HEALTH LAW

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INTRODUCTION

In this *Survey* Article, changes to New York Law involving health issues will be discussed. During the past year, numerous court opinions have been rendered, and many statutes have been enacted on a wide-ranging array of issues, including continuing issues relating to COVID-19, animal health concerns, reproductive health, pre-natal care, and gender-affirming care. Additionally, New York also is addressing continued issues in electronic health information, hospice care, amongst others.

I. COVID-19 VACCINE MANDATE

This *Survey* year saw more caselaw interpreting the legality of the State's Mandate that certain professionals maintain full vaccination for COVID-19. As discussed below, the general consensus is moving toward the conclusion that the State did not exceed its authority on this issue.

A. Medical Professionals for Informed Consent v. Bassett

A Supreme Court within the Fourth Department was presented with the issue of whether the New York State Department of Health (DOH), its Commissioner, Mary Bassett (the "Commissioner"), and the New York State Governor, Kathleen Hochul (collectively, the "Respondents"), acted *ultra vires* and arbitrarily and capriciously in enacting 10 N.Y.C.R.R. Section 2.61, a regulation mandating certain medical professionals be "fully vaccinated" (the "Mandate"), following the rescission of the Governor's emergency orders.[1] The Onondaga County Supreme Court held that they did.[2]

In *Medical Professionals for Informed Consent v. Bassett*, a group of petitioners comprised of various health providers, including medical doctors, technicians and a nurse (the "Petitioners"), commenced a special proceeding seeking to permanently enjoin the Respondents from implementing or enforcing the Mandate.[3] The supreme court explained that during the COVID-19 pandemic, the New York State Legislature ceded powers to the Governor, who at that time

1. *See* Med. Pros. for Informed Consent v. Bassett, 185 N.Y.S.3d 578, 580, 585 (Sup. Ct. Onondaga Cnty. 2023).
2. *See id.* at 585, 586.
3. *See id.* at 580.

was Andrew Cuomo, on an emergency basis.[4] As part of this, the Governor mandated, via emergency order, that various health providers be vaccinated against the COVID-19 virus.[5] On June 24, 2021, the Governor rescinded his previous emergency orders.[6] However, on June 22, 2022, the Commissioner adopted the Mandate as a permanent regulation.[7]

The Petitioners, applying *Boreali*, argued that the Respondents violated the separation of power doctrine in enacting a rule that exceeded the parameters of the power granted by the legislature.[8] More specifically, the Petitioners argued that the Respondents exceeded the scope of their power as set forth in New York Public Health Law (PHL) Sections 206, 613, 2164 and 2165.[9] Pursuant to PHL Sections 206(1)(l) and 613(1)(c), the Commissioner is required to establish immunization programs, but the section did not authorize mandatory immunization of adults or children, except as provided in PHL Sections 2164 and 2165.[10] PHL Sections 2164 and 2165 relate to mandatory vaccinations for children attending day care through high school and college, respectively, but neither COVID-19 nor coronaviruses in general are identified as a disease for which a vaccine is mandatory.[11]

The Petitioners also argued that the Mandate was arbitrary and capricious in that it was so lacking in reason that it was essentially arbitrary.[12] The Petitioners argued that it lacked a religious exemption such that it targeted religious minorities.[13] The Petitioners moreover submitted that the DOH acknowledged that the vaccine failed to prevent the spread of COVID-19.[14]

The Respondents argued that PHL Section 225 authorized the DOH to promulgate regulations dealing with matters affecting, *inter alia*, the preservation and improvement of public health in New York State and, moreover, the Second Circuit, examined the Mandate's lack of a religious exception under federal law and found that the Mandate

4. *See id.* at 581.
5. *See id.*
6. *See Bassett*, 185 N.Y.S.3d at 581.
7. *See id.*
8. *See id.* at 582 (applying Boreali v. Axelrod, 517 N.E.2d 1350, 1354–56 (N.Y. 1987)).
9. *See id.* at 581 (referencing N.Y. PUB. HEALTH LAW §§ 206, 613, 2164, 2165 (McKinney 2024)).
10. *See id.* (referencing PUB. HEALTH §§ 206(1)(l), 613(1)(c)).
11. *Bassett*, 185 N.Y.S.3d at 581 (referencing PUB. HEALTH §§2164, 2165).
12. *See id.* at 582.
13. *See id.* at 582–83.
14. *See id.* at 583.

"was a reasonable exercise of the State's power to enact rules to protect the public health."[15] The Respondents further argued that PHL Sections 2803, 3612 and 4010, which govern the authority of the Commissioner to set rules for hospitals, home care programs, and hospice, respectively, authorized the DOH to promulgate these regulations.[16] Finally, the Respondents argued that each of the *Boreali* factors favored them.[17]

The court explained that it was "a commonplace of statutory construction that the specific governs the general."[18] Adopting the Petitioners' argument, the court cited PHL Sections 206(1)(l) and 613 and noted that the Commissioner was explicitly prohibited from implementing a mandatory immunization program for adults and children, except as provided in PHL Sections 2164 and 2165, which did not include COVID-19 or any coronavirus.[19] In that regard, the Court found that the PHL created a ceiling that limited what Respondents were permitted to do and therefore the Mandate was beyond the scope of their authority.[20]

The court further acknowledged that *Boreali* was inapplicable since the DOH was not acting in a "gray area," but nevertheless addressed each factor and found that each favored the Petitioners, again citing the limitation of their power as defined in the PHL and, moreover, the failure to exercise special expertise (the fourth and final factor) on the basis that the COVID-19 vaccine failed to prevent *transmission* of the disease.[21]

Alternatively, the court also examined whether the Mandate was arbitrary and capricious.[22] The court again noted that the purpose of the Mandate was to prevent transmission of COVID-19 and the DOH conceded that the vaccine was ineffective in accomplishing

15. *Id.* at 583 (referencing N.Y. PUB. HEALTH LAW §225 (McKinney 2024) and citing We the Patriots USA, Inc. v. Hochul, 17 F.4th 266, 290 (2d Cir. 2021), *cert. denied* 142 S. Ct. 2569 (2022)).

16. *See Bassett*, 185 N.Y.S.3d at 584 (referencing N.Y. PUB. HEALTH LAW §§2803, 3612, 4010 (McKinney 2024)).

17. *See id.* at 584 (referencing Boreali v. Axelrod, 517 N.E.2d 1350, 1354–56 (N.Y. 1987)).

18. *Bassett*, 185 N.Y.S.3d at 585 (citing Morales v. Trans World Airlines, Inc., 504 U.S. 374, 384 (1992)).

19. *See id.*

20. *See id.*

21. *See Bassett,* 185 N.Y.S.3d at 586 (referencing *Boreali*, 517 N.E.2d at 1354–56).

22. *See id.*

this.[23] Moreover, the Court noted that the Mandate defined "fully vaccinated" based on a changing definition—it was defined as "determined by the [DOH] in accordance with applicable federal guidelines and recommendations."[24] As the Mandate could not clearly define its requirements and instead it was subject to change "at the whim of an entity . . . without a moment's notice," this constituted, in the court's opinion, "all the hallmarks of 'absurdity.'"[25] The court therefore found that the Mandate was arbitrary and capricious.[26] The court therefore granted the relief requested in the petition and enjoined Respondents from implementing or enforcing the Mandate.[27]

The Respondents filed a Notice of Appeal to the Fourth Department, prompting it to stay the enforcement of the Supreme Court's decision during the pendency of the appeal.[28] While oral arguments were heard, immediately following oral arguments, the Respondents submitted a letter from the DOH indicating that the federal government would start the process to end their vaccination requirements for healthcare facilities certified by the Centers for Medicare and Medicaid Services and moreover that the Mandate was "being recommended for repeal by the [DOH] subject to consideration by the Public Health and Health Planning Council."[29] While the repeal was under consideration, the DOH indicated that it would cease citing providers for failing to comply with the Mandate; however, it would continue to seek sanctions against providers based on previously cited violations.[30] The DOH concluded its correspondence in urging healthcare facilities to "consider how to implement their own internal policies regarding COVID-19 vaccination while remaining in compliance with applicable state and federal laws."[31]

On September 18, 2023, the DOH submitted a Notice of Adoption of rules to the New York Department of State (DOS), which provided for the repeal of the Mandate.[32] The DOS indicated that it would

23. *See id*.

24. *Id*. (citing 10 N.Y.C.R.R. § 2.61 (effective June 22, 2022) (repealed 2023)).

25. *Id*.

26. *See Bassett*, 185 N.Y.S.3d at 586.

27. *See id*. at 587.

28. *See* Med. Pros. for Informed Consent v. Bassett, No. CA 23-00161, 2023 N.Y. Slip Op. 62807(U), at 1 (App. Div. 4th Dep't Feb. 27, 2023).

29. Post-Argument Submission at 3, *Bassett*, 2023 N.Y. Slip Op. 62807(U) (No. CA 23-00161).

30. *See id*.

31. *Id*.

32. *See* Notice of Motion for Permission to File a Post-Argument Submission at Exhibit A, *Bassett*, 2023 N.Y. Slip Op. 62807(U) (No. CA 23-00161).

publish the same in the State Register on October 4, 2023, at which point the repeal of the Mandate would be final.[33] Consistent with its letter, the repeal did not provide relief against previously cited violations.[34]

While the Respondents urged the Fourth Department that the appeal has been rendered moot, in light of the absence of relief provided against previously cited violations, the Petitioners urged the Fourth Department to render a decision.[35] Pertinently, the Respondents cited *In re McGlynn v. New York State Department of Health*, where the DOH was able to defend against a challenge to the validity of the Mandate.[36] Unlike the Onondaga County Supreme Court, the Albany Supreme Court, applying *Boreali*, found that the DOH did not exceed the power granted to it by the legislature.[37] More specifically, the Court found that PHL Section 225 authorized it to issue the Mandate and noted that the limitation to healthcare workers in covered entities distinguished it from the limitations set forth in PHL Sections 206 and 613.[38]

The Petitioners argued that the Respondents had relied on this precedent to justify pursuing violations of the Mandate prior to its repeal such that the appeal was not moot.[39] On October 11, 2023, the Fourth Department issued an Order denying the motion as moot.[40]

B. In re Parks

While appellate practice was ongoing before the Fourth Department, the Third Department was presented with a similar issue on appeal of a determination from the Unemployment Insurance Appeal Board (the "Board").[41] The question was whether the claimant, who was terminated for failing to provide proof of vaccination against Covid-19, was improperly denied unemployment insurance benefits

33. *See* Affirmation in Support of Motion for Permission to File a Post-Argument Submission at 3, *Bassett*, 2023 N.Y. Slip Op. 62807(U) (No. CA 23-00161).

34. *See id.*

35. *Compare id.*, *with* Affirmation of Sujata S. Gibson, Esq. at 2, 14, *Bassett*, 2023 N.Y. Slip Op. 62807(U) (No. CA 23-00161).

36. *See* Affirmation of Sujata S. Gibson, Esq., *supra* note 35, at 30; *see also* Decision, Order and Judgment at 6, McGlynn v. N.Y. State Dep't of Health, No. 904317-22, (N.Y. Sup. Ct. Albany Cnty. Jan. 10, 2023), NYSCEF Doc. No. 35.

37. *See id.* at 3–5.

38. *See id.* at 4–5 (referencing N.Y. PUB. HEALTH LAW §§ 206, 225, 613 (McKinney 2024)).

39. *See* Affirmation of Sujata S. Gibson, Esq., *supra* note 35, at 30.

40. citation.

41. *See* In re Parks, 195 N.Y.S.3d 551, 553 (App. Div. 3d Dep't 2023).

on the basis of having voluntarily left his employment without good cause pursuant to New York Labor Law Section 593(1).[42] The Third Department held that he was not.[43]

In *In re Parks*, the claimant, a security guard for a medical center (the "Claimant"), was advised that in order to maintain his employment, he was required to be vaccinated against Covid-19 pursuant to the Mandate.[44] When he failed to provide proof of vaccination by the required deadline on the basis of his claimed religious beliefs, he was terminated.[45] He attempted to apply for unemployment insurance benefits, but the Department of Labor denied his request on the basis that he had voluntarily separated from his employment without good cause.[46] An Administrative Law Judge and thereafter the Unemployment Insurance Appeal Board affirmed, prompting the Claimant's appeal to the Third Department.[47]

The Third Department explained that "'[w]hether a claimant has good cause to leave employment is a factual issue for the Board to resolve[,] and its determination will be upheld if supported by substantial evidence,' notwithstanding evidence in the record that might support a contrary conclusion."[48]

As an initial matter, the Third Department noted that the Mandate did not authorize a religious exemption.[49] Moreover, religious beliefs "do not excuse compliance with a valid, religion-neutral law of general applicability that prohibits conduct that the state is free to regulate, as the Board recognized."[50] In that regard, "[w]hen employment is terminated as a consequence of the failure to comply with such a law, including noncompliance with a religious motivation, the First Amendment does not prohibit the denial of unemployment insurance benefits based upon that noncompliance" since "the mandate has a rational public-health basis and is justified by a compelling government interest."[51] In reaching its decision, the Court cited *We the Patriots*

42. *See id.* (referencing N.Y. LAB. LAW § 593 (McKinney 2024)).
43. *See id.*
44. *See id.*
45. *See id.*
46. *See In re Parks*, 195 N.Y.S.3d at 553.
47. *See id.*
48. *Id.* (citing In re Brozak, 184 N.Y.S.3d 842, 844 (App. Div. 3d Dep't 2023)).
49. *See id.*
50. *Id.* at 553–54 (citing Emp. Div. v. Smith, 494 U.S. 872, 878–80 (1990)).
51. *In re Parks*, 195 N.Y.S.3d at 554 (citing Emp. Div. v. Smith, 494 U.S. 872, 876, 879, 882–83, 888–90 (1990)).

USA, Inc. v. Hochul, where, as set forth above, the Second Circuit upheld the Mandate in the face of a religious challenge.[52]

Pertinently, the Claimant also cited *Medical Professionals for Informed Consent*; however, the Third Department refused to adopt this holding, citing *Algarin v. NYC Health + Hospitals Corporation*.[53] In that case, in the face of challenges pursuant to, *inter alia*, Title VII and the First Amendment, the Court cited *Medical Professionals for Informed Consent* and rejected its application, noting that the decision was immediately appealed and enforcement stayed by the Fourth Department such that it did not render the Mandate unenforceable.[54]

As the Third Department rejected the *Medical Professionals for Informed Consent* holding in adopting the reasoning of the court in *Algarin*, pending a decision from the Fourth Department, it seems the current law of New York State is that the DOH did not exceed the scope of its authority in issuing the Mandate such that the Mandate was valid and any violations, during its pendency prior to its repeal, are enforceable.

II. ANIMAL HEALTH UPDATE

Multiple pieces of legislation have been enacted during this *Survey* year and more are pending. Additionally, the Court of Appeals issued a detailed opinion on whether an animal may file a writ of habeas corpus.

A. In re Nonhuman Rights Project, Inc. v. Breheny, 197 N.E.3d 921 (N.Y. 2022)

The New York Court of Appeals recently entertained a writ of habeas corpus filed on behalf of Happy, an elephant residing in the Bronx Zoo.[55] Procedurally, the Supreme Court, Bronx County, granted a motion to dismiss filed by the Bronx Zoo, and the Appellate Division, First Department, affirmed.[56]

The question presented to the Court of Appeals was "whether petitioner Nonhuman Rights Project may seek habeas corpus relief on

52. *See id.* at 554 (citing We the Patriots USA, Inc. v. Hochul, 17 F.4th 266, 272–74, 280–90 (2d Cir. 2021)).

53. *See id.* at 55 (citing Algarin v. NYC Health + Hosps. Corp., No. 1: 22-cv-8340 (JLR), 2023 U.S. Dist. LEXIS 108666, at *24–26 (S.D.N.Y. June 23, 2023).

54. *See id.* at *24–26.

55. *See* In re Nonhuman Rts. Project, Inc. v. Breheny, 197 N.E.3d 921, 923 (N.Y. 2022).

56. *See id*. at 924, 926–27.

behalf of Happy, an elephant residing at the Bronx Zoo, in order to secure her transfer to an elephant sanctuary."[57]

The petitioner had sought a writ of habeas corpus on behalf of the elephant, arguing that the elephant was being "unlawfully confined at the Zoo in violation of her right to bodily liberty."[58] In reviewing the elephant's history of captivity at the Bronx Zoo, the Court noted that the elephant's two prior companion elephants had been euthanized years before, and the zoo was not acquiring new elephants.[59] The Court noted that the zoo only had one other elephant in captivity, a female elephant who was housed separately from Happy due to a "hostile relationship."[60]

In reviewing the petitioner's argument, the Court noted that the petitioner did not dispute that the elephant's residence at the Zoo fully complied with all state and federal statutes and regulations governing elephant care.[61] The Court further noted that petitioner did not argue that the elephant was subjected to any cruel treatment, other than that the elephant did "not have sufficient direct social contact with other elephants."[62] The petitioner also argued that elephants are "extraordinarily cognitively complex and autonomous nonhuman" animals.[63] The Court also noted that the petitioner conceded that the elephant could not be released into the wild, but was instead seeking to transfer the elephant to an elephant sanctuary.[64]

In analyzing the petitioner's submissions, the Court noted that the petitioner had established that "elephants are intelligent beings, who have the capacity for self-awareness, long-term memory, intentional communication, learning and problem-solving skills, empathy, and significant emotional response."[65] The Court also noted that the petitioner's expert submissions did not address Happy's specific circumstances at the Bronx Zoo, the adequacy of her environment, or the care she received.[66]

In reviewing the respondents' submissions, the Court noted that the respondents outlined the Zoo's efforts to maintain Happy's

57. *Id*. at 923.
58. *Id*. at 924.
59. *See id*.
60. *In re Nonhuman Rts. Project, Inc.*, 197 N.E.3d at 924.
61. *See id*.
62. *Id*. at 924–25.
63. *Id*. at 925.
64. *See id*.
65. *In re Nonhuman Rts. Project, Inc.*, 197 N.E.3d at 925.
66. *See id*.

physical and psychological well-being.[67] The respondents' submission also argued that a transfer could cause significant stress to Happy, and that there was no guarantee that a transfer would result in increased interaction with other elephants.[68] On this point, the Court also noted that the elephant sanctuary petitioner wanted to transfer the elephant to had itself conceded that unrelated elephants living in captivity together may have "acrimonious relationships."[69]

In beginning its legal analysis, the Court noted that the writ of habeas corpus is a proceeding to secure the personal liberty against the "unlawful imprisonment or restraint of the person by state or citizen."[70] The Court also noted that the writ of habeas corpus was included in the New York State Constitution, creating safeguards for "[t]he right of persons, deprived of liberty, to challenge in the courts the *legality* of their detention."[71] The New York Constitution specifically states that "[n]o person shall be deprived of life, liberty or property without due process of law."[72]

Turning to whether the writ of habeas corpus could be invoked by an elephant, the Court noted that there was no court precedent within New York State, any other state, or in any federal court finding that a nonhuman animal could invoke the writ of habeas corpus.[73] The Court further observed that precedent supports a conclusion that the writ of habeas corpus protects the liberty rights of humans "*because* they are humans . . . ."[74] The Court also noted that New York statutes and caselaw have never considered animals to be persons with liberty rights.[75]

In assessing the remedy sought by the petitioner, the Court noted that the petitioner was not seeking complete discharge from captivity, but a transfer to an elephant sanctuary.[76] The Court reasoned that this was "an implicit acknowledgement that Happy, as a nonhuman

67. *See id.*

68. *See id.*

69. *Id.*

70. *In re Nonhuman Rts. Project, Inc.*, 197 N.E.3d at 926 (quoting People ex rel. Duryee v. Duryee, 81 N.E. 313, 315 (N.Y. 1907)).

71. *Id.* (quoting Hoff v. State, 18 N.E.2d 671, 672 (1939)) (alteration and emphasis in original).

72. *Id.*; *see also* N.Y. CONST. art. I, § 6.

73. *See In re Nonhuman Rts. Project, Inc.*, 197 N.E.3d at 927.

74. *Id.* (citing Presier v. Rodriguez, 411 U.S. 475, 485 (1973)) (emphasis in original).

75. *See id.* (citing N.Y. ENV'T CONSERV. LAW § 11-0105 (McKinney 2024)).

76. *See id.* at 928.

animal, does not have a legally cognizable right to be at liberty under New York law."[77]

The Court continued it analysis by citing numerous federal and state court decisions holding that the "rights and responsibilities associated with legal personhood cannot be bestowed on nonhuman animals."[78]

Next, the Court considered the societal impacts of holding that nonhuman animals had liberty interests.[79] The Court reasoned that finding that an elephant had liberty interests would have "significant implications for the interactions of humans and animals in all facets of life, including risking the disruption of property rights, the agricultural industry (among others), and medical research efforts."[80]

Based on its analysis, the Court ultimately affirmed the lower courts' decisions finding that nonhumans cannot invoke the writ of habeas corpus.[81]

B. Legislation Changes

1. SB 01130 – Sale of Dogs, Cats, & Rabbits in Retail Shops

On December 15, 2022, New York enacted Senate Bill 01130, codified at New York General Business Law Sections 752, 753-f, which prohibits retail shops from selling dogs, cats or rabbits.[82] The legislation defined retail pet shops as "any for-profit place of business that sells or offers for sale animals to be kept as household pets, pet food or supplies."[83] The legislation excludes breeders "who sell or offer to sell directly to the consumer animals that are born and raised on the breeder's residential premises."[84]

The legislation expressly prohibits retail pet shops from selling, leasing, bartering, auctions, or otherwise transferring ownership of any dog, cat, or rabbit.[85] The legislation allows retail pet shops to collaborate with designated animal societies to facilitate adoptions of

77. *Id.*
78. *In re Nonhuman Rts. Project, Inc*., 197 N.E.3d at 928.
79. *See id.* at 928–29.
80. *Id.* at 929.
81. *See id.* at 932.
82. *See* N.Y. GEN. BUS. LAW §§ 752, 753-f (McKinney 2024).
83. GEN. BUS. §752(8).
84. *Id.*
85. *See* GEN. BUS. § 753-f (McKinney 2024).

dogs, cats or animals.[86] The statutory changes are set to become effective at the end of 2024.[87]

2. SB 4099 – Addressing Wildlife Killing Contests

On December 22, 2023, New York enacted Senate Bill S4099, codified at New York Environmental Conservation Law Section 11-0901, which illegalizes certain competitions involving killing wildlife.[88] The legislation makes it "unlawful for any person to organize . . . or participate in any contest . . . with the objective of taking or hunting wildlife for prizes or other inducement, or for entertainment."[89] Per the legislation, any remains of wildlife killed during an unlawful contest would become the property of the state.[90] The legislation contains carve-outs for contests involving white-tailed deer, turkey, or bear, and certain dog performance events, which would remain legal.[91] Any violation results in a fine between $500.00 and $2,000.00.[92]

3. Pending Legislation – SB 142 – Devocalization of Cats & Dogs

Senate Bill 142 seeks to illegalize the devocalization of dogs and cats under certain circumstances. As of the time of writing, the legislation is in the New York Senate's Agriculture Committee.

The proposed legislation would add a section to the New York Agriculture and Markets Law generally illegalizing the surgical devocalization of cats or dogs.[93] The proposed legislation would define devocalization as a "surgical procedure on the larynx or vocal cords of an animal intended to cause the reduction or elimination of vocal sounds . . . ."[94] The proposed legislation would allow surgical devocalization of a dog or cat

> where necessary to treat or relieve a physical illness, disease or injury . . . where such physical illness, disease, [or] injury . . . is causing or may reasonably cause the animal physical

86. *See id.*
87. *See id.*
88. N.Y. ENV'T CONSERV. LAW § 11-0901(14) (McKinney 2024).
89. *Id.*
90. *See id*.
91. *See id.*
92. *See* N.Y. Senate Bill No. 4099, 246th Sess. (2023) (to be codified at N.Y. ENV'T CONSERV. LAW § 71-0921 (McKinney 2024)).
93. *See* N.Y. Senate Bill No. 142, 246th Sess. (2023).
94. *Id.*

> pain or harm, or when determined by a veterinarian to be medically necessary to preserve the life of the animal.[95]

The proposed legislation would require any surgical devocalization of a dog or cat to "be performed only by a person licensed as a veterinarian . . . ."[96] Any veterinarian performing a surgical devocalization procedure would be required to document the procedure in the patient's treatment record and include the medical justification for the procedure.[97]

The proposed legislation would create additional restrictions on surgical devocalization procedures on animals less than six months old. Specifically, the legislation would prohibit devocalization procedures on animals less than six months old unless the only alternative is death or euthanasia.[98]

With respect to violations, any veterinarian who would perform a surgical devocalization procedure in violation of the statue would face a fine of up to $1,000.00 and could have his or her license suspended or revoked pursuant to the New York Education Law.[99] Any non-veterinarian who performs surgical devocalization could be charged with a Class B misdemeanor and subject to either up to ninety days of imprisonment and/or a fine up to $500.00.[100]

4. Pending Legislation – SB 6365 – Inspection of Vacant Properties for Abandoned Animals

As of the writing of this article, Senate Bill 6365 is in the New York Senate's Agriculture Committee, and it seeks to address abandoned animals in vacant properties. The legislation would add a new statutory subdivision to Section 373 of the New York Agriculture and Markets Law.[101] The new subdivision would require property owners to inspect vacant properties within three days of learning that the property had been vacated.[102] If the property owner discovers an abandoned animal, the property owner would be required to promptly notify a "dog control officer, the police, or [an] agent . . . of a duly incorporated society for the prevention of cruelty to animals . . . ."[103]

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95. *Id.*
96. *Id.*
97. *See id.*
98. *See* N.Y. Senate Bill No. 142, 246th Sess. (2023).
99. *See id.*
100. *See id.*
101. *See* N.Y. Senate Bill No. 6365, 246th Sess. (2023).
102. *See id.*
103. *Id.*

The discovering property owner would not be deemed to be the animal's owner as a result of the discovery.[104] Any property owner who fails to comply with the statutory requirements would be subject to a $500.00 fine for the first offense and $1,000.00 fines for subsequent offenses.[105]

III. REPRODUCTIVE HEALTH LAW

In the wake of *Dobbs v. Jackson Women's Health Organization*,[106] via New York Senate Bills (SB) 1351, 1066B and 4007C Part LL, New York State made additional statutory changes to supplement and bolster prior amendments and additions to the New York Public Health Law (PHL), New York Education Law ("Education Law"), New York Civil Practice Law and Rules (CPLR), New York Criminal Procedure Law (CPL), New York Executive Law ("Executive Law") and New York Insurance Law ("Insurance Law"),[107] as set forth in last year's *Survey*.[108]

A. SB 1351

On March 3, 2023, Governor Kathleen Hochul signed SB 1351, which amended (1) CPL 570.17; (2) CPL 140.10(3-a); and (3) Executive Law 837-w to provide clarity to the prior amendments and additions passed via SB 9077-A and Assembly Bill 10372-A.[109]

CPL 570.17, which provides for protections for medical professionals from extradition for providing an abortion, was amended to expand the scope of the statute: while the initial statute provided protections for providing an abortion, this was modified to protections for providing "reproductive health care services," which encompasses more than the sole act of performing an abortion.[110]

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104. *See id.*

105. *See id.*

106. *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

107. *See* N.Y. Senate Bill No. 1351, 246th Sess. (2023); N.Y. Senate Bill No. 1066B, 246th Sess. (2023); N.Y. Senate Bill No. 4007C, 246th Sess. (2023).

108. *See generally* Kali Ruth Helen Schreiner & Robert P. Carpenter, *2021-2022 Survey of New York Law: Health Law*, 73 SYRACUSE L. REV. 763 (2023) (discussing proposed New York legislation spurred in the wake of the *Dobbs* decision).

109. *See* N.Y. Senate Bill No. 1351, 246th Sess. (2023).

110. *Id.* As discussed below, this language differs from that currently found in CPL 570.17, which states "legally protected health activity." N.Y. CRIM. PROC. LAW § 570.17(2) (McKinney 2024). This is because SB 1066B amended the language that was adopted from SB 1351. *See* N.Y. Senate Bill No. 1066B, 246th Sess. (2023).

In a similar vein, CPL 140.10(3-a)(A), which relates to providing protection for medical professionals against arrest for providing an abortion, and Executive Law 837-w, which relates to providing medical professionals protection against out-of-state investigations regarding providing an abortion, were similarly amended to expand their respective scopes: each expanded from performing an abortion to aiding in an abortion performed within the State.[111]

These modifications became effective as of the effective date of SB 9077-A and AB 10372-A.[112]

B. SB 1066B

On June 23, 2023, Governor Kathleen Hochul signed SB 1066B, which (1) amended CPL 140.10 and 570.17; (2) renamed Executive Law 837-w to 837-x and amended Executive Law 837-x; (3) amended CPLR 3102 and 3119; (4) added CPLR 4550; (5) amended Insurance Law 3436-a; and (6) amended Education Law 6531-b.[113]

In providing the justification for the bill, the Senate noted that Mifepristone, which can be used to end a pregnancy of less than ten weeks ("medication abortion"),[114] was recently approved by the FDA.[115] The Senate explained that "nearly 40 million U.S. women of reproductive age (58% of the total number) live in states that have demonstrated hostility to abortion rights."[116] The bans and restrictions on these residents have "decreased access to safe abortions."[117] The Senate noted the prior bills contained protections afforded to medical professionals providing abortion services, but such protections did not explicitly address telehealth services.[118]

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111. *See* N.Y. Senate Bill No. 1351, 246th Sess. (2023); *see also* N.Y. CRIM. PROC. LAW § 140.10(3-a)(A) (McKinney 2024); N.Y. EXEC. LAW § 837-w (McKinney 2024) (renumbered). Similar to CPL 570.17, CPL 140.10(3-a)(A), Executive Law 837-w, now Executive Law 837-x, were amended by SB 1066B to use the more expansive language of a "legally protected health activity." *See* N.Y. Senate Bill No. 1066B, 246th Sess. (2023).

112. *See* N.Y. Senate Bill No. 1351, 246th Sess. (2023).

113. *See* N.Y. Senate Bill No. 1066B, 246th Sess. (2023).

114. *See* U.S. FOOD & DRUG ADMIN., *Information about Mifepristone for Medical Termination of Pregnancy Through Ten Weeks Gestation*, (Mar. 23, 2023), https://www.fda.gov/drugs/postmarket-drug-safety-information-patients-and-providers/information-about-mifepristone-medical-termination-pregnancy-through-ten-weeks-gestation.

115. *See* Legislative Memorandum of Sen. Mayer, *reprinted in* 2023 McKinney's Sess. Law News no. 3, ch. 138, at A-175.

116. *Id.*

117. *Id.*

118. *See id.*

The Senate commented that SB 1066B added a new definition of "legally protected health activity" to encompass "reproductive health services," which includes, *inter alia*, telehealth and telehealth services.[119] This new definition, now codified in CPL 570.17, was incorporated via SB 1066B into CPL 510.17(2), CPL 140.10(3-a)(A), Executive Law 837-x (previously Executive Law 837-w), CPLR 3102 and 3119, Insurance Law 3436-a and Education Law 6531-b in order to expand the protections set forth in these statutes to explicitly include telehealth and telehealth services.[120]

Moreover, CPLR 4550 was added, which similarly incorporated CPL 570.17's definition of "legally protected health activity."[121] This statute prohibits the admission of evidence relating to a medical professional engaging in "legally protected health activity" in providing services to a person outside the State in any proceeding that is based on a patient receiving such services outside the State.[122] The statute creates an exception where such an action is brought by the patient who received such services.[123]

These modifications became effective immediately.[124]

C. SB 4007C Part LL

On May 3, 2023, Governor Kathleen Hochul signed SB 4007C, which amended Insurance Law 3216(i)(36), 3221(k)(2), 4303(ss)(3) and 3436-a.[125]

Insurance Law 3216(i)(36), 3221(k)(2) and 4303(ss)(3) were amended to expand coverage for abortion to include any drug prescribed for such a purpose, even if not approved by the FDA, as long as the drug is recognized by: (1) the WHO Model Lists of Essential Medicines; (2) the WHO Abortion Care Guidance; or (3) the National Academies of Science, Engineering, and Medicine Consensus Study Report.[126]

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119. N.Y. Senate Bill No. 1066B, 246th Sess. (2023).

120. *See id.; see also* N.Y. CRIM. PROC. LAW § 570.17(2) (McKinney 2024); N.Y. CRIM. PROC. LAW § 140.10(3-a)(A) (McKinney 2024); N.Y. EXEC. LAW § 837-x (McKinney 2024); N.Y. C.P.L.R. 3102, 3119 (McKinney 2024); N.Y. INS. LAW § 3436-a (McKinney 2024); N.Y. EDUC. LAW § 6531-b (McKinney 2024).

121. N.Y. Senate Bill No. 1066B, 246th Sess. (2023); *see also* N.Y. C.P.L.R. 4550 (McKinney 2024).

122. N.Y. C.P.L.R. 4550 (McKinney 2024).

123. *See id.*

124. *See* N.Y. Senate Bill No. 1066B, 246th Sess. (2023).

125. *See* N.Y. Senate Bill No. 4007C, 246th Sess. (2023); N.Y. INS. LAW §§ 3216(i)(36), 3221(k)(2), 4303(ss)(3), 3436-a (McKinney 2024).

126. *See* INS. §§ 3216(i)(36), 3221(k)(2), 4303(ss)(3).

Insurance Law 3436-a was amended to provide protections for medical professionals in obtaining malpractice insurance coverage: insurers are prohibited from "refusing to issue or renew, canceling, or charging or imposing an increased premium or rate for, or excluding, limiting, restricting, or reducing coverage" due to the prescription of any medication for the purpose of an abortion that has not been approved by the FDA as long as the drug is recognized by: (1) the WHO Model Lists of Essential Medicines; (2) the WHO Abortion Care Guidance; or (3) the National Academies of Science, Engineering, and Medicine Consensus Study Report.[127]

These modifications became effective immediately.[128]

D. A1060A

Recently passed legislation allows physicians and certified nurse practitioners to prescribe non-patient specific orders for self-administered hormonal contraceptives.[129] The legislation created a new subdivision of the New York Education Law allowing physicians to execute non-patient specific orders for self-administered hormonal contraceptives to pharmacists.[130] A similar provision was added for certified nurse practitioners.[131] Self-administered hormonal contraceptives are defined as "self-administered contraceptive medications or devices approved by the [FDA] to prevent pregnancy by using hormones to regulate or prevent ovulation, and includes oral hormonal contraceptives, hormonal contraceptive vaginal rings and hormonal contraceptive patches."[132]

The statutes governing pharmacists also has been amended to allow pharmacists to execute non-patient specific orders for self-administered hormonal contraceptives based on an order or prescription from the Commissioner of Health, a licensed physician, or certified nurse practitioners.[133] Prior to dispensing the contraceptives, the pharmacist must have the patient complete a self-screening risk assessment questionnaire and give the patient a fact sheet that contains various informational material about hormonal contraceptives.[134] The

127. INS. § 3436-a.
128. *See* N.Y. Senate Bill No. 4007C, 246th Sess. (2023).
129. *See* N.Y. Assembly Bill No. A1060A, 246th Sess. (2023).
130. *See* N.Y. EDUC. LAW § 6527(11) (McKinney 2024).
131. *See* N.Y. EDUC. LAW § 6909(11) (McKinney 2024).
132. N.Y. EDUC. LAW § 6802(29) (McKinney 2024).
133. *See* N.Y. EDUC. LAW § 6801(9) (McKinney 2024).
134. *See id.*

screening assessment must be completed, and the fact sheet must be given to the patient, every twelve months.[135]

A pharmacist must notify a patient's primary care physician that a self-administered hormonal contraceptive prescription has been filled within seventy-two hours of filling the prescription.[136] A patient may opt out of requiring the pharmacist to notify the primary care physician.[137]

E. SB 1213B

New York State has also enacted legislation increasing access to abortion services on SUNY and CUNY campuses.[138] The legislation created a new provision of the New York Education Law.[139] The new statute requires every campus of SUNY or CUNY to provide access to medication abortion.[140] The college campuses can achieve this either by employing or contracting individuals to prescribe medication abortion prescription drugs or providing students with referrals to providers authorized to make such prescriptions.[141] Both SUNY and CUNY are statutorily obligated to make a report to the Governor every year indicating which option each campus is using, and the number of providers authorized to prescribe medication abortion prescription drugs at each campus.[142]

IV. GENDER-AFFIRMING CARE

On June 25, 2023, Governor Hochul signed NY Senate Bill S2475B into law.[143] The law enacted several statutory changes regarding gender-affirming care.[144] Each statutory change will be discussed below.

135. *See id.*
136. *See id.*
137. *See id.*
138. *See* N.Y. Senate Bill No. 1213B, 246th Sess. (2023).
139. *See* N.Y. EDUC. LAW § 6438-b (McKinney 2024).
140. *See* EDUC. § 6438-b(1).
141. *See id.*
142. *See* EDUC. § 6438-b(2).
143. *See* N.Y. Senate Bill No. S2475B, 246th Sess. (2023).
144. *See id.*

A. Changes to the Family Court Act

The law created a new provision of the Family Court Act.[145] The new provision states that any law from another state which authorizes a child to be removed from a parent or guardian based on the parent allowing the child to receive gender-affirming care shall not be enforceable in New York.[146] Additionally, New York courts are not allowed to admit or consider a finding of abuse based on a parent allowing a child to proceed with gender-affirming care.[147]

B. Changes to the Executive Law

The law also created a new provision of the Executive Law.[148] The new statute prohibits state or local law enforcement agencies from cooperating with out-of-state investigations that seek information regarding gender-affirming care performed in this state.[149] The law allows law enforcement agencies to participate in investigations involving criminal activity in New York that may involve gender-affirming care.[150] However, in no situation may a law enforcement agency provide information regarding a medical procedure performed on a specific individual.[151]

C. Changes to the CPLR

The law also enacted changes to provisions of the CPLR addressing subpoenas.[152] Specifically, the provision prevents a court or court clerk from issuing a subpoena in connection to an out-of-state proceeding seeking information regarding gender-affirming care legally performed in this State.[153] However, the court or county clerk may issue such a subpoena if the out of state proceeding: (1) sounds in tort or contract, or is based on statute, (2) would be actionable under New York State Law, and (3) is brought by the patient who received the gender-affirming care.[154]

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145. *See* N.Y. F.C.A. § 659 (McKinney 2024).

146. *See id.*

147. *See id.*

148. *See* N.Y. EXEC. LAW § 837-x (McKinney 2024). There are two sections of Executive Law Section 837-x. The first section was discussed earlier in Part III. The second section of Executive Law Section 837-x is discussed here in Part IV.

149. *See id.*

150. *See id.*

151. *See id.*

152. *See* N.Y. C.P.L.R. 3119(h) (McKinney 2024).

153. *See id.*

154. *See id.*

D. Changes to the Criminal Procedure Law

The law also added a new provision to the Criminal Procedure Law prohibiting a police officer from arresting any person who participated in a legal gender-affirming care procedure within New York State.[155]

Additionally, the law created a statutory provision that prohibited the governor from recognizing an extradition request for a person subject to criminal liability based on gender-affirming care legally performed in New York State.[156] However, the extradition request will be recognized if the foreign state alleges that the defendant was in the state demanding extradition at the time of the alleged offense, and then fled from the state.[157]

E. Changes to the Education Law & Public Health Law

The law added a definition for "gender-affirming care" to the New York Education Law.[158] The statute defines gender-affirming care as "any type of care provided to an individual to affirm their gender identity or gender expression; provided that surgical interventions on minors with variations in their sex characteristics that are not sought and initiated by the individual patient are not gender-affirming care."[159]

The Education Law also was changed to address how performing gender-affirming care is handled in the context of allegations of professional misconduct.[160] Specifically, it shall not be considered professional misconduct if a healthcare provider performed gender-affirming care for a patient who is located in a state where such services are illegal.[161] Further, the law prohibits a provider's license from being revoked, suspended or otherwise subject to penalty based solely on providing gender-affirming care to a patient who is located in state where such services are illegal.[162]

Similar provisions were added to the New York Public Health Law.[163] Specifically, both the Board for Professional Medical Conduct

155. *See* N.Y. CRIM. PROC. LAW § 140.10(3-b) (McKinney 2024).
156. *See* N.Y. CRIM. PROC. LAW § 570.19 (McKinney 2024).
157. *See id.*
158. *See* N.Y. EDUC. LAW § 6531-b(1)(c) (McKinney 2024).
159. *Id.*
160. See *id.* § 6531-b(2).
161. *See id.*
162. *See id.*
163. *See* N.Y. PUB. HEALTH LAW § 230(9-c) (McKinney 2024).

and the Office of Professional Medical Conduct are prohibited from charging a licensee with misconduct for providing gender-affirming care to a patient living in a state where gender-affirming care is illegal.[164]

Finally, an application for licensure in New York State shall not be denied based solely on a disciplinary action in another jurisdiction related to the applicant providing gender-affirming care unless such action would have been professional misconduct in this State.[165]

F. Changes to the Insurance Law

The act also enacted changes to the New York Insurance Law. Specifically, the Insurance Law now prohibits insurers offering medical malpractice insurance from taking an adverse action against a provider who performs gender-affirming care on a patient living outside New York.[166]

V. PRE-NATAL CARE LEGISLATION

A. SB 4981B – Treatment of Patients with Confirmed Fetal Demise

New York State enacted Senate Bill 4981B, which addresses conversations between health care providers and a patient following confirmation of fetal demise.[167]

The legislation requires hospitals to adopt and implement protocols for managing fetal demise.[168] The legislation requires hospitals to "determine whether a pregnant person is experiencing an emergency medical condition in relation to fetal demise."[169] If the patient is experiencing an emergency medical condition, the hospital is required to admit the patient to the hospital or "treat them in the emergency room for close observation, continuous monitoring and stabilizing treatment until it is deemed medically safe for discharge or transfer to another medical facility."[170]

164. *See id.* § 230(9-c)(a).
165. *See* N.Y. EDUC. LAW § 6505-d (McKinney 2024).
166. *See* N.Y. INS. LAW § 3436-a (McKinney 2024).
167. *See* N.Y. Senate Bill No. 4981B, 246th Sess. (2023).
168. *See* N.Y. PUB. HEALTH LAW § 2803-o-1 (McKinney 2024).
169. *Id.*
170. *Id.*

B. A8529– Establishing a Doula Directory

New York State enacted Assembly Bill 8529, which establishes a Directory of Doulas.[171] The proposed legislation creates a new section under New York Social Services Law.[172]

The legislation defines a doula as "a trained person who provides continuous physical, emotional, and informational support to a pregnant person and the family of such pregnant person during or a reasonable time after pregnancy."[173] The legislation requires New York State, through the Department of Health, to maintain a publicly available directory of doulas who are eligible for Medicaid reimbursement.[174]

In order to be added to the directory, a doula needs to apply to the directory, and provide a certified copy of his or her doula certification, his or her contact information, and his or her national provider identification number.[175]

VI. STATUTES AFFECTING HOSPICES & NURSING HOMES

During this *Survey* year, the state legislature passed or proposed multiple bills affecting hospices.

A. SB 4858 – Establishing the Office of Hospice & Palliative Care Access & Quality

The New York Legislature has passed New York Senate Bill No. 4858, which would establish the Office of Hospice and Palliative Care Access and Quality.[176] The bill would create a new section of the Public Health Law, which outlines the powers and duties of the new government office.[177] The proposed government office would be given multiple responsibilities, including: (1) developing recommendations to improve patient care, (2) raising awareness and access to hospice and palliative care service, and (3) ensuring equitable access to palliative care, amongst others.[178] Governor Hochul vetoed the proposed legislation on November 17, 2023.

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171. *See* N.Y. Assembly Bill No. 8529, 247th Sess. (2024).
172. *See id.*
173. N.Y. SOC. SERV. LAW § 365-p(1) (McKinney 2024).
174. *See id.* § 365-p(2).
175. *See id.* § 365-p(3).
176. *See* N.Y. Senate Bill No. 4858, 246th Sess. (2023).
177. *See* N.Y. Senate Bill No. 4858, 246th Sess. (2023).
178. *See id.*

B. SB S6460 – Banning For-Profit Hospice

During the past *Survey* year, the legislature passed a bill banning for-profit hospices, but the bill was vetoed by Governor Hochul.[179] A similar bill has been proposed this year, and is in the Senate at the time of writing.[180] The proposed bill would ban the creation of any new hospice if it is be operated on a for-profit basis.[181] Additionally, the bill would prohibit any currently operating for-profit hospice from increasing its capacity.[182] It will be interesting to see if New York prioritizes corporate profit or access to quality end of life care.

VII. PRIVACY RIGHTS FOR ELECTRONIC HEALTH INFORMATION

During this *Survey* year, New York State enacted multiple statutes aimed at protecting individuals' electronic health information in some circumstances.

A. Enacted Legislation – Changes to the New York General Business Law

As part of the budget bill, New York enacted new sections of the General Business Law that create certain types of electronic health information.[183]

1. New York General Business Law Section 394-f – Reproductive Health Information

First, New York General Business Law 394-f provides protections for reproductive health information.[184] Broadly, the statute creates a mechanism to not produce certain reproductive health information sought by an out-of-state entity.[185] The new statute defines reproductive health care services as including "any services related to

179. *See* N.Y. Assembly Bill No. 8472, 244th Sess. (2021); *see also* Leslie J. Levinson et al., *New York Governor Vetoes Act Prohibiting Establishment and Expansion of For-Profit Hospices,* NAT'L L. REV. (Jan. 4, 2023), https://www.natlawreview.com/article/new-york-governor-vetoes-act-prohibiting-establishment-and-expansion-profit-hospices.

180. *See* N.Y. Senate Bill No. 6460, 246th Sess. (2023).

181. *See id.*

182. *See id.*

183. *See* N.Y. Senate Bill No. 4007C, 246th Sess. (2023).

184. *See* N.Y. GEN. BUS. LAW § 394-f (McKinney 2024).

185. *See id.*

the performance or aiding within the performance of an abortion performed within this state. . . ."[186]

The statute states that a person or entity served with an out-of-state warrant that seeks records which would reveal the identity of a customer "shall not produce those records when the corporation knows that the warrant relates to an investigation into, or enforcement of, a prohibited violation."[187] A prohibited violation is defined as "any civil or criminal offense . . . [in] another state" that relates to (1) providing reproductive health care services that are legal in New York, or (2) attempting to provide reproductive health care services that are legal in New York.[188]

The statute expressly allows a person or entity to comply with a warrant seeking reproductive health information "if the warrant is accompanied by an attestation" stating that the records are not being sought in relation to an investigation or enforcement proceeding for a prohibited violation.[189]

2. New York General Business Law Section 394-f – Geofencing of Health Care Facilities

Second, New York created protections against "geofencing" health care information in General Business Law Section 394-g.[190] For context, geofencing is defined as any technology using

> global positioning system coordinates, cell tower connectivity, cellular data, radio frequency identification, Wi-Fi data . . . to establish a virtual boundary . . . around a particular location that allows a digital advertiser to track the location of an individual . . . and . . . electronically deliver targeted digital advertisements.[191]

The statute selectively prohibits any person or corporation from establishing "a geofence or similar virtual boundary around any health care facility, other than their own health care facility . . . ."[192] Specifically, such geofencing is only prohibited for the express purposes of: "delivering by electronic means a digital advertisement to a user,"

186. *Id.* § 394-f(1)(d).
187. *Id.* § 394-f(2).
188. *Id.* §394-f(1)(c).
189. GEN. BUS. §394-f(3).
190. *See* N.Y. GEN. BUS. LAW § 394-g (McKinney 2024).
191. *Id.* § 394-g(1)(b).
192. *Id.* § 394-g(2).

building a consumer profile, or inferring "health status, medical condition, or medical treatment of [a] person" within the facility.[193]

3. New York General Business Law Section 394-h – Law Enforcement Access to Electronic Health Information

Third and finally, New York General Business Law Section 394-h creates a prohibition against law enforcement offices obtaining electronic health information without a warrant. The statute expressly states that "law enforcement agencies and law enforcement officers shall be prohibited from purchasing or obtaining electronic health information without a warrant."[194] The statute provides for a series of exemptions based on HIPAA and FERPA law, amongst others.[195]

The Act created a new Article within the New York General Business Law.[196] To begin, the legislation includes a broad definition of what encompasses "electronic health information," including:

> Any information in any electronic format or media that relates to an individual or a device that is reasonably linkable to an individual or individuals in connection with: any past, present, or future disability, physical health condition, or mental health condition; the search for or attempt to obtain health care services; any past, present, or future treatment or other health care services for a disability, physical health condition, or mental health condition; location information associated with a health care facility; or the past, present, or future payment for health care services.[197]

The Act then illegalizes certain types of processing electronic health information.[198] Specifically, the legislation prohibits the sale of an individual's electronic health information by a regulated entity to a third party.[199] The legislation also prohibits processing "an individual's electronic health information to advertise or market products or

193. *Id.*

194. N.Y. GEN. BUS. LAW § 394-h(2) (McKinney 2024).

195. See id. § 394-h(3).

196. *See* N.Y. Senate Bill No. 4007B, 246th Sess. (2023) (to be codified at N.Y. GEN. BUS. LAW §§1100–1107 (McKinney 2024)).

197. *Id*. Currently pending Senate and Assembly bills that seek to propose the language for this new Article have changed the language of this provision and have titled the definition "regulated health information" instead of "electronic health information." *See* N.Y. Senate Bill No. 158B, 246th Sess. (2023); N.Y. Assembly Bill No. 4983B, 246th Sess. (2023).

198. *See* N.Y. Senate Bill No. 4007B, 246th Sess. (2023) (to be codified at N.Y. GEN. BUS. LAW §§1100–1107 (McKinney 2024)).

199. *See id*.

services."[200] The prohibition against the use of electronic health information for marketing or advertising contains an exception for "contextual advertising" so long as the individual's electronic "health information is not disclosed to any third party and is not used to build a profile about the individual . . . ."[201] An individual's electronic health information can also be processed for the purpose of assessing advertising effectiveness.[202] The legislation also contains certain exceptions to the prohibitions based on obtaining the individual's written consent, amongst others.[203]

Next, the legislation creates rights for individuals over their electronic health information.[204] First, regulated entities are required to maintain a mechanism through which an individual may request access to their electronic health information.[205] A regulated entity must provide a copy of an individual's electronic health information within thirty days of receiving a request.[206]

Second, a regulated entity must maintain a mechanism through which an individual may request the deletion of their electronic health information.[207] The regulated entity would be required to delete all electronic health information within thirty days of receiving the

200. *Id.* Currently pending Senate and Assembly bills that seek to propose the language for this new Article word this provision slightly differently, although ultimately these bills also prohibit processing for advertising and marketing. *See* N.Y. Senate Bill No. 158B, 246th Sess. (2023); N.Y. Assembly Bill No. 4983B, 246th Sess. (2023).

201. N.Y. Senate Bill No. 4007B, 246th Sess. (2023) (to be codified at N.Y. GEN. BUS. LAW §§1100–1107 (McKinney 2024)). Currently pending Senate and Assembly bills that seek to propose the language for this new Article do not include contextual advertising. *See* N.Y. Senate Bill No. 158B, 246th Sess. (2023); N.Y. Assembly Bill No. 4983B, 246th Sess. (2023).

202. *See* N.Y. Senate Bill No. 4007B, 246th Sess. (2023) (to be codified at N.Y. GEN. BUS. LAW §§1100–1107 (McKinney 2024)). Currently pending Senate and Assembly bills that seek to propose the language for this new Article do not include an effectiveness exception. *See* N.Y. Senate Bill No. 158B, 246th Sess. (2023); N.Y. Assembly Bill No. 4983B, 246th Sess. (2023).

203. *See* N.Y. Senate Bill No. 4007B, 246th Sess. (2023) (to be codified at N.Y. GEN. BUS. LAW §§1100–1107 (McKinney 2024)). Currently pending Senate and Assembly bills that seek to propose the language for this new Article have a similar exception for individual authorization. *See* N.Y. Senate Bill No. 158B, 246th Sess. (2023); N.Y. Assembly Bill No. 4983B, 246th Sess. (2023).

204. *See* N.Y. Senate Bill No. 4007B, 246th Sess. (2023) (to be codified at N.Y. GEN. BUS. LAW §§1100–1107 (McKinney 2024)).

205. *See id.*

206. *See id*.

207. *See id.*

request, except to the extent necessary to fulfill legal obligations or if the request proves impossible to complete.[208]

The rights created by the legislation may be exercised by: the individual, the parent or guardian of the individual who is the subject of the electronic health information, or an agent authorized by the individual who is the subject of the electronic health information.[209]

The legislation also requires regulated entities to develop and implement "reasonable administrative, technical, and physical safeguards to protect the security, confidentiality, and integrity of electronic health information."[210] Additionally, service providers and regulated entities must execute written agreements outlining the instructions for processing electronic health information.[211]

Finally, the legislation empowers the Attorney General to commence legal action against any person in violation of the article.[212] The Attorney General may seek to enjoin any violation, to obtain restitution of any money obtained through a violation, to obtain any disgorgements of profits obtained through a violation, and to seek civil penalties not to exceed $15,000.00 per violation.[213]

208. *See id.*

209. *See* N.Y. Senate Bill No. 4007B, 246th Sess. (2023) (to be codified at N.Y. GEN. BUS. LAW §§1100–1107 (McKinney 2024)). Currently pending Senate and Assembly bills that seek to propose the language for this new Article do not expressly include parents as enforcers of the rights created by the legislation. *See* N.Y. Senate Bill No. 158B, 246th Sess. (2023); N.Y. Assembly Bill No. 4983B, 246th Sess. (2023).

210. N.Y. Senate Bill No. 4007B, 246th Sess. (2023) (to be codified at N.Y. GEN. BUS. LAW §§1100–1107 (McKinney 2024)). Currently pending Senate and Assembly bills that seek to propose the language for this new Article impose the same requirement but use their term of "regulated health information." *See* N.Y. Senate Bill No. 158B, 246th Sess. (2023); N.Y. Assembly Bill No. 4983B, 246th Sess. (2023).

211. *See* N.Y. Senate Bill No. 4007B, 246th Sess. (2023) (to be codified at N.Y. GEN. BUS. LAW §§1100–1107 (McKinney 2024)). Currently pending Senate and Assembly bills that seek to propose the language for this new Article impose the same requirement but use their term of "regulated health information." *See* N.Y. Senate Bill No. 158B, 246th Sess. (2023); N.Y. Assembly Bill No. 4983B, 246th Sess. (2023).

212. *See* N.Y. Senate Bill No. 4007B, 246th Sess. (2023) (to be codified at N.Y. GEN. BUS. LAW §§1100–1107 (McKinney 2024)).

213. *See id.*

VIII. MISCELLANEOUS UPDATES

A. Grieving Families Act

In wrongful death cases concerning medical malpractice, a plaintiff's damages are governed by New York Estate Powers and Trusts Law (EPTL) Section 5-4.3. Pursuant to this statute, a plaintiff's amount of recovery is limited to "the reasonable expenses of medical aid, nursing and attention incident to the injury causing death and the reasonable funeral expenses of the decedent paid by the distributees . . . ."[214] As currently formatted, the law does not permit wrongful death plaintiffs to recover damages for grief or anguish, loss of society and services, or loss of guidance and counsel from the decedent. Put simply, the current law does not permit for recovery of emotional damages as it relates to wrongful death lawsuits.

This law has drawn criticism for being antiquated. As a result, in 2022 the New York legislature passed a bill that has colloquially been termed the Grieving Families Act.[215] The purpose of the bill was to expand the classes of distributees and damages recoverable in a wrongful death lawsuit. The original bill passed with overwhelming support in the New York State Assembly in June 2022.[216] However, in January 2023, Governor Kathy Hochul vetoed the bill, voicing concerns about its impact on the insurance industry, small businesses, and medical providers.[217] Thus, the bill was reintroduced in the New York legislature as the Grieving Families Act, Assembly Bill 6698, in the summer of 2023.[218]

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214. N.Y. EST. POWERS & TRUSTS LAW § 5-4.3 (McKinney 2024).

215. *See* N.Y. Senate Bill No. 74A, 244th Sess. (2021); *see also* Andrew G. Simpson, *New York Waits to See if Bill to Expand Wrongful Death Damages Becomes Law*, INS. J. (July 7, 2022), https://www.insurancejournal.com/news/east/2022/07/07/675013.htm.

216. *See* N.Y. Senate Bill No. 74A, 244th Sess. (2021); *see also* Andrew G. Simpson, *New York Waits to See if Bill to Expand Wrongful Death Damages Becomes Law*, INS. J. (July 7, 2022), https://www.insurancejournal.com/news/east/2022/07/07/675013.htm.

217. *See* Bill Hutchinson, *New York Gov. Kathy Hochul Vetoes Grieving Families Act*, *Angering Some Loved Ones of Buffalo Massacre*, ABC NEWS (Jan. 31, 2023, 1:37 PM), https://abcnews.go.com/US/new-york-gov-kathy-hochul-vetoes-grieving-families/story?id=96789738.

218. *See* N.Y. Assembly Bill No. 6698, 246th Sess. (2023); *See* Taylor Ash, *Radical Changes to New York's Wrongful Death Law Advocated by State Legislature*, JD SUPRA (Aug. 22, 2023), https://www.jdsupra.com/legalnews/radical-changes-to-new-york-s-wrongful-1102846/.

The latest version of the bill is substantively identical to the previous version that was vetoed by Governor Hochul.[219] Like the previous iteration, the most significant aspect of this bill is that it amends the aforementioned EPTL Section 5-4.3 to allow plaintiffs in wrongful death suits to recover for emotional damages in addition to the pecuniary damages already allowable under EPTL Section 5-4.3.[220] Specifically, section 2(a) of the bill allows plaintiffs to recover compensation for:

> (i) reasonable funeral expenses of the decedent paid by the persons for whose benefit the action is brought, or for the payment of which any persons for whose benefit the action is brought is responsible; (ii) reasonable expenses for medical care incident to the injury causing death, including but not limited to doctors, nursing, attendant care, treatment, hospitalization of the decedent, and medicines; (iii) grief or anguish caused by the decedent's death; (iv) loss of love, society, protection, comfort, companionship, and consortium resulting from the decedent's death; (v) pecuniary injuries, including loss of services, support, assistance, and loss or diminishment of inheritance, resulting from the decedent's death; and (vi) loss of nurture, guidance, counsel, advice, training, and education resulting from the decedent's death.[221]

The bill, like its predecessor, also exponentially expands a plaintiff's potential damages. Additionally, it extends the wrongful death statute of limitations from two years under the NY EPTL to three years after the decedent's death.[222] Section 5 of the bill further provides that the bill "shall apply to all causes of action that accrue on or after July 1, 2018, regardless of when filed."[223] This allows plaintiffs within this time frame who were formerly outside the statute of limitations to retroactively bring lawsuits for wrongful death.

Additionally, the bill would enlarge the pool of people than can potentially recover damages in a wrongful death case. The current statute governing this issue is EPTL Section 1-2.5 which limits recovery

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219. *See* Ash, *supra* note 219 ("The bill is the latest iteration of a bill that New York Governor Hochul has already vetoed. A substantively identical bill passed through New York's Senate and Assembly in 2022, only to be vetoed by the Governor in January 2023, who voiced concerns about its impact on the insurance industry and medical providers.").

220. *See* N.Y. Assembly Bill No. 6698, 246th Sess. (2023).

221. *Id.*

222. *See id.*

223. *Id.*

in wrongful death cases to "distributees.[224]" In the context of wrongful death cases, distrubutees are generally limited to the decedent's spouse and children.[225] Under section 3(a) of the act, recovery will be permitted from the decedent's "surviving close family members."[226] Specifically this includes the decedent's "spouse or domestic partner, issue, foster children, step-children, and step grandchildren, parents, grandparents, step-parents, step-grandparents, siblings or any person standing in loco parentis to the decedent."[227] The legislation further provides that the finder of fact shall determine which persons are entitled to damages as "close family members."[228]

As with prior versions of this bill, Governor Hochul vetoed the proposed legislation.[229]

B. Covid-19 Executive Orders

During this *Survey* year, the First, Second, and Fourth Appellate Departments held that the executive orders issued by Governor Cuomo in the wake of the COVID-19 tolled, rather than suspended, the statute of limitations.

In *Murphy*, the plaintiff commenced an action on November 3, 2020.[230] The plaintiff then served an amended summons and complaint on February 12, 2021.[231] The amended pleading contained causes of action for wrongful death, conscious pain and suffering, and loss of consortium.[232] The underlying date of alleged negligence was September 30, 2018.[233]

The defendants moved to dismiss the amended pleading as barred by the statute of limitations, simultaneously arguing that the executive orders issued by Governor Cuomo only amounted to a suspension of the statute of limitations.[234] For context, a toll stops the running of the

224. See N.Y. Est. Powers & Trusts Law § 1-2.5 (McKinney 2024).
225. *See* N.Y. EST. POWERS & TRUSTS LAW §§ 4-1.1 (McKinney 2024).
226. N.Y. Assembly Bill No. 6698, 246th Sess. (2023).
227. *Id*.
228. *Id.*
229. Please insert citation to article mentioned in the comments.
230. *See* Murphy v. Harris, 177 N.Y.S.3d 559, 561 (App. Div. 1st Dep't 2022).
231. *See id*.
232. *See id*.
233. *See id*.
234. *See id.*

statute of limitations for a set period while a suspension only delays the expiration of the statute of limitations.[235]

In beginning its analysis of whether the executive orders were a toll or suspension, the First Department noted that the executive orders expressly used the word "tolled."[236] The court also noted that the New York Executive Law authorizes the governor to "alter or modify the requirements of a statute" and held that a tolling of statute of limitations was within the authority of that statute.[237]

Similarly, both the Fourth and Third Departments issued decisions concluding that the executive orders functioned as tolls rather than suspensions.[238] Therefore, all four departments have now issued decisions finding that the executive orders were tolls not suspensions. This will presumably resolve this issue moving forward.

C. Appleyard v. Tigges, 181 N.Y.S.3d 565 (1st Dep't 2023) – Physician's Liability for Supervision of Midlevels

Generally, while midlevel healthcare providers such as physician assistants (PA) are allowed to perform medical services without the immediate presence of a physician, they must still indirectly be under the supervision of a physician.[239] The recent case of *Appleyard v. Tigges* provided additional clarification on the circumstances in which a physician can be held liable for the acts of a midlevel provider.

In *Appleyard*, the plaintiff alleged that a physician assistant failed to timely act on abnormal bloodwork and that the defendant-physician, who was listed as the PA's supervising physician, was vicariously liable for the actions.[240] On a motion to set aside the verdict, the court held that the defendant-physician could not be vicariously liable for the PA as he was not involved in the plaintiff's treatment during her admission, nor was there evidence that the defendant-physician was acting as the supervising physician at the time in question.[241]

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235. *See Murphy*, 177 N.Y.S.3d at 561 (citing Brash v. Richards, 149 N.Y.S.3d 560, 561 (App. Div. 2d Dep't 2021)).

236. *See id.*

237. *See id*. (citing *Brash*, 149 N.Y.S.3d at 585).

238. *See* In re Roach v. Cornell Univ., 172 N.Y.S.3d 215, 218 (App. Div. 3d Dep't 2022); *see also* Santiago v. State, 193 N.Y.S.3d 550, 552 (App. Div. 4th Dep't 2023).

239. *See* N.Y. EDUC. LAW § 6542 (McKinney 2024).

240. *See* Appleyard v. Tigges, 181 N.Y.S.3d 565, 566–67 (App. Div. 1st Dep't 2023).

241. *See id*. at 567.

D. Loss of Chance Doctrine

The loss of chance doctrine is a theory of recovery that applies in medical malpractice cases where the plaintiff alleges the defendant provider failed to or delayed in diagnosing and treating a condition and thereby "diminished the [patient's] chances of a better outcome."[242] In these cases, proximate cause is not analyzed under the typical substantial factor approach, but rather, whether the alleged deviation diminished the plaintiff's chance of a better outcome or increased the injury.[243] As the law currently stands, a plaintiff will meet their burden as long as they present evidence where a jury could rationally infer that the defendant's conduct diminished the patient's chance of a better outcome.[244]

While all four Departments in New York recognize the doctrine, it is one of some controversy, and the Court of Appeals has never definitely ruled on the issue.[245] Some argue that the doctrine unfairly reduces a plaintiff's burden of proof.[246] The recent case of *Sovocool v Cortland Regional Medical Center* acknowledges this.

In *Sovocool*, a plaintiff brought a medical malpractice action against physicians, alleging that the defendants failed to timely intubate the patient.[247] The defendants moved for summary judgment, on both standard of care and causation grounds.[248] The trial court granted the motion, finding that the plaintiffs' opposition papers were too speculative to raise an issue of fact.[249]

On appeal, the Third Department reversed.[250] The Third Department noted that the plaintiff was proceeding under a loss of chance theory of causation.[251] The court confirmed that the loss of chance theory does not "require a precise explanation of 'how or why specific

242. Humbolt v. Parmeter, 151 N.Y.S.3d 788, 794 (App. Div. 4th Dep't 2021) (citing Clune v. Moore, 38 N.Y.S.3d 852, 855 (App. Div. 4th Dep't 2016)).

243. *See* Wolf v. Persaud, 14 N.Y.S.3d 601, 602 (App. Div. 4th Dep't 2015).

244. *See Humbolt*, 151 N.Y.S.3d at 794 (citing *Clune*, 38 N.Y.S.3d at 854–55).

245. *See* Wild v. Cath. Health Sys., 991 N.E.2d 704, 705–06 (N.Y. 2013).

246. *See id.*

247. *See* Sovocool v. Cortland Reg'l Med. Ctr., 192 N.Y.S.3d 746, 749 (App. Div. 3d Dep't 2023).

248. *See id.*

249. *See id.*

250. *See id.*

251. *See id.* at 751.

tests or therapies would have improved [decedent's] outcome.'"[252] Instead, the court indicated that the plaintiff only needs to "present evidence from which a rational jury could infer that there was a substantial possibility that the patient was denied a chance of the better outcome"[253]

The court then noted that the plaintiff's expert internist opined that earlier intubation of the patient would have produced a seventy percent chance of survival by preventing an anoxic brain injury.[254] Although the expert failed to specifically address how an earlier intubation would have increased the chances of survival, the Third Department acknowledged that plaintiffs are "proceeding upon a loss of chance theory of causation, which has less onerous requirements" and that therefore a rational juror could conclude the decedent would have had a chance at a better outcome.[255]

This doctrine will continue to be controversial amongst trial courts and the Appellate Divisions across New York. The Court of Appeals will undoubtedly have to rule on the issue to provide more clarity going forward.

CONCLUSION

Looking ahead, it will be interesting to see how New York handles evolving areas of law, such as animal health and electronic health information, as well as if pending legislation will be enacted.

252. *Sovocool*, 192 N.Y.S.3d at 751–52 (quoting Leberman v. Glick, 171 N.Y.S.3d 677, 681 (App. Div. 4th Dep't 2022)).

253. *Id.* at 752 (quoting *Leberman*, 171 N.Y.S.3d at 681).

254. *See id.*

255. *Id.* at 751–52.