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NCBA COMMITTEES
Chairs, Vice Chairs, Liaisons Page 20

SAVE THE DATE

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NCBA and NAL
INSTALLATION OF OFFICERS
Tuesday, June 2, 2020
5:00 PM via Zoom
See pg. 6

WHAT'S INSIDE

OF NOTE

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UPCOMING PUBLICATIONS COMMITTEE MEETINGS

Thursday, June 4, 2020 at 12:45 PM
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Meet NCBA's 118th President

By Ann Burkowsky

The Nassau County Bar Association is pleased to welcome Dorian R. Glover as its 118th President, who was installed on Tuesday, June 2, 2020 at the first ever virtual NCBA Installation ceremony.

Glover attended Morehouse College in Atlanta GA; receiving his B.A. in Business Administration. He later pursued his life-long dream of becoming a lawyer and attended Touro College's Jacob D. Fuchsberg Law Center to obtain his Juris Doctorate. In 1998, Dorian established The Law Offices of Dorian R. Glover, a firm specializing in real estate, family/divorce, criminal, will, trusts & estates, and personal injury law. He has represented hundreds of people in the courts of New York in all types of civil and criminal proceedings. In addition to his practice, Dorian is also an Adjunct Professor at Touro College Jacob D. Fuchsberg Law Center, his alma mater.

Leadership and Community Service

Dorian R. Glover has been an active member of the NCBA for over 25 years. In addition to being elected to the Executive Committee, Dorian has served on a number of member committees, including the Judiciary Committee and the Membership Committee. Recognized for his leadership, Dorian was later awarded Director of the Year in 2012 and 2013.

While he is not practicing law or lecturing future attorneys, Dorian devotes his time assisting our local community. He has served as a mentor at the Jackson Main Elementary School, Malverne High School, and currently is a mentor and coordinator at Barack Obama Elementary School in Hempstead. He has also served as the legal adviser for Valley Stream and Roosevelt High Schools, and as a judge in the New York State Mock Trial Competition.

Honors and Awards

In 2015 and 2016, Dorian was appointed by the Nassau County Bar Association as a Delegate to the New York State Bar Association. In addition to his achievements at the NCBA, Dorian has received awards from the likes of U.S. Senators Charles Schumer and Kirsten Gillabrand, Governor Andrew Cuomo, NYC Mayors Michael Bloomberg and David Dinkins, and Nassau County Executive Laura Curran. He has also received the American Flag flown during Operation Enduring Freedom in Kandahar, Afghanistan, and has been recognized for his contributions to the city of New Orleans during Hurricane Katrina.

In 2019, Village of Hempstead's Mayor Wayne Hall and Village Trustees renamed William Street, the street in front of the elementary school Dorian attended, "Dorian R. Glover Way."

In addition to his impressive roster of accomplishments, Dorian's achievements as a Prince Hall Mason include Past Master of Doric Lodge No. 53 in Hempstead; Past High Priest of Royal Eagle Chapter No. 27; Past Eminent Commander of Gethsemane No. 3; Past Thrice Potent Master and Past Most Wise and Perfect Master of L.I. Consistory No. 61. He is a Past Illustrious Potentate of Abu Bekr Temple No. 91. He has also served in the highest appointed office of District Deputy Grand Master, Fourth Masonic District. In 2018, Dorian was elected President of the Conference of Grand Masters, ranking him as one of the most influential officers among the leadership across the country and was re-elected in 2019.

Personal Life

On Valentine's Day of 2020, Dorian wedded the Hon. Linda K. Mejias at the Heritage Club in Bethpage. They enjoyed a beautiful ceremony together surrounded by family and friends.

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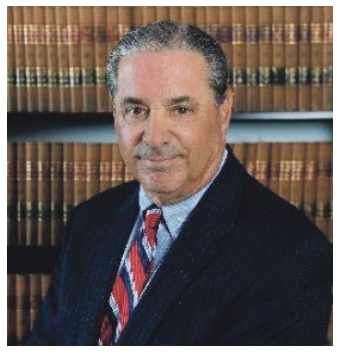

David H. Besso, past Chairman of the Grievance Committee, has been representing attorneys for more than twenty years.

Michelle Aulivola has represented attorneys in grievance and disciplinary proceedings for more than a decade.

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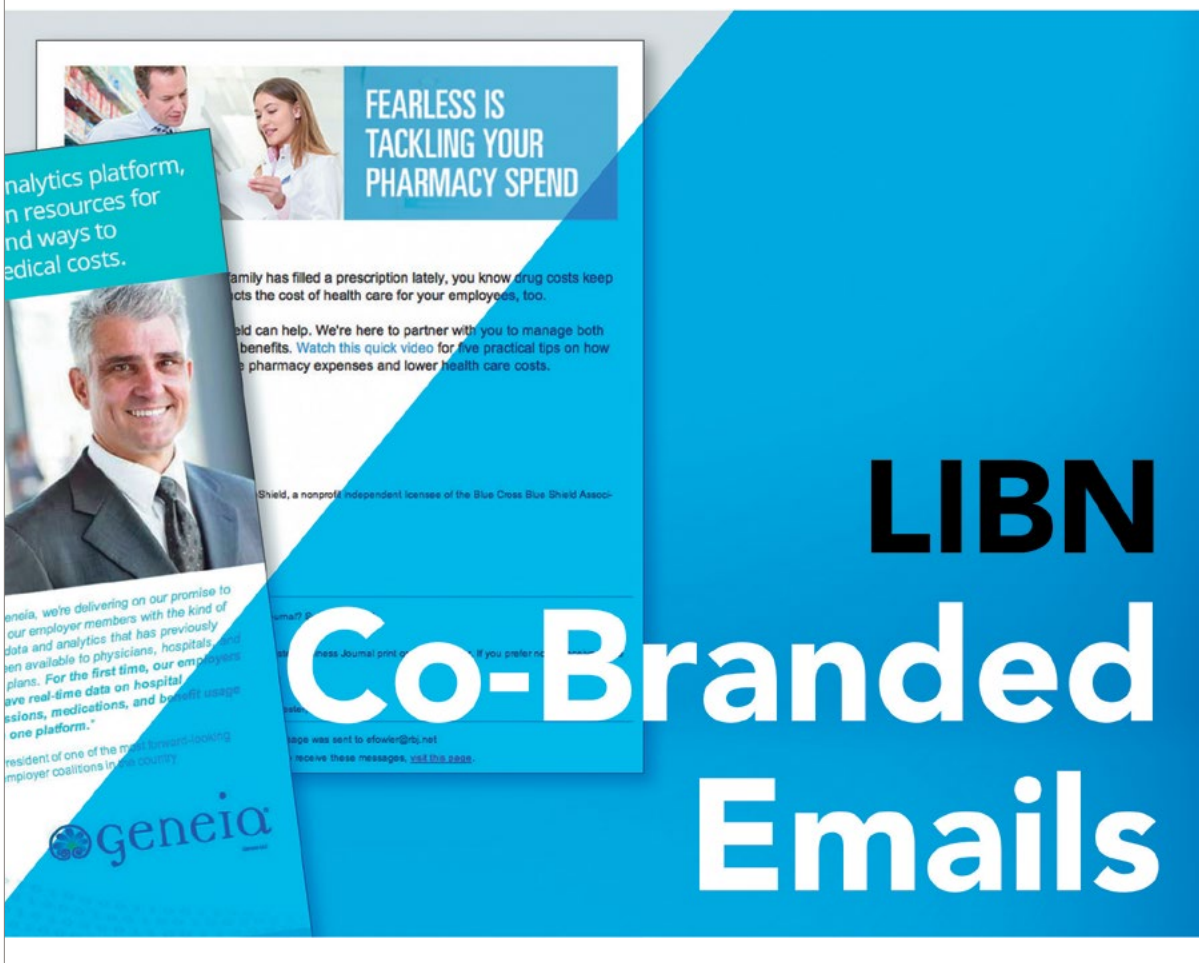

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Education/Constitutional Law

Stay-at-Home Orders: Violation of Our Constitutional Rights?

Cynthia A. Augello

The Constitution protects the right to associate, assemble, worship, and travel. Does that mean there are limits on what sort of restrictions the government can place on people's freedom of movement? The answer is complicated and it is different for state and local governments than it is for the federal government.

Some of Americans' civil liberties—like the freedom to assemble in public, the right to travel, the ability to purchase a gun at a gun store or visit a reproductive health clinic, the freedom to exercise religion by going to church, and more—are typically exercised in person. Currently, due to coronavirus, states are enforcing stay-at-home orders to prevent the spread of the virus. As a result, there have been several lawsuits to date concerning these rights.

The Right to Assembly

The First Amendment guarantees "the right of the people peaceably to assemble."[1] The strict prohibition on any law abridging this right applies to state and local governments as well as Congress. Under the Incorporation Doctrine (which applies the Bill of Rights to states through case law via the 14th Amendment), the Supreme Court has fully incorporated the First Amendment guarantees to place these strictures on the states.

The Supreme Court has had little to say about state power to override people's liberties during epidemics. The most helpful case is from back in 1905 during the smallpox epidemic, *Jacobson v. Massachusetts*.[2]

In that case, a pastor argued that a mandatory smallpox vaccination violated his constitutional rights. Although the Court sided with Massachusetts, it framed its decision carefully. Specifically, the Court acknowledged that "the liberty secured by the Fourteenth Amendment…consists, in part, in the right of a person 'to live and work where he will.'"[3] But it added: "in every well-ordered society…the rights of the individual in respect of his liberty may at times, under the pressure of great dangers, be subjected to such restraint, to be enforced by reasonable regulations, as the safety of the general public may demand."[4]

The power of the governments is not absolute. The Court in *Jacobson* warned that some restrictions may be so "arbitrary and oppressive in particular cases as to justify the interference of the courts to prevent wrong and oppression."[5] The Court added "if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."[6]

If determining what restrictions may cross the line, the Court would most likely apply the "strict scrutiny" test, which requires that a law be "narrowly tailored to further a compelling government interest."[7] Here, the Court would ask whether the restrictions placed during COVID-19 (e.g., closing churches) was the least restrictive measure to contain the spread of the virus. The government can override even such basic rights as freedom of speech, assembly, and religion if it meets the demands of strict scrutiny. Preventing the spread of a pandemic is obviously a compelling government interest. Therefore, challenges to any restrictions would turn on whether they are narrowly tailored to do that.

In *Jacobson*, the pastor who did not want the vaccination argued that there was a difference of opinion about the effectiveness and risks of vaccinations. The Supreme Court responded: "[t]he fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone. The possibility that the belief may be wrong, and that science may yet show it to be wrong, is not conclusive, for the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases."[8]

In 1900, in *Wai v. Williamson*,[9] the City of San Francisco required persons of Chinese ancestry to undergo inoculation against the bubonic plague by a potentially dangerous serum known as 'Haffkine Prophylactic' and prohibited uninoculated Chinese residents from traveling outside the city. The Circuit Court stopped the city from enforcing the order, holding the city failed to produce evidence that the Chinese were more likely to carry or spread the plague than anyone else.

The legal authority for isolation and quarantine, as a general rule, for the CDC is coming under Section 361 of the Public Health Service Act (the "Act").[10] The Act is designed to prevent communicable diseases entering the US from foreign countries, and into the US and between states within the US. Also, the states generally have police powers, and police powers encompass regulations concerning public health. A question remains as to whether the statutory authority for quarantine could apply to an entire state under the Act. This will remain to be determined.

As of the date of the writing of this article, there are a great number of published decisions concerning challenges to the bans on gatherings in states all over the country. For example, in *Maryville Baptiste Church v. Beshear*,[11] the court held that the church, in seeking a TRO, was not likely to succeed on the merits of its claim that executive orders issued by governor in response to the COVID-19 crisis that prohibited mass gatherings violated the First Amendment and Kentucky Religious Freedom Restoration Act.

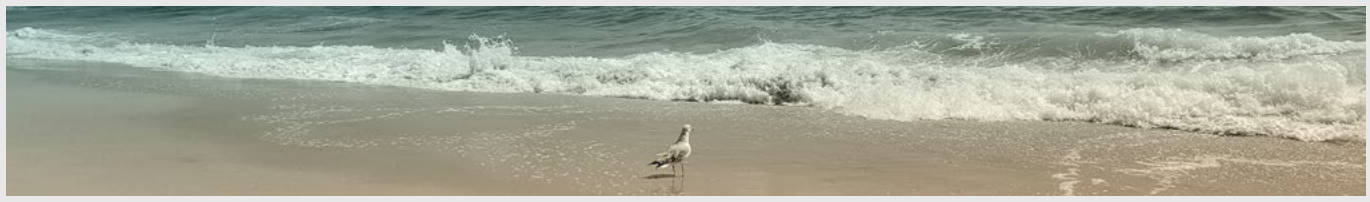
Thus, the church was not entitled to temporary restraining order prohibiting enforcement of the orders, even though the orders permitted some businesses to continue operating, where the court found that: (1) the church failed to identify any speech that had been or would be restricted by the orders; (2) the prohibition was not limited to faith-based gatherings; (3) the state had compelling interest in the restrictions; (4) the governor would likely be able to demonstrate that restricting large in-person gatherings was the least restrictive means of accomplishing the state's objective; and (5) a TRO would substantially harm third parties by facilitating spread of COVID-19.

As mentioned, the various courts will be applying a strict scrutiny analysis to challenges brought concerning the various state actions taken to stop the spread of the virus. It cannot be argued that there is not a compelling governmental interest in wanting to stop the spread of the virus. Second, are the bans on gatherings and stay-home orders the least restrictive means of achieving the goal? Although it sounds draconian to restrict people from gathering together and exercising their rights of assembly, we know that the virus is transmitted by contact and by droplets in the air. This means that physical proximity is a way in which the virus is transmitted. Furthermore, the virus has shown to be extraordinarily contagious, meaning that in order to stop the spread, people should avoid each other. While the measures taken by the states are the current least restrictive means of achieving the governmental goals of stopping the spread of the virus, the states will need to constantly monitor the statistics to determine whether the restrictions currently in place continue to be the least restrictive.

Free Exercise Claims

In addition to the First Amendment claims asserting that the prohibition of gatherings denies people the right to peaceably gather, there are also a large quantity of free exercise claims. Most of these cases will be governed by the 1990 decision *Employment Division v. Smith*,[12] which lowered the level of constitutional protection for free exercise claims.

See STAY-AT-HOME, Page 18



President's Column

FROM THE PRESIDENT

Dorian R. Glover

Since 1899, this Association has faithfully served the lawyers and community of Nassau County, becoming the largest suburban bar association in the country. It all began when nineteen attorneys met at Allen's Hotel in Mineola and named themselves the charter members of the Nassau County Bar Association. Surely, they could not have imagined the impact this Association would have and how it would preserve.

Throughout the years, our Association has grown, changed and developed to keep pace with the changes in our county, state, nation and world, as well as the needs of the bench, bar, and community-at-large.

And now in 2020, amid the pandemic, we stand resolute in our commitment to serve the members and residents of Nassau County. We will continue to confront the challenges facing our communities head on to vigorously defend the rights of others, while continuing to develop lawyers into leaders and provide a place for growth and opportunity to all those who call Domus home. A new era is upon us, and a new way of working and engaging is in front of us.

Irrespective of the current crisis, our mission remains unchanged: to deliver competent legal services to all without regard to their ability to pay; to protect and improve our system of justice; to maintain and increase our levels of professionalism through continuing legal education programs; and to inspire all citizens to have an appreciation and respect for the law while providing benefits and opportunities to enhance professional, personal, and economic growth.

As the 118th President of this Association, my focus and goals for this year consists of three components:

Membership – Focus on attracting diverse attorneys, public sector attorneys, and law students

Retention – Enhanced and multifaceted retention program

Communication – Explore and implement alternative mechanisms for communicating and app development

I honor our existing programs and will ensure their continued success.

Membership

It is our goal to continue to grow our membership outside of traditional channels to keep pace with the changing demographics of the bench and bar. It is imperative that we attract members who think differently, look differently, and come to our doors through a non-traditional legal journey. To this end, we will continue to work both in the public and private sectors, as well as among law students who are looking for leadership, mentorship, and networking opportunities. We must develop our relationships with students and newly admitted attorneys because they are the future of the Bar.

Retention

Our model around professional development provides lawyers continuous learning and engagement. Domus provides a space for activities that build networks, relationships, and opportunities for business development. We must continue to add to the menu of offerings that the Association provides, which keeps pace with the changes in how we practice law, communicate and network. Demonstrating the value of membership in our Association has to be a priority; members must see us as valuable, so that they will then give back to Domus what is truly priceless…their time, talents, and energy.

Communication

The way we communicate is at the very essence of what we do. We have accelerated our ability to stay connected and engage while staying at a distance. We have put down the briefcase and picked up the laptop. Meeting virtually and being on the various online communications platforms have become part of a lawyers' toolkit. As the times are changing, the Association has proven we too can change with the times. Our goal is to continue to develop vehicles of communications that speak to the needs of our members. Whether it be on mobile or digital platforms, we must continue to find ways to be of service to the ones who serve.

I humbly serve as your president and look forward to leading this august body. My predecessors laid the foundation, and I had the opportunity to see them grow our organization to what is before you today. Our legacy is what history says about the work that we have accomplished and the impressions we have left on those around us.

With your support and assistance, this will be an exciting and successful year. Our goals of membership, retention, and communication requires all of us to lean in and contribute as liberally as others' necessities require.

As my term as President of the Nassau County Bar Association commences, I am reminded that the journey would not be as significant if I did not travel with those who genuinely believed in me and supported my endeavors.

I thank God first, from whom all blessings flow. To my wife, the Honorable Linda K. Mejias, my mother Lolita R. Glover, and the family, friends and brothers who have traveled with me and supported my ascension to President, you have sacrificed much, and it has not gone unnoticed or unappreciated.

To our membership…the true spirit of Domus continues to serve us as a beacon of light because the law is more than just a profession and Domus is more than just a building.

The spirit of Domus rings true because it belongs to all of us. In this oasis of space, this spectrum of time, this cornerstone of our community, we have not just the challenges before us, but more importantly the opportunity and the responsibility to lead Domus to even greater heights in the years ahead. It is my goal to be the attendant of the building, to welcome you in from the cold, to welcome you back if you have been away, and to welcome you back home to Domus.

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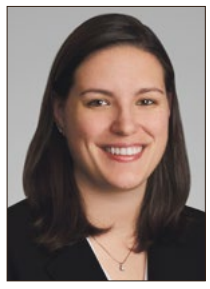
Education/Constitutional Law

How Higher Education Institutions Can Survive the Pandemic

James G. Ryan



Jennifer E. Seeba

The coronavirus pandemic has drastically changed the face of higher education in a matter of weeks and institutions must be prepared for the likelihood of another such outbreak in the future. The United States has reported over one million confirmed COVID-19 cases;[1] New York accounts for over three hundred thousand of these confirmed cases.[2]

In New York, and across the country, colleges and universities have had to adapt to this new reality. In the United States, over 4,000 higher education institutions have been impacted by COVID-19, which equates to over 25,700,000 students.[3] Theses impacts are not minor. Many colleges and universities have cancelled in-person classes and switched to remote learning.[4] Commencement ceremonies have been cancelled.[5] The number of students permitted on campus has been limited;[6] many institutions are applying strict standards regarding which students are permitted to remain and require students who wish to remain on campus to petition to do so.[7]

The adjustments made by colleges and universities, however, do not end with the current semester. While some institutions have already announced plans to reopen in the fall,[8] other colleges and universities are still grappling with how to conduct classes during the Fall 2020 semester.[9] Possible options include: beginning the semester remotely and transitioning to in-person classes, staying fully remote, having only certain groups of students (i.e., freshmen) attend classes on campus while the remainder of the institution remains remote, or if circumstances allow, completely returning to the in-person model.[10]

Even if all social distancing mandates can be lifted by the time the Fall 2020 semester begins, colleges and universities should now begin considering the legal ramifications and issues exposed by this pandemic in order to streamline whatever decision is made and ensure preparedness for another mass closure scenario in the future. This article explores some of the many legal issues that institutions should be considering as they adjust to this new normal.

Examine Contracts and Consider Renegotiating

Higher education institutions are parties to myriad contracts, including, for example, contracts regarding food service, books, and technology.[11] Particularly relevant to higher education institutions now is whether these contracts contain a force majeure clause and what specific language is contained within it. "Generally, a force majeure event is an event beyond the control of the parties that prevents performance under a contract and may excuse nonperformance."[12] However, "[i]nterpretation of *force majeure* clauses is to be narrowly construed and 'only if the force majeure clause specifically includes the event that actually prevents a party's performance will that party be excused.'"[13]

In light of Covid-19 and subsequent campus closures, it is possible that the services or goods that the institution has contracted for will no longer be needed in the Fall 2020 semester; alternatively, campus closure could prevent the institution from being able to satisfy its obligations under the contract. Institutions should examine the language in their contracts to determine if and how the contract can be modified or terminated without giving rise to a breach of contract claim against the institution.

Notably, "financial hardship is not grounds for avoiding performance under a contract."[14] Thus, while higher education institutions may be struggling financially,[15] they cannot use this as a reason to unilaterally terminate the contract. Likewise, regarding a force majeure clause, if no reference to a pandemic or similar scenario is made in the contract language, institutions may not be able to rely on this clause to terminate current contracts. Moving forward, however, institutions may wish to include language in new contracts that would encompass this kind of scenario.

Institutions should also review the contracts that they have with their employees, specifically faculty. Many teachers this semester needed to quickly switch to teaching via online learning methods as opposed to in-person instruction.[16] If institutions are considering maintaining this method during the Fall 2020 semester, they should confirm that requiring online teaching does not violate the terms of any faculty contracts. While some unions may have temporarily renegotiated in the midst of the COVID-19 pandemic regarding subjects such as online teaching requirements and pay,[17] institutions should strive for permanent terms regarding this type of situation during any future renegotiation of collective bargaining agreements.

Anticipate Litigation Regarding Closures

In the wake of campus closures, class-action lawsuits have been brought against colleges and universities regarding refunds of tuition and fees.[18] While it is beyond the scope of this article to address the full panoply of claims that institutions could face, colleges and universities should be prepared for the possibility of litigation initiated by students demanding the refund of tuition, room and board, and/or any other fees relating to the Spring 2020 semester.

There are numerous defenses to these types of cases, especially those brought as class actions, and institutions should take care to explore the various litigation strategies that are available to them. Looking forward to the Fall 2020 semester, institutions should consider whether any fees or tuition payments should be preemptively adjusted based on the anticipated format for classes or students' limited access to the campus and its resources. If the decision is made to leave everything as it is, the institution should be prepared to explain the decision, update its contracts and policies accordingly, and point to any other authority that supports it, such as an Executive Order or other legal mandate.

Adapt Title IX Investigations

Title IX of the Education Amendments of 1972 ("Title IX") states that, with certain named exceptions, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[19] Colleges and universities are legally required to "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints" related to Title IX.[20] In light of campus closures due to COVID-19, institutions have had to adjust the way that investigations are conducted.[21] Some institutions are choosing to postpone hearings in light of social distancing orders while others have decided to continue with the investigation process remotely.[22] Under current[23] Title IX requirements, there is no specific time limit within which investigations must be completed.[24] Nevertheless, the Department of Education's Office for Civil Rights issued a warning on May 12, 2020 that "institutions should not delay investigations or hearings solely on the basis that in-person interviews or hearings are cumbersome or not feasible, so long as the institution is able to comply with the requirements in 34 CFR 106.8 to resolve complaints promptly and equitably."[25] There are, however, concerns that conducting the process and hearing remotely—such as through video chat or over the phone—could negatively impact both the accuser and the accused.[26]

While schools may have quickly adjusted their policies and procedures in order to conduct investigations during the Spring 2020 semester, they should begin thinking about a more permanent, codified policy regarding remote investigations if one was not already in place. In order to allay fears that parties will be able to circumvent certain investigation policies if the investigation is conducted remotely,[27] institutions should include policies that address this possibility.

Having a clear and written policy regarding remote investigations not only ensures the required "equitable" process for the parties,[28] but ultimately it helps to protect the institution as well. If a party were to appeal the results of a disciplinary hearing via an Article 78 hearing, part of the standard that the Court uses to evaluate the institution's decision is whether "the determination…was rendered in accordance with the university's published regulations."[29] If the only policy in place refers to an in-person procedure and there is no formal policy regarding remote investigations, the institution may have a difficult time showing it followed its published regulations. Additionally, having a clear policy in place regarding remote procedures will benefit the institution in the long run, as the policy will already be in place should another campus closure be required.

Be Prepared for Issues Regarding Reopening

Though some institutions have already announced that they intend to reopen their

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2020 Installation of NCBA and NAL Officers and Directors

Tuesday, June 2, 2020
at 5:00 PM via Zoom.

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NCBA Updates Regarding COVID-19 Can Be Found:

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At this difficult time, the Nassau County Bar Association wants you to know we will do what we can to help our members with their legal and business responsibilities.

All NCBA, Court, and Nassau County updates regarding COVID-19 can be found on our website at www.nassaubar.org and our Facebook page. We are here if you need us.

Education/Constitutional Law

Second Amendment Rights of the Successfully Treated/ Former "Mentally Ill"


David Z. Carl

There are many situations where someone could be determined to have a "mental condition" prohibiting ownership of a firearm. Such situations are often where a person has a lifelong psychotic disorder and is involuntarily committed long-term to a mental health facility.

Suppose, however, a teenage girl is suffering from an eating disorder. Her parents take her to a hospital where two doctors determine that she needs mental health treatment (against her objection) and she stays in the hospital for a few weeks to get better.

Or perhaps, 20 years ago, a person was struggling with gender identity issues (which was previously categorized by the American Psychiatric Association as a mental disorder[1]) and was then involuntarily admitted to a hospital's psychiatric unit because he/she identified as the "wrong" gender.

What about a person who had experienced psychosis and hospitalization years earlier but has taken a fully effective medication for several years and has never had a single recurring symptom? That person now is a highly functioning professional and his mental health symptoms have been resolved by the medication.

In some states, the people in each of the above scenarios might now find themselves prohibited from buying a firearm. Anyone who has been "committed to a mental institution"[2] or has "been adjudicated a mental defective"[3] is prohibited, under Federal law, from possessing a firearm.[4] Nonetheless, they each might want a functional firearm for self-defense in their homes.

State and Federal Restrictions on a "Fundamental Right"

In 2008, in *D.C. v. Heller,* the Supreme Court declared that the right to have a functional handgun in the home is a fundamental right under the Second Amendment.[5] In 2010, the Court held in *McDonald v. Chicago* that this "fundamental right" is incorporated against the states by the Fourteenth Amendment's Due Process Clause.[6]

Although it declined to "undertake an exhaustive historical analysis…of the full scope of the Second Amendment," the *Heller* court declared "longstanding prohibitions on the possession of firearms by…the mentally ill" were "presumptively" constitutional.[7]

Since then, some federal Circuit and District Courts have explored the issue and decided that "presumptive" constitutionality might not mean "actual" constitutionality. These courts have based their reasoning on a combined interpretation of Second and Fifth Amendment rights.

Pursuant to 18 USC § 922 (g) (4) "It shall be unlawful for any person…who has been adjudicated as a mental defective or who has been committed to a mental institution… to [possess a firearm]."[8] The Code of Federal Regulations defines certain terms as follows:

> Committed to a mental institution: A formal commitment of a person to a mental institution by a court, board, commission, or other lawful authority. The term includes a commitment to a mental institution involuntarily...[9]
>
> ….
>
> Mental institution: Includes mental health facilities, mental hospitals, sanitariums, psychiatric facilities, and other facilities that provide diagnoses by licensed professionals of mental retardation or mental illness, including a psychiatric ward in a general hospital.[10]

Despite the regulatory authority above providing that "committed to a mental institution" means a "a formal commitment …by a court, board, commission, or other lawful authority," the Second Circuit in *U.S. v. Waters*[11] upheld the conviction of a New York man who had been admitted to a mental health unit solely upon the evaluation of two physicians. Mr. Waters was subsequently convicted of being a prohibited person in possession of firearms. The *Waters* case, however, was decided fourteen years before the Supreme Court held the possession of a firearm is a fundamental right. Accordingly, the court never considered whether the absence of, or minimal elements of, due process available at that time, was enough to allow for the deprivation of a newly secured fundamental constitutional right.

Under the New York state statutes still in effect today (e.g., MHL § 9.27,[12]) [the statute at issue in *Waters*[13]] and MHL § 9.37an otherwise astute individual could theoretically seek representation and some type of hearing, but only after the individual had already been admitted without such a hearing or counsel for as many as 60 days at the behest of two (or fewer) physicians. No automatic hearing or assignment of counsel is required prior to involuntary admission to a mental health facility. If, perhaps, believing he/she will soon be discharged, the individual never requests counsel or a hearing, the only available due process is effectively waived. The person is nonetheless deemed to have been "committed," which would require firearms deprivation. This seems to conflict with other cases, discussed infra, that require before-the-fact due process for deprivation of a constitutional right.

Decades earlier, in *United States v. Hansel*,[14] the Eighth Circuit Court of Appeals observed that Nebraska law provided a two-step procedure for determining when a patient was mentally ill and in need of hospitalization. If the County Mental Health Board made such determination, the individual could be hospitalized for up to 60 days; much like the time frame in New York. There was a second step available for keeping the patient beyond 60 days, but since Hansel was released after two weeks, this second provision was never invoked. The Court found that Hansel's temporary confinement did not constitute a commitment.[15]

Despite the equivalent length of 60-day hospitalizations in New York and Nebraska, the holding in *Hansel* is contradictory to the holding in *Waters* in that in New York, the initial 60 days of hospitalization, without due process, is sufficient to refuse an individual his Second Amendment rights. In Nebraska, only the holding of an individual after the 60 days is sufficient to refuse said rights.

Current Decisions

Now that the ability to possess a functional firearm is an individual right,[16] a once largely mundane area of law has surfaced as a hot topic. In *United States v. Rehlander*,[17] the State of Maine offered two categories of hospitalization. One offered due process, the other did not. The First Circuit Court of Appeals held that since possessing a firearm is a fundamen-

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Education/Constitutional Law

From Class to Class Action Lawsuits: Considerations for Colleges and Universities Facing Coronavirus-Related Student Refund Actions

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The coronavirus pandemic has radically transformed the nature of higher education and posed unprecedented challenges for colleges and universities across the country. Students who used to spend their days on campus are now required to stay home and practice social distancing. Higher education institutions inevitably had to advocate, and sometimes require, that students vacate on-campus housing in order to safeguard their communities and avoid the spread of the virus. Most, if not all, institutions have been diligently working to maintain the substance of the educational experience by rapidly transitioning classroom courses to remote instruction using online platforms.

With this mandated shift to a virtual college experience, several institutions now face class action lawsuits by students claiming that they are entitled to reimbursement of costs and fees as a result of campus closures. As institutions continue to address the daily issues that arise as a result of the global pandemic, a new challenge has emerged: they must defend against these lawsuits while minimizing the potential impact to institutional budgets and reputational harm. As the pandemic continues, more class actions are likely, and institutions are taking proactive steps to mitigate their potential exposure.

A Nationwide Outbreak of Litigation

As of May 4, 2020, over 50 refund class action lawsuits had been filed against colleges and universities across the country since late March when the first action was filed against the Arizona Board of Regents.[1] This number continues to grow each day, with a number of institutions facing more than one class action.[2] One firm, which represents students in many of the lawsuits, created a website advertising the class actions and encouraging students to join.[3]

A few law firms have filed the vast majority of the lawsuits alleging comparable claims.[4] For example, the aforementioned firm[5] represents students in the lawsuits filed against, among others, the University of Colorado-Boulder, the University of California, the Board of Trustees of Boston University, the cases against the North Carolina Universities, and one of the two lawsuits filed against both Drexel University and University of Miami, as well as at least five New York institutions.[6] Another firm[7] is representing students in the lawsuits against the Pennsylvania State University, one of the two lawsuits against each Drexel University, University of Miami, and the Arizona Board of Regents, as well as at least seven of the New York institutions.[8]

Finally, the two firms[9] that filed the first action on March 27, 2020, against the Arizona Board of Regents, have subsequently filed various suits on behalf of students including those against Liberty University, Grand Canyon University, the Board of Trustees of the California State University, and the Regents of the University of California.[10] A distinguishing factor between the lawsuits this team has filed and those filed by the other firms in this space is that this team's complaints are not seeking reimbursement of tuition.[11]

Claims in Contract and Tort

The students' claims include breach of contract and unjust enrichment, with some also alleging conversion. The students claim, among other things, that they contracted for services, facilities, and opportunities, such as in-person academic instruction, and that as a result of institutional closures, they no longer received the full benefit of those contracts.[12] Consequently, the students claim they are entitled to refunds of various fees and costs, including those for tuition, housing, meals, and other miscellaneous fees, such as those for student services, campus activities, recreation, health and wellness, libraries, counseling, technology, athletics, financial aid, transportation, parking, and other fees.[13]

For example, in nearly identical class action complaints filed against the University of Miami and Drexel University, students allege they are entitled to refunds because "[t]hrough the admission agreement and payment of tuition and fees, [the students] entered into a binding contract with [their institutions]."[14] Since social-distancing measures were implemented, students claim to have been deprived of the "on-campus experience" and "the benefits of on-campus learning."[15] They allege that the benefits of being on-campus and in-person academic instruction allegedly include, but are not limited to:

- face to face interaction with professors, mentors, and peers;
- access to facilities, such as computer labs, study rooms, libraries, and laboratories;
- student governance and student unions;
- extra-curricular activities, groups, intramurals;
- student art, culture and other activities;
- social development and independence;
- hands-on learning and experimentation; and
- networking and mentorship opportunities.[16]

Similarly, in other complaints filed against the University of Miami and Drexel University, students allege they "have been deprived of the opportunity for collaborative learning and in-person dialogue, feedback, and critique."[17] Some complaints include screenshots from marketing materials of statements that colleges and universities have made to recruit students to portray the importance institutions allegedly place on the on-campus experience.[18]

The students also claim unjust enrichment on the grounds that, through the payment of tuition and fees, they allegedly conferred a benefit to their respective institutions, which the institutions have retained without providing the services such benefit was premised upon.[19] In some cases, students also allege that their respective institutions have wrongfully converted fees that should be returned to students.[20]

In a few cases, such as the first action filed, students are not seeking reimbursement of tuition.[21] The complaint filed against the Arizona Board of Regents expressly recognizes that the "decision to transition to online classes and to request or encourage students to leave campus were responsible decisions to make."[22] The students seek refunds of room, board, and other fees for the unused portion of the Spring 2020 semester after the University of Arizona, Arizona State University, and Northern Arizona University closed their campuses.[23] In addition to the breach of contract, unjust enrichment, and conversion claims, the students contend that, while the Arizona Board of Regents offered housing and rent credits toward the next academic year, these credits are insufficient and not commensurate with their financial losses.[24]

Strategies for Colleges and Universities

Numerous institutions have provided or will provide pro-rated refunds to students for unused housing or meal plans as a result of directing students to leave campus and closing the dorms.[25] However, colleges and universities have generally indicated that tuition will not be returned or reduced because students are still receiving instruction and curriculum in exchange for their tuition dollars. Although the method of delivery has shifted online, institutions are continuing to meet accreditation requirements and students are receiving the same opportunity to earn academic credit to satisfy their degree requirements.[26]

Additionally, students continue to have access to institutional academic offerings and support, as online video platforms permit professor-student interaction and a virtual classroom environment. Broad classroom discussions can be achieved via message boards and many institutions are proactively working with students to host virtual mentoring and networking events to ensure students can still obtain benefits they were receiving when physically present on campus.

For higher education institutions, the costs of delivering academic instruction and services have not necessarily changed despite shifting to online instruction as a result of the pandemic. In fact, in some cases costs have increased due to the associated expense of ramping up the required technology. Moreover, the underlying assumption of "unjust enrichment claims"—that institutions are saving money by being off campus—may be erroneous; some costs may have, in fact, increased, such as the costs associated with transitioning to and providing large-scale delivery of online courses and academic instruction (e.g., technology licenses and large-scale remote networks). Further, many institutions were mandated to close campuses by governmental order and/or to protect the safety of their communities to slow the spread of the virus. Therefore, while the loss of the on-campus experience is certainly a different experience, many institutions believe that they should not bear the burden of reimbursement, especially if they are meeting their obligations by continuing to provide academic instruction and services to students.

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Education/Constitutional Law

"Stigma-Plus" and the Name-Clearing Process for Probationary School Employees

Not every wrong committed at the hands of the government is cognizable as a constitutional violation.[1] When a school district terminates a probationary employee, the constitutional question is whether the district's action amounts to a deprivation of a property or liberty interest without due process of law, triggering a right to sue for damages.

Procedural Due Process Claims for Probationary School Employees

Procedural due process under the Fourteenth Amendment requires a government seeking to deprive a person of life, liberty, or property to afford that person notice and opportunity for a hearing appropriate to the nature of the deprivation.[2] Procedural due process protection requires substantive rights in the first instance.[3] Therefore, to sustain a procedural due process claim, a terminated probationary school employee must show deprivation of a life, liberty, or property interest without notice and an opportunity to be heard.

In New York, probationary school employees lack a property interest in their employment.[4] Therefore, terminated probationary school employees rarely succeed on a procedural due process claim premised on a property deprivation.

Terminated probationary employees, however, may have procedural due process claims even without a property interest in their terminated employment if their termination deprived them of a *liberty* interest. Terminated government employees lose a liberty interest in possible future employment if their termination includes government defamation.[5] Specifically, when a district fires a probationary school employee and publicly charges the employee with acting dishonestly or immorally, procedural due process guarantees the employee an opportunity to defend his or her "good name, reputation, honor, or integrity."[6] This type of claim is commonly referred to as a "stigma-plus" claim.[7]

"Stigma-Plus" Requirements

In 1976, in *Paul v. Davis*, the United States Supreme Court held reputational harm alone is insufficient to trigger constitutional protections under procedural due process.[8] Therefore, a probationary school employee cannot invoke due process protections based on reputational harm alone.[9] Put another way, a free-standing defamatory statement made by a state official about an employee is not a constitutional deprivation by itself.[10] Instead, a probationary employee must suffer a loss of reputation coupled with the deprivation of a more tangible interest, such as government employment.[11] This "stigma-plus" action involves an injury to the probationary school employee's reputation (the "stigma") coupled with the deprivation of some tangible interest (the "plus"), without adequate process.[12]

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To establish a "stigma-plus" claim, a probationary school employee must satisfy three elements. First, the employee must demonstrate the government made stigmatizing statements calling into question the employee's good name, reputation, honor, or integrity.[13] The Second Circuit has held even governmental allegations of professional incompetence do not implicate a liberty interest in every instance.[14] Rather, such allegations will only trigger a liberty interest-based procedural due process claim (and a right to a name clearing hearing) when the statements, "Denigrate the employee's competence as a professional and impugn the employee's professional reputation in such a fashion as to effectively put a significant roadblock in that employee's continued ability to practice his or her profession."[15] To make out a procedural due process claim, the terminated probationary employee need only prove the stigmatizing statements were made, not that they were false.[16]

Second, a probationary school employee must prove the stigmatizing statements were made public.[17] This requirement is often satisfied where the stigmatizing charges are placed in the probationary school employee's personnel file and are likely to be disclosed to prospective employers.[18]

Finally, a probationary school employee must show the stigmatizing statements were made concurrently with, or in close temporal relationship to, the dismissal from governmental employment.[19] For example, the Second Circuit has held five months later for publication of defamatory statements is too long to sustain a "stigma-plus" claim.[20]

Even if a probationary school employee satisfies all three elements to a "stigma-plus" claim, the due process inquiry is not finished.

Consequences of Proving a "Stigma-Plus" Claim

Once a court finds a probationary school employee satisfied the requirements of a "stigma-plus" claim and determines the employee lost a liberty interest, the next question becomes, "What process is due?"[21]

In *Board of Regents of State Colleges v. Roth*, the United States Supreme Court stated that, when a government employee is dismissed for stigmatizing reasons that seriously imperil the opportunity to acquire future employment, the employee deserves "an opportunity to refute the charge."[22] A hearing must be held for the limited purpose of giving the employee an opportunity to clear his or her name.[23] A "name clearing hearing" reduces the risk an employee will be dismissed with false stigmatizing charges placed in the employee's personnel file.

Name Clearing Hearings Under Article 78

An adequate post- deprivation hearing gives the probationary school employee an opportunity to hear and answer first-hand any stigmatizing charges, thereby clearing his or her name of any false statements, and curing the reputational injury. A name clearing hearing must conform to the requirements of the due process clause.

In New York, the post-deprivation remedy for a government employee deserving of a name clearing hearing is a mandamus-type Article 78 proceeding.[24] In the proceeding, the court will determine whether the employee meets the "stigma-plus" elements, thus earning a name clearing hearing.[25] Where a name clearing hearing is appropriate, the court will order the respondent to conduct the hearing.[26] The Second Circuit has held this avenue of redress satisfies the due process requirement of a name clearing hearing.[27]

Article 78 proceedings have a four-month statute of limitations. A terminated probationary employee who fails to commence an Article 78 proceeding within its short four-month statute of limitations cannot thereafter claim the name clearing process was not available.[28]

Practical Effects of Hearing

Determining whether a discharged probationary school employee meets the "stigma-plus" test requires a case-by-case analysis. Sometimes, a district employer's comments will not be so stigmatizing that they kill a terminated employee's freedom to seek other employment. On the other hand, when a district employee makes stigmatizing allegations while dismissing a probationary school employee, the terminated employee's liberty to seek new employment is imperiled, triggering Fourteenth Amendment protections.

Since a "stigma-plus" claim is a "species within the phylum of procedural due process," it is not enough for a terminated employee to demonstrate a deprivation of a liberty interest; a successful "stigma-plus" claim requires the employee show the deprivation occurred without due process.[29] Therefore, a school district can defeat a "stigma-plus" claim when it affords a terminated probationary school employee a constitutionally adequate post-deprivation hearing.

A terminated probationary employee entitled to, but deprived of, a name clearing hearing can commence an Article 78 proceeding in the nature of mandamus to compel a name clearing hearing. If the court determines the employee is entitled to a name clearing hearing, it will direct the employer to hold one. At the hearing, the terminated employee will have the opportunity to clear his or her name. Notably, there is no requirement for the district to rehire the employee, even if the employee can prove the inaccuracy of the stigmatizing allegations.[30] The appropriate remedy following a name clearing hearing is only expungement of the charges, not reinstatement.[31] However, when the allegations are shown to be false, the removal from the employee's file restores the freedom to seek future employment and thus obviates due process concerns based on the "stigma-plus" framework.

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2. *Desir v. Board of Co-op. Educational Services*, 2008 WL 4508735 (E.D.N.Y. Sept. 30, 2008).
3. *Id.*
4. *Kahn v. New York City Dept. of Educ.*, 79 A.D.3d 521 (2d Dept. 2010), *aff'd*, 18 N.Y.3d 457 (2012); *Pinder v. City of New York*, 49 A.D.3d 280 (1st Dept. 2008).
5. *Patterson v. City of Utica*, 370 F.3d 322 (2d Cir. 2004).
6. *Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623, 630 (2d Cir. 1996).
7. *Id.*
8. *Paul v. Davis*, 424 U.S. 693 (1976).
9. *Segal*, 459 F.3d 207.
10. *Donato*, 96 F.3d 623.
11. *Segal*, 459 F.3d 207.
12. *DiBlasio v. Novello*, 344 F.3d 292 (2d Cir. 2003).
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14. *Donato*, 96 F.3d 623.
15. *Segal*, 459 F.3d 207 (quoting *Donato*, 96 F.3d at 630-31).
16. *Guerra v. Jones*, 421 Fed.Appx. 15 (2d Cir. 2011).
17. *Patterson*, 370 F.3d 322.
18. *Guerra*, 421 Fed.Appx. 15.
19. *Patterson*, 370 F.3d 322.
20. *See Martz v. Inc. Vill. Of Valley Stream*, 22 F.3d 26 (2d Cir. 1994).
21. *Donato*, 96 F.3d 623.
22. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 573 (1972); *see also Baden v. Koch*, 799 F.2d 825, 832 (2d Cir. 1986).
23. *Donato*, 96 F.3d 623.
24. *Rakiecki v. State University of New York*, 31 A.D.3d 1015 (3d Dept. 2006).
25. *Guerra*, 421 Fed.Appx. 15.
26. *Knox v. New York City Dep't of Educ.*, 85 A.D.3d 439 (1st Dept. 2011) (affirming trial court order directing a name clearing hearing); *In re Mccurry v. The New York State Office for People with Dev. Disabilities*, 2013 N.Y. Slip Op. 30727(U) (Sup. Ct., Albany Co. 2013); *Parise v. New York City Dept. of Educ.*, 2008 N.Y. Slip Op. 32835(U) (Sup. Ct., N.Y. Co. 2008) (granting a name clearing hearing but denying petitioner's request the court conduct the hearing).
27. *Anemone v. Metropolitan Transp. Authority*, 629 F.3d 97 (2d Cir. 2011); *see also McHerron v. Burnt Hills—Ballston Lake Central School District*, 778 Fed. Appx. 54 (2d Cir. 2019) (Article 78 proceeding provides the requisite post-deprivation process). Interestingly, the *McHerron* plaintiff filed a *certiorari* petition asking the Supreme Court to review the Second Circuit's holding that Article 78 suffices for a name clearing hearing. On April 6, 2020, the Supreme Court denied the cert. petition.
28. *See Hennigan v. Driscoll*, 2009 WL 3199220 (N.D.N.Y. Sept. 30, 2009).
29. *Segal*, 459 F.3d 207.
30. *Donato*, 96 F.3d 623.
31. *Swinton v. Safir*, 93 N.Y.2d 758 (1999).

Education/Constitutional Law

Defining a Hostile Education/ Learning Environment Today

At the start of the 2019-20 school year, United States District Court Judge Denis R. Hurley in *Moore v. St. Mary School* issued a decision vindicating the rights of students whether in public or private schools to be free from threats and more significantly recognized a right to be free from a hostile education environment.[1]

The *New York Law Journal* focused on the characterization by Judge Denis Hurley that this was a "Disturbing Racial Attack,"[2] and "[t]he pictures targeted the student's race and referenced the KKK, Nazis and suicide, according to copies included with the complaint."[3] When white students sent an African-American/black student pictures of, among other things, a gun to his head, school administrators should have acted but did not—as counsel for the family, we would not wait until this young man was shot dead or lynched.

From emojis to gun gestures, school administrators know that images can convey physical threats and the images in this case certainly conveyed threats of physical harm. In *Virginia v. Black*,[4] an appeal stemming from cross burning by Ku Klux Klan members, Justice Clarence Thomas stated in dissent, "cross burning subjects its targets…to extreme emotional distress, and is virtually never viewed merely as 'unwanted communication,' but rather, as a physical threat." Justice Thomas reminds us that every African-American knows upon seeing images of white-sheeted Ku Klux Klan members, Adolph Hitler and a noose, that their life is being threatened because they are black.

While schools have gone from in-person to online[5] for the duration of this school year, we live in an age where Klan members no longer need wood, matches, and gasoline to state their message of hate in front of someone's home. Now all they have to do is click "send." In the age of COVID-19, it seems that school-age children will primarily interact through online and internet means.

Already reports of "Zoom-Bombing" have resulted in warnings from the Federal Bureau of Investigation[6] and criminal prosecutions.[7] "Law enforcement agencies across the country are trying to adapt and respond to reports of uninvited guests on video conferencing platforms who make threats, interject racist, anti-gay or anti-Semitic messages, or show pornographic images."[8] In the absence of the physical classroom, we must start to evaluate these attacks with 2020 vision.

Cory H. Morris

In *Moore v. Diocese,*[9] the complaint claimed that tolerating and facilitating a racially hostile environment effectively prevented the infant Plaintiffs from obtaining the Roman Catholic elementary school education their parents contracted for from St. Mary School and the Diocese of Rockville Centre. The Plaintiffs in *Moore* were unable to obtain any kind of protection by Order to Show Cause, and the Plaintiff children had to leave school to avoid the threats.

"School-aged children mandated to participate in online courses must be afforded constitutional protections. "[N] either the Fourteenth Amendment nor the Bill of Rights is for adults alone. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."

Judge Hurley's ruling accepting the Hostile Educational Environment claim is extremely important in these unfortunate days of violent turmoil and school shootings. "The Second Circuit has indicated that discrimination claims under Title II are subject to the same analysis as discrimination claims under 42 U.S.C. § 1981."[10] "[T]he Second Circuit has made clear that there is no state action requirement to invoke the equal benefit clause of the section."[11]

The Plaintiffs in *Moore v. Diocese* alleged that both the Constitution of the United States and the New York State constitution protect persons against the harm caused by racial threats and intimidation. It should not and does not matter that the school was a private or a public school. The cyberassault images contained in Plaintiffs' Amended Complaint leave no doubt that their purpose was intimidation by racial threats.

"A child, merely on account of his minority, is not beyond the protection of the Constitution."[12] As society moves online and into the future, now more than ever, we must be cognizant that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."[13]

Where prosecutors and publicly elected officials act upon such threats[14] there are surely remedies but when, for whatever reason, prosecutors exercise discretion not to act, there is little recourse for private citizens aside from bringing such claims.

School-aged children mandated to participate in online courses must be afforded constitutional protections. "[N]either the Fourteenth Amendment nor the Bill of Rights is for adults alone."[15] "They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State."[16] Recently, an appeals court had no trouble finding that "[r]acial slurs, swastikas and other offensive language spray-painted on a Maryland high school campus are not shielded from hate-crime prosecution under the First Amendment."[17] Where property damage is involved, it seems that there was no difficulty upholding a criminal conviction.

We should ask whether due process still protects the bodily integrity of a child[18] if courses are exclusively online? Certainly, as schools require mandatory online education, we must evaluate what occurs when the bully moves from using a schoolbook to a Chromebook as the weapon of choice.[19] As we continue to work with 21st Century problems perhaps it is time we address some of the limitations[20] of the Civil Rights Act and start to recognize that the due process rights of a child include the freedom from fear and bodily integrity in not just one's body but in one's mind.

Basic minimum education is a fundamental right[21] that we must safeguard as the new normal appears to be online education in 2020.[22]

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17. Rodgers, *supra* note 14.
18. *Ingraham v. Wright*, 430 U.S. 651 (1977).
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Education/Constitutional Law

Conducting Open School Board Meetings In A Pandemic

Traditionally, public bodies have had to follow strict guidelines for their public meetings pursuant to Article 7 of the New York State Public Officers Law ("POL"), also known as the Open Meetings Law ("OML"). This statute imposes important obligations on public bodies, such as villages, towns, and school district boards, when conducting public meetings.

Anyone who has attended a meeting of their local school board, town, or village may have seen facets of the OML at work. The manner in which these meetings are conducted are well established. But the current COVID-19 pandemic has resulted in an Executive Order from Governor Andrew Cuomo generating substantive changes.[1] This article will provide an overview of these changes, with particular emphasis on school board meetings.

Under the OML, school boards are required to conduct business in an "open and public manner."[2] This is generally accomplished through meetings to discuss public business, or gatherings by a quorum of the public body at a designated time and place. To achieve this purpose, the statute requires that "[e]very meeting of a public body shall be open to the general public…."[3]

For a meeting to be valid, a majority of the total membership of that body, i.e., a quorum, must gather together, either in the presence of each other or through "the use of videoconferencing for attendance and participation by the members of the public body."[4] Only under certain circumstances may the school board transact business in a proceeding closed to the public known as an "executive session."[5]

On March 12, 2020, Governor Cuomo's Executive Order 202.1 suspended certain OML requirements pertinent to public participation and in-person attendance at meetings of public entities. Under subsequent Executive Order 202.14 and Executive Order 202.28, such requirements have been further extended through June 6, 2020 (and will likely be extended again, given that schools are closed for the remainder of the 2019-20 school year).

Laura A. Ferrugiari

As a result, school boards (and other public bodies) can hold meetings and take action as authorized by the law without "public in-person access to meetings and authorizing such meetings to be held remotely by conference call or similar service, provided that the public has the ability to view or listen to such proceeding and that such meetings are recorded and later transcribed."[6]

School boards now have two options for conducting public meetings without the public being physically present. The first option contemplates a public meeting where the school board is physically present in one location, and the public views or listens to the meeting through electronic means. This option allows a public meeting to take place where the school board is physically present in the same room conducting business (with social distancing), while the public listens or views the meeting electronically.

The second option contemplates a public meeting where the school board members meet via conference call or videoconference with no in-person location, and the public views or listens to the meeting electronically. This option provides for even more "socially distancing," relying exclusively on technology to shape the meeting and allowing public bodies to transact business during the pandemic. In both cases, however, the public body must record and later transcribe the meeting, and presumably make the record available under New York State's Freedom of Information Law.[7]

In sum, based on this suspension of the OML:

- Board members can participate by telephone conference or videoconference, and their attendance is counted for purposes of obtaining a quorum and for voting;
- While a board meeting must be publicly noticed, the meeting notice does not have to state each site from which an individual board member will be participating; instead, the notice has to include information on how the public can view or listen to the board meeting in real time; and,
- Board meetings conducted under Executive Order 202.1 must be recorded by the board, and later transcribed, with the transcription available through the Freedom of Information Law.

In addition, the New York State Committee on Open Government has indicated that, where the public is excluded for health and safety reasons, it should use technology, if possible, to broadcast the meeting, and/or it should limit the business conducted to things that would result in damage or harm if not acted upon by the school board.[8]

School boards can continue to meet in executive sessions to discuss items permitted to be discussed in executive sessions, such as collective bargaining (i.e., impact of a shut down on contractual employees), and the preparation or administration of exams (this could include issues related to school closures and administration of exams). Any discussions with an attorney regarding proposed litigation or any specific item in which the school board seeks the advice of counsel would also fall under the executive session parameters.

Pursuant to New York State Executive Order 202.1, the notice of a meeting should indicate that public attendance is not permitted on account of the suspension of the OML provision of the POL. The notice should indicate that the meeting will be teleconferenced or livestreamed and describe how the public can listen or view the meeting live. School boards may allow individuals to submit written comments to be read and/or allow public discussion at the meeting.

However, neither is required under the Executive Order. Generally, there is no legal requirement that school boards allow members of the public to speak at school board meetings, although it has been encouraged by the New York State Commissioner of Education.[9] Finally, the meeting notice should be posted prominently on the school district website and on school building doors, to the extent practicable.

As a result of the unprecedented changes brought about by the COVID-19 pandemic, public entities need to be aware of the options available so as to continue holding meetings and conducting business. Pubic bodies should familiarize themselves with the provisions of the OML, continue to monitor the Governor's Executive Orders, and consult with their attorneys to ensure that OML violations are avoided.

An additional source for guidance on this subject is the New York State Committee for Open Government, which issues and posts advisory opinions regarding the OML at www.dos.ny.gov/coog/.

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1. *See* Executive Order 202.1 (Mar. 12, 2020); *see also* Executive Order 202.28 (May 7, 2020); Executive Order 202.14 (Apr. 7, 2020).
2. POL § 100.
3. POL § 103(a).
4. POL § 102(1).
5. POL § 103(a).
6. Executive Order 202.1 (Mar. 12, 2020).
7. POL §§ 84–90.
8. Shoshanah Bewlay, *Memorandum: Open Meetings Law "In-Person" Requirement and Novel Coronavirus*, Committee on Open Government (Mar. 9, 2020), available at https://bit.ly/3cXz0vl.
9. *See, e.g., Appeal of Kushner*, 49 Ed. Dept. Rep. 263 (2010) (stating no statutory mandate requiring public participation at board meetings); *Appeal of Wittneben*, 31 Ed. Dept. Rep. 375 (1992) (noting public participation nonetheless encouraged at board meetings).

Education/Constitutional Law

The Shogun's Constitution

It is my earnest hope and indeed the hope of all mankind that from this solemn occasion a better world shall emerge out of the blood and carnage of the past—a world founded upon faith and understanding—a world dedicated to the dignity of man and the fulfillment of his most cherished wish—for freedom, tolerance and justice.

—General MacArthur,
Surrender Ceremony aboard the USS
Missouri, September 2, 1945

By any measure, General of the Army Douglas MacArthur performed his duties valiantly at the highest level of command in the course of three major wars. The annals of World War I, World War II, and the Korean Conflict would read far differently but for his half-century of active military service. But his finest contribution to his country and to civilization took place off the battlefield.

While everyone "liked" Ike, MacArthur was a polarizing commander. As Australian Field Marshall Thomas Blamey once noted, "[t]he best and the worst things you hear about him are both true."[1] And yet the one point of near unanimity concerns his role as the Supreme Commander for the Allied Powers during the Occupation of Japan.

MacArthur took to his responsibilities with every fiber of his being. As he later recalled, "I had to become an economist, a political scientist, an engineer, a manufacturing executive, a teacher, even a theologian of sorts."[2] The Occupation technically was under the auspices of the Allied Powers, including the British, the Chinese, and the Russians. But in all actuality, it was MacArthur's show.

MacArthur is the father of modern Japan. In a remarkable undertaking, the General recreated the Japanese state as a prosperous, peaceful, democratic nation firmly allied to the West. He literally converted the vanquished Nippon from a bitter foe into a valued friend. The cornerstone of his achievement was the post-war "MacArthur" Constitution.

Rudolph Carmenaty

We, the Japanese people, desire peace for all time and are deeply conscious of the high ideals controlling human relationship, and we have determined to preserve our security and existence, trusting in the justice and faith of the peace-loving peoples of the world. We desire to occupy an honored place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance, for all time from the earth.

—The Constitution of Japan

For seven centuries, Japan was led by Shoguns, feudal military lords who had complete dictatorial control.[3] With the Meiji Restoration of 1868, the Shogunate was eliminated in favor of a monarchy with sovereignty vested in the divinity of the Emperor. The Meiji Constitution of 1889 was written along Prussian lines.[4] The era of the Meiji Restoration formally ended with the surrender.

Into this void MacArthur stepped forward, confident and charismatic, wielding powers comparable to those of any Shogun. Answerable only to the President and the War Department (which were conveniently in a distant Washington, DC), from 1945 to 1951 he maintained near-total authority over the lives and the destiny of the Japanese islands.

The Japan MacArthur took charge of was a nation in ruins. The world vividly remembers the destruction of Hiroshima and Nagasaki, but the entire country in fact had been levelled to the ground by American Air Power. Having to accept a surrender seen as shameful, the country was not only devastated by war but, more importantly perhaps, it was demoralized by defeat.

Considering the atrocities perpetrated at Bataan to MacArthur's troops, one could have expected retaliation. But he was not vindictive. MacArthur instead was a benign, paternalistic proconsul whose administration would prove conciliatory and broad-minded. For the Japanese, he became a Christ-like figure devoted to resurrecting Japan from the ashes.[5]

In my efforts for a revision of the Meiji constitution, I emphasized the point that we felt a democratic regime was essential to the new Japan, and that we could only insure such a society by having a plainly written and clearly understood statement of rights.

—General MacArthur, Reminiscences

MacArthur had decades of experience in Asia. Rare among the upper echelons of American foreign and military policy, the General was particularly attuned to the sensitivities of the Japanese. This can be seen in his treatment of Hirohito. After all, it was MacArthur's insistence that enabled the Emperor to remain on the throne.

Prepared by the General's staff in secrecy, MacArthur's Constitution rejected the earlier propagated "Matsumoto Draft" which barely altered the Meiji Constitution.[6] A dissatisfied MacArthur ordered a total revision that was completed in ten days to avoid any input from the Soviets.[7] Presented as an amendment to the Meiji Constitution, which it was replacing, the new document would ultimately reshape the whole of civil society.

The document places sovereignty in the Japanese people. The Emperor is no longer divine but rather "the symbol of the State," with the throne retaining its dynastic features.[8] The "sole law-making organ of the State" is the Diet (or parliament) and executive power is vested in the Cabinet headed by the Prime Minister.[9] The document also provides for an independent judiciary and a Supreme Court with powers of judicial review.[10]

MacArthur was a conservative. In American politics, he sought the Republican party's presidential nomination in 1948 and 1952. But MacArthur's Constitution was anything but conservative. In present day Japan, it is objected to by Japanese nationalists and is championed by those on the left.[11]

MacArthur's Constitution has many progressive features. It guarantees the provision of welfare and public health, a right to equal public education, academic freedom, the right of labor to organize and bargain collectively, while prohibiting censorship, discrimination and torture. MacArthur also instituted widespread land reform that radically altered the country's socio-economic landscape.

See SHOGUN'S, Page 19

Knowledge is Power. **The Nassau Academy of law empowers our members with knowledge: knowledge of the law; knowledge of strategy and tactics in litigation, transactions, and dispute resolution; knowledge of the intricacies of the court systems, federal, state, and local; and knowledge of their fellows, in a spirit of collegiality and openness.**

The NAL has met the challenges of today, and will meet those yet to come. In the current climate, we have and shall continue to provide the "virtual Academy," with no loss in quality. As things return to normal––and they surely will––we shall revitalize our live CLEs, because there is no substitute for personal interaction. Indeed, it is paramount to the health of both the NAL and the NCBA that we get back to business with optimism and fortitude.

In all these things, the Academy will innovate, vigorously compete in the CLE marketplace by providing superior speakers and material, respond to the needs of its members, and, above all else, be dedicated to the goal of justice through continued legal education.

George S. Patton, III, America's greatest combat general, once proclaimed that "greatness hangs on an ability to lead and inspire." I respectfully close with the promise that the NAL shall do both in the upcoming academic year.

Anthony Michael Sabino
Nassau Academy of Law Dean, 2020-21

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The Academy staff, comprised of Jen and Patti, are manually processing hundreds of CLE forms each week. To streamline efforts, please send all forms to **academy@nassaubar.org** as opposed to an individual staffer. In addition, we ask that forms be sent in batches, instead of individually. Thank you for your patience and cooperation.

Until we can be six feet closer, be safe and be well.

General Law

Face Masks and Temperature Checks: Constitution vs. Coronavirus

With a COVID-19 vaccine at least months away, if not longer, New Yorkers are bracing for life under the continued threat of the novel coronavirus.[1] In mid-April 2020, President Trump outlined the federal government's views on how the post-lockdown country may look.[2] With the President's guidance on suggested protocols, including temperature checks and face coverings, Americans may reasonably be concerned about such new requirements infringing on individual liberties. This article explores constitutional concerns raised by government-mandated temperature checks and face-covering rules.

Americans Generally Accept Health and Safety Regulations

Philosophically speaking, American society has accepted broad government powers to combat threats to safety. Perhaps the best example is security changes implemented after 9/11. The Patriot Act was purportedly enacted to stop further terrorist acts, but was widely viewed as an expansion of the government's surveillance capabilities.[3] Though not without political and legal challenges and some amendments, the law largely remains valid and in effect.

Similarly in the wake of the 9/11 terrorist attacks, the federal government empowered the Transportation Security Administration to screen airline passengers for dangerous substances.[4] To advance its objectives, the TSA uses, among other technologies, body scanners which can produce a "crude image of an unclothed person."[5] The scanners similarly received political and legal challenges, but remain lawful and in use as an acceptable means to prevent terrorism.[6]

Even in the absence of a crisis, citizens accept some levels of government regulation when it comes to dressing and hygiene. For example, Nassau County requires food handlers to wear clean "outer garments" and to wash their hands, among other times, after using the toilet.[7] The Town of Hempstead requires individuals using public swimming pools to wear proper bathing attire, tie back long hair, and to take a soap and warm -water shower before the using the pool.[8] Additionally, as a society, Americans accept that attendance at sporting and concert events requires security screening including possible pat downs, use of metal detectors, and bag searches.

Thus, these examples demonstrate that society can accept government regulations in the areas of safety, security, health, and hygiene, albeit on a more limited scale than widespread regulations concerning what New Yorkers may have to do before entering public spaces because of coronavirus. Only time will tell whether temperature checks and facecovering requirements are tolerated in the same way as TSA checks, security screenings, and dress codes.

The Constitutionality of Disease-Prevention Measures

The legal question remains, though: can governments in the United States lawfully require citizens to wear face masks and to have temperatures taken before, for example, entering a work place or going grocery shopping? Preliminarily, governments have broad authority to regulate workplaces. Indeed, the federal government, which by its nature is limited in authority, broadly and lawfully regulates workplace safety via OSHA, administers workplace labor unions via the NLRB, and prohibits various forms of employment discrimination.[9] States, including New York, have similarly implemented legislative schemes to abridge workers' rights to sue employers for workplace injuries, or to require that employees use safety devices to protect themselves and/or others.[10]

Matthew Weinick

Accordingly, COVID-19 regulations concerning mitigating disease transmission risks in workplaces will likely pass constitutional muster. In fact, the Equal Employment Opportunity Commission ("EEOC"), the federal agency charged with administering workplace discrimination laws, has already issued guidance which either directly or indirectly answers the question of whether temperature checks and face masks can be required in a workplace. In its Technical Assistance Questions and Answers issued on April 17, 2020, the EEOC indicated that taking temperatures to check for COVID-19 is permissible under the Americans with Disabilities Act.[11] Additionally, other reasonable accommodations, such as barriers, may be appropriate to prevent transmission, suggesting that masks would also be lawful under the ADA.[12]

Turning directly to the heart of the matter, the constitutionality of such government regulations in broader contexts invokes concerns about individual liberties, including Fourth and Fourteenth Amendment concerns.[13] Leading Supreme Court precedent on the issue dates back to 1905.

In *Jacobson v. Massachusetts*, the plaintiff challenged a Massachusetts law which authorized local city and town governments to require the vaccination of their citizens when deemed "necessary for the public health or safety."[14] Subsequently, Cambridge, Massachusetts determined that smallpox had become prevalent in the city and ordered that all inhabitants be vaccinated. The Supreme Court held that the law was enacted pursuant to a state's inherent "police power," i.e., the power of a state to pass reasonable laws to protect the public health and safety.[15] In other words, the vaccination law was constitutional. Notably, as recently as 2015, in upholding a New York law requiring vaccinations for school children, the Second Circuit suggested that *Jacobson* remains good law.[16]

Jacobson and *Phillips*, however, concerned the Fourteenth Amendment and substantive due process. The vaccinations at issue in *Jacobson* and *Phillips*, and the idea of taking temperatures being promoted now, differ in material ways. Vaccinations inject material into a person, thus they sound more invasive. But, taking temperatures extracts information about a person and therefore invokes concerns about the government's invasion of privacy. Do temperature checks, therefore, raise Fourth Amendment concerns about unlawful searches?

A complete analysis of how more than two centuries of Fourth Amendment jurisprudence applies to the 21st century coronavirus pandemic is beyond the scope of this short article. But, more likely than not, temperature checks either fall into an exception to the Fourth Amendment, or do not constitute a Fourth Amendment search in the first instance.

Indeed, temperature checks are akin to the TSA body scanners. TSA checkpoints are considered administrative searches, i.e., searches effected for the purpose of protecting safety, not for determining whether a crime has been committed.[17] To constitute a lawful administrative search, courts weigh the degree of intrusion into a person's privacy against the degree the intrusion is needed to promote a legitimate government interest.[18] It is doubtful a court would conclude that a person's body temperature deserves privacy protections more than the government has a legitimate interest in controlling the spread of COVID-19.

To be sure, this latter point is supported by the fact that checking body temperature may not constitute a Fourth Amendment search at all. Some sense-enhancing technologies, such as dog sniffs, are not Fourth Amendment searches, as held by the Supreme Court in *United States v. Place*.[19] But, when specifically addressing infrared temperature-sensing cameras to locate heat lamps in a home used to grow marijuana, the Supreme Court ruled, in *Kyllo v. United States*, that such use constitutes a search.[20]

The infrared camera searches in *Kyllo*, however, penetrated into a person's house and related to criminal searches. The same outcome seems less likely with medical screening for body temperature because (1) infrared sensing of a person's body temperature measures heat emanating off of a person's body, not the temperature inside (although the measures are equivalent), and (2) the process is not intrusive and does not risk revealing sensitive or private information.[21] Thus, infrared temperature checks look more comparable to the limited procedure of a canine sniff in *Place* and less like the cameras in *Kyllo*, which penetrated through the walls of a person's home.

COVID-19 Transmission Abatement Measures Are Presumably Lawful

With this framework, should New York practitioners be concerned about the constitutionality of mitigation rules which may be imposed to ease New York out of the "Pause?" In principle, many regulations being discussed now will likely pass constitutional scrutiny. With the Supreme Court showing such strong deference to state and local governments' decisions on how to use their inherent police powers to control disease spread, ideas such as face coverings and temperature checks are likely constitutional under Fourth and Fourteenth Amendment challenges.

Vagueness, however, may be an avenue to test the constitutionality of specific orders or laws. The Constitution requires that laws define criminal offenses with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and capricious enforcement."[22] Such vagueness arguments are already being used to challenge social distancing rules across the country.[23]

On April 15, 2020, New York's Governor Cuomo signed an executive order requiring:

> Any individual who is over age two and able to medically tolerate a face-covering shall be required to cover their nose and mouth with a mask or cloth face-covering when in a public place and unable to maintain, or when not maintaining, social distance.

Whether this guidance is sufficiently specific may expose the order to critique about its constitutionality based on vagueness grounds, but its concept is likely lawful based on, among other precedents, *Jacobson*. Practitioners should continue to monitor new mitigation regulations and pay close attention to wording.

COVID-19 is raising new issues in nearly all facets of life. As we emerge from New York's Pause and enter a new normal which may include body temperature checks and face mask requirements, Nassau County civil rights attorneys should be prepared for novel legal issues arising from what appears to be an extended period of mitigation rules. Because of the states' broad police powers in the area of public health emergencies, many constitutional challenges may fail. But the police powers are not limitless, and vigilant practitioners may find room to push back on overbroad or vague regulations.

In the end, perhaps New Yorkers just need to remain mindful of the practical wisdom imparted by Justice Harlan in the *Jacobson* decision: "There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members."[24]

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1. Dennis Thompson, "Why Will It Take So Long For a Covid-19 Vaccine?", *U.S. News & World Report*, Apr. 7, 2020, available at https://bit.ly/3bs2jEB..
2. President Donald J. Trump, "*Opening Up America*," available at https://www.whitehouse.gov/openingamerica/#criteria
3. *E.g.*, Kyle Welch, "*The Patriot Act and Crisis Legislation: The Unintended Consequences of Disaster Lawmaking*," 42 Cap. U.L. Rev. 481, 483 (2015).
4. *Electronic Privacy Information Center ("EPIC") v. United StatesDept. of Homeland Sec.*, 653 F.3d 1, 3 (D.C. Cir. 2011).
5. *Id.*
6. *See id.*
7. Nassau County Public Health Ordinance, Article III, Section 1(f)
8. Code of the Town of Hempstead, Chapter 78 §§ 24(E)-(G).
9. *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 242 (1964); *Steel Institute of New York v. City of N.Y.*, 716 F.3d 31, 33-34 (2d Cir. 2013); *see Buckley v. Amer. Fed. Of Television and Radio Artists*, 496 F.3d 305, 309 (2d Cir. 1973).
10. *E.g., Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y. 2d 494 (1993); *Maas v. Cornell Univ.*, 253 A.D.2d 1 (3d Dept. 1999).
11. EEOC, "*What You Should Know About Covid-19 and the ADA, Rehabilitation Act, and Other EEO Laws*," Apr. 17, 2020, available at https://bit.ly/2xXeo7k. Notably, temperature checks are generally considered a medical examination which would ordinarily be barred by the ADA, were COVID-19 less serious. *Id.*
12. *Id.*
13. Another preliminary question is whether the constitution is invoked, at all, if the government is not performing temperature checks itself, but instead requires private businesses to perform the checks. *See, e.g. Syblaski v. Independent Group Home Living Program, Inc.*, 546 F.3d 255, 257 (2d Cir. 2008) (discussing that only state actors can violate the constitution). For purposes of this article, it is assumed that the Fourth Amendment may apply.
14. 197 U.S. 11 (1905).
15. *Id.* at 25.
16. *Phillips v. City of New York*, 775 F.3d 538, 542 (2d Cir. 2015).
17. EPIC, 653 F.3d at 10 (collecting cases).
18. *Id.*
19. *United States v. Place*, 462 U.S. 696, 707 (1983).
20. *Kyllo v. United States*, 533 U.S. 27 (2001).
21. *See MacWade v. Kelly*, 05 Civ. 6921, 2005 U.S. Dist. LEXIS 31281 (S.D.N.Y. 2005) (holding that random searches of New York City subway riders are lawful under the Fourth Amendment under the "special needs" doctrine because governments' need to prevent terrorism outweighs the minimal intrusion into personal privacy).
22. *United States v. Rybicki*, 354 F.3d 124, 130 (2d Cir. 2003).
23. *E.g.*, Ryan J. Farrick, "*Michigan Conservation Groups Sue Gov. Whitmer Over Motorboat Restrictions*," Apr. 20, 2020, available at https://bit.ly/3bmTzja. .
24. *Jacobson*, 197 U.S. at 26.

General Law

Children as Pawns and Other Legal Issues During The COVID-19 Pandemic

Governor Andrew Cuomo issued Executive Order 202.6 on March 20, 2020, reflecting the unfathomable severity of an essentially invisible enemy, a virus. This novel coronavirus disease, COVID-19, is so transmissible that the all-too-familiar voice of Dr. Anthony Fauci repetitively reminds us all that we must continually adapt our behavior to the vectors of the contagion or risk his grim projections being realized.

To counter the dire and unthinkable, inspiring individuals have expressed uplifting expressions, words to the effect that *we all must work together to survive!* And yet, we see in our matrimonial community that there remain those misguided and unwise parents who are using their children as pawns; it is as if the pandemic crisis provided another opportunity for them to do so.

Mitigation Efforts, Visitation and COVID-19

Less than a month ago as of the writing of this article, Governor Cuomo took the never-before considered drastic measures of closing schools, prohibiting public gatherings, shutting restaurant eat-in services, and ordering non-essential employees to work remotely, when feasible, thereby shuttering most non-essential retail operations and other businesses.

But appreciably, what the Order did not do is prohibit parental access to children, whether such access be based upon ongoing voluntary schedules, written agreement or court orders. Certainly, parents who are divorced or legally separated, or in the process of being so, would work together to figure out how to serve the best interests of their own children in the face of the dreadful circumstances of COVID-19; it turns out that view now seems naive.

Despite that a primary responsibility of a custodial parent is to assure meaningful contact between the children and the other parent[1] and the willingness of a parent to assure such meaningful contact between the children and the other parent,[2] our esteemed Judge Jeffrey Sunshine, Justice of the Supreme Court of the State of New York and the Statewide Coordinating Judge for Matrimonial Cases, found it necessary to speak out to troubled parents at the beginning of the outbreak; he provided a message to the bench and bar in the hopes that his words would reach the right parties and wrote:

> [T]hose who think that there is a lack of consequences to not conducting themselves appropriately during this crisis are wrong… One of the only things that should and can bring comfort to a child are parents cooperating… Let them have fond memories of how parents conducted themselves… If parents do not conduct themselves appropriately and sensibly, their children will remember throughout their lives how they acted and so will the judge deciding the case… If your clients are not listening to you and think they are not accountable for their conduct—might I suggest you send this to them.[3]

Every day, courts and counsel alike participate in countless cases wherein one parent interferes in the children's relationship with the other parent, where the child(ren) are being treated as pawns by the interfering parent. Sometimes, one parent overtly denies parental access to the other parent, but other times, the actions of the wrongdoer are a bit more subtle and insidious in their manifestation.

Such manipulations include, but clearly are not limited to, interfering with a parent's parenting time by scheduling social activities during a parent's parenting time,[4] extorting money from a spouse by not allowing parenting time unless the other parent pays money not due and owing,[5] showing up [unexpectedly] during a parent's scheduled time with the child,[6] repeatedly texting a child during the other parent's limited parenting time,[7] buying concert tickets for concerts scheduled during a parent's summer vacation time with the child,[8] punishing a child for having a relationship with the other parent by forcing the child to take phone/video calls outside in inclement weather[9] or by confiscating gifts given to the child by the other parent.[10]

Jane K. Cristal

Parents Facing New Challenges

Now, only a few months into the COVID crisis, the machinations of the offender parent are all too predictable, telegraphing his or her malintent. One parent deciding unilaterally to withhold the child from the other parent would be legally baseless when each parent is equally capable of following all the safety rules to protect the child. Likewise, a parent demanding to exercise his or her parental rights when he or she is immunologically compromised or showing symptoms of disease would also be legally without merit. Even where certain parents and their children should not be in physical contact with each other because of illness or vulnerabilities to the virus, the available technology opens a wide dimension of virtual contact. But where there is a controlling and ill-intentioned parent, that access may be shut down.

Clients who are dealing with such a troubled parent would do well to be counseled to keep a careful log of incidents of poor conduct by the other parent, including dates and times, changes in the child's behavior toward the visiting parent and statement made by the child that may seem derogatory or sound coached. Counsel should encourage the client to remain calm and work on providing additional allegations of alienating parental conduct to counsel so that he or she may use the reported information to form the basis to seek remediation.

Courts have always been attentive to protecting the well-being of their wards and have fashioned its awards accordingly: in extreme cases ordering a change in custody,[11] suspension or cancellation of child support payments,[12] awarding the parent who is the subject of interference expanded and additional parenting access,[13] or ordering compliance with custody and visitation orders.[14] Consequently, in the long picture, courts will ultimately be there to right the wrongs.

As a matter of practice within the legal framework, these parental-access cases, known to be tension-filled, motion saturated and litigation heavy, have traditionally been conferenced by the courts to give the process a chance to work and progress possibly to resolution. But now, just as New York State residents are being asked by the Governor to pause, attorneys and courts must do likewise and refrain from hitting the litigation lever when the pause button may provide more productive outcomes, especially when the courts, families and economies have been overwhelmed by sickness and death.

Consider for a moment the current status of pending cases. In this writer's experience, attorneys are reaching out to each other to solve current issues between the parties, and parties are entering into signed stipulations, whenever possible. Governor Cuomo understood the need for legal life to move forward despite the closure of court buildings. Implicitly, he communicated the message that work does not stop because the workplace is closed. When the Governor issued the executive order to permit the notarization of signatures through technology to adhere to the social distancing guidelines, attorneys were empowered to pick up the pace and use their talent, skills and experience to accomplish the clients' legal goals, minimizing court intervention.

Conclusion

The COVID-19 pandemic that has devastated New York State, especially Long Island and NYC, must now be considered a significant factor in the legal analysis of not only pending and future divorce actions, but also post-action financial applications that will undoubtedly be made as a result of businesses being closed, jobs being lost, and stock markets being wildly volatile. Attorneys who practice in the diversified and multifaceted areas of matrimonial and family law, have always had a large role in negotiations, therapeutic analysis, and hands-on problems solving, and now more so, during these trying times.

Perhaps now, for example, when representing the non-monied spouse, the attorney will not be as quick to move for pendente lite financial relief and instead seek relief through negotiations with opposing counsel. Or, maybe counsel should first explore the possibility of resolution, without court intervention, when representing a payee spouse receiving benefits under a pendente lite order where payments are late. Being quick to seek a finding of contempt the moment a default occurs without investigating the cause of the default may no longer be good practice. Instead, attorneys renewing their commitment to work intensively towards resolution outside the judiciary system will become the new gold standard, providing a high quality of legal services while avoiding numerous, often inefficient, hours in court, scorching pretrial litigation and trial preparation.

Does it make sense at this time, for example, to make a contempt application against a payor spouse whose business has been shuttered for the past month? Or, to bring a preclusion motion against a first responder working around the clock who has not been available to collect the documents demanded as part of the discovery process? Or, to move for a visitation modification because one of the parties is a COVID-19 nurse and

See CHILDREN AS PAWNS, Page 20

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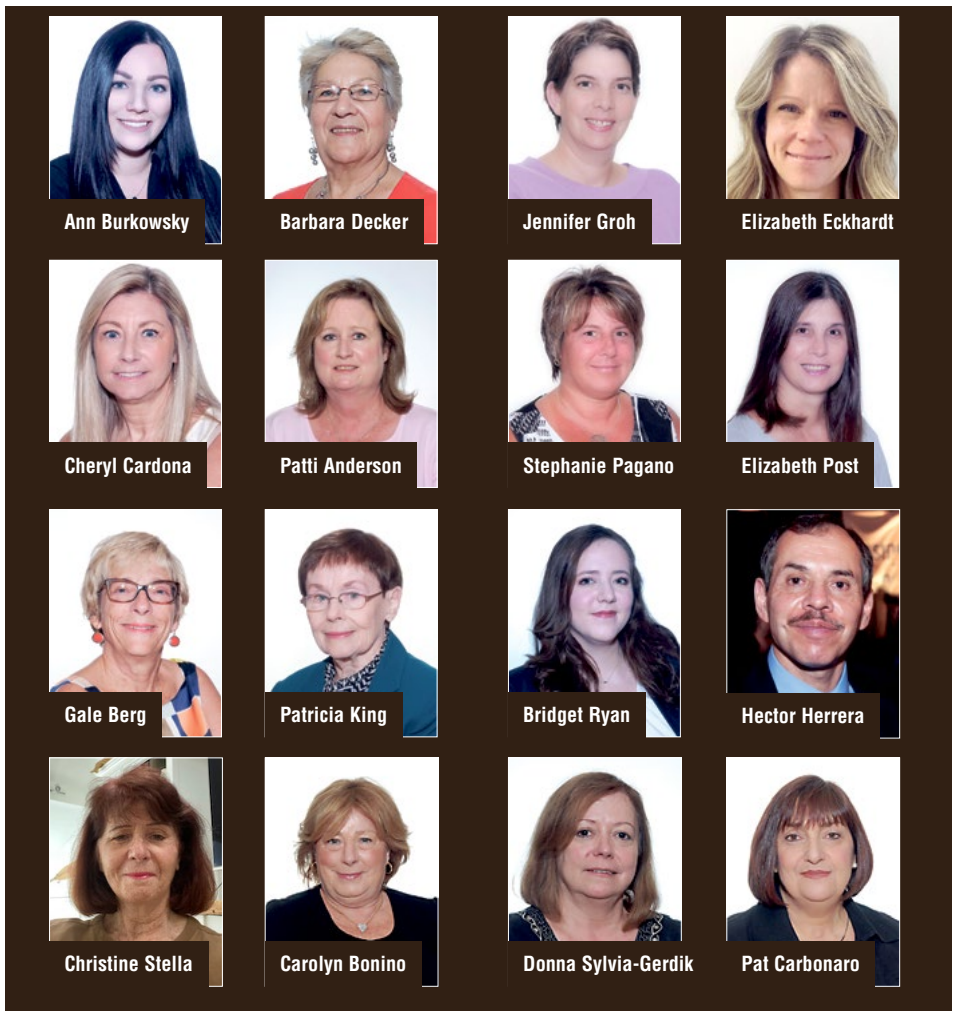

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As Executive Director of NCBA, Liz's job is to support the Bar's leadership and to turn their visions into reality. Her role is to make sure the organization runs as smoothly as possible and to provide the organization's staff the necessary tools and direction so that they can provide exemplary services and programs to Members. As a longtime nonprofit executive, her motto is that you never ask someone else to do something that you aren't willing to do yourself. That's why Members will just as likely see Liz at Domus moving tables around for the next meeting as finding her in her back office preparing next year's budget.

Patti Anderson, Executive Assistant
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Patti joined the NCBA staff in November 2002. Her husband was planning to retire from the Port Authority Police Department in January 2003. She knew that was the perfect time to get a full-time job!

Patti has always worked in the Academy of Law, the educational arm of the Bar Association. Some of her other responsibilities are: arbitration, mediation, Judiciary Committee, WE CARE donations, Executive Assistant and working with the Board of Directors.

She has been married to her husband, Andy for 37 years. They have three children, Lindsay, Sean and their fur baby, Tikibelle, a puggle. Patti enjoys cooking, swapping recipes and spending time with her family and friends.

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Gale has been an attorney for over 40 years and since 2010 has been the Director of Attorney Pro Bono Activities for the Nassau County Bar Association, Mortgage Foreclosure Project. As Director, she recruits attorneys to volunteer to counsel Nassau residents at either our twice monthly clinics or at Mandatory Conferences. Additionally, Gale locates and writes the grant proposals which have funded this project for the last ten years.

What you may not know is that Gale is an Associate Magistrate for the Village of Baxter Estates and recently retired as a float escort in the Macy's Thanksgiving Day Parade! She has photos of the nine years in which she marched; stop by if you want to see the proof!

Carolyn Bonino, Lawyer Referral Service Coordinator
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Carolyn has worked at the NCBA since 2006 in the Lawyer Referral Service Program where she provides Long Island residents and local businesses referrals to the right lawyer for their legal inquiry. In her free time, Carolyn enjoys spending time with her grandchildren.

Ann Burkowsky, Communications Manager
aburkowsky@nassaubar.org

Ann is the NCBA Communications Manager and has been working at the Bar since March 2018. She works on special events like BBQ at the Bar, Judiciary Night, and the Dinner Dance to name a few. She is also the Production Editor of the *Nassau Lawyer*, the official publication of the NCBA.

She graduated from LIU Post in 2016 with a B.A. in Public Relations. She is the oldest of three girls and enjoys spending time with family and friends.

Pat Carbonaro, Lawyer Referral Service Coordinator
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Pat has worked at the NCBA for over 20 years. She currently works with Carolyn Bonino in the Lawyer Referral Service Program to provide Long Island Residents and local businesses referrals to the right attorney.

Cheryl Cardona, Paralegal
ccardona@nassaubar.org

Cheryl has been a Real Estate Paralegal over 25 years and is now working part-time with the Mortgage Foreclosure Project. She works closely with the volunteer attorneys, housing counselors and homeowners. She loves helping people and this wonderful project is perfect for her as she gets a sense of gratitude when she can help a Nassau County resident save their home. She currently co-chair sthe Paralegal Committee here at Domus and is also a member of the Advisory Board of the Paralegal Program at Hofstra.

She's a mother to three beautiful teenage daughters, one of which will be leaving for college soon. In her spare time she likes to work in her garden and volunteer at various animal shelters and rescue organizations.

Barbara Decker, Office Manager/Controller
bdecker@nassaubar.org

Barbara is the bookkeeper/controller for the NCBA, Nassau Academy of Law, and Nassau Bar Foundation, which consists of General, Mortgage Foreclosure, Lawyer Assistance Program, and WE CARE.

She raised five children as a single parent while working as the controller of a 22 million a year textile firm in Manhattan. She also played tennis for many years and only stopped when her health forced her to, at which time she took up pickle ball. She is devoted to her family and is fortunate to have a wide circle of friends.

Dr. Beth Eckhardt, Director of Lawyer Assistance Program (LAP)
eeckhardt@nassaubar.org

As Director of the Lawyer Assistance Program (LAP), Dr. Beth Eckhardt provides professional, confidential counseling services to lawyers, judges, law students and their families struggling with mental health and substance use issues. In addition, Dr. Eckhardt conducts evaluations and makes treatment referrals.

The Lawyer Assistance Program provides early identification, peer support, stress management, motivation, treatment referrals and monitoring services. LAP also conducts presentations and workshops at law firms and law schools regarding substance use and mental health issues among attorneys, suicide prevention, time management, stress management and mindfulness.

Donna Gerdik, Membership Coordinator
dgerdik@nassaubar.org

Donna has been working at the Bar Association for 22 years. She was the administrative assistant in the Nassau Academy of Law, and was later transferred to a new position as membership coordinator. She is on the NCBA Membership Committee, oversees the Matrimonial Law Committee Dinners, as well as the Lunch with the Judges Program. She also does grievance and conciliation.

Jennifer Groh, CLE Director
jgroh@nassaubar.org

Jen has been a part of the Bar Association since 2013 and is the Director of the Nassau Academy of Law, the educational arm of the Bar Association which is responsible for our CLE programming. In addition to her duties for the Academy, Jen is also responsible for coordinating sponsorships, for the administration of the Mock Trial tournament for high school students through our Community Relations and Public Education outreach, and for the running of the Elaine Jackson Stack Moot Court competition for law school students. Jen also secures speakers for local community organizations and school districts upon request through the Bar's Speakers Bureau.

Jen comes from the legal world and has a 15+ year background as an intellectual property law librarian. She holds a Master's Degree in Education from New York University and a Master's Degree in Information and Library Science from Pratt Institute.

She is the proud mom of Andrew, a Class of 2020 North Babylon High School graduate with honors, and Eagle Scout.

Hector Herrera, Building Manager
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Hector assists the NCBA staff with technological needs involving maintaining the network, upgrades servers and workstations, extracts and converts videos and uploads them to the website. He also takes care of the general maintenance of Domus and during normal times take photographs of all NCBA events, sets up rooms for CLE programs, events and committee meetings, and provides all audio visual requirements.

Hector schedules the Zoom meetings for the Committees and Bar entities, while assisting the Chairs and speakers to manage them and monitor its security.

Pat King, Administrative Assistant
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As receptionist at the NCBA, Pat greets members as they arrive to attend meetings and CLEs. She meets the public as they come into the Bar Association seeking information and legal assistance and refers them to local agencies and the NCBA Lawyer Referral. Pat also answers the NCBA's very busy telephones. In addition, she enjoys her work as administrative assistant to the Mortgage Foreclosure Project.

Stephanie Pagano, Membership Coordinator/Committee Liaison
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Stephanie has worked at the NCBA since 2007. She is a Membership Coordinator and is responsible for sending out the invoices and processing of payments as well as making all corrections. As Committees Liaison, she's the one to ask about booking committee meetings and sending out meeting notices. Stephanie is literally the keeper of the Bar calendar, and manages the calendar for not just committees but all other Bar events. She also handles the WE CARE Grants, which has two grant cycles a year. Her voice is also one of the ones that you will hear if you should call the Bar Association for help.

When not hard at work, she enjoys going to the beach, reading, traveling, and spending time with her kids.

Bridget Ryan, WE CARE Coordinator/ Special Events Assistant
bryan@nassaubar.org

Bridget is the NCBA Special Events Assistant and WE CARE Coordinator. She helps to plan NCBA events such as the Annual Dinner Dance Gala and Judiciary Night, as well as WE CARE events such as Las Vegas Night and Gingerbread University. A fun fact about Bridget is that she's a former Walt Disney World Cast member!

Christine Stella, Paralegal
cstella@nassaubar.org

Christine is a retired litigation paralegal who came to the Nassau Bar to provide part-time assistance to Gale Berg and Cheryl Cardona with the Mortgage Foreclosure Program. She and Gale Berg are childhood friends who grew up together and have remained friends throughout the years. When Gale approached Christine to come out of retirement to help with the project, she didn't hesitate to lend a hand. She has been with the program for just over a year.

Her main focus is to review client information, gathered by volunteer attorneys from court appearances at the Mortgage Foreclosure Part of the Nassau County Supreme Court, or at Mortgage Foreclosure clinics hosted by the Bar, and then to input this information into the main database for processing. She also assists with miscellaneous assignments in the office as they pop up.

WE CARE

We Acknowledge, with Thanks, Contributions to the WE CARE Fund

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New York Bar Foundation Awards Grant to Nassau Bar Foundation In Response to Need for Mortgage Foreclosure Assistance

In the wake of a critical time where mortgage foreclosure assistance is most needed within the local community, the Nassau Bar Foundation's (NBF) Mortgage Foreclosure Program was awarded a $6,000 grant from The New York State Bar Foundation. This funding will enable the program to continue its mission of providing pro bono foreclosure clinics and assistance to Nassau County residents in court that are in need. The program invites individuals with questions regarding foreclosure to meet with a volunteer NCBA member attorney who can provide advice and guidance, or represent them for the day at mandatory conferences.

IN BRIEF

Alan J. Schwartz, Principal & Managing Attorney of the Law Offices of Alan J. Schwartz, PC in Garden City, has been elected as a Board Member of Long Island Community Chest, an ongoing fund to provide immediate short-term financial support to needy individuals and families on Long Island.

Ronald Fatoullah of Ronald Fatoullah & Associates presented several educational webinars including a CLE event hosted by Judicial Title. Mr. Fatoullah provided an update regarding the changes for Medicaid Home Care effective October 1, 2020, and the recent New York State Executive Orders from Governor Cuomo which authorized remote execution, witnessing, and notarization of documents during the business shutdown. In addition, in collaboration with the Alzheimer's Association of Long Island, Mr. Fatoullah presented at their annual "Legal and Financial Planning for Caregivers" conference.

Marian C. Rice

The In Brief column is compiled by Marian C. Rice, a partner at the Garden City law firm L'Abbate Balkan Colavita & Contini, LLP, where she chairs the Attorney Professional Liability Practice Group. In addition to representing attorneys for 35 years, Ms. Rice is a Past President of NCBA.

Please email your submissions to nassaulawyer@nassaubar.org with subject line: IN BRIEF

The *Nassau Lawyer* welcomes submissions to the IN BRIEF column announcing news, events, and recent accomplishments of its current members. Due to space limitations, submissions may be edited for length and content.

PLEASE NOTE: All submissions to the IN BRIEF column must be made as WORD DOCUMENTS.

Stay at Home ...

Continued From Page 3

Now, if a church challenges a shut-down order from the federal government, the Religious Freedom Restoration Act[13] requires that courts review the order under higher scrutiny. But, if it is a state order, then there is a lower level of scrutiny unless there is a state level Religious Freedom Restoration Act.

Moreover, as long as churches are not singled out, they can be banned as "non-essential" businesses. Of important note, the strict scrutiny analysis requires that the action taken be the least restrictive means of protecting the public health. Churches and other places of worship all over the country have found alternative means to provide their services to their congregations, such as online or streaming services meaning that the ban is the least restrictive means at this point to prevent the spread of the virus.

Second Amendment Claims

Some states and localities have ordered gun stores to close their doors as part of the shelter orders due to Coronavirus. Gun shop owners have argued that they have the right to keep their stores open because the right to arm ourselves is essential under the Second Amendment. There is not a well-defined test of alleged infringement to the Second Amendment, however, many of the cases concerning same are analyzed under the less-stringent intermediate scrutiny test. Which level of scrutiny to apply to a law in Second Amendment challenge depends on how close the law comes to the core of a Second Amendment right, and the severity of the law's burden on the right.[14] Whether the courts addressing challenges concerning the Second Amendment related to the coronavirus will use the strict scrutiny standard or the intermediate scrutiny standard will depend on how the issues are framed for the reviewing courts (i.e., are the closures a substantial burden on the right?). Here, unlike the shutting down of churches where worshipers are able to attend virtual services, the same does not hold true for individuals wishing to purchase firearms making the shutting of gun stores a quasi-extinction of the right.

Abortion Bans

Several states have temporarily banned non-essential medical procedures to help preserve medical supplies in the face of nationwide shortages as well as limiting the number of people entering and exiting the hospitals. But several states have included abortions in that category, leading to court challenges from abortion rights groups who argue that not permitting abortions is unconstitutional.

Advocacy organizations and abortion providers have filed lawsuits in Alabama, Iowa, Ohio, Oklahoma and Texas, arguing that the orders violate the landmark abortion precedent set in the case *Roe v. Wade*[15] that protects women's right to abortions. In *In Re Abbott*, licensed abortion facilities, board-certified family medicine physician who provided abortion care, and other abortion services providers in State of Texas filed a § 1983 action on behalf of themselves and their patients against the Texas Governor, other state officials, and district attorneys, challenging on substantive due process grounds the Texas Governor's executive order and Texas Medical Board's emergency rule requiring health care professionals and facilities to postpone non-essential surgeries and procedures in order to preserve critical medical resources to fight the COVID-19 pandemic. The United States District Court for the Western District of Texas granted a temporary restraining order barring enforcement of executive order and emergency rule as applied to non-emergency medication abortions and surgical abortions.[16] The Governor and state officials petitioned for a writ of mandamus.

The Appeals Court, relying on *Jacobson*, overruled the district court reserving, however, an answer to whether an injunction narrowly tailored to particular circumstances would pass muster under the *Jacobson* framework.[17]

Conclusion

While rules are constantly changing and evolving as we face this pandemic, it will be fascinating to watch how the various constitutional challenges are addressed and decided by the District Courts, Courts of Appeals, and the Supreme Court in the days, months, and years to come.

Cynthia A. Augello is the founder of the Law Offices of Cynthia A. Augello, PC where she regularly advises clients on employment and constitutional law issues. Ms. Augello is also the current Chair of the Labor and Employment Law Committee for the Nassau County Chapter of the Women's Bar Association of State of New York.

1. U.S. Const. amend. I.
2. *Jacobson v. Massachusetts*, 197 U.S. 11 (1905).
3. *Id.* at 29.
4. *Id.*
5. *Id.* at 26.
6. *Id.* at 31.
7. U.S. Const. amend. XIV.
8. *Jacobson*, 197 U.S. at 35.
9. *Wai v. Williamson*, 103 F. 384 (N.D. Cal. 1900).
10. 42 U.S.C. § 264.
11. *Maryville Baptiste Church v. Beshear*, 2020 WL 1909616 (W.D. Ky. Apr. 18, 2020).
12. *Employment Division v. Smith*, 494 U.S. 872 (1990).
13. 42 U.S.C. § 2000bb-bb-4
14. U.S. Const. amend. II.
15. *Roe v. Wade*, 410 U.S. 113(1973)
16. 2020 WL 1502102 (5th Cir. Apr. 7, 2020)
17. *See, e.g., O'Donnell v. Harris Cty.*, 892 F.3d 147, 163 (5th Cir. 2018) ("A district court abuses its discretion if it does not narrowly tailor an injunction to remedy the specific action which gives rise to the order.")(citation and internal quotations omitted).

Second Amendment ...

Continued From Page 6

tal right, *an admission without any adversary proceeding lacked the necessary due process procedures for permanent deprivation under Section 922(g)(4).*

The Sixth Circuit Court of Appeals later made it clear en banc, in *Tyler v. Hillsdale County Sherriff's Department*, that § 922(g)(4) "applies only to persons who are involuntarily committed by an appropriate judicial authority following due process safeguards."[18]

This is highly significant, because in *Waters*: (1) there was no advance due process; (2) the admitted individual was permitted only an opportunity to attempt to contact counsel from the hospital; and (3) said individual had to request an optional (rather than mandatory) hearing at some future time. If, as held by the Sixth Circuit, due process is required as a *prerequisite* for the deprivation of firearm rights, the holding in *Waters* presumably could not stand.

In *United States v. McMichael*, for example, the United States District Court for the Western District of Michigan held that "*a commitment [for the purpose of firearm rights-deprivation] does not occur until the completion of an adversary process that results in an adjudicative decision in favor of hospitalization.*"[19]

Moreover, in *Wilborn v. Barr*, the District Court for the Eastern District of Pennsylvania held that an emergency mental health examination lasting 120 hours or less directed by someone other than an authoritative body, where the individual did not have the right to counsel or an adversarial proceeding, could not support firearm deprivation.[20] If the logic of the *Wilborn* court is to be considered, the deprivation of rights by New York's provision for confinement up to 60 days without mandatory due process could be constitutionally suspect.

To be clear, the Second Circuit Court of Appeals has subsequently (and recently) held in an unpublished case that appellants admitted based on New York's strictly medical standard could be denied fundamental firearms rights. In *Phelps v. Bosco*, the Second Circuit cited to *Waters* in upholding the denial of a firearm to the appellant. The Court took care to note, however, that:

> Phelps did not raise a constitutional challenge to the state's conduct on appeal. Such a challenge would present complex issues, whether under the Second Amendment or the Due Process Clause.…We therefore do not consider whether the state violated any of his constitutional rights when it reported his hospitalizations to the FBI or whether concern for these constitutional rights might change our interpretation of the word 'commitment' under New York's scheme…[21]

Finally, in *Doe I v. Evanchick*, the Eastern District of Pennsylvania held that:

> Although the Supreme Court in *Heller* articulated that prohibition on the right to own a gun by the mentally ill is presumptively lawful, a temporary emergency commitment to a mental institution is not sufficient to consider the individual 'mentally ill' for the purposes of the *Heller* mental health exception. Thus, an individual committed under [Pennsylvania law] still retains a protected liberty interest in the right to bear arms.[22]

Curiously, though, the court denied the Plaintiff's contention that Pennsylvania lacked sufficient due process safeguards as Pennsylvania provided a mechanism for reinstatement of Second Amendment rights post-deprivation. The court held that the *post-deprivation* remedy was sufficient to satisfy due process requisites.[23]

Possibilities for Restoring Rights

One could argue that New York also offers post-deprivation remedies, as it offers a potential Certificate of Relief from Disabilities (restoring firearms rights) for individuals who have been committed without due process in accordance with the "NICS Improvement Act of 2007."[24] This remedy, nonetheless, seems akin to holding a person guilty (at the whim of a doctor) without any trial, and forcing him to prove his innocence later at his own burden and expense. It hardly seems like a sufficient protection of due process when countless individuals could be easily afforded adequate pre-deprivation safeguards for now-fundamental Constitutional rights.

It is eminently reasonable that people should not live with a lifelong disability because of unfortunate health conditions, which no longer endure, perhaps because of successful medical treatment or perhaps because their disabilities are from the distant past. Most courts so far seem to be correct in the wake of *Heller* and *McDonald* that the determination should be made on an individualized basis with robust pre-deprivation due-process safeguards. But whether this theory will prevail nationwide is a matter only time will tell.

David Z. Carl is an Agency Attorney for the Nassau County Department of Social Services, a Director of the Nassau County Bar Association, and Co-Chair of the Mental Health Law Committee. The views in this article do not necessarily reflect the positions of the Nassau County Department of Social Services.

1. The APA Removes "Gender Identity Disorder" From Updated Mental Health Guide, Dani Heffernan (Dec.3, 2012), available at https://bit.ly/3fEeou0.
2. 18 USC § 922 (g) (4).
3. *Id.*
4. *Id.*
5. *District of Columbia v. Heller*, 554 U.S. 570 (2008).
6. *McDonald v. City of Chicago, Ill.*, 561 US 742 (2010).
7. *District of Columbia v. Heller*, 554 U.S. 570 (2008).
8. 18 USC § 922 (g)(4).
9. 27 CFR § 478.11.
10. *Id.*
11. *United States v. Waters*, 23 F.3d 29 (2d Cir. 1994).
12. MHL§ 9.27.
13. MHL§ 9.37.
14. *United States v. Hansel*, 474 F.2d 1120 (8th Cir. 1973).
15. *Id.*
16. *District of Columbia v. Heller*, 554 U.S. 570 (2008).
17. *United States v. Rehlander*, 666 F.3d 45 (1st Cir. 2012).
18. *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678, 681–82 (6th Cir. 2016) (en banc)(emphasis added).
19. *United States v. McMichael*, 350 F.Supp.3d 647 (W.D. Mich. 2018) (emphasis added).
20. *Wilborn v. Barr*, 401 F. Supp. 3d 501 (E.D. Pa. 2019).
21. *Phelps v. Bosco*, 711 Fed.Appx. 63 (2d Cir. 2018).
22. *Doe I v. Evanchick*, 355 F.Supp.3d 197 (E.D. Pa. 2019).
23. *Id.*
24. *NICS Improvement Amendments Act of* 2007 (NIAA), Penal Law §§ 110-180

Class to Class ...

Continued From Page 7

Colleges and universities may have numerous defenses against these class action lawsuits. For example, to obtain class certification, the students must establish numerosity, commonality, typicality, and adequacy.[27] Institutions may have a challenge to class certification based on issues regarding the commonality and typicality of the class.[28] Many students are on academic, athletic, merit, and/or need based scholarships and would not be entitled to refunds under any circumstances. Other students have not fully paid their tuition for the semester. Institutions may want to determine whether these students are included in the class. Further, to have proper federal jurisdiction under the Class Action Fairness Act, the amount in controversy must exceed $5 million.[29] Other arguments may be available depending on an institution's jurisdiction and particularized circumstances.

An institution defending against these lawsuits should also assess whether it has possible defenses or relief from contractual obligations. Colleges and universities should consider reviewing agreements for any force majeure provisions. A force majeure is an event beyond the control of the parties that prevents contractual performance and may excuse performance without it constituting a breach.[30] Force majeure clauses provide a narrow defense on a contract-by-contract basis because each contract has different obligations that may be affected in varying ways and each jurisdiction has unique applicable laws.[31] Therefore, performance may only be excused if the force majeure clause includes the event, such as pandemics, epidemics or quarantines, preventing performance.[32]

In some jurisdictions, institutions may be able to assert impossibility of performance in response to breach of contract claims, particularly when there is no force majeure provision in the agreement.[33] Impossibility of performance is a defense that may be invoked "when the destruction of the subject matter of the contract or means of performance makes performance objectively impossible" as a result of circumstances that could not have been anticipated.[34] The assumption that a global pandemic would not occur was likely an underlying assumption between students and their institutions. The pandemic arguably rendered the delivery of in-person classroom instruction, room and board, and other services impossible in many cases depending on the institution's location.

Proactive Steps for Institutions

As the ramifications of the pandemic continue to emerge, institutions should consider taking proactive steps to minimize potential exposure. Colleges and universities should consider analyzing their existing contracts, marketing materials, and policies and/or make any changes, if necessary, as soon as practicable.

Depending on the circumstances and jurisdiction, courts have considered student handbooks, bulletins, catalogs, and admissions materials as contracts.[35] Institutions should consider reviewing institutional contracts and contract templates, including enrollment, tuition, and housing agreements, admissions agreements, room and board plans, handbooks, and marketing materials to determine what promises, if any, were made to current or prospective students, and also to determine whether such materials should be modified to include additional or revised protective clauses, such as force majeure, indemnification, consents, waivers, and/or early termination provisions.

For example, do current contracts indicate that all classes must be offered in-person? Do they explicitly require refunds to students if the institution is required to move classes online? Do housing agreements require a refund in the event the institution is required to evacuate students from the residence hall? Do residence hall agreements contain a force majeure provision that includes a pandemic or epidemic? Do waivers signed by students participating in study abroad programs include acceptance of risk relating to a pandemic, including infection, travel restrictions, inability to return home, termination of educational programs, etc.? Institutions should also review any webpages that address or describe the cost of attendance, tuition, room, board, and other related fees.

Regardless of how courts decide the class action complaints, the potential impact of the pandemic on college and university campuses is significant—operationally, financially, legally and otherwise—and preparation is key. In this time of uncertainty, institutions that proactively assess defenses and mitigate risk will be better positioned to resiliently respond to today's unprecedented challenges.

Dina L. Vespia and Hayley B. Dryer are Partners in the Higher Education Practice Group at Cullen and Dykman LLP. Thank you to Maria A. Gomez, an Associate in Cullen and Dykman LLP's Higher Education Practice Group, for her assistance with this article.

1. *Rosenkrantz v. Ariz. Bd. of Regents*, No. 2:20-cv-00613-JZB (D. Ariz. Mar. 27, 2020); *see generally* Emma Kerr, *Why Students Are Seeking Refunds During COVID-19*, U.S. News, (Apr. 22, 2020), available at https://bit.ly/3cY9xlE; cases cited infra n. 6, 8, 10.
2. *See, e.g., Rickenbaker v. Drexel Univ.*, No. 2:20-cv-01358-BHH (D. S.C. Apr. 8, 2020); *Friedman v. Drexel Univ.*, No. 3:20-cv-05147-AET-ZNQ (D. N.J. Apr. 27, 2020); *Dixon v. Univ. of Miami*, No. 2:20-cv-01348-BHH (D. S.C. Apr. 8, 2020); *Dimitryuk v. Univ. of Miami*, No. 0:20-cv-60851-AHS (S.D. Fla. Apr. 26, 2020); *Rosenkrantz v. Ariz. Bd. of Regents*, No. 2:20-cv-00613-JZB (D. Ariz. Mar. 27, 2020); *Raftopoulous-Johnson v. Ariz. Bd. of Regents*, No. 2:20-cv-04399-BRM-ESK (D. N.J. Apr. 17, 2020).
3. *College Refund 2020*, The Anastopoulo Law Firm, (last visited May 1, 2020), available at https://bit.ly/2ANiqjv.
4. *See id.*; *infra* notes 5, 7, 9 and accompanying text.
5. The Anastopoulo Law Firm, (last visited May 4, 2020), available at https://bit.ly/2XkTirZ.
6. *See, e.g., Rickenbaker and Dixon, supra* n.2.
7. Bursor & Fisher, P.A., (last visited May 4, 2020), available at https://bit.ly/2zlFm9i.
8. *See, e.g., Friedman, Dimitryuk and Raftopoulous-Johnson, supra* n. 2.
9. Matthew S. Miller LLC, (last visited May 4, 2020), available at https://bit.ly/2WUQJy8; DiCello Levitt Gutzler LLC, (last visited May 4, 2020), available at https://bit.ly/2WUWg7E.
10. *See, e.g., Rosenkrantz, supra* n. 1; *Student A v. Liberty Univ.*, No. 6:20-cv-00023-NKM (W.D. Va. Apr. 13, 2020); *Brandmeyer v. The Regents of the Univ. of Cal.*, No. 3:20-cv-02886-SK (N.D. Cal., Oakland Div. Apr. 27, 2020).
11. *See id.; Little v. Grand Canyon Univ.*, No. 2:20-cv-00795-SMB (D. Ariz. Apr. 24, 2020); *Miller v. Bd. of Trustees of the Cal. State Univ.*, No. 2:20-cv-03833-SVW-SK (C.D. Cal., W. Div. Apr. 27, 2020).
12. *See, e.g., Friedman, supra* n. 2, complaint at 2; *Dimitryuk, supra* n. 2, complaint at 2.
13. *See Kerr, supra* n. 1.
14. *Rickenbaker, supra* n. 2, complaint at 7; *Dixon, supra* n. 2, complaint at 8.
15. *Rickenbaker, supra* n. 2, complaint at 3-4, 8; *Dixon, supra* n. 2, complaint at 3-5, 8.
16. *Id.*
17. *Friedman, supra* n. 2, complaint at 2; *Dimitryuk, supra* n. 2, complaint at 2.
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19. *See, e.g., Rickenbaker, supra* n. 2, complaint at 8; *Friedman, supra* n. 2, complaint at 11-12; *Dixon, supra* n. 2, complaint at 9; *Dimitryuk, supra* n. 2, complaint at 13-14.
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23. *Id.* at 27.
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25. Audrey Williams June, *The Coronavirus Has Emptied Dorms and Dining Halls. Here's Why Refunds for Them Are a Tricky Calculation*, The Chronicle of Higher Ed. (Apr. 10, 2020), available at https://bit.ly/3gfAjI0; Kerr, *supra* n. 1.
26. *See id.*; Kerr, *supra* n. 1; *Students Demand That Colleges Refund Tuition and Fees*, CBS News, (May 4, 2020), available at https://cbsn.ws/3bShA20.
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31. *Kel Kim Corp. v. Cent. Mkts.*, 70 N.Y.2d 900, 902–03 (1987).
32. *Id.* at 902–03; *see also Coastal Power Prod. Co. v. N.Y. State Pub. Serv. Comm'n*, 153 A.D.2d 235, 240 (3d Dept. 1990); *Macalloy Corp. v. Metallurg, Inc.*, 284 A.D.2d 227 (1st Dept. 2001) (both concluding that financial considerations and the fact that a contract becomes increasingly difficult and expensive to perform does not excuse performance under force majeure).
33. *Id.* at 902; *see also Univ. of Minn. v. Agbo*, 176 Misc.2d 95, 96 (2d Dept. 1998) (note that impossibility of performance is not available as a defense to unjust enrichment claims).
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Shogun's ...

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All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.

—The Constitution of Japan, Article 14

Of particular note, MacArthur's Constitution redefines the legal status of women. The sole woman on the General's staff was Beate Sirota, a twenty-two-year-old naturalized citizen who spoke fluent Japanese (a rare skill among Americans then) whose parents had lived in Japan during the war.[12]

Sirota was responsible for Article 14 which secures equality for all irrespective of gender and other suspect classifications. It does so in a manner above and beyond that expressed in the US Constitution.[13] Under MacArthur's Constitution, women were given the vote. The first election after its adoption resulted in thirteen million women voting with 39 women being elected to the Diet.[14]

Even more telling, Sirota drafted a gender-specific provision that afforded women equal status in marriage, divorce, property rights and other spheres of domestic relations/family law. Article 24 enshrines the "individual dignity and essential equality of the sexes," by establishing that marriage shall be "based only on mutual consent of both sexes and it shall be maintained through mutual cooperation with equal rights of husband and wife as a basis."[15]

Foremost of its provisions is that which, abolishing war as a sovereign right of the nation, forever enounces the threat or use of force as a means for settling disputes with any other nation and forbids in future the authorization of any army, navy, air force or other war potential or assumption of rights of belligerency by the state.

—General MacArthur's Announcement of March 2, 1946

The most commented aspect of MacArthur's Constitution is Article 9, wherein the Japanese "forever renounce war as a sovereign right of the nation and the threat or use of force as a means of settling disputes."[16] The text goes on to prohibit the establishment of land, sea, and air forces. Although there are the Japanese Self Defense Forces (JSDF), the nation principally relies for its protection on the United States per the US-Japan Security Treaty of 1951.[17]

The sheer brutality of the Pacific War demanded that Japan be demilitarized so that it no longer threatened the peace. Japan also desperately needed to have its economy restored. Ironically, the Korean War assured the latter while Article 9 secured the former. MacArthur envisioned the United States as the preeminent power in the Pacific. Taking into account the necessities dictated by the emerging Cold War, the General needed to regenerate an economically vibrant, democratic Japan within the American orbit.

MacArthur's Constitution achieved that and more. The text was, after some wrangling, accepted by Hirohito, grateful no doubt for having been spared. It was approved in the Diet by overwhelming numbers: 421 to 8 in the lower house and 298 to 2 in the upper chamber.[18] The document was then affirmed by large majorities in a public referendum, taking effect on May 3, 1947, an anniversary celebrated annually as Kenpo Kenenbi (Constitution Day).[19]

The people themselves control their own constitution and are, in the final analysis, the sovereigns of their own land. One of the most interesting things about the Japanese constitution as adopted in 1946 is the fact that it has never been amended, although it has been in force for seventeen years. This speaks well for the wisdom and the judiciousness that went into its final draft.

—General MacArthur, Reminiscences

Nearly three-quarters of a century later, MacArthur's Constitution remains in full force and effect without a single word being altered. By contrast, the American Constitution has been amended twenty-seven times since its adoption in 1787. More to the point, the Constitution of the French Fifth Republic has been amended ten times since it was first proposed by General De Gaulle in 1958.[20]

This is not to say that there has not been agitation for revision of the text, notably Article 9, due to the provocations of the North Koreans. Shinzo Abe, the current Prime Minister, has made Constitutional revision an issue, but he has yet to act on it.[21] That being said, MacArthur's Constitution serves as more than the charter of government for one of the great nations of the world.

It is and will forever be a lasting testament to Japan's finest Shogun and the most outstanding soldier/statesman the United States military ever produced. The final word on MacArthur's achievement belongs the Shigeru Yoshida, Japan's great post-war leader, who succinctly summed up the General's sublime peacetime triumph:

> The accomplishments of General MacArthur in the interest of our country are one of the marvels of history. It is he who has salvaged our nation from post-surrender confusion and prostration, and steered the country on the road to recovery and reconstruction. It is he who has firmly planted democracy in all segments of our society. It is he who paved the way for a peace settlement. No wonder he is looked upon by all our people with the profoundest veneration and affection.[22]

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Children as Pawns ...

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alternate visitation arrangements need to be made? Maybe we are seeing the beginning of a new normal in matrimonial and family law practice.

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Higher Education ...

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campuses for the Fall 2020 semester,[30] both they and those that are still deciding how to proceed should consider various factors. For example, many different government entities have released guidance regarding the reopening of businesses, such as the U.S. Equal Employment Opportunity Commission ("EEOC"),[31] the Centers for Disease Control and Prevention ("CDC"),[32] and New York State, via Governor Cuomo.[33] Institutions would be wise to read, and if possible, apply, this guidance to their own reopening strategies. Additionally, institutions should make sure that their plans do not run afoul of any federal, state, or local government mandates relating to closures due to COVID-19.

Even if an institution is able to and chooses to fully return to in-person norms on campus for the Fall 2020 semester, this does not mean that all of its employees or students will be comfortable returning to campus. Under federal law, employees have the right to stop working "in good faith because of abnormally dangerous conditions for work at the place of employment."[34] Essentially, "a work stoppage called solely to protect employees from immediate danger is authorized by [section] 502 and cannot be the basis for either a damages award or a *Boys Markets* injunction."[35] Even unionized employees with "contractually prohibited work stoppage" provisions in a collective bargaining agreement can stop work under this section if they "present ascertainable, objective evidence supporting its conclusion that an abnormally dangerous condition for work exists."[36]

Institutions should be prepared for employee questions and concerns regarding the safety of returning to work. Taking appropriate safety measures will not only protect the employees from getting sick, but it will also protect the institution from being unable to reopen due to employee's refusal to return. Students may have similar concerns regarding returning to campus. Institutions should begin crafting a policy now regarding how they will respond in this scenario, whether it be with an option for deferral, an option for remote learning, or by some other means. To help calm fears, it is also recommended that institutions inform employees and students of the steps they have taken to make the campus as safe as possible.

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23. Currently, there are new regulations regarding Title IX, entitled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," which have completed review by the Office of Management and Budget and are currently in their final form. *See OIRA Conclusion of EO 12866 Regulatory Review*, Reginfo, (last visited May 12, 2020), https://bit.ly/35WN7yf. On May 6, 2020, the Department of Education released the unofficial version of the regulations, but they are not effective until August 14, 2020. *See U.S. Department of Education Releases Final Title IX Rule*, United States Dep't of Education Newsroom, (May 6, 2020), https://bit.ly/3cmccFg.
24. United States Dep't of Education, *Q&A on Campus Sexual Misconduct*, Dep't of Education, p.3, (Sept. 2017), available at https://bit.ly/3fRgGpI.
25. United States Dep't of Education, *Questions and Answers for Postsecondary Institutions Regarding the COVID-19 National Emergency*, Dep't of Education, p. 3, (May 12, 2020), available at https://bit.ly/2Wo9I3I.
26. *See* Anderson, *supra* n. 21; Brown, supra n. 22.
27. *See* Brown, *supra* n. 22.
28. *See* 34 C.F.R. § 106.8(b).
29. *Galiani v. Hofstra Univ.*, 118 A.D.2d 572 (2nd Dept. 1986) (citations omitted).
30. *See, e.g.*, Hemphill, *supra* n. 8; Alger, *supra* n. 8.
31. *See What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*, U.S. Equal Employment Opportunity Commission, (May 5, 2020), https://bit.ly/365hR0l; *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act*, U.S. Equal Employment Opportunity Commission, (Mar. 21, 2020), https://bit.ly/2Wpxuw7.
32. *See, e.g., Coronavirus Disease 2019 (COVID-19) Guidance for Businesses & Employers*, CDC, https://bit.ly/3cCSIMA.
33. *See, e.g., Amid Ongoing COVID-19 Pandemic, Governor Cuomo Outlines Additional Guidelines for Phased Plan to Re-open New York*, New York State Governor, (Apr. 28, 2020), https://on.ny.gov/2YU4jTG.
34. 29 U.S.C. § 143; *see also Clark Eng'g & Const. Co. v. United Broth. of Carpenters & Joiners of Am., Four Rivers Dist. Council*, 510 F.2d 1075, 1079 (6th Cir. 1975) ("Section 502 serves an entirely different purpose. When an employee is exposed to abnormally dangerous working conditions and quits work in good faith because of such conditions the section protects him from employer retaliation. The employee cannot be discharged . . .; the employer cannot resort to a lockout.") (citations omitted).
35. *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 385 (1974).
36. *Id.* at 386–87 (internal quotation and citations omitted).

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