ADMINISTRATIVE LAW

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INTRODUCTION

This article reviews decisions announced by the New York Court of Appeals, regarding administrative law during the period of 2018–2019. The decisions cover procedural due process, freedom of information law, separation of powers, standing as a precondition to judicial review, substantial evidence standard of review, arbitrary and capricious standard of review, state agency duties and obligations by statute, and judicial review of judicial misconduct.

I. PROCEDURAL DUE PROCESS

State procedural due process guarantees the right to legal counsel.[1] In *People v. Grimes*, the Court of Appeals considered if assigned counsel's failure to file a Criminal Leave Appeal ("CLA") within the statutory time limit, where the defendant is not at fault for the delay, is sufficient evidence to toll the statute of limitations and allow defendant to appeal to the Court of Appeals.[2]

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1. N.Y. CONST. art. 1, §6.
2. *See* 32 N.Y.3d 302, 305–06, 115 N.E.3d 587, 591, 91 N.Y.S.3d 315, 319 (2018).

The defendant was convicted of criminal possession of a controlled substance in the third and fourth degree in 2012, and the appellate division affirmed the conviction.[3] The defendant's lawyer promised to submit the CLA to the Court of Appeals, but failed to do so until thirteen months had passed, putting the claim outside both the standard time to appeal, as well as outside the one-year time frame for late filing relief.[4] The defendant asks the Court to extend coram nobis relief to grant an appeal "to preserve defendant's 'fundamental right to appeal.'"[5]

Coram nobis relief is granted where there is a violation of a defendant's constitutional right not appearing on the record, the defendant was not negligent for the violation, and the appeal options available cannot cure the violation.[6] Coram nobis provides a remedy to defendants where they had suffered a wrong, and no procedural avenue existed to cure it.[7] In the context of criminal appeals, the Court previously held "that every defendant has a fundamental right to appeal . . . either because the defendant was unaware of its existence or counsel failed to abide by a promise to either file rule or prosecute an appeal."[8] This right was codified at Criminal Procedure Law (CPL) section 460.30, and allows filing of an appeal to the Court of Appeals if the filing was late for certain reasons, including improper conduct of an attorney.[9]

In *Grimes,* the defendant's CLA was filed outside the one-year time frame allowed under CPL section 460.30 for late filing relief.[10] Therefore, the Court had to decide if other grounds existed to grant late filing relief.[11] The Court held that the federal Constitution provided no coram nobis relief because "there is no federal constitutional entitlement to legal representation on a discretionary application for an appeal to a

3. *See id*. at 305, 115 N.E.3d at 590, 91 N.Y.S.3d at 318.

4. *See id*. at 305, 115 N.E.3d at 590–91, 91 N.Y.S.3d at 318–19 (citing N.Y. CRIM. PROC. LAW § 460.30 (McKinney 2005 & Supp. 2019)).

5. *Id*. at 306, 115 N.E.3d at 591, 91 N.Y.S.3d at 319.

6. *Id*. (quoting People v. Bachert, 69 N.Y.2d 593, 598, 509 N.E.2d 318, 321, 516 N.Y.S.2d 623, 626 (1987)).

7. *See Grimes*, 32 N.Y.3d at 306, 115 N.E.3d at 591, 91 N.Y.S.3d at 319 (first citing People v. Hairston, 10
N.Y.2d 92, 93–94, 176 N.E.2d 90, 90–91, 217 N.Y.S.2d 77, 78 (1961); and then citing Bojinoff v. People, 299 N.Y. 145, 151, 85 N.E.2d 909, 912 (1949)).

8. People v. Montgomery, 24 N.Y.2d 130, 132, 247 N.E.2d 130, 132, 299 N.Y.S.2d 156, 159 (1969).

9. *Grimes*, 32 N.Y.3d at 307, 115 N.E.3d at 592, 91 N.Y.S.3d at 320 (citing N.Y.C.P.L. § 460.30).

10. *Id.* at 305, 115 N.E.3d at 590–91, 91 N.Y.S.3d at 318–19 (citing N.Y.C.P.L. § 460.30).

11. *See id*. at 306, 115 N.E.3d at 591, 91 N.Y.S.3d at 319 (citing N.Y.C.P.L. § 460.30).

state's highest court."[12] As the federal Constitution provides no right to legal counsel for "second-tier"[13] appellate review, the Court then reviewed state constitutional due process protections to determine if state procedural due process grants defendants a right to legal counsel on appeal to the Court of Appeals.[14]

The Court held that as a matter of state constitutional law, there is no right to counsel on appeal to the Court of Appeals.[15] When appealing a trial court conviction, "a criminal defendant is attempting to demonstrate that the conviction, with its consequent drastic loss of liberty, is unlawful . . . . An unrepresented appellant—like an unrepresented defendant at trial—is unable to protect the vital interests at stake."[16]

On the other hand, individual guilt is no longer a factor on second-tier appeal, and at issue is if the subject matter: (1) is of interest to the public; (2) if the legal question is of great importance to state law; or (3) if the decision made in the lower court conflicts with a U.S. Supreme Court decision.[17] Stated otherwise, the Court of Appeals does not accept cases to determine the guilt of an individual, but to make policy decisions for the state.[18] As guilt was no longer at issue in the case, the defendant had no right to counsel and therefore could not have his due process rights violated through his attorney's improper conduct.[19] As the defendant had no right to counsel on appeal to the Court of Appeals, his state procedural due process rights were not violated, foreclosing a coram nobis ruling.[20]

Judge Wilson argued in his dissent that the real issue in this appeal was if a defendant with state assigned counsel has a "constitutional right

12. *Id*. at 309, 115 N.E.3d at 593–94, 91 N.Y.S.3d at 321–22 (quoting People v. Andrews, 23 N.Y.3d 605, 616, 17 N.E.3d 491, 498, 993 N.Y.S.2d 236, 243 (2014)) (first citing Ross v. Moffitt, 417 U.S. 600, 615–16 (1974); and then citing Halbert v. Michigan, 545 U.S. 605, 611–12 (2005)).

13. "Second-tier" refers to an appeal to the highest state or federal court available, either a state's highest court or the federal Supreme Court. *See Halbert*, 545 U.S. at 611.

14. *See Grimes*, 32 N.Y.3d at 319, 115 N.E.3d at 601, 91 N.Y.S.3d at 329.

15. *Id*.

16. *Id*. at 311–12, 115 N.E.3d at 595, 91 N.Y.S.3d at 323 (quoting Evitts v. Lucey, 469 U.S. 387, 396 (1985)).

17. *Id.* at 313, 115 N.E.3d at 596–97, 91 N.Y.S.3d at 324–25 (quoting *Ross*, 417 U.S. at 615).

18. *See id.*

19. *Grimes*, 32 N.Y.3d at 318, 115 N.E.3d at 600–01, 91 N.Y.S.3d at 328–29 (first citing People v. Arjune, 30 N.Y.3d 347, 356 n.7, 89 N.E.3d 1207, 1213, 67 N.Y.S.3d 526, 532 (2017); and then citing Roe v. Flores-Ortega, 528 U.S. 470, 479 (2000)). The Court explained that if a CLA is accepted from a pro se defendant, counsel is assigned "in order to enhance the appellate review for both the Court and the defendant." *Id.*

20. *See id.* at 319, 115 N.E.3d at 601, 91 N.Y.S.3d at 329.

that counsel meet established standards of effectiveness."[21] Where state law provides for appellate review of criminal convictions, both the state and federal constitutions grant defendants a right to counsel.[22] Further, once counsel has been provided, the Constitution now grants a defendant the right to effective counsel, throughout the trial and appellate levels.[23] The only step in the process that the majority has denied the right to counsel is the filing of a CLA, because before and after this step, counsel is provided by state statute.[24]

The dissent took issue with the Supreme Court cases used in the majority opinion when discussing the federal right to counsel, stating that the cases are "off point and do[] not advance [the majority] position."[25] Additionally, Judge Wilson disagrees that CLAs can be decided purely on the trial and appellate records, because issues important to second-tier review may have been glossed over or minimized in the earlier record.[26] Finally, he examined other state due process decisions referenced in the majority opinion, arguing that these decisions were quite different from the current situation, and had more convincing reasons to deny relief; a request sixteen years too late, and a filing delay that occurred because the defendant himself never requested filing of the CLA.[27]

II. 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.[28] The New York Civil Liberties Union (NYCLU) submitted a FOIL request to the New York Police Department (NYPD) in August 2011 asking for all final opinions

21. *Id.* at 320, 115 N.E.3d at 602, 91 N.Y.S.3d at 330.

22. *See id.* at 323, 115 N.E.3d at 604, 91 N.Y.S.3d at 332 (first citing Douglas v. California, 372 U.S. 353, 356 (1963); then citing Griffin v. Illinois, 351 U.S. 12, 18 (1956); then citing *Montgomery*, 24 N.Y.2d at 133, 247 N.E.2d at 133, 299 N.Y.S.2d at 160; and then citing Hamilton v. Alabama, 368 U.S. 52, 53 (1961)).

23. *See id.*

24. *See Grimes*, 32 N.Y.3d at 324, 115 N.E.3d at 605, 91 N.Y.S.3d at 333 (citing 22 N.Y.C.R.R § 606.5 (2019)).

25. *Id.* at 325–26, 115 N.E.3d at 606, 91 N.Y.S.3d at 334 (first citing *Ross*, 417 U.S. at 600; and then citing *Evitts*, 469 U.S. at 387).

26. *See id.* at 332–33, 115 N.E.3d at 611, 91 N.Y.S.3d at 339.

27. *See id.* at 335–36, 115 N.E.3d at 613, 91 N.Y.S.3d at 341 (first citing People v. Perez, 23 N.Y.3d 89, 101, 12 N.E.3d 416, 421, 989 N.Y.S.2d 418, 423 (2014); then citing N.Y.C.P.L. § 460.30; then citing *Andrews*, 23 N.Y.3d at 615–16, 17 N.E.3d at 497–98, 993 N.Y.S.2d at 242–43; and then citing People v. Rosario, 26 N.Y.3d 597, 603–04, 46 N.E.3d 1043, 1046–47, 26 N.Y.S.3d 490, 493–94 (2015)).

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

and discipline records of NYPD officers who were charged through the civilian complaint process.[29] NYPD denied the FOIL requests, stating that the records were exempt from disclosure under a state statute that protects records used for evaluation and continued employment of officers.[30] On an administrative appeal, NYPD produced over 700 pages of "Disposition of Charges forms" redacted to conceal officer identities, but again denied the request in regard to Report and Recommendation documents, the "final opinion" on charges against an officer.[31] NYCLU commenced an Article 78 proceeding asking for access to the disciplinary records withheld by NYPD.[32]

The supreme court ordered NYPD to produce redacted records, protecting the officer identities.[33] NYPD appealed, and the appellate division reversed, determining "that it could not 'order respondents to disclose redacted versions of the disciplinary decisions.'"[34] NYCLU appealed to the Court of Appeals, which held that Civil Rights Law section 50-a protections exempted the requested records from disclosure under FOIL.[35]

Public Officers Law section 87(2)(a) provides an exemption to FOIL for documents that are "exempted from disclosure by state or federal statute."[36] Civil Rights Law section 50-a states that "[a]ll personnel records used to evaluate performance toward continued employment or promotion" are confidential and "not subject to inspection or review."[37] Unless an officer consents to release of his or her records, the only avenue for disclosure under section 50-a is through court order.[38] Section 50-a's purpose is to prevent use of police records for harassment, revenge, or as cross-examination material in litigation involving the officer.[39]

29. *See* N.Y. Civil Liberties Union v. NYPD, 32 N.Y.3d 556, 561–62, 118 N.E.3d 847, 850, 94 N.Y.S.3d 185, 188 (2018).

30. *See id.* at 562, 118 N.E.3d at 850, 94 N.Y.S.3d at 188.

31. *Id.*

32. *See id.*

33. *See id.*

34. *N.Y. Civil Liberties Union*, 32 N.Y.3d at 563, 118 N.E.3d at 851, 94 N.Y.S.3d at 189 (quoting N.Y. Civil Liberties Union v. NYPD, 148 A.D.3d 642, 643, 50 N.Y.S.3d. 365, 367, 2017 N.Y. Slip Op. 025061, at 2 (1st Dep't 2017)).

35. *Id.* at 560, 118 N.E.3d at 849, 94 N.Y.S.3d at 187.

36. PUB. OFF. § 87(2)(a).

37. N.Y. CIV. RIGHTS LAW § 50-a(1) (McKinney 2019).

38. *See id.*

39. *N.Y. Civil Liberties Union*, 32 N.Y.3d at 564, 118 N.E.3d at 851–52, 94 N.Y.S.3d at 189–90 (citing Prisoners' Legal Servs. of N.Y. v. N.Y.S. Dep't of Corr. Servs., 73 N.Y.2d 26, 31–32, 535 N.E.2d 243, 245, 538 N.Y.S.2d 190, 192 (1988)).

NYCLU argued that section 50-a protection only applies where there is current or potential litigation that involves the personnel records.[40] However, the Court held that section 50-a extends to records that could allow "any 'abusive exploitation of personally damaging information contained in officers' personnel records.'"[41] The most important factor when applying section 50-a to personnel records is if the information in the records has the potential to be used to harass or embarrass officers, whether in the field or during litigation.[42] The Court of Appeals found that the records NYCLU requested fell squarely within section 50-a protections, because police department disciplinary records are "replete with factual details regarding misconduct allegations, hearing judges' impressions and findings, and any punishment imposed on officers," all information that has the potential to embarrass officers and be used for impeachment of an officer in litigation.[43]

Once invoked, section 50-a mandates procedures to minimize the exposure of protected information, and disclosure is only granted where the requested records are relevant and material in an on-going action before the court reviewing the protected documents.[44] The Court determined that the personnel records requested by NYCLU have no relevance to any pending litigation, and therefore cannot be disclosed.[45]

The Court addressed NYCLU's policy arguments in favor of disclosure of the NYPD records at issue.[46] NYCLU argued that in order to maintain public confidence in NYPD disciplinary proceedings, records of these proceedings should be made publicly available, with redactions to prevent identification of individual officers.[47] However, the Court did not accept this rationale, stating that these views were taken into account when section 50-a was enacted, and the legislature made a "policy choice" to allow protection of a broad category of records with some

40. *See id.* at 564, 118 N.E.3d at 852, 94 N.Y.S.3d at 190 (first citing Daily Gazette Co. v. City of Schenectady, 93 N.Y.2d 145, 153, 710 N.E.2d 1072, 1074, 688 N.Y.S.2d 472, 474 (1999); and then citing *Prisoners' Legal Servs. of N.Y.*, 73 N.Y.2d at 33, 535 N.E.2d at 246, 538 N.Y.S.2d at 193)).

41. *Id.* (quoting *Daily Gazette Co.*, 93 N.Y.2d at 154, 710 N.E.2d at 1075, 688 N.Y.S at 475).

42. *See id.* at 564–65, 117 N.E.3d at 852, 94 N.Y.S.3d at 190 (quoting *Daily Gazette Co.*, 93 N.Y.2d at 156–57, 710 N.E.2d at 1076, 688 N.Y.S.2d at 477).

43. *Id. at* 565, 118 N.E.3d at 853, 94 N.Y.S.3d at 191 (quoting *Daily Gazette Co.*, 93 N.Y.2d at 157–58, 710 N.E.2d at 1077, 688 N.Y.S.2d at 477).

44. *See N.Y. Civil Liberties Union*, 32 N.Y.3d at 566, 118 N.E.3d at 853, 94 N.Y.S.3d at 191 (quoting CIV. RIGHTS LAW § 50-a(3)).

45. *Id.*

46. *See id.*

47. *Id.*

exceptions allowing disclosure of specific sections of documents for specific purposes.[48]

Public Officers Law section 87(2)(a), the FOIL exemption at issue, has no redaction provision for records exempted from disclosure under a state or federal law such as Civil Rights Law section 50-a.[49] Additionally, two cases, *Matter of Short* and *Matter of Karlin* take the position that records protected under Public Officers Law section 87(2)(a) should not be disclosed with redactions to protect identity because the statute has no redaction provision.[50] The Court suggested that if records protected by section 87(2)(a) could be produced through redaction, it is up to the Legislature to amend the relevant provisions of the statute, not for the Court to amend FOIL through the judicial process.[51] Accordingly, the Court affirmed the appellate division decision.[52]

In a concurring opinion, Judge Stein argued that this case turned purely on application of section 50-a, which prevents disclosure outside the specific context of ongoing litigation.[53] Section 50-a provides specific procedural protections for all personnel records protected under the law, making discussion of redaction under section 87(2)(a) unnecessary, because section 50-a "provides the exclusive means for disclosure of confidential personnel records."[54] Therefore, Judge Stein declined to join in the majority analysis of section 87(2)(a) and its application in *Short* and *Karlin*.[55]

Judge Rivera dissented, stating that redaction should be used to promote transparency and accountability of the NYPD in this situation.[56] In her discussion, the judge reviewed cases where the Court granted FOIL requests for records protected under section 50-a with redactions to

48. *Id.* at 567, 118 N.E.3d at 854, 94 N.Y.S.3d at 192 (quoting *Daily Gazette Co.*, 93 N.Y.2d at 158, 710 N.E.2d at 1077, 688 N.Y.S.2d at 478).

49. *N.Y. Civil Liberties Union*, 32 N.Y.3d at 569, 118 N.E.3d at 855, 94 N.Y.S.3d at 193 (citing PUB. OFF. LAW § 87(2)(a)).

50. *See id.* at 570, 118 N.E.3d at 856, 94 N.Y.S.3d at 194 (first quoting Karlin v. McMahon, 96 N.Y.2d 842, 843, 754 N.E.2d 194, 195, 729 N.Y.S.2d 435, 436 (2001)) (citing Short v. Bd. of Managers of Nassau Cty. Med. Ctr., 57 N.Y.2d 399, 401, 442 N.E.2d 1235, 1235–36, 456 N.Y.S.2d 724, 724–25 (1982)).

51. *See id.* at 569, 118 N.E.3d at 856, 94 N.Y.S.3d at 194 (quoting *Short*, 57 N.Y.2d at 405, 442 N.E.2d at 1237, 456 N.Y.S.2d at 726–27).

52. *Id.* at 571, 118 N.E.3d at 857, 94 N.Y.S.3d at 195.

53. *See id.* at 571, 118 N.E.3d at 857, 94 N.Y.S.3d at 195 (Stein, J., concurring) (first citing CIV. RIGHTS LAW § 50-a(3); and then citing *Prisoners' Legal Servs.*, 73 N.Y.2d at 32–33, 535 N.E.2d at 246, 538 N.Y.S.2d at 193).

54. *N.Y. Civil Liberties Union*, 32 N.Y.3d at 568, 118 N.E.3d at 854, 94 N.Y.S.3d at 193.

55. *See id.* at 572, 118 N.E.3d at 858, N.Y.S.3d at 196 (Stein, J., concurring).

56. *See id.* at 573, 118 N.E.3d at 858, 94 N.Y.S.3d at 196 (Rivera, J., dissenting).

anonymize the information.[57] The majority opinion treated section 50-a as "an absolute bar to FOIL disclosure," which cannot be correct when earlier cases allowed redaction for section 50-a records.[58]

Finally, Judge Wilson dissented, stating that although section 50-a might be a bar to some records, the disciplinary records at issue here were conducted as "Trial Room" proceedings, which are open to the public by default, unless the subject officer sought to have his or her proceedings treated as confidential.[59] As FOIL's default posture favors transparency, only those disciplinary records that were treated as confidential should be exempt under section 50-a, with the remainder subject to FOIL disclosure.[60]

III. SEPARATION OF POWERS

In January of 2012, Governor Cuomo issued an executive order to state agencies to promulgate regulations that limit state funding to providers who use it for administrative costs and executive compensation.[61] In response, the Department of Health (DOH) created 10 N.Y.C.R.R. section 1002, which consists of three sections, one covering administrative expenses, and two regarding executive pay.[62] In relation to total administrative expenses, no more than fifteen percent of covered expenses using state funds may be used for administrative expenses.[63] Executive pay was curtailed in two ways. First, executives cannot be paid more than $199,000 using state funds unless the state waives this requirement.[64] Second, if total executive compensation exceeds $199,000 from any source, the organization is penalized unless (1) the executive's compensation package is at the seventy-fifth percentile or below for a

57. *See id.* at 586, 118 N.E.3d at 867–868, 94 N.Y.S.3d at 205–06 (Rivera, J., dissenting) (first citing *Daily Gazette Co.*, 93 N.Y.2d at 159, 710 N.E.2d at 1078, 688 N.Y.S.2d at 478–79; and then citing Capital Newspapers Div. of Hearst Corps. v. Burns, 67 N.Y.2d 562, 569, 496 N.E.2d 665, 669, 505 N.Y.S.2d 576, 580 (1986)).

58. *Id.* at 586, 118 N.E.3d at 868, 94 N.Y.S.3d at 206 (Rivera, J., dissenting).

59. *N.Y. Civil Liberties Union*, 32 N.Y.3d at 588–89, 118 N.E.3d at 870, 94 N.Y.S.3d at 208 (Wilson, J., dissenting).

60. *Id.* at 589-90, 118 N.E.3d at 870, 94 N.Y.S.3d at 208 (Wilson, J., dissenting).

61. Exec. Order No. 38 (Jan. 18, 2012), available at http://www.governor.ny.gov/executiveorder/38 (ordering limits on state-funded administrative costs and executive compensations).

62. 10 N.Y.C.R.R. §§ 1002.2(a), 1002.3(a)-(b) (2017).

63. LeadingAge N.Y., Inc. v. Shah, 32 N.Y.3d 249, 255, 114 N.E.3d 1032, 1036, 90 N.Y.S.3d 579, 583 (2018) (citing 10 N.Y.C.R.R. § 1002.2(a)).

64. *Id.* (citing 10 N.Y.C.R.R. § 1002.3(a)).

similar position, and (2) the organization's board or governing body approved the compensation.[65]

Two groups representing nursing homes, assisted-living facilities, home care agencies, health care plans, health maintenance organizations, and long term care plans commenced actions alleging that DOH: (1) exceeded its authority when promulgating the regulations; (2) violated the separation of powers doctrine; and (3) acted in an arbitrary and capricious manner when promulgating the regulations.[66] After merging the cases, the trial court declared that the administrative expenses regulation and executive compensation waiver (collectively known as the "hard cap regulations") did not violate separation of powers, and were not arbitrary and capricious.[67] The executive compensation penalties (known as the "soft cap regulations") were invalidated because it was an excessive use of authority delegated by the governor to control compensation from sources other than the government.[68] The appellate division affirmed, and the petitioners appealed to the Court of Appeals.[69]

The Court began its discussion by reviewing the separation of powers doctrine.[70] "If an agency promulgates a rule beyond the power it was granted by the legislature, it usurps the legislative role and violates the doctrine of separation of powers."[71] When looking for the line that separates administrative rulemaking and legislative policy-making, the Court turned to the *Boreali* factors: 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

65. *Id.* at 255, 114 N.E.3d at 1037, 90 N.Y.S.3d at 584. The board or governing body must have at least two independent members for the approval to meet DOH requirements and avoid the penalties. *Id.* at 255–56, 114 N.E.3d at 1037, 90 N.Y.S.3d at 584.

66. *Id.* at 257, 114 N.E.3d at 1038, 90 N.Y.S.3d at 585. The LeadingAge plaintiffs brought substantive due process and federal preemption claims, but these were dismissed at the trial court level. *LeadingAge N.Y., Inc.*, 32 N.Y.3d at 258, 114 N.E.3d at 1038, 90 N.Y.S.3d at 585 (citing LeadingAge N.Y., Inc. v. Shah, 56 Misc. 3d 594, 610, 53 N.Y.S.3d 804, 817 (Sup. Ct. Albany Cty. 2015)).

67. *Id.* (citing *LeadingAge N.Y., Inc.*, 56 Misc. 3d at 610, 53 N.Y.S.3d at 817).

68. *Id.* at 258, 114 N.E.3d at 1039, 90 N.Y.S.3d at 586 (citing *LeadingAge N.Y., Inc.*, 56 Misc. 3d at 606–07, 53 N.Y.S.3d at 814-15).

69. *Id.*

70. *Id.* at 259, 114 N.E.3d at 1039, 90 N.Y.S.3d at 586 (citing NYC C.L.A.S.H., Inc. v. N.Y.S. Office of Parks, Recreation & Historic Pres., 27 N.Y.3d 174, 178, 51 N.E.3d 512, 515, 32 N.Y.S.3d 1, 4 (2016)).

71. *LeadingAge N.Y., Inc.*, 32 N.Y.3d at 260, 114 N.E.3d at 1040, 90 N.Y.S.3d at 587 (first citing *NYC C.L.A.S.H., Inc.*, 27 N.Y.3d at 178, 32 N.Y.S.3d at 5, 51 N.E.3d at 516; and then citing Greater N.Y. Taxi Ass'n v. New York City Taxi & Limousine Comm'n, 25 N.Y.3d 600, 608, 36 N.E.3d 632, 637, 15 N.Y.S.3d 725, 730 (2015)).

debate in the subject area had occurred, and 4) whether the action required specific agency expertise and technical competence.[72]

The Court first discussed the hard cap regulations.[73] The first factor, which instructs that agency regulation should not make value judgments better left to the legislature, does not point to a separation of powers violation.[74] These regulations are tied to the DOH enabling statute, which mandates DOH "efficiently direct state funds toward quality medical care for the public."[75] Efficient use of money was directed by the legislature, and is the goal of the hard cap regulations, so DOH made no value judgement in promulgating the regulations.[76] The general grant of authority to create efficient and effective healthcare services is sufficient to allow the hard cap regulations.[77]

The second factor, whether the agency wrote on a clean slate or filled in details, also weighed in favor of the hard cap regulations.[78] As with the first factor, efficiency of funds is a statutory directive to DOH, and the hard cap regulations require funds be used efficiently, thereby filling in the details of "a statutory framework directing DOH to use state healthcare funds in the most efficient and effective manner possible."[79]

The third factor, which looks to legislative debate around the topic of regulation, did not point to a separation of powers violation.[80] The Court found that no bills relating to executive compensation made it out of committee, and the only proposal voted on by the legislature came from the governor at the same time he issued the executive order directing DOH to create these regulations.[81]

Finally, the Court held that DOH used specific agency expertise when crafting the regulations.[82] Although the bones of the regulations,

72. *Id.* at 260–61, 114 N.E.3d at 1040, 90 N.Y.S.3d at 587 (quoting *NYC C.L.A.S.H., Inc.*, 27 N.Y.3d at 179–80, 51 N.E.3d at 517–18, 32 N.Y.S.3d at 6) (citing Boreali v. Axelrod, 71 N.Y.2d 1, 12–13, 517 N.E.2d 1350, 1355–56, 523 N.Y.S.2d 464, 470–71 (1987)). This Boreali factor paraphrasing was used in last year's administrative law *Survey* as well at the beginning of the separation of powers section. Rose Mary Bailly & William P. Davies, *2017-2018 Survey of New York Law: Administrative Law*, 69 SYRACUSE L. REV. 665, 666 (2019).

73. *Id.* at 262, 114 N.E.3d at 1042, 90 N.Y.S.3d at 589.

74. *Id.* at 262–63, 114 N.E.3d at 1042, 90 N.Y.S.3d at 589.

75. *Id.* at 263, 114 N.E.3d at 1042, 90 N.Y.S.3d at 589 (citing Garcia v. N.Y.C. Dep't of Health & Mental Hygiene, 31 N.Y.3d 601, 611–12, 106 N.E.3d 1187, 1195–96, 81 N.Y.S.3d 827, 835–36 (2018)).

76. *LeadingAge N.Y., Inc.*, 32 N.Y.3d at 263, 114 N.E.3d at 1042, 90 N.Y.S.3d at 589.

77. *Id.* at 264, 114 N.E.3d at 1043, 90 N.Y.S.3d at 590.

78. *Id.* at 265, 114 N.E.3d at 1044, 90 N.Y.S.3d at 591.

79. *Id.* (citing *LeadingAge N.Y., Inc.*, 56 Misc. 3d at 604, 53 N.Y.S.3d at 812).

80. *Id.*

81. *LeadingAge N.Y., Inc.*, 32 N.Y.3d at 265–66, 114 N.E.3d at 1044, 90 N.Y.S.3d at 591.

82. *Id.* at 266, 114 N.E.3d at 1044, 90 N.Y.S.3d at 591.

the actual values assigned to the hard cap, were dictated by the governor, DOH created definitions, waiver, and exemption provisions that ensure the new rules applied only to those parties the governor intended.[83] For instance, the exemptions prevent the compensation cap from applying to jobs "inseparable from the direct provision of program services, like hospital department chairs."[84]

As *Boreali* did not weigh in favor of a separation of powers violation or a charge that DOH exceeded its authority, the Court turned to the petitioners' second argument, that the regulations are arbitrary and capricious.[85] "An administrative regulation stands as long as it 'has a rational basis and is not unreasonable, arbitrary or capricious.'"[86] Pointing to the task force convened by Governor Cuomo before issuing his executive order, the Court decided that the discovery of excessive compensation for health care executives and rising costs in overall healthcare spending in New York provided a rational basis to implement the hard cap regulations.[87]

Although the hard cap regulations were found to be a valid exercise of agency regulation, the soft cap regulations do not focus on direct regulation of state funding for healthcare.[88] The legislature has not granted DOH the authority to regulate private funding in the healthcare industry.[89] Accordingly, this regulation runs afoul of the first two *Boreali* factors, because regulating private receipts and creating a structure for such regulation are both a value judgment and writing on a clean slate where the legislature has provided no framework or rationale for the regulations.[90] "DOH appears to have envisioned an additional goal of limiting executive compensation as a matter of public policy and regulated to that end."[91] Accordingly, the Court of Appeals held that the soft cap regulation violated the separation of powers doctrine and DOH's promulgation of this regulation exceeded the agency's authority.[92]

83. *Id.*

84. *Id.*

85. *Id.* at 267, 114 N.E.3d at 1045, 90 N.Y.S.3d at 592.

86. *LeadingAge N.Y., Inc.*, 32 N.Y.3d at 267, 114 N.E.3d at 1045, 90 N.Y.S.3d at 592 (quoting Acevedo v. N.Y.S. Dep't of Motor Vehicles, 29 N.Y.3d 202, 226, 77 N.E.3d 331, 347 (2017)).

87. *Id.* at 267–68, 114 N.E.3d at 1045, 90 N.Y.S.3d at 592.

88. *Id.* at 268, 114 N.E.3d at 1046, 90 N.Y.S.3d at 593.

89. *Id.*

90. *Id.*

91. *LeadingAge N.Y., Inc.*, 32 N.Y.3d at 271, 114 N.E.3d at 1048, 90 N.Y.S.3d at 595.

92. *Id.*

Judges Garcia and Wilson dissented.[93] Judge Garcia stated that the hard cap regulations should have been examined separately, because the administrative expenses capped by the DOH regulations included executive compensation.[94] As the executive compensation waiver did not affect the percentage of expenses that went toward overall administration, it had no effect on the policy goal of efficient funding of medical care.[95] If the regulation does not satisfy a legislative goal, then it is a policy choice, in this case the choice to avoid overcompensating executives.[96] "This is precisely the type of social policymaking prohibited by [the Court of Appeals] prior decisions."[97] Further, the executive compensation "benchmark" salary of $199,000 has no support from the task force report, and the majority opinion provides no support for the number.[98] Therefore, the executive compensation hard cap not only exceeds the agency's authority but also has no rational basis, making it arbitrary and capricious.

Judge Wilson's dissent took issue with the use of the *Boreali* factors in this case.[99] "Boreali's separation of powers analysis has been followed by no other jurisdiction, and for good reason: it is unhelpful in cases to which it applies, and this is not even one of those cases."[100] Judge Wilson argued that the *Boreali* factors are used when literal interpretation of a statute would give the executive branch unconstitutionally excessive power, because the statute grants the executive branch powers without sufficient specificity.[101] Instead, "the question in this case is solely whether the Governor[] and his appointed commissioner" exceeded their

93. *Id.*

94. *Id.* at 273, 114 N.E.3d at 1049, 90 N.Y.S.3d at 596 (Garcia, J., dissenting).

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

96. *See LeadingAge N.Y., Inc.*, 32 N.Y.3d at 274, 114 N.E.3d at 1050, 90 N.Y.S.3d at 597 (Garcia, J., dissenting).

97. *Id.* (Garcia, J., dissenting) (first citing Campagna v. Shaffer, 73 N.Y.2d 237, 242–43, 536 N.E.2d 368, 370, 538 N.Y.S.2d 933, 935 (1989); then citing Council for Owner Occupied Hous., Inc. v. Abrams, 72 N.Y.2d 553, 558, 531 N.E.2d 627, 629, 534 N.Y.S.2d 906, 908 (1988); then citing Under 21, Catholic Home Bureau for Dependent Children v. New York, 65 N.Y.2d 344, 359, 482 N.E.2d 1, 6, 492 N.Y.S.2d 522, 527 (1985); then citing Subcontractors Trade Ass'n v. Koch, 62 N.Y.2d 422, 428, 465 N.E.2d 840, 843, 477 N.Y.S.2d 120, 123 (1984); then citing Fullilove v. Beame, 48 N.Y.2d 376, 379, 398 N.E.2d 765, 766, 423 N.Y.S.2d 144, 145 (1979); and then citing Broidrick v. Lindsay, 39 N.Y.2d 641, 646, 350 N.E.2d 595, 598, 385 N.Y.S.2d 265, 267 (1976)).

98. *Id.* at 277, 114 N.E.3d at 1052, 90 N.Y.S.3d at 599 (Garcia, J., dissenting).

99. *Id.* at 279, 114 N.E.3d at 1053–54, 90 N.Y.S.3d at 600–01 (Wilson, J., dissenting).

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

101. *LeadingAge N.Y., Inc.*, 32 N.Y.3d at 280, 114 N.E.3d at 1054, 90 N.Y.S.3d at 602 (Wilson, J., dissenting).

executive power by promulgating the regulations at issue.[102] Framed this way, the hard and soft cap regulations work together to ensure that state funding is used to provide the greatest benefit to New York citizens, while ensuring that healthcare executives did not pay themselves $199,000 using state funds and provide the rest of their compensation funds out of private dollars.[103] By striking down the soft cap regulation, the majority created an accounting loophole that allows an executive to pay him or herself as high a salary as possible as long as all but $199,000 is paid through allocation of private funds.[104] Accordingly, the soft cap regulation should have been upheld as an integral part of the overall purpose of the regulations.[105] Finally, Judge Wilson examined other legal avenues that would uphold the entire regulation scheme, including a state law that grants the executive branch the authority to find "responsible" contractors, and authority granted to the executive to contract with private entities to provide state services.[106]

IV. STANDING AS A PRE-CONDITION TO JUDICIAL REVIEW

Standing, namely, whether the petitioner is "a proper party to request an adjudication" is "considered at the outset of any litigation" as a matter of justiciability.[107] The Court of Appeals has examined a party's standing through the application of several tests depending on the nature of the petitioner and the claim at stake.[108] In some instances, a statute may identify the class of people who can seek redress of a claim.[109] In such an instance, the court "need not fathom whether the plaintiff's interests are

102. *Id.* at 290, 114 N.E.3d at 1062, 90 N.Y.S.3d at 609 (Wilson, J., dissenting).

103. *See id.* at 296; 114 N.E.3d at 1066, 90 N.Y.S.3d at 613 (Wilson, J., dissenting).

104. *See id.* at 295, 114 N.E.3d at 1065, 90 N.Y.S.3d at 612 (Wilson, J., dissenting). Without the soft cap, an executive can pay him or herself $199,000 of public money, avoid the waiver requirement, and receive the remainder of his or her salary from private funds that were previously allocated to paying for expenses that would not count as administrative expenses. *Id.* at 296, 114 N.E.3d at 1066, 90 N.Y.S.3d at 613 (Wilson, J., dissenting). Without the soft cap regulation, this practice would successfully "circumvent[] the central goal of the regulation, . . . to maximize the 'bang for the buck' the State receives when it chooses among service providers." *LeadingAge N.Y., Inc*., 32 N.Y.3d at 295, 114 N.E.3d at 1065–66, 90 N.Y.S.3d at 612–13 (Wilson, J., dissenting).

105. *Id.* at 296–97, 114 N.E.3d at 1066, 90 N.Y.S.3d at 613 (Wilson, J., dissenting).

106. *Id.* at 300, 114 N.E.3d at 1069, 90 N.Y.S.3d at 616 (Wilson, J., dissenting) (first citing N.Y. STATE FIN. LAW §163(2)(f) (McKinney 2014); and then citing N.Y. PUB. HEALTH LAW §206(3) (McKinney 2012 & Supp. 2019)).

107. Dairylea Coop. v. Walkley, 38 N.Y.2d 6, 9, 339 N.E.2d 865, 867, 377 N.Y.S.2d 451, 453 (1975).

108. Mental Hygiene Legal Serv. v. Daniels, 33 N.Y.3d 44, 60, 122 N.E.3d 21, 32, 98 N.Y.S. 3d 504, 515 (2019) (Rivera, J., dissenting).

109. *Id.* at 61, 122 N.E.3d at 32, 98 N.Y.S. 3d at 515.

of the type that the Legislature sought to protect because the Legislature has provided the answer in the statute itself."[110]

The Court considered standing in two cases involving such statutes: a tax assessment statute in *Larchmont Pancake House v. Board of Assessors*,[111] and a document production statute in *Mental Hygiene Legal Service v. Daniels.*[112]

The issue before the Court in *Larchmont Pancake House* was whether the Larchmont Pancake House restaurant was an aggrieved party under Article 7 of the Real Property Tax Law (RPTL)[113] and thus had standing to challenge tax assessments on the property where it is located.[114] The law has viewed a party as aggrieved when the tax assessment causes a "direct adverse effect on the challenger's pecuniary interest."[115] Typically, an aggrieved party under RPTL Article 7 is a taxpaying owner of real property.[116] A lessee pursuant to a lease which obligates them to pay the real property taxes would also be considered an aggrieved party.[117] If a lessee's interest suffers an indirect impact, however, the lessee would not have standing as an aggrieved party to challenge the tax assessment.[118]

In *Larchmont Pancake House*, the restaurant had paid taxes and filed timely challenges to the assessments for each of four years.[119] The owner of the real property where it was located was a trust benefitting the daughters of the former restaurant owners.[120] One of the daughters was

110. *Id.* at 62, 122 N.E.3d at 33, 98 N.Y.S. 3d at 516.

111. 33 N.Y.3d 228, 236, 124 N.E.3d 230, 232, 100 N.Y.S.3d 680, 682 (2019).

112. 33 N.Y.3d at 47, 122 N.E.3d at 23, 98 N.Y.S. 3d at 506.

113. *Larchmont*, 33 N.Y.3d at 237, 124 N.E.3d at 233, 100 N.Y.S.3d at 683. Article 7 of the Real Property Tax Law provides for judicial review of tax assessments. *See generally* N.Y. REAL PROP. TAX LAW §§ 700–60 (McKinney 2013) (referring to Article 7 – Judicial Review).

114. *Larchmont*, 33 N.Y.3d at 237, 124 N.E.3d at 233, 100 N.Y.S.3d at 683.

115. *Id.* (quoting Waldbaum, Inc. v. Fin. Adm'r of N.Y., 74 N.Y.2d 128, 132, 542 N.E.2d 1078, 1080, 544 N.Y.S.2d 561, 563 (1989)) (first citing Steel Los III/Goya Foods, Inc. v. Bd. of Assessors of Cty. of Nassau, 10 N.Y.3d 445, 452–53, 889 N.E.2d 453, 456, 859 N.Y.S. 576, 579 (2008); and then citing *In re* Walter, 75 N.Y. 354, 357 (1878)).

116. *Id.* at 237–38, 124 N.E.3d at 234, 100 N.Y.S.3d at 684 (first citing Garth v. Bd. of Assessment Review for Town of Richmond, 13 N.Y.3d 176, 178, 918 N.E.2d 103, 104 889 N.Y.S.2d 513, 514 (2009); then citing *In re* Gantz, 85 N.Y. 536, 538 (1881); and then citing *Walter*, 75 N.Y. at 357.

117. *Id.* at 238, 124 N.E.3d at 234, 100 N.Y.S.3d at 684 (citing *In re* Burke, 62 N.Y. 224, 227–28 (1875)).

118. *Id.* at 238, 124 N.E.3d at 234, 100 N.Y.S.3d at 684 (citing *Waldbaum*, 74 N.Y.2d at 131, 542 N.E.3d at 1079, 544 N.Y.S.2d at 562 (where the lessee's pecuniary interest was an increase in rent)).

119. *Larchmont*, 33 N.Y.3d at 236, 124 N.E.3d at 232–33, 100 N.Y.S.3d at 682–83.

120. *Id.* at 242–43, 124 N.E.3d at 237, 100 N.Y.S.3d at 687 (Wilson. J., dissenting).

the CEO and owner of the restaurant; she signed the petitions asserting the challenges.[121] After the board of assessment review upheld the assessments, the restaurant filed tax certiorari proceedings in accordance with Article 7.[122] The respondents moved to dismiss the proceedings on the grounds that the restaurant petitioner failed to meet the requirements of RPTL 524(3) regarding who must sign the complaint[123] and was not an aggrieved party under RPTL 704(1).[124]

The trial court denied the motion holding that the matter was properly before the court because both requirements were satisfied.[125] The daughter who signed the petition on behalf of the restaurant was a beneficiary of the trust which owned the property and she was an aggrieved party.[126] The Appellate Division, Second Department reversed.[127] It held that the restaurant was an aggrieved party because the assessment adversely affected its "pecuniary interests,"[128] but that the trial court lacked subject matter jurisdiction to consider the matter because the complaint required under RPTL 524, a "condition precedent and jurisdictional prerequisite to obtaining judicial review" was not signed by the property owner as required by statute.[129]

The Court of Appeals granted leave to appeal[130] and held that the restaurant was not an aggrieved party under Article 7 of the RPTL and thus lacked standing to maintain this proceeding.[131] In reaching its decision, the Court relied on the crucial fact that even though it regularly

121. *Id.* at 236, 124 N.E.3d at 232–33, 100 N.Y.S.3d at 682–83.

122. *Id.* at 236, 124 N.E.3d at 233, 100 N.Y.S.3d at 683.

123. *Id*. at 236, 124 N.E.2d at 233, 100 N.Y.S.3d at 683. RPTL 524(3) provides that the complaint regarding the tax assessment "must be made by the person whose property is assessed, or by some person authorized in writing by the complainant or his officer or agent to make such statement who has knowledge of the facts stated therein" because it was not the "person whose property is assessed, or . . . some person authorized in writing by the complainant or his officer or agent." N.Y. REAL PROP. TAX LAW § 524(3) (McKinney 2017).

124. *Larchmont*, 33 N.Y.3d at 236, 124 N.E.2d at 233, 100 N.Y.S.3d at 683. RPTL 704(1) provides "[a]ny person claiming to be aggrieved by any assessment of real property upon any assessment roll may commence a proceeding under this article . . . ." N.Y. REAL PROP. TAX LAW § 704(1) (McKinney 2013).

125. *Id*. at 236–37, 124 N.E.2d at 233, 100 N.Y.S.3d at 683.

126. *Id*. at 237, 124 N.E.2d at 233, 100 N.Y.S.3d at 683.

127. Larchmont Pancake House v. Bd. of Assessors &/or the Assessor of Mamaroneck, 153 A.D.3d 521, 521, 61 N.Y.S.3d 45, 46 (2d Dep't 2017).

128. *Larchmont*, 33 N.Y.3d at 237, 124 N.E.2d at 233, 100 N.Y.S.3d at 683 (citing *Id*. at 522, 61 N.Y.S.3d at 46).

129. *Id.* (citing *Larchmont*, 153 A.D.3d at 522, 61 N.Y.S.3d at 46).

130. *Id.* (citing Larchmont Pancake House v. Bd. of Assessors, 31 N.Y.3d 907, 907, 103 N.E.3d 1243, 1243, 79 N.Y.S.3d 96, 96 (2018)).

131. *Id.*

did so, the restaurant was not legally obligated to pay the taxes.[132] The Court concluded that "[a] contractual obligation to assume the undivided tax liability ensures the requisite direct pecuniary impact"[133] and promotes the principles underlying the standing requirement, namely, "protecting the taxing authority from multiple litigations as to the same parcel by parties of unknown relation to the taxed premises."[134]

The dissent felt that the equities of the case lay with the restaurant which had mistakenly listed itself instead of the trust as the property owner, dutifully paid the taxes, bore the burden of the inflated tax increase, and whose ownership was known to the town long before the issue was raised in the tax proceeding. [135] The dissent observed that the majority "relies on hypertechnicalities to close the courthouse doors to aggrieved taxpayers" and replaces "the Legislature's liberal scheme for challenging local government decisions with a new, gloomier rule: you can't fight City Hall."[136]

Mental Hygiene Legal Service (MHLS),[137] which has offices in each judicial department of the state, is charged by statute to "provide legal services and assistance to patients or residents and their families related to the admission, retention, and care and treatment of such persons" in mental hygiene facilities.[138]

If a patient is admitted to a mental hygiene facility involuntarily on a medical certification, MHLS is entitled to a copy of the record of the

132. *Id*. at 238–239, 124 N.E.3d at 234, 124 N.Y.S.3d at 684.

133. *Larchmont*, 33 N.Y.3d at 239, 124 N.E.3d at 234, 124 N.Y.S.3d at 684 (citing Big "v" Supermarkets, Inc., Store #217 v. Assessor of E. Greenbush, 114 A.D.2d 726, 727–28, 494 N.Y.S.2d 520, 521 (3d Dep't 1985)).

134. *Id*. at 240, 124 N.E.3d at 234, 124 N.Y.S.3d at 684 (citing *Waldbaum*, 74 N.Y.2d at 134, 542 N.E.2d at 1081, 544 N.Y.S.2d at 564).

135. *Id*. at 241, 124 N.E.3d at 236, 124 N.Y.S.3d at 686 (Wilson, J., dissenting).

136. *Id*. at 242, 124 N.E.3d at 237, 124 N.Y.S.3d at 687 (citing Burrows v. Bd. of Assessors for Chatham, 64 N.Y.2d 33, 36–37, 473 N.E.2d 748, 749–50, 48 N.Y.S.2d 520, 521–22 (1984)).

137. *See* N.Y. MENTAL HYG. LAW § 47.01 (McKinney 2011).

> The Mental Hygiene Legal Service (MHLS) is a New York State agency responsible for representing, advocating and litigating on behalf of individuals receiving services for a mental disability. It is the oldest and most comprehensive legal advocacy program for the mentally disabled in the United States. Originally created by the New York State Legislature in 1964 as the Mental Health Information Service to act as the guardian of due process rights for the institutionalized mentally disabled, the agency functioned primarily in an informational and ombudsman capacity.

Mental Hygiene Legal Service, NYCOURTS.GOV, https://www.nycourts.gov/courts/ad2/mhls_mainpage.shtml (last visited Oct. 26, 2019).

138. N.Y. MENTAL HYG. LAW § 47.03.

patient.[139] Within sixty days of a patient's involuntary admission, the patient or MHLS can request a hearing "on the need for involuntary care and treatment."[140] The statute governing the procedure for the hearing provides that if such a hearing is requested, a copy of the patient's record must be provided to the court and to MHLS.[141] *Mental Hygiene Legal Service v. Daniel* presented the issue of MHLS's standing to seek the medical records of patients challenging an involuntary admission to a mental hygiene legal facility.[142]

The practice of the psychiatric facility in question was to provide the Court and MHLS copies of "the notice of hearing, the client's admission, transfer, or retention papers, and the physician certificates supporting the client's confinement" but not the patient's clinical record.[143] Facility staff would bring the patient's chart (usually a multi-volume binder) to the hearing.[144] MHLS commenced an Article 78 of New York Civil Practice Law and Rules proceeding against the facility to compel production of patient records because it had observed that the records provided by the facility prior to the hearing were incomplete.[145] The facility raised two issues. First, it asserted that MHLS did not have standing apart from its clients in that it had failed to establish an injury in fact, and that, as a government agency, it lacked organizational standing.[146] The facility also argued that the materials provided satisfied the meaning of the statutory

139. Mental Hygiene Legal Serv. v. Daniels, 33 N.Y.3d 44, 47, 122 N.E.3d 21, 23, 98 N.Y.S.3d 504, 506 (2019) (quoting N.Y. MENTAL HYG. LAW § 9.31). "[T]he director of a hospital shall within five days, excluding Sunday and holidays, after the admission of any patient forward to the mental hygiene legal service a record of such patient . . . ." N.Y. MENTAL HYG. LAW § 9.11.

140. *Mental Hygiene Legal Serv.*, 33 N.Y.3d at 57, 122 N.E.3d at 29, 98 N.Y.S.3d at 512. N.Y. Mental Hyg. Law § 9.31(a) provides . . .

> [i]f, at any time prior to the expiration of the sixty days from the date of involuntary admission of a patient on an application supported by medical certification, he or any relative or friend or the mental hygiene legal service gives notice in writing to the director of request for hearing on the question of need for involuntary care and treatment, a hearing shall be held as herein provided.

N.Y. MENTAL HYG. LAW § 9.31(a).

141. N.Y. MENTAL HYG. LAW § 9.31(b).

142. *Mental Hygiene Legal Serv.*, 33 N.Y.3d at 47, 122 N.E.3d at 22, 98 N.Y.S.3d at 505 (citing N.Y. MENTAL HYG. LAW § 9.31(b)).

143. *Id.* at 48, 122 N.E.3d at 23, 98 N.Y.S. 3d at 506 (citing N.Y. MENTAL HYG. LAW § 9.27(e)).

144. *Id.*

145. *Id.*

146. *Id.*

term "record."[147] MHLS responded that it had standing because of its representation of patients in the proceedings, and that, consistent with other provisions of the mental hygiene law and the regulations of the Office of Mental Hygiene, the term "record" should be construed to mean the patient's entire clinical record.[148]

The Bronx County Supreme Court held that MHLS had organizational standing to bring the mandamus action.[149] It observed that "the proponent of organizational standing need not establish injury-in-fact and need only demonstrate that a party has failed to comply with a statute and that those whom the statute seeks to protect [MHLS' clients] will not seek judicial intervention and, thus, a remedy."[150] Given that the facility had failed to provide complete copies of patients' records as required by statute, the court ordered the hospital to provide complete records of patients who had requested hearings.[151]

The Appellate Division, First Department affirmed[152] with two dissents.[153] The majority supported the finding of organizational standing based on exceptional circumstances,[154] namely, that the interests MHLS asserts are those of the clients it is obligated to protect.[155] It also

147. *Mental Hygiene Legal Serv.*, 33 N.Y.3d at 48, 122 N.E.3d at 23, 98 N.Y.S.3d at 506 (quoting N.Y. MENTAL HYG. LAW § 9.01).

148. *See Mental Hygiene Legal Serv.*, 33 N.Y.3d at 49, 122 N.E.3d at 23–24, 98 N.Y.S.3d at 506–07 (first citing N.Y. MENTAL HYG. LAW § 9.31; then citing N.Y. MENTAL HYG. LAW § 9.01, then citing N.Y. MENTAL HYG. LAW § 33.16(a)(1); and then citing 14 N.Y.C.R.R. § 501.2(a) (2019)).

149. Mental Hygiene Legal Serv. v. Daniels, 55 Misc. 3d 258, 268, 43 N.Y.S.3d 857, 866 (Sup. Ct. Bronx. Co. 2016).

150. *Id.* (citing Grant v. Cuomo, 130 A.D.2d 154, 159, 518 N.Y.S.2d 105, 108 (1st Dep't 1987)).

151. *Id.* at 269, 43 N.Y.S.3d at 867 (first citing N.Y. MENTAL HYG. LAW § 9.31(a)-(b); then citing MENTAL HYG. LAW § 9.01; then citing MENTAL HYG. LAW § 33.16(a)(1); and then citing 14 N.Y.C.R.R. § 501.2(a)).

152. Mental Hygiene Legal Serv. v. Daniels, 158 A.D.3d 82, 106, 67 N.Y.S.3d 147, 164 (1st Dep't 2017).

153. *Id.*

154. *Id.* at 88, 67 N.Y.S.3d at 151. "[O]rganizational standing under exceptional circumstances involv[es] organizations that were dedicated to protecting a class of individuals who suffered injuries which certain statutes were intended to guard against, and who could not otherwise act in their own interests." *Id.*

155. *Id.* at 89, 67 N.Y.S. 3d at 152.

> [T]he injury that MHLS asserts falls within the interests or concerns sought to be provided or protected by the statutory provision that it invokes. Indeed, BFC does not deny that Mental Hygiene Law 9.31(a), which MHLS claims entitled its clients to copies of their entire medical records prior to retention hearings, is intended to protect the rights of the patients.

concluded that the record to which MHLS was entitled was "any information concerning or relating to the examination or treatment of an identifiable patient or client maintained or possessed by a facility which has treated or is treating such patient or client."[156] Thus, it held that MHLS had standing to compel the production of the records from the facility, and that complete records should be turned over.[157]

The Court of Appeals reversed as to standing and thus dismissed the proceeding[158] as to the production of the records.[159] As to standing, despite the language of section 9.31 of the New York Mental Hygiene Law, which provides that MHLS is entitled to the patient's records prior to a retention hearing,[160] the Court concluded that MHLS failed to demonstrate an injury-in-fact to itself rather than its clients and as to them that it could raise the medical records issue in each individual case.[161] In light of its holding, the Court did not reach the issue of the production of the medical records.[162]

The dissent concluded that the principles of standing articulated by the majority "were never meant to close the courthouse door on an individual or entity, like MHLS, specifically named by the Legislature as an intended beneficiary of the government's statutory obligation and who claims some harm due to the government's noncompliance."[163] The dissent also concluded that MHLS was correct on the substantive issue of the production of records, namely, they are entitled to the patient's record.[164]

V. SUBSTANTIAL EVIDENCE STANDARD OF REVIEW

The substantial evidence test for judicial review of an administrative proceeding requires "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

Mental Hygiene Legal Serv., 158 A.D.3d at 89, 67 N.Y.S.3d at 152 (citing MENTAL HYG. LAW § 9.31(a)).

156. *Id.* at 90, 67 N.Y.S.3d at 152 (quoting MENTAL HYG. LAW § 33.16(a)).

157. *Id.* at 94, 67 N.Y.S. 3d at 155 (first citing MENTAL HYG. LAW § 9.31(a)-(b); then citing MENTAL HYG. LAW § 9.01; then citing MENTAL HYG. LAW § 33.16(a)(1); and then citing 14 N.Y.C.R.R. § 501.2(a)).

158. *Id.*

159. *Mental Hygiene Legal Serv.*, 33 N.Y.3d at 50, 122 N.E.3d at 24, 98 N.Y.S. 3d at 507.

160. MENTAL HYG. LAW § 9.31.

161. *Mental Hygiene Legal Serv.*, 33 N.Y.3d at 52, 122 N.E.3d at 26, 98 N.Y.S. 3d at 509.

162. *Id.* at 55, 122 N.E.3d at 28, 98 N.Y.S.3d at 511 (citing MENTAL HYG. LAW § 9.31(b)).

163. *Id.* at 56, 122 N.E.3d at 29, 98 N.Y.S.3d at 512 (Rivera, J., dissenting).

164. *Id.* at 67, 122 N.E.3d at 36, 98 N.Y.S.3d at 519 (Rivera, J., dissenting).

room for choice exists."[165] 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."[166]

The Court reviewed the application of this standard in the memorandum decision of *Haug v. State University of New York at Potsdam.*[167] The question was whether the school's determination that the student had violated the school's code of conduct was supported by substantial evidence.[168] The decision offers a demonstration of the standard's ambiguity. After hearing from the petitioner and individuals to whom the complainant had disclosed the events, the school's hearing board determined that the student had sexually assaulted a female student.[169] On administrative appeal, the penalty for the misconduct was increased from suspension to expulsion.[170] The complainant had not testified.[171]

The student commenced an Article 78 proceeding in the supreme court.[172] Because the matter was subject to the substantial evidence standard of review, the case was transferred to the appellate division which concluded that the school's determination that a code violation had occurred was not supported by substantial evidence.[173] The Court stated rather obliquely that "it is not clear to us that a reasonable person could find from these hearsay accounts an absence of 'behavior that indicate[d],

165. *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, 499–500, 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)).

166. *Id.* at 1047, 100 N.E.3d at 851, 76 N.Y.S. 3d at 512 (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).

167. *See generally* 32 N.Y.3d 1044, 112 N.E.3d 323, 87 N.Y.S.3d, 146 (2018) (applying the substantial evidence standard). In another memorandum decision, the Court held that the decision of the Department of Motor Vehicles to revoke a petitioner's license for failure to submit to a sobriety test when he was pulled over for what appeared to the police officer as driving while intoxicated was supported by substantial evidence. *Schoonmaker v. N.Y.S. Dep't of Motor Vehicles*, 33 N.Y.3d 926, 928, 123 N.E.3d 244, 245, 99 N.Y.S.3d 760, 761 (2019).

168. *Haug*, 32 N.Y.3d at 1044, 112 N.E.3d at 325, 87 N.Y.S.3d at 148.

169. *Id.*

170. *Haug v. State Univ. of N.Y. at Potsdam*, 149 A.D.3d 1200, 1201, 51 N.Y.S.3d 663, 664 (3d Dep't 2017).

171. *Id.* at 1200–01, 51 N.Y.S.3d at 664.

172. *Id.*

173. *Id.* at 1203, 51 N.Y.S.3d at 666 (first citing 125 Bar Corp. v. State Liquor Auth. of the State of N.Y., 24 N.Y.2d 174, 179–180, 247 N.E.2d 157, 160, 299 N.Y.S.2d 194, 199 (1969); and then citing Gerald HH. v. Carrion, 130 A.D.3d 1174, 1176, 14 N.Y.S.3d 185, 188 (3d Dep't 2015)).

without doubt to either party, a mutual agreement to participate in sexual intercourse,' as to do so would require overlooking the complainant's admission that she removed her shirt when sex was suggested."[174] It also dismissed the complainant's report that she "froze up," suggesting that it was not clear that the petitioner was, or should have been, aware of the complainant's "inner turmoil."[175] Finally, it concluded that the petitioner and complainant's versions as to whether she consented to the sex were contradictory and the hearsay testimony about her account was not sufficient to overcome his version.[176]

The dissent found substantial evidence to support the hearing board's finding, observed that the complainant's report that she "froze up" was sufficient to demonstrate her lack of consent, and critiqued the majority's comment about the complainant's "inner turmoil."[177] The dissent also observed that petitioner's account of the events was internally contradictory, and that the hearing board's decision to accept the complainant's version of events when confronted with two "competing versions" was well within its province.[178] Finally, the dissent opined that " we are unpersuaded by petitioner's assertion that the penalty of expulsion was so disproportionate to the offense of sexual misconduct so as to be shocking to one's sense of fairness" in light of the school's goal to protect the well-being of its students and create an atmosphere free of sexual assault.[179]

The Court of Appeals concluded in a memorandum decision that the school's determination was supported by substantial evidence.[180] It observed that "[w]here substantial evidence exists to support a decision

174. *Id.* at 1202, 51 N.Y.S.3d at 665.

175. *Haug*, 149 A.D.3d at 1202, 51 N.Y.S.3d at 665.

176. *Id.* at 1203, 51 N.Y.S.3d at 666 (first citing *125 Bar Corp.*, 24 N.Y.2d at 179–180, 247 N.E.2d at 160, 299 N.Y.S.2d at 199; and then citing *Gerald HH.*, 130 A.D.3d at 1176, 14 N.Y.S.3d at 188). The court expressed concern about the penalty of expulsion. *Id.* It noted that the reason for increasing the penalty to expulsion was not explained and thus seemed to be the improper result of the petitioner appealing the hearing board's determination. *Id.*

177. *Id.* at 1205, 51 N.Y.S.3d at 668 (Clark, J., dissenting).

178. *Haug*, 149 A.D.3d at 1207, 51 N.Y.S.3d at 669 (Clark, J., dissenting) (quoting Collins v. Codd, 38 N.Y.2d 271, 342 N.E.2d 524, 525, 379 N.Y.S.2d 733, 734 (1976)) (first citing Stork Rest., Inc. v. Boland, 282 N.Y. 256, 267, 26 N.E.2d 247, 252 (1940); then citing Lambraia v. State Univ. of N.Y. at Binghamton, 135 A.D.3d 1144, 1146, 23 N.Y.S.3d 679, 681 (3d Dep't 2016); and then citing Lampert v. State Univ. of N.Y. at Albany, 116 A.D.3d 1292, 1294, 984 N.Y.S.2d 234, 236 (3d Dep't 2014)).

179. *Id.* at 1208, 51 N.Y.S.3d at 670 (Clark, J., dissenting) (first citing Idahosa v. Farmingdale State Coll., 97 A.D.3d 580, 581, 948 N.Y.S.2d 104, 106 (2d Dep't 2012); and then citing Deilis v. Albany Med. Coll. of Union Univ., 136 A.D.2d 42, 45, 525 N.Y.S.2d 932, 934 (3d Dep't 1988)).

180. *Haug*, 32 N.Y.3d at 1044, 112 N.E.3d at 324, 87 N.Y.S.3d at 148.

being reviewed by the courts, the determination must be sustained, 'irrespective of whether a similar quantum of evidence is available to support other varying conclusions,'" and even if the determination is based on hearsay evidence.[181] The dissent agreed with the majority of the Third Department.[182]

The case was remitted to the Third Department which held that the school had the authority to increase the penalty to expulsion and was not required to provide a reason for doing so. [183]

VI. ARBITRARY & CAPRICIOUS STANDARD OF REVIEW—REVIEW OF FACTS

Generally, "courts must defer to an administrative agency's rational interpretation of its own regulations in its area of expertise."[184] This means a Department of Labor (DOL) opinion letter regarding the agency's own regulations must be upheld if it is not irrational or unreasonable, due to the agency's position as expert in its area of regulation.[185]

In *Andreyeyeva v. New York Health Care, Inc.*, the Court of Appeals must consider how to interpret a DOL opinion letter for the agency's Minimum Wage Order.[186] Two cases, *Moreno* and *Andreyeyeva*, ask the Court to grant home health care aides who work twenty-four-hour shifts class certification in order to bring suit on behalf of home health aides against home health organizations who do not pay aides on twenty-four-hour shifts for the full twenty-four hours.[187] In opposition, defendant home health organizations argue that this question cannot receive class certification, because determining whether a twenty-hour worker should

181. *Id.* at 325–26, 87 N.Y.S.3d at 148–49 (quoting *Collins*, 38 N.Y.2d at 270, 342 N.E.2d at 524, 379 N.Y.S.2d at 734) (first citing 300 Gramatan Ave. Assocs. v. State Div. of Human Rights, 45 N.Y.2d 176, 180–81, 379 N.E.2d 1183, 1185, 408 N.Y.S.2d 54, 56 (1978); and then citing Gray v. Adduci, 73 N.Y.2d 741, 742, 532 N.E.2d 1268, 1269, 536 N.Y.S.2d 40, 41 (1988)).

182. *Id.* at 326, 87 N.Y.S.3d 149 (Fahey, J., dissenting) (citing *Haug*, 149 A.D.3d at 1201–02, 51 N.Y.S.3d at 664–66).

183. *Haug*, 166 A.D.3d at 1405, 88 N.Y.S. 3d at 679.

184. Peckham v. Calogero, 12 N.Y.3d 424, 431, 911 N.E.2d 813, 816, 883 N.Y.S.2d 751, 754 (2009) (citing Kurcsics v. Merchants Mut. Ins. Co., 49 N.Y.2d 451, 459, 403 N.E.2d 159, 163, 426 N.Y.S.2d 454, 458 (1980)).

185. *Id.*

186. 33 N.Y.3d 152, 164, 124 N.E.3d 162, 165, 100 N.Y.S.3d 612, 615 (2019).

187. *Andreyeyeva v. N.Y. Health Care, Inc.*, 153 A.D.3d 1216, 1217, 61 N.Y.S.3d 280, 281 (2d Dep't 2017); Moreno v. Future Care Health Servs., Inc., 153 A.D.3d 1254, 1255, 61 N.Y.S.3d 589, 591 (2d Dep't 2017).

be paid for all twenty-four-hours is based on each worker's unique facts and circumstances.[188]

Under the New York DOL Minimum Wage Order, all minimum wage employees must be paid for any time they "are required to be available for work at a place prescribed by the employer."[189] In March of 2010, the DOL issued an opinion letter stating that "live-in" employees must be paid for thirteen hours of a twenty-four hour period if they are able to take eight hours for sleep and three hours for meals, an exception to the general availability rule.[190] Additionally, the Minimum Wage Order itself has an exemption stating residential workers do not have be paid during normal sleeping hours even if they are on call during those hours.[191]

In *Moreno* and *Andreyeyeva* at the appellate division, the courts found that the only exception to payment of minimum wage for twenty-four hour workers in the Minimum Wage Order, for those who worked in a "residential" setting, did not apply, and therefore the opinion letter could not be correct, because workers who are not residential employees but are required to be on call for twenty-four hours do not fit within the exception, and are required to be available.[192] The appellate division cases found that the opinion letter was not rational or reasonable because it conflicted with the plain meaning of the Minimum Wage Order, and so workers who are required to be available, and are not residential employees, must be paid minimum wage for all hours worked.[193] As a result, class certification was available, as home health aides who worked twenty-four hours but were not in a residential setting were entitled to be paid for all twenty-four hours of work, and no individual assessment of

188. *Andreyeyeva*, 33 N.Y.3d at 170, 124 N.E.3d at 169, 100 N.Y.S.3d at 619 (citing Ops. Gen. Counsel N.Y.S. Dep't of Labor No. RO-09-0169).

189. 12 N.Y.C.R.R. § 142-2.1 (2018).

190. *Andreyeyeva*, 153 A.D.3d at 1218, 16 N.Y.S.3d at 282.

191. 12 N.Y.C.R.R. § 142-3.1(b).

192. *Andreyeyeva*, 153 A.D.3d at 1218–19, 16 N.Y.S.3d at 282–283 (quoting 12 N.Y.C.R.R. § 142-2.1(b)) (first citing Severin v. Project OHR, Inc., 2012 U.S. Dist. LEXIS 85705, *24–*25 (S.D.N.Y. 2012); then citing Tokhtaman v. Human Care, LLC, 149 A.D.3d 476, 476–77, 52 N.Y.S.3d 89, 91 (1st Dep't 2017); then citing Yaniveth R. v. LTD Realty Co., 27 N.Y.3d 186, 192–93, 51 N.E.3d 521, 524, 32 N.Y.S.3d 10, 13 (2016); and then citing Settlement Home Care v. Indus. Bd. of Appeals of Dep't of Labor, 151 A.D.2d 580, 581–82, 542 N.Y.S.2d 346, 347–48 (2d Dep't 1989)); *Moreno*, 153 A.D.3d at 1255, 61 N.Y.S.3d at 591.

193. *Andreyeyeva*, 153 A.D.3d at 1218, 16 N.Y.S.3d at 282 (first citing *Tokhtaman*, 149 A.D.3d at 477, 52 N.Y.S.3d at 91; and then citing Visiting Nurse Serv. of N.Y. Home Care v. Dep't of Health, 5 N.Y.3d 499, 506, 840 N.E.2d 577, 580, 806 N.Y.S.2d 465, 468 (2005)).

each worker to determine if they actually received eight hours of sleep and three hours of meals was necessary.[194]

Defendant home health care organizations appealed this decision.[195] The Court had to decide whether the DOL's opinion letter should have been followed in the appellate division cases.[196] If the opinion letter should have been taken into account, class status would not be available, because whether a home health aide should be paid for all twenty-four hours required evidence of the employee having their sleep and meals interrupted.[197]

State courts must give deference to an agency's interpretation of its own regulations because the agency is in the best position to "describe the intent and construction of its chosen language."[198] Further, agency interpretation of a regulation "followed for 'a long period of time . . . is entitled to great weight and may not be ignored.'"[199]

Upon review of the DOL Minimum Wage Order and opinion letter, the Court decided that the appellate division erred in disregarding the opinion letter while interpreting the Minimum Wage Order.[200] Specifically, the Court found that the DOL Opinion Letter used its "specialized knowledge" of the home health care industry and harmonized the state and federal approach to minimum wage, and further found that the phrase "required to be available" needs both a worker's presence at a job site, and an active scheduled shift which takes into account sleep and meal breaks.[201] Accordingly, whether a worker must be paid for the full twenty-four hours turns on the existence or absence of scheduled breaks for meals and sleep.[202] The Court notes that although this case shows that there may be a need for further regulation of home health care worker protections, "it is for DOL and the Legislature, not this Court, to consider whether the sleep and meal time exemption is a

194. *Andreyeyeva*, 153 A.D.3d at 1219, 16 N.Y.S.3d at 282–83 (first citing 12 N.Y.C.R.R. § 142-2.1(b); then citing *Tokhtaman*, 149 A.D.3d at 476–77, 52 N.Y.S.3d at 91; then citing *Yaniveth R.*, 27 N.Y.3d at 192–93, 51 N.E.3d at 524–25, 32 N.Y.S.3d at 13–14; and then citing *Settlement Home Care*, 151 A.D.2d at 581, 542 N.Y.S.2d at 347).

195. *Andreyeyeva*, 33 N.Y.3d at 172, 124 N.E.3d at 171, 100 N.Y.S.3d at 621.

196. *Id.* at 174, 124 N.E.3d at 172, 100 N.Y.S.3d 622.

197. *Id.*

198. *Id.* at 174, 124 N.E.3d at 172–73, 100 N.Y.S.3d at 622–23 (citing *Peckham*, 12 N.Y.3d at 431, 911 N.E.2d at 816, 883 N.Y.S.2d at 754).

199. *Id* .at 174–75, 124 N.E.3d at 173, 100 N.Y.S.3d at 623 (quoting Ferraiolo v. O'Dwyer, 302 N.Y. 371, 376, 98 N.E.2d 563, 565 (1951)).

200. *Andreyeyeva*, 33 N.Y.3d at 182–83, 124 N.E.3d at 179, 100 N.Y.S.3d at 629.

201. *Id.* at 175–76, 182, 124 N.E.3d at 173–74, 178–79, 100 N.Y.S.3d at 623–24.

202. *Id.* at 176, 124 N.E.3d at 174, 100 N.Y.S.3d at 624 (citing Roberts v. Tishman Speyer Props., L.P., 13 N.Y.3d 270, 289, 918 N.E.2d 900, 908, 890 N.Y.S.2d 388, 396 (2009)).

viable methodology to ensure employer compliance with the law and proper wage payment in the case of home health care aides."[203]

Although the Court ultimately left this decision and further regulation to DOL, Judge Garcia dissented, stating that the deference afforded to DOL Orders should not be given to the agency's opinion letters.[204] Opinion letters do not have the procedural safeguards of new orders, which include "research, consultation, public hearings, notice, and input from various stakeholders."[205] Accordingly, the majority should not have given such weight to the opinion letter, which amounted to an end run around the safeguards built into the Minimum Wage Act, and required no consultation with the employers and employees who would be bound by the new interpretation.[206]

"[W]here the question is one of pure statutory interpretation," the court "need not accord any deference to an agency's determination and can undertake its function of statutory interpretation [sic][.]"[207] Whether the State Education Department's (SED) interpretation of the statute governing charter school pre-K programs should be accorded this treatment was at issue in *Matter of DeVera*.[208]

In 1997, the legislature first addressed universal pre-K by creating a grant program for school districts.[209] School districts were expected to use some of the funds to collaborate with local organizations in creating programs.[210] The plan suffered from uncertain funding and the school district's lack of enthusiasm.[211] In 2014, the legislature tried again, this time with substantial funding and a framework which did not rely on

203. *Id.* at 183, 124 N.E.3d at 179, 100 N.Y.S.3d at 629.

204. *See id.* at 193–94, 124 N.E.3d at 186–87, 100 N.Y.S.3d at 636–37 (Garcia, J., dissenting).

205. *Andryeyeva*, 33 N.Y.3d at 193, 124 N.E.3d at 186, 100 N.Y.S.3d at 636 (Garcia, J., dissenting).

206. *Id.* at 193–94, 124 N.E.3d at 186–87, 100 N.Y.S.3d at 636–37 (Garcia, J., dissenting).

207. DeVera v. Elia, 32 N.Y.3d 423, 434, 117 N.E.3d 757, 763, 93 N.Y.S.3d 198, 204 (2018) (quoting Albano v. Bd. of Trs., 98 N.Y.2d 548, 553, 780 N.E.2d 159, 161, 750 N.Y.S.2d 558, 560 (2002)).

208. *Id.* at 427, 117 N.E.3d at 759, 93 N.Y.S.3d at 200.

209. *Id.* (quoting N.Y. EDUC. LAW § 3602-e (McKinney 2019)).

210. *Id.* (quoting N.Y. EDUC. LAW § 3602-e(5)(d)-(e)).

211. *Id.* at 428, 117 N.E.3d at 759, 93 N.Y.S.3d at 200 (quoting Citizens Budget Commission, The Challenge of Making Universal Prekindergarten a Reality in New York State, Oct. 23, 2013) (citing Jeffrey D. Klein, *An Economic Argument for NYC Mayor Bill de Blasio's Universal Pre-K Plan*, OFFICE OF SENATE MAJORITY COALITION LEADER (Jan. 5, 2014), https://www.nysenate.gov/sites/default/files/Klein%20UPK%20Economic%20Report_0.docx).

school districts to disburse funds to community programs.[212] Community providers could seek funding by participating in a school district's application to SED for its funding; if the district denied a community provider's request to be included in the district's application, the community provider could seek funding directly from SED.[213]

In 1998, legislation authorized the creation of charter schools which would "operate independently of existing schools and school districts."[214] Once created, charter schools generally do operate independently.[215] With regard to charter school pre-K programs, section 3602-ee(12) of the Education Law provides that "monitoring, programmatic review and operational requirements [of the pre-K programs] shall be the responsibility of the charter entity and shall be consistent with the requirements of [the Charter Schools Act]."[216]

Nevertheless, school districts have a limited oversight role regarding charter schools: they conduct inspections and advise of any problems of a school's non-compliance with laws and regulations applicable to the charter entity and the Board of Regents.[217]

The petitioner charter school sought and received approval from the New York City Department of Education (DOE) for a three-site pre-K program subject to negotiation of a contract with DOE.[218] The DOE

212. *DeVera*, 32 N.Y.3d at 428, 117 N.E.3d at 759, 93 N.Y.S.3d at 200 (citing N.Y. EDUC. LAW § 3602-ee (McKinney 2019)).

213. *Id.* at 428, 117 N.E.3d at 759–60, 93 N.Y.S.3d at 200–01 (quoting N.Y. EDUC. LAW § 3602-ee(3)(a)-(d)).

> Charter schools must meet the 'same health and safety, civil rights, and student assessment requirements applicable to public schools,' but they are otherwise 'exempt from all other state and local laws, rules, regulations or policies governing public or private schools [and] school districts,' unless the Charter Schools Act specifies differently. The Charter Schools Act further provides that, 'notwithstanding any provision of law to the contrary, to the extent any provision of [the Charter Schools Act] is inconsistent with any other state or local law the provisions of [the Charter Schools Act] shall govern and be controlling.'

Id. at 429–30, 117 N.E.3d at 760, 93 N.Y.S.3d at 201 (internal citation omitted) (quoting N.Y. EDUC. LAW § 2854(1)(a)-(b) (McKinney 2019)).

214. *Id.* at 429, 117 N.E.3d at 760, 93 N.Y.S.3d at 201 (quoting N.Y. Charter Schs. Ass'n v. DiNapoli, 13 N.Y.3d 120, 123, 914 N.E.2d 991, 992, 886 N.Y.S.2d 74, 75 (2009)).

215. *See id.* (quoting *N.Y. Charter Schs. Ass'n*, 13 N.Y.3d at 123, 914 N.E.2d at 992, 886 N.Y.S.2d at 75).

216. *DeVera*, 32 N.Y.3d at 430–31, 117 N.E.3d at 761, 93 N.Y.S.3d at 202 (quoting N.Y. EDUC. LAW § 3602-ee(12)).

217. *Id.* at 430, 117 N.E.3d at 761, 93 N.Y.S.3d at 202 (quoting N.Y. EDUC. LAW § 2853(2-a)).

218. *Id.* at 431, 117 N.E.3d at 761–62, 93 N.Y.S.3d at 202–03.

contract contained "provisions that sought to regulate the curriculum and operations of the charter school pre-kindergarten program" as well as a provision that "purported to give DOE 'monitoring' authority[ ]" and "broad discretion to change curriculum or operational requirements at any time."[219] The school objected to the contract's terms. [220] The pre-K program began in August 2015 and the school subsequently sought payment of funds from DOE. [221] DOE refused, citing the lack of a signed contract.[222] The school sought an administrative determination from SED, directing DOE to pay and declaring the DOE contract unlawful.[223] The SED Commissioner found that DOE was entitled to withhold payment from the school in the absence of a signed contract and that section 3602-ee(12) "did not constitute an exclusive grant of authority to the charter entity" but rather reflected the fact that the charter school *also* had responsibility for insuring compliance with laws and regulations.[224]

The petitioner school commenced an Article 78 challenging the Commissioner's determination and seeking the same relief as it had sought administratively.[225] The supreme court held that the Commissioner's determination was "rational and not arbitrary and capricious."[226] The appellate division reversed, holding that the plain meaning of the statute was that the charter school was solely responsible for oversight and that the "inspection" role given to the school district did not mean regulating the charter school's curriculum.[227] The court remitted the matter to SED because the Commissioner's erroneous determination affected the payment to petitioner.[228]

The Court of Appeals granted leave to appeal[229] and affirmed the holding of the appellate division.[230] It found that the Commissioner's interpretation of section 3206-ee(12) was not entitled to deference; all that was needed in its view was a straightforward analysis "to determine where and with whom the Legislature housed oversight authority."[231] The

219. *Id.* at 431–32, 117 N.E.3d at 762, 93 N.Y.S.3d at 203.

220. *DeVera*, 32 N.Y.3d at 432, 117 N.E.3d at 762, 93 N.Y.S.3d at 203.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.* (quoting N.Y.EDUC. LAW §§ 3602-ee(10, 12)).

225. *DeVera*, 32 N.Y.3d at 433, 117 N.E.3d at 762–63, 93 N.Y.S.3d at 203–04.

226. *Id.* at 433, 117 N.E.3d at 763, 93 N.Y.S.3d at 204.

227. *See id.* (first citing DeVera v. Elia, 152 A.D.3d 13, 20, 56 N.Y.S.3d 609, 614–15 (3d Dep't 2017); and then citing N.Y.EDUC. LAW §§ 3602-ee (10, 12)).

228. *DeVera*, 152 A.D.3d at 22, 56 N.Y.S.3d at 616.

229. *DeVera*, 32 N.Y.3d at 433, 117 N.E.3d at 763, 93 N.Y.S.3d at 204.

230. *Id.* at 427, 117 N.E.3d at 759, 93 N.Y.S.3d at 200.

231. *Id.* at 434, 117 N.E.3d at 763, 93 N.Y.S.3d at 204.

special expertise of SED was not warranted.[232] It quickly dismissed SED's view that the school districts should have "a vigorous supervisory role . . . over charter school Pre–K programs" as unavailing.[233] It viewed the legislative language as clearly contemplating exclusive rather than shared oversight of charter schools.[234] It also dismissed the respondents' arguments that other provisions of the Education Law supported SED and DOE's interpretation.[235]

The dissent argued that the majority's interpretation ignores the broader context of SED oversight and "strips" the charter school from "oversight from the SED—the sole entity legislatively charged with approving grants for pre-k programs in accordance with its own scoring system and developing statewide inspection and quality assurance protocols mandated for provider annual inspections."[236]

In *Mental Hygiene Legal Service v. Sullivan*, the Court was asked to address whether MHLS fell within the categories of individuals entitled under the Mental Hygiene Law to participate in treatment plan meetings for an individual in a Sex Offender Treatment Program.[237] Section 29.13, governing treatment plans for any patient in a mental hygiene facility, provides that "an authorized representative", and, if the patient wishes, "a significant individual to the patient including any relative, close friend or individual otherwise concerned with the welfare of the patient" can participate in the meetings.[238] MHLS, as noted earlier, is required by statute "[t]o provide legal services and assistance to patients or residents and their families related to the admission, retention, and care and treatment of such persons, . . . and to inform patients or residents, their families and, in proper cases, others interested in the patients' or residents' welfare of the availability of other legal resources which may be of assistance in [other] matters."[239] The Chief of Service for the Sex Offender Treatment Program denied the patient's request as well as that

232. *Id.* at 434, 117 N.E.3d at 763–64, 93 N.Y.S.3d at 204–05 (citing Lorillard Tobacco Co. v. Roth, 99 N.Y.2d 316, 322, 786 N.E.2d 7, 10, 756 N.Y.S.2d 108, 111 (2003)).

233. *Id.* at 434, 117 N.E.3d at 763, 93 N.Y.S.3d at 204.

234. *Id.* at 435–36, 117 N.E.3d at 764, 93 N.Y.S.3d at 205 (citing N.Y. EDUC. LAW § 3602-ee(12)).

235. *DeVera*, 32 N.Y.3d at 436, 117 N.E.3d at 765, N.Y.S.3d at 206 (citing N.Y. EDUC. LAW § 3602-ee(12)).

236. *Id.* at 457–58, 117 N.E.3d at 780, N.Y.S.3d at 221 (Rivera, J., dissenting) (first citing N.Y. EDUC. LAW § 3602 (ee)(12); and then citing N.Y. EDUC. LAW §§ 3602 (2, 5, 6, 7)).

237. 32 N.Y.3d at 654, 119 N.E.3d at 1226, 95 N.Y.S.3d at 545 (2019) (first citing N.Y. MENTAL HYG. LAW § 10 (McKinney 2011); then citing N.Y. MENTAL HYG. LAW § 29 (McKinney 2011); and then citing N.Y. MENTAL HYG. LAW § 47 (McKinney 2011)).

238. N.Y. MENTAL HYG. LAW § 29.13(b).

239. N.Y. MENTAL HYG. LAW § 47.03.

of MHLS to have MHLS participate in the treatment plan meetings.[240] MHLS commenced an Article 78 proceeding to challenge that decision.[241] The supreme court and the appellate division upheld the decision.[242] The appellate division interpreted the term "authorized representative" as limited to individuals making treatment decisions for the patient.[243] MHLS'conventional attorney-client relationship with the patient removed it from the category of decision-maker.[244] The language regarding a person concerned with the patient's welfare likewise excluded someone providing legal counsel.[245]

The dissent looked at both the legislative intent of section 29.13, which focused on ensuring that the patient had a "friend or *advocate"* at their side[246] and the statutory language governing MHLS's role to conclude that MHLS was entitled to participate in the treatment plan meetings.[247] MHLS appealed as of right.[248]

The Court called MHLS "a creature of statute" and observed that absent explicit statutory direction, the Court could not supply a role for it.[249] It observed that when the Legislature intends a role for MHLS, a statute will specifically mention them; because the sex offender legislation (Article 10 of the Mental Hygiene Law) mentions treatment plans without reference to MHLS, it is clear that the legislature did not

240. *Sullivan*, 32 N.Y.3d at 655, 119 N.E.3d at 1227, 95 N.Y.S.3d at 546.

241. *Id.* at 655–56, 119 N.E.3d at 1227, 95 N.Y.S.3d at 546.

242. Mental Health Hygiene Legal Serv. v. Sullivan, 153 A.D.3d 114, 116–17, 59 N.Y.S.3d 518, 520 (2017).

243. *Id*. at 118, 59 N.Y.S.3d at 521 (quoting Anderson v. U.S. Dep't of Labor, 422 F.3d 1155, 1180 (10th Cir. 2005)) (first citing Protection of Human Subjects, 45 C.F.R. § 46.102(c) (2019); and then citing 18 N.Y.C.R.R. § 387.1(e) (2019)).

244. *Id*. (citing N.Y. Code Prof. Conduct R. 1.14(a), (b) (codified at 22 N.Y.C.R.R. § 1200 (2019)).

245. *Id*. at 119, 59 N.Y.S.3d at 521.

246. *Id*. at 121, 59 N.Y.S.3d at 523 (Garry, J., dissenting) (citing N.Y. MENTAL HYG. LAW § 29.13(b)).

247. *Sullivan*, 153 A.D.3d at 123, 59 N.Y.S.3d at 524 (Garry, J., dissenting).

248. *Sullivan*, 32 N.Y.3d at 657, 119 N.E.3d at 1228, 95 N.Y.S.3d at 547 (Garry, J., dissenting) (citing N.Y.C.P.L.R. 5601(a) (McKinney 2014)).

249. *Id*. at 657, 119 N.E.3d at 1228, 95 N.Y.S.3d at 547 (citing Flynn v. State Ethics Comm'n, 87 N.Y.2d 199, 202, 661 N.E.2d 991, 993, 638 N.Y.S.2d 418, 420 (1995)). As an aside, in *Mental Hygiene Legal Service v. Daniels* issued on, February 14, 2019, the same day as *Sullivan*, the Court was faced with interpreting a statute in which MHLS is mentioned by name, demonstrating as the Court points out in *Sullivan*, "a role for the agency." *See generally* 33 N.Y.3d 44, 122 N.E.3d 21, 98 N.Y.S.3d 504 (interpreting a statute involving MHLS); *Sullivan*, 32 N.Y.3d at 658, 119 N.E.3d at 1229, 95 N.Y.S.3d at 548. But in *Daniels*, the court declined to hold that MHLS had standing to compel disclosure of documents pursuant to the statute that gave it the right to those documents. *See Daniels*, 33 N.Y. 3d at 47, 122 N.E.3d at 22, N.Y.S.3d at 505 (citing N.Y. MENTAL HYG. LAW § 9.31(b)).

contemplate a role for MHLS.[250] The Court noted that the Office of Mental Health conceded that a decision to allow MHLS to participate in a treatment plan meeting was within its discretion if MHLS had developed a significant relationship with the patient.[251] The Court concluded that the record contained no showing for an exercise of that discretion.[252] It affirmed the appellate division's decision that MHLS was not entitled to participate.[253]

The dissent agreed that MHLS is not entitled to join the treatment plan meeting as MHLS; but focused on what the patient is entitled to do, namely, designate a particular MHLS attorney as a person of significance to him.[254] The dissent points out that a lawyer's role is quite broad, including advocacy, a role that is reflected in translations of the word "lawyer."[255] Finally, with biting humor, the dissent notes that

> [a]lthough OMH grumbles that the inclusion of MHLS attorneys in the treatment planning would produce some vaguely-defined adversarial atmosphere and thereby undermine the process, those warnings are speculative at best and such a risk would exist with anyone. Family members and friends can be adversarial as well—they might even be lawyers![256]

VII. STATE AGENCY DUTIES AND OBLIGATIONS BY STATUTE

In *Gonzalez v. Annucci*, the Court of Appeals interpreted state law that requires state agencies to help reintegrate prison inmates into society after they have served their sentence. In 2012, the petitioner was convicted of statutory rape in the second degree.[257] His sentence required two and a half years in prison, and three years supervision upon release.[258] After receiving good time credit that allowed him to receive conditional release four months early from his prison sentence, the petitioner had to locate housing at least one thousand feet away from a school for early release to be approved by the Department of Corrections and Community

250. *Id*. at 658–59, 119 N.E.3d at 1229, 95 N.Y.S.3d at 548 (first citing N.Y. MENTAL HYG. LAW § 10.10(b) (McKinney 2019); and then citing Corrigan v. New York State Office of Children & Family Servs., 28 N.Y.3d 636, 642, 71 N.E.3d 537, 540, 49 N.Y.S.3d 46, 49 (2017)).

251. *Id*. at 662, 119 N.E.3d at 1231, 95 N.Y.S.3d at 550.

252. *Id.*

253. *Sullivan*, 32 N.Y.3d at 662, 119 N.E.3d at 1232, 95 N.Y.S.3d at 551.

254. Thus, the patient's statutory choice was disregarded. *Id*. (Wilson, J., dissenting).

255. *See id*. at 667, 119 N.E.3d at 1235, 95 N.Y.S.3d at 554. (Wilson, J., dissenting).

256. *Id.* at 669, 119 N.E.3d at 1236, 95 N.Y.S.3d at 555. (Wilson, J., dissenting).

257. Gonzalez v. Annucci, 32 N.Y.3d 461, 476, 117 N.E.3d 795, 804, 93 N.Y.S.3d 236, 245 (2018) (Rivera, J., dissenting).

258. *Id.*

Supervision (DOCCS).[259] Unable to secure housing that was sufficiently far away from a school,[260] he was denied early release and served his full prison sentence.[261] Unsuccessful in finding housing approved by DOCCS, the petitioner was moved to a Residential Treatment Facility (RTF) for six months, after which he was placed in a New York City homeless shelter that was over one thousand feet from a school.[262]

During his stay at the RTF, the petitioner commenced an Article 78 proceeding, arguing that (1) DOCCS failed to assist him in finding suitable housing locations, (2) his RTF facility should not have been designated as an RTF, and (3) that the loss of conditional release for good time credit was a violation of state procedure and procedural due process.[263] The trial court determined that Gonzalez's petition was moot, because he was no longer incarcerated or subject to any conditional release programs by the time the case was heard.[264] Gonzalez appealed.[265]

The appellate division agreed that all issues except the loss of good time credit were moot, but applied the mootness exception because this situation was likely to be repeated and continue to evade court review, and had not previously been reviewed by the courts.[266] The appellate court found that DOCCS failed to provide the assistance envisioned by the legislature to Gonzalez, and "did little or nothing to assist the petitioner."[267] The appellate court declared that DOCCS "had an affirmative statutory obligation to provide substantial assistance to [the] petitioner," which it failed to do.[268] Regarding the RTF, the appellate court held that DOCCS did not act irrationally in placing Gonzalez at the RTF, and he failed to show that the RTF should not have received that

259. *Id.* at 466, 117 N.E.3d at 797, 93 N.Y.S.3d at 238.

260. *Id.* The dissent discussed conditions imposed on the petitioner, including that he had to conduct his search without internet and no guidance from DOCCS on compliant areas, with only twice weekly appointments to propose new locations to DOCCS officers. *Id.* Before being released, the petition proposed 58 locations which were all denied. *Id.* at 483, 117 N.E.3d at 809, 93 N.Y.S.3d at 250 (Rivera, J., dissenting).

261. *Gonzalez*, 32 N.Y.3d at 467, 117 N.E.3d at 798, 93 N.Y.S.3d at 239 (first citing N.Y. PENAL LAW § 70.45(3) (McKinney 2009 & Supp. 2019); and then citing N.Y. CORRECT. LAW § 2 (McKinney 2014 & Supp. 2019)).

262. *Id.* at 467, 117 N.E.3d at 797–98, 93 N.Y.S.3d at 238–39.

263. *Id.* at 467, 117 N.E.3d at 798, 93 N.Y.S.3d at 239.

264. *Id.* at 469–70, 117 N.E.3d at 799, 93 N.Y.S.3d at 240.

265. Gonzalez v. Annucci, 149 A.D.3d 256, 258, 50 N.Y.S.3d 597, 599 (3d Dep't 2017).

266. *Id.* at 261, 50 N.Y.S.3d at 601 (quoting People ex. rel. Green v. Superintendent of Sullivan Corr. Facility, 137 A.D.3d 56, 58, 25 N.Y.S.3d 375, 376 (3d Dep't 2016)) (first citing City of New York v. Maul, 14 N.Y.3d 499, 507, 929 N.E.2d 366, 371, 903 N.Y.S.2d 304, 309 (2010); then citing N.Y. PENAL LAW § 70.45(3); and then citing N.Y. CORRECT. LAW § 2).

267. *Id.* at 263, 50 N.Y.S.3d at 603.

268. *Id.* at 264, 50 N.Y.S.3d at 603–04.

designation.[269] Finally, Gonzalez's loss of good time credit was not irrational, because he was unable to secure housing that satisfied DOCCS early release criteria, a decision within DOCCS discretion.[270] DOCCS appealed to the Court of Appeals, arguing that the mootness exception should not have been applied, and in any event, state law did not imposed a duty to provide more assistance in locating housing than was given.[271]

Initially, the Court determined that the exception to mootness applied, because the relatively short period of time a petitioner is involved in a conditional release program or subject to an RTF[272] is likely to evade review, and this is a "substantial and novel issue[] . . . likely to be repeated . . . ."[273] The Court then turned to the critical issue, whether DOCCS fulfilled its obligation to assist inmates by locating housing.[274]

New York Correction Law §201(5) requires DOCCS to "assist inmates eligible for community supervision and inmates who are on community supervision to secure employment, education or vocational training, and housing."[275] The Court of Appeals interpreted the appellate court's order to provide "substantial" assistance as creating a heightened duty on DOCCS toward sex offenders than the general population of a prison.[276] DOCCS has no statutory obligation to provide more than "assistance" under section 201(5), which the agency fulfilled by investigating locations Gonzalez proposed and if the location complied with the conditions of release, granting approval.[277] State law mandates

269. *Id.* at 261–62, 50 N.Y.S.3d at 602 (first citing N.Y. CORRECT. LAW § 2; and then citing N.Y. CORRECT. LAW § 73(1, 2, 10) (McKinney 2019)).

270. *Gonzalez*, 149 A.D.3d at 259–60, 50 N.Y.S.3d at 600 (quoting Fowler v. Fischer, 98 A.D.3d 1212, 1212, 951 N.Y.S. 262, 263 (3d Dep't 2012)) (first citing N.Y. CORRECT. LAW § 803(4) (McKinney 2014 & Supp. 2019); and then citing Thomas v. Fischer, 106 A.D.3d 1343, 1344, 966 N.Y.S.2d 254, 255 (3d Dep't 2013); then citing N.Y. EXEC. LAW § 259(c) (McKinney 2018); then citing Boss v. N.Y.S. Div. of Parole, 89 A.D.3d 1265, 1266, 932 N.Y.S.2d 387, 388 (3d Dep't 2011); and then citing Breeden v. Donnelli, 26 A.D.3d 660, 660–61, 808 N.Y.S.2d 839, 840–41 (3d Dep't 2006)).

271. *Gonzalez*, 32 N.Y.3d at 470–71, 117 N.E.3d at 800–01, 93 N.Y.S.3d at 241–42 (first citing N.Y.C.P.L.R. § 5601(a) (McKinney 2014); and then citing N.Y. CORRECT. LAW § 201(5) (McKinney 2014)).

272. *Id.* at 470, 117 N.E.3d at 800, 93 N.Y.S.3d at 241. RTF placement may be required for a maximum of six months following a term of imprisonment, and conditional release in this case would only have been available for four months. N.Y. PENAL LAW § 70.45(3) (McKinney 2019); *Id.* at 466–67, 117 N.E.3d at 798, 93 N.Y.S.3d at 239.

273. *Id.* (citing Hearst Corp., v. Clyne, 50 N.Y.2d 707, 714–15, 409 N.E.2d 876, 878, 431 N.Y.S.2d 400, 402 (1980)).

274. *Id.* at 471, 117 N.E.3d at 801, 93 N.Y.S.3d at 242.

275. N.Y. CORRECT. LAW §201(5).

276. *Gonzalez*, 32 N.Y.3d at 472, 117 N.E.3d at 801, 93 N.Y.S.3d at 242

277. *Id.* at 474–75, 117 N.E.3d at 803, 93 N.Y.S.3d at 244 (citing N.Y. CORRECT. LAW § 201(5)).

greater duties toward second and third level offenders, but because Gonzalez was only a level one offender, no state agency was required to "investigate and approve" his residence placement.[278] The Court also held that Gonzalez's rights were not violated by placement in an RTF, because he had the rights of a "resident" rather than an inmate,[279] and his placement in a facility near Poughkeepsie, New York was the closest option to New York City with appropriate treatment programs for a sex offender.[280] Finally, the Court declined to invoke the mootness exception to discuss loss of good time credit because offenders with a longer sentence will be able to litigate the issue before it becomes moot.[281]

In his dissent, Judge Wilson argues that DOCCS forced Gonzalez to play a game of "battleship," blindly guessing rental apartments, only for DOCCS to disapprove of each option.[282] Further, DOCCS not only provided no resources for Gonzalez to use in his hunt, but appeared to actively work against him, refusing to let his mother propose residences directly to a DOCCS agent for approval or disapproval.[283] This conduct fell below the "assistance" standard required by statute, and therefore DOCCS did not fulfill its duty to assist inmates who are eligible for community supervision with locating housing.[284] Judge Wilson also argued trial level fact-finding should have been ordered regarding Gonzalez's RTF claims, and that if his claims are true, the RTF facility should not have held this designation, making Gonzalez's placement there a statutory violation.[285] Finally, Judge Wilson argued that the good-time credit issue will continue to avoid review, because even an offender with a sentence of twenty-five years and a corresponding conditional release time of roughly three and half years might not reach the Court of Appeals until four years after the start of his or her case, as happened to Gonzalez.[286]

278. *Id.* at 473, 117 N.E.3d at 802, 93 N.Y.S.3d at 243 (citing 9 N.Y.C.R.R. § 8002.7 (McKinney 2019)).

279. *Id.* at 475, 117 N.E.3d at 803, 93 N.Y.S.3d at 244. Gonzalez had argued that he was held under the same conditions as a prisoner while at the RTF, but the Court accepted DOCCS argument that as a resident, Gonzales met with DOCCS staff more frequently than inmates, and was paid a higher wage than those serving a prison sentence at the facility. *Id.* at 468–69, 117 N.E.3d at 798–99, 93 N.Y.S.3d at 239–40.

280. *Gonzalez*, 32 N.Y.3d at 469, 117 N.E.3d at 799, 93 N.Y.S.3d at 240.

281. *See id.* at 470, 117 N.E.3d at 800, 93 N.Y.S.3d at 241.

282. *Id.* at 476, 117 N.E.3d at 804, 93 N.Y.S.3d at 245 (Wilson, J., dissenting).

283. *Id.* at 484, 117 N.E.3d at 810, 93 N.Y.S.3d at 251.

284. *Id.*

285. *See Gonzalez*, 32 N.Y.3d at 485–86, 117 N.E.3d at 811, 93 N.Y.S.3d at 252.

286. *Id.* at 488, 117 N.E.3d at 812–13, 93 N.Y.S.3d at 253–54.

VIII. JUDICIAL REVIEW OF JUDICIAL MISCONDUCT

Leticia Astacio became a Rochester City Court judge in 2015.[287] Prior to her election, she worked as an Assistant District Attorney and in private practice handling DWI cases.[288] On April 23, 2018, the Board of Judicial Conduct reviewed a complaint brought against Judge Astacio and ultimately determined that she should be removed from her position to protect the public interest.[289] On appeal to the Court of Appeals, the Commission's determination was accepted and Astacio was removed from the bench.[290]

In February of 2016, Astacio was approached by a police officer (Trooper Kowalski) while sitting in her car on the side of I-490.[291] Trooper Kowalski stated that the judge was dressed in casual and "disheveled" clothing, and her car had multiple flat tires and damage to the front of the vehicle.[292] When questioned about the damage Astacio had no recollection of hitting anything, and had no identifying information or her vehicle registration with her in the car.[293] Kowalski believed Astacio had been drinking due to her appearance and demeanor, and when asked about recent consumption of alcohol she responded evasively, saying that she did not drink at this time of the morning, 7 a.m..[294] When pressed about her alcohol consumption, Astacio stated that she was uncomfortable in the car and even suggested that the officer might shoot her, although he had made no threatening moves or displayed his weapon.[295]

After calling a second officer to the scene to act as a witness, Kowalski asked Astacio to submit to a field sobriety test, which she agreed to in part, declining a balance test due to a brain injury.[296] Although she passed the administered tests, Astacio was arrested based on Kowalski's observations and experience with intoxicated individuals.[297] Instead of remaining silent, Astacio lectured Kowalski

287. *Astacio*, Determination of the State of New York Commission on Judicial Conduct, 3 (Apr. 23, 2018), http://cjc.ny.gov/Determinations/A/Astacio.Leticia.D.2018.04.23.DET.pdf.

288. *Id.*

289. *Id.* at 40–41.

290. *In re* Astacio, 32 N.Y.3d 131, 138, 87 N.Y.S.3d 545, 550 (2018).

291. *Astacio*, *supra* note 287, at 3–4.

292. *Astacio*, *supra* note 287, at 4.

293. *Astacio*, *supra* note 287, at 4.

294. *Astacio*, *supra* note 287, at 5.

295. *Astacio*, *supra* note 287, at 6.

296. *Astacio*, *supra* note 287, at 6.

297. *Astacio*, *supra* note 287, at 7.

about probable cause and DWI factors, opining that he did not have enough evidence to charge her with DWI.[298]

After being arrested, Astacio submitted a preliminary breath test, which registered the presence of alcohol, and she was transported to the police barracks.[299] During the trip Astacio was "upset, irate, belligerent, loud and swearing."[300] Upon arrival, Astacio continued to act belligerently and plead with the officers not to continue with the arrest process because she was scheduled to preside over arraignments that morning.[301] She was convicted of DWI and sentenced to a one year conditional discharge.[302] The Judicial Conduct Board determined that Astacio's profanity and her attempt to use her position as a judge to influence the police were significant factors in determining appropriate punishment.[303]

Multiple attempts to start her car while testing positive for alcohol brought Astacio back to Court, because she had agreed not to drink for a year as a consequence of her DWI conviction.[304] She admitted to drinking while discharged under the defense that she had not read her conditional discharge agreement, and even had she understood the prohibition on drinking, it "would [not] have necessarily changed [her] behavior."[305]

While still under the terms of the conditional discharge, Astacio took a trip to Thailand.[306] She failed to notify the police or court of her trip, and later it became known that she left the day after another attempt to drive her car after drinking alcohol.[307] A series of alleged misunderstandings between Astacio and her lawyer resulted in a missed court ordered drug test and court appearance, and the issuance of a bench warrant for Astacio's arrest.[308] The result was the revocation of her conditional discharge, and Astacio was sentenced to sixty days incarceration, three years' probation, and an alcohol monitoring bracelet for a period of six months.[309] Based on these actions, the Judicial Conduct

298. *Astacio*, *supra* note 287, at 7.
299. *Astacio*, *supra* note 287, at 8–9.
300. *Astacio*, *supra* note 287, at 9.
301. *Astacio*, *supra* note 287, at 13.
302. *Astacio*, *supra* note 287, at 10 (citing N.Y. VEH. & TRAF LAW § 1192(3) (McKinney 2011)).
303. *Astacio*, *supra* note 287, at 38.
304. *Astacio*, *supra* note 287, at 15.
305. *Astacio*, *supra* note 287, at 16.
306. *Astacio*, *supra* note 287, at 22.
307. *Astacio*, *supra* note 287, at 22.
308. *Astacio*, *supra* note 287, at 23–24.
309. *Astacio*, *supra* note 287, at 25.

Board determined that Astacio had a "profound lack of respect" for the law, and this series of events alone warranted a severe sanction.[310]

However, the determination goes onto discuss more incidents of conduct unbecoming a judge.[311] When she first took the bench, Astacio used her position to help a former client who was in front of her on a separate charge, including attempting to transfer him to a lenient judge and setting a nominal bail that would give her former client credit for time served.[312] Another time, Astacio made a number of inappropriate comments about a person being arraigned, jokingly suggesting that the defendant should be roughed up and that she "need[ed] a whoopin.'"[313] Similarly, the judge told a third defendant that if she were driving when he blocked traffic, her choice would have been to run him over.[314] Finally, Astacio made light of an alleged sexual misconduct victim's situation when she laughed at an insensitive joke made by the defendant's attorney.[315] These situations were all examples of improper conduct on the bench, and factored into Astacio's removal.[316]

Astacio appealed the Commission's determination, arguing that the punishment was too harsh for her actions.[317] The Court of Appeals review included ensuring the Commission's determination was based only on evidence within the record, and making sure that a determination of removal is reserved for "truly egregious circumstances."[318]

In the determination, the Commission based its decision on Astacio's violation of several rules of Judicial Conduct.[319] These include maintaining high standards of integrity and independence in the judiciary, maintaining public confidence in judges' integrity and impartiality, scrupulously avoiding conflicts of interest and the appearance of impartiality, and refraining from impinging on the dignity of the office.[320]

310. *Astacio*, *supra* note 287, at 38.

311. *See Astacio*, *supra* note 287, at 39.

312. *Astacio*, *supra* note 287, at 17–18.

313. *Astacio*, *supra* note 287, 19.

314. *Astacio*, *supra* note 287, at 20.

315. *Astacio*, *supra* note 287, at 21.

316. *See Astacio*, *supra* note 287, at 28.

317. *In re Astacio*, 32 N.Y.3d at 133, 87 N.Y.S.3d at 546 (first citing N.Y. CONST. art.VI, § 22(d); and then citing N.Y. JUD. LAW § 44(7) (McKinney 2018)).

318. *Id.* at 135, 87 N.Y.S.3d at 548 (first quoting *In re* Simon, 28 N.Y.3d 35, 37–38, 41 N.Y.S.3d 192, 194, 63 N.E.3d 1136, 1138 (2016); and then quoting *In re* Restaino, 10 N.Y.3d 577, 589–90, 809 N.E.2d 224, 231, 860 N.Y.S.2d 462, 469 (2008)).

319. *Id.* at 133, 87 N.Y.S.3d at 546 (citing N.Y. Code Prof. Conduct R. 100.1, 100.2(a), 100.2(c), 100.3(b)(3), 100.3(e)(1)(a)(i), 100.4(a)(2) (codified at 22 N.Y.C.R.R. § 100 (2016)).

320. *Id.* at 133–34, 87 N.Y.S.3d at 546–47 (quoting N.Y. Code Prof. Conduct R. 100.1, 100.2(a), 100.4(a)(2) (codified at 22 N.Y.C.R.R. § 100 (2016)).

Rather than argue that she did not violate these rules, Astacio argues that the Chair of the Commission was biased and the decision was tainted by this bias.[321] However, there was no evidence on the record that the Chair's alleged bias had any effect on the Commission's decision to remove Astacio.[322]

Judges' actions must be held to a higher standard of conduct than others, and Astacio's misconduct, chronicled in the Commission's report, was "egregious."[323] Astacio did not accept responsibility for her actions, repeatedly spoke in an undignified manner to those who appeared in her court, used her position to attempt to influence the police, and would be less effective as a judge in drunk driving cases due to her own criminal record.[324] The Court found that Astacio was no longer fit to perform her duties because she did not appear to understand the gravity of her actions, her public image was beyond repair, and because sanctions such as this case are not meant as punishment, but are meant to protect the judiciary's public image.[325] Therefore, Astacio's removal from the bench was accepted.[326]

321. *Id.* at 135, 87 N.Y.S.3d at 547.

322. *In re Astacio*, 32 N.Y.3d at 135, 87 N.Y.S.3d at 547 (first citing Simpson v. Wolansky, 38 N.Y.2d 391, 396, 343 N.E.2d 274, 277, 380 N.Y.S.2d 630, 634–35 (1975); and then citing Warder v. Bd. of Regents of Univ. of State of N.Y., 53 N.Y.2d 186, 197, 423 N.E.2d 352, 358, 440 N.Y.S.2d 875, 881 (1981), *cert. denied*, 454 U.S. 1125 (1981)).

323. *Id.* at 136, 87 N.Y.S.3d at 548.

324. *Astacio*, *supra* note 287, at 2, 28, 39.

325. *In re Astacio*, 32 N.Y.3d at 137–38, 87 N.Y.S.3d at 549–50.

326. *Id.*