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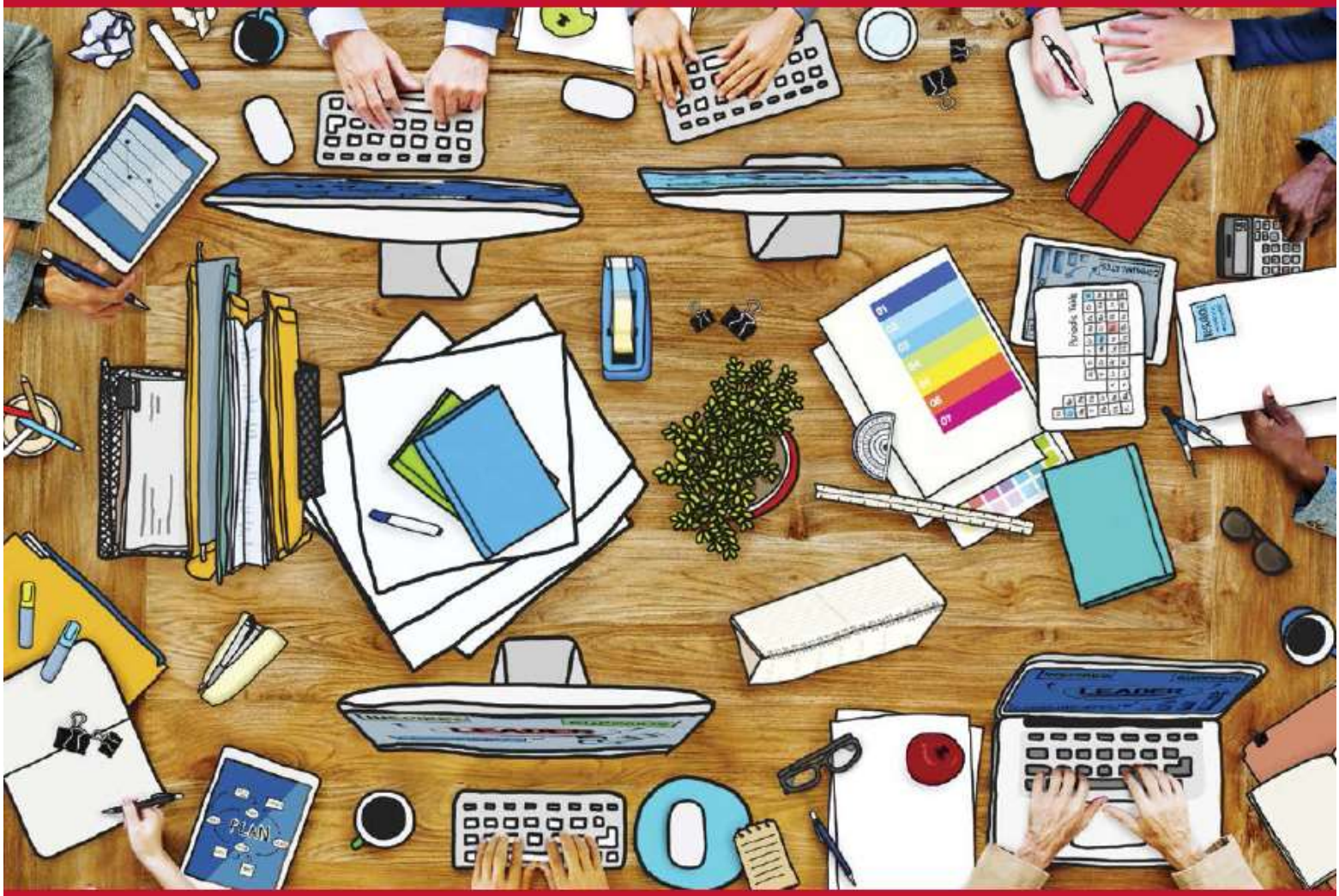

It's Not Just "Lawyering"

The Law Practice Management Issue
Edited by Marian C. Rice

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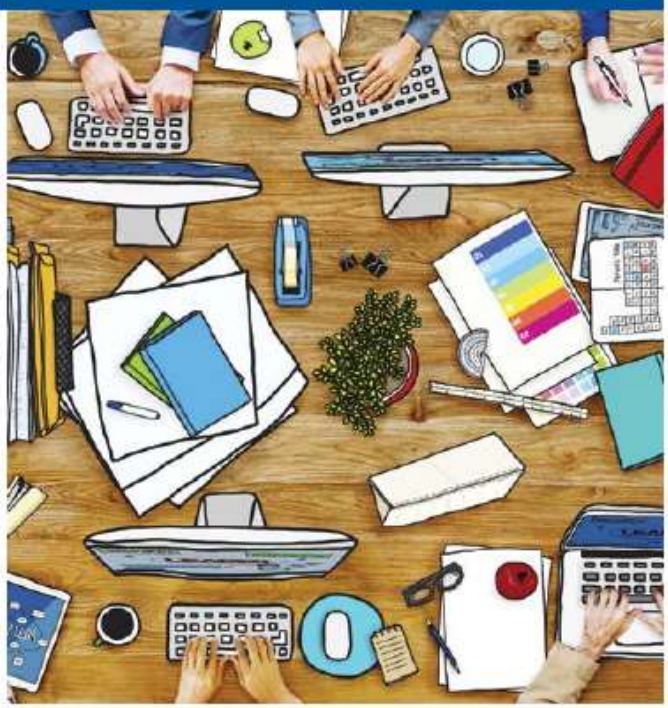

DEPARTMENTS

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Disability Determinations, Judicial Authority and CPLR Article 78

Part II

By Chet Lukaszewski

Chet Lukaszewski formed Chet Lukaszewski, P.C. in 2008. The firm's primary areas of practice are New York City and State municipal disability pensions, as well as Social Security Disability claims and personal injury matters. Prior to opening his law firm, Mr. Lukaszewski worked for a foremost disability pension and Social Security disability firm throughout law school. After being admitted to the bar in 2001, he concentrated exclusively on personal injury work for several years, before returning to disability pension law, eventually becoming the lead litigator in one of the top firms practicing in that area at the time. Now, he is recognized as one of the leading disability pension law attorneys in New York.

Part I of this article, published in the May *Journal*, gave an overview of the current interpretation by the courts of the judicial authority possessed by judges under N.Y. Civil Practice Law and Rules Article 78, where municipal retirement systems and pension funds can deny sick and injured civil servants disability retirement pensions by finding an applicant not to be disabled, even if the finding is repeatedly deemed by the courts to be unlawful. This is because the courts have held that New York state judges do not possess the power

in an Article 78 proceeding to find a disability where a pension agency's medical board has not; a judge can only remand for reconsideration an application found to be improperly denied. This second part of the article covers CPLR Article 78 as it relates to municipal disability retirement pensions and reviews the cases that have established this "rule of law."

The Law

Hundreds of thousands of New York citizens work in civil service jobs, and their memberships in municipal pension funds and retirement systems and their entitlement to pension benefits accruing thereunder are not a gratuity. All municipal pension agency members have a pension contribution deducted from every paycheck they receive; it is those monies that primarily fund their retirement pensions. In addition, civil servants enter their occupations believing a retirement pension will be in place when they complete their careers, whether by performing the requisite number of years of service, or if after a certain amount of time on the job, they become disabled and can no longer do their job. The New York State Constitution Article V § 7, establishes that "membership in any pension or retirement system of the state or of a civil division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired." The Court of Appeals has said that a remedial statute enacted for the benefit of a civil servant, such as the disability pension laws, "should be liberally construed in their favor."[1] Moreover, the courts have maintained that disability pension laws are in place to assure the availability of such benefits to a municipal employee who is permanently incapacitated for duty.[2] The Court of Appeals has also stated that pension agencies are required to act "lawfully, with due regard to the essential evidence and in a nonarbitrary fashion."[3]

Nevertheless, those involved in disability pension law will say there are instances where seemingly disabled workers are denied disability pensions by New York's municipal pension funds and retirement systems – a fact demonstrated by the courts regularly deeming application denials to be improper. In many of these cases, the only recourse for a denied applicant is an Article 78 proceeding challenging the denial. It is in these proceedings that judges lack the authority to award a disability pension.

In many disability pension Article 78 proceedings, the pension agencies are found to have met the applicable standards in denying applications and their determinations are upheld. But in the cases where they are not, it seems contrary to the language of CPLR Article 78, and overly limiting to judicial authority, to not allow a judge to determine that a permanent disability for full duty has been shown. This seems particularly true in light of the fact that a pension agency could keep refusing to find a disability to exist, no matter how many times a court has deemed the determination to be legally improper. A disability pension Article 78 proceeding usually spans 10 to 18 months from the filing of the petition to the receipt of a decision. If an application is remanded to a pension agency by the court, it will be several more months before the often lengthy reconsideration process begins, and that is when the agency does not appeal the court's decision. If the agency appeals, the process becomes longer and costlier, as appellate printing costs, even for the respondent in such a case, are usually over $1,000 (and generally $3,500–$5,000, if the worker loses the Article 78 challenge and brings the appeal), and appeals usually involve additional attorney fees, which are typically several thousand dollars.

Brady v. City of New York

A careful review of the holdings of the courts that are seen as having established the "rule" that judges are prohibited from finding disability in Article 78 proceedings involving pensions for municipal workers calls into question whether said rule actually has definitive legal support. The courts in disability pension matters often indicate that "as is well established, courts cannot weigh the medical evidence or substitute their own judgment for that of the Medical Board," citing the Court of Appeals decision in *Brady v. City of New York*[4] as support. However, *Brady* involved the question of whether a police officer was off duty at the time of his death, which would determine whether his widow would receive line-of-duty death benefits. There was no question about a medical board making a determination of whether or not a disability for full duty existed.

Courts often cite the *Brady* decision when setting forth the aforementioned rule. However, that section involves only the issue of whether the board considered evidence of the deceased officer being on or off duty when he died, and whether the fund's Board of Trustees merely adopted a finding that was clearly deficient. The Board of Trustees oversees the administration of a pension agency and renders final determinations on disability pension applications. It is bound by a medical board's finding of whether or not a disability exists, but it has the ultimate power to determine "causation" when a disability is found. Specifically the decision states:

> In this case, it appears that the board [of Trustees] merely adopted the recommendation (*606) by the medical panel which, in turn, had relied on an incomplete investigation which resulted in a purely conclusory report that the deceased was off duty at the time of his death. The board could not so delegate its independent responsibility for the determination of the issue upon which depended the granting or denial of the petitioner's application. The implications of this failure to make an independent evaluation and determination are acutely apparent in the abundance of documentary evidence in the form of duty charts

> and the testimonial evidence from the deceased's commanding officer and the detectives who worked under his supervision, all of which evidence was clearly available within the police department itself but was never considered by the pension board.[5]

Note that *Daley v. Board of Estimate City of New York*,[6] referenced as support by the *Brady* Court, also involved a pensioner's death and the need to determine whether the death was related to his line-of-duty efforts; it in no way involved the issue of disability. Thus it is perplexing how the courts have derived the proposition, "as is well established, courts cannot weigh the medical evidence or substitute their own judgment for that of the Medical Board," from the *Brady* case, and that portion of the decision in particular. In a case where the issue is whether a death is line-of-duty related, why has the *Brady* decision come to be the basis for the rule that judges cannot find a disability to exist in an Article 78 proceeding?

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The "Definitive Authority"

The case currently considered the definitive authority on whether a court can find a disability where a medical board has not is *Borenstein v. New York City Employees' Retirement System*.[7] In *Borenstein*, the Court of Appeals overturned the Appellate Division, First Department's ruling that a medical board's no-disability finding was irrational, based upon the medical evidence in the record, and thus the applicant was entitled to the disability pension sought. The *Borenstein* Court noted: "In the end, the Appellate Division here did what it should not do: 'substitute [its] own judgment for that of the Medical Board,'" citing *Brady*.[8] The *Borenstein* Court also cited as support the Appellate Division, Second Department case *Santoro v. Board of Trustees*,[9] which upheld a disability pension denial based upon a no-disability finding. *Santoro* referencing *Brady*, stated, "It is well settled that courts cannot weigh the medical evidence or substitute their own judgment for that of the Medical Board."[10] The final case cited by *Borenstein* as support for the proposition was *Appleby v. Herkommer*.[11] There, the court also stated that "[a]s is well established, courts cannot weigh the medical evidence or substitute their own judgment for that of the Medical Board,"[12] citing *Brady*. However *Appleby*, like *Brady*, did not involve the issue of disability vs. no disability; it involved the question of whether a police officer's line-of-duty job stress had resulted in a heart condition, which contributed to his death. Note that in a case where a disability (or death) is found to exist by a medical board, a court does have the power to determine the cause of the disability and award a disability pension.[13] Thus, perhaps *Brady* has been improperly interpreted and relied upon by the courts to establish the supposed rule of law that judges cannot find a disability to exist in an Article 78 proceeding.

It must be noted that in denying NYPD Officer Michael Mazziotti retroactive pension benefits to the date of the original improper denial of his application, as discussed in Part I, despite both court orders finding the pension fund's findings to be unlawful, and despite the fact that when he was finally approved seven years after filing his application, was based upon essentially the same facts and medical evidence proffered throughout, the court in *Mazziotti v. Kelly*[14] wrote, and cited as the basis for its determination:

> Thus, to award petitioner WTC-ADR [the 9/11 line of duty disability retirement pension he was awarded] to the date of any of the Medical Board's prior recommendations to deny his WTC-ADR or ODR applications the court would have to make a finding that at a given point petitioner was disabled for full duty police work as a result of his WTC related psychological issues as a matter of law. This court simply cannot make such a determination as it is well settled that the threshold question of whether an applicant has the injury claimed and whether that injury incapacitates the applicant from the performance of duty is solely for the Medical Board to decide.[15]

If, in the years following the *Brady* case that decision came to be referenced as standing for a proposition that it truly did not, then it would lend further support to the call for revisiting the issue in the Legislature and/or the courts.

The Language of CPLR Article 78

The CPLR states that an Article 78 proceeding can be brought against a "body or officer," can only challenge a decision that is final, and must be commenced in the supreme court of the county. The relief sought can include mandamus (an order from a high court to a lower court, or to an authority, instructing it to perform an action or duty) or prohibition, or certiorari to review. Currently in disability pension challenges , a review and vacatur of the no-disability finding is all that can be sought via the relief of certiorari to review. One cannot seek a pension award under the court's power of mandamus, often referred

to as the "power to compel," which is available to petitioners in countless other Article 78 proceedings. CPLR Article 78 states that the expression "body or officer" includes every court, tribunal, board, corporation, officer, or other person, or aggregation of persons, whose action may be affected by a proceeding under the article. It specifically indicates that whenever necessary to accomplish "substantial justice," a proceeding under the article may be maintained against an officer exercising judicial or quasi-judicial functions, or a member of a body whose term of office has expired. Also, any party may join the successor of such an officer or member of a body or other person having custody of the record of proceedings under review. It would seem that based upon the language of the statute, there should be no prohibition on judges possessing the power to find a disability to exist in an Article 78 proceeding brought against a retirement system or pension fund, and to award a disability pension, under the power of mandamus, so as to accomplish "substantial justice."

As per the language of CPLR Article 78, the following questions can be raised in such proceedings:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or
2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or
3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or
4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

The petitioners in most no-disability pension Article 78 proceedings assert that the pension agency's medical board failed to perform a lawful evaluation of their application, and thus the finding and application denial were arbitrary and capricious and an abuse of discretion, based upon facts of the matter, including the medical evidence presented, the realities of their diagnosed conditions, and the realities of the full duty requirements of their job title.

CPLR Article 78 indicates that a court "may grant the petitioner the relief to which he is entitled," or may dismiss the proceeding either on the merits or with leave to renew. It also states that, if the proceeding was brought to review a determination, the judgment may "annul or confirm the determination in whole or in part, or modify it, and may direct or prohibit specified action by the respondent." Yet, the Court of Appeals has determined that it is not within the purview of New York state judges to find a "disability" in an Article 78 proceeding involving a disability pension, despite their being allowed to determine the cause of a disability in such a case.[16] Article 78 also specifically states: "If a triable issue of fact is raised in a proceeding under this article, it shall be tried forthwith."[17] However, currently, a judge cannot hold a trial as to the issue of whether a petitioner is in fact disabled for his or her job title. In a disability pension Article 78 proceeding, when a judge evaluates the propriety of a no-disability denial, the law says that the burden of proving one's incapacity for full duty and its cause is placed upon the applicant; if the applicant is deemed not to have met this burden, then the pension agency's denial is proper and cannot be disturbed.[18] The law is clear that, during the application process, the threshold question of whether an applicant has the injury claimed and whether that injury permanently incapacitates the applicant from the performance of full duty is solely for the agency's medical board to determine. If the medical board certifies that the applicant is not medically disabled for duty, the agency's board of trustees must accept that determination and deny the application.[19] A medical board is legally permitted to differ with an applicant's doctors' findings and conclusions, and the findings and conclusions of all other entities and agencies, no matter how consistent said outside findings may be.[20] The law states that any difference in opinion between the medical board and any of an applicant's physicians is a conflict of medical opinion, which is solely within the province of the medical board, and that conflicting medical opinions alone provide no occasion for judicial interference.[21] With such great deference being afforded to pension agencies and their doctors, when a court nevertheless finds a no-disability denial to be legally improper, why not allow for the judge to deem a disability to have been demonstrated and to award the pension sought? The language of CPLR Article 78 does not seem to preclude such power.

The general standard in disability pension denial Article 78 proceedings is whether the determination is arbitrary and capricious, and without sound basis in reason, and is generally based upon the administrative record that was before the pension agency.[22] The specific standards and elements that are to be applied and

Their memberships in municipal pension funds and retirement systems and their entitlement to pension benefits accruing thereunder are not a gratuity.

evaluated by judges include whether a medical board's decision was based on "substantial," "credible" evidence, whether "all essential facts" were "investigated," whether the decision was "rational," and whether the reasoning for the decision was fully "articulated."[23]

"Credible evidence" has been defined by the Court of Appeals as "evidence that proceeds from a credible source and reasonably tends to support the proposition for which it is offered . . . must be evidentiary in nature and not merely a conclusion of law, nor mere conjecture or unsupported suspicion."[24] Pension agencies have a duty to applicants to handle cases in a fair and equitable manner, and to consider the totality of the evidence and circumstances surrounding an application.[25] Moreover, a denial cannot be conclusory or based upon a "bald finding" by a medical board.[26] The extent and in-depth nature of these considerations and factors evidences the great familiarity and understanding that a judge unquestionably gains about an application in an Article 78 proceeding.

Conclusion

The Court of Appeals has found that a medical board's determination denying a disability pension where the medical board itself does not perform a physical examination of an applicant can still be deemed to be legally sufficient, as that Court has held that sound medical conclusions can be reached based solely upon the review of medical evidence.[27] Judges presiding over Article 78 proceedings should be perfectly capable of performing such review. Granting judges the power to find disability in Article 78 proceedings would not result in a flood of approvals that would drastically impact pension agencies and, in turn, potentially burden taxpayers, who could be looked to if municipal pension agency fiscal deficits were to ensue; nor would it result in a pension award in every no-disability case. Just as many denials would be upheld, and a remand for clarification and a more appropriate review, as opposed to a pension award, would still likely comprise the majority of judgments in favor of petitioners in such cases. A disability finding and pension award would be a remedy used only in the most extreme and obvious of cases. If necessary, limitations could be placed upon the exercise of said power. For example, it could be established that at the very least, judges would be required to hold a trial under the powers of CPLR 7804(h), where the petitioner would need to appear, before finding a disability to exist, similar to Workers' Compensation and SSD hearings. Action by the Legislature or courts is needed either in the form of an amendment or addendum to CPLR Article 78 or a judicial re-visitation of this issue. A New York state judge can uphold a disability pension denial as being lawful, based upon a finding that it was supported by "substantial" and "credible" evidence, when "all essential facts" are "investigated," and can rationally determine that no permanent disability for full duty has been shown; and a judge can also set aside a pension denial and award the pension sought when concluding as "a matter of law" that a disability was the "natural and proximate result of a service related accident." Then, it stands to reason that New York's judges can also determine that a permanent disability for full duty has been shown to exist as a matter of law.

Closing the legal gap that allows for pension funds and retirement systems to be immune from being compelled to award a disability pension, no matter how many times the courts find a denial to be unlawful, would limit potential abuses of power by pension agencies, and ensure that more disabled civil servants receive the pension benefits they deserve. We must trust in the abilities of New York's judges and empower them, in the appropriate cases, to find injured workers to be disabled and award them the disability retirement pensions to which they are entitled. ■

1. *Mashnouk v. Miles*, 55 N.Y.2d 80, 88 (1982).
2. *O'Marah v. Levitt*, 35 N.Y.2d 593, 596 (1974).
3. *VR Equities v. N.Y. City Conciliation & Appeals Bd.*, 118 A.D.2d 459 (1st Dep't 1986).
4. 22 N.Y.2d 601 (1968).
5. *Id.* at 605–06 (citing *Daley v. Bd. of Estimate City of N.Y.*, 267 A.D. 592 (2d Dep't 1944)).
6. 267 A.D. 592.
7. 88 N.Y.2d 756 (1996).
8. *Id.* at 761 (citing *Brady*, 22 N.Y.2d 601).
9. 217 A.D.2d 660 (2d Dep't 1995).
10. *Id.* at 660.
11. 165 A.D.2d 727 (1st Dep't 1990).
12. *Id.* at 728.
13. *Meyer v. Bd. of Trustees*, 90 N.Y.2d 139 (1997).
14. Index No. 101666/13 (Sup. Ct., N.Y. Co. May 1, 2014).
15. *Id.* (citation omitted).
16. *Borenstein*, 88 N.Y.2d 756; *Canfora v. Bd. of Trustees*, 60 N.Y.2d 347 (1983).
17. CPLR 7804(h).
18. *Evans v. City of N.Y.*, 145 A.D.2d 361 (1st Dep't 1988); *Archul v. Bd. of Trustees*, 93 A.D.2d 716 (1st Dep't), *aff'd*, 60 N.Y.2d 567 (1983).
19. *Zamelsky v. N.Y. City Emps.' Ret. Sys.*, 55 A.D.3d 844, 845 (2d Dep't 2008).
20. *Manza v. Malcolm*, 44 A.D.2d 794 (1st Dep't 1974); *Russo v. Bd. of Trustees*, 143 A.D.2d 674 (2d Dep't 1988).
21. *Manza*, 44 A.D.2d 794; *Muffoletto v. N.Y. City Emps.' Ret. Sys.*, 198 A.D.2d 7 (1st Dep't 1993); *Borenstein*, 88 N.Y.2d 756; *Scotto v. Bd. of Trustees*, 76 A.D.2d 774 (1st Dep't 1980), *aff'd*, 54 N.Y.2d 918 (1981).
22. *Pell v. Bd. of Educ.*, 34 N.Y.2d 222 (1974).
23. *Borenstein*, 88 N.Y.2d 756; *Meyer*, 90 N.Y.2d 139.
24. *Meyer*, 90 N.Y.2d at 147 (internal citations omitted); *Baranowski v. Kelly*, 95 A.D.3d 746 (1st Dep't 2012).
25. *Brady v. City of N.Y.*, 22 N.Y.2d 601 (1968); *Kiess v. Kelly*, 75 A.D.3d 416 (1st Dep't 2010); *see Diaz v. Kelly*, 98 A.D.3d 425 (1st Dep't 2012); *Kelly v. Bd. of Trustees*, 47 A.D.2d 892 (1st Dep't 1975).
26. *Costello v. Bd. of Trustees*, 63 A.D.2d 894 (1st Dep't 1978); *Bennett v. Bd. of Trustees*, 20 A.D.2d 522 (1st Dep't 1963).
27. *Meyer*, 90 N.Y.2d at 145–46.