



STATE OF NEW YORK
OFFICE OF THE ATTORNEY GENERAL

LETITIA JAMES
ATTORNEY GENERAL

BARBARA D. UNDERWOOD
SOLICITOR GENERAL
DIVISION OF APPEALS & OPINIONS

October 28, 2022

Catherine O'Hagan Wolfe
Clerk of Court
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

Re: *Roberts v. Bassett*, No. 22-622

Dear Clerk,

This Office represents the defendant-appellee Mary T. Bassett, Commissioner of the New York State Department of Health (DOH), in the above-referenced matter. I am writing to provide information the Court requested during oral argument on October 25, 2022. Specifically, the Court requested that the DOH and defendant-appellee the New York City Department of Health describe the statutory bases for any authority that these entities have over physicians practicing within their respective jurisdictions.

New York law accords DOH with “broad power to regulate in the public interest.” *Agencies for Child. Therapy Sers., Inc. v. New York State Dep’t of Health*, 136 A.D.3d 122, 129 (2d Dep’t 2015). This includes the power to “supervise the reporting and control of disease” and “to promote education in the prevention and control of disease.” N.Y. Pub. Health L. § 201(1)(c), (g). Pursuant to this authority, DOH has promulgated regulations and issued orders, advisories, and guidance documents in support of its efforts to control COVID-19 in New York,¹ including

¹ See, e.g., 10 N.Y.C.R.R. §§ 2.9, 2.60-2.62; New York Dep’t of Health, *Health Advisory: Nursing Home Testing, Cohorting and Visitation Guidance* (Oct. 13, 2022), available at: https://www.health.ny.gov/professionals/nursing_home_administrator/dal/docs/2022-10-11_health_advisory.pdf; New York Dep’t of Health, *Commissioner’s*

the Guidance documents at issue in this appeal (*see Roberts* Joint Appendix (J.A.) 27, 36, 250).

New York law imposes civil penalties for the violation of any provision of the Public Health Law, “or of any lawful notice, order or regulation pursuant thereto.” Pub. Health Law § 12(1)(a). Penalties for violations are capped at \$2,000 unless otherwise prescribed by law, subject to escalators to up to \$5,000 (for repeat violations) or \$10,000 (where the violation directly results in serious physical harm). *Id.* § 12(a)(1)-(3). Willful violations of provisions of the Public Health Law or regulations established pursuant thereto, or of any lawful order or regulation prescribed by a local board of health or health officer, are subject to criminal penalties. *Id.* § 12-b(1)-(2). However, not every “notice, order or regulation” promulgated by DOH pursuant to the Public Health Law gives rise to enforceable, binding requirements. The DOH Guidance that is the subject of this action does not impose mandatory duties on providers (*see* J.A. 80), and thus cannot be the subject of enforcement under these provisions.

In addition, New York regulates the practice of medicine in part by proscribing and establishing civil penalties for “professional misconduct.” *See* N.Y. Pub. Health L. §§ 230, 230-a; *see also* N.Y. Educ. Law §§ 6520-6529. In relevant part, “professional misconduct” is defined to include “[a] willful or grossly negligent failure to comply with substantial provisions of federal, state, or local laws, rules, or regulations governing the practice of medicine,” N.Y. Educ. Law § 6530(16), as well as numerous other practice-specific activities or conduct, *see generally id.* § 6530. The law empowers a state board for professional misconduct to investigate and adjudicate allegations of professional misconduct, and establishes procedures for the conduct of such investigations and hearings. *See generally* Pub. Health Law § 230. A person found guilty of professional misconduct may be subject to censure, license suspension or revocation, a fine of up to \$10,000 per violation, and/or additional training or public service. *Id.* § 230-a. Here, the DOH Guidance is not a “state . . . law[], rule[], or regulation[],” N.Y. Educ. Law § 6530(16), and thus would not properly be the subject of a professional misconduct charge. And even if it could be so construed, the fact that the Guidance is non-binding means that there can be no “failure to comply” with its “substantial provisions.” *Id.*

Determination on Masking in Certain Indoor Settings Pursuant to 10 NYCRR 2.60
 (Sept. 7, 2022), available at:
<https://coronavirus.health.ny.gov/system/files/documents/2022/09/2.60-determination-9.7.22.pdf>.

Finally, New York also regulates the practice of pharmacists. *See generally*, N.Y. Educ. Law §§ 6801-6832. The law imposes various obligations in connection with the filling of prescriptions, *see id.* § 6810, and makes the violation of any of these provisions a class A misdemeanor, *see id.* § 6811(19). However, none of the requirements imposed by § 6810 appears to implicate the issues presented by this appeal.

Please do not hesitate to inform me should the Court require any additional information.

Respectfully,

/s/ Andrea W. Trento

Andrea W. Trento

Cc: All counsel of record (via ECF)