the Commission are Thad Allen, Senior Vice President, Booz Allen; Admiral (US Coast Guard)—Retired, and K. Bradley Penuel, Director, Center for Catastrophe Preparedness and Response at New York University. The other members of the Commission include Doug Barton, Director of Planning & Economic Development, Tioga County; Patricia Bashaw, EMS Coordinator, Essex County; Bradford Berk, Senior Vice President for Health Sciences & CEO of the University of Rochester Medical Center; LaRay Brown, Senior Vice President, Corporate Planning, Community Health and Intergovernmental Relations, NYC Health & Hospitals Corporation; Major General Doug Burnett, Florida National Guard (Ret.); James Burns, President, Firemen's Association of the State of New York; The Reverend Frederick Davie, Executive Vice President, Union

planning, training, and resources so that New York can respond appropriately both before and after any emergency or disaster occurs.[481]

The third commission, NYS Ready, is charged with developing recommendations to ensure the adequacy of New York's critical systems and services for future emergencies.[482]

Theological Seminary in New York City; Peter J. Davoren, President and Chief Executive Officer, Turner Construction; Grant Dillon, President, Global Preparedness and Mitigation; Eli Feldman, President & CEO, MJHS and Elderplan; Peter Gudaitis, President, National Disaster Interfaiths Network; Tony Hannigan, Executive Director, Center for Urban Community Services (CUCS); Jerome Hauer, Commissioner, New York State Division of Homeland Security and Emergency Services (Advisory Member); Scott Heller, Director of Emergency Management, Albany Medical Center; Tino Hernandez, President & Chief Executive Officer, Samaritan Village, Inc.; Bart Johnson, Executive Director, International Association of Chiefs of Police; Timothy Manning, Deputy Administrator for Protection and National Preparedness, FEMA (Advisory Member); Mike McManus, President, New York State Professional Fire Fighters Association; Thomas Mungeer, President, New York State Troopers Police Benevolent Association; Chris Renschler, Associate Professor of Geography, University of Buffalo; Marilyn Saviola, Vice President, Advocacy and the Women's Health Access Program, Independence Care System; Jennifer Schneider, Professor & Russell C. McCarthy Endowed Chair, Civil Engineering Technology, Environmental Management & Safety Department, Rochester Institute of Technology; Mark J. Solazzo, Executive Vice President & Chief Operating Officer, North Shore-LIJ Health System; Harry L. Weed, II, Superintendent of Public Works, Village of Rockville Centre; and Sheena Wright, President, United Way of New York City. *See* Appointments, *supra* note 475.

481. *See* Emergency Preparedness Commissions, *supra* note 476.

482. *See id.* The co-chairs of the Commission are Ira Millstein, Senior Partner, Weil, Gotshal & Manges LLP; and Irwin Redlener, Director, National Center for Disaster Preparedness at Columbia University. The other members of the Commission include William Acker, Executive Director, NY-BEST; Scott Amrhein, President, Continuing Care Leadership Coalition; Robert Atkinson, Director of Policy Research, Columbia Institute for Tele-Information at Columbia University; Guruduth Banavar, Vice President and Chief Technology Officer, Global Public Sector, IBM; Donald Capoccia, Managing Principal & Founder, BFC Partners; Mae Carpenter, Commissioner, Westchester County Department of Senior Programs & Services; Gerry Cauley, President & CEO, North American Electric Reliability Corporation; Mary Ann Christopher, President & CEO, Visiting Nurse Service of New York; Arthur V. Gorman, Jr., Lieutenant Colonel, US Marine Corps (Ret.); Patricia A. Hoffman, Assistant Secretary of Electricity Delivery and Energy Reliability, U.S. Department of Energy (Advisory Member); William Hooke, Senior Policy Fellow and Director, American Meteorological Society; John Kemp, President & CEO, The Viscardi Center; Kit Kennedy, Counsel to the Air & Energy Program, Natural Resources Defense Council; Steven Levy, Managing Director, Sprague Energy; Robert Mayer, Vice President - Industry and State Affairs, US Telecom; Daniel McCartan, Emergency Preparedness Coordinator, Western New York Regional Resource Center & Erie County Medical Center' John Merklinger, 9-1-1 Coordinator, Monroe County, and President, New York State 9-1-1 Coordinators Association; Cynthia Morrow, Commissioner of Health, Onondaga County; Major General Patrick A. Murphy, Adjutant General of New York State (Advisory Member); Kyle Olson, Founder, The Olson Group; Walter Parkes, Chairman, O'Connell Electric Company, Inc.; Cynthia Rosenzweig, Senior Research Scientist, NASA Goddard Institute for Space Studies at Columbia University; Howard Schmidt, Former Special Assistant to the President and Cybersecurity Coordinator; Denise Scott, Managing Director,

III. LEGISLATIVE BRANCH

In Chapter 501 of the Laws of 2012, the Justice Center came to life.[483]

On February 2, 2012, a new subdivision (e) of the Open Meetings Law became effective.[484] Subdivision (e) addresses the situation that arises when reference is made to a document during a public meeting that has not been made available to the public.[485] As the Committee on Open Government describes it, "a public body, may discuss an issue and refer, for example, to 'page 3, second paragraph' of a record that the public has never seen."[486]

The resulting legislation was an effort to marry openness with reasonableness to ensure that the obligation on the governmental agency did not evolve into an unfunded mandate.[487] The documents that are subject to the statute are documents that are subject to FOIL as well as "any proposed resolution, law, rule, regulation, policy or any amendment thereto, that is scheduled to be the subject of discussion by a public body during an open meeting."[488]

The relevant documents can be posted on the agency's website; if the agency does not maintain a website, a hard copy of the documents can be distributed upon request for a fee established in the same manner as under FOIL.[489]

Finally, true to the effort to avoid unfunded mandates, the legislation provides that "[a]n agency may, but shall not be required to, expend additional moneys to implement the provisions of this

LISC; D. Gregory Scott, Senior Vice President, Terminal Operations & Petroleum Distribution, Gulf Oil; S. Shyam Sunder, Director, Engineering Laboratory, National Institute of Standards and Technology (NIST); Major General (Retired) Joseph J. Taluto, Former Adjutant General, New York State; Anthony Townsend, Associate Research Scientist, Rudin Center for Transportation Policy and Management, New York University; Russell Unger, Executive Director, Urban Green Building Council; Susan C. Waltman, Executive Vice President and General Counsel, Greater New York Hospital Association (GNYHA); William "Bill" Wilson, President & CEO, Pepsi-Cola Bottling Company of New York; and John E. Zuccotti, Co-Chairman, Brookfield Office Properties; *see* Appointments, *supra* note 475.

483. *See supra* Part II.A.

484. N.Y. PUB. OFF. LAW § 103(e) (McKinney 2008) (as added by 2011 McKinney's Sess. Laws of N.Y. 603).

485. *Id.*

486. *Disclosure of Records Scheduled to be Discussed During Open Meetings Section 103(e) of the Open Meetings Law*, N.Y. DEP'T OF ST., http://www.dos.ny.gov/coog/QA-2-12.html (last visited Jan. 22, 2013) [hereinafter *Disclosure of Records*].

487. *See id.*

488. N.Y. PUB. OFF. LAW § 103(e).

489. *Id.*

subdivision."[490]

The Committee on Open Government has detailed information in response to common questions about the new law on its website.[491]

CONCLUSION

New York is always witnessing advances in administrative law as reflected in this year's developments. Despite the fact that the decisions of the Court of Appeals addressed fundamental principles of administrative law, an analysis of the facts of individual cases shed new light on our understanding of these rules. The Executive Branch has undertaken a new look at our treatment of individuals with disabilities, and given the recent deluges New York has experience with Hurricane Sandy, a welcome examination of how we prepare and respond to natural disasters. The Legislature has improved the Open Meetings Law and created a new state agency which will hopefully improve our treatment and care of vulnerable New Yorkers. It has been a year of milestones.

490. *Id.*
491. *See Disclosure of Records*, *supra* note 486.