

# Government and Regulatory Affairs Webinar

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## Using Article 78 to Advance Public Policy Goals



# Presenters



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# Government and Regulatory Affairs

- Bond's Government and Regulatory Affairs attorneys support their clients' legal needs as they navigate the complexities of federal, state and local government.
- We often work in collaboration with lobbyists and consultants, leveraging our legal expertise to meet client needs.

# Agenda

- Litigation: The Continuation of Politics by Other Means
- Article 78 as a Tool to Overturn Final Agency Action
- Advocacy in the Shadow of Litigation

# Politics by Other Means

"War is the continuation of politics by other means"

Carl von Clausewitz, On War

- Litigation is the continuation of advocacy by other means.
- Litigation can be a threat if advocacy fails.
- Successful litigation requires a political response.

# CDPAANYS v. Zucker

- Department of Health changed reimbursement methodology to fiscal intermediaries in the CDPAP program through issuance of a memorandum directing the reduction.
- After advocacy failed, association brought lawsuit challenging the reduction under State Administrative Procedure Act (SAPA).
- State Supreme Court agreed that SAPA had been violated as the rate methodology must go through rule-making procedure.
- After initially noticing an appeal, DOH did not pursue it and instead adopted a revised methodology, with substantially improved rates, through rule-making process.

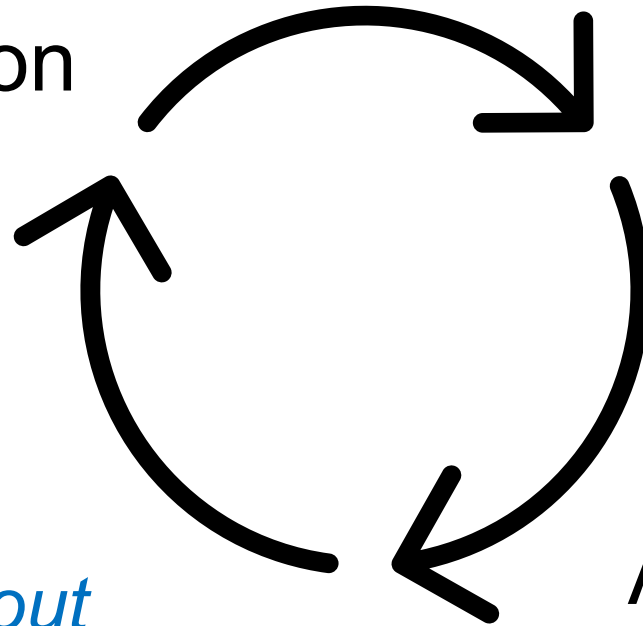
# Agudath Israel of America v. NYS Dept. of Ed

- Department of Education issued emergency regulations to limit due process rights of nonpublic school students with disabilities.
- Emergency regulations challenged as violation both of NYS Education Law and not following SAPA requirements.
- Court grants Temporary Restraining Order due to not meeting SAPA requirement for emergency rule-making.
- DOE withdraws emergency regulation and proposes substantially similar proposed final regulation.
- After advocacy, DOE did not finalize proposed final regulation.

# Article 78 – Fast, Front-Loaded Vehicle for Challenging Final Agency Action

Final Agency Action

Challenger Files Petition and Accompanying Papers



Agency's Response

*Total process is about 3-4 months until fully submitted*

# When to Commence Article 78 Litigation?

- 4-month clock starts to run when the agency's position is **final**
- Final Action = actual injury + exhaustion of administrative remedies

# What Do You Need to File?

- Notice of Petition/Petition
  - Summons/Complaint
- Memorandum of Law (Legal Argument)
- Affirmations (Facts)
- Exhibits (Evidence)

# How Does the Agency Respond?

- Memorandum of Law (Legal Argument)
- Affirmation (Facts)
- Exhibits (Evidence)

# Article 78 – Four Paths to Challenge Final Action

1. Compel a state or local body to perform a duty enjoined upon it by law;
2. Stop a state or local body from proceeding or outside the scope of its authority (or invalidate such an action);
3. **Challenge the determination of a government body that was made in violation of lawful procedure, affected by an error of law, arbitrary and capricious, or an abuse of discretion; or**
4. Challenge whether a determination made at a hearing was supported by substantial evidence.

*The question is not just whether the agency was wrong, but how it was wrong.*

# Article 78 Review – 4 Practical Questions

- Did the Agency follow the required procedure?
- Did the Agency correctly apply the law?
- Did the Agency act rationally?
- Did the Agency abuse its discretion in the penalty or discipline imposed?

# Advocacy in the Shadow of Litigation

“The political object is the goal, war is the means of reaching it, and means can never be considered in isolation from their purpose”  
— Carl von Clausewitz, On War

- Advocacy should contemplate the possibility of litigation.
- Advocacy will happen after litigation.

# Considerations in the Shadow of Litigation

- Does the agency have the authority to make the rule or determination?
- Is the mechanism the agency using the correct one for the type of action it wishes to undertake?
- Is the agency following its own enabling statute and regulations?
- Is there a reasoned basis for the agency's actions?

# Agency Authority

- State agencies have only the authority given by NYS constitution and their relevant enabling statutes.
- In Executive Order 38 litigation, DOH regulations purported to limit executive compensation both for use of Medicaid funds (“soft cap”) and for all funds (“hard cap”).
- Court of Appeals upheld soft cap and struck down hard cap because DOH lacked authority to regulate the use of funds outside its purview.

# Distinguish Law from Guidance

- Only a statute or regulation can create a legally-enforceable requirement.
- Subregulatory guidance can clarify the requirements of a statute or regulation, but cannot create a new legal mandate.
- DOH has twice changed fiscal intermediary reimbursement through issuance of a Medicaid Update newsletter.
- Courts held both times that any change needed to proceed through rule-making and annulled the rate reduction.

# Agencies Must Follow their Own Rules

- Regulations often set specific procedures agencies must follow in order to take a certain action.
- Even if the underlying action that the agency undertakes may be rational, if the agency failed to follow the correct process in reaching its conclusion, courts will annul the agency action.
- These rules can be agency-specific rules or rules of general applicability such as the State Administrative Procedure Act or State Finance Law.

# Rational Basis

- Rational basis review is the most forgiving legal standard.
- It is not enough that a different or even better decision could have been reached; the agency decision must be irrational.
- Reliance on unaudited data, when audited data was available, is an example of an irrational decision.
- Building the administrative record while the agency decision is under consideration is essential for a successful rational basis challenge.

# The Takeaway

- When dealing with a quality assurance or compliance issue, the first question should be what is required?
- The answer will be most often be found in a statute or regulation.
- Everything else (ADM, protocol, guidance, policy document) can clarify an agency's interpretation of statute of regulation, but they do not give an independent basis for regulatory oversight.
- Subregulatory guidance can also create constructive notice.

# The Takeaway

- Begin your litigation strategy while engaged in advocacy.
- Government operates under constraints and needs to be reminded of those constraints.
- The possibility of litigation can support advocacy efforts.
- Litigation can generate additional opportunities for advocacy.

# Thank You

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