ADMINISTRATIVE LAW

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CONTENTS

INTRODUCTION

This Article reviews developments in the New York Court of Appeals in administrative law and practice during the period from July 2017 through June 2018. The decisions covered a wide range of topics which included separation of powers, ultra vires actions by agencies, an agency's interpretation of its governing statutes, procedural due process, the substantial evidence and arbitrary and capricious standards of review, limited judicial review under SEQRA, government liability, and the Freedom of Information Law.

I. SEPARATION OF POWERS

The separation of powers doctrine "often involve[s] the question of whether a regulatory body has exceeded the scope of its delegated powers and encroached upon the legislative domain of policymaking."[1] Many times this comes down to weighing factors that determine whether agency

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1. Garcia v. N.Y.C. Dep't of Health & Mental Hygiene, 31 N.Y.3d 601, 608, 106 N.E.3d 1187, 1193, 81 N.Y.S.3d 827, 833 (2018) (citing Greater N.Y. Taxi Ass'n v. N.Y.C. Taxi & Limousine Comm., 25 N.Y.3d 600, 608, 36 N.E.3d 632, 637, 15 N.Y.S.3d 725, 730 (1st Dep't 2015)).

action was the exercise of authority granted by the New York State Legislature, or the impermissible taking of legislative power through agency regulation.[2] In *Boreali v. Axelrod*, the Court of Appeals set out four factors that are relevant to separation of powers challenges.[3] These factors are: (1) whether the action taken was a uniquely legislative function involving value judgments and choices in regard to policy goals; (2) whether the agency was acting on a clean slate or filling in details of the law; (3) whether previous or current legislative debate in the subject area had occurred; and (4) whether the action required specific agency expertise and technical competence.[4]

In December 2013, the New York City Health Code was amended to require that children "between the ages of 6 months and 59 months who attend child care of school-based programs under the Department's jurisdiction must also receive annual influenza vaccinations."[5] The parents of some children subject to this rule commenced an Article 78 proceeding to prevent enforcement of the vaccine rule or have it declared invalid.[6] The supreme court struck down the vaccine rule, holding that state law preempted the rule.[7] On appeal, the First Department affirmed, but stated that the proper question was whether the rule exceeded agency regulatory authority, and was not a matter of state law preemption.[8]

The Court of Appeals conducted a new analysis of the *Boreali* factors to determine whether there had been an improper exercise of legislative authority by a state agency. In regard to whether the Board of Health (the "Board") made complex value judgments, the Court found that the Legislature gave the Board authority to add health code provisions to prevent the spread of diseases, including through vaccination, meaning that the value judgment was made at the legislative

2. *See id*.

3. *See* 71 N.Y.2d 1, 11–14, 517 N.E.2d 1350, 1355–56, 523 N.Y.S.2d 464, 469–71 (1987).

4. *Garcia*, 31 N.Y.3d at 609, 106 N.E.3d at 1194, 81 N.Y.S.3d at 834 (first citing Acevedo v. N.Y. State Dep't of Motor Vehicles, 29 N.Y.3d 202, 222–23, 77 N.E.3d 331, 344 (3d Dep't 2017); then citing N.Y.C. C.L.A.S.H. v. N.Y. State Office of Parks, Recreation & Historic Pres., 29 N.Y.3d 174, 182, 51 N.E.3d 512, 519, 32 N.Y.S.3d 1, 8 (3d Dep't 2016); and then citing *Boreali*, 71 N.Y.2d at 13–14, 517 N.E.2d at 1356, 523 N.Y.S.2d at 470–71).

5. *Id.* at 606, 106 N.E.3d at 1191, 81 N.Y.S.3d at 831 (citing N.Y.C. HEALTH CODE §§ 43.17(a)(2)(B)(i), 47.25(a)(2)(B)(i) (2018)).

6. *Id.* at 606, 106 N.E.3d at 1192, 81 N.Y.S.3d at 832.

7. *Id.* at 607, 106 N.E.3d at 1192, 81 N.Y.S.3d at 832 (citing Garcia v. N.Y.C. Dep't of Health & Mental Hygiene, 161484/2015, 2015 N.Y. Slip Op. 32601(U), at 7 (Sup. Ct. N.Y. Cty. Dec. 16, 2015)).

8. *Id.* (citing Garcia v. N.Y.C. Dep't of Health & Mental Hygiene, 144 A.D.3d 59, 65, 67, 38 N.Y.S.3d 880, 882, 884 (1st Dep't 2016)).

level rather than by the agency itself.[9] Additionally, although limited scope rules may be evidence of improper exceptions to the Legislature's intent, here the scope is limited based on age due to heightened risk of infectious disease in that age group rather than economic or social concerns.[10] Accordingly, the first factor weighed in favor of the state agency.[11]

The second factor, whether or not the agency was simply filling in details or creating rules on a clean slate, also fell in favor of the state agency.[12] The Legislature has given the Board vast authority over vaccinations since as far back as 1866 with mandatory smallpox vaccines.[13] Further, the Board has successfully mandated immunizations for children above the minimum levels set by the Legislature without legislative intervention numerous times in the past.[14] Therefore, the flu vaccine rules enacted by the Board were more akin to filling in the details than writing on a clean slate.[15]

The third factor has to do with legislative inaction, or rather attempts at legislation that have been heavily debated and lobbied by various factions, and ended in inaction due to gridlock.[16] The Court found that although the Legislature has enacted laws regarding vaccines, the inaction in this case is not due to arguments within the Legislature, but rather a simple lack of legislation.[17] Additionally, "legislative inaction, because of its inherent ambiguity, affords the most dubious foundation for drawing positive inferences."[18] The Court found that this factor did

9. *Garcia*, 31, N.Y.3d 601 at 611–12, 106 N.E.3d at 1195–96, 81 N.Y.S.3d at 835–36 (quoting N.Y.C. ADMIN. CODE § 17-109(a)–(b) (2019)).

10. *Id.* at 612–13, 106 N.E.3d at 1196, 81 N.Y.S.3d at 836 (first citing N.Y.C. C.L.A.S.H. v. N.Y. State Office of Parks, Recreation & Historic Pres., 29 N.Y.3d 174, 181 n.5, 51 N.E.3d 512, 518 n.5, 32 N.Y.S.3d 1, 7 n.5 (3d Dep't 2016); then citing Boreali v. Axelrod, 71 N.Y.2d 1, 11–12, 517 N.E.2d 1350, 1355, 523 N.Y.S.2d 464, 469 (1987); and then citing N.Y. Statewide Coalition of Hispanic Chamber of Commerce v. N.Y.C. Dep't of Health & Mental Hygiene, 23 N.Y.3d 681, 698 n.3, 16 N.E.3d 538, 547 n.3, 992 N.Y.S.2d 480, 489 n.3 (2014)).

11. *Id.* at 613, 106 N.E.3d at 1196, 81 N.Y.S.3d at 836.

12. *Id.* at 615, 106 N.E.3d at 1198, 81 N.Y.S.3d at 838.

13. *Id.* at 613–14, 106 N.E.3d at 1197, 81 N.Y.S.3d at 837 (citing N.Y.C. HEALTH CODE § 29 (1866)).

14. *Garcia*, 31, N.Y.3d 601 at 614, 106 N.E.3d at 1197, 81 N.Y.S.3d at 837.

15. *Id.* at 614, 106 N.E.3d at 1197–98, 81 N.Y.S.3d at 837–38 (first citing *N.Y.C. C.L.A.S.H.*, 27 N.Y.3d at 182, 51 N.E.3d at 519, 32 N.Y.S.3d at 8; and then citing Rent Stabilization Ass'n v. Higgins, 83 N.Y.2d 156, 170, 630 N.E.2d 626, 631, 608 N.Y.S.2d 930, 935 (1993)).

16. *Id.* at 615, 106 N.E.3d at 1198, 81 N.Y.S.3d at 838.

17. *Id.* (first citing 2010 McKinney's Sess. Laws of N.Y., ch. 36, § 1, at 80; and then citing Boreali v. Axelrod, 71 N.Y.2d 1, 13, 517 N.E.2d 1350, 1356, 523 N.Y.S.2d 464, 470 (1987)).

18. *Id.* (internal quotations omitted) (quoting *N.Y.C. C.L.A.S.H.*, 27 N.Y.3d at 184, 51

not weigh against the Board.[19]

Finally, regarding whether the agency had special expertise in the development of the regulation in question, the Court found that the Board did extensive research and relied on recommendation of federal immunization authorities when adopting the new vaccine rules.[20] Additionally, the Board justified its choices for age group with research regarding attack rates of influenza, promotion of herd immunity, and flu transmission data.[21] Therefore, "the Board's health expertise was essential to its determination of whether to require the influenza vaccination."[22]

Based on the Court's discussion, it determined that the Board's flu vaccine rules were a valid use of regulatory authority and did not constitute policymaking.[23] Additionally, the Court found that state law did not preempt the Board's actions because there was no direct conflict with a state statute, nor intent by the Legislature to occupy the field through legislation.[24]

II. ULTRA VIRES

A state agency has acted "ultra vires" when it takes actions that are beyond the powers granted to that agency by the Legislature.[25] Stated otherwise, the ultimate determination hinges on whether agency actions exceed statutory authority.

In *People v. Francis*, the petitioner was nineteen-years-old when he was convicted of first degree rape.[26] At age seventeen, Jude Francis had been convicted of third degree criminal possession of stolen property and received a Youthful Offender's (YO) adjudication, which allowed those between the ages of sixteen and nineteen to avoid criminal records even if convicted.[27] "[A] YO adjudication is nothing short of 'the opportunity for a fresh start, without a criminal record."[28]

N.E.3d at 520, 32 N.Y.S.3d at 9).

19. *Garcia*, 31 N.Y.3d 601 at 615, 106 N.E.3d at 1198, 81 N.Y.S.3d at 838.

20. *Id.* at 615–16, 106 N.E.3d at 1198, 81 N.Y.S.3d at 838.

21. *Id.* at 616, 106 N.E.3d at 1198–99, 81 N.Y.S.3d at 838–39.

22. *Id.* at 616, 106 N.E.3d at 1199, 81 N.Y.S.3d at 839.

23. *Id.* at 621, 106 N.E.3d at 1202, 81 N.Y.S.3d at 842.

24. *Garcia*, 31 N.Y.3d 601 at 621, 106 N.E.3d at 1202, 81 N.Y.S.3d at 842.

25. *See* Prometheus Realty Corp. v. N.Y.C. Water Bd., 30 N.Y.3d 639, 645, 92 N.E.3d 778, 781, 69 N.Y.S.3d 555, 558 (2017) (citing Prometheus Realty Corp. v. N.Y.C. Water Bd., 54 Misc. 3d 745, 762, 37 N.Y.S.3d 362, 374 (Sup. Ct. N.Y. Cty. 2016)).

26. 30 N.Y.3d 737, 744, 94 N.E.3d 882, 887, 71 N.Y.S.3d 394, 399 (2018).

27. *Id.* at 744–45, 94 N.E.3d at 887, 71 N.Y.S.3d at 399; *see also* N.Y. CRIM. PROC. LAW § 720 (McKinney 2011).

28. *Francis*, 30 N.Y.3d at 741, 94 N.E.3d at 885, 71 N.Y.S.3d at 397 (quoting People v.

When convicted of a sex crime, offenders are given a rating that attempts to gauge how likely he or she is to become a repeat offender, as required by the Sex Offender Registration Act (SORA).[29] At this hearing, a panel of experts presents its case for a particular rating for the sex offender in question, and the SORA court makes an ultimate determination as to the rating of the offender.[30] When making the determination, "admissible evidence includes case summaries and the Board's [Risk Assessment Instrument], because such documents 'certainly meet the reliable hearsay' standard for admissibility at SORA proceedings."[31] In this case, the SORA court determined that Francis was at high risk of re-offending based on the SORA hearing and Board assessment, which included information about the YO adjudication mentioned previously.[32] Had the YO adjudication been inadmissible, Francis would have received a lower risk of re-offense categorization (Level II).[33] Accordingly, defense counsel objected to the inclusion of the YO adjudication, arguing that as this was not a conviction, it could not be considered for purposes of the SORA assessment.[34] The SORA court disagreed, designating Francis a Level III sexually violent sex offender.[35] The Second Department affirmed the SORA holding, and the Court of Appeals granted leave to appeal.[36]

To determine whether YO adjudication information may be consulted by the Board and the SORA court, the Court looked to the language of the statute to determine the intent of the Legislature.[37] The Court found that the SORA statute gave the Board permission to consider YO adjudication information and further that inclusion of the YO

Rudolph, 21 N.Y.3d 497, 501, 997 N.E.2d 457, 458, 974 N.Y.S.2d 885, 886 (2013)).

29. *Id.* at 743, 94 N.E.2d at 886, 71 N.Y.S.3d at 398 (citing N.Y. CORRECT. LAW § 168-I(6) (McKinney 2014)).

30. *Id.* at 744, 94 N.E.2d at 887, 71 N.Y.S.3d at 399 (quoting People v. Johnson, 11 N.Y.3d 416, 421, 900 N.E.2d 930, 933, 872 N.Y.S.2d 379, 382 (2008)).

31. *Id.* (quoting People v. Mingo, 12 N.Y.3d 563, 573, 910 N.E.2d 983, 990, 883 N.Y.S.2d 154, 161 (2009)).

32. *Id.* at 745, 94 N.E.2d at 887, 71 N.Y.S.3d at 399.

33. *Francis*, 30 N.Y.3d at 745, 94 N.E.2d at 887, 71 N.Y.S.3d at 399.

34. *Id.* at 747–48, 94 N.E.3d at 889–90, 71 N.Y.S.3d at 401–02 (quoting N.Y. CRIM. PROC. LAW § 720.35(1) (McKinney 2011)).

35. *Id.* at 745, 94 N.E.2d at 887, 71 N.Y.S.3d at 399.

36. *Id.* at 745, 94 N.E.2d at 888, 71 N.Y.S.3d at 400 (first citing People v. Francis, 137 A.D.3d 91, 100, 25 N.Y.S.3d 221, 227 (2d Dep't 2016); and then citing People v. Francis, 27 N.Y.3d 908, 908, 56 N.E.3d 902, 902, 36 N.Y.S.3d 622, 622 (2016)).

37. *Id.* (first citing People v. Andujar, 30 N.Y.3d 160, 163, 88 N.E.3d 309, 311, 66 N.Y.S.3d 151, 153 (2017); then citing People v. Ocasio, 28 N.Y.3d 178, 181, 65 N.E.3d 1263, 1265, 43 N.Y.S.3d 228, 230 (2016); then citing People v. Ballman, 15 N.Y.3d 68, 72, 930 N.E.2d 282, 284, 904 N.Y.S.2d 361, 363 (2010); and then citing MCKINNEY'S CONSOLIDATED LAWS OF N.Y., BOOK 1, STATUTES, § 92 (1971)).

adjudication to determine risk of re-offense was a Board decision entitled to judicial deference.[38] Additionally, although the defendant argued that YO adjudication could not be considered because it was not part of the defendant's criminal history, the Court noted that a lack of criminal history did not erase the defendant's conviction for a crime.[39] Therefore, Francis' previous conviction converted to youthful offender status was admissible evidence in front of a SORA court, and the Board actions did not exceed those authorized by statute.[40]

In early April 2016, the New York City Water Board (the "Water Board") issued a proposed rate increase of 2.1% to close a projected funding gap.[41] On April 25, 2016, the Mayor of New York City announced that the City would not collect rent from the Water Board through the year 2020, allowing a significant savings to the Water Board for 2017.[42] At the Mayor's behest, the Water Board used these savings to give a credit to account holders with "Tax Class One" properties, defined as "most residential property of up to three units (family homes and small stores or offices with one or two apartments attached), and most condominiums that are not more than three stories."[43] Accordingly, the Water Board adopted both the rate increase and the credit for certain property owners.[44] Property owners who did not receive the credit brought an Article 78 proceeding, arguing that the rate increase and credit to Tax Class One account holders was "irrational, arbitrary and capricious, and exceeded the Board's authority" to act (ultra vires).[45]

The supreme court found that the Water Board exceeded its authority to act by increasing rates and giving a credit, because the action "amounts to an impermissible tax" on the building owners who did not receive the credit.[46] The First Department disagreed with the trial court's ultra vires rationale, but stated there was no rational basis for the credit because (1) the use of the tax classification scheme as the credit measurement had nothing to do with ability to pay or customer needs, and

38. *Francis*, 30 N.Y.3d at 747, 94 N.E.2d at 889, 71 N.Y.S.3d at 401.

39. *Id.* at 748, 94 N.E.2d at 890, 71 N.Y.S.3d at 402 (quoting N.Y. PENAL LAW § 60.02 (3) (McKinney 2009)).

40. *Id*. at 750, 94 N.E.2d at 891–92, 71 N.Y.S.3d at 403–04.

41. Prometheus Realty Corp. v. N.Y.C. Water Bd., 30 N.Y.3d 639, 643, 92 N.E.3d 778, 780, 69 N.Y.S.3d 555, 557 (2017).

42. *Id.* at 643–44, 92 N.E.3d at 780, 69 N.Y.S.3d at 557.

43. *Id.* at 644, 92 N.E.3d at 780, 69 N.Y.S.3d at 557.

44. *Id.*

45. *Id.* at 644, 92 N.E.3d at 780–81, 69 N.Y.S.3d at 557–58.

46. *Prometheus Realty Corp.*, 30 N.Y.3d at 644–45, 92 N.E.3d at 781, 69 N.Y.S.3d at 558 (internal quotations omitted) (quoting Prometheus Realty Corp. v. N.Y.C. Water Bd., 54 Misc. 3d 745, 751, 762, 37 N.Y.S.3d 362, 367, 374 (Sup. Ct. N.Y. Cty. 2016)).

(2) the credit exacerbated the next year's projected budget shortfall.[47]

The Court of Appeals found that the Water Board's governing statute allowed it to take into consideration public policy goals as well as economic goals, and gave the Water Board some discretion in charging more than a minimum amount to recover revenue.[48] Additionally, the Court found that the use of tax categories to determine who received the water credit was not irrational, because it served the purpose of "singling out single-family households and owners of small apartment buildings . . . ."[49] Therefore, granting a credit based on tax category had a rational basis and "must be upheld in the absence of invidious discriminations or a differential that is entirely unsupported by rational goals."[50] Regarding the ultra vires challenge, the Court held that the higher rate imposed on building owners outside the group receiving a credit did not qualify as impermissible taxation because the increase itself was based on valid future cost projections.[51]

Anonymous, an Intermediate Care Facility v. Molik involved a challenge to the New York State Justice Center's interpretation of its statutory authority to penalize provider agencies.[52] The Justice Center has oversight of residential and non-residential programs and provider agencies that fall under the jurisdiction of six state oversight agencies, namely, the Office of Mental Health, the Office for People with Developmental Disabilities, the Office of Alcohol and Substance Abuse Services, the Office of Children and Family Services, the Department of Health, and the State Education Department.[53] It investigates allegations of abuse, neglect and significant incidents, disciplines individuals and agencies, and prosecutes crimes of neglect and abuse.[54]

Section 493(3) of the Social Services Law which governs the work of the Justice Center provides:

47. *Id.* at 645, 92 N.E.3d at 781, 69 N.Y.S.3d at 558 (citing Prometheus Realty Corp. v. N.Y.C. Water Bd., 147 A.D.3d 519, 521–23, 48 N.Y.S.3d 318, 321–23 (1st Dep't 2017)).

48. *Id.* at 646, 92 N.E.3d at 782, 69 N.Y.S.3d at 559 (quoting N.Y. PUB. AUTH. LAW § 2824(1)(g) (McKinney 2011)). "[The] Water Board is granted broad authority to set rates for water usage." *Id.* (quoting Vill. of Scarsdale v. Jorling, 91 N.Y.2d 507, 515, 695 N.E.2d 1113, 1116, 673 N.Y.S.2d 32, 35 (1998)).

49. *Id.* at 647, 92 N.E.3d at 782, 69 N.Y.S.3d at 559.

50. *Prometheus Realty Corp.*, 30 N.Y.3d at 647, 92 N.E.3d at 783, 69 N.Y.S.3d at 560.

51. *Id.* at 647–48, 92 N.E.3d at 783, 69 N.Y.S.3d at 560 (citing Watergate II Apartments v. Buffalo Sewer Auth., 46 N.Y.2d 52, 58–59, 385 N.E.2d 560, 564, 412 N.Y.S.2d 821, 825 (1978)).

52. (*Molik II*), 32 N.Y.3d 30, 31–32, 109 N.E.3d 563, 565, 84 N.Y.S.3d 414, 416 (2018) (citing N.Y. SOC. SERV. LAW § 493 (McKinney 2003)).

53. Protection of People with Special Needs Act, 2012 McKinney's Sess. Laws of N.Y., ch. 501, at 1290 (codified at SOC. SERV. § 493).

54. *Id*. at 1289.

> (a) A finding shall be based on a preponderance of the evidence and shall indicate whether: (i) the alleged abuse or neglect is substantiated because it is determined that the incident occurred and the subject of the report was responsible or, *if no subject can be identified and an incident occurred, that, the facility or provider agency was responsible*; or (ii) the alleged abuse or neglect is unsubstantiated because it is determined not to have occurred or the subject of the report was not responsible, or because it cannot be determined that the incident occurred or that the subject of the report was responsible. . . .
>
> (b) *In conjunction with the possible findings identified in paragraph (a) of this subdivision, a concurrent finding may be made that a systemic problem caused or contributed to the occurrence of the incident*.[55]

Substantiated findings of abuse or neglect are divided into four categories, generally referring to the severity of the conduct, which in turn provides the penalty.[56] Category One reports of abuse or neglect include "serious physical abuse, sexual abuse or other serious conduct by custodians . . . ."[57] Prohibited conduct includes physical injury, failure to perform a duty which causes harm or death, cruel or degrading treatment, threats, taunts, ridicule, sexual conduct and abuse, offenses involving controlled substances, and obstructing investigation.[58] Category Two includes instances of abuse or neglect which do not fit into Category One, but which "seriously endanger[] the health, safety or welfare of a service recipient."[59] Category Three offenses include abuse and neglect which endangers the health, safety, or welfare of a service recipient, but does not rise to the level of a Category One or Two offense.[60] Finally, Category Four offenses apply specifically to provider agencies, including facility or agency service conditions which are harmful or expose individuals to a risk of harm, but staff responsibility is mitigated because of "systemic problems."[61] This Category also includes substantiated reports where the individual perpetrator cannot be identified.[62] The Justice Center's authority under § 493(b) and its finding under Category Four was at issue in *Molik*.[63]

Three sexual assaults were committed by the same resident during a

55. SOC. SERV. § 493(3) (emphasis added).
56. *Id.* § 493(4).
57. *Id.* § 493(4)(a).
58. *Id.*
59. *Id.* § 493(4)(b).
60. SOC. SERV. § 493(4)(c).
61. *Id.* § 493(4)(d).
62. *Id.*
63. *Molik II*, 32 N.Y.3d 30, 33, 109 N.E.3d 563, 565, 84 N.Y.S.3d 414, 416 (2018) (citing SOC. SERV. § 493).

six-month period at the petitioner's residential health care facility.[64] After investigating the events, the Justice Center concluded that complaints against individual staff could not be substantiated because the petitioner did not have rules that prohibited staff from leaving residents unsupervised in the common room where the assaults took place, thus mitigating individual staff responsibility.[65] The Justice Center nevertheless found claims of neglect and negligence against the petitioner agency under Category Four and required it to address the systemic gaps in the petitioner's protocols that led to the attacks.[66]

The petitioner commenced an Article 78 proceeding claiming both that the Justice Center lacked authority under Social Services Law § 493 to "substantiate a finding of neglect" against the provider under Category Four when there were no substantiated charges against an individual connected to the provider, and that the determination was not supported by substantial evidence.[67]

The Third Department granted the petition, annulled the determination and held that the "Justice Center acted in excess of its statutory authority in making a finding of neglect against [the] petitioner."[68] The court concluded that Social Services Law § 493(3)(a) limited a provider's responsibility for cases of neglect to those where the subject of an incident of neglect could not be identified, an element missing in the case.[69] The Justice Center was granted leave to appeal.[70]

The case turned on the interpretation of Social Services Law § 493(3)(a)(i).[71] The petitioner argued that facility liability is "limited to those incidents where 'no subject can be identified'—that is, where an incident occurred but the investigation failed to identify a responsible employee."[72] The petitioner also argued that the use of a concurrent finding, as described in Social Services Law § 493(3)(b), was permissible

64. *Id.* at 31, 109 N.E.3d at 564–65, 84 N.Y.S.3d at 415–16.

65. *Id.* at 32, 109 N.E.3d at 565, 84 N.Y.S.3d at 416.

66. *Id.*

67. *Id.* at 33, 109 N.E.3d at 565, 84 N.Y.S.3d at 416 (citing SOC. SERV. § 493).

68. *Molik II*, 32 N.Y.3d at 33, 109 N.E.3d at 565–66, 84 N.Y.S.3d at 416–17 (quoting Anonymous, an Intermediate Care Facility v. Molik (*Molik I*), 141 A.D.3d 162, 164, 34 N.Y.S.3d 203, 204 (3d Dep't 2016)).

69. *Id.* at 33, 109 N.E.3d at 566, 84 N.Y.S.3d at 417 (quoting *Molik I*, 141 A.D.3d at 167, 34 N.Y.S.3d 206).

70. *Id.* at 34, 109 N.E.3d at 566, 84 N.Y.S.3d at 417 (citing Anonymous, an Intermediate Care Facility v. Molik, 29 N.Y.3d 902, 902, 80 N.E.3d 398, 398, 57 N.Y.S.3d 705, 705 (2017)).

71. *See* SOC. SERV. § 493(3)(a)(i).

72. *Molik II*, 32 N.Y.3d at 36, 109 N.E.3d at 567, 84 N.Y.S.3d at 418 (quoting SOC. SERV. § 493(3)(a)(i)).

only when there is a substantiated finding against an individual under § 493(3)(a)(i).[73] The Court concluded that under the petitioner's argument, a provider could not be held responsible for systemic problems, a result contrary to "the statutory text, the legislative history, and the underlying purpose of the statute,"[74] and one the court characterized as "absurd."[75] The Court bolstered this view by reference to the statute's legislative history explaining that

> [s]ystemic deficiencies may present a greater hazard to vulnerable residents than do discrete instances of employee misconduct, since employee-related incidents can often be remedied through targeted disciplinary action. Latent systemic problems, by contrast, are often more challenging to identify and more complicated to rectify—and therefore more likely to recur.[76]

The Court remitted the matter to the appellate division to determine the matters not decided on appeal.[77]

The petitioner landlord in *Brookford, LLC v. New York State Division of Housing & Community Renewal* challenged the respondent's decision to deny its application for deregulation of a rent controlled apartment based on the agency's interpretation of the Rent Control Law and implementing regulations.[78] The basis for his application was that the tenant's income exceeded the regulatory threshold amount, making her ineligible to remain in the apartment.[79] The landlord sought an eligibility determination from the Division of Housing & Community Renewal (DHCR) when it did not receive the tenant's response to its biannual request for an Income Certification Form (ICF).[80] The ICF was used to determine whether the "total annual income of the occupants of the subject apartment exceeded the deregulation threshold for the two years preceding of the filing of the ICF."[81] The regulation provided for deregulation when the "'total annual income' exceeds $175,000 in the two calendar years preceding the filing of an ICF."[82] The term "total annual income" is defined as "the sum of the annual incomes of all

73. *Id.* at 36, 38, 109 N.E.3d at 567, 569, 84 N.Y.S.3d at 418, 420 (citing SOC. SERV. § 493(3)(b)); *see also* SOC. SERV. § 493(3)(a)(i).

74. *Id.* at 37–38, 109 N.E.3d at 568–69, 84 N.Y.S.3d at 419–20.

75. *Id.* at 39, 109 N.E.3d at 570, 84 N.Y.S.3d at 421.

76. *Id.* at 39, 109 N.E.3d at 570, 84 N.Y.S.3d at 420–21.

77. *Molik II*, 32 N.Y.3d at 41, 109 N.E.3d at 571, 84 N.Y.S.3d at 422.

78. 31 N.Y.3d 679, 684, 107 N.E.3d 1258, 1259, 82 N.Y.S.3d 788, 789 (2018).

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 685, 107 N.E.3d at 1260, 82 N.Y.S.3d at 790.

persons who occupy the housing accommodation as their primary residence other than on a temporary basis."[83] Annual income is further defined "as the federal adjusted gross income [(AGI)] as reported on the New York State income tax return."[84] The tenant argued that she was entitled to apportion her annual income on the ICF so that it was below the threshold amount because her husband was living in a nursing home and had not been a resident of the apartment for over a year.[85] DHCR adopted that position and denied the landlord's application.[86] After the requisite administrative appeal, the landlord commenced an Article 78 proceeding.[87] The supreme court denied the petition.[88] The appellate division ordered the matter remanded to the DHCR.[89] The DHCR again denied the petition so the landlord commenced a second Article 78 proceeding.[90] The petition was once again denied by the supreme court and affirmed by the appellate division.[91] The matter came before the Court of Appeals on leave to appeal.[92]

The Court made quick work of the petitioner's argument that because the tenant and her husband filed a joint federal income tax return their income could not be apportioned, observing that the landlord had offered no explanation of why the federal filing should determine the DHCR's interpretation of its regulations.[93] It further observed that while the DHCR rule use the term "federal AGI," more importantly, the regulation also provided that the "total annual income is calculated as the 'sum' of the annual incomes of all those 'who occupy the housing accommodation as their primary residence.'"[94] In the Court's view, the two parts of the rule should be harmonized; otherwise it would result in the conflict between the two parts of the rule or the inclusion of income of parties who do not reside in the apartment being counted in reaching

83. *Brookford*, 31 N.Y.3d at 685, 107 N.E.3d at 1260, 82 N.Y.S.3d at 790 (emphasis omitted) (quoting N.Y.C. ADMIN. CODE § 26-403.1 (a)(1) (2019)).

84. *Id*. (quoting N.Y.C. ADMIN. CODE § 26-403.1 (a)(1)).

85. *Id.* at 684, 107 N.E.3d at 1259, 82 N.Y.S.3d at 789.

86. *Id*.

87. *Id*.

88. *Brookford*, 31 N.Y.3d at 684, 107 N.E.3d at 1259, 82 N.Y.S.3d at 789.

89. *Id*.

90. *Id.*

91. *Id*. (citing Brookford, LLC v. N.Y. State Div. of Hous. & Cmty. Renewal, 142 A.D.3d 433, 434, N.Y.S.3d 39, 41 (1st Dep't 2016)).

92. *Id.*

93. *Brookford*, 31 N.Y.3d at 685, 107 N.E.3d at 1260, 82 N.Y.S.3d at 790 (citing 26 U.S.C. § 6013(d)(3) (2012)).

94. *Id*. (quoting N.Y.C. ADMIN. CODE § 26-403.1(a)(1) (2019)).

the threshold amount.[95] It dismissed the dissent's contention based on a hypothetical of a wealthy couple manipulating the rules as inapposite.[96]

The Court of Appeals held that DHCR's interpretation of its statute to permit "income reported on a joint tax return filed on behalf of an occupant and non-occupant of a housing accommodation [to] be apportioned to determine the occupant's" eligibility was rational.[97]

The question on appeal in *Lemma v. Nassau County Police Officer Indemnification Board* was whether the respondent's determination which revoked a prior grant of indemnification to the petitioner police officer in a Section 1983 action was rational, based on its interpretation of § 50-*l* of the General Municipal Law.[98] The statute provides that the Board may indemnify police officers named as defendants in civil actions or proceedings from "any judgment for damages, including punitive or exemplary damages, arising out of a negligent act or other tort of such police officer committed while in the proper discharge of the officer's duties and within the scope of the officer's employment."[99] The statute further provides that what constitutes the "proper discharge and scope shall be determined by a majority vote" of the members of the Nassau County Police Officer Indemnification Board (the "Indemnification Board").[100]

The petitioner, an officer on the Nassau County police force, had been involved in investigating a robbery at knifepoint involving three men.[101] One suspect was arrested.[102] The officer subsequently arrested a second man who admitted his own involvement but told the officer that the first suspect had been in jail at the time of the incident.[103] The petitioner confirmed through official records that the first suspect had indeed been incarcerated, but the petitioner never revealed this exonerating information.[104] It was only after the suspect was arraigned

95. *Id*. at 685–86, 107 N.E.3d at 1260, 82 N.Y.S.3d at 790 (quoting Rangolan v. Cty. of Nassau, 96 N.Y.2d 42, 48, 749 N.E.2d 178, 183, 725 N.Y.S.2d 611, 616 (2001)) (citing Dutchess Cty. Dep't of Soc. Servs. ex rel. Day v. Day, 96 N.Y.2d 149, 153, 749 N.E.2d 733, 736, 726 N.Y.S.2d 54, 57 (2001)).

96. *Id.* at 687, 107 N.E.3d at 1261, 82 N.Y.S.3d at 791.

97. *Id.* at 683, 107 N.E.3d at 1259, 82 N.Y.S.3d at 789.

98. 31 N.Y.3d 523, 525–26, 105 N.E.3d 1250, 1252, 80 N.Y.S.3d 669, 671 (2018); *see also* N.Y. GEN. MUN. LAW § 50-*l* (McKinney 2016).

99. *Id*. at 529, 105 N.E.3d at 1254, 80 N.Y.S.3d at 673 (internal quotations omitted) (quoting GEN. MUN. § 50-*l*).

100. GEN. MUN. § 50-*l*.

101. *Lemma*, 31 N.Y.3d at 526, 105 N.E.3d at 1252, 80 N.Y.S.3d at 671.

102. *Id.*

103. *Id.*

104. *Id.*

for the robbery that his defense counsel learned about the alibi.[105] The suspect then commenced a 1983 action based on the arrest.[106] The county agreed to indemnify the petitioner, not knowing of the concealment of the alibi.[107] During the petitioner's deposition in the 1983 action, the petitioner revealed that he had known of the alibi.[108] "When asked what he did after learning this information, [the] petitioner stated: 'I kept it to myself and said, let the chips fall where they may.'"[109]

The Board then revoked its indemnification agreement, determining that the petitioner had acted intentionally.[110] The petitioner made several arguments against revocation, claiming that his statement reflected his understanding that he would have to live with his mistake, that the information had slipped his mind, and that the indemnification statute covered intentional conduct because it allowed for indemnification of punitive damages.[111] At the petitioner's request, the Board reconsidered the matter and reached the same conclusion, revoking indemnification.[112] The petitioner then commenced an Article 78 proceeding.[113] The supreme court dismissed the petition finding that the Board had discretion to determine what conduct was proper and "rationally concluded [the] petitioner's conduct was not 'proper.'"[114] The appellate division confirmed.[115] The Court of Appeals, hearing the case on leave to appeal,[116] concluded that the statutory interpretation adopted by the Indemnification Board was consistent with the language of the statute and its legislative history.[117] It noted that the conjunctive phrases "proper discharge" and in the "scope of employment" are intended to emphasize "a higher standard than mere performance of duty."[118] It observed that

105. *Id.*

106. *Lemma*, 31 N.Y.3d at 526, 105 N.E.3d at 1252, 80 N.Y.S.3d at 672.

107. *Id.* (citing N.Y. GEN. MUN. LAW § 50-*l* (McKinney 2016)).

108. *Id.* at 526–27, 105 N.E.3d at 1252, 80 N.Y.S.3d at 672.

109. *Id.* at 527, 105 N.E.3d at 1252–53, 80 N.Y.S.3d at 672.

110. *Id.* at 527, 105 N.E.3d at 1253, 80 N.Y.S.3d at 672.

111. *Lemma*, 31 N.Y.3d at 527, 105 N.E.3d at 1253, 80 N.Y.S.3d at 672.

112. *Id.*

113. *Id.*

114. *Id.* at 528, 105 N.E.3d at 1253, 80 N.Y.S.3d at 672–73 (citing N.Y. GEN. MUN. LAW § 50-*l* (McKinney 2016)).

115. *Id.* at 528, 105 N.E.3d at 1253, 80 N.Y.S.3d at 673 (first citing GEN. MUN. § 50-*l*; and then citing Lemma v. Nassau Cty. Police Officer Indem. Bd., 147 A.D.3d 760, 762, 47 N.Y.S.3d 54, 57 (2d Dep't 2017)).

116. *Lemma*, 31 N.Y.3d. at 528, 105 N.E.3d at 1253, 80 N.Y.S.3d at 673 (citing Lemma v. Nassau Cty. Police Officer Indem. Bd., 29 N.Y.3d 907, 907, 80 N.E.3d 405, 405, 57 N.Y.S.3d 712, 712 (2017)).

117. *Id.* at 532, 105 N.E.3d at 1256, 80 N.Y.S.3d at 675.

118. *Id.* at 529, 105 N.E.3d at 1254, 80 N.Y.S.3d at 673–74.

the statute's legislative history supported that interpretation by stating that the intent was to "alleviate [officers'] concern that their actions, although proper, may subject them to personal liability."[119] It also observed that the legislative history explained that punitive damages were potentially covered because of concerns that juries might incorrectly interpret the legal standard for such awards or seek to punish police officers.[120] The Court concluded that its inclusion was not inconsistent with the term "proper."[121] Based on that result, the Court also concluded that the Board's determination to deny indemnification was rational given that evidence supported

> the Board's finding that, despite knowledge that [suspect] could not have committed the robbery for which he had been arrested and charged (and for which he remained in pretrial detention for four months), [the] petitioner, by his own admission, remained silent—conduct antithetical to proper police work that resulted in a man's loss of liberty.[122]

III. PROCEDURAL DUE PROCESS

New York Procedural Due Process protections are enacted through our state constitution, case law, and state statute. Three recent cases discuss some of these due process rights, which include a defendant's limited right to disclosure of all documents used in his or her sentencing,[123] the right to a speedy trial,[124] and the right to have separate judges preside over trial and appellate proceedings.[125]

In the case of *People v. Minemier*, an eighteen-year-old man was charged with second degree murder and first and second degree assault for stabbing a woman and cutting a bystander who attempted to intervene.[126] Although his age at the time of the crime made him eligible for YO status, and despite defense counsel's request, the trial court did not state whether it considered allowing YO status.[127] Additionally, the trial court denied defense counsel's request to receive victim impact

119. *Id.* at 529, 105 N.E.3d at 1255, 80 N.Y.S.3d at 674 (internal quotations omitted) (quoting Legislative Memorandum of Assemb. Kremer, Bill Jacket, L. 1983, ch. 872, at 8).

120. *See id.* at 530, 105 N.E.3d at 1255, 80 N.Y.S.3d at 674.

121. *Lemma*, 31 N.Y.3d. at 531, 105 N.E.3d at 1255–56, 80 N.Y.S.3d at 675.

122. *Id.* at 532, 105 N.E.3d at 1257, 80 N.Y.S.3d at 676.

123. *See* People v. Minemier, 29 N.Y.3d 414, 416–17, 80 N.E.3d 389, 390, 57 N.Y.S.3d. 696, 697–98 (2017) (citing N.Y. CRIM. PROC. LAW § 390.50 (McKinney 2018)).

124. *See* People v. Wiggins, 31 N.Y.3d 1, 7, 95 N.E.3d 303,306, 72 N.Y.S.3d 1, 4 (2018).

125. *See* People v. Novak, 30 N.Y.3d 222, 224, 88 N.E.3d 305, 306, 66 N.Y.S.3d 147, 148 (2017).

126. 29 N.Y.3d at 417, 80 N.E.3d at 390, 57 N.Y.S.3d at 698.

127. *Id.*

statements submitted with the presentence investigation report (PSI).[128] The defendant was sentenced to twenty years in prison with five years of post-release supervision.[129] On appeal, the appellate division remanded to trial court, stating that there must be "an on-the-record determination . . . as to whether [the] defendant should be adjudicated a YO," and that the trial court must "make a record of what statements it had reviewed and to provide its reasons for refusing to disclose those statements to the parties."[130]

After remand, the trial court stated that based on all the information provided, it was denying the defendant YO adjudication status.[131] Regarding the withheld portions of the PSI, the trial court stated due to a promise of confidentiality, it would not disclose the missing document.[132] On appeal again, the appellate division held that the trial court's actions were proper and affirmed, because (1) the trial court acted properly by denying YO status on the record without stating the reasons for its decision, and (2) "that the sentencing court had not erred by denying disclosure of 'confidential information.'"[133]

The Court of Appeals reversed, holding that although a trial court has discretion to withhold its reasons for denial of YO status, the defendant's procedural due process rights were violated by the refusal to disclose the reason for withholding the entire PSI for sentencing purposes.[134] A defendant must be able to respond to the facts a court uses in making its decision, and Criminal Procedure Law (CPL) § 390.50 specifically states that a PSI report must be available to a defendant's attorney, unless (1) redactions are made only to the source of information, or (2) the court states on the records the reasons for excepting portions of the PSI.[135] As the trial court "failed to explain the nature of the document or the reason for its confidentiality," withholding the document from the defendant's attorney was in violation of state procedural due process

128. *Id.*

129. *Id.*

130. *Id.* at 417, 80 N.E.3d at 390–91, 57 N.Y.S.3d at 698 (first citing People v. Randolph, 21 N.Y.3d 497, 501, 997 N.E.2d 457, 458, 974 N.Y.S.2d 885, 886 (2013); and then citing People v. Minemier, 124 A.D.3d 1408, 1408, 1 N.Y.S.3d 706, 707 (4th Dep't 2015)).

131. *Minemier*, 29 N.Y.3d at 418, 80 N.E.3d at 391, 57 N.Y.S.3d at 698.

132. *Id.*

133. *Id.* at 418, 80 N.E.3d at 391, 57 N.Y.S.3d at 698–99 (quoting People v. Minemier, 134 A.D.3d 1551, 1552, 23 N.Y.S.3d 786, 788 (4th Dep't 2015)).

134. *Id.* at 421–22, 80 N.E.3d at 393–94, 57 N.Y.S.3d at 701 (citing N.Y. CRIM. PROC. LAW § 390.50 (McKinney 2018)).

135. *Id.* at 422–23, 80 N.E.3d at 394, 57 N.Y.S.3d at 701–02 (citing N.Y. C.P.L. § 390.50(2)(a)).

protections.[136] Accordingly, the case was reversed and remitted to the trial court.[137]

In *People v. Wiggins*, the Court of Appeals revisited the constitutional right to a speedy trial.[138] The defendant, Reginald Wiggins, killed a fifteen-year-old bystander with a gun and was arrested on May 28, 2008, along with a companion, Jamal Armstead.[139] The two were charged with second degree murder, two counts of attempted murder, and criminal possession of a weapon in the second degree.[140]

> [T]he People pursued a cooperation agreement with Armstead for approximately [two-and-a-half] years. After that effort proved unsuccessful, they spent the next three years attempting to convict Armstead, trying him separately from [the] defendant. After three mistrials, Armstead had been convicted of only criminal possession of a weapon in the second degree, he had been acquitted on the top count of second-degree murder, and the People were no closer to securing his testimony against [the] defendant. The time between [the] defendant's arrest on May 28, 2008 and [the] defendant's plea on September 23, 2014 spanned six years, three months, and 25 days, from when [the] defendant was 16 years old until he was 22. [The] [d]efendant spent the entirety of that period incarcerated.[141]

The defendant filed a motion to dismiss based on violation of his constitutional right to a speedy trial.[142] Although he withdrew the motion and pleaded guilty, the appellate division held that his constitutional right to a speedy trial was not violated, and granted the defendant leave to appeal.[143] The Court of Appeals conducted an analysis of the speedy trial claim, looking at:

> (1) the extent of the delay; (2) the reason for the delay; (3) the nature of the underlying charge; (4) whether or not there has been an extended period of pretrial incarceration; and (5) whether or not there is any indication that the defense has been impaired by reason of the delay.[144]

136. *Minemier*, 29 N.Y.3d at 424, 80 N.E.3d at 395, 57 N.Y.S.3d at 703.

137. *Id.* at 424, 80 N.E.3d at 396, 57 N.Y.S.3d at 703.

138. 31 N.Y.3d 1, 7, 95 N.E.3d 303, 306, 72 N.Y.S.3d 1, 4 (2018).

139. *Id.*

140. *Id.*

141. *Id.* at 9, 95 N.E.3d at 308, 72 N.Y.S.3d at 6.

142. *Id.*

143. *Wiggins*, 31 N.Y.3d at 6, 95 N.E.3d at 308, 72 N.Y.S.3d at 6 (first citing People v. Wiggins, 143 A.D.3d 451, 459, 39 N.Y.S.3d 395, 403 (1st Dep't 2016); and then citing People v. Wiggins, 28 N.Y.3d 1152, 1152, 74 N.E.3d 688, 688, 52 N.Y.S.3d 303, 303 (2017)).

144. *Id.* at 9–10, 95 N.E.3d at 308, 72 N.Y.S.3d at 6 (quotations omitted) (quoting People v. Taranovich, 37 N.Y.2d 442, 445, 335 N.E.2d 303, 306, 373 N.Y.S.2d 79, 82 (1975)).

The first factor, length of delay, favored the defendant.[145] The Court refused to set down a hard rule regarding how long is too long, but here indicated that five-and-a-half years would also be too long of a delay.[146] The longer the delay, the closer the scrutiny of the remaining factors, because the People bear the burden to get to trial in a timely fashion.[147]

The second factor, reason for delay, also favored the defendant.[148] The appellate division incorrectly relied on CPL § 30.30 for the proposition that Armstead's consent to adjournments in the joint case meant these periods of time were not due to prosecutorial unreadiness, and so could not be held against the prosecution.[149] According to the Court, "dilatory tactics" of a co-defendant cannot negate a defendant's constitutional right to a speedy trial.[150] Additionally, prior to charging a defendant, a good faith delay by the prosecution will not implicate speedy trial protections.[151] However, "once having instituted the prosecution by detainer warrant, indictment, or other initiatory process, [the prosecution] ha[s] the obligation of advancing [the case] unless there is a reasonable ground for delay."[152] Accordingly, a delay of this magnitude could not be justified solely through good faith on the part of the prosecution.[153]

The third factor weighed in favor of the prosecution, because charges that include murder must be taken seriously and the case treated with caution and deliberation.[154] In a case involving serious charges, a prosecutor is given some leeway to ensure precision and accuracy in his or her preparations.[155]

The fourth factor looked at the period of incarceration served by the

145. *Id.* at 10, 95 N.E.3d at 309, 72 N.Y.S.3d at 7 (quoting *Wiggins*, 143 A.D.3d at 455, 39 N.Y.S.3d at 399) (citing People v. Romeo, 12 N.Y.3d 51, 56, 904 N.E.2d 802, 806, 876 N.Y.S.2d 666, 670 (2009)).

146. *Id.* at 10–11, 95 N.E.3d at 309, 72 N.Y.S.3d at 7 (quoting *Taranovich*, 37 N.Y.2d at 445, 335 N.E.2d 303 at 306, 373 N.Y.S.2d at 82).

147. *Id.* at 11, 95 N.E. 3d at 309, 72 N.Y.S. 3d at 7 (quoting *Romeo*, 12 N.Y.3d at 56, 904 N.E.2d at 806, 876 N.Y.2d at 670).

148. *Wiggins*, 31 N.Y.3d at 16, 95 N.E.3d at 313, 72 N.Y.S.3d at 11.

149. *Id.* at 12, 95 N.E.3d at 310, 72 N.Y.S.3d at 8 (citing N.Y. CRIM. PROC. LAW § 30.30 (McKinney 2018)).

150. *Id.* (citing N.Y. C.P.L. § 30.30).

151. *Id.* at 13–14, 95 N.E.3d at 311, 72 N.Y.S.3d at 9.

152. *Id.* at 14, 95 N.E.3d at 312, 72 N.Y.S.3d at 10 (internal quotations omitted) (quoting People v. White, 32 N.Y.2d 393, 398, 298 N.E.2d 659, 663, 345 N.Y.S.2d 513, 518 (1973)).

153. *Wiggins*, 31 N.Y. 3d at 16, 95 N.E.3d at 313, 72 N.Y.S.3d at 11 (citing Barker v. Wingo, 407 U.S. 514, 534 (1972)).

154. *Id.* at 16, 95 N.E.3d at 313, 72 N.Y.S.3d at 11 (quoting People v. Taranovich, 37 N.Y.2d 442, 446, 335 N.E.2d 303, 306, 373 N.Y.S.2d 79, 82 (1975)).

155. *Id.* (quoting *Taranovich*, 37 N.Y.2d at 446, 335 N.E.2d at 306, 373 N.Y.S.2d at 82).

defendant.[156] Relevant to this inquiry are whether a defendant has been imprisoned based on conviction of an unrelated charge and whether incarceration began before trial.[157] As the defendant had been in prison since his arrest in 2008,[158] this factor favored the defendant.[159]

Finally, the Court considered prejudice to the defendant from delay.[160] Referencing similar holdings by the U.S. Supreme Court, the Court of Appeals found that there was presumptive prejudice caused by extreme delays in prosecution that "compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify."[161] These include interference with a defendant's liberty, employment, finances, friendships, and hardship on friends and family.[162] Accordingly, although the defendant could point to no specific impairment, the Court found presumptive prejudice in the extraordinary amount of time between arrest and trial, weighing in favor the defendant.[163]

The Court held that the defendant's constitutional right to a speedy trial was violated, and dismissed the charges against him.[164] In a dissent, the Chief Judge argued that although five years was a significant amount of time to spend in prison without conviction, the defendant's lack of protest at the adjournments, failure to show specific prejudice, and the Prosecution's efforts to move the case forward meant that a crime as severe as murder should not be dismissed due to a due process issue such as speedy trial.[165]

Finally, in the case of *People v. Novak*, the Court of Appeals discussed the consequences of a single judge presiding over trial court proceedings and the subsequent appeal.[166] The defendant was convicted of driving while ability impaired.[167] The trial court judge denied the

156. *Id.* (quoting *Taranovich*, 37 N.Y.2d at 445, 335 N.E 2d at 306, 373 N.Y.S.2d at 82).

157. *Wiggins*, 31 N.Y.3d at 17, 95 N.E.3d at 313–14, 72 N.Y.S.3d at 11–12 (first citing People v. Romeo, 12 N.Y.3d 51, 58, 904 N.E.2d 802, 806, 807, N.Y.S.2d 666, 672 (2009); and then citing People v. Prosser, 309 N.Y. 353, 357, 130 N.E. 2d 891, 894 (1955)).

158. *Id.* at 7, 95 N.E.3d at 306, 72 N.Y.S.3d at 4.

159. *See id.* at 17, 95 N.E.3d at 314, 72 N.Y.S.3d at 12.

160. *Id.* at 17, 95 N.E. 3d at 314, 72 N.Y.S. 3d at 12 (citing *Taranovich*, 37 N.Y.2d at 446–47, 335 N.E.2d at 307–08, 373 N.Y.S.2d at 83).

161. *Id.* at 18, 95 N.E.3d at 314, 72 N.Y.S.3d at 12 (quoting Doggett v. United States, 505 U.S. 647, 655 (1993)).

162. *Wiggins*, 31 N.Y.3d at 18, 95 N.E.3d at 315, 72 N.Y.S.3d at 13 (quoting Moore v. Arizona, 414 U.S. 25, 27 (1973)).

163. *Id.* at 19, 95 N.E.3d at 315, 72 N.Y.S.3d at 13.

164. *Id.*

165. *Id.* at 29, 95 N.E.3d at 322–23, 72 N.Y.S.3d at 20–21 (DiFiore, J., dissenting) (citing N.Y. CRIM. PROC. LAW § 210.45 (McKinney 2007)).

166. 30 N.Y.3d 222, 224, 88 N.E.3d 305, 306, 66 N.Y.S.3d 147, 148 (2017).

167. *Id.*

defendant's motion to dismiss, and found him guilty of the charge at a bench trial.[168] In the interim, the trial court judge was elected to county court, and was the sole appeals judge assigned to the defendant's case.[169] He ruled that his previous conviction and sentencing were proper and upheld his trial court verdict.[170] The defendant was granted leave to appeal to the Court of Appeals.[171]

The Court found that the use of an appellate division of courts that reviews trial court decisions on questions of both law and fact requires that an "impartial jurist" conduct the appellate review.[172] Additionally, although a judge may be capable of actual impartiality when conducting an appeal, there must also be the appearance of impartiality.[173] Where the same judge presides over both trial and appeal, at the least the appearance of impartiality is lacking.[174] The Court held that "under principles of due process, a judge may not act as appellate decision-maker in a case over which the judge previously presided at trial."[175]

Adequacy of notice was at issue in *West Midtown Management Group, Inc. v. State of New York*.[176] West Midtown Management Group Inc., a Medicaid Service Provider, is the operator of two methadone clinics in Manhattan, New York.[177] The Office of the Medicaid Inspector General (OMIG) has authority to audit the records of Medicaid Service Providers.[178] After conducting an audit of West Midtown's claims reimbursement rates, OMIG's initial report concluded that unjustified Medicaid payments made up over $6 million of West Midtown's claims reimbursement.[179] However, the final report provided by OMIG came up with a much lower estimate of unjustified expenses, an amount of $1,857,401.[180] This lower number, known as an "extrapolated point

168. *Id.*

169. *Id*. at 224–25, 88 N.E.3d at 306, 66 N.Y.S.3d at 148.

170. *Id.* at 225, 88 N.E.3d at 306, 66 N.Y.S.3d at 148.

171. *Novak*, 30 N.Y.3d at 224, 88 N.E.3d at 306, 66 N.Y.S.3d at 148 (citing People v. Novak, 27 N.Y.3d 1072, 1072, 60 N.E.3d 1209, 1209, 38 N.Y.S.3d 843, 843 (2016)).

172. *Id.* at 225, 88 N.E.3d at 307, 66 N.Y.S.3d at 149 (first citing *In re* Murchison, 349 U.S. 133, 136 (1955); and then citing People v. Alomar, 93 N.Y.2d 239, 245, 711 N.E.2d 958, 961, 689 N.Y.S.2d 680, 683 (1999)).

173. *Id.* at 226, 88 N.E.3d at 307, 66 N.Y.S.3d at 149.

174. *Id.* (first citing U.S. CONST. amend. XIV, § 1; and then citing N.Y. CONST. art. I, § 6).

175. *Id.* (first citing U.S. CONST. amend. XIV, § 1; and then citing N.Y. CONST. art. I, § 6).

176. (*West Midtown Mgmt. Group II*), 31 N.Y.3d 533, 535, 106 N.E.3d 726, 727, 81 N.Y.S.3d 343, 344 (2018) (citing 18 N.Y.C.R.R. § 517.6(b) (2018)).

177. *Id.* at 537, 106 N.E.3d at 728, 81 N.Y.S.3d at 345.

178. *Id.* (citing 18 N.Y.C.R.R. § 504.3(i) (2018)).

179. *Id.*

180. *Id.*

estimate," enjoys a presumption of accuracy at any administrative hearing, unless there is "expert testimony or evidence to the contrary."[181] Finally, the report stated that there was a ninety-five percent chance that West Midtown received overpayments of more than $1,460,914.[182]

After receiving the final report prepared by OMIG, West Midtown had an opportunity to settle the unjustified reimbursement claims by repaying Medicaid $1,460,914, also referred to as the "lower confidence limit amount."[183] If West Midtown did not respond to the final report within twenty days, Medicaid would begin to withhold payments to reimburse itself for the lower confidence amount, but explicitly retained the right to seek other remedies at law.[184] West Midtown also had the opportunity to challenge the final report within sixty days of receipt in an administrative hearing.[185]

Upon expiration of the twenty-day period in December 2010, West Midtown received a Notice of Withholding from OMIG, stating that (1) withholding had begun to reimburse Medicaid for the lower confidence amount, (2) West Midtown had been "previously informed that an overpayment totaling $1,460,914 was identified as a result of" the audit conducted,[186] and (3) withholding would continue until the balance due was recovered.[187] Although West Midtown sought a hearing to challenge the final report, its request was outside the sixty-day request period, and was therefore denied.[188] For over two and one-half years following the Notice of Withholding, OMIG withheld a portion of Medicaid claims made by West Midtown without incident.[189]

In September 2013, two years and nine months after OMIG began withholding claim payments in reimbursement, OMIG told a West Midtown representative that withholding would continue until the extrapolated point estimate of $1,857,401 had been returned to Medicaid.[190] Until OMIG spoke to the West Midtown representative,

181. *West Midtown Mgmt. Group II*, 31 N.Y.3d at 537, 106 N.E.3d at 729, 81 N.Y.S.3d at 346 (citing 18 N.Y.C.R.R. § 519.18(g) (2018)).

182. *Id.* at 537–38, 106 N.E.3d at 729, 81 N.Y.S.3d at 346.

183. *Id.* at 538, 106 N.E.3d at 729, 81 N.Y.S.3d at 346.

184. *Id.* Specifically, OMIG would begin to withhold West Midtown's billings at fifty percent per claim submitted until reimbursed to the lower confidence amount, "not barring any other remedy allowed by law." *Id.*

185. *West Midtown Mgmt. Group II*, 31 N.Y.3d. at 538, 106 N.E.3d at 729, 81 N.Y.S.3d at 346.

186. *Id.* at 538–39, 106 N.E.3d at 729–30, 81 N.Y.S.3d at 346–47.

187. *Id.* at 540, 106 N.E.3d at 730, 81 N.Y.S.3d at 347.

188. *Id.* at 539 n.1, 106 N.E.3d at 729 n.1, 81 N.Y.S.3d at 346 n.1.

189. *See id.* at 539, 106 N.E.3d at 730, 81 N.Y.S.3d at 347.

190. *West Midtown Mgmt. Group II*, 31 N.Y.3d. at 539, 106 N.E.3d at 730, 81 N.Y.S.3d

West Midtown alleged that it had understood the repayment plan to end upon recovery of the lower confidence amount, not the extrapolated point estimate.[191] West Midtown commenced an Article 78 proceeding, seeking to prevent OMIG from continuing withholding once the lower confidence limit amount of $1,460,914 had been recouped.[192]

In order to satisfy New York law, a final audit report must "clearly advise" a provider

> (1) of the nature and amount of the audit findings, the basis for the action and the legal authority therefor: (2) of the action which will be taken; (3) of the effective date of the intended action which will be not less than 20 days from the date of the final audit report . . . .[193]

West Midtown argued that OMIG failed to follow the above standard because the agency did not "clearly advise" of its intent to withhold payments past the lower confidence in the absence of request for a hearing.[194] Additionally, West Midtown claimed that references to a balance due of the lower confidence amount in the Notices of Withholding meant that OMIG did not provide proper notice of intent to seek a greater amount in accordance with New York regulations.[195]

The supreme court found for OMIG, stating that West Midtown was aware of its possible liability for the entire extrapolated point estimate because of the late request for an administrative hearing.[196] In the attempts to force an administrative law judge to hold a hearing, multiple references to liability for the entire $1,857,401 were made on the record by the administrative law judge and in submissions by West Midtown itself.[197] Further, the supreme court did not agree that the Notices of Withholding limited OMIG to collecting the lower confidence amount because the final audit report stated that OMIG reserved the right to recover the amount using other remedies at law.[198]

The appellate division reversed, holding that OMIG failed to deliver statutorily required notice to withhold a greater amount than the lower confidence amount.[199] The final audit report stated that OMIG would

at 347.

191. *Id.*

192. *Id.*

193. 18 N.Y.C.R.R. § 517.6(b)(1)–(3) (2018).

194. *West Midtown Mgmt. Group II*, 31 N.Y.3d at 540, 106 N.E.3d at 730, 81 N.Y.S.3d at 347 (citing 18 N.Y.C.R.R. § 517.6(b)).

195. *Id.* (citing 18 N.Y.C.R.R. § 518.7(c) (2018)).

196. *Id.* at 539, 106 N.E.3d at 730, 81 N.Y.S.3d at 347.

197. *Id.*

198. *Id.*

199. *West Midtown Mgmt. Group II*, 31 N.Y.3d at 539–40, 106 N.E.3d at 730, 81 N.Y.S.3d

defend the extrapolated point estimate if the report was challenged in a hearing, "but would otherwise recover the lower confidence limit amount."[200] Accordingly, the appellate division held that OMIG could not seek reimbursement for the higher amount because no hearing was held due to West Midtown's failure to seek a hearing within the sixty-day timeframe.[201]

Finally, the Court of Appeals once again reversed, holding that OMIG was not limited to the lower confidence amount.[202] References in the final audit report to the estimated liability of $1,857,401 provided West Midtown with the statutorily required notice of 18 N.Y.C.R.R. § 517.6(b).[203] As the final audit report stated that withholding to the lower confidence amount would begin if the provider failed to reach a settlement, and the withholding did not bar other remedies allowed by law, the Court of Appeals found that the references to the lower confidence amount were conditions of settlement, not a limit on West Midtown's liability.[204] Additionally, the Court found that OMIG was not required to state the total amount it sought to withhold in the Notices of Withholding under 18 N.Y.C.R.R. § 518.7(c).[205] Therefore, references to the lower confidence amount in the Notices of Withholding did not prevent OMIG from seeking reimbursement for amounts above $1,460,914.[206]

According to the Court of Appeals, "'those who deal with the government are expected to know the law, and cannot rely on the conduct of government agents' to excuse legal obligations."[207] Allowing West Midtown to avoid liability for the full extrapolated point estimate would mean that a provider's failure to settle an expense reimbursement matter left them better off than a negotiated settlement.[208]

at 347 (citing West Midtown Mgmt. Group, Inc. v. State (*West Midtown Mgmt. Group I*), 142 A.D.3d 843, 846, 38 N.Y.S.3d 119, 122 (1st Dep't 2016)).

200. *West Midtown Mgmt. Group I*, 142 A.D.3d at 846, 38 N.Y.S.3d at 121–22.

201. *Id.* at 846, 38 N.Y.S.3d at 122.

202. *West Midtown Mgmt. Group II*, 31 N.Y.3d at 540, 106 N.E.3d at 730, 81 N.Y.S.3d at 347.

203. *Id.* at 540, 106 N.E.3d at 731, 81 N.Y.S.3d at 348 (first citing 18 N.Y.C.R.R. § 517.6(b) (2018); and then citing 18 N.Y.C.R.R. § 518.7(c) (2018)).

204. *Id.* at 541, 106 N.E.3d at 731, 81 N.Y.S.3d at 348.

205. *Id.* (citing 18 N.Y.C.R.R. § 518.7(c)).

206. *Id.* (citing 18 N.Y.C.R.R. § 518.7(c)).

207. *West Midtown Mgmt. Group II*, 31 N.Y.3d at 542, 106 N.E.3d at 732, 81 N.Y.S.3d at 349 (quoting N.Y. State Med. Transporters Ass'n v. Perales, 77 N.Y.2d 126, 131, 566 N.E.2d 134, 137, 564 N.Y.S.2d 1007, 1010 (1990)).

208. *See id.*

IV. SUBSTANTIAL EVIDENCE STANDARD OF REVIEW

The substantial evidence test for judicial review of an administrative proceeding requires that "only that a given inference is reasonable and plausible, not necessarily the most probable . . . courts may not weigh the evidence or reject a determination where the evidence is conflicting and room for choice exists."[209] Instead, "when a rational basis for the conclusion adopted by the agency is found, the judicial function is exhausted. The question, thus, is not whether the reviewing court finds the proof convincing, but whether the agency could do so."[210] The Court in *Marine Holdings, LLC v. New York City Commission on Human Rights* considered whether the agency's determination that the landlord had failed to show undue hardship so as to excuse it from creating an accessible entrance for its tenant was supported by substantial evidence.[211] The Court noted that it was not whether there was substantial evidence to support the petitioner's argument, but whether the agency's determination was supported by substantial evidence[212]—a critical difference.[213] The evidence relied on by the majority opinion showed that the petitioner had made several other window-to-door conversions without claiming any hardship and that the conversion at issue was not substantially different from prior conversions.[214] Thus, the Court in a memorandum decision concluded that the New York City Commission on Human Rights' (the "Commission") determination should not be disturbed.[215] However, the evidence described in the dissent is enough to give one pause.[216] Although two non-expert Commission employees who visited the premises reported to the landlord that the tenant was entitled to an accommodation,[217] a feasibility study by the landlord's architect stated that the necessary construction "would be 'quite involved' but

209. Marine Holdings, LLC v. N.Y.C. Comm'n on Human Rights, 31 N.Y.3d 1045, 1047, 100 N.E.3d 849, 850–51, 76 N.Y.S.3d 510, 511–12 (2018) (first quoting Ridge Rd. Fire Dist. v. Schiano, 16 N.Y.3d 494, 499, 947 N.E.2d 140, 143, 922 N.Y.S.2d 249, 252 (2011); and then quoting *In re* State Div. of Human Rights, 70 N.Y.2d 100, 106, 510 N.E.2d 799, 801, 517 N.Y.S.2d 715, 717 (1987)).

210. *Id.* (quoting *In re State Div. of Human Rights*, 70 N.Y.2d at 106, 510 N.E.2d at 801, 517 N.Y.S.2d at 717).

211. *Id.* at 1046, 100 N.E.3d at 850, 76 N.Y.S.3d at 511 (first citing N.Y.C. ADMIN. CODE § 8-123(e) (2019); and then citing N.Y. C.P.L.R. 7803(4) (McKinney 2008)).

212. *Id.* at 1047, 100 N.E.3d at 850, 76 N.Y.S.3d at 511.

213. *Id.*

214. *Marine Holdings, LLC*, 31 N.Y.3d at 1047, 100 N.E.3d at 851, 76 N.Y.S.3d at 512.

215. *Id.*

216. *See id.* at 1048, 100 N.E.3d at 851, 76 N.Y.S.3d at 512 (Garcia, J. dissenting).

217. *Id.* (Garcia, J. dissenting) (citing N.Y.C. ADMIN. CODE § 8-101 (2019)).

'technically feasible.'"[218] The landlord's structural engineer concluded that "the accommodation would cause a 'slew of structural issues' and that the building might need to be evacuated."[219] After a hearing at which experts for both sides testified,[220] the administrative law judge's (ALJ) report and recommendation found that the petitioners would suffer an undue hardship in creating the proposed accommodation.[221] Interestingly, the Commission reached the opposite conclusion, reversing the ALJ's findings.[222] The dissent examined the evidence in detail, challenging the standards used by the Commission that the conversion could be done and that it would be substantially similar to other previous conversions.[223]

V. ARBITRARY AND CAPRICIOUS—REVIEW OF FACTS

Aponte v. Olatoye also involved a challenge to an agency determination as arbitrary and capricious.[224] Mr. Aponte challenged the decision of the New York City Housing Authority's (NYCHA) that he was not entitled to "remaining family member" (RFM) status in order to remain in his deceased mother's apartment.[225] The case turned on the ultimate result for Mr. Aponte and his mother despite the failure of NYCHA to follow its own regulations, as criticized by the concurring opinion.[226] Mr. Aponte lived with his mother in a single bedroom apartment in public housing.[227] His mother suffered from dementia and Mr. Aponte provided her care.[228] Two NYCHA rules were implicated by this arrangement.[229] One rule provides that a single adult and an adult child occupying a single bedroom apartment constitutes "overcrowding" a situation which prohibits a person "from seeking permanent permission [to reside] in the apartment."[230] Without such permanent permission for residency, the individual is precluded from obtaining RFM status.[231] Thus

218. *Id.* (Garcia, J., dissenting).

219. *Marine Holdings, LLC*, 31 N.Y.3d at 1048, 100 N.E.3d at 851, 76 N.Y.S.3d at 512 (Garcia, J. dissenting).

220. *Id.* (Garcia, J. dissenting).

221. *Id.* at 1049, 100 N.E.3d at 852, 76 N.Y.S.3d at 513 (Garcia, J., dissenting).

222. *Id.* (Garcia, J., dissenting).

223. *Id.* at 1052–53, 100 N.E.3d at 854, 76 N.Y.S.3d at 515 (Garcia, J., dissenting).

224. *See* 30 N.Y.3d 693, 697, 94 N.E.3d 466, 467, 70 N.Y.S.3d 904, 905 (2018).

225. *Id.* at 696–97, 94 N.E.3d at 467, 70 N.Y.S.3d at 905 (citing N.Y. C.P.L.R. art. 78 (McKinney 2008)).

226. *Id.* at 702, 94 N.E.3d at 471, 70 N.Y.S.3d at 909 (Rivera, J., concurring).

227. *Id.* at 697, 94 N.E.3d at 467, 70 N.Y.S.3d at 905.

228. *Id.*

229. *See Aponte*, 30 N.Y.3d at 697–98, 94 N.E.3d at 467–68, 70 N.Y.S.3d at 905–06.

230. *Id.* at 697, 94 N.E.3d at 467, 70 N.Y.S.3d at 905.

231. *Id.*

under the overcrowding rule, Mr. Aponte was ineligible for RFM status.[232] The second rule provides that a home care attendant residing in the apartment with the individual receiving care, whether they are related, can be granted temporary resident status even if that arrangement results in "overcrowding."[233] That temporary residence status does not entitle the caregiver to seek RFM status if he or she happens to be a family member.[234] NYCHA denied Mr. Aponte's application for RFM after his mother's death.[235] After an administrative appeal, Mr. Aponte commenced an Article 78 proceeding, claiming that NYCHA's decision was discriminatory, and arbitrary and capricious because it barred him as a caregiver from RFM status.[236]

The majority opinion quickly concluded that the NYCHA rules prohibited it from acceding to Mr. Aponte's demand.[237] While the court sympathized with the petitioner's argument that family caregivers should be given "a succession priority," it declined to hold that NYCHA's existing policy of "prioritizing children in need and persons facing homelessness when allocating its insufficient housing stock" was arbitrary and capricious.[238] It did not reach the issue of discrimination as that claim had not been raised in the administrative proceeding.[239]

The concurring opinion discussed the discrimination claim and the alleged failure of NYCHA to make reasonable accommodations through individual assessments as required under the Americans with Disabilities Act, the New York State Human Rights Law, and the New York City Human Rights Law.[240] The concurrence expressed the view that NYCHA's default treatment of Mr. Aponte as a temporary resident by virtue of his caretaker role did not excuse its failure to follow its "procedures for providing reasonable accommodations to people with

232. *Id.*

233. *Id.* at 698, 94 N.E.3d at 468, 70 N.Y.S.3d at 906.

234. *Aponte*, 30 N.Y.3d at 698, 94 N.E.3d at 468, 70 N.Y.S.3d at 906 (first citing Ortiz v. Rhea, 127 A.D.3d 665, 666, 8 N.Y.S.3d 188, 189 (1st Dep't 2015); and then citing Banks v. Rhea, 133 A.D.3d 745, 745, 19 N.Y.S.3d 337, 338 (2d Dep't 2015)).

235. *Id.* at 697, 94 N.E.3d at 467, 70 N.Y.S.3d at 905.

236. *Id.*

237. *Id.* at 698, 94 N.E.3d at 468, 70 N.Y.S.3d at 906 (first citing Ortiz, 127 A.D.3d at 666, 8 N.Y.S.3d at 189; and then citing *Banks*, 133 A.D.3d at 745, 19 N.Y.S.3d at 338).

238. *Id.* at 698, 94 N.E.3d at 468, 70 N.Y.S.3d at 906.

239. *Aponte*, 30 N.Y.3d at 698, 94 N.E.3d at 468, 70 N.Y.S.3d at 906 (citing Peckham v. Calogero, 12 N.Y.3d 424, 430, 911 N.E.2d 813, 816, 883 N.Y.S.2d 751, 754 (2009)).

240. *Id.* at 699, 94 N.E.3d at 468–69, 70 N.Y.S.3d at 907 (Rivera, J., concurring) (first citing 42 U.S.C. § 12112 (2012); then citing N.Y. EXEC. LAW § 296 (McKinney 2018); and then citing N.Y.C. ADMIN. CODE § 8-107 (2019)).

disabilities."[241] NYCHA's argument that its failures were merely technical were not satisfactory to the concurrence.[242]

In *Natasha W. v. New York Office of Children and Family Services*, the issue was whether the agency had acted irrationally in declaring that the petitioner had maltreated her son and declining to seal a child abuse report against her.[243] The petitioner was arrested on charges of shoplifting for stolen items on her person.[244] At the time, her five-year-old son was with her and wearing some stolen clothing as well.[245] A police officer made a complaint about the arrest to the Statewide Central Register of Child Abuse and Maltreatment (the "Child Abuse Register"), and New York City's Administration for Children's Services (ACS) began a two-month long investigation.[246] Although ACS labeled the complaint "indicated," meaning that there was a basis for the complaint and her name was added to the Child Abuse Register, in fact, the evidence in the ACS file showed that the petitioner did not have a criminal record, and that the child was well adjusted.[247] ACS concluded that "the child was not 'likely to be in immediate or impending danger of serious harm,' and that no 'Safety Plan/Controlling Interventions were necessary.'"[248] Concerned that having her name placed ~~placing her name~~ on the registry would restrict her ability to pursue her chosen career in child care, the petitioner commenced an administrative appeal.[249] The ALJ denied her application, finding her conduct of using her son to shoplift was outrageous and created an imminent risk to his emotional wellbeing which was relevant to any career in child care.[250]

The petitioner challenged this finding in an Article 78 proceeding.[251] The supreme court reversed the ALJ's determination, and that decision was affirmed by the First Department.[252] Both courts concluded that the

241. *Id.* (Rivera, J., concurring).

242. *Id.* at 702, 94 N.E.3d at 471, 70 N.Y.S.3d at 909 (Rivera, J., concurring).

243. (*Natasha W. II*), 32 N.Y.3d. 982, 984, 110 N.E.3d 503, 504, 85 N.Y.S.3d 391, 329 (2018) (first citing N.Y. SOC. SERV. LAW § 412(2)(a) (McKinney 2010); then citing N.Y. JUD. FAM. CT. ACT. § 1012(f)(i)(B) (McKinney 2010); then citing 18 N.Y.C.R.R. § 432.1 (b) (2018); and then citing Nicholson v. Scoppetta, 3 N.Y.3d 357, 368, 820 N.E.2d 840, 844, 787 N.Y.S.2d 196, 200 (2004)).

244. *Id.* at 985, 110 N.E.3d at 504, 85 N.Y.S.2d at 392 (Wilson, J. dissenting).

245. *Id.* (Wilson, J. dissenting).

246. *Id*. at 985, 110 N.E.3d at 505, 85 N.Y.S.3d at 393 (Wilson, J. dissenting).

247. *Id.* (Wilson, J. dissenting).

248. *Natasha W. II*, 32 N.Y.3d at 985, 10 N.E.3d at 505, 110 N.E.3d at 393 (Wilson, J. dissenting).

249. *Id.* (Wilson, J. dissenting).

250. *Id.* at 985–86, 110 N.E.3d at 505, 85 N.Y.S.3d at 393 (Wilson, J. dissenting).

251. *Id.* at 986, 110 N.E.3d at 505, 85 N.Y.S.3d at 393 (Wilson, J. dissenting).

252. *Id.* (Wilson, J. dissenting).

ALJ had improperly applied the law to the case and that there was no evidence to support the administrative ruling.[253] Two members of the appellate court dissented.[254] The majority of the Court of Appeals agreed with the First Department dissent that the petitioner's conduct was unacceptable in that "'utilizing a child to commit a crime and teaching a child that such behavior is acceptable must have an immediate impact on that child's emotional and mental well-being,' particularly where, as here, the child is 'young and just learning to differentiate between right and wrong.'"[255] The dissent at the Court of Appeals argued that the ALJ had not only applied the incorrect standards but also created a per se rule that the child of an individual accused or convicted of a crime committed with a child is a neglected child.[256]

VI. ARBITRARY AND CAPRICIOUS—REVIEW OF PENALTIES

A court asked to review penalties assessed as arbitrary and capricious should not disturb them if they are rational and do not shock the conscience.[257] The penalties under review in *Bolt v. New York City Department of Education* involved the termination of three teachers in three separate and unrelated cases which were consolidated on appeal.[258] In *Bolt*, a tenured teacher was terminated after a hearing pursuant to compulsory arbitration for assisting students on a state exam.[259] In the companion case *Beatty v. City of New York*, a special education home instructor was terminated for filing false time sheets.[260] In the other companion case, *Williams v. City of New York*, a tenured teacher was

253. *Natasha W. II*, 32 N.Y.3d at 986, 10 N.E.3d at 505, 110 N.E.3d at 393 (Wilson, J. dissenting).

254. Natasha W. v. N.Y. State Office of Children & Family Servs. (*Natasha W. I*), 145 A.D.3d 401, 411, 42 N.Y.S.3d 126, 134 (1st Dep't 2016) (Tom, J.P. dissenting), *rev'd*, *Natasha W. II*, 32 N.Y.3d 982, 110 N.E.3d 503, 85 N.Y.S.3d 391 (2018).

255. *Natasha W. II*, 32 N.Y.3d at 984, 10 N.E.3d at 504, 110 N.E.3d at 392 (quoting *Natasha W. I*, 145 A.3d. at 418, 42 N.Y.S 3d at 149).

256. *Id.* at 989, 10 N.E.3d at 507, 85 N.Y.S.3d at 395 (Wilson, J., dissenting).

257. Bolt v. N.Y.C. Dep't of Educ. (*Bolt III*), 30 N.Y.3d 1065, 1068, 91 N.E.3d 1234, 1236, 69 N.Y.S.3d 255, 257 (2018) (Rivera, J. concurring) (citing Pell v. Bd. of Educ. 34 N.Y.2d 222, 240, 313 N.E.2d 321, 331, 365 N.Y.S.2d 833, 848 (1974)).

258. *See id.* (first citing Bolt v. N.Y.C. Dep't of Educ. (*Bolt II*), 145 A.D.3d 450, 450, 42 N.Y.S.3d 151, 151 (1st Dep't 2016); then citing Beatty v. City of New York, 148 A.D.3d 413, 413, 48 N.Y.S.3d 393, 394 (1st Dep't 2017); and then citing Williams v. City of New York, 142 A.D.3d 901, 901, 38 N.Y.S.3d 528, 528 (1st Dep't 2016)).

259. Bolt v. N.Y.C. Dep't of Educ. (*Bolt I*), No. 653285/2014, 2015 N.Y. Slip Op. 30683(U), at 1–2 (Sup. Ct. N.Y. Cty. April 27, 2015), *aff'd in part & modified in part*, *Bolt II*, 145 A.D.3d 450, 42 N.Y.S.3d 151 (1st Dep't 2017), *rev'd*, *Bolt III*, 30 N.Y.3d 1065, 91 N.E.3d 1234, 69 N.Y.S.3d 255 (2018).

260. *Beatty*, 148 A.D.3d at 413, 48 N.Y.S.3d at 394.

terminated for making inquiries about the female relatives of his eighth grade female students.[261] In each case, the First Department reversed as to the penalties imposed,[262] holding that the penalty so outweighed the offense as to "shock the conscience"[263] or to shock "[the court's] sense of fairness."[264]

The Court of Appeals made short shrift of the appeals. It reversed the appellate decisions in all three cases, concluding that the appellate division had exceeded its authority by reevaluating the evidence and substituting its judgment for that of the hearing officers.[265] It noted that it is not enough to undo the penalties imposed because "reasonable minds might disagree over . . . the proper penalty."[266] The concurring opinion responded to a request by the City to clarify the standard for reviewing penalties.[267] The concurrence stated the well-established rules for judicial review of penalties and examined the petitioners' conduct in light of the rules and the lower courts' rulings.[268] The applicable standard for judicial review of penalties is as follows:

> [A] result is shocking to one's sense of fairness if the sanction imposed is so grave in its impact on the individual subjected to it that it is disproportionate to the misconduct, incompetence, failure or turpitude of the individual, or to the harm or risk of harm to the agency or institution, or to the public generally visited or threatened by the derelictions of the individuals. Additional factors would be the prospect of deterrence of the individual or of others in like situations, and therefore a reasonable prospect of recurrence of derelictions by the individual or persons similarly employed. There is also the element that the sanctions reflect the standards of society to be applied to the offense involved. Thus, for a single illustrative contrast, habitual lateness or carelessness, resulting in substantial monetary loss, by a lesser employee, will not be as seriously treated as an offense as morally grave as larceny, bribery, sabotage, and the like, although only small sums of

261. *Williams*, 142 A.D.3d at 901, 38 N.Y. S.3d at 528.

262. *Beatty*, 148 A.D.3d at 413, 48 N.Y.S.3d at 394; *Bolt II*, 145 A.D.3d at 450, 42 N.Y.S.3d at 151; *Williams*, 142 A.D.3d at 901, 38 N.Y. S.3d at 528.

263. *Williams*, 142 A.D.3d at 902, 38 N.Y.S.3d at 529 (citing Lackow v. Dep't of Educ., 51 A.D.3d 563, 569, 859 N.Y.S.2d 52, 57 (1st Dep't 2008)).

264. *Beatty*, 148 A.D.3d at 413, 48 N.Y.S.3d at 394 (citing Pell v. Bd. of Educ., 34 N.Y.2d 222, 233, 313 N.E.2d 321, 327, 356 N.Y.S.2d 833, 841 (1974); *Bolt II*, 145 A.D.3d at 451, 42 N.Y.S.3d at 152 (citing *Pell*, 34 N.Y.2d at 234, 313 N.E.2d at 327–28, 356 N.Y.S.2d at 842).

265. *Bolt III*, 30 N.Y.3d 1065, 1068, 91 N.E.3d 1234, 1236, 69 N.Y.S.3d 255, 257 (2018).

266. *Id.* (internal quotations omitted) (quoting City Sch. Dist. v. McGraham, 17 N.Y.3d 917, 920, 958 N.E.2d 897, 899, 934 N.Y.S.2d 768, 770 (2011)).

267. *Id.* at 1069, 91 N.E.3d at 1236, 69 N.Y.S.3d at 257 (Rivera, J., concurring).

268. *See id.* (Rivera, J., concurring).

money may be involved.[269]

The concurrence observed that the consideration of societal standards does not imply an invitation for the appellate courts to second guess the administrative judge's determination by substituting its own opinion.[270] The concurrence placed particular emphasis on consideration of the ruling agency's mission, goals, and responsibilities to the public.[271] The concurrence focused on the education department's public responsibilities as it concluded that the arbitration determination of dismissal for each teacher did not shock the conscience since encouraging students to cheat on tests, submitting false time sheets, and making sexually suggestive comments about female students' older sisters were activities that were inconsistent with Department of Education's mission.[272] The terminations would "discourage similarly egregious behavior in the future, and [were] well suited to mitigate the impact of [the] petitioners' respective misconduct on their students' personal development, as well as on the integrity of the public education system."[273]

VII. LIMITED JUDICIAL REVIEW

When a construction project which may significantly impact the environment requires approval of a state agency, the project must be assessed in accordance with the New York State Environmental Quality Review Act (SEQRA).[274] The agency's SEQRA findings are subject to limited judicial review to determine whether they were decided in "accordance with lawful procedure and . . . affected by an error of law or was arbitrary and capricious or an abuse of discretion."[275] Consideration of the required "hard look" must be tailored to the complexity of the environmental problems actually existing at the project under

269. *Id.* at 1070, 91 N.E.3d at 1237, 69 N.Y.S.3d at 258 (Rivera, J., concurring) (quoting *Pell*, 34 N.Y.2d at 234–35, 313 N.E.2d at 327–28, 356 N.Y.S.2d at 842).

270. *Bolt III*, 30 N.Y.3d at 1070–71, 91 N.E.3d at 1237, 69 N.Y.S.3d at 258 (Rivera, J., concurring) (citing *Pell*, 34 N.Y.2d at 232, 313 N.E.2d at 326, 356 N.Y.S.2d at 840).

271. *See id.* at 1071, 91 N.E.3d at 1238, 69 N.Y.S.3d at 259 (Rivera, J., concurring).

272. *Id.* at 1072, 91 N.E.3d at 1238, 69 N.Y.S.3d at 259 (quoting *Pell*, 34 N.Y.2d at 241, 313 N.E.2d at 331, 356 N.Y.S.2d at 848).

273. *Id.* at 1072, 91 N.E.3d at 1239, 69 N.Y.S.3d at 260.

274. Friends of P.S. 163, Inc. v. Jewish Home Lifecare, Manhattan, 30 N.Y.3d 416, 424, 90 N.E.3d 1253, 1256, 68 N.Y.S.3d 382, 385 (2018) (first citing N.Y. PUB. HEALTH LAW § 2802 (McKinney 2012); and then citing N.Y. ENVTL. CONSERV. LAW § 8-0109(1)–(2) (McKinney 2017)).

275. *Id.* at 430, 90 N.E.3d at 1260, 68 N.Y.S.3d at 389 (internal quotations omitted) (quoting Akpan v. Koch, 75 N.Y.2d 561, 570, 554 N.E.2d 53, 57, 555 N.Y.S.2d 16, 20 (1990)).

consideration.[276]

Friends of P.S. 163, Inc. v. Jewish Home Lifecare, Manhattan was an Article 78 proceeding against the Department of Health challenging its SEQRA findings with respect to the construction of a nursing home next to an elementary school in Manhattan.[277] The petitioners included parents, teachers and students, and tenants of buildings next to and near the construction project.[278] The respondents included Jewish Home Life Care (the "nursing home company"), the owners of the vacant land on which the project was sited and the Department of Health (DOH).[279]

In 2012, Jewish Home Life submitted a Certificate of Need to the DOH for a new 414 bed facility to replace its aging structure.[280] The project, which was to be an innovative type of facility, enjoyed substantial support from various New York City providers of services to older adults.[281] The application was subject to SEQRA.[282] In accordance with SEQRA, the DOH determined that it needed to prepare an Environmental Impact Statement (EIS) and assumed the role of lead agency for the review process.[283] At the subsequent hearing on the draft EIS, concerns were expressed about the noise level, harm from toxic materials at the site, and the need for greater mitigation measures.[284] The DOH then issued a final EIS (FEIS), stating that all environmental concerns had been addressed.[285] The FEIS addressed noise levels, toxic materials, traffic, and alternatives to the project.[286] The DOH found that while noise from construction would continue for two years, the levels inconsistent with acceptable levels would be mitigated by air conditioning units and acoustical windows.[287] The DOH found various hazardous materials on the site; some of them were within acceptable guidelines, and others exceeded the guidelines, so it proposed methods for addressing their adverse impacts—a Remedial Action Plan and a Construction Health and Safety Plan.[288] The DOH conducted a traffic

276. *See id.* (quoting *Akpan*, 75 N.Y.2d at 570, 554 N.E.2d at 57, 555 N.Y.S.2d at 20).

277. *Id.* at 424, 90 N.E.3d at 1255, 68 N.Y.S.3d at 384.

278. *Id.*

279. *See Friends of P.S. 163*, 30 N.Y.3d at 424, 90 N.E.3d at 1255, 68 N.Y.S.3d at 384.

280. *Id.* at 426, 90 N.E.3d at 1257, 68 N.Y.S.3d at 386.

281. *Id.* at 424, 90 N.E.3d at 1255, 68 N.Y.S.3d at 384 (noting the number of amici briefs filed in the case).

282. *Id.* at 426, 90 N.E.3d at 1257, 68 N.Y.S.3d at 386.

283. *Id.*

284. *See Friends of P.S. 163*, 30 N.Y.3d at 426, 90 N.E.3d at 1257, 68 N.Y.S.3d at 386.

285. *See id*. at 428, 90 N.E.3d at 1258, 68 N.Y.S.3d at 387.

286. *Id*.

287. *Id*. at 428–29, 90 N.E.3d at 1258–59, 68 N.Y.S.3d at 387–88.

288. *See id*. at 428, 90 N.E.3d at 1258, 68 N.Y.S.3d at 387.

study and determined that adverse traffic impacts could be mitigated and pedestrian safety could be addressed through additional safety measures.[289] The DOH also considered alternatives to the construction project but concluded that they would not be consistent with the goals and objectives of the proposed project.[290]

Litigation ensued alleging that the DOH failed to take a "hard look" at the environmental factors.[291] The supreme court agreed with the petitioners that the DOH had relied on inadequate methodologies and failed to mitigate "environmental dangers."[292] It annulled the FEIS and remitted the matter to the DOH to prepare a revised FEIS.[293] The appellate division reversed, with one dissent.[294] The appellate division also granted leave to appeal.[295]

The Court of Appeals found the record before the Court demonstrated that the DOH had taken a "hard look" at the relevant environmental factors by conducting various studies and relying on acceptable government standards.[296] The Court concluded that the DOH had not acted unreasonably.[297]

VIII. GOVERNMENT LIABILITY

The plaintiffs in *Connolly v. Long Island Power Authority* sought damages for the destruction of their property in Rockaway, New York during a major hurricane which caused widespread damage to the coastline of New York City.[298] The plaintiffs alleged that defendants Long Island Power Authority (LIPA), Long Island Lighting Company (LILCO), and National Grid Electric Services, LLC ("National Grid")

289. *See Friends of P.S. 163*, 30 N.Y.3d at 428, 90 N.E.3d at 1258, 68 N.Y.S.3d at 387.

290. *Id*. at 429, 90 N.E.3d at 1259, 68 N.Y.S.3d at 388.

291. *See id*. at 430, 90 N.E.3d at 1260, 68 N.Y.S.3d at 389 (quoting Akpan v. Koch, 75 N.Y.2d 561, 570, 554 N.E.2d 53, 57, 555 N.Y.S.2d 16, 20 (1990)).

292. *Id.* at 429, 90 N.E.3d at 1259, 68 N.Y.S.3d at 388.

293. *Id.*

294. *Friends of P.S. 163*, 30 N.Y.3d at 429, 90 N.E.3d at 1259, 68 N.Y.S.3d at 388 (citing Friends of P.S. 163, Inc. v. Jewish Home Lifecare, Manhattan, 146 A.D.3d 576, 576, 46 N.Y.S.3d 540, 542–43 (1st Dep't 2017)).

295. *Id.* at 430, 90 N.E.3d at 1259–60, 68 N.Y.S.3d at 388–89.

296. *Id.* at 433, 90 N.E.3d at 1262, 68 N.Y.S.3d at 391 (quoting *Akpan*, 75 N.Y.2d at 570, 554 N.E.2d at 57, 555 N.Y.S.2d at 20).

297. *Id*.

298. 30 N.Y.3d 719, 725, 94 N.E.3d 471, 474, 70 N.Y.S.3d 909, 912 (2018). The Court of Appeals decision addressed consolidated appeals of two cases: Baumann v. Long Island Power Authority (*Baumann I*), 45 Misc.3d 257, 989 N.Y.S.2d 565 (Sup. Ct. N.Y. Cty. 2014) and Heeran v. Long Island Power Authority (*Heeran I*), No. 702558/2013, 2014 N.Y. Slip Op. 32205(U) (Sup. Ct. Queens Cty. 2014). *Id.* at 736, 94 N.E.3d at 482, 70 N.Y.S.3d at 921 (Rivera, J. concurring).

failed to "de-energize the Rockaway Peninsula prior to or after Hurricane Sandy made landfall" and that failure caused the fire that destroyed the plaintiffs' property.[299] The defendants LIPA and LILCO moved to dismiss the complaint on the grounds that they enjoyed government immunity.[300] National Grid moved to dismiss, claiming that it enjoyed governmental immunity because it was a government contractor.[301] The outcome of these motions turned on the status of the defendants and the nature of the activities in which they collectively engaged, namely the transmission and distribution of electricity to the properties where the plaintiffs lived.[302]

At the time of the initiation of the litigation, LIPA was a municipal subdivision of New York State providing electricity to Long Island and the part of New York City known as the Rockaway Peninsula.[303] LIPA had been created in 1986 to address concerns about the continued viability of LILCO, an investor-owned utility that served the area taken over by LIPA.[304] The enabling legislation described LIPA as a "'corporate municipal instrumentality of the state which shall be a body corporate and politic and a political subdivision of the state, exercising essential governmental and public powers,' and authorized it to operate in LILCO's service area."[305] The plaintiffs alleged that despite the Governor's Executive Order declaring a state of emergency in preparation for high winds and widespread flooding from the storm, and the fact the utility serving other parts of New York City preemptively shut down its transmission service, LIPA failed to do so.[306] The plaintiffs claimed that the connection of the storm winds and water with the live transmission lines caused fires and the destruction of their property.[307] According to the plaintiffs, LIPA's failure continued even after it became aware of downed transmission lines.[308] The defendants moved to dismiss the amended complaints asserting that they were entitled to governmental immunity because their supplying electricity is a governmental act, and

299. *Id*. at 725, 94 N.E.3d at 474, 70 N.Y.S.3d at 912.

300. *Id.* at 726, 94 N.E.3d at 474, 70 N.Y.S.3d at 913 (citing N.Y. C.P.L.R. 3211(a)(7) (McKinney 2016)).

301. *Id*.

302. *See Connolly*, 30 N.Y.3d at 729–30, 94 N.E.3d at 477, 70 N.Y.S.3d at 915–16.

303. *Id.* at 724, 94 N.E.3d at 473, 70 N.Y.S.3d at 911–12 (quoting N.Y. PUB. AUTH. LAW § 1020-a (McKinney 2014)).

304. *Id.* (quoting PUB. AUTH. § 1020-a).

305. *Id*. at 724, 94 N.E.3d at 473–74, 70 N.Y.S.3d at 912 (quoting PUB. AUTH. § 1020-c(1)–(2)).

306. *Id*. at 725, 94 N.E.3d at 474, 70 N.Y.S.3d at 912.

307. *Connolly*, 30 N.Y.3d at 725, 94 N.E.3d at 474, 70 N.Y.S.3d at 912.

308. *Id*. at 726, 94 N.E.3d at 474, 70 N.Y.S.3d at 912–13.

absent a special duty owed to the plaintiffs, they could not be held responsible.[309] The supreme court denied the defendants' motions, holding that supplying electricity was a proprietary function rather than a governmental function, and thus the defendants could be held responsible for their negligence.[310] Relying on well-established precedent from the Court of Appeals regarding the circumstances under which a government entity is acting in a governmental or proprietary manner,[311] the supreme court described a continuum of activities: at one end, actions "'undertaken for the protection and safety of the public pursuant to the general police powers,' which are governmental functions," and at the other end, "functions in which governmental activities essentially substitute for or supplement traditionally private enterprises."[312] The court concluded that the defendants' actions were proprietary in nature because "electricity has traditionally been supplied by the private sector."[313] The court observed that the defendants had offered no evidence to support a finding that supplying electricity was an activity performed by governmental entities; in fact, prior to the creation of LIPA, that activity had been performed by the private company LILCO, and at the time of the hurricane, the electric grid was operated by its co-defendant National Grid, also a private entity.[314] The court concluded that by performing a proprietary function, the defendants could be held liable for their negligence.[315] Immunity could be asserted only if the defendants had been performing a governmental function.[316] The supreme court rejected National Grid's defense of governmental immunity on two grounds: (1) it could not piggy back on LIPA's defense because LIPA could not assert government immunity for its actions; and (2) the government immunity defense was not available in New York to a government contractor.[317] On separate appeals by LIPA, LILCO, and

309. *Baumann I*, 45 Misc.3d 257, 259, 989 N.Y.S.2d 565, 567 (Sup. Ct. N.Y. Cty. 2014), *aff'd*, (*Baumann II*), 141 A.D.3d 554, 34 N.Y.S.3d 901 (2d Dep't 2016).

310. *Id*. at 261, 989 N.Y.S.2d at 569.

311. *See id*. at 259–60, 989 N.Y.S.2d at 568 (first quoting Maxmilian v. City of New York, 62 N.Y. 160, 164–65 (1875); and then quoting Miller v. State, 62 N.Y.2d 506, 511–12, 467 N.E.2d 493, 496, 478 N.Y.S.2d 829, 832 (1984)).

312. *Id*. at 260, 989 N.Y.S.2d at 568 (internal quotations omitted) (quoting Sebastian v. State, 93 N.Y.2d 790, 793, 720 N.E.2d 878, 879–80, 698 N.Y.S.2d 601, 603 (1999)) (citing Kochanski v. City of New York, 76 A.D.3d 1050, 1051, 908 N.Y.S.2d 260, 262 (2d Dep't 2010)).

313. *Id*.

314. *Baumann I*, 45 Misc.3d at 260–61, 989 N.Y.S.2d at 568–69.

315. *Id*. at 262, 989 N.Y.S.2d at 569.

316. *Id.* at 261, 989 N.Y.S.2d at 569.

317. *Id*. at 262, 989 N.Y.S.2d at 570.

National Grid,[318] the Second Department affirmed the dismissals.[319] One dissent was filed.[320] The dissent relied on Justice Miller's opinion in a companion case[321] where he observed that the gravamen of the plaintiffs' complaint was not negligent transmission of electricity, a traditionally proprietary activity, but rather the negligent governmental function of preparing for an environmental disaster.[322] This preparation "implicate[s] discretionary policy decisions regarding the management and prioritization of the multifaceted risks posed by the external hazard, along with the utilization of the finite resources available to address such threats to public safety."[323] The Court of Appeals granted leave to appeal.[324] In its decision affirming the trial and appellate courts, the Court of Appeals first reviewed the principles governing governmental immunity:

> [A] governmental entity's conduct may fall along a continuum of responsibility to individuals and society deriving from its governmental and proprietary functions, and that "the determination may present a close question for the courts to decide." Consequently, "when the liability of a governmental entity is at issue, it is the specific act or omission out of which the injury is claimed to have arisen and the capacity in which that act or failure to act occurred which governs liability." Put differently, "the determination of the primary capacity under which a governmental agency was acting turns solely on the acts or omissions claimed to have caused the injury."[325]

The issue of whether the government owed a duty to the plaintiffs

318. *Baumann II*, 141 A.D.3d 554, 554, 34 N.Y.S.3d 901, 901 (2d Dep't 2016).

319. *Id*. at 555, 34 N.Y.S.3d at 901.

320. *Id*. (Miller, J., dissenting).

321. *Id*. (Miller, J., dissenting) (citing Heeran v. Long Island Power Auth. (*Heeran II*), 141 A.D.3d 561, 567, 36 N.Y.S.3d 165, 172 (2d Dep't 2016)).

322. *Heeran II*, 141 A.D.3d at 572, 36 N.Y.S.3d at 176 (Miller, J., dissenting).

323. *Id*. at 573, 36 N.Y.S. at 177 (Miller, J., dissenting) (first citing *In re* World Trade Ctr. Bombing Litig., 17 N.Y.3d 428, 448–49, 957 N.E.2d 733, 746, 933 N.Y.S.2d 164, 177 (2011); then citing Stathakos v. Metro. Transit Auth. Long Island R.R., 109 A.D.3d 979, 980–81, 971 N.Y.S.2d 557, 559 (2d Dep't 2013); then citing Kadymir v. N.Y.C. Transit Auth., 55 A.D.3d 549, 552, 865 N.Y.S.2d 269, 272 (2d Dep't 2008); then citing Balsam v. Delma Eng'g Corp., 90 N.Y.2d 966, 968, 688 N.E.2d 487, 489, 665 N.Y.S.2d 613, 615 (1997); then citing Clinger v. N.Y.C. Transit Auth., 85 N.Y.2d 957, 959, 650 N.E.2d 855, 856, 626 N.Y.S.2d 1008, 1009 (1995); then citing Bonner v. New York, 73 N.Y.2d 930, 536 N.E.2d 1147, 1148, 539 N.Y.S.2d 728, 729–30 (1989); and then citing Weiner v. Metro. Transp. Auth., 55 N.Y.2d 175, 182, 433 N.E.2d 124, 127, 448 N.Y.S.2d 141, 145 (1982)).

324. Connolly v. Long Island Power Auth., 30 N.Y.3d 719, 726, 94 N.E.3d 471, 475, 70 N.Y.S.3d 909, 913 (2018).

325. *Id.* at 727, 94 N.E.3d at 476, 70 N.Y.S.3d at 914 (first quoting Miller v. State, 62 N.Y.2d 506, 511–13, 467 N.E.2d 493, 496–97, 478 N.Y.S.2d 829, 832–33 (1984); then quoting Applewhite v. Accuhealth, Inc., 21 N.Y.3d 420, 425, 995 N.E.2d 131, 134, 972 N.Y.S.2d 169, 172 (2013); and then quoting *In re World Trade Ctr.*, 17 N.Y.3d at 447, 957 N.E.2d at 745, 933 N.Y.S.2d at 176).

would arise only if the government were acting in a governmental capacity.[326]

After noting the unusual circumstance of the legislative creation of LIPA to undertake providing electric service, the Court held that it could not determine as a matter of law based on the plaintiffs' allegations that the defendants were acting in a governmental capacity, and thus entitled to dismissal of the complaints.[327] The concurrence agreed that the defendants had failed to establish the defense of governmental immunity as a matter of law, but criticized the majority for not closing that defense once and for all, but rather encouraging further motion practice on the issue with associated litigation costs.[328]

IX. FREEDOM OF INFORMATION LAW

New York's Freedom of Information Law (FOIL) requires that state agencies "make available for public inspection and copying all records, except that such agency may deny access to records or portions thereof that" are subject to certain enumerate exemptions.[329] Three recent Court of Appeals cases discuss state attempts at asserting exemptions including: (1) allowing state agencies to deny FOIL requests based on exemption without certifying the existence of responsive documents;[330] (2) exemption based on a prior promise of confidentiality or inference of confidentiality;[331] and (3) exemption based on unique public school audit procedural reports.[332]

"[I]n federal parlance, when an agency neither confirms nor denies that it possesses records in response to a [Freedom of Information Act (FOIA)] request, it is known as a Glomar response."[333] A Glomar response is appropriate when an agency claims exemption from

326. *Id.* at 727, 94 N.E.3d at 475, 70 N.Y.S.3d at 914 (quoting *Applewhite*, 21 N.Y.3d at 425, 995 N.E.2d at 134, 972 N.Y.S.2d at 172) (citing Lauer v. City of New York, 95 N.Y.2d 95, 99, 733 N.E.2d 184, 187, 711 N.Y.S.2d 112, 115 (2000)).

327. *Id.* at 729–30, 94 N.E.3d at 477, 70 N.Y.S.3d at 915–16.

328. *Id.* at 731, 94 N.E.3d at 478, 70 N.Y.S.3d at 917 (Rivera, J., concurring).

329. N.Y. PUB. OFF. LAW § 87(2) (McKinney 2008).

330. *See* Abdur-Rashid v. N.Y.C. Police Dep't (*Abdur-Rashid III*), 31 N.Y.3d 217, 222, 100 N.E.3d 799, 801, 76 N.Y.S.3d 460, 462 (2018) (citing N.Y. PUB. OFF. LAW § 84 (McKinney 2008)).

331. *See* Friedman v. Rice, 30 N.Y.3d 461, 466, 90 N.E.3d 800, 802–03, 68 N.Y.S.3d 1, 3–4 (2017) (first citing N.Y. PUB. OFF. LAW art. 6 (McKinney 2008); and then citing PUB. OFF. § 87(2)(e)(iii)).

332. *See* Maideiros v. N.Y. State Educ. Dep't, 30 N.Y.3d 67, 70, 86 N.E.3d 527, 529, 64 N.Y.S.3d 635, 637 (2017).

333. *Abdur-Rashid III*, 31 N.Y.3d at 228, 100 N.E.3d at 805–06, 76 N.Y.S.3d at 466–67 (citing Wilner v. NSA, 592 F.3d 60, 64 (2d Cir. 2009)).

disclosing materials, and even admitting possession of the information would constitute a disclosure exempted from FOIA.[334] The Court of Appeals discusses New York's version of a Glomar response in *Abdur-Rashid v. New York City Police Department*.[335]

Abdur-Rashid and Samir Hashmi each requested records in the New York Police Department's (NYPD) possession related to surveillance and investigation of their persons and organizations to which they belong.[336] In both cases, the NYPD declined to provide any information and denied the FOIL requests without stating whether they possessed any responsive information.[337] Thomas Galati, NYPD's Chief of Intelligence, executed an affidavit stating that revealing whether the NYPD possessed any of the relevant records would "provide unprecedented and invaluable information concerning NYPD counterterrorism strategies, operations, tactics and techniques to those planning future terrorist attacks."[338] Both Abdur-Rashid and Hashmi commenced Article 78 proceedings to challenge the NYPD's response.[339]

In the appellate division, the cases of Abdur Rashid and Hashmi were heard together, and the court dismissed both petitions, finding that the "NYPD's refusal to confirm or deny the existence of responsive records was consistent with FOIL and the cases construing it."[340] Previously, *Abdur-Rashid*[341] was dismissed for the same reason in the supreme court, but *Hashmi v. New York City Police Department*[342] survived the supreme court because "the NYPD's failure to acknowledge whether or not responsive records existed was impermissible under FOIL."[343] Following the appellate division affirmation of *Abdur-Rashid* and reversal of *Hashmi*, the Court of Appeals granted leave to appeal.[344]

334. *Id.* at 222, 100 N.E.3d at 801, 76 N.Y.S.3d at 462.

335. *See id.*

336. *Id.* at 223, 100 N.E.3d at 801, 76 N.Y.S.3d at 462.

337. *Id.*

338. *Abdur-Rashid III*, 31 N.Y.3d at 223–24, 100 N.E.3d at 802, 76 N.Y.S.3d at 463.

339. *Id.* at 223, 100 N.E.3d at 801, 76 N.Y.S.3d at 462.

340. *Id.* at 224, 100 N.E.3d at 802, 76 N.Y.S.3d at 463.

341. Abdur-Rashid v. N.Y.C. Police Dep't (*Abdur-Rashid I*), 45 Misc. 3d 888, 895, 992 N.Y.S.2d 870, 876 (Sup. Ct. N.Y. Cty. Sept. 11, 2014), *aff'd*, (*Abdur-Rashid II*), 140 A.D.3d 419, 37 N.Y.S.3d 64 (1st Dep't 2016), *aff'd*, *Abdur-Rashid III*, 31 N.Y.3d 217, 100 N.E.3d 799, 76 N.Y.S.3d 460 (2018).

342. 46 Misc. 3d 712, 725, 998 N.Y.S.2d 596, 605 (Sup. Ct. N.Y. Cty. Nov. 17, 2014), *rev'd sub. nom.*, *Abdur-Rashid II*, 140 A.D.3d 419, 37 N.Y.S.3d 64 (1st Dep't 2016), *aff'd*, *Abdur-Rashid III*, 31 N.Y.3d 217, 100 N.E.3d 799, 76 N.Y.S.3d 460 (2018).

343. *Abdur-Rashid III*, 31 N.Y.3d at 224, 100 N.E.3d at 802, 76 N.Y.S.3d at 463.

344. *Id.* (first citing *Abdur-Rashid II*, 140 A.D.3d at 419–20, 37 N.Y.S.3d at 65; and then citing Abdur-Rashid v. N.Y.C. Police Dep't, 28 N.Y.3d 908, 908, 69 N.E.3d 1019, 1019, 47 N.Y.S.3d 223, 223 (2016)).

The argument before the Court of Appeals focused not on whether the NYPD must disclose the information to the petitioners, but rather whether the NYPD "must specify whether or not it possesses materials responsive to the FOIL request even when doing so would reveal information safeguarded by that same FOIL exemption."[345] Actual release of information was not in question, because the Court of Appeals has previously held that Public Officers Law § 87 provides a FOIL exemption for information related to ongoing criminal investigations.[346] Accordingly, if either Abdur-Rashid or Hashmi were currently the subject of surveillance, the information would necessarily be exempt from FOIL as information related to ongoing criminal investigations.[347]

The Court of Appeals held that federal precedent was relevant to FOIL interpretation because the New York scheme was modeled on the FOIA.[348] FOIA allows federal agencies to claim exemption without specifying if there are responsive records where any confirmation could hurt ongoing law enforcement investigations or counterterrorism operations.[349] However, the Court found sufficient basis to support the NYPD response in FOIL statutory exemptions and state case law, avoiding claim of adoption of federal jurisprudence.[350] Specifically, no New York law requires an agency to verify the existence of records that are protected by an exemption, and denial of the FOIL request is one of the permissible final responses to such a request.[351]

Declining to create a blanket rule, the Court cautions that its finding here, that a "Glomar-type response" as present in *Abdur-Rashid*, is only applicable to requests for information regarding ongoing criminal

345. *Id.* at 228, 100 N.E.3d at 805, 76 N.Y.S.3d at 466.

346. *See* Lesher v. Hynes, 19 N.Y.3d 57, 64, 968 N.E.2d 451, 455, 945 N.Y.S.2d 214, 218 (2012) (first citing Lesher v. Hynes, 80 A.D.3d 611, 613, 914 N.Y.S.2d 264, 266 (2d Dep't 2011); and then citing Lesher v. Hynes, 16 N.Y.3d 710, 710, 947 N.E.2d 164, 164, 922 N.Y.S.2d 273, 273 (2011)); *see also* N.Y. PUB. OFF. LAW § 87 (McKinney 2008).

347. *See Abdur-Rashid III*, 31 N.Y.3d at 227, 100 N.E.3d at 804–05, 76 N.Y.S.3d at 465–66 ("This Court has never held that FOIL compels a law enforcement agency to reveal records relating to an ongoing criminal investigation of a particular individual or organization to the target, the press or anyone else . . . .").

348. *Id.* at 231, 100 N.E.3d at 807, 76 N.Y.S.3d at 468 (first citing Friedman v. Rice, 30 N.Y.3d 461, 466, 90 N.E.3d 800, 803, 68 N.Y.S.3d 1, 4 (2017); then citing Madeiros v. N.Y. Educ. Dep't, 30 N.Y.3d 67, 76, 86 N.E.3d 527, 533, 64 N.Y.S.3d 635, 641 (2017); and then citing *Lesher*, 19 N.Y.3d at 64, 968 N.E.2d at 455, 945 N.Y.S.2d at 218).

349. *Id.* at 229, 100 N.E.3d at 806, 76 N.Y.S.3d at 467 (quoting Wilner v. NSA, 592 F.3d 60, 68 (2d Cir. 2009)).

350. *Id.* at 231, n.4, 100 N.E.3d at 807 n.4, 76 N.Y.S.3d at 468.

351. *Abdur-Rashid III*, 31 N.Y. 3d at 233, 100 N.E.3d at 808, 76 N.Y.S.3d at 469 (citing Beechwood Restorative Care Ctr. v. Signor, 5 N.Y.3d 435, 440–41, 842 N.E.2d 466, 469, 808 N.Y.S.2d 568, 571 (2005)).

investigations.[352] In a concurring opinion, Judge Wilson states that although he agrees with the conclusion of the majority, any discussion of the *Glomar* doctrine as relevant law is misplaced.[353] *Glomar* dealt with secretive government operations that "will never see the light of day, let alone that of a courthouse[,]" while all successful NYPD investigations will eventually be subject to the full view of the public eye.[354] Accordingly, Judge Wilson states that the creation of a blanket rule, however narrow, is inappropriate for New York State courts, because our judges are capable of examining agency responses on a case-by-case basis.[355] He argues that FOIL requests with a broad scope should not be denied with a Glomar-type response due to an ongoing investigation of the individual or organization making the request when the agency holds other records outside the exemption that could otherwise be released.[356] However, the majority's decision authorizes a response neither confirming nor denying records under the ongoing investigation exemption, without mention of records outside the exemption, like those of past investigations.[357]

In *Friedman v. Rice*, the Court of Appeals considers application of Public Officers Law § 87(2)(e)(iii), which allows a state agency to claim exemption from FOIL based on promised or inferred confidentiality.[358]

The petitioner in this case was a convicted child sex offender, attempting to find information that would help him overturn his 1988 conviction for child sex crimes.[359] In 2003, the film "Capturing the Friedmans" was released, which suggested that the petitioner in this case was wrongfully convicted.[360] Following unsuccessful attempts to get his conviction overturned in state court, the Second Circuit stated that a new inquiry by the relevant prosecutor's office was warranted because "the record here suggests a reasonable likelihood that Jesse Friedman was wrongfully convicted."[361]

352. *Id.* at 237, 100 N.E.3d at 811–12, 76 N.Y.S.3d at 472–43.

353. *Id.* at 242, 100 N.E.3d at 815, 76 N.Y.S.3d at 476 (Wilson, J., concurring).

354. *Id.* at 244, 100 N.E.3d at 816, 76 N.Y.S.3d at 477 (Wilson, J., concurring).

355. *Id.* (Wilson, J., concurring).

356. *Abdur-Rashid*, 31 N.Y. 3d at 245, 100 N.E.3d at 817, 76 N.Y.S.3d at 478 (Wilson, J., concurring).

357. *Id.* at 245, 100 N.E.3d at 817–18, 76 N.Y.S.3d at 478–79 (Wilson, J., concurring).

358. (*Friedman II*), 30 N.Y.3d 461, 466, 90 N.E.3d 800, 802, 68 N.Y.S.3d 1, 3 (2017) (citing N.Y. PUB. OFF. LAW § 87(2)(e)(iii) (McKinney 2008)).

359. *Id.* at 467, 90 N.E.3d at 803, 68 N.Y.S.3d at 4.

360. *Id.*; *see also Capturing the Friedmans*, IMDB, https://www.imdb.com/title/tt0342172/ (last visited June 5, 2019).

361. *Friedman II*, 30 N.Y.3d at 468–69, 90 N.E.3d at 804, 68 N.Y.S.3d at 5 (internal quotations omitted) (quoting Friedman v. Rehal, 618 F.3d 142, 159–60 (2d Cir. 2010)).

Based on the Second Circuit opinion, the Nassau County District Attorney convened a group of prosecutors (the "Review Team") and a panel of experts (the "Advisory Panel") to reinvestigate the original conviction.[362] The purpose of the Advisory panel was to "counsel[] the prosecutors on how best to conduct a reinvestigation and generally [to] audit[] whether the Review Team was operating in good faith."[363] The petitioner filed a FOIL request for all documents furnished to the senior prosecutors and members of the Advisory Panel, but was denied on four separate grounds.[364]

After denial of his FOIL request, the petitioner commenced an Article 78 proceeding challenging the District Attorney's claimed exemptions.[365] The supreme court found for the petitioner, but the appellate division reversed, holding that the exemption from FOIL for witnesses who do not testify was sufficient to shield the records from disclosure due to presumptive confidentiality.[366] However, this finding highlights a split in the appellate division because the Second Department interpretation differed from remaining departments.[367] The Court of Appeals granted leave to appeal in order to resolve the split.[368]

According to the Court of Appeals holding, the Second Department standard was based on a previous version of FOIL that is no longer in effect.[369] Under the previous FOIL provisions, "witness statements could be withheld from disclosure irrespective of the confidential nature of the

362. *Id.* at 469, 90 N.E.3d at 804–05, 68 N.Y.S.3d at 5–6.

363. *Id.* at 469, 90 N.E.3d at 805, 68 N.Y.S.3d at 6.

364. *Id.* 469–70, 90 N.E.3d at 805, 68 N.Y.S.3d at 6 (citing N.Y. CIV. RIGHTS LAW § 50-b (McKinney 2009). The reasons for denial are as follows: (1) because statements of witnesses for law enforcement purposes are exempt unless the witness has testified at trial under Public Officers Law § 87(2)(e)(iii); (2) because documents which tend to identify victims of sex crimes are exempt under § 87(2)(a); (3) due to interference with an ongoing criminal investigation under § 87(2)(e)(i); and finally (4) under § 87(2)(g) which provides exemption for many inter and intra agency materials. *Id.* (first citing N.Y. PUB. OFF. LAW § 87(2)(e)(iii) (McKinney 2008); then citing CIV. RIGHTS § 50-b; then citing PUB. OFF. § 87(2)(a); then citing PUB. OFF. § 87(2)(e)(i); and then citing PUB. OFF. § 87(2)(g)).

365. *Friedman II*, 30 N.Y.3d at 470, 90 N.E.3d at 805, 68 N.Y.S.3d at 6.

366. *Id.* at 471–72, 90 N.E.3d at 806, 68 N.Y.S.3d at 7 (first citing Friedman v. Rice (*Friedman I*), 134 A.D.3d 826, 836, 20 N.Y.S.3d 600, 605 (2d Dep't 2015); and then citing PUB. OFF. § 87(2)(e)(iii)).

367. *Id.* at 472, 90 N.E.3d at 807, 68 N.Y.S.3d at 8 (citing *Friedman I*, 134 A.D.3d at 832–33, 20 N.Y.S.3d at 605–06 (Barros, J., dissenting)).

368. *Id*. (citing Friedman v. Rice, 27 N.Y.3d 903, 903, 51 N.E.3d 565, 565, 32 N.Y.S.3d 54, 54 (2016)). Specifically, the other departments require an "express promise of confidentiality or circumstances from which confidentiality can be inferred," while the Second Department created a blanket exemption for non-testifying witnesses. *Id.* (citing *Friedman I*, 134 A.D.3d at 832–33, 20 N.Y.S.3d at 605–06 (Barros, J., dissenting)).

369. *Friedman II*, 30 N.Y.3d at 476, 90 N.E.3d at 809, 68 N.Y.S.3d at 10.

information or its source."[370] These former laws presumed state records were exempt unless they belonged to a category that must be disclosed.[371] Under the new regime, records enjoy an opposite presumption; they are subject to disclosure unless falling within a specified and narrowly interpreted exemption provision.[372] Accordingly, whether records are confidential is determined on a case-by-case basis, and the blanket exemption for non-testifying witnesses applied by the Second Department was an incorrect standard.[373] As the Second Department applied an incorrect standard, the holding was reversed and "remitted for consideration under the correct standard."[374] Therefore, § 87(2)(e)(iii) may only be invoked as a FOIL exemption where the state "agency presents a 'particularized and specific justification for denying access."[375]

Finally, *Madeiros v. New York State Education Department* discusses proper application of Public Officers Law § 87(2)(e)(i), a FOIL exemption that applies to some audit techniques and procedures used for law enforcement purposes.[376]

The petitioner submitted a FOIL request for "any and all audit standards in the Department's possession, including any audit program and audit plan submitted by a municipality or school district . . . ."[377] The Department of Education denied the request, stating that the records were exempt from disclosure under Public Officers Law § 87(2)(e)(i) because disclosure would interfere with compliance investigations conducted by the state.[378] Upon appeal, the district did not respond within the statutory timeframe, constructively denying the petitioner her appeal.[379] At that point, the petitioner commenced an Article 78 proceeding to obtain the

370. *Id.* at 476, 90 N.E.3d at 809–10, 68 N.Y.S.3d at 10–11.

371. *Id.* at 476, 90 N.E.3d at 810, 68 N.Y.S.3d at 11 (quoting News Release of Sec'y of State Mario M. Cuomo, Bill Jacket L. 1977, ch. 933). This section of the statute was replaced with § 87(2)(e)(i)–(iv), which sets out specific categories where the exemption applies. *Id.* (citing PUB. OFF. § 87(2(e)(i)–(iv)).

372. *Id.* (citing Lesher v. Hynes, 19 N.Y.3d 57, 64–65, 968 N.E.2d 451, 456, 945 N.Y.S.2d 214, 219 (2012)).

373. *See id.* at 481, 90 N.E.3d at 813, 68 N.Y.S.3d at 14.

374. *Friedman II*, 30 N.Y.3d at 482, 90 N.E.3d at 814, 68 N.Y.S.3d at 15.

375. *Id.* at 481, 90 N.E.3d at 813–14, 68 N.Y.S.3d at 14–15 (internal quotations omitted) (quoting Capital Newspapers Div. of Hearst Corp. v. Burns, 67 N.Y.2d 562, 566, 496 N.E.2d 665, 667, 505 N.Y.S.2d 576, 578 (1986)).

376. 30 N.Y.3d 67, 73, 86 N.E.3d 527, 531, 64 N.Y.S.3d 635, 639 (2017) (citing PUB. OFF. § 87(2)(e)(i)).

377. *Id.* at 72, 86 N.E.3d at 530, 64 N.Y.S.3d at 638 (first citing N.Y. EDUC. LAW § 4410(11)(c) (McKinney 2016); and then citing 8 N.Y.C.R.R. § 200.18 (2018)).

378. *Id.* (citing N.Y. PUB. OFF. LAW §§ 87(2)(e), 89(4)(a) (McKinney 2008)).

379. *Id.* (citing PUB. OFF. §§ 87(2)(e), 89(4)(a)).

audit records requested in her original FOIL request.[380] In response, the Department of Education released some of the records in partially redacted form and filed a motion to dismiss the petition, arguing that the redacted portions of the audit reports were exempt under § 87(2)(e) and (g).[381]

The supreme court, citing § 87(2)(e), stated that the redactions were "non-routine audit techniques and procedures compiled for law enforcement purposes, and disclosure would interfere with law enforcement investigations."[382] Additionally, the petitioner's request for attorney's fees was denied.[383] The appellate division affirmed, and the Court of Appeals granted leave to appeal.[384]

The Court reviewed the meaning of the § 87(2)(e) exemption to FOIL, stating that "an agency may deny public access to records . . . that, as relevant here, 'are compiled for law enforcement purposes and which, if disclosed would' either 'interfere with law enforcement investigations or judicial proceedings' or 'reveal criminal investigative techniques or procedures, except routine techniques and procedures.'"[385]

The petitioner argued that the audit records at issue were not compiled for criminal law enforcement purposes, and therefore could not fall under § 87(2)(e).[386] However, the Court held that law enforcement purposes are not defined in the statute, and therefore encompass the enforcement of all laws, criminal or otherwise.[387] This means § 87(2)(e) applies to all records compiled for the enforcement of any law, including those applicable to the public school system.[388] This holding does not apply to all necessary audits, but rather those that are something more than routine fiscal audits, such as the audit at issue here, aimed at bringing to light possible illegal and fraudulent cost reporting by special education

380. *Id.* at 72, 86 N.E.3d at 531, 64 N.Y.S.3d at 639. The petitioner additionally asked for attorney's fees pursuant to § 89(4)(c) of the Public Officer's Law. *Madeiros*, 30 N.Y.3d at 72, 86 N.E.3d at 531, 64 N.Y.S.3d at 639 (citing PUB. OFF. § 89(4)(c)).

381. *Id.* at 72, 86 N.E.3d at 531, 64 N.Y.S.3d at 639 (citing PUB. OFF. § 87(2)(e), (g)).

382. *Id.* at 73, 86 N.E.3d at 531, 64 N.Y.S.3d at 639 (citing PUB. OFF. § 87(2)(e)(i), (iv)).

383. *Id.*

384. *Id.* (first citing Madeiros v. N.Y. State Educ. Dep't, 133 A.D.3d 962, 965, 18 N.Y.S.3d 782, 786 (3d Dep't 2015); and then citing Madeiros v. N.Y. State Educ. Dep't, 27 N.Y.3d 903, 903, 51 N.E.3d 565, 565, 32 N.Y.S.3d 54, 54 (2016)).

385. *Madeiros*, 30 N.Y.3d at 73, 86 N.E.3d at 532, 64 N.Y.S.3d at 640 (citing PUB. OFF. § 87(2)(e)(i), (iv)).

386. *Id.* at 73–74, 86 N.E.3d at 532, 64 N.Y.S.3d at 640.

387. *Id*. at 75, 86 N.E.3d at 533, 64 N.Y.S.3d at 641 (first citing N.Y. PUB. OFF. LAW § 86 (McKinney 2008); and then citing *Law enforcement*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

388. *Id.* at 75–76, 86 N.E.3d at 533, 64 N.Y.S.3d at 641 (citing PUB. OFF. § 87(2)(e)).

providers.[389]

Additionally, releasing audit reports that contain information about audits unique to certain counties would give school employees engaged in illegal or fraudulent activity the opportunity to conceal their actions using the FOIL records.[390] These individualized audit reports fall within the second half of the relevant exemption, which applies the exemption only to records that reveal criminal investigative techniques or procedures.[391]

Finally, although the Court found that redaction of the audit reports was proper, it awarded the petitioner attorney's fees under § 89(c)(4), reversing the appellate division.[392] The petitioner received no response within the statutory timeframe designated for her administrative appeal, and brought an Article 78 proceeding due to the lack of response.[393] The attorney's fee award is conditioned on a petitioner "substantially prevail[ing]" in his or her court action.[394] As the petitioner received responsive documents only after commencing an Article 78 proceeding, the Court held that she had met the requirements to be awarded attorney's fees.[395]

389. *Id.* at 76, 86 N.E.3d at 534, 64 N.Y.S.3d at 642 (citing N.Y. EDUC. LAW § 4410(11)(c) (McKinney 2016)).

390. *Madeiros*, 30 N.Y.3d at 78, 86 N.E.3d at 535, 64 N.Y.S.3d at 643 (quoting Fink v. Lefkowitz, 47 N.Y.2d 576, 572, 393 N.E.2d 463, 466, 419 N.Y.S.2d 467, 471 (1979)).

391. *Id.* at 78, 86 N.E.3d at 535, 64 N.Y.S.3d at 643.

392. *Id.* at 79, 86 N.E.3d at 536, 64 N.Y.S.3d at 644 (citing N.Y. PUB. OFF. LAW § 89(4)(c) (McKinney 2008)).

393. *Id.*

394. *Id.* at 78–79, 86 N.E.3d at 535, 64 N.Y.S.3d at 643 (citing PUB. OFF. § 89(4)(c)(i), (iii)).

395. *Madeiros*, 30 N.Y.3d at 79, 86 N.E.3d at 536, 64 N.Y.S.3d at 644.