HEALTH LAW

Robert Carpenter, Kali Schreiner, Carly Dziekan[†]

[†] Mr. Carpenter is an associate with Gale Gale & Hunt, LLC, JD, Syracuse University College of Law, B.S. State University of New York at Geneseo, reigning GGH Cornhole Tournament Champion; Ms. Dziekan is an associate with Mackenzie Hughes, LLP, JD, Albany Law School of University, M.S. Albany Medical College, B.S., St. Lawrence University; Ms. Schreiner is an associate with Gale Gale & Hunt LLC, JD, Syracuse University College of Law, B.S. Syracuse University. The authors would like to thank the staff of the Syracuse Law Review. Any errors are our own.

INTRODUCTION

Surprising no practitioner, this *Survey* Year saw many Executive Orders, Statutory Amendments and court decisions grappling with the COVID-19. This article will discuss many of those changes, but will not cover many of the local rules and court administrative orders that affect practitioners throughout the state. Additionally, this *Survey* Year saw non-COVID-19 changes to the law, including, amongst others, the adoption of the Cannabis Law, vaccine litigation decisions from the appellate departments, and changes to Insulin regulation.

I. EXECUTIVE ORDERS

During this *Survey* year, Governor Cuomo issued numerous Executive Orders regarding COVID-19. The following is a summary of the Executive Orders that affect civil practice moving forward.

A. Executive Orders Tolling Statutes of Limitations

In response to the Coronavirus pandemic, Governor Andrew Cuomo issued a series of executive orders which effectively tolled all statutory deadlines.[1] On March 20, 2020 the first of the series was

1. *See* Brash v. Richards, 195 A.D.3d 582, 582, 149 N.Y.S.3d 560, 561 (2d Dep't 2021); Exec. Order No. 202.8, 9 N.Y.C.R.R. § 8.202.8 (2020); Exec. Order No. 8.202.14, 9 N.Y.C.R.R. § 8.202.14 (2020); Exec. Order No. 8.202.28, 9 N.Y.C.R.R. § 8.202.28 (2020); Exec. Order No. 8.202.38, 9 N.Y.C.R.R. § 8.202.38

issued, tolling all statutory deadlines until April 19, 2020.[2] Executive Law § 29-a(1) grants the Governor the authority to temporarily modify specific provisions of law, statute, or regulation by executive order during a state disaster emergency, but only for a time period not to exceed 30 days.[3] Thereafter, Governor Cuomo extended this toll for consecutive thirty-day periods through issuance of new orders until his last Executive Order issued on October 5, 2020, which tolled deadlines until November 3, 2020.[4]

Collectively, the executive orders created a 228-day grace period[5] which Courts were then left to address whether this grace period would operate as a toll or a suspension of statutory deadlines. A suspension would allow a party to file up until the expiration of the grace period, whereas a toll would allow a party to utilize the time left on the statute after the expiration of the grace period.[6] Albeit subtle, the distinction is important.

At this time, there is only one appellate level decision addressing the issue of whether the statutory deadlines were tolled or suspended.[7] In *Brash v. Richards*, the Second Department held that the executive orders operated as a toll rather than a suspension, setting the deadline to file a notice of appeal thirty days after the expiration of the grace period on November 3, 2020.[8] The clock stopped ticking during the

(2020); Exec. Order No. 202.48, 9 N.Y.C.R.R. § 8.202.48 (2020); Exec. Order No. 202.55, 9 N.Y.C.R.R. § 8.202.55 (2020); Exec. Order No. 202.55.1, 9 N.Y.C.R.R. § 8.202.55.1 (2020); Exec. Order No. 202.60, 9 N.Y.C.R.R. § 8.202.60 (2020); Exec. Order No. 202.67, 9 N.Y.C.R.R. § 8.202.67 (2020); Exec. Order No. 202.72, 9 N.Y.C.R.R. § 8.202.72 (2020).

2. *See* Exec. Order No. 202.8, 9 N.Y.C.R.R. § 8.202.8 (2020).

3. N.Y. EXEC. LAW § 29-a(2)(a) (McKinney 2021).

4. *See* Exec. Order No. 8.202.14, 9 N.Y.C.R.R. § 8.202.14 (2020); Exec. Order No. 8.202.28, 9 N.Y.C.R.R. § 8.202.28 (2020); Exec. Order No. 8.202.38, 9 N.Y.C.R.R. § 8.202.38 (2020); Exec. Order No. 202.48, 9 N.Y.C.R.R. § 8.202.48 (2020); Exec. Order No. 202.55, 9 N.Y.C.R.R. § 8.202.55 (2020); Exec. Order No. 202.55.1, 9 N.Y.C.R.R. § 8.202.55.1 (2020); Exec. Order No. 202.60, 9 N.Y.C.R.R. § 8.202.60 (2020); Exec. Order No. 202.67, 9 N.Y.C.R.R. § 8.202.67 (2020); Exec. Order No. 202.72, 9 N.Y.C.R.R. § 8.202.72 (2020).

5. *See id.*

6. *See Brash*, 195 A.D.3d at 582, 149 N.Y.S.3d at 561 (quoting Chavez v. Occidental Chem. Corp., 35 N.Y.3d 492, 505 n.8, 158 N.E.3d 93, 102, 132 N.Y.S.3d 224, 233 (2020)) (citing Foy v. N.Y., 71 Misc. 3d 605, 607, 144 N.Y.S.3d 285, 288 (Ct. Cl. 2021)).

7. *See generally id.* at 582, 149 N.Y.S.3d at 561.

8. *See id.* at 585, 149 N.Y.S.3d at 563 (citing N.Y. C.P.L.R. 5513(a) (McKinney 2021)).

executive orders.[9] In effect, the toll stopped the clock during the grace period from March 20, 2020 to November 3, 2020.[10] The amount of time the clock would have counted towards the statutory deadline during the grace period is now tacked onto the end.[11]

However, *Brash* did not address precisely to which deadlines the toll applies and whether the toll applies to deadlines expiring outside the grace period.[12] The deadline at issue in *Brash* was filing of a notice of appeal which expired during the grace period.[13] It is analogous to say the same would be true of other motion and filing deadlines, but what is less clear is whether the toll applies to the statute of limitations, more specifically statute of limitations which expire outside of the grace period. The below examples illustrate how the toll functions in practice for an action arising out of medical malpractice.

Example 1:

- The incident of alleged medical malpractice occurs on October 20, 2020.
- Without the COVID toll, the statute of limitations would expire on April 20, 2023.
- With the COVID toll, it now expires on May 4, 2023. (2 years and 6 months + 14 days of grace period).[14]

Example 2:

- The incident of alleged medical malpractice occurs on August 5, 2019.
- Without the COVID toll, the statute of limitations would expire on March 20, 2021.
- Accounting for the 228-day toll, the statute of limitations now expires on November 3, 2021. (2 years and 6 months + 228-day grace period).[15]

In Example 1, the incidence of malpractice occurred during the grace period, so the amount of time tacked on to the statute of limitations is restricted to the time the statute would have been running

9. *See id.* at 583, 149 N.Y.S.3d at 562 (citing Exec. Order No. 8.202.8, 9 N.Y.C.R.R. § 8.202.8 (2020)).

10. *See id.* at 585, 149 N.Y.S.3d at 563 (citing N.Y. C.P.L.R. 5513(a)).

11. *See Brash*, 195 A.D.3d at 582, 149 N.Y.S.3d at 561.

12. *See id.* at 585, 149 N.Y.S.3d at 563.

13. *See id.* at 582–83, 149 N.Y.S.3d at 561 (citing N.Y. C.P.L.R. 5513(a) (McKinney 2021)).

14. *See id.* at 583, 149 N.Y.S.3d at 562.

15. *See id.* at 585, 149 N.Y.S.3d at 563 (first citing N.Y. C.P.L.R. 5513(a)); then citing N.Y. C.P.L.R. 214-a (McKinney 2021)).

during the grace period, which in this example is 14 days.[16] In Example 2, the statute would have been running throughout the entirety of the grace period, so the full 228 days are tacked onto the statute of limitations. The toll has the ability to extend an already lengthy statute of limitations. For example, a medical malpractice claim for an infant has the potential to be ten years and can now be extended by an additional 228 days.[17]

The application of toll in practice will likely be the subject of heavy motion practice in the coming months. Additionally, Appellate Departments will be forced to address this issue further as more cases arise dealing with this issue.[18] The New York State Academy of Trial Lawyers issued a statement, reasoning the standard in *Brash* applies to all statute of limitations, expiring within and outside of the grace period.[19] The decision in *Brash* was left open ended, and arguments can be made either way to limit the applicability of this toll.[20] Recently, attorneys have utilized this toll in oral arguments at the Supreme Court level to extend the statute of limitations to prevent case dismissal due to the ability to re-file.[21]

B. Executive Order 210

As discussed in last year's edition of the *Survey*, Governor Cuomo issued a plethora of executive orders modifying various laws following the emergence of COVID-19 in New York State.[22] Effective June 25, 2021, Governor Cuomo signed Executive Order 210.[23] Executive Order 210 rescinded Executive Orders 202–202.111 and

16. *See Brash*, 195 A.D.3d at 585, 149 N.Y.S.3d at 563 (citing N.Y. C.P.L.R. 5513(a)).

17. N.Y. C.P.L.R. 208 (McKinney 2022); *see also Brash*, 195 A.D.3d at 585, 149 N.Y.S.3d at 563 (citing N.Y. C.P.L.R. 5513(a)).

18. *See Brash*, 195 A.D.3d at 585, 149 N.Y.S.3d at 563 (first citing N.Y. C.P.L.R. 5701(a)(2)(v) (McKinney 2022); then citing Parker v. Mobil Oil Corp., 16 A.D.3d 648, 650, 793 N.Y.S.2d 434, 436 (2d Dep't 2005)).

19. *See* Letter from Angelicque Moreno, President, NYS Acad. of Trial Law., to Janet DiFiore, N.Y. Chief Judge, et al. (Mar. 27, 2020), https://trialacademy.org (choose "search" from dropdown; then choose "Website Documents"; then refine search for terms toll, statute of limitations; then click Academy COVID-19 Response Letter from list of results).

20. *See Brash*, 195 A.D.3d at 585, 149 N.Y.S.3d at 563 (first citing N.Y. C.P.L.R. 5701(a)(2)(v); then citing *Parker*, 16 A.D.3d at 650, 793 N.Y.S.2d at 436).

21. Transcript of Oral Argument (on file with author).

22. *See* Robert P. Carpenter, Carly J. Dziekan & Kali Ruth Helen Schreiner, *2020–21 Survey of New York Law: Health Law*, 71 SYRACUSE L. REV. 191, 192 (2021).

23. *See* Exec. Order No. 210, 9 N.Y.C.R.R. § 8.210 (2021).

Executive Orders 205–205.3.[24] This rescission covers all of the executive orders pertaining to COVID-19 previously executed by Governor Cuomo. Accordingly, practitioners should consider how their practice has been affected by the COVID-19 executive orders and make appropriate adjustments.

II. STATUTORY CHANGES

A. Public Health Law Section 3080–3082

During the last *Survey* year, New York passed legislation granting civil immunities to health care providers during COVID-19.[25] Relevantly, the civil immunities applied to health care workers who provided "health care services" during the pandemic.[26] During this *Survey* year, New York State limited the scope of these immunities, and ultimately ended the immunities. The following is a chronological summary of the changes that occurred during this *Survey* year

1. August 3, 2020

On August 3, 2020, Governor Cuomo signed legislation into law that reduced the scope of COVID-19 immunities.[27] Specifically, the legislation curtailed the definition of "health care services" that qualified for immunity.[28] Originally, the statute encompassed health care provided to any individual during the pandemic, regardless of whether the patient had COVID-19.[29] Effective August 3, 2020, "health care services" was only defined as including, "(1) the diagnosis or treatment of COVID-19, or (2) the assessment or care of

24. *See id.*

25. *See* Act of Aug. 3, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 56, at 473–75 (codified at N.Y. PUB. HEALTH LAW §§ 3080–3082 (McKinney 2020), *amended by* Act of Aug. 3, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 134, at 827–28, *repealed by* Act of Apr. 6, 2021, 2021 McKinney's Sess. Laws of N.Y., ch. 96, at 653.

26. *See id.*

27. *See* Act of Aug. 3, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 134, at 827–28 (codified at N.Y. PUB. HEALTH LAW § 3081(5)(a)–(b) (McKinney 2020)), *repealed by* Act of Apr. 6, 2021, 2021 McKinney's Sess. Laws of N.Y., ch. 96, at 653.

28. *See id.*

29. *See* N.Y. Pub. Health Law § 3081(5)(c) (McKinney 2020), *repealed by* Act of Aug. 3, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 134, at 827.

an individual as it relates to COVID-19, when such individual has a confirmed or suspected case of COVID-19."[30]

2. April 6, 2021

On April 6, 2021, Governor Cuomo signed New York Assembly Bill A3397 into law.[31] Effective upon signing, the legislation repealed the sections of the Public Health Law granting civil immunities.[32]

B. NY Cannabis Law

On March 31, 2021, Governor Cuomo signed S854A, commonly referred to as the "Marihuana Regulation and Taxation Act" into law.[33] The statute has been codified as New York Cannabis Law.[34] The stated legislative intent of the law is "to regulate, control and tax marihuana, heretofore known as cannabis"[35] The following is a summary of the newly created Cannabis Law.

1. Article 2: The New York State Cannabis Control Board

Article 2, codified at New York Cannabis Sections 7–15, creates and empowers the Cannabis Control Board.[36] The Board will be headed by a chairperson along with four other members.[37] The Governor appoints the chairperson and two board members.[38] The speaker of the assembly and temporary president of the senate each get to appoint one member.[39] The board will have principal offices in

30. *See* Act of Aug. 3, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 134, at 827–28 (codified at N.Y. PUB HEALTH LAW § 3081 (5)(a)–(b)), *repealed by* Act of Apr. 6, 2021, 2021 McKinney's Sess. Laws of N.Y., ch. 96, at 653.

31. Act of Apr. 6, 2021, 2021 McKinney's Sess. Laws of N.Y., ch. 96, at 653 (repealing N.Y. PUB. HEALTH LAW §§ 3080–3082 (McKinney 2020)).

32. *See id.*; Act of March 7, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 56, at 473–75 (codified at N.Y. PUB. HEALTH LAW §§ 3080–3082), *amended by* Act of Aug. 3, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 134, at 827–28 (codified at N.Y. PUB HEALTH LAW § 3080–3082), *repealed by* Act of Apr. 6, 2021, 2021 McKinney's Sess. Laws of N.Y., ch. 96, at 653.

33. *See* Act of March 31, 2021, 2021 McKinney's Sess. Laws of N.Y., ch. 92, at 529–639 (codified at N.Y. CANBS. LAW §§ 1–139 (McKinney 2021)).

34. *See* N.Y. CANBS. LAW §§ 1–139 (McKinney 2021)).

35. *Id.* § 2.

36. *See generally id.* §§ 7–15 (authorizing Cannabis Control Board, makeup of board, and empowering board).

37. *Id.* § 7(1).

38. *Id.* § 7(2).

39. *See* N.Y. CANBS. LAW § 7(2) (McKinney 2021).

Albany, New York, with additional offices in New York City and Buffalo.[40]

The Cannabis Law also establishes an "office of cannabis management" within the division of alcoholic beverage control.[41] The office will be run by an executive director nominated by the Governor and subject to senate approval.[42]

A. Powers of the Control Board

The Control Board will have the power to grant or deny applications for registrations and licenses.[43] Procedurally, the chairperson makes an initial decision on an application.[44] That decision remains in effect unless a board member objects or requests a full board determination within fourteen days.[45] The Control Board is supposed to ensure that fifty percent of successful applications "prioritizes social and economic equity."[46] The Control Board also has the power to revoke licenses, impose civil penalties, and rulemake in regards to standards for cultivation, processing, packaging and marketing, and sale of cannabis products.[47] Other powers include: (1) advising the office of cannabis management to make low interest loans to qualified social and economic equity applicants,[48] and (2) issuing an annual report.[49]

B. Powers of the Office of Cannabis Management

The Office of Cannabis Management is empowered, amongst others: (1) to inspect facilities that sell, cultivate, manufacture, process, store or distribute cannabis products, (2) to keep records of all registrations, licenses and permits (3) to promulgate forms for applications, and (4) to exercise other powers delegated by the Control Board.[50]

40. *Id.* § 7(6).
41. *Id.* § 8.
42. *Id.* § 9.
43. *Id.* § 10(1).
44. N.Y. CANBS. LAW § 10(1) (McKinney 2021).
45. *Id.*
46. *Id.* § 10(2).
47. *See id*. § 10(3)–(4); *see generally id.* § 13 (for detailed discussion of rulemaking powers and goals).
48. N.Y. CANBS. LAW § 10(14) (McKinney 2021).
49. *Id.* § 10(17).
50. *See id.* § 11(2)–(4), (6), (8).

C. Miscellaneous Provisions in Article 2

Various provisions of Article 2 address penalties for violations of Cannabis Law, establish procedures for formal hearings, establish an "advisory board" that makes recommendations to the Control Board, and provide for a "chief equity officer" who will ensure that the statutory goals of social and economic equity are achieved.[51]

2. Article 3 – Medical Cannabis

Article 3 of the Cannabis Law provides legal framework for regulating medical cannabis. The statute defines medical cannabis as any cannabis that is "intended for a certified medical use."[52] The process for a patient obtaining medical cannabis begins with receiving a "certification" from a prescribing practitioner.[53]

A. Certification Process

A prescribing practitioner may only issue a certification if: (1) the patient has a medical condition, (2) the practitioner is licensed to treat the condition, (3) the patient is under the care of the practitioner, and (4) the practitioner believes that medical cannabis is likely to provide therapeutic or palliative benefit based on the patient's treatment history and on the practitioner's professional opinion.[54] Prior to issuing a certification, a practitioner must consult the prescription monitoring program in order to review the patient's controlled substance history.[55] A practitioner may also impose limitations on the certification regarding the form of cannabis, dosage and time limits.[56]

After deciding to issue a certification, the practitioner gives a certification form to the patient and place a copy in the patient's medical record.[57] Unless the practitioner states differently, certifications expire one year after the practitioner signs the certification.[58] A practitioner may not issue a certification for themselves.[59]

51. *Id.* §§ 12(1), 14(1), 17(1).
52. *Id.* § 3(33).
53. N.Y. CANBS. LAW §§ 3(13), 30(1)(a) (McKinney 2021).
54. *Id.* § 30(1)(a)–(d).
55. *Id.* § 30(4).
56. *Id.* § 30(3).
57. *Id.* § 30(5).
58. CANBS. § 30(7).
59. *Id.* § 30(6).

B. Registry Identification Cards

After a practitioner has issued a certification, a patient may obtain a registry identification card.[60] In order to obtain an identification card, a patient must submit a registry application with the office of cannabis management.[61] If a patient is under the age of 18, or incapable of consent, the application must identify a designated caregiver.[62]

C. Cannabis Research Licenses

Article 3 also allows an individual to apply for a research license.[63] A research licensee may produce, process, purchase and possess cannabis for statutorily specified research purposes.[64] The statute allows for research to: (1) "test chemical potency and composition levels," (2) investigate "cannabis-derived drug products," (3) test the efficacy and safety of cannabis-related medical treatments, and (4) "conduct genomic and agricultural research."[65]

Applications for research licenses must provide a description of the proposed research and state the quantity of cannabis to be grown or purchased.[66] If granted a license, the research licensee may only sell cannabis to other cannabis research licensees.[67] The statutory framework allows a research licensee to contract with higher education institution, including state university hospitals, to conduct joint research.[68]

D. Home Cultivation of Cannabis

The Cannabis Law allows home cultivation of cannabis.[69] Specifically, patients who are at least 21 years old may cultivate cannabis for personal use.[70] Additionally, designated caregivers caring for patients of any age may cultivate cannabis, provided that the designated caregiver is at least 21 years old.[71]

60. *See id.* § 32(1).
61. *Id.* § 32(2).
62. *See id.* § 32(3).
63. CANBS. § 38(1).
64. *Id.*
65. *Id.* § 38(1)(a)–(d).
66. *Id.* § 38(2).
67. *Id.* § 38(3).
68. CANBS. § 38(4).
69. *See id.* § 41.
70. *Id.*
71. *Id.*; *see generally* N.Y. PENAL LAW § 222.15 (McKinney 2021) (for further regulations governing home cultivation of cannabis in New York).

3. Article 4 – Adult Cannabis use

Article 4 of the Cannabis Law governs applications for different types of licenses that allow for cultivation, processing, distribution, and sale of cannabis.[72] Relevantly, the NY Penal Code was amended on March 31, 2021 to allow for legalization of possession and use of cannabis.[73]

A. General Provisions Affecting all License Applications

Every application for adult-use licenses must be submitted to the Board.[74] The Board is empowered to determine what information is required in an application and can require fees as part of an application.[75]

When making a determination on a license application, the board is required to consider multiple factors, including whether: (1) "the applicant is a social and economic equity applicant," (2) the applicant can maintain effective control against illegal cannabis use, (3) the applicant can comply with state rules and regulations, (4) the applicant has sufficient land, equipment and supplies to carry out the proposed activity.[76]

The statute also prohibits anyone younger than twenty-one years old from obtaining a license.[77] Additionally, license holder may not employee anyone younger than eighteen years old, and cannot employ anyone younger than twenty-years old in a role requiring customer interaction.[78] License holders are also prohibited from selling cannabis in quantities in excess of the possession limits outlined in the New York Penal Code.[79] All license expire after two years.[80]

When seeking renewal of a license, the license holder must, in addition to other requirements, submit documentation demonstrating "the racial, ethnic, and gender diversity of the applicant's employees" and submit a plan outlining how the applicant is benefiting the

72. CANBS. §§ 61–89.

73. Act of March 31, 2021, 2021 McKinney's Sess. Laws of N.Y, ch. 92 (codified at PENAL §§ 222.00, .06, .39, .78).

74. *See* CANBS. § 61.

75. *See id.*

76. *Id.* § 64(1)(a)–(c), (e) (McKinney 2021).

77. *Id.* § 65(1).

78. *Id.*

79. CANBS. § 65(3); *see also* PENAL § 222.05.

80. *See* CANBS. § 65(5).

communities and people disproportionately affected by cannabis law enforcement.[81]

B. Different Types of Adult Use Licenses

The following are brief summaries of the different types of licenses available in New York.[82]

Cultivator Licenses: A cultivator license allows the holder to engage in activities including, but not limited to, "planting, growing, cloning, harvesting, drying, curing, grading and trimming of cannabis."[83] A person who holds a cultivator license *may not* hold, or have any type of direct or indirect interest, in a retail dispensary license.[84]A person holding a cultivator *may* hold and obtain a processor and/or a distributor license, but only to process and distribute their own product.[85] A person can only hold one cultivator license.[86] The Board has the authority to issue quantity, environmental and other regulations.[87]

Processor Licenses: A processor license allows the holder to "blend[], extract[], infuse[], package[], label[], brand[] and otherwise prepare" cannabis.[88] A person holding a processor license *may not* have a direct or indirect interest in a retail dispensary license.[89]A person holding a processor license *may* obtain a distributor's license, but solely for distributing their own products.[90]

Distributor Licenses: A distributor license allows the holder to distribute processor businesses to retail dispensaries.[91] Distribution licensees *may not* hold a direct or indirect interest in retail dispensaries.[92] If a distributor holds a direct or indirect interest in a processor or cultivator license, the distributor can only distribute cannabis grown at processed under those licensees.[93]

81. *Id.* § 66(2), (6).

82. This Survey article discusses many, but not all, of the licenses created by the statute.

83. *See* CANBS. § 68(2).

84. *Id.* § 68(4) (emphasis added).

85. *Id.* § 68(3) (emphasis added).

86. *See id.* § 68(5).

87. *See id.* § 65(4).

88. CANBS. § 69(2).

89. *Id.* § 69(5) (emphasis added).

90. *Id.* § 69(1) (emphasis added).

91. *Id.* § 71(1).

92. *Id.* § 71(2) (emphasis added).

93. CANBS. § 71(3).

Retail Dispensary Licenses: A retail dispensary license allows the holder to sell cannabis to consumers.[94] A person may not have a direct interest in more than three retail dispensary licenses.[95] With limited exceptions, the holder of a retail dispensary license may not hold other adult use licenses.[96] Prior to obtaining a retail dispensary license, the license seeker must demonstrate that they have a valid lease or other agreement to control a premises on the street level of a building zoned for business trade or industry.[97] Additionally, no dispensary can be within five hundred feet of a school, or two hundred feet of a house of worship.[98]

Microbusiness License: A microbusiness license holder may cultivate, process, distribute their own cannabis products.[99] A microbusiness licensee *may not* hold any other type of adult use license and can only distribute their cannabis product to dispensaries.[100] The Board has the authority to determine the size and scope of limitations on microbusiness licenses.[101]

Delivery Licenses: A holder of a delivery license may deliver cannabis from a dispensary to consumers.[102]

Nursery Licenses: A nursery license allows the holder to produce, sell and distribute "clones, immature plants, seeds and other agricultural products" to cultivator, cooperative and microbusiness licensees.[103] A cultivator licensee may hold one nursery license to sell to other cultivators, microbusinesses and cooperatives.[104]

4. Article 6 – General Provisions

Article 6 of the Cannabis Law contains miscellaneous regulations on Cannabis.

94. *Id.* § 72(1).
95. *Id.* § 72(2).
96. *Id.* § 72(3).
97. *Id.* § 72(4).
98. CANBS. § 72(6).
99. *Id.* § 73(1).
100. *Id.* § 73(2) (emphasis added).
101. *Id.* § 73(3).
102. *Id.* § 74.
103. CANBS. § 75(1). A cooperative licensee may cultivate, process, distribute and sell cannabis, given certain criteria are met; *see id.* § 70(2).
104. *Id.* § 75(2).

A. Laboratory Testing

The Board has the power to select one or more independent testing laboratories to test cannabis products.[105] The owner of a testing laboratory shall not have a direct or indirect interest in any type of license under the Cannabis Law.[106]

B. Local Opt-Out

Under the Cannabis Law, a municipality has the option to opt out of allowing retail dispensaries to operate within the municipality.[107] In order to do so, the municipality must adopt a local law no later than December 31, 2021, requesting that the Board prohibit the establishment of retail dispensaries within the municipality.[108] Municipalities may also pass local laws governing the time, place and manner of operation for retail dispensaries, so long as the regulation does not make operation of a retail dispensaries "unreasonably impracticable."[109]

5. Summation

Based on the above, practitioners advising physicians issuing patient certifications, or patients using certifications to obtain cannabis, should be fully aware of the procedure and requirements of the process. Practitioners advising clients advising clients wishing to obtain cannabis license should be aware of the rights and prohibitions each license entails.

C. Insulin Capping Cost

The high cost of insulin in the United States has been the subject of scrutiny over the last few decades.[110] The cost of the most commonly prescribed insulin analog was ten times more in the United States than in any other developed country until recent legislation.[111] Individuals with Type 1 Diabetes, a chronic, lifelong illness, were

105. *Id.* § 129(1).
106. *Id.* § 129(3).
107. CANBS. § 131(1).
108. *Id.*
109. *Id.* § 131(2).
110. *See generally* S. Vincent Rajkumar, *The High Cost of Insulin in the U.S.: An Urgent Call to Action*, 95 MAYO CLINIC PROC. 22, 22–28 (2019), https://www.mayoclinicproceedings.org/article/S0025-6196(19)31008-0/fulltext.
111. *Id.* at 22; *see* Act of Apr. 3, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 56, at 470 (codified at N.Y. INS. LAW § 3216(i)15-a (McKinney 2021)).

often forced to ration the amount of insulin they took as they could not afford their full prescription.[112] Many diabetics died as a result.[113] In 2020, one vial of insulin could cost upwards of 250 dollars, some diabetics needing six vials a month, totaling 18,000 dollars a year.[114] Pharmaceutical companies cite to a high cost of development and continued innovation to justify these costs.[115] However, these factors do not apply to insulin; insulin was initially developed over 100 years ago and requires little innovation to continue to remain effective.[116] The exact reason for the high cost of insulin remains unknown, but many believe it to be heavily motivated by profit for pharmaceutical companies.[117]

Recent legislation capped the cost of insulin at 100 dollars per 30-day supply for those with state-regulated commercial insurance.[118] The amendment reads:

> [T]he total amount that a covered person is required to pay out of pocket for covered prescription insulin drugs shall be capped at an amount not to exceed one hundred dollars per thirty-day supply, regardless of the amount or type of insulin needed to fill such covered person's prescription and regardless of the insured's deductible, copayment, coinsurance or any other cost sharing requirement.[119]

This legislation is an extremely important one for diabetics, and was heavily supported by the American Diabetes Association.[120] There is still more work to be done to make insulin even more

112. Rajkumar, *supra* note 110, at 22, 26.

113. *See id.*

114. SINGLECARE TEAM, *Insulin Prices: How Much Does Insulin Cost?* (Jan. 27, 2020), https://www.singlecare.com/blog/insulin-prices/.

115. *See* Rajkumar, *supra* note 110, at 22.

116. *See id.*; Ryan Knox, *Insulin Insulated: Barriers to Competition and Affordability in the U.S. Insulin Market*, 7 J. L. & BIOSCIENCES 1, 4 (2020).

117. *See* Rajkumar, *supra* note 110, at 22–23; SINGLECARE TEAM, *supra* note 114; Am. Diabetes Ass'n, Press Release, *Insulin Co-Pays Capped at $100 for New Yorkers with Diabetes* (Apr. 13, 2020), https://www.diabetes.org/newsroom/press-releases/2020/insulin-co-pays-new-york.

118. *See* Am. Diabetes Ass'n, *supra* note 117; Act of Apr. 3, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 56, at 470 (codified at N.Y. INS. LAW § 3216(i)15-a (McKinney 2021)).

119. Act of Apr. 3, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 56, at 471 (codified at INS. § 4303(u)(2)).

120. *See id.*; Am. Diabetes Ass'n, *supra* note 117.

affordable and eliminate cost sharing in state-regulated health insurance plans, but this legislation in a step in the right direction.[121]

D. Insulin Pharmacist Prescription

A licensed pharmacist may now execute a non-patient specific regimen of insulin to an individual with a valid prescription expiring within the last twelve months.[122] The valid, expired prescription must have been executed by a physician or nurse practitioner licensed in New York State.[123] The execution will be on an emergency basis, subject to the following provisions:

> (1) attempts have been made to obtain such an authorization from the original prescriber, and the prescriber does not object to the emergency supply;
>
> (2) the refill is for an emergency thirty-day supply in conformity with the expired prescription; and
>
> (3) the original prescriber whose authorization could not be obtained an emergency supply was notified and dispensed.[124]

This legislation joins the insulin capping cost in back-to-back legislation protecting diabetic individuals.[125] More specifically, this legislation ensures diabetics will not go without insulin for inability to attend a follow up appointment to renew their prescription.[126] Both the capping cost and emergency supply legislation are important updates in the Education Law and address the need for increased protections for diabetics relating to equal access to insulin.[127]

E. Reporting Sexual Misconduct

Public Health Law § 230 was amended to require the Office of Professional Medical Conduct (OPMC) to post instructions on their website for patients to file a complaint against a physician, with

121. *See id.*

122. N.Y. EDUC. LAW § 6801(6) (McKinney 2021).

123. *Id.*

124. *Id.*

125. *See* Act of June 11, 2021, 2021 McKinney's Sess. Laws of N.Y., ch. 134 (codified at EDUC. § 6801); Act of Apr. 3, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 56, at 471 (codified at INS. § 4303(u)(2)).

126. *See* EDUC. § 6801(6).

127. *See* Act of June 11, 2021, 2021 McKinney's Sess. Laws of N.Y., ch. 134 (codified at EDUC. § 6801; Act of Apr. 3, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 56, at 471 (codified at INS. § 4303(u)(2)).

specific information on reporting sexual assault and harassment.[128] Additionally, physicians' offices will be required to post information in their offices with instructions for same.[129] The amendment to the statute reads:

> The office of professional medical conduct shall post on its website information on patients' rights and reporting options under this subdivision regarding professional misconduct, *which shall specifically include information on reporting instances of misconduct involving sexual harassment and assault*. All physicians' practice settings shall conspicuously post signage, visible to their patients, directing such patients to the office of professional medical conduct's website for information about their rights and how to report professional misconduct.[130]

The New York American College of Emergency Physicians submitted a letter to Governor Cuomo opposing the legislation.[131] The letter referenced the already easily accessible information regarding filing a complaint against a physician.[132] Prior to this legislation, a simple Google search of "file a complaint against a New York physician" would be sufficient to obtain information on how to do so.[133] Now, not only will information on filing a complaint be available on the OPMC website, but also physicians will be required to post the instructions in their offices and practices.[134] The New York American College of Emergency Physicians argued the legislation unnecessarily increased the risk of misconduct proceedings against physicians.[135]

The language in the statute specifically detailing "misconduct involving sexual harassment and assault" suggests the intent for the amendment was to increase protection from such conduct by

128. *See* Act of Oct. 7, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 203, at 877 (codified at N.Y. PUB. HEALTH LAW § 230(11)(h) (McKinney 2021)).

129. PUB. HEALTH § 230(11)(h)

130. *Id.* (emphasis added)

131. Letter from N.Y. Am. Coll. of Emergency Physicians to Andrew Cuomo, Governor, N.Y. (July 27, 2020), https://www.nyacep.org/images/GovernmentAffairs/Gov-Ltr-A7991-A-Simotas-NYACEP-Oppose-revised-002.pdf.

132. *Id.*

133. *Id.*

134. PUB. HEALTH § 230(11)(h).

135. N.Y. Am. Coll. of Emergency Physicians, *supra* note 131 (citing A. 7991A, 242d Leg., Reg. Sess. (N.Y. 2019)).

physicians.[136] This amendment follows a recent amendment to the Public Health Law from last *Survey* year, which increased protections for unconscious or anesthetized female patients receiving pelvic examinations they did not consent to.[137] As of April 4, 2020, performing such exam is now sexual misconduct.[138] Back-to-back legislation protecting patients from sexual assault and harassment by a physician[139] evidences a potential shift in legislation to address this issue.

However, the most recent amendment is overly broad. The primary purpose of this amendment appears to be increasing public awareness of how to file a misconduct claim against a physician.[140] One may argue this to be true, but specifically in the context of sexual assault and harassment claims.[141] If so, the amendment should have included language limiting the requirement to post signage in an a physician's office to physicians who have misconduct violations specifically arising from sexual assault and sexual misconduct.[142] The amendment to the public health law is an important one to protect patient's right, but could have been drafted more narrowly to also protect the rights and interests of physicians.

F. A7812A – Opioid Antagonists at Public Facilities

On August 24, 2020, Governor Cuomo signed Assembly Bill A7812A into law.[143] The bill amends the Public Health Law to expand the types of public facilities authorized to use opioid antagonists. Specifically, the Public Health Law now allows the following public facilities to use opioid antagonists: (1) school districts, (2) public libraries, (3) board of cooperative educational services, (4) county vocational education and extension boards, (5) charter schools, (6) private elementary and secondary schools, (7) restaurants, (8) bars, (9) retail stores, (10) shopping malls, (11) barber shops, (12) beauty

136. *See* PUB. HEALTH § 230(11)(h).

137. *See* Act of Oct. 8, 2019, 2019 McKinney's Sess. Laws of N.Y., ch. 360, at 1269 (codified at PUB. HEALTH § 230-e); Robert P. Carpenter et al., *supra* note 22 at 192.

138. PUB. HEALTH § 230-e.

139. *See id.*; Act of Oct. 7, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 203, at 877 (codified at PUB. HEALTH § 230(11)(h)).

140. *See* PUB. HEALTH § 230(11)(h).

141. *See* A. 7991A, 242d Leg., Reg. Sess. (N.Y. 2019).

142. *See id.*; *see also* N.Y. Am. Coll. of Emergency Physicians, *supra* note 131.

143. *See* Act of Aug. 24, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 148, at 836–37 (codified at PUB. HEALTH § 3309).

parlors, (13) theaters, (14) sporting event centers, and (15) inns, hotels, and motels.[144]

The amended statute also expressly states that any person employed by the above-referenced facilities will not be subject to criminal, civil or administrative action if they act in compliance with the statute.[145]

G. S.4336 - Changes to Seat Belt Regulations

On August 11, 2020, Governor Cuomo signed Senate Bill S4336.[146] The bill changed Vehicle and Traffic Law Section 1229-c.[147] Effective November 1st, 2021, everyone over the age of sixteen needs to wear a seat belt while in a vehicle, regardless of where in the vehicle they are seated.[148] Previously, persons sixteen or older only needed to wear a seat belt while riding in the front seat.[149]

H. 7991-A – Changes to Required Signage at Physician Offices

On October 7, 2020, Governor Cuomo signed Assembly Bill A. 7991-A into law.[150] Effective immediately after signing, the legislation—codified at Public Health Law Section 230—requires physicians to post signage providing information to patients about how to report professional misconduct to the Office of Professional Medical Conduct (OPMC).[151] The legislation also requires the OPMC to post information regarding reporting misconduct related to sexual harassment and sexual assault on its website.[152]

III. CASE LAW

A. McKinnon v. North Shore-Long Island Jewish Health Systems

As discussed in previous *Surveys*, New York has recently changed the statute of limitations for allegations involving a failure to

144. PUB. HEALTH § 3309(3)(a)(v).

145. *Id.* § 3309(4)(b).

146. See Act of Aug. 11, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 136, at 828 (codified at N.Y. VEH. & TRAF. § 1229-c (McKinney 2020)).

147. *Id.*

148. *Id.*

149. *See* VEH. & TRAF. § 1229-c (McKinney 2019), *amended by* VEH. & TRAF. § 1229-c (McKinney 2020).

150. *See* Act of Oct. 7, 2020, 2020 McKinney's Sess. Laws of N.Y., ch. 203, at 877 (codified at N.Y. PUB. HEALTH LAW § 230 (McKinney 2021)).

151. *Id*. *See* PUB. HEALTH § 230(11)(h).

152. *Id.*

diagnose cancer.[153] Notably, the changes to the relevant CPLR provisions did not fully articulate the alterations signed into law.[154] During this *Survey* Year, the Second Department issued an opinion discussing this discrepancy.[155]

In *McKinnon*, the plaintiff alleged that the defendants had failed to diagnose cancer that was evident on an August 2011 biopsy.[156] The plaintiff first learned of the cancer diagnosis in January 2014.[157] The plaintiff subsequent commenced a legal action against defendants in March 2015.[158]

In turn, the defendant filed a motion to dismiss the Complaint as untimely pursuant to CPLR 3211(a)(5).[159] The trial court granted the defendant's motion to dismiss.[160] The plaintiff appealed.[161]

When discussing the applicable statute of limitations, the Second Department cited to the legislative language rather than the CPLR.[162] The court noted that the statutory change applies to acts or omissions occurring after January 31, 2018.[163] The court also observed that the statutory change also retroactively applies to acts and omissions occurring after July 31, 2015.[164] Finally, the court noted that the legislative language also included a revival provision that temporarily

153. *See, e.g.*, Robert P. Carpenter et al., *Health Law*, 69 SYRACUSE L. REV. 815, 816 (2019).

154. *See id.* at 844 (first citing N.Y. C.P.L.R. 203 (McKinney 2021); then citing N.Y. C.P.L.R. 214-a (McKinney 2021); Act of Jan. 31, 2018, 2018 McKinney's Sess. Laws of N.Y., ch.1, at 1–2 (codified at N.Y. C.P.L.R. 214-a (McKinney 2021)).

155. McKinnon v. N. Shore-Long Island Jewish Health Sys. Labs., 187 A.D.3d 890, 890–91, 130 N.Y.S.3d 731, 732 (2d Dep't 2020) (citing Act of Jan. 31, 2018, 2018 McKinney's Sess. Laws of N.Y., ch.1, at 1–2 (codified at N.Y. C.P.L.R. 214-a (McKinney 2021)).

156. *Id*. at 890, 130 N.Y.S.3d at 732.

157. *Id.*

158. *Id.*

159. *Id*. (citing N.Y. C.P.L.R. 3211(a)(5) (2006)).

160. *McKinnon*, 187 A.D.3d at 890, 130 N.Y.S.3d at 732.

161. *Id.*

162. *Id*. at 891, 130 N.Y.S.3d at 732 (citing Act of Jan. 31, 2018, 2018 McKinney's Sess. Laws of N.Y., ch.1, at 1).

163. *Id.* (citing Act of Jan. 31, 2018, 2018 McKinney's Sess. Laws of N.Y., ch.1, at 1).

164. *Id.* (citing Act of Jan. 31, 2018, 2018 McKinney's Sess. Laws of N.Y., ch.1, at 2 (codified at N.Y. C.P.L.R. 203, 214-a (McKinney 2018)).

revived claims that were time-barred by the prior statute of limitations.[165]

Based on this legal framework, the Second Department concluded that the plaintiff's claim accrued on August 29, 2011, the date of the misdiagnosed biopsy.[166] The claim then became time-barred on March 1, 2014.[167] The Second Department then concluded that the claim was not saved by the retroactive or revival provisions of the statutory amendment.[168] Based on the foregoing, the court affirmed the trial court's decision to grant the defendant's motion to dismiss.[169]

Based on this recent decision out of the Second Department, defense counsel should review any action based on a failure to diagnose cancer to determine whether the claim is timely. If not, a motion to dismiss with a clear discussion of the legislative language may be availing. Conversely, plaintiffs' attorneys should be cognizant of the statute of limitations for failure to diagnose cancer cases prior to taking on, or turning down, a potential client.

B. Pasek v Catholic Health System, Inc.

On June 11, 2021, the Fourth Appellate Department issued an opinion regarding vicarious liability of hospitals for private physicians.[170] The trial court had granted the defendant hospital's motion for summary judgment regarding plaintiff's vicarious liability claims.[171] On appeal, the Fourth Department held that the hospital had met its initial burden to demonstrate that the private physicians were not acting under the hospital's direction or control.[172]

165. *McKinnon*, 187 A.D.3d at 891, 130 N.Y.S.3d at 732 (citing Act of Jan. 31, 2018, 2018 McKinney's Sess. Laws of N.Y., ch.1, at 2). The revived claims needed to be filed by July 31, 2018. *Id.* (citing Act of Jan. 31, 2018, 2018 McKinney's Sess. Laws of N.Y., ch.1, at 2).

166. *Id.* (first citing Mula v. Sasson, 181 A.D.3d 686, 688, 121 N.Y.S.3d 143, 144 (2d Dep't 2020); then citing Forbes v. Caris Life Scis., Inc., 159 A.D.3d 1569, 1572, 72 N.Y.S.3d 728, 732 (4th Dep't 2018)).

167. *Id.*

168. *Id.* (citing Act of Jan. 31, 2018, 2018 McKinney's Sess. Laws of N.Y., ch.1, at 2).

169. *Id.* at 890, 130 N.Y.S.3d at 732.

170. Pasek v. Cath. Health Sys., Inc., 195 A.D.3d 1381, 1381, 150 N.Y.S.3d 189, 191 (4th Dep't 2021).

171. *Id.*

172. *Id.* at 1382, 150 N.Y.S.3d at 192 (citing Thurman v. United Health Servs. Hosps., Inc., 39 A.D.3d 934, 937, 833 N.Y.S.2d 702, 705 (3d Dep't 2007)).

The Fourth Department also held that plaintiff's arguments in opposition were unavailing.[173] Specifically, the plaintiff argued that the hospital had failed to submit the contract between itself and one of the private physicians.[174] In response, the court held that the facts necessary to determine the relationship between the hospital and the private physician were not within the exclusive control of the hospital, and that the plaintiff did not have the documents due to their own inaction.[175]

Plaintiff next argued that the hospital's logo appeared on the private anesthesiologist's records.[176] The court held that the presence of the logo was insufficient to establish that the hospital held the anesthesiologist out as its employee.[177]

C. Berkowitz v. Equinox One Park Ave. Inc.

The First Department recently issued a decision addressing the applicability of the lack of informed consent claim in actions involving "medical spas."[178] By way of background, medical spas are facilities

173. *Id.* at 1382, 150 N.Y.S.3d at 192. (first citing Nagengast v. Samaritan Hosp., 211 A.D.2d 878, 879, 621 N.Y.S.2d 217, 219 (3d Dep't 1995); then citing Keesler v. Small, 140 A.D.3d 1021, 1022–23, 35 N.Y.S.3d 356, 359 (2d Dep't 2016); and then citing Dragotta v. Southampton Hosp., 39 A.D.3d 697, 699, 833 N.Y.S.2d 638, 640–41 (2d Dep't 2007)).

174. *Id.*

175. *Pasek*, 195 A.D.3d at 1383, 150 N.Y.S.3d at 192–93 (citing Sheehan v. Columbia Presbyterian Med. Ctr., 182 A.D.2d 556, 556, 583 N.Y.S.2d 250, 251 (1st Dep't 1992)).

176. *Id.* at 1384, 150 N.Y.S.3d at 193. It was undisputed that the anesthesiologist was in fact employed by an independent practice group. *Id.* at 1833–34, 150 N.Y.S.3d at 193. (first citing Sampson v. Contillo, 55 A.D.3d 588, 590–91, 865 N.Y.S.2d 634, 637 (2d Dep't 2008); and then citing Dupree v. Westchester Cnty. Health Care Corp., 164 A.D.3d 1211, 1213–14, 84 N.Y.S.3d 176, 179 (2d Dep't 2018); and then citing King v. Mitchell, 31 A.D.3d 958, 959–60, 819 N.Y.S.2d 169, 171 (3d Dep't 2006)).

177. *Id.* at 1383–84, 150 N.Y.S.3d at 193 (first citing *Thurman*, 39 A.D.3d at 936, 833 N.Y.S.2d at 705; then citing *King*, 31 A.D.3d at 960, 819 N.Y.S.2d at 172; and then citing *Nagengast*, 211 A.D.2d at 879, 621 N.Y.S.2d at 219; and then citing *Dragotta*, 39 A.D.3d at 699–700, 833 N.Y.S.2d at 641).

178. *See generally* Berkowitz v. Equinox One Park Ave., Inc., 181 A.D.3d 436, 121 N.Y.S.3d 20 (1st Dep't 2020).

that offer a variety of esthetic services, and some provide medical services such as Botox injections.[179]

In this case, the plaintiff alleged that the defendant negligently performed a laser hair removal procedure on her, resulting in injury.[180] Plaintiff's complaint also brought a cause of action for lack of informed consent.[181] The defendant moved for summary judgment and the trial denied the motion.[182]

On appeal, the First Department held that the events forming the basis for the lack of informed consent claim were "not based on treatments that are medical procedures."[183] Accordingly, the court dismissed the lack of informed consent brought by the plaintiff.[184] Also interesting, the First Department held that the events at issue, *i.e.*, laser hair removal, did not involve "specialized knowledge of medical science or diagnosis."[185] Therefore, the remainder of plaintiff's claims sounded in negligence rather than medical malpractice.[186]

As medical spas grow in popularity in New York State, it will be interesting to see how New York courts assess claims of liability against those facilities.

D. People ex rel. Figueroa v. Keyser

In this action, a convict confined to prison brought an application for a writ of habeas corpus, pursuant to CPLR Article 70, seeking release from prison.[187] Not eligible for parole until 2038, petitioner argued that his underlying health conditions and age increased his risk if he were to be infected by COVID-19.[188] Petitioner further argued

179. *See* Eric Mariotti, *What to Look for in a Quality Med Spa*, AM. SOC'Y OF PLASTIC SURGEONS: NEWS/BLOG (Mar. 8, 2019), https://www.plasticsurgery.org/news/blog/what-to-look-for-in-a-quality-med-spa.

180. *Berkowitz*, 181 A.D.3d at 437, 121 N.Y.S.3d at 21.

181. *Id.* at 436, 121 N.Y.S.3d at 21.

182. *Id.* at 437, 121 N.Y.S.3d at 21–22.

183. *Id.* at 437, 121 N.Y.S.3d at 22.

184. *Id.*

185. *Berkowitz*, 181 A.D.3d at 437, 121 N.Y.S.3d at 22 (quoting D'Elia v. Menorah Home & Hosp. for the Aged & Infirm, 51 A.D.3d 848, 851–52, 859 N.Y.S.2d 224, 227 (2d Dep't 2008)).

186. *Id.* at 436–37, 121 N.Y.S.3d at 21 (quoting *D'Elia*, 51 A.D.3d at 851, 859 N.Y.S.2d at 227).

187. People *ex rel.* Figueroa v. Keyser, 193 A.D.3d 1148, 1148, 145 N.Y.S.3d 663, 727 (3d Dep't 2021) (citing N.Y. C.P.L.R. 7001–7012 (McKinney 2021)).

188. *Id.* at 1148–49, 145 N.Y.S.3d at 727 (citing People v. Figueroa, 213 A.D.2d 669, 669–70, 625 N.Y.S.2d 49, 50–51 (2d Dep't 1995)) (the appellate court noted

that the risks presented by continued imprisonment constituted "cruel and unusual punishment," thereby violating his constitutional rights.[189] The supreme court denied the petition.[190]

On appeal, the Third Department affirmed.[191] In reaching this decision, the court noted that the petitioner "may have arguably established that, objectively, he was 'incarcerated under conditions posing a substantial risk of serious harm'" based on the spread of COVID-19.[192] However, the court held that the petitioner failed to establish that prison officials displayed "deliberate indifference" to the risk of COVID-19.[193]

The appellate division credited an affidavit submitted by the respondent, outlining the protocols and preparedness measure put into place in June 2020 to address infections in the prison.[194] The respondent also established that no prisoner who became contracted COVID-19 had died of the infection.[195] Based on these showings, the court held that the prison did not exhibit a deliberate indifference to risk of COVID-19.[196]

In opposition, the petitioner argued that the social distancing guidelines adopted were "difficult if not impossible to maintain in a prison setting and that adequate protective equipment was not consistently supplied or use."[197] In response, the court held that

that the petitioner did not submit any medical documentation detailing his underlying health conditions).

189. *Id.* at 1148, 145 N.Y.S.3d at 727 (first citing U.S. CONST. amends. VIII, XIV; and then citing N.Y. CONST. art. I, §§ 5, 6).

190. *Id.* at 1148–49, 145 N.Y.S.3d at 727 (citing People *ex rel*. Carroll v. Keyser, 184 A.D.3d 189, 196, 125 N.Y.S.3d 484, 490 (3d Dep't 2020)).

191. *Id.* at 1149, 145 N.Y.S.3d at 727.

192. *People* ex rel. *Figueroa*, 193 A.D.3d at 1149, 145 N.Y.S.3d at 727 (citing U.S. CONST. amend. VIII).

193. *Id.* at 1149–50, 145 N.Y.S.3d at 727 (quoting Farmer v. Brennan, 511 U.S. 825, 828, 834, 839–40, 114 S. Ct. 1970, 1974, 1977, 1980 (1994)) (citing *People* ex rel. *Carroll*, 184 A.D.3d at 193–95, 125 N.Y.S.3d at 488).

194. *Id.* at 1150, 145 N.Y.S.3d at 727 (first citing U.S. CONST. amend. VIII; then citing *People* ex rel. *Carroll*, 184 A.D.3d at 194, 125 N.Y.S.3d at 488).

195. *See id.*

196. *Id.* (first citing U.S. CONST. amend. VIII; then citing *People* ex rel. *Carroll*, 184 A.D.3d at 193–95, 125 N.Y.S.3d at 488).

197. *People* ex rel. *Figueroa*, 193 A.D.3d at 1150, 145 N.Y.S.3d at 727.

petitioner's arguments did not establish a deliberate indifference.[198] Based on the foregoing, the petitioner was not released.[199]

E. Mackenzie v. Tedford

In this case, petitioner sought release from the Adirondack Correctional Facility during the COVID-19 pandemic.[200] The petitioner alleged that he suffered from hypertension, high cholesterol, and COPD.[201] He further alleged that social distancing protocols, hygiene protocols, and COVID-19 testing were "scant."[202] Based on the foregoing facts, petitioner argued that he was at a heightened risk of both contracting COVID-19 and suffering a serious infection.[203] Petitioner sought his immediate release.[204]

In assessing the petition, the trial court noted that the State has an obligation to provide "reasonable and adequate" medical care, stemming from the Eighth Amendment.[205] The trial court then cited United States Supreme Court precedents that an official must know of and disregard an excessive risk to the inmate's health before an Eighth Amendment violation will be found.[206]

Based on its review of the relevant caselaw, the trial court concluded that the petitioner was required to show that prison officials "act[ed] unreasonably with regard to his serious medical needs."[207]

Moving forward, the court found that the petitioner had submitted competent proof to establish that he had hypertension and high

198. *Id.* (first citing U.S. CONST. amend. VIII; then citing *People* ex rel. *Carroll*, 184 A.D.3d at 193–95, 125 N.Y.S.3d at 488).

199. *Id.* at 1151, 145 N.Y.S.3d at 727.

200. People *ex rel.* Mackenzie v. Tedford, 70 Misc.3d 1111, 1112, 141 N.Y.S.3d 265, 266 (Sup. Ct. Essex Cty. 2021) (citing N.Y. C.P.L.R. 7000–7012 (McKinney 2021)).

201. *Id.*

202. *Id.* at 1112–13, 141 N.Y.S.3d at 266–67.

203. *Id*. at 1112–13, 141 N.Y.S.3d at 266.

204. *Id*. at 1113, 141 N.Y.S.3d at 267. (citing U.S. CONST. amend. VIII).

205. *Mackenzie*, 70 Misc.3d at 1115, 141 N.Y.S.3d at 268 (first citing U.S. CONST. amend. VIII; then citing Estelle v. Gamble, 429 U.S. 97, 106, 97 S. Ct. 285, 292 (1976); and then citing Brown v. Plata, 563 U.S. 493, 510–11, 131 S. Ct. 1910, 1928 (2011)).

206. *Id*. (first quoting Helling v. McKinney, 509 U.S. 25, 32, 113 S. Ct. 2475, 2480 (1993); then quoting *Farmer*, 511 U.S. at 837, 114 S. Ct. at 1979) (first citing *Estelle*, 429 U.S. at 104, 97 S. Ct. at 291; then citing U.S. CONST. amend. VIII).

207. *Id*. at 1116, 141 N.Y.S.3d at 269 (first citing *Estelle*, 429 U.S. at 104, 97 S. Ct. at 291; then citing *Helling*, 509 U.S. at 32, 113 S. Ct. at 2480).

cholesterol.[208] Notably, the court acknowledged that the petitioner had submitted competent proof to establish that he had COPD, but concluded that the petitioner failed to establish the severity of that respiratory condition.[209]

The court then held that the respondents had not acted with deliberate indifference when addressing petitioner's medical conditions.[210] The court noted that there were no known cases at the Adirondack Correctional Facility at the time of the petition, and that all incoming prisoners are quarantined for fourteen days.[211] The court also noted that the petitioner was eligible for the vaccine at the time of the petition, and had not submitted any evidence that he was denied access to the vaccine.[212] Based on the above, the court denied petitioner's request for immediate release.[213]

F. King v. Board of Education of City School District of City of New York

In this case, parents of children attending New York City charter schools brought an Article 78 petition challenging the government's decision to not provide the same level of COVID-19 screening tests at charter schools as it did at public schools.[214] The supreme court had granted the petition, and ordered respondents to provide an identical system of COVID-19 screening as was provided in public schools to students and staff.[215]

In assessing the claims, the First Department noted that the relevant provisions of the Education Law require charter school boards to provide health services in "essentially the same manner and to the same extent as they are offered to students in the school district's

208. *Id*. at 1117, 141 N.Y.S.3d at 269.

209. *Id*. at 1117, 141 N.Y.S.3d at 270.

210. *Mackenzie*, 70 Misc.3d at 1118, 141 N.Y.S.3d at 270.

211. *Id*. at 1118, 141 N.Y.S.3d at 270–71.

212. *Id*. at 1119, 141 N.Y.S.3d at 271.

213. *Id.*

214. King v. Bd. of Educ. of the City Sch. Dist. of N.Y., 195 A.D.3d 551, 551, 151 N.Y.S.3d 34, 36 (1st Dep't 2021) (citing N.Y. C.P.L.R. 7801–7806 (McKinney 2021)).

215. *Id.*

public schools."[216] The court also noted that that health screening tests were covered under the meaning of "health services."[217]

In opposition, respondents argued that random COVID-19 testing was not "made available" to public school children because the children could not ask for the tests.[218] The court rejected this argument as "strained," reasoning that request at issue comes from the charter school, not the children.[219] The court rejected the respondents' other arguments and held that the City needed to provide COVID-19 testing to charter school children to the same extent testing was provided to public school children.[220]

G. Arons Authorizations: Stick to the Script

In two decisions handed down on the same day, the Fourth Department addressed the issue of the language appropriate for an *Arons* authorization.[221] In *Sims v. Reyes*, the plaintiff brought a medical malpractice action resulting from a missed cancer diagnosis.[222] As part of the discovery process, defendant, Seton Imaging, demanded HIPAA compliant authorizations which included requests for *Arons* authorizations allowing defendant's attorney to speak with plaintiff's treating, non-party physicians.[223]

216. *Id*. at 552, 151 N.Y.S.3d at 36 (quoting Richard K. v. Petrone, 31 A.D.3d 181, 183–84, 815 N.Y.S.2d 270, 272 (2d Dep't 2006)) (citing N.Y. EDUC. LAW § 912 (McKinney 2021)).

217. *Id.* (quoting EDUC. § 912).

218. *Id*. at 552, 151 N.Y.S.3d at 37 (quoting EDUC. § 912) (Section 912 of the Education Law requires a board of education to provide health and welfare services available at public schools within the district, upon request of a non-public school). *King*, 195 A.D.3d at 552, 151 N.Y.S.3d at 37.

219. *Id.* at 552–53, 151 N.Y.S.3d at 37 (quoting EDUC. § 912).

220. *King*, 195 A.D.3d at 553, 151 N.Y.S.3d at 37 (citing EDUC. § 912).

221. Sims v. Reyes, 195 A.D.3d 133, 134, 147 N.Y.S.3d 300, 302 (4th Dep't 2021) (citing Arons v. Jutkowitz, 9 N.Y.3d 393, 880 N.E.2d 831, 850 N.Y.S.2d 345 (2007)); Sky v. Cath. Charities of Buffalo, 194 A.D.3d 1417, 1417, 143 N.Y.S.3d 634, 634 (4th Dep't 2021) (first citing Grieco v. Kaleida Health, 82 A.D.3d 1671, 1672, 919 N.Y.S.2d 443, 443 (4th Dep't 2011); then citing *Arons*, 9 N.Y.3d 393, 415–16, 880 N.E.2d 831, 842, 850 N.Y.S.2d 345, 356). Arons authorizations allow defense attorney to converse with non-party physicians who treated a plaintiff in a medical malpractice action. *See Arons*, 9 N.Y.3d at 415–16, 880 N.E.2d at 842, 850 N.Y.S.2d at 356.

222. *Sims*, 195 A.D.3d at 134, 147 N.Y.S.3d at 302.

223. *Id.* (citing Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered titles and sections of U.S.C.).

> Plaintiff's authorization contained the following language: [t]he attorneys for the defendants in this lawsuit have indicated that they intend to contact you, and will attempt to meet with you to discuss the medical treatment you have provided, and perhaps other issues that relate to a lawsuit I commenced. Although I am required to provide these defense lawyers with a written authorization permitting them to contact you, the law does not obligate you in any way to meet with them or talk to them. That decision is entirely yours. If you decide to meet with their lawyers, I would ask that you let me know, because I would like the opportunity to be present or have my attorneys present.[224]

The defendant objected and proposed the following, "the purpose of the requested interview with the physician is solely to assist defense counsel at trial. The physician is not obligated to speak with defense counsel prior to trial. The interview is voluntary."[225] The parties went back and forth but could not come to a mutually agreed upon wording.[226]

The lower court granted defendant's motion, directing plaintiff "to provide revised HIPAA-compliant authorizations containing defendant's proposed language, un-emphasized and in the same size font as the rest of the authorization."[227] On appeal, the Fourth Department, in a four-to-one decision, held that the supreme court had broad discretion in the matter and had not abused its discretion in granting defendant's motion.[228] In support of its holding, the court compared defendant's proposed version to the standard form authorization from the Office of the Court Administration.[229] As the

224. *Id.* at 134–35, 147 N.Y.S.3d at 302.

225. *Id.* at 135, 147 N.Y.S.3d at 302.

226. *Id.*

227. *Sims*, 195 A.D.3d at 135, 147 N.Y.S.3d at 302–03 (citing 42 U.S. § 1320d).

228. *Id.* at 137, 147 N.Y.S.3d at 304 (first citing Voss v. Duchmann, 129 A.D.3d 1697, 1698, 12 N.Y.S.3d 428, 428 (4th Dep't 2015); then citing Forman v. Henkin, 30 N.Y.3d 656, 662, 93 N.E.3d 882, 887–88, 70 N.Y.S.3d 157, 162–63 (2018); then citing Lisa I. v. Manikas, 183 A.D.3d 1096, 1097, 123 N.Y.S.3d 734, 736 (3d Dep't 2020); and then citing Hann v. Black, 96 A.D.3d 1503, 1504, 946 N.Y.S.2d 722, 724 (4th Dep't 2012)).

229. *Id.* at 136–37, 147 N.Y.S.3d at 304 (first citing *Authorization to Permit Interview of Treating Physician by Defense Counsel*, NYCOURTS.GOV, https://www.nycourts.gov/forms/hipaa.shtml (last visited Mar. 23, 2022); then citing Akalski v. Counsell, 29 Misc. 3d 936, 939, 908 N.Y.S.2d 537, 539 (Sup. Ct. Westchester Cty. 2010)).

"wording that was approved by the court is identical to the wording that previously met with approval in the Second Department in *Porcelli* . . . [and] it is similar to the language contained in the standard form, [then] there is no dispute that it is consistent with the applicable law."[230]

The sole dissenter, Judge Bannister argued that the original authorization as set forth by the plaintiff, "was in no way improper, illegal, or misleading" and therefore the supreme court abused its discretion in compelling plaintiff to provide revised authorizations.[231]

Further, in *Sky*, the Fourth Department again addressed the issue of language disputes as they relate to *Arons* authorizations.[232] In finding that the lower court did not abuse its discretion, the court held that the plaintiff's proposed alterations were largely redundant to the standard form.[233] Read together, these cases suggest that although plaintiffs and defendants are free to adopt their own authorizations, it may be best practice to utilize the standardized form as provided by the Office of the Court Administration. Furthermore, it is likely that any modification of font size, boldness, color, etc. may be outside the bounds of what the court is willing to allow.

H. C.F. v. New York City Department of Health and Mental Hygiene

In 2000, measles was declared eliminated from the United States.[234] However, the risk of disease remained and an outbreak occurred in early 2019, resulting from an unvaccinated child who had returned home from visiting Israel.[235] This eventually led to the largest measles outbreak in the United States since 1992.[236] The outbreak was isolated to a few communities in New York City.[237] A majority of the cases consisted of individuals from the Orthodox Jewish community residing in the Williamsburg and Borough Park neighbors of

230. *Id.* at 137, 147 N.Y.S.3d at 304 (citing Porcelli v. N. Westchester Hosp. Ctr., 65 A.D.3d 176, 178, 882 N.Y.S.2d 130, 132 (2d Dep't 2009)).

231. *Id.* at 138, 139, 147 N.Y.S.3d at 305 (Bannister, J., dissenting) (first citing *Porcelli*, 65 A.D.3d at 178, 882 N.Y.S.2d at 132; then citing 42 U.S.C. § 1320d).

232. *Sky*, 194 A.D.3d at 1417, 143 N.Y.S.3d at 634 (first citing *Arons*, 9 N.Y.3d at 415, 880 N.E.2d at 841, 850 N.Y.S.2d at 355; then citing 42 U.S.C. § 1320d).

233. *Id.* at 1417, 143 N.Y.S.3d at 634–35 (quoting *Grieco*, 82 A.D.3d at 1672, 919 N.Y.S.2d at 443–44).

234. J.R. Zucker et al., *Consequences of Undervaccination—Measles Outbreak, New York City, 2018–2019*, 382 NEW ENG. J. MED. 1009, 1010 (2020).

235. *Id.*

236. *Id.*

237. *Id.*

Brooklyn.[238] The outbreak was largely attributed to an under vaccinated and susceptible population of young children.[239]

To combat the growing outbreak, the Board of Health of the Department of Health and Mental Hygiene of the City of New York adopted a resolution that required "any person over the age of six months who was living, working, or attending school or childcare in the affected areas . . . to be immunized against measles, absent a medical exemption."[240] The resolution was directed at individuals residing within four specified zip codes in the Williamsburg neighborhood where the outbreak was the worst.[241] Failure to comply with such vaccination mandates was made "punishable by fines authorized by law, rule, or regulation, for each day of noncompliance."[242]

Eventually, a group of parents, as individuals and on behalf their children, commenced this action for a declaratory judgment and injunctive relief.[243] The supreme court disagreed with plaintiff's contentions, holding that "there existed an emergent measles epidemic that affected zip codes sufficient to warrant the declaration of a public health emergency."[244] The court further rejected plaintiff's other arguments including ones related to Public Health Law Section 2164 (9).[245] From there, the petitioners noticed an appeal.[246] However, by mid-July 2019 the number of new cases had dropped to zero and by September 2019 the Board had rescinded the resolution.[247]

Despite defendants' mootness argument, the Second Department determined that in light of the current COVID-19 pandemic, the case

238. *Id.* at 1011.

239. Zucker, *supra* note 234, at 1014.

240. C.F. v. N.Y. City Dep't of Health & Mental Hygiene, 191 A.D.3d 52, 55, 139 N.Y.S.3d 273, 275–76 (2d Dep't 2020) (first citing DEMETRE DASKALAKIS, N.Y. CITY DEP'T OF HEALTH & MENTAL HYGIENE, PROPOSED RESOLUTION: MEASLES VACCINATION 22 (2019), https://www.courthousenews.com/wp-content/uploads/2019/04/Vax.pdf; then citing N.Y. CITY, N.Y., ADMIN. CODE § 17-148 (2019)).

241. *Id.* at 57–58, 139 N.Y.S.3d at 277 (citing Order of the Commissioner, N.Y. City Dep't of Health & Mental Hygiene (Apr. 9, 2019) (codified at N.Y. CITY, N.Y., ADMIN. CODE § 17-148 (2019)).

242. *Id.* at 55, 139 N.Y.S.3d at 275 (citing ADMIN. CODE § 17-148).

243. *Id.* at 58, 139 N.Y.S.3d at 278.

244. *Id.* at 60, 139 N.Y.S.3d at 279.

245. *C.F.*, 191 A.D.3d at 60, 139 N.Y.S.3d at 279 (citing N.Y. PUB. HEALTH LAW § 2164(9) (McKinney 2015) (repealed 2021)).

246. *Id.* at 60, 139 N.Y.S.3d at 280.

247. *Id.* at 61, 139 N.Y.S.3d at 280. Despite this fact, Petitioners perfected their appeal on October 18, 2019. *Id.*

at hand presented "a significant issue which is likely to recur and evade review" warranting the court's review.[248]

Plaintiffs argued on appeal that the Board acted outside of its police powers by labeling those who were not vaccinated as a "nuisance."[249] The court disagreed and held that in fact the City Health Department has "jurisdiction to regulate all matters affecting health in the city of New York."[250] This included the power to "take measures . . . for general and gratuitous vaccination," leaving the Board with the authority to "adopt vaccination measures."[251] Further, the court held that the Board declared the outbreak a public nuisance, not the unvaccinated people and in doing so, the Board was well within its rights to make such a declaration and act "to abate that nuisance.[252]

The court also credited the Board's initial, less restrictive actions whereby it made "considerable efforts to protect the public through outreach to the affected community."[253] When this failed to curb the spread, the Board took further action as it saw fit while limiting the mandate to areas where there was a high level of disease.[254] Furthermore, the court held that the Board's actions were neither irrational, arbitrary, capricious nor did they constitute an abuse of discretion.[255] Under these circumstances, the Board is accorded great deference.[256] Therefore, the Board's actions were supported by the

248. *Id.* (first citing State v. Robert F., 25 N.Y.3d 448, 453, 34 N.E.3d 829, 832, 13 N.Y.S.3d 319, 322 (2015); then citing Wisholek v. Douglas, 97 N.Y.2d 740, 741, 769 N.E.2d 808, 810, 743 N.Y.S.2d 51, 53 (2002); and then citing City of N. Y. v. Maul, 14 N.Y.3d 499, 507, 929 N.E.2d 366, 371, 903 N.Y.S.2d 304, 309 (2010); and then 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); and then citing In Def. of Animals v. Vassar Coll., 121 A.D.3d 991, 992, 994 N.Y.S.2d 412, 414 (2d Dep't 2014)).

249. *C.F.*, 191 A.D.3d at 64, 139 N.Y.S.3d at 282.

250. *Id.* (quoting N.Y. CITY CHARTER § 556 (2021)).

251. *Id.* at 64–65, 139 N.Y.S.3d at 282–83 (first citing N.Y. CITY, N.Y. ADMIN. CODE § 17-109(b); then citing Garcia v. N.Y. City Dep't of Health & Mental Hygiene, 31 N.Y.3d 601, 611, 106 N.Y.3d 1187, 1195, 81 N.Y.S.3d 827, 835 (2018)).

252. *Id.* at 66–67, 139 N.Y.S.3d at 284.

253. *Id.* at 67, 139 N.Y.S.3d at 284–85.

254. *C.F.*, 191 A.D.3d at 67, 139 N.Y.S.3d at 285; (quoting Belle Harbor Realty Corp. v. Kerr, 35 N.Y.2d 507, 511, 323 N.E.2d 697, 699, 364 N.Y.S.2d 160, 163 (1974)).

255. *Id.* at 69, 139 N.Y.S.2d at 285.

256. *Id.* at 68, 193 N.Y.S.2d at 285 (citing Matter of Ralex Servs., Inc. v. Shah, 145 A.D.3d 1013, 1014, 44 N.Y.S.3d 170, 171 (2d Dep't 2016)).

severity of the measles outbreak and its reliance on medical consensus.[257]

The court also addressed certain constitutional concerns raised by the plaintiff.[258] "The United States Supreme Court long ago held that a state may mandate vaccinations without violating the liberty secured by the Fourteenth Amendment of the United States Constitution."[259] Further, in response to plaintiff's argument that the resolution violated their free exercise of religion, the court held that:

> [s]trict scrutiny does not apply to this neutral law of general applicability and, even if it did, the adoption of a geographically limited and temporary emergency mandatory vaccination requirement was supported by a compelling state interest and was narrowly tailored to apply only to a specific, confined geographical area with a high incidence of disease and only applied for a limited period of time.[260]

While the court confirmed there can be no singling out of a house of worship, the "Free Exercise Clause does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability, even if the law has the incidental effect of burdening a particular religious practice."[261] Further, the court concluded that the Board's resolution passed both the rational basis and strict scrutiny tests and was a "valid and constitutional exercise of the Board's authority."[262]

I. F.F. v. State of New York

As part of their argument opposing mandatory vaccination, plaintiffs in *C.F. v New York City Department of Health and Mental Hygiene* contended that the Board's actions were overridden by the

257. *Id.* at 69, 139 N.Y.S.2d at 286.

258. *Id.* at 71, 139 N.Y.S.2d at 287.

259. *C.F.*, 191 A.D.3d at 71, 139 N.Y.S.3d at 287 (first citing U.S. CONST. amend. XIV; then citing Jacobson v. Mass., 197 U.S. 11, 25, 25 S. Ct. 358, 361 (1905)).

260. *Id.* at 72–73, 139 N.Y.S.2d at 288. The Court acknowledged the issues with the *Smith* rule that "a law is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Id.* at 74 (quoting Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 531, 113 S. Ct. 2217, 2226 (1993)); *see also* Emp. Div., Dep't of Hum. Res. of Ore. v. Smith, 494 U.S. 872, 878, 110 S. Ct. 1595, 1600 (1989)).

261. *Id.* at 76, 139 N.Y.S.2d at 291 (citing U.S. CONST. amend. I).

262. *Id.* at 79, 139 N.Y.S.2d at 293.

religious exemption granted by Public Health Law Section 2164(9).[263] This argument was quickly overshadowed by the change in law that occurred on June 13, 2019.[264]

Public Health Law Section 2164 "requires children from the ages of two months to 18 years to be immunized from certain disease, including measles, in order to attend any public or private school or child care facility."[265] Initially this law consisted of two exemptions: a medical exemption and a religious exemption.[266] In light of the recent outbreaks, lawmakers in New York voted to end the religious exemption previously afforded under Public Health Law section 2164(9).[267] This amendment was quickly contested by parents throughout the state whose children had been granted a religious exemption.[268] In response to the lawsuit, the State submitted a pre-answer motion to dismiss which the supreme court granted, holding that the "repeal was a neutral law of general applicability driven by the public health concerns and not tainted by hostility towards religion."[269]

On appeal, plaintiffs' primary challenge was that the repeal constituted a violation of the Free Exercise Clause.[270] The Third Department phrased the issue as whether the repeal, which eliminated a religious exemption, was "nonetheless a neutral law of general applicability?"[271] In holding that the supreme court did not err in its conclusion, the Third Department determined that the "repeal is a neutral law of general applicability, not based on hostility towards religion and not infringing upon the free exercise of religion."[272] In so holding, the court determined that the repeal did not single out a

263. *C.F.*, 191 A.D.3d. at 68, 139 N.Y.S.2d at 285 (citing N.Y. PUB. HEALTH LAW § 2164(9) (McKinney 2015)).

264. *C.F.*, 191 A.D.3d at 68, 139 N.Y.S.2d at 285 (citing Act of June 13, 2019, 2019 McKinney's Sess. Laws of N.Y., ch. 35, at 153 (codified at PUB. HEALTH § 2164 (McKinney 2021)).

265. F.F. v. N.Y., 194 A.D.3d 80, 82, 143 N.Y.S.3d 734, 737 (3d Dep't 2021) (citing PUB. HEALTH § 2164(7)(a) (McKinney 2021)).

266. *Id.* (citing PUB. HEALTH § 2164(8)–(9) (McKinney 2015) (repealed 2019)).

267. *Id.* at 83, 143 N.Y.S.3d at 738 (citing Act of June 13, 2019, 2019 McKinney's Sess. Laws of N.Y., ch. 35, at 153 (codified at PUB. HEALTH § 2164 (McKinney 2021)).

268. *Id.*

269. *F.F.*, 194 A.D.3d at 83, 143 N.Y.S.3d at 738.

270. *Id.* (citing U.S. CONST. amend. I).

271. *Id.* at 84, 143 N.Y.S.3d at 739 (emphasis removed).

272. *Id.* at 88, 143 N.Y.S.3d at 742.

religious entity but placed all school-age children on equal footing.[273] The group being targeted was not in fact a religious entity, but school age children that the Legislature desired to protect.[274] There were no ulterior motives to the repeal and although it forced parents "to make difficult decisions for their families" it did "not interfere with plaintiffs' right to communicate, or to refrain from communicating, any message they like."[275]

Based on the foregoing, it is possible that a mandatory vaccination requirement for COVID-19 could be justified by a public health and safety argument as the COVID-19 pandemic is far more reaching than that of measles and poses a much greater health crisis than the United States has seen in the last century.

CONCLUSION

The coming *Survey* Year will no doubt see more changes to the law due to COVID-19. Of particular interest will be litigation surrounding the tolling of statute of limitations, the extent of civil immunities, and any state efforts to require COVID-19 vaccinations. We also look forward to seeing further developments in the legalization of cannabis in New York State.

273. *Id.* at 89, 143 N.Y.S.3d at 742.

274. *F.F.*, 194 A.D.3d at 89–90, 143 N.Y.S.3d at 743 (citing Act of June 13, 2019, 2019 McKinney's Sess. Laws of N.Y., ch. 35, at 153 (codified at N.Y. PUB. HEALTH LAW § 2164 (McKinney 2021)).

275. *Id.* at 91, 143 N.Y.S.3d at 743–44 (quoting Cath. Charities of Diocese of Albany v. Serio, 7 N.Y.3d 510, 523, 859 N.E.2d 459, 465, 825 N.Y.S.2d 653, 659 (2006)).