ADMINISTRATIVE LAW

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INTRODUCTION

This article reviews eleven decisions announced by the New York Court of Appeals that reflect developments in administrative law and practice during 2021–2022.

PROCEDURAL DUE PROCESS

In *Hallock v. Grievance Committee*, an attorney grievance matter, the Court of Appeals reviewed appellate division orders holding two supervisory attorneys responsible for their associate attorney's actions.[1] The defendants were sanctioned in federal court for failure to supervise their associate, who notarized an affidavit that was later found to be false, and the affiant denied all knowledge of the affidavit.[2]

After federal sanctions and discipline were imposed on the defendants, the Grievance Committee for the Tenth Judicial District charged the defendants with violations of the New York Rules of

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1. *See* Hallock v. Grievance Comm., 180 N.E.3d 549, 550 (N.Y. 2021).
2. *See id.* at 550–51.

Professional Conduct.[3] The appellate division suspended the defendants from the practice of law, finding both acted dishonestly, and the defendants appealed to the Court of Appeals.[4]

The defendants argued that the appellate division improperly relied on evidence from the associate attorney's reciprocal hearing, and that the record did not support the appellate division's finding of dishonesty.[5] The court disagreed with the first argument, holding that the appellate division may have referenced the associate attorney's disciplinary hearing, but these references existed only to summarize the findings of the federal court, not as additional evidence.[6] However, the court found that the appellate division abused its discretion, therefore violating the defendants' procedural due process rights, by claiming that the defendants acted dishonestly without sufficient support in the record.[7] The federal court did not make a finding of dishonesty by either of the defendant's on the record, and therefore the appellate divisions reference to dishonesty was not supported by the record.[8]

The court remanded the case to the appellate division, stating that the appellate division must provide sufficient detail of the federal court proceeding to support the finding of dishonesty in the record.[9] The court did not indicate if the suspensions were appropriate under the circumstances, only that "whatever sanction is imposed [must be] grounded in the record of the federal court proceedings."[10]

MOOTNESS

The availability of judicial review of an administrative action may implicate the doctrine of mootness, limiting the "influence [a court may] have over agencies."[11] The "power of a court to declare the law arises out of, and is limited to, determining the rights of persons" in an actual controversy.[12] "'[T]he doctrine of mootness is invoked

3. *See id.* at 551.
4. *See id.* at 551–52.
5. *Id.* at 552.
6. *See Hallock*, 180 N.E.3d at 552.
7. *See id.*
8. *See id.* at 553.
9. *See id.*
10. *Id.*
11. PATRICK J. BORCHERS & DAVID L. MARKELL, NEW YORK STATE ADMINISTRATIVE PROCEDURE AND PRACTICE 195 (2d ed. 1998).
12. ARTHUR KARGER, THE POWERS OF THE NEW YORK COURT OF APPEALS 404 (3d ed. 2005) (citing Hearst Corp. v. Clyne, 409 N.E.2d 876, 877 (N.Y. 1980)).

where a change in circumstances prevents a court from rendering a decision that would effectively determine an actual controversy.'"[13]

An exception to the applicability of the doctrine may be invoked when "a novel and important legal issue" is likely to recur "between the parties or among other members of the public" and is likely to evade review repeatedly.[14] The issue of mootness is frequently raised in challenges to administrative action by the Department of Corrections and Community Supervision (DOCCS) because during the pendency of an appeal, a challenged disciplinary action is reversed administratively,[15] a satisfactory community housing placement is made by DOCCS,[16] or a prisoner is released.[17]

The issue of mootness arose in *Alvarez v. Annucci* over petitioner's claim that DOCCS had failed to meet the community housing requirements of the Sexual Assault Reform Act (SARA) during his post-release supervision. [18] Petitioner commenced an Article 78 proceeding to compel DOCCS to transfer him to a residential treatment facility or appropriate housing in the community.[19] During the pendency of the proceeding, petitioner was placed in community residence housing which met DOCCS' statutory obligations.[20] The trial court had dismissed the proceeding on the grounds that petitioner's placement in "compliant housing" had rendered the matter academic.[21] The Second Department affirmed, finding that factors dictating an exception to the mootness doctrine had been met.[22] The appellate court held that the issue of whether particular placement complied with SARA's housing requirements was significant, had already

13. Joseph F. Castiglione, *A "Moot Point" Is an Ongoing Concern for Everyone*, 82-FEB N.Y. ST. B. J. 38, 38 (2010) (quoting Dreikausen v. Zoning Bd. of Appeals, 774 N.E.2d 193, 196 (N.Y. 2002)).

14. KARGER, *supra* note 12, at 416.

15. *See, e.g.*, Slater v. Annucci, 163 N.Y.S.3d 308, 311 (App. Div. 3rd Dep't 2022) (incarcerated petitioner's challenge to two findings of guilt regarding violation of prison disciplinary rules was moot because they were reversed administratively).

16. *See, e.g.*, Kirkland v. Annucci, 54 N.Y.S.3d 40, 42 (App. Div. 2d Dep't 2017).

17. *See, e.g.*, Rizzuto v. Annucci, 165 N.Y.S.3d 386, 387 (App. Div. 3d Dep't 2022) (incarcerated petitioner's appeal regarding the denial of six grievances including restrictions on his use of the grievance procedure was moot because during the pendency of his appeal he was released to parole supervision).

18. *See* Alvarez v. Annucci, 187 N.E.3d 1032, 1033 (N.Y. 2022).

19. *See* Alvarez v. Annucci, 127 N.Y.S.3d 303, 303 (App. Div. 2d Dep't 2020).

20. *See id.*

21. *See id.*

22. *See id.* at 303–04.

resulted in litigation between the parties, and was likely to evade review because of the "passage of time during which individuals subject to post release supervision, such as [Mr. Alvarez], obtain SARA-compliant housing."[23] However, it affirmed the dismissal of petitioner's case.[24] Petitioner was granted leave to appeal.[25] The Court of Appeals reversed, holding that petitioner did not have a clear legal right to relief because the housing requirements of the Sexual Assault Reform Act were applicable to individuals under post-release supervision.[26]

Mental Hygiene Legal Service v. Delaney addressed mootness because of a placement problem as well.[27] At issue was the alleged lack of reasonable promptness of the Department of Health (DOH) and the Office of People with Developmental Disabilities (OPWDD) in providing community rehabilitation services to a child with multiple disabilities stranded in a hospital emergency room for over five weeks.[28] In 2013, the child was determined to be eligible for services under "[O]PWDD's Home and Community Based Services Medicaid waiver program."[29] Medicaid funds paid for the services which were "delivered in the child's home, and the child's mother was responsible for hiring and supervising providers."[30] The child had been living with her mother but her behavior became difficult to manage.[31] After an incident at school, her mother believed she would be unable to care for her daughter at home.[32] The child was taken to the local hospital emergency room.[33] The hospital determined that she did not require admission for psychiatric or other services and sought to discharge her in accordance with safe discharge requirements.[34] Discharge quickly became difficult.[35] Her mother declined to take her home without

23. *Id.* at 304.

24. *See Alvarez*, 127 N.Y.S.3d at 303.

25. *See* Alvarez v. Annucci, 168 N.E.3d 853, 853 (N.Y. 2021) (order granting leave to appeal).

26. *See* Alvarez v. Annucci, 187 N.E.3d 1032, 1033 (N.Y. 2022).

27. *See* Mental Hygiene Legal Serv. v. Delaney, 191 N.E.3d 1113, 1115 (N.Y. 2022).

28. *See* Mental Hygiene Legal Serv. v. Delaney, 109 N.Y.S.3d 469, 473 (App. Div. 3d Dep't 2019).

29. *Id.* at 474.

30. *Id.*

31. *See id.*

32. *See id.*

33. *See Mental Hygiene Legal Serv.*, 109 N.Y.S.3d at 474.

34. *See id.*

35. *See id.*

further support.[36] The hospital attempted to force the issue but its complaint to the local county department of social services alleging neglect and abandonment was rejected.[37] The school district determined that the child should be placed in a residential school but could find no appropriate facilities with an opening.[38] OPWDD's efforts to find a residential placement were also unsuccessful.[39] Despite making increased funding available for at-home assistance, [40] OPWDD could not find any private providers who were available and it declined to provide OPWDD employees for her care.[41]

Mental Hygiene Legal Service (MHLS)[42] commenced an Article 78 proceeding and an Article 70 habeas corpus proceeding against DOH and OPWDD alleging that their failure to provide services violated OPWDD's obligation to the child's personal and civil rights by failing to provide her with needed services with reasonable promptness, and that the agencies' failures were arbitrary and capricious.[43] The petition also named the hospital as having custody of the child.[44]

Before the matter could be resolved by the trial court, the child was placed in a residential facility on a trial basis.[45] The court then dismissed the complaint, which on its order had been amended to name the school district as a respondent with the statutory obligation to place the child in a residential facility.[46] On appeal, the respondents urged the court to treat the matter as moot.[47] The appellate court declined to do so, observing that

> The record reveals that temporary residential placements for children with complex disabilities are scarce. As the process of finding appropriate permanent placements necessarily takes time, the problem of the unavailability of interim placements is likely to recur, and, because long-term placements will

36. *See id.*
37. *See id.*
38. *See Mental Hygiene Legal Serv.*, 109 N.Y.S.3d at 474.
39. *See id.*
40. *See id.*
41. *See id.*
42. MHLS is charged by statute to "provide legal assistance to patients or residents" related to the admission, retention, and care and treatment of such persons in mental hygiene facilities. N.Y. MENTAL HYG. LAW § 47.01 (McKinney 2022).
43. *See Mental Hygiene Legal Serv.*, 109 N.Y.S.3d at 474, 479.
44. *See id.* at 474.
45. *See id.* at 475.
46. *See id.* at 474–75.
47. *See id.* at 475.

> usually be found before appeals can be perfected, the issue will typically evade appellate review. The matter indisputably "implicates significant and novel questions of statewide importance involving the rights of [developmentally disabled minors]".[48]

It did, however, make quick work of dismissing the petitioner's substantive claims. It held that MHLS's claims that respondent OPWDD's failure to protect the child's civil rights and failure to provide services could not properly be the subject of a mandamus to review because the conduct complained of involved omissions to act.[49] Mandamus to review involves a court reviewing "administrative action involving the exercise of discretion."[50] The proper remedy was a mandamus to compel, "an extraordinary remedy that lies only to compel the performance of acts which are mandatory, not discretionary, and only when there is a clear legal right to the relief sought."[51] The court dismissed petitioner's claim observing that the child did not have a clear legal right to relief.[52] The court characterized OPWDD as having broad discretion in providing services and "allocating its resources."[53] Here, OPWDD did provide services in the form of more funding for at-home services.[54] According to the court,

> The discretion and flexibility embodied in the governing provisions of the Mental Hygiene Law preclude a finding that the child had a 'clear legal right' to a more appropriate placement or to any other specific service. OPWDD's actions and policy choices "involve the exercise of reasoned judgment which could typically produce different acceptable results" and, as such, are beyond the reach of judicial intervention.[55]

As to petitioner's claim that DOH failed to act "with reasonable promptness" as required by the federal Medicaid statute, in providing funding for community-based services, the court concluded that the "reasonable promptness" provision does not create a private right of

48. *Mental Hygiene Legal Serv.*, 109 N.Y.S.3d at 475.

49. *See id.* at 477.

50. *Id.* (internal quotations omitted).

51. *Id.* (internal quotations omitted).

52. *See id.*

53. *Mental Hygiene Legal Serv.*, 109 N.Y.S.3d at 478 (citation omitted) (OPWDD works with school districts and other agencies to provide community-based services, and rather than providing residential services, it licenses private agencies to provide them).

54. *See id.*

55. *Id.* (citation omitted).

action, relying on the United States Supreme Court decision in *Armstrong v. Exceptional Child Center, Inc.*, in which the Court held that "no private right of action existed by which a Medicaid provider could enforce one of the other provisions that, like the reasonable promptness requirement, must be included in state Medicaid plans."[56] The court also dismissed petitioner's claims that the actions of DOH and OPWDD violated the "integration mandate" of the Americans with Disabilities Act.[57] It also declined to address the hospital's claim that the court should have exercised its equity jurisdiction to resolve the matter, noting that while the hospital's argument was very persuasive, it did not file pleadings, nor did petitioner seek such relief.[58]

The Court of Appeals dismissed the appeal to it as moot.[59] It declined to adopt an exception to the mootness doctrine on the grounds that during the pendency of the appeal, OPWDD had developed a statewide program of crisis intervention to address the needs of children such as the child in this case.[60]

Whether this new program will address similar situations going forward remains to be seen. As all three courts noted,[61] this child's situation is not uncommon.[62] Patients with complex needs are at the

56. *Id.* at 479. (citing Armstrong v. Exceptional Child Ctr. Inc., 575 U.S. 320, 331–32 (2015)).

57. *Id.* at 480.

58. *Mental Hygiene Legal Serv.*, 109 N.Y.S.3d at 476.

59. *See* Mental Hygiene Legal Serv. v. Delaney, 191 N.E.3d 1113, 1114 (N.Y. 2022).

60. *See id.* at 1115.

61. *See id.*; Mental Hygiene Legal Serv. v. Delaney, 109 N.Y.S.3d 469, 473 (App. Div. 3d Dep't 2019).

62. The Champlain Valley Physicians Hospital which appeared in *Mental Hygiene Legal Service v. Delaney* stated that

> [T]he lack of adequate services for children with complex diagnoses has created a "new de facto type of legal confinement." [The trial court observed,] "It is a stark reality that our state's most vulnerable children alarmingly spend multiple months (or longer) housed in hospital emergency rooms, notwithstanding the absence of any on-going medical need, nor abuse/neglect within the home setting nor the immense efforts of family members attempting to orchestrate a better life plan for their loved ones."

Mental Hygiene Legal Serv., 109 N.Y.S.3d at 469 n.1. *See, e.g.*, Abigail Kramer & Gabriel Poblete, *"We're at a Crisis Point": NY Attorney General Hearing Spotlights Child Mental Health Care Failures*, THE CITY (June 23, 2022), https://www.thecity.nyc/2022/6/23/23180163/child-mental-health-letitia-james/; Abigail Kramer, *New York Let Residences for Kids with Serious Mental Health Problems Vanish. Desperate Families Call the Cops Instead*, THE CITY (June 16, 2022), https://www.thecity.nyc/2022/6/8/23158882/new-york-residential-treatment-

mercy of the current health care system which does not serve them well.[63] A work group established by the Hospitals Association of New York State (HANYS) issued a white paper stating that

> Complex case discharge delays, also known as bed blocking or bed delays, are a longstanding, growing challenge throughout the U.S. and the world. These delays happen for many reasons, but are most commonly attributed to difficulty finding safe post-discharge care and lengthy administrative or legal processes. Individuals experiencing behavioral health, intellectual or developmental disabilities and/or co-occurring conditions are most profoundly impacted. Once a person enters through emergency room doors, hospitals become responsible for their safe care and discharge. As a result, people are often brought to the emergency department as a last resort — when no other options for care can be found. The unintended consequence is a system where hospitals are left bridging gaps between health and social care; serving as a long-term destination rather than as a way station for those who, once their acute care needs are met, are better served in a non-hospital setting.[64]

STATE CONSTITUTION

In 2014, the New York Constitution was amended, and the state redistricting process was restructured to avoid future gerrymandering.[65] However, in 2020, after census data was released, the senate majority manipulated the new redistricting process in such a way that it nullified the changes, allowing the legislature to act exactly as it had prior to the constitutional amendments and redistricting process changes.[66] This led to multiple lawsuits by state voters against various

facilities-mental-health ("Many residential treatment facilities for children in New York are shutting down, leaving families frustrated and scrambling to find mental health services. Some kids age out of care as they wait.").

63. *See* HEALTH CARE ASSOCIATION OF NEW YORK, THE COMPLEX CASE DISCHARGE DELAY PROBLEMS 8 (2021) (available at https://www.hanys.org/communications/publications/complex_case_discharge_delays/).

64. *Id.* at 1. The state of community-based care is complex as well. *See generally* NEW YORK STATE COALITION FOR CHILDREN'S MENTAL HEALTH SERVICES, REDESIGNING RESIDENTIAL TREATMENT FACILITIES: PACC REFORM, CLINICAL TRANSFORMATION AND PREPARING FOR CARE COORDINATION (2013); NEW YORK ALLIANCE FOR INCLUSION & INNOVATION, PERSON-CENTERED PAYMENT AND PROGRAM POLICIES: SUPPORTING SERVICES FOR INDIVIDUALS WITH COMPLEX NEEDS (2019) (discussing of the complexities of community-based care).

65. *See* Harkenrider v. Hochul, No. 60, slip op. at 1 (N.Y. Apr. 27, 2022).

66. *See id.*

government officials challenging the constitutionality of the new maps.[67]

In *Harkenrider v. Hochul,* the Court of Appeals declared the new maps void because the legislature did not follow the redistricting rules, specifically that the legislature improperly submitted new maps without following the procedure laid out for an Independent Redistricting Commission (IRC), made up of both Democratic and Republican Senators, to submit maps twice before the legislature itself was given the chance to create the maps outside of the IRC.[68] The IRC submitted a first set of maps, which were voted down, but the IRC failed to submit a second set of maps pursuant to the new rules.[69] Additionally, the supreme court held that the maps "violated the constitutional prohibition on partisan gerrymandering", and both the maps and the legislation authorizing the maps were unconstitutional.[70] The appellate division affirmed in part, agreeing that the new maps were void and unenforceable because they violated the prohibition against gerrymandering, but did not find the maps and legislation to be unconstitutional.[71] Both sides appealed the appellate division order, and the Court of Appeals took the case.[72]

First, the court found that the petitioners expressly had standing to bring the lawsuits both through the state constitution and state law.[73] Then the court reviewed the history of the state constitutional amendment, the redistricting process, and the actions of the IRC and the state senate.[74] The court held that the plain meaning of the constitutional amendment required two IRC map submissions prior to the creation of maps by the legislature, and the context and history of the amendments shows that the IRC "was unquestionably intended to operate as a necessary precondition to, and limitation on, the legislature's exercise of its discretion in redistricting."[75] Therefore, the court upheld the

67. *See id.* at 3.

68. *See id.*

69. *See id.* (first citing N.Y. CONST. art. 3, § 4; then citing N.Y. CONST. art. 3, § 5-b).

70. *Harkenrider*, slip op. at 4.

71. *See id.* at 5.

72. *See id.* (citing N.Y. C.P.L.R. 5601(b) (McKinney 2022)).

73. *See id.*

74. *See id*.

75. *Harkenrider*, slip op. at 7.

appellate division decision to render the maps void and unenforceable for failure to follow the process laid out in the state constitution.[76]

Next, the court addressed the constitutionality of the maps considering the constitutional prohibition on partisan gerrymandering.[77] The court found that evidence presented in supreme court by an expert witness, along with the partisan process and map produced by the senate that showed less competitive districts existed on the new maps than previous maps, was sufficient record support to find that the maps violated the constitutional prohibition on partisan gerrymandering.[78] Finally, the court ordered the supreme court to work with the interested parties and a Special Master to develop new maps that pass constitutional muster.[79]

Multiple Justices dissented, both in part and in full.[80] Judge Troutman agreed with the majority decision to vacate the maps due to the procedural defect, but believed the court should have stopped there, sending the issue back to the legislature to agree on one of the two maps first submitted by the IRC.[81] Taking the responsibility of drawing new maps away from the legislature completely was not in keeping with the wording or intent of the constitutional amendment.[82] Judge Wilson dissented in full, agreeing with Judge Troutman's suggestion to send the matter back down to the Senate as a better plan than the majority holding, and further arguing that the redistricting was not unconstitutional at all.[83] Judge Wilson believed that the supreme court expert witness's methodology was not sufficiently rigorous to prove beyond a reasonable doubt that the legislature engaged in prohibited partisan gerrymandering.[84] Finally, Judge Rivera dissented, agreeing with Judge Wilson that petitioners did not submit sufficient evidence to prove the existence of prohibited partisan gerrymandering, and more, she believed the failure of the IRC to provide a second set of maps meant the legislature acted appropriately by creating new

76. *See id.* at 7–8 (citing Cohen v. Cuomo, 969 N.E.2d 754, 757–58 (N.Y. 2012)).

77. *See id.* at 8.

78. *See id.* at 9. (citing Rittersporn v. Sadowski, 396 N.E.2d 197, 197–98 (N.Y. 1979)).

79. *See id.* at 11.

80. *See Harkenrider*, slip op. at 11.

81. *See id.* (Troutman, J., dissenting).

82. *See id.*

83. *See id.* (Wilson, J., dissenting).

84. *See id.* at 11–12 (Wilson, J., dissenting) (citing Wolpoff v. Cuomo, 600 N.E.2d 191, 194 (N.Y. 1992)).

maps on its own, meaning that neither a procedural or substantive constitutional defect existed.[85]

STATUTORY INTERPRETATION

A well-established principle of administrative law is the deference accorded to an agency's interpretation of the laws it is charged with regulating.[86] However, if the law has a plain meaning that does not require a specialized expertise to interpret, the courts are not bound by an agency's interpretation.[87] The Court of Appeals has repeatedly stated its understanding that the court's primary consideration in statutory interpretation is to identify and follow the legislative intent which is demonstrated by "the plain meaning of the statutory text."[88] The court addressed several cases involving statutory interpretation this year. *Alvarez v. Annucci* involved the applicability of the Sexual Assault Reform Act's housing restrictions on an individual under post release supervision after serving a determinate sentence.[89] "A determinate sentence, or 'flat' sentence, is one in which the sentencing court is authorized to set a maximum term of incarceration in whole or half years. [D]eterminate sentences must also include a separate period of post-release supervision."[90] Section 70.45 of the Penal Law was amended to include the requirement of post-release supervision as a way to provide for the protection of the community and the successful reintegration of the prisoner into the community by providing "services to the offender, such as assistance with employment or housing as well as by requiring for a period of transfer to, and participation in, programs of a residential treatment facility . . ."[91]

New York Correction Law section 201(5) requires the Department of Corrections and Community Supervision (DOCCS) to "assist incarcerated individuals eligible for community supervision and individuals who are on community supervision to secure employment,

85. *See Harkenrider*, slip op. at 18 (Rivera, J. dissenting).

86. *See* BORCHERS & MARKELL, *supra* note 11, at 239.

87. *See id.*

88. *See, e.g.,* Verneau v. Consol. Edison Co. of N.Y., Inc., 180 N.E.3d 537, 541 (N.Y. 2021) (quoting People v. Cahill, 809 N.E.2d 561, 627 (N.Y. 2003).

89. *See* Alvarez v. Annucci, 187 N.E.3d 1032, 1033 (N.Y. 2022).

90. N.Y. CORR. AND CMTY. SUPERVISION, CMTY. SUPERVISION HANDBOOK: QUESTIONS AND ANSWERS CONCERNING RELEASE AND COMMUNITY SUPERVISION 4 (2019) (available at https://doccs.ny.gov/system/files/documents/2019/05/Community_Supervion_Handbook.pdf).

91. William C. Donnino, PRACTICE COMMENTARIES TO PENAL LAW § 70.45 (2021).

educational or vocational training, and housing."[92] The Sexual Assault Reform Act (SARA) requires that a person convicted of certain sexual offenses are prohibited from residing within 1000 feet of school grounds.[93] The underlying issue in *Alvarez v. Annucci* was whether the provisions of SARA regarding community housing were applicable to Mr. Alvarez.[94] He had been "convicted of sexual abuse in the first degree, sentenced to a determinate term of imprisonment of three years,"[95] and required to be listed on the Sex Offender registry.[96] After serving his sentence he was released from prison for seven years of post-release supervision.[97] When Mr. Alvarez reached the maximum expiration date of his prison sentence, he was transferred to Fishkill Correctional Facility (a portion of which is categorized as a residential treatment facility)[98] and then to Queensboro Correctional Facility, a facility which DOCCS likewise has designated as a residential treatment facility.[99] A residential treatment facility is defined under the Corrections law as "[a] correctional facility consisting of a community based residence in or near a community where employment, educational and training opportunities are readily available for persons who are on parole or conditional release and for persons who are or who will soon be eligible for release on parole who intend to reside in or near that community when released."[100] Mr. Alvarez commenced an Article 78 proceeding to compel the Acting Commissioner of DOCCs to release him from Queensboro, arguing alternatively that he was not subject to SARA housing requirements[101], and that if he was, that DOCCS had failed to comply with the legal requirement to obtain housing in the community by not transferring him to an "actual" residential treatment facility.[102] While the matter was pending, Mr.

92. N.Y. CORRECT. LAW § 201(5) (McKinney 2022).

93. *See Alvarez*, 187 N.E.3d at 1033–34 (citing N.Y. EXEC. LAW § 259(c)(14) (Mckinney 2022)).

94. *See id.* at 1036 (Wilson, J. dissenting).

95. Alvarez v. Annucci, 127 N.Y.S.3d 303, 303 (N.Y. App. Div. 2d Dep't 2020).

96. *See Alvarez*, 187 N.E.3d at 1033.

97. *See id.* at 1035 (Wilson J., dissenting).

98. *See id.* at 1036 (Wilson J., dissenting).

99. *See Alvarez*, 127 N.Y.S.3d at 303 (citing 7 N.Y.C.R.R. § 100.9(c)(3) (2021)).

100. N.Y. CORRECT. LAW § 2(6) (McKinney 2022).

101. *See Alvarez*, 187 N.E.3d at 1036 (Wilson J., dissenting).

102. *See Alvarez*, 127 N.Y.S.3d at 303 (citing N.Y. CORRECT. LAW § 201(5) (McKinney 2022); then citing 9 N.Y.C.R.R. § 8002.7 (2021); then citing N.Y. EXEC.

Alvarez was released to community housing, and DOCCS moved to dismiss the petition as moot.[103] The trial court held that no exceptions to the mootness doctrine applied, and dismissed the petition.[104] Petitioner appealed.[105] The Second Department disagreed as to the mootness question.[106] However, despite holding that the mootness exception applied, the court affirmed the trial court's dismissal of the petition.[107] It dismissed the claim that he was not subject to the SARA housing requirements as meritless, and rejected his claim that Queensboro did not meet the requirements of a residential facility, finding that his placement there was not irrational.[108] The Court of Appeals granted leave to appeal.[109] The sole issue before the court was the applicability of SARA restrictions on his post release supervision.[110] The Court of Appeals affirmed the Second department decision[111] with two dissents.[112] The Court held that "[t]he residency restriction of [SARA] applies equally to eligible offenders released on parole, conditionally released, or subject to a period of postrelease supervision."[113]

In reaching its conclusion it examined both section 70.45 of the Penal Law, part of the Sentencing Reform Act, and the Sexual Assault Reform Act (SARA).[114] Section 70.45 authorizes the Board of Parole to "establish and impose conditions of post-release supervision in the same manner and to the same extent as it may establish and impose conditions in accordance with the executive law upon persons who are

LAW § 259-c(14) (McKinney 2021); then citing N.Y. Penal Law § 220.00(14) (McKinney 2021); and then citing CORRECT. § 2(6)).

103. *See id.*

104. *See id.* at 303–04. The Court of Appeals entertained a similar claim regarding mootness in *Gonzalez v. Annucci*, 117 N.E.3d 795 (N.Y. 2018). The Court determined that an 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 is likely to evade review, and this is a "substantial and novel issue[] . . . likely to be repeated." *Id.* at 800 (citing Hearst Corp. v. Clyne, 409 N.E.2d 876, 878 (N.Y. 1980)).

105. *See Alvarez,* 127 N.Y.S. at 304.

106. *See id*.

107. *See id.* 304.

108. *See id.* at 304–305.

109. *See* Alvarez v. Annucci, 168 N.E.3d 853, 853 (N.Y. 2021).

110. *See* Alvarez v. Annuci, 187 N.E.3d 1032, 1034–35 (N.Y. 2022).

111. *See id.* at 1033.

112. *See id.* at 1032.

113. *Id.* at 1033 (citing N.Y. EXEC. LAW § 259-c (McKinney 2021)).

114. *See Alvarez*, 187 N.E.3d at 1033 (citing People v. Williams 925 N.E.2d. 878, 899 (N.Y. 2010)).

granted parole or conditional release."[115] SARA which was enacted after the amendment to section 70.45, prohibits individuals "convicted of certain sex offenses from residing within 1,000 feet of a school."[116] It further provides that this prohibition applies to individuals "released on parole or conditionally released."[117] SARA does not specifically refer to those who are under post release supervision, and it is this omission upon which Mr. Alvarez based his argument.

The Court observed that a plain reading of the statutes together compels the conclusion that SARA residency prohibitions are applicable to individuals under post-release supervision.[118] The Court also rejected the dissent's view that the absence of the post-release language demonstrated a legislative intent to treat sex offenders who have served a determinate sentence more leniently.[119]

The dissent argued that SARA's language limiting the school grounds prohibition to individuals "released on parole or conditionally released" was intentional and that the majority was wrong to advance the application of SARA that the legislature did not intend.[120]

Miller v. Annucci involved a more straightforward issue of statutory applicability: whether the filing and service of a notice of appeal by an inmate appearing pro-se were untimely but could be excused under CPLR 5520.[121] CPLR 5520 provides that "[i]f an appellant either serves or files a timely notice of appeal . . . but neglects through mistake or excusable neglect to do another required act within the time limited, the court from or to which the appeal is taken . . . may grant an extension of time for curing the omission."[122] Respondent moved to dismiss petitioner's appeal in a civil suit to the appellate division as untimely both as to service on the respondent and as to filing with the court clerk.[123] Mr. Miller opposed the motion, claiming that he had delivered a notice of appeal addressed to the clerk of the court and a copy for service on the respondent to a prison employee prior to the applicable deadline.[124] His application included records of his

115. *Id*. (citing N.Y. PENAL LAW § 70.45 (McKinney 2022)).

116. *Id*. at 1033–34 (citing N.Y. EXEC. LAW § 259-c (McKinney 2021)).

117. *Id*.

118. *See id*. at 1034 (citing N.Y. PENAL LAW § 70.40 (McKinney 2022); and then citing N.Y. PENAL LAW § 70.45 (McKinney 2022)).

119. *See Alvarez*, 187 N.E.3d at 1034–35.

120. *Id*. at 1035 (Wilson, J., dissenting).

121. *See* Miller v. Annucci, 174 N.E.3d 368, 368 (N.Y. 2021).

122. *Id*. at 370 (citing N.Y. C.P.L.R. 5520) (internal quotations omitted).

123. *See id*. at 369.

124. *See id*.

purchase of postage for the necessary mailings.[125] The appellate court granted respondent's motion without an explanation for the grounds for dismissing the appeal.[126] The Court of Appeals accepted the matter for review.[127] The argument before the court focused on the filing requirement.[128] Petitioner argued that the court should adopt the "mailbox rule" of the United State Supreme Court which provides that a notice of appeal by a pro se prisoner is deemed to be filed for purposes of the Federal Rules of Appellate Procedure when "delivered to prison officials."[129] The court declined to adopt such a rule.[130] Unlike the Supreme Court which promulgates and adopts the federal appellate practice rules, the Court of Appeals is bound by the legislature's enactment of the New York Civil Practice Law and Rules (CPLR).[131] Moreover, CPLR 5515 provides that "filing has long been understood to occur only upon actual receipt by the appropriate court clerk."[132] The court found that it was not "free to disregard the statutory text defining when filing and service [by mail] occurs, or to otherwise endorse an exception to the relevant CPLR provisions."[133] Noting, however, that CPLR 5520 provides that a court may grant an extension of time to correct an omission if there has been timely filing or service of a notice of appeal, the court reversed and remitted the matter to the appellate division for consideration of the basis for the dismissal, including whether the court could exercise its discretion to excuse the untimely filing.[134]

125. *See id*.

126. *See Miller*, 174 N.E.3d at 369.

127. *See id*. at 369; 22 N.Y.C.R.R. § 500.11 (2022) ("(a) On its own motion, the Court may review selected appeals by an alternative procedure. . . . (b) Appeals may be selected for alternative review on the basis of: (1) questions of discretion, mixed questions of law and fact or affirmed findings of fact, which are subject to a limited scope of review; (2) recent, controlling precedent; (3) narrow issues of law not of statewide importance; (4) unpreserved issues of law; (5) a party's request for such review; or (6) other appropriate factors.").

128. *See Miller,* 174 N.E.3d at 369.

129. *Id*. at 369–70 (citing Houston v. Lack, 487 U.S. 266, 270 (1988)).

130. *See id.* at 370.

131. *See id.* at 370 (citing Grant v. Senkowski, 744 N.E.2d 132, 134 (N.Y. 2001)).

132. *Id.* at 369 (citing *Grant*, 744 N.E.2d at 134) (internal quotations omitted).

133. *See Miller*, 174 N.E.3d at 369 (citing N. Mariana Islands v. Canadian Imperial Bank of Com., 990 N.E.2d 114, 117 (N.Y. 2013)).

134. *See id.* at 370 (first citing N.Y. C.P.L.R. 5520(a); then citing M Ent., Inc. v. Leydier, 919 N.E.2d 177, 178 (N.Y. 2009)).

Verneau v. Consolidated Edison Co. of New York, Inc. addressed whether the transfer of liability for death benefits claim for two decedents, Verneau and Radley, by an employer and insurance carrier respectively, could be submitted to the Workers' Compensation Special Fund (Special Fund) under section 15-a of the Workers' Compensation Law after the statutory filing deadline, where liability for the original disability benefits claim had been transferred to the Special Fund prior to that date.[135]

The Special Fund, the subject of the decision in *Verneau,* was created in 1933, allowing a transfer of liability for workers' compensation benefits "in cases of insurance carrier insolvency, employer inability to pay benefits, or upon the reopening of a long-closed matter."[136] Often, previously closed cases were reopened "after many years due to, for example, 'a recurrence of malady, a progress in disease not anticipated, or a pathological development not previously prognosticated'" and to protect insurance carriers from "uncertain future liability costs they might incur in these 'stale' cases."[137] Under the Workers Compensation Law, "liability for a claim could be transferred from the employer or carrier to the Special Fund once certain statutory conditions had been satisfied."[138] If liability for the claim was transferred, an insurance carrier had no further obligation.[139] Financing for the fund came from annual assessments on insurance carriers who ultimately passed the cost of the assessment onto the policyholders, namely employers.[140] As insurance carriers pushed more cases to the Special Fund, its costs became unsustainable while insurance carriers reaped the windfall of insurance premium payments

135. *See* Verneau v. Consol. Edison Co. of N.Y., Inc., 180 N.E.3d 537, 540 (N.Y. 2021). The Court also examined the statutory interpretation of section 15 of the Worker's Compensation Law regarding calculation of Schedule Loss of use (SLU) benefits in Johnson v. N.Y.C, 195 N.E.3d 1 (N.Y. 2022) an area of special expertise not addressed here.

136. *Id.* at 540 (citing Am. Econ. Ins. Co. v. N.Y., 87 N.E.3d 126, 129 (N.Y. 2017)).

137. *Am. Econ. Ins.*, 87 N.E.3d at 129–30 (citing Ryan v. Am. Bridge Co., 278 N.Y.S. 612, 614 (App. Div. 3d Dep't 1935)).

138. *Verneau*, 180 N.E.3d at 540 (citing N.Y. WORKERS' COMP. LAW § 25-a(1) (McKinney 2022)).

139. *See id.* (citing De Mayo v. Rensselaer Polytech Inst., 547 N.E.2d 1157, 1159 (N.Y. 1989)).

140. *See Am. Econ. Ins.*, 87 N.E.3d at 130.

which would otherwise cover their liability.[141] As a consequence, the Special Fund was closed to new applications for a transfer of a claim after January 1, 2014.[142] *Verneau* involved two cases where the employer/insurance carrier sought to transfer liability for death benefit claims to the Special Fund after the statutory filing deadline, relying on the fact that the original lifetime benefits claims were filed prior to that date.[143] In Mr. Verneau's case, the Workers' Compensation Board (Board) held that Mr. Verneau's death was causally related to his work place injuries over the objection of the employer, and that the Special Fund was responsible for payment of the death benefit.[144] After an administrative appeal by the Special Fund, the Board reversed its decision, holding the transfer of the claim was barred by the statutory filing deadline.[145] The employer appealed.[146] The appellate division reversed, holding that liability for the death benefits could be transferred to the Special Fund when liability for the lifetime benefits has been transferred to the Special Fund prior to the statutory deadline.[147] The court also held that the statutory deadline was not applicable because no application had been filed after that date.[148]

The Workers' Compensation Board held that the insurance carrier was responsible for payment of the death benefit in Mr. Radley's case, a finding affirmed on administrative appeal.[149] The insurance carrier appealed.[150] The appellate division reversed, reaching the same conclusion as it had in Mr. Verneau's case.[151]

141. *See Verneau*, 180 N.E.3d at 542–43 (citing DIV. OF THE BUDGET, MEMORANDUM IN SUPPORT, 2013–14 N.Y. STATE EXEC. BUDGET, PUBLIC PROTECTION AND GENERAL GOVERNMENT ARTICLE VII LEGISLATION. 29 (available at https://www.budget.ny.gov/pubs/archive/fy1314archive/eBudget1314/fy1314artVIIbills/PPGG_ArticleVII_MS.pdf).

142. *See id.* at 541.

143. *See id.* at 539.

144. *See id.* at 540.

145. *See id.*

146. *See Verneau*, 180 N.E.3d at 540.

147. *See* Verneau v. Consol. Edison Co. of N.Y., Inc., 104 N.Y.S.3d 401, 403–04 (App. Div. 3d Dep't 2019).

148. *See id.* at 403.

149. *See Verneau*, 180 N.E.3d at 540.

150. *See id.*

151. *See id.*

The Court of Appeals granted leave to appeal in each case.[152] After reciting the applicable principles of statutory construction, the court held that the plain text of section 25-a(1-a) "expressly provides that the statutory cutoff forecloses transfer of liability for '*a* claim'" and that the use of the "singular indefinite article—'a' claim—means the liability to be transferred is for a *single claim at the time of application*."[153] The court reversed the decisions of the Third Department based on that reading of the statute together with the court's precedent in *Zechmann v. Canisteo Volunteer Fire Department,* holding that "a claim for death benefits" is a separate proceeding that cannot be "equated with the beneficiary's original disability claim."[154]

The court further stated that a claim for a death benefit cannot be construed to have been transferred at the time of transfer of liability for lifetime benefits because the death benefit claim does not accrue "prior to the death."[155] In the court's view, "[a]dopting the Appellate Division's reasoning—that, once liability for disability benefits has been transferred to the Special Fund, the employer and carrier are thereby divested of all liability for future death benefits claims arising from the same injury"—would contravene the statutory text and the court's own precedent about the accrual of death benefits and "result in leaving the Special Fund open for years, continuing the windfall to carriers that the amendment was expressly intended to eliminate."[156] The court rejected the dissent's view that a Third Department decision holding that the use of the phrase "transfer of liability," was intended to mean "liability for costs associated with the original claim, including the cost of a related death benefits claim."[157] It dismissed the reliance on the Third Department decision as a disregard of the Court of Appeals as the final arbiter of the law in New York and its reading of the phrase as unsupported by the statutory text.[158]

In *People v. Torres*, the Court of Appeals reviewed the state "Right of Way Law", which makes it a misdemeanor to hit a person or bicyclist walking on the street within a Pedestrian Right of Way

152. *See id.* (citing Verneau v. Consol. Edison Co. of N.Y., Inc. No. 2019-1120, slip op. at 1 (N.Y. March 24, 2020); then citing Rexford v. Gould Erectors & Riggers, Inc., 145 N.E.3d 963 (N.Y. 2020)).

153. *Id.* at 541.

154. *See Verneau,* 180 N.E.3d at 541 (quoting Zechmann v. Canisteo Volunteer Fire Dep't., 651 N.E.2d 1268, 1271 (N.Y. 1995)) (internal quotations omitted).

155. *Id.* at 542.

156. *Id.* at 543.

157. *Id.* at 541 n.1. (internal quotations omitted).

158. *See id.* at 541 n.2.

area if the driver did not exercise "due care".[159] The court consolidated two cases for review where a driver hit and killed a person when the person walked across a road within a "Right of Way" area, and were convicted of misdemeanor offenses.[160] In both cases, the defendants argued that (1) the negligence standard at issue, failing to exercise due care, was vague and could not be used to impose criminal liability due to state and federal due process protections, (2) state penal law does not allow failure to exercise due care, an "ordinary negligence" standard, to be used to imposed criminal liability, and (3) the state Constitution does not allow local law to punish someone more severely than existing state law.[161] The appellate division affirmed the convictions, and defendants appealed to the Court of Appeals.[162]

Defendants first argued that the Right of Way laws ordinary negligence standard, "failure to exercise due care", is void for vagueness.[163] The court found that "due care" is the established standard of ordinary negligence, and both state and federal caselaw supported the use of this language.[164] As a due care standard is common and used frequently to establish an ordinary negligence standard, it is not vague.[165]

The defendants then argued that criminal liability cannot attach to a charge of ordinary negligence due to state and federal due process protections.[166] The court found that this cannot be true on the state level, because strict liability offenses, which require no finding of any negligence, are constitutional.[167] On the federal level, the defendants argued that a Supreme Court case, *Elonis v. United States*, prevented criminal liability from attaching to a crime under an ordinary negligence standard, but the court held that unlike *Elonis*, where the law in question had no mental culpability standard, the Right of Way law specifically references ordinary negligence.[168] Therefore, the Supreme Court's holding in *Elonis* was inapplicable to the current case and did

159. People v. Torres, 177 N.E.3d 973, 976–77 (N.Y. 2021).
160. *See id.* at 977.
161. *See id.*
162. *See id.*
163. *See id.* at 978.
164. *See Torres,* 177 N.E.3d at 978.
165. *See id.* at 978–79.
166. *See id.* at 977.
167. *See id.*
168. *See id.* at 978 (citing Elonis v. United States, 575 U.S. 723, 734 (2015)).

not require reconsideration of state criminal statutes using an ordinary negligence standard.[169]

Next, the court turned to defendant's constitutional preemption arguments.[170] Defendant argued that Article 15 of the Penal law contained all mental states that could lead to criminal liability, and ordinary negligence was not one of them.[171] The court reviewed the statutes and held that the mental states defined in Article 15 of the Penal Law were only relevant to Article 15 itself, and so did not apply to the Right of Way law, which is contained in the administrative Law of New York City.[172] Further, defendants argued that the Right of Way law is preempted by the Vehicle and Traffic Law, because the administrative law punished conduct contemplated by state law more harshly than the state (conflict preemption) and because the administrative law was inconsistent with state law (field preemption).[173] The court held that state law delegated the authority to pass laws relating to pedestrian and vehicle right of way to the city.[174] As the state delegated authority in this area to the city, neither field nor conflict preemption were applicable.[175]

Accordingly, the Court of Appeals affirmed the convictions.[176] In a concurring opinion, Judge Wilson reviewed the history of traffic infractions as a distinct area of the law from criminal convictions, suggesting that because the state legislature intended to make traffic violations non-criminal in nature, it is possible that cities and towns lack the authority to enact criminal penalties for traffic infractions.[177]

In *Endara-Caicedo v. Vehicles,* another statutory interpretation case, the petitioner was arrested for driving while intoxicated.[178] Three hours after the arrest, the police attempted to administer a blood alcohol content (BAC) test, referred to as a chemical test, which petitioner refused.[179] Due to his refusal, petitioner's driver's license was revoked

169. *See Torres,* 177 N.E.3d at 978.
170. See *id.* at 979.
171. *See id.*
172. *See id.* at 980.
173. *See id.* at 981.
174. *See Torres*, 177 N.E.3d at 981.
175. *See id.* at 981–82.
176. See *id.* at 982.
177. *See id.* at 982–95 (Wilson, J., concurring).
178. *See* Endara-Caicedo v. N.Y. Dep't of Motor Vehicles, 184 N.E.3d 871, 871 (N.Y. 2022).
179. *See id.* at 872–73.

by New York Department of Motor Vehicles (DMV).[180] Petitioner commenced an Article 78 proceeding, arguing that Vehicle and Traffic Law (VTL) section 1192, which governs administrative license revocation, requires that the BAC test must be requested and administered or refused within two hours of arrest.[181] The supreme court and the appellate division affirmed the DMV revocation, holding that refusal to take a chemical test even outside of the two hour mark is admissible in an administrative hearing.[182]

The Court of Appeals first examined the plain language of the statute, finding that the two-hour rule does not apply to administrative hearings, because it is not one of the four enumerated issues listed in NY VTL section 1194(c), the section of the statute governing issues in a license suspension hearing.[183] Next, the court examined the history of the two-hour rule, finding that the rule is meant to prevent the conviction of sober drivers and aid in criminal prosecutions, not to prevent the administrative suspension of driver's licenses in an agency setting.[184] The court also dismissed petitioner's argument that *People v. Odum* controlled, where the two-hour rule prevented admittance of a chemical test taken more than two hours after arrest in the criminal trial.[185] While the rule prevents admittance of a late chemical test in a criminal trial, the same is not true of an administrative revocation hearing.[186] As the court determined that an administrative hearing may consider a late chemical test under NY VTL §1194(c), the court affirmed the lower court ruling.[187]

Judge Rivera dissented and concluded from her own analysis of the statute that the two-hour rule should govern admissibility of the test or refusal even in an administrative setting.[188] She writes that the use of the phrase "such chemical test" in the administrative hearing section specifically references the chemical test laid out in NY VTL section 1194(2), and the two-hour rule is contained within that section.[189] Further, the Majority's decision to apply *Odum* only to criminal proceedings has no basis in fact, as it requires that "the same phrase

180. *See id.* at 873.
181. *See id.*
182. *See id.*
183. *See Endara-Caicedo*, 184 N.E.3d at 873–74.
184. *See id.* at 874.
185. *See id.* at 876.
186. *See id.*
187. *See id.* at 877.
188. *See Endara-Caicedo*, 184 N.E.3d at 877–82 (Rivera, J., dissenting).
189. *Id.* at 880.

in the same subdivision of the same statute must now mean something entirely different."[190] Finally, Judge Rivera disagrees with the majority's examination and conclusions from case law and legislative history, arguing that as the statutes meaning is clear on its face, there is no need to examine the history, and even upon examination, both cases and legislative history support the opposite conclusion, that the two-hour rule applies to admissibility of chemical tests in all settings.[191]

ARBITRARY & CAPRICIOUS

In *Callen v. New York City Loft Board*, in March of 2014, the residents of a building in New York City applied to the NYC Loft Board, a state agency, to compel the building owner to legalize the building and provide the residents with rent stabilization.[192] After negotiation, the residents and building owner agreed that the residents would drop the request to legalize the building, and in return the building owner agreed that the residents were covered by NYC rent stabilization laws.[193] However, the Loft Board rejected the agreement because the building had no residential certificate of occupancy, and if the application to the Board was withdrawn, the residents would be living in the building illegally with no movement towards legalizing their residency.[194] After a second denial, the residents and the building owner brought an Article 78 Proceeding, arguing that the Board's decision was arbitrary and capricious.[195]

The supreme court sided with the petitioners, finding that forcing the residents and building owner to litigate the issue was wasteful and therefore without rational basis.[196] The appellate division agreed that it was irrational not to allow the petitioners to withdraw their application because other legal avenues existed to legalize the tenancy outside of the Loft Board application.[197] The appellate division reviewed the record and determined that although the Loft Board was not irrational to reject the proposed settlement, the Board had no authority to supervise continued negotiations due to the application withdrawal.[198]

190. *Id.* at 881.

191. *Id.* at 881–82.

192. *See* Callen v. N.Y.C. Loft Bd., 117 N.Y.S.3d 209, 211 (App. Div. 1st Dep't 2020).

193. *See id.*

194. *See id.* at 211–12.

195. *See id.* at 212.

196. *See id.*

197. *See Callen*, 117 N.Y.S.3d at 212.

198. *See id.*

The Court of Appeals sided with the Loft Board, holding that it was not irrational for the Board to reject the settlement agreement.[199] Further, the Court held that the rationality of the Board's reason for rejecting the settlement—that it allowed an illegal living arrangement to remain in place with no path toward resolution—was not a determination for the judiciary.[200] As the Board's decision to reject the settlement was not irrational, the decision stands, and the settlement agreement's withdrawal provision no longer took effect.[201] The matter was remanded to the Loft Board for further proceedings.[202]

GOVERNMENT LIABILITY

Perhaps the most compelling factual cases in administrative law involve government liability for negligence. In *Ferreira v. City of Binghamton*, the Court of Appeals was asked to provide an advisory opinion to the United States Court of Appeals for the Second Circuit on New York law regarding whether "'special duty' requirement" applies 'to claims of injury inflicted through municipal negligence' or if it applies only to claims premised upon a municipality's negligent 'failure to protect the plaintiff from an injury inflicted other than by a municipal employee.'"[203] The appeal before the Second Circuit involved a shooting by police officers of the City of Binghamton during the execution of a no-knock warrant on the apartment where plaintiff was sleeping.[204] Mr. Ferreira who had been asleep on the living room couch was awakened by the entrance of the SWAT team, and immediately shot by the team's leading officer.[205] The officer who shot Mr. Ferreira claimed that he thought the video game controller in Mr. Ferreira's hand was a ".38 caliber gray snub-nosed revolver."[206] Mr. Ferreira claimed "he did not leave the couch, did not have the controller in his hand, and [the officer] shot him as soon as the door opened."[207]

199. *See* Callen v. N.Y.C. Loft Bd., 183 N.E.3d 1211, 1211 (N.Y. 2022).

200. *See id.* (citing 511 W. 232nd Owners Corp. v. Jennifer Realty Co., 773 N.E.2d 496, 499 n. 3 (N.Y. 2002)).

201. *See id.*

202. *See id.* at 1212.

203. Ferreira v. Binghamton, 194 N.E.3d 239, 243 (N.Y. 2022) (quoting Ferreira v. Binghamton, 975 F.3d 255, 291 (2d Cir. 2020)).

204. *See Ferreira*, 975 F.3d at 255, 272.

205. *See id.* at 263–64.

206. *Id.* at 263.

207. *Ferreira*, 194 N.E.3d at 244.

Additional facts were elicited at trial regarding the activities of the police prior to the execution of the no-knock warrant.[208] The jury found the city negligent and awarded Mr. Ferreira $3 million; it did not find negligence against the officer "and rendered a verdict in his favor."[209] The issue of the officer's negligence was not raised on appeal.[210]

The district court granted the city a judgment as a matter of law concluding that "New York state law requires a plaintiff to demonstrate the existence of a 'special relationship' in order to sustain the duty element of a negligence claim against a municipality, and that Ferreira had failed to adduce evidence supporting such a relationship."[211] It rejected Mr. Ferreira's argument that "the special duty requirement applies only" when the government fails to protect against a third party, not the "government's own infliction of injury."[212] Mr. Ferreira appealed.[213]

In certifying the question to the court, the Second Circuit cited The Rules of Practice of the New York Court of Appeals regarding certification of "a dispositive question of law to that Court '[w]henever it appears . . . that determinative questions of New York law are involved in a case . . . for which no controlling precedent of the Court of Appeals exists.'"[214] The Second Circuit concluded that the scope of municipality liability involves a policy issue, and because there is "conflicting guidance in the decisions of the Court of Appeals on the question whether the special duty requirement applies to cases of government-inflicted injury," a question which was dispositive of the case before the Second Circuit, it concluded that the New York Court of Appeals was "better situated than we are to decide" the applicable rule.[215]

First, the Court of Appeals noted that New York has waived sovereign immunity, thus, "opening the door to negligence claims against

208. *See Ferreira*, 975 F.3d at 272.

209. *Id.* at 264 (the finding was based on the theory of respondeat superior). *See also Ferreira*, 194 N.E.3d at 244.

210. *See Ferreira,* 975 F.3d at 266.

211. *Id.* at 264 (citing Ferreira v. Binghamton, No. 3:13-CV-107, 2017 WL 4286626, at *6 (N.D.N.Y. Sept. 27, 2017)).

212. *Ferreira*, 194 N.E.3d at 245.

213. *Ferreira*, 975 F.3d at 262.

214. *Id.* at 291 (citing 22 N.Y.C.R.R. § 500.27(a); *see also* 2d Cir. R. 27.2(a) (permitting certification as provided by state law)).

215. *Id.*

municipal actors." [216] Actions alleging negligence against municipal actors, as those against other defendants, must establish the elements of the cause of action as other plaintiffs, namely "(1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom."[217] Unlike a negligence action maintained against a non-government actor, "[a] negligence claim against a municipality implicates a 'complex area of the law' that has caused some 'confusion concerning the relationship between the special duty rule (establishing a tort duty of care) and the governmental function immunity defense (affording a full defense for discretionary acts, even when all elements of the negligence claim have been established).'"[218] In such cases, the court observed, the threshold issue is whether the government was acting in a proprietary or governmental capacity.[219] The government is acting in a proprietary capacity when "its activities essentially substitute for or supplement traditionally private enterprises," so, for example, when it "acts as a landlord."[220] The government is performing in a governmental capacity "when its acts are undertaken for the protection and safety of the public pursuant to the general police powers."[221] Those functions include: "fire protection services, the oversight of juvenile delinquents, the issuance of building permits or certificates of occupancy, garbage collection, and the provision of front-line emergency medical services [and] policing, a 'long-recognized, quintessential governmental function.'"[222] In an earlier decision regarding municipal liability, the court had described the analysis of the function which a government is performing thus:

> A governmental entity's conduct may fall along a continuum of responsibility to individuals and society deriving from its governmental and proprietary functions. This begins with the simplest matters directly concerning a piece of property for which the entity acting as landlord has a certain duty of care, for example, the repair of steps or the maintenance of doors in an apartment building. The spectrum extends gradually out to more complex measures of safety and security for a greater area and populace, whereupon the actions increasingly, and at

216. *Ferreira*, 194 N.E.3d at 245.

217. *Id.* (quoting Solomon v. N.Y.C. 489 N.E.2d 1294, 1294 (N.Y. 1985).

218. *Id.* at 246 (quoting Valdez v. N.Y.C. 960 N.E.2d 356, 356 (N.Y. 2011)).

219. *See id*.

220. *See id.*

221. *See Ferreira*, 194 N.E.3d at 246 (quoting Applewhite v. Accuhealth, Inc., 995 N.E.2d 131, 131 (N.Y. 2013)).

222. *See id*.

> a certain point only, involve governmental functions, for example, the maintenance of general police and fire protection. Consequently, any issue relating to the safety or security of an individual claimant must be carefully scrutinized to determine the point along the continuum that the State's alleged negligent action falls into, either a proprietary or governmental category.[223]

There was no dispute that in *Ferriera*, the government was carrying out a government function by executing a no-knock warrant.[224] Unlike negligence cases involving a proprietary function, in negligence cases that involve a government function, "a special duty [is] an element of the plaintiff's negligence cause of action."[225] The need to establish a special duty is derived from an underlying policy to "rationally limit the class of citizens to whom the municipality owes a duty of protection."[226]

According to the court:

> A special duty can arise in three situations: (1) the plaintiff belonged to a class for whose benefit a statute was enacted; (2) the government entity voluntarily assumed a duty to the plaintiff beyond what was owed to the public generally; or (3) the municipality took positive control of a known and dangerous safety condition.[227]

As the court noted, the most frequently litigated circumstance is the voluntary assumption of a duty beyond that owed to the general public.[228] In such a case, plaintiff must show its special relationship to the municipal officials by showing the following:

223. *See* in re World Trade Ctr. Bombing Litig., 957 N.E.2d 733, 745 (N.Y. 2011) (citing Miller v. State, 467 N.E.2d 493, 496 (N.Y. 1984)) (emphasis removed).

224. *See Ferreira*, 194 N.E.3d at 246.

225. *See id.* (quoting Connolly v. Long Island Power Auth., 94 N.E.3d 471, 471 (N.Y. 2018)).

226. *See id*. at 247 (quoting *Applewhite,* 995 N.E.2d at 135).

227. *See id*. at 247–48.

228. *See id.* at 249. *See also* Valdez v. N.Y.C., 690 N.E.2d 356, 362 (N.Y. 2011) (no special duty to girlfriend when her abusive boyfriend subject to a court order of protection shot and seriously injured her outside her apartment door while her five-year-old twin boys watched); McLean v. N.Y.C., 905 N.E.2d 1167, 1174 (N.Y. 2009) (no special duty to a woman whose infant suffered brain damage suffered while in the care of a City registered child care provider); Dinardo v. N.Y.C., 921 N.E.2d 585, 589 (N.Y. 2009) (no special duty to a teacher for failure to remove an aggressive student from her classroom); Riss v. N.Y.C., 240 N.E.2d 860, 881 (N.Y. 1968) (no special duty to a woman who requested but was denied police protection against a former boyfriend).

> (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of the party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking.[229]

If the plaintiff cannot make a case for a special duty, the negligence case will fail. However, if they can satisfy that requirement, the hurdle of the governmental function immunity defense remains.[230] This defense involves a policy decision that leaves government officials free "to exercise judgment and discretion in their official functions, unhampered by fear of second-guessing and retaliatory lawsuits, outweighs the benefits to be had from imposing liability for that injury."[231]

Thus, a properly proved defense that the municipality was exercising its discretionary authority in the activity in question will defeat a negligence claim even if plaintiff establishes a special duty.[232] If the activities of the government were ministerial and plaintiff establishes a special duty, a negligence claim may succeed.[233]

The court emphatically rejected plaintiff's argument that the special duty element of a negligence case involving a governmental function was only applicable in cases where third parties caused the injury to plaintiff.[234] While recognizing the plethora of cases involving those injuries, the court reiterated that the special duty requirement applies in all cases,[235] and declined to hold otherwise notwithstanding the dissent view that the court's approach was novel.[236] The court also

229. *See Ferreira*, 194 N.E.3d at 249 (quoting Cuffy v. N.Y.C., 505 N.E.2d 937, 940 (N.Y. 1987)).

230. *See id*. at 248.

231. *See id*. (first citing Haddock v. N.Y.C., 553 N.E.2d 987, 991 (N.Y. 1990)); then citing *Valdez*, 960 N.E.2d at. 362); *in re* World Trade Ctr. Bombing Litig., 957 N.E.2d 733, 751 (N.Y. 2011) (court held that Port Authority could assert governmental immunity defense when group of terrorists detonated a car bomb along the roadway of the underground garage of the World Trade Center in 1993 because unlike a private owner providing security, the allocation of police resources is limited by resources of the community and executive and legislative decisions over how to use those resources, which in turn involves discretionary decision making).

232. *See Ferreira*, 194 N.E.3d at 248.

233. *See id*. at 248–49.

234. *See id.* at 249.

235. *See id.*

236. *See id.* at 251.

emphasized that a special duty could be established in the execution of a no-knock warrant, although it acknowledged it had not had occasion to do so.[237]

237. *See Ferreira*, 194 N.E.3d at 253.