OFFICE OF COUNSEL

NEW YORK STATE EDUCATION DEPARTMENT

89 WASHINGTON AVENUE

ALBANY, NEW YORK 12234

FACSIMILE TRANSMITTAL SHEET

TO:
Arthur Z. Schwartz, Esq.
(646) 219-~~6569~~
(212) 285-1410
David J. Butler, Esq.
(202) 373-6001

FROM:
Athena Small

DATE:
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SENDER'S PHONE NUMBER:
(518) 474-8927

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THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

OFFICE OF COUNSEL
Tel. 518-474-8927
Fax 518-474-4188

November 28, 2014

David J. Butler, Esq.
Bingham McCutchen LLP
2022 K Street NW
Washington DC, NY 20006-1806

Arthur Z. Schwartz, Esq.
Advocates for Justice
225 Broadway, Suite 1902
New York, NY 10007

Re: Appeal No. 19683 / Decision No. 16689

Dear Sir/Madam:

Enclosed is a copy of the decision of the Commissioner of Education in the above-referenced appeal.

In a case where the decision must be filed with the school district clerk, a duplicate original is being provided to the district's counsel for that purpose.

Sincerely,

Tina Urbaitis
Appeals Coordinator

Enclosure

No. 16689

The University of the State of New York

The State Education Department

Before the Commissioner

Appeal of BETTY CARMAND and STEVEN WHITE from action of the Board of Education of the East Ramapo Central School District, Daniel Schwartz, Yehuda Weissmandl, Moshe Hopstein, Eliyahu Solomon, Aron Wieder, Morris Kohn, Moses Friedman, Richard Stone, Joel Klein, Eliezer Wizman and Albert D'Agostino regarding the expenditure of district funds.

Advocates for Justice, attorneys for petitioners, Arthur Z. Schwartz, Esq., of counsel

Bingham McCutchen LLP, attorneys for respondents, excepting D'Agostino, David J. Butler, Esq., of counsel

Petitioners appeal from action of the Board of Education of the East Ramapo Central School District (the "board") to expend district funds to appoint counsel to defend or otherwise represent current and former board members and district employees in connection with several actions, proceedings and other matters. The appeal must be sustained in part.

In July 2012, Appeal of Jones, et al. v. Schwartz, et al. was commenced pursuant to Education Law 310 (the "Administrative Action") seeking both the appointment of a monitor to oversee the East Ramapo Central School District and removal of board president Daniel Schwartz and board members Moshe Hopstein, Moses Friedman, Yehuda Weissmandl and Eliyahu Solomon (collectively, the "Administrative Respondents") from office. On July 17, 2012, according to the board minutes, the board held a special meeting and approved appointment of counsel to represent and defend each of the Administrative Respondents.

At a board meeting on July 24, 2012, board minutes also indicate that the board approved amended resolutions, pursuant to Public Officers Law §18, to defend and indemnify the Administrative Respondents, appointing the law firm of Bingham McCutchen LLP (the "Bingham firm") to represent Hopstein, Friedman, Weissmandl and Solomon; and the law firm of Snitow Kanfer Holtzer & Millus LLP (the "Snitow firm") to represent Schwartz. At the same meeting, the board adopted a resolution retaining the Bingham firm to review and inquire into certain issues raised in various matters before the Commissioner of Education, as well as other agencies of the State of New York, and to "take such steps as are reasonably required, including ... the commencement and proceeding with such litigation(s) as may be required in connection therewith ...."

In August 2012, a federal civil rights class-action, Montesa, et al. v. Schwartz, et al., 12 cv 6057, was commenced in the Southern District of New York (the "Federal Action") against, *inter alia*, each of the Administrative Respondents; former board members Aron Wieder, Morris Kohn, and Richard Stone; the district's superintendent, Joel Klein, and assistant superintendent, Eliezer Wizman (collectively, the Federal Defendants); as well as against board counsel, Albert D'Agostino. At a board meeting held on September 13, 2012, the minutes reflect that the board approved 10 separate resolutions pursuant to Public Officers Law §18 to defend and indemnify each of the Federal Defendants in the Federal Action and appointed the Bingham firm to represent them.

During this time, the board was also the subject of a pending New York State Attorney General investigation (the "Attorney General Investigation"). In July 2012, the New York State Attorney General notified D'Agostino that he may be a witness in that matter. Consequently, on October 2, 2012, the board adopted a resolution, pursuant to Public Officers Law §18, prospectively appointing the Bingham firm to provide legal representation and indemnification upon written request, for current and former board members and district employees who may be subpoenaed or compelled to testify in the Attorney General Investigation.

Petitioners commenced this appeal challenging the board's decisions to appoint counsel to provide a defense and to indemnify the costs of such defense for the Administrative Respondents, Federal Defendants, and current and former board members and employees in the

Administrative Action, the Federal Action and the Attorney General Investigation, respectively. Petitioners also challenge the board's July 24, 2012 appointment of counsel to review certain matters and take necessary steps, including litigation. Petitioners' request for interim relief was denied.

Petitioners claim that the individual respondents are not entitled to defense and indemnification of legal costs for several reasons. First, they contend that the Administrative Respondents and Federal Defendants have engaged in a pattern of willful and intentional misconduct which includes the breach of fiduciary duties, defrauding the district and its residents, and committing "Constitutional torts." Accordingly, petitioners argue that the Administrative Respondents and Federal Defendants were not acting within the scope of their employment or duties when the acts or omissions giving rise to the causes of action in the Administrative Action and Federal Action occurred and, also, that their acts or omissions were in bad faith. Therefore, petitioners claim that those individual respondents/defendants are not entitled to legal representation, defense, and indemnification, pursuant to Public Officers Law §18(3)(a) or Education Law §3811. Petitioners also claim that respondent Schwartz was improperly provided with separate counsel in the Administrative Action. Petitioners also challenge appointed counsels' fees as unreasonable. In addition, petitioners assert that the board is not authorized to appoint counsel to "defend" an Attorney General Investigation or to proactively initiate litigation against the Attorney General. Petitioners challenge the propriety of the votes taken at each board meeting appointing counsel and also allege violations of the Open Meetings Law.

Respondents[1] argue that the appeal must be dismissed on several procedural grounds, including lack of standing, failure to properly join the Administrative Respondents and Federal Defendants as necessary parties to the appeal, improper service, untimeliness, and election of remedies as to certain of petitioners' claims. Respondents further assert that petitioners fail to state a claim, that Education Law §3811 is irrelevant in this appeal, and maintain that the board's actions were proper in all respects.

[1] Although subsequently named as an individual respondent, Albert D'Agostino was not properly joined, as discussed infra, and has not submitted an answer to the petition.

I must first address several procedural matters. The parties have submitted several letters and attachments for my consideration in this matter. By letter dated November 5, 2012, petitioners' reply memorandum of law and additional affidavit was accepted, as was respondent board's sur-reply memorandum of law. Pursuant to §276.5 of the Commissioner's regulations, the parties' further submissions, including respondents' letters dated November 14, November 16, November 21, and December 10, 2012, as well as petitioners' letters dated November 16, November 19, and November 26, 2012 have been accepted for consideration.

Next, the purpose of a reply is to respond to new material or affirmative defenses set forth in an answer (8 NYCRR §§275.3 and 275.14). A reply is not meant to buttress allegations in the petition or to belatedly add assertions that should have been in the petition (Appeal of Caswell, 48 Ed Dept Rep 472, Decision No. 15,920; Appeal of Hinson, 48 id. 437, Decision No. 15,908; Appeal of Baez, 48 id. 418, Decision No. 15,901). Therefore, while I have reviewed the reply, I have not considered those portions containing new allegations or exhibits that are not responsive to new material or affirmative defenses set forth in the answer.

Further, respondents claim that petitioners failed to respond to the affirmative defenses raised in their answer and that, consequently, all such affirmative defenses are admitted, warranting dismissal of the appeal. Respondents are incorrect. Section 275.14 of the Commissioner's regulations provides that a petitioner shall reply to each affirmative defense contained in the answer. Respondents note that, although petitioners submitted a reply, they failed to respond to each affirmative defense enumerated in respondents' answers, including interposing admissions or denials. However, the result of petitioners' failure is that the facts alleged by respondents are considered to be true. A legal analysis of any admitted facts with respect to each affirmative defense still must be undertaken, and I am not bound to accept respondents' legal conclusion with respect to each affirmative defense merely because petitioner did not interpose a reply to them. I further note that all papers submitted by both parties in connection with petitioners' request for interim relief were accepted into the record by letter dated November 5,

2012. Therefore, each of respondents' affirmative defenses are separately considered as follows.

Respondents assert that petitioners lack standing to maintain the appeal. An individual may not maintain an appeal pursuant to Education Law §310 unless aggrieved in the sense that he or she has suffered personal damage or injury to his or her civil, personal or property rights (Appeal of Waechter, 48 Ed Dept Rep 261, Decision No. 15,853; Appeal of Erickson, 47 id. 261, Decision No. 15,689). Only persons who are directly affected by the action being appealed have standing to bring an appeal (Appeal of Waechter, 48 Ed Dept Rep 261, Decision No. 15,853; Appeal of Erickson, 47 id. 261, Decision No. 15,689). District residents have standing to challenge an allegedly illegal expenditure of district funds (Appeal of Strade, et al., 48 Ed Dept Rep 73, Decision No. 15,797; Appeal of Russo, 47 id. 429, Decision No. 15,744; Appeal of Houdek, 47 id. 415, Decision No. 15,740). Petitioners are district residents challenging the expenditure of district funds to appoint counsel for members of the board and employees engaged in alleged wrongful conduct. Accordingly, they have standing to maintain this appeal (see, e.g., Appeal of Bach, 33 Ed Dept Rep 452, Decision No. 13,110; Appeal of Percy and Ross, 31 id. 199, Decision No. 12,619).

Respondents' reliance on Lawrence v. Baxter (2004 WL 1563105 [W.D.N.Y.]) to find otherwise is misplaced. In that case, the plaintiff appeared to be a resident of Florida suing the City Clerk of the City of Niagara Falls, New York, for alleged constitutional violations. As a litigation tactic within that lawsuit, the plaintiff moved to disqualify the attorneys who were appointed by the city to represent the defendant by contending that the defendant acted outside the scope of employment and, therefore, counsel should not have been provided pursuant to Public Officers Law §18. The court denied the motion, finding no support for the argument that standing existed by virtue of being a plaintiff suing a public official.

I find, however, that Lawrence v. Baxter has no bearing on whether a district resident and taxpayer has standing to commence an appeal before the Commissioner pursuant to Education Law §310 challenging the expenditure of district funds. As noted above, a taxpayer may so commence a challenge to a district's expenditure of funds; here, such expenditure is to provide counsel for members of

the board or its employees (see, e.g., Appeal of Bach, 33 Ed Dept Rep 452, Decision No. 13,110; Appeal of Percy and Ross, 31 id. 199, Decision No. 12,619; accord, Merrill v. County of Broome, 244 AD2d 590 [taxpayer action in Supreme Court to determine if county was authorized to pay counsel fees incurred by certain employees]). Thus, I decline to dismiss the appeal for lack of standing.

With respect to respondents' assertion that this appeal is barred by the doctrine of election of remedies, when the Federal Action was commenced, the plaintiffs (which include petitioners herein) requested, inter alia, that the federal court issue an injunction prohibiting the district from expending any funds in defense of that action and the Administrative Action. This relief is nearly identical to that requested in this appeal. As a result, respondents argue that the prior commencement of the Federal Action for similar relief constitutes an election of remedies which precludes the instant appeal (Appeal of Qureshi, 43 Ed Dept Rep 504, Decision No. 15,066).

However, subsequent to the commencement of this appeal, the plaintiffs in the Federal Action amended their complaint. I take judicial notice of the "Third Amended Complaint" (hereinafter the "complaint") in the Federal Action which was filed on December 11, 2013. In that iteration of the complaint, the cause of action requesting injunctive relief prohibiting the district from expending funds to defend the Federal Action and the Administrative Action has been deleted. Therefore, I conclude that petitioners' claims herein that arise from the appointment of counsel to defend and indemnify the individual respondents are not precluded by the doctrine of election of remedies.

Turning to the issue of joinder of necessary parties, a party whose rights would be adversely affected by a determination of an appeal in favor of a petitioner is a necessary party and must be joined as such (Appeal of Murray, 48 Ed Dept Rep 517, Decision No. 15,934; Appeal of Miller, 48 id. 465, Decision No. 15,917; Appeal of Williams, 48 id. 343, Decision No. 15,879). Joinder requires that an individual be clearly named as a respondent in the caption and served with a copy of the notice of petition and petition to inform the individual that he or she should respond to the petition and enter a defense (Appeal of Murray, 48 Ed Dept Rep 517, Decision No.

15,934; Appeal of Miller, 48 id. 465, Decision No. 15,917; Appeal of Williams, 48 id. 343, Decision No. 15,879).

When petitioners initially commenced this appeal they named only the board as respondent and served it with notice of petition and the petition. Because petitioners seek to overturn the board's decision to provide defense and indemnification to the Administrative Respondents and Federal Defendants, those individuals would be affected were petitioners to prevail in the appeal. Consequently, by letter dated November 6, 2012 (the "Joinder Order"), I directed petitioners, pursuant to §275.1 of the Commissioners regulations, to join the Administrative Respondents and Federal Defendants by personally serving each with copies of all pleadings and papers thus far submitted in the appeal.[2] The Joinder Order stated that personal service upon each of the Administrative Respondents and Federal Respondents must be made in compliance with §275.8(a) of the Commissioner's regulations, and that such service must completed by November 13, 2012.

Petitioners, however, were unable to complete personal service by the prescribed date. On November 13, 2012, petitioners requested additional time to complete personal service and also sought permission for alternate service upon the parties to be joined. Petitioner's request for an extension of time until November 16, 2012, to complete personal service was granted, but their request to effect alternate service was denied. On November 19 and 26, 2012, petitioners again requested that I order alternate service or otherwise accept deficient affidavits of service. By letter dated December 3, 2012, the request was denied.

Section 275.8(a) of the Commissioner's regulations requires that a copy of the petition "shall be personally served upon each named respondent, or, if a named respondent cannot be found upon diligent search, by delivering and leaving the same at respondent's residence with some person of suitable age and discretion ... or as otherwise directed by the Commissioner."

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[2] Respondents argue that the Joinder Order was improper and dismissal of the appeal, instead, was warranted. However, §275.1 of the Commissioner's regulations specifically authorizes such an order in the Commissioner's discretion (see, Matter of Capobianco v. Ambach, 112 AD2d 640; Matter of Education Alternatives, Inc. v. Mills, 175 Misc. 2d 105).

I have reviewed the affidavits of service submitted by petitioners. The record indicates that petitioners failed to properly serve respondents Hopstein, Solomon, Wieder, Kohn, Klein, Wizman or D'Agostino. Petitioners attempted to effect service upon Hopstein and Kohn by serving the papers upon each of their respective spouses, as a "person of suitable age and discretion." The affidavits of service, however, fail to demonstrate that petitioners made any attempt to serve Hopstein and Kohn before resorting to this substitute method of service. Therefore, service upon Hopstein and Kohn did not comply with the requirements of §275.8(a). As service was improper, I must dismiss the appeal as against them (Appeal of Houdek, 47 Ed Dept Rep 415, Decision 15,740) for failure to join necessary parties, insofar as petitioners challenge board resolutions that if annulled would adversely affect their rights.

With respect to Solomon and Wieder, the affidavits of service state that, after attempts to serve each were unsuccessful, copies of the notice of petition and petition were left at the door of their respective residences. Section 275.8(a) of the Commissioner's regulations, however, does not permit alternate service unless "directed by the Commissioner." Petitioners did not obtain authorization for alternative service; thus, service upon Solomon and Wieder is improper, and I am constrained to dismiss the appeal as against them (Appeal of the New York City Department of Education, 46 Ed Dept Rep 199, Decision 15,482; Appeal of Colleluori, et al., 35 id. 283, Decision 13,542) for failure to join necessary parties, insofar as petitioners challenge board resolutions that if annulled would adversely affect their rights.

The affidavits of service for Klein and Wizman indicate that, on November 9, 2012, petitioners attempted to serve each of them by leaving copies of the notice of petition and petition with the school district clerk. Thereafter, on November 15 and 16, petitioners' process server returned to the district offices, apparently to attempt service again, but did not affect service, personal or otherwise, upon Klein or Wizman. There is no indication that service was attempted at Klein or Wizman's residence or that any other attempts to effect personal service upon Klein or Wizman were made. Service upon the district clerk did not confer personal jurisdiction over either Klein or Wizman (Appeal of Astafan, 36 Ed Dept Rep 463, Decision No. 13,776; see also, Application of Vendel, 49 id. 361, Decision No. 16,050; Application of Barton, 48 id. 189,

Decision No. 15,832). Thus, the appeal must be dismissed as against them for failure to join necessary parties, insofar as petitioners challenge board resolutions that if annulled would adversely affect their rights.[3]

With respect to Schwartz, Friedman, Weissmandl and Stone (hereinafter collectively referred to as the "Remaining Individual Respondents"), petitioners' affidavits of service indicate that each was personally served as directed by the Joinder Order. Accordingly, I find that service was properly effected upon each of the Remaining Individual Respondents.

However, in their answer, the Remaining Individual Respondents assert that they were not properly joined as parties because they were named only in the revised notice of petition but not in the petition. As noted above, joinder requires that an individual be clearly named as a respondent in the caption and served with a copy of the notice of petition and petition to inform the individual that he or she should respond to the petition and enter a defense. Here, petitioners served a revised notice of petition clearly naming the Remaining Individual Respondents - Schwartz, Friedman, Weissmandl and Stone - as respondents in the appeal, but the first page of the petition was not so revised. In this instance, I find that appropriate notice was provided by naming the Remaining Individual Respondents in the notice of petition which was delivered to them with the petition. Consequently, I find that the Remaining Individual Respondents were properly joined as parties to the appeal.

Respondents contend that the appeal must be dismissed as untimely. An appeal to the Commissioner must be commenced within 30 days from the making of the decision or the performance of the act complained of, unless any delay is excused by the Commissioner for good cause shown (8 NYCRR §275.16; Appeal of Lippolt, 48 Ed Dept Rep 457, Decision No. 15,914; Appeal of Williams, 48 id. 343, Decision No. 15,879).

With respect to petitioners' challenge to the board's July 17 and July 24, 2012 actions approving the appointment

[3] With respect to respondent D'Agostino, named in petitioners' revised notice of petition, there is no evidence of service or attempted service upon him at all. In any event, the Commissioner of Education does not have jurisdiction in this matter over the school district attorney (Education Law §310).

of counsel to defend and the indemnification of legal costs in the Administrative Action, respondents correctly assert that the board approved such defense and indemnification in the Administrative Action at meetings held on July 17, 2012 and July 24, 2012. Petitioners, however, did not commence the instant appeal until October 12, 2012, well beyond the 30-day time period. Similarly, petitioners' challenge to the board's July 24, 2012 action appointing counsel to inquire into certain issues and take necessary steps, including litigation, is outside the required 30-day period.

Petitioners argue that the board's actions constitute a continuing wrong and, therefore, its claims arising from actions of the board on July 17, 2012 and July 24, 2012 are timely. Petitioners are correct only in part.

The continuing wrong doctrine applies when the ongoing action is itself an unlawful action, such as the unlawful employment of an unqualified individual (Appeal of Kippen, 48 Ed Dept Rep 469, Decision No. 15,919), unlawful appointments to a district's shared decision-making team (Appeal of Sadue-Sokolow, 39 Ed Dept Rep 6, Decision No. 14,155), or an improperly constituted professional development team (Appeal of Copenhagen Teachers' Association, et al., 45 Ed Dept Rep 459, Decision No. 15,381). The doctrine does not apply where the specific action being challenged is a single action, inaction or decision and the resulting effects are not intrinsically unlawful (Application of Ayers, 48 Ed Dept Rep 350, Decision No. 15,883; Appeal of a Student with a Disability, 48 id. 146, Decision No. 15,821, judgment granted dismissing petition to review, April 8, 2009, Sup.Ct., Albany Co. [Zwack, J.]).

I do not find that the provision of legal defense to board members is intrinsically unlawful, nor is appointment of counsel to represent a board and commence litigation, if necessary. I find this situation analogous to those in which parties challenge the award of a contract as improper or illegal. In those cases, I have consistently held that the statute of limitations commences upon the award of the contract when the administrative determination becomes final, rather than treating an allegedly improperly awarded contract as creating a continuing wrong (Appeals of Pascazi, 43 Ed Dept Rep 286, Decision No. 14,997; Appeals of American Quality Beverages, LLC, et al., 42 id. 144, Decision No. 14,804). Therefore, I find that the

continuing wrong doctrine does not apply to the board's appointment of counsel for the Administrative Respondents in the Administrative Action or the board's appointment of counsel to inquire into issues and take necessary steps, including litigation, on behalf of the board. Consequently, petitioners' claims arising from those board actions on July 17, 2012 and July 24, 2012, are untimely and must be dismissed.

However, to the extent that petitioners challenge the board's determination to provide indemnification of the legal costs of defense in the Administrative Action, I note that the July 24, 2012 resolution authorizing such states that each board member "shall be fully and unconditionally indemnified" for all costs, expenses, claims, losses or damages incurred in connection with the Administrative Action. Neither Public Officers Law §18 or Education Law §3811 authorize unconditional indemnification of school board members, officers or employees. I conclude that the provision of unconditional indemnification is inherently unlawful and constitutes a continuing wrong. Therefore, I will not dismiss that aspect of petitioners' claim as untimely and dispose of it infra.

Respondents also maintain that petitioners' claims related to the Federal Action and the Attorney General Investigation must be dismissed as untimely because service and joinder of the Remaining Individual Respondents did not occur within 30 days of the boards' respective September 13, 2012 and October 2, 2012 actions pertaining to those matters. However, the Commissioner of Education has discretion to join necessary parties after the expiration of the 30-day time period for commencing an appeal (see e.g., Appeal of Heller, 34 Ed Dept Rep 220, Decision No. 13,288). Here, petitioners timely commenced the appeal as against respondent board. Thereafter, petitioners were directed to serve a copy of the pleadings upon the individual respondents by November 13, 2012, and then by extension, November 16, 2012. Petitioners complied with that requirement. Consequently, in view of the fact that petitioners' pleadings were originally served in a timely fashion, that petitioners served the Remaining Individual Respondents in the time period directed and that any delay is minimal and has not prejudiced the Remaining Individual Respondents, I will excuse petitioners' delay in commencing the appeal as against them (see, Appeal of Heller, 34 Ed Dept Rep 220, Decision No. 13,288) and decline to dismiss

as untimely petitioners' claims pertaining to the Federal Action or the Attorney General Investigation.

Turning to the merits, I must first address the applicability of Public Officers Law §18 and Education Law §3811, which authorize the defense and indemnification of school board members, officers and employees. As reflected in the board resolutions, counsel was appointed by the board in each instance nominally pursuant to Public Officers Law §18. Respondent board contends in its verified answer that this was proper because Public Officers Law §18 controls and that Education Law §3811 is irrelevant to this appeal. I disagree.

Education Law §3811 provides for the defense and indemnification of school board members, officers and employees if they comply with certain procedural steps; the matter arises out of the exercise of their powers or the performance of their duties; and a court or the Commissioner, as the case may be, certifies that the individual appeared to act in good faith with respect to the exercise of his powers or the performance of his duties. The protections afforded under Education Law §3811 were enacted in 1965 and were intended to protect school board members, who serve on a volunteer basis, from the prohibitive expense of having to defend themselves from a variety of claims that could arise during the performance of their duties (see, Office of Local Government's Mem. and Budget Report on Bills Mem., Bill Jacket, L. 1965, ch. 361).

Public Officers Law §18(3) provides for defense and indemnification in any civil action or proceeding arising out of any alleged act or omission which occurred or allegedly occurred while acting within the scope of the individual's employment or duties. The duty to indemnify under this statute, however, does not arise where the injury or damage resulted from intentional wrongdoing or recklessness on the part of the employee (Public Officers Law §18[4][b]).

Public Officers Law §18 was enacted in 1981 and was intended to avoid the "piecemeal approach to enacting defense and indemnification protection for various municipal employees" (Matter of Coker v. City of Schenectady, 200 AD2d 250, 252, lv. granted, 84 NY2d 806, lv. denied, 84 NY2d 1027). Given that Public Officers Law §18 was intended to provide defense and indemnification for

municipal and public employees (other than state employees) who were provided defense and indemnification under a "confusing patchwork" of local enactments (see, Law Revision Commission Mem., Bill Jacket, L. 1981, ch. 277), the Law Revision Commission included a provision in Public Officers Law §18 to eliminate any inconsistency or conflict between its protections and those provided by an existing enactment (see, Recommendation of the Law Revision Commission to 1981 Legislature, pg. 19, Bill Jacket, L. 1981, ch. 277).

Thus, pursuant to Public Officers Law §18 (12), the rights accorded to employees[4] regarding defense and indemnification under the Public Officers Law shall take the place of defense and indemnification provisions provided by another enactment unless the public entity provides that the benefits shall supplement and be in addition to protections conferred by another law. Once adopted by a public entity or board, Public Officers Law §18 normally becomes the exclusive source of an employee's or board member's defense and indemnification rights, but not if the governing body elects to retain existing protections under another enactment by providing that the benefits of Public Officers Law §18 would supplement, or be in addition to, the protections conferred by an existing enactment (Appeal of Percy and Ross, 31 Ed Dept Rep 199, Decision No. 12,619; see also, 1987 Opn. Atty. Gen 82 [Inf.]).

In this case, when the board approved a resolution on January 5, 2011, adopting the protections afforded under Public Officers §18, it expressly stated that such protections shall be in addition to the indemnification provisions available under Education Law §3811 (the "Adopting Resolution"). As a result, I conclude that Education Law §3811 is the primary source of defense and indemnification in this case and protections under Public Officers Law §18 are secondary (Appeal of Percy and Ross, 31 Ed Dept Rep 199, Decision No. 12,619). Had the board intended Public Officers Law §18 to provide its sole source of defense and indemnification, it need not have enacted the Adopting Resolution. In any event, the right to defense is available under either statute and is further discussed in infra.

[4] Public Officers Law §1(b) defines "employee" as including board members, officers and employees.

I will now address petitioners' challenges to the appointment of counsel regarding the Federal Action and the Attorney General Investigation.

I will first review the propriety of the board's determination to provide defense and indemnification to the Remaining Individual Respondents who are defendants in the Federal Action. The gravamen of the Federal Action is that respondent board and the individual defendants routinely acted in contravention of law by settling special education cases by placing students in private religious schools, engaging in manipulative real estate transactions by attempting to sell district property at below market value, and using district funds to purchase religious textbooks. Petitioners assert that these actions were beyond the scope of the individual defendants' public employment or duties and, therefore, they were not eligible for defense at public expense under Public Officers Law §18(3). Petitioners also seek a determination that the individual defendants did not act in "good faith" rendering them ineligible for defense and indemnification pursuant to Education Law §3811.

Respondents argue that the acts alleged in the Federal Action all relate to the board's official actions and to the individual defendants' public employment or duties in their capacity as members of the board, or officers or employees of the district.

As noted above, Education Law §3811, which is found applicable here, provides for the defense and indemnification of school board members, officers and employees if they comply with certain procedural steps and the matter arises out of the exercise of their powers or the performance of their duties. The phrase "arising out of the exercise of his powers or the performance of his duties under this chapter" (Education Law §3811[1]) is equivalent to the term "scope of employment" (Matter of James v. Board of Educ. of the Marathon Cent. School Dist., 42 Misc.3d 1202[A]).

Thus, I must review the complaint in the Federal Action to determine if it alleges that the Remaining Individual Respondents committed the alleged wrongful acts while they were acting within the scope of their duties (see, Matter of Dreyer v. City of Saratoga Springs, 43 AD3d 586, 587; Merrill v. County of Broome, 244 AD2d 590; Polak v. City of Schenectady, 181 AD2d 233; Matter of James v.

Board of Educ. of the Marathon Cent. School Dist., 42 Misc.3d 1202[A]). As the Court in Matter of Dreyer stated, "If the allegations of the complaint suggest that any of the conduct asserted falls reasonably within the scope of employment, the duty to provide a defense is triggered since the duty to defend is extremely broad" (id. at 588). Notably, the determining factor is the conduct as alleged in the complaint, not what the actual conduct may or may not be (id.).

Upon reviewing the original complaint that was before the board when counsel was appointed, I find that the alleged wrongful conduct related to actions taken by the Remaining Individual Respondents in their official capacities as board members. The complaint specifically alleges that the Remaining Individual Respondents, as defendants in that action, "were at all times herein acting under color of state law in the course and scope of their duties and functions as officers and agents of the [district] ... although in a manner ultra vires."

Although petitioners argue that the district's insurance carrier disclaimed coverage because the Federal Action alleged certain intentional wrongful conduct, I am not bound by the determination of a school district's insurance carrier that was interpreting the terms of an insurance policy (see Appeal of Percy and Ross, 31 Ed Dept Rep 199, Decision No. 12,619).

Accordingly, I find that the complaint in the Federal Action alleges conduct arising out of the performance of the Remaining Individual Respondents' duties as board members and the initial appointment of counsel for their defense in the Federal Action was appropriate. However, the ultimate determination whether the conduct charged arises out of the remaining Individual Respondents' performance of their duties thus entitling them to indemnification of their legal costs must be made within the context of the underlying proceedings (see, Matter of Board of Educ. of City School Dist. Of City of Poughkeepsie v. Ambach, 81 Misc.2d 864).

Similarly, petitioners' request that I find that the Remaining Individual Respondents conduct was without good faith and, thus, they may not ultimately be indemnified for their legal defense and costs, is not properly before me in this appeal. Such a determination of whether a board member is eligible for indemnification based on lack of

good faith cannot be made until a final decision is rendered in the underlying action or proceeding. Until a final decision is rendered, there is no factual record on which to base a finding that the board member is disqualified from receiving indemnification. It would be inappropriate and contrary to the interests of judicial economy for me as Commissioner to prejudge the outcome of the Federal Action and I lack jurisdiction to do so (see Appeal of Bach, 33 Ed Dept Rep 452, Decision No. 13,110). As the Commissioner ruled in Appeal of Bach, because the Federal Action is pending in federal court, the issue of whether the Federal Defendants acted in good faith must be determined by that court. Accordingly, I find that petitioners' claims that the Remaining Individual Respondents should, at this juncture, be denied indemnification in the Federal Action based on lack of good faith must be dismissed.

In a similar analysis, I turn to that part of each of the board's July 24, 2012 resolutions that purported to "unconditionally" indemnify the Remaining Individual Respondents in the Administrative Action. The September 13, 2012 resolutions pertaining to the Federal Action also provide for unconditional indemnification. As noted, neither Public Officers Law §18 nor Education Law §3811 authorizes unconditional indemnification.

In this appeal I take administrative notice that respondents request a certificate of good faith in the answers submitted in the Administrative Action. Consequently, the Remaining Individual Respondents in this appeal will require such certificates to receive indemnification for their defense and other costs therein, as will all the respondents in the Administrative Action. Because the question is pending in that action, it cannot be decided separately in this appeal. Similarly, whether indemnification is warranted in the Federal Action will be decided upon conclusion of that underlying action and cannot be addressed here (see, Matter of Board of Educ. of City School Dist. of City of Poughkeepsie v. Ambach, 81 Misc.2d 864; Appeal of Bach, 33 Ed Dept Rep 452, Decision No. 13,110).

Next, I must address petitioners' claims regarding the Attorney General Investigation. As a result of the Attorney General advising board counsel, Albert D'Agostino, that he may be a necessary witness in its investigation of the district, the board determined that it was in the

district's best interest to retain separate counsel for itself and individual board members in connection with the investigation. Consequently, on October 2, 2012, the board appointed counsel prospectively, pursuant to Public Officers Law §18, for the defense and indemnification of any current and former board members and district employees who may be subpoenaed or compelled to testify in the Attorney General Investigation.

Petitioners contend that this was improper because the Attorney General Investigation is not a "civil action or proceeding, state or federal" as contemplated by Public Officers Law §18 (3)(a). I agree. Moreover, Education Law §3811 also applies wherever a board member, officer or employee defends "any action or proceeding" (Education Law §3811[1]), a prerequisite not met here.

Respondents rely on Matter of Hunt v. Hamilton County, 235 AD2d 758, in which it was found that the appointment of counsel to represent an employee called to testify at, or who is the target of, a Grand Jury investigation was proper. However, I note that, pursuant to Criminal Procedure Law, Article 190 (under Title I - Preliminary Proceedings in Superior Court), a Grand Jury is impanelled by a court and constitutes "a part of such court" (CPL §190.05). An Attorney General Investigation does not constitute a part of any court preliminary proceeding and is, thus, distinguishable from Hunt. I note also that the Attorney General has opined, with respect to Public Officers Law §18, that a municipality is not authorized to provide defense for one of its officers or employees before the New York State Division of Human Rights (1997 Opn. Atty. Gen. 24 [Inf.]). I find that the Attorney General Investigation is not an "action or proceeding" as contemplated by Education Law §3811 or Public Officers Law §18.

Moreover, I note that the October 2, 2012 resolution broadly provides that "current and former members, officers and employees shall be fully and unconditionally indemnified ..." in the future, without regard to any particular individual, whether the individual's actions arose out of the exercise of his or her powers or the performance of his or her duties, were within the scope of his or her public employment or duties, or whether the action was undertaken in good faith or constitutes intentional wrongdoing or recklessness - criteria set forth under Education Law §3811 and Public Officers Law §18.

Such broad, unconditional action disregards such criteria, is void as against public policy and cannot be permitted.

To the extent petitioners challenge the reasonableness of the attorneys' fees incurred by the district, I have no authority to rule on such a claim under either Education Law §3811 or Public Officers Law §18.

The legislative history surrounding Education Law §3811 indicates that this issue was a concern when the law was enacted in 1965. In evaluating the law in 1965, the State Comptroller opined that, although the proposed statute did correct some of the objections raised in prior iterations of the statute, it still "makes no provision for review of such costs and expenses" (Dept. of Audit and Control Mem., Bill Jacket, L. 1965, ch. 361). In response, it appears Education Law §3811(2) was added, which states, if the amount of fees incurred under the statute were disputed, it "shall be adjusted by the county judge of any county in which the district" is located. The intent of this provision is clear, as a legislative memorandum indicates that certain safeguards were put in place including "any dispute of the amount claimed shall be adjusted by the county court" (Budget Report on Bills, Bill Jacket, L. 1965, ch. 361; see also, Office for Local Government Mem., Bill Jacket, L. 1965, ch. 361). Therefore, I conclude that I do not have the authority under Education Law §3811 to issue any findings regarding the reasonableness of the fees incurred and such a challenge should be brought in a taxpayer's action in court (see generally, Pappas v. Nyquist, 85 Misc.2d 114).

Nor do I have any authority to review the reasonableness of fees under the Public Officers Law. Public Officers Law §18(3)(c) expressly provides that any dispute regarding "the amount of litigation expenses or the reasonableness of attorneys' fees shall be resolved by the court upon motion or by way of a special proceeding."

Moreover, even if I had the authority to rule on such an issue, the claims are premature. Petitioners cite only to counsels' alleged hourly rate, which they assert is excessive. However, determining reasonableness of attorneys' fees requires analysis of several factors at the conclusion of the underlying action or proceeding. In the context of determining the reasonableness of an award of attorneys' fees, there is a long tradition of courts considering factors such as time and labor required, the

difficulty of the questions involved, the skill required to handle the case, the lawyer's experience, ability and reputation, the amount involved and benefit to the client , the contingency or certainty of compensation, in addition to the customary fees for similar services and the results obtained (see, e.g., Matter of Freeman, 34 NY2d 1, 6; Matter of Board of Educ. of Northport-E. Northport Union Free School Dist. v. Ambach, 90 A.D.2d 227, 242, aff'd, 60 N.Y.2d 758, cert. den. 465 U.S. 1101. Though there is a paucity of case law on the issue, it is logical to apply a similar analysis in assessing the reasonableness of attorneys' fees for purposes of defense and indemnification, and until a final decision is rendered in the underlying action or proceeding, such an analysis of the reasonableness of fees cannot be made.

To the extent petitioners challenge the manner in which the board conducted the September 13, 2012 vote to appoint counsel for the Remaining Individual Respondents, such challenge lacks merit. Petitioners assert that any member of the board for whom counsel would be appointed should have abstained from voting on all such resolutions. Petitioners cite no authority for such proposition and, indeed, there is none.

Finally, Public Officers Law §107 vests exclusive jurisdiction over complaints alleging violations of the Open Meetings Law in the Supreme Court of the State of New York, and alleged violations thereof may not be adjudicated in an appeal to the Commissioner (Appeal of McColgan and El-Rez, 48 Ed Dept Rep 493, Decision No. 15,928; Applications and Appeals of Del Rio, et al., 48 id. 360, Decision No. 15,886). Therefore, I have no jurisdiction to address the Open Meetings Law allegations raised in this appeal.

In light of the above disposition, I need not address the parties' remaining contentions.

Although I am constrained to dismiss the appeal, except in part, for the reasons discussed above, I note that petitioners do not bring this appeal as an application pursuant to Education Law §306 seeking removal of board members based on an alleged breach of fiduciary duty for authorizing the payment of high hourly rates to a law firm that appear to be in excess of customary rates for similar legal services at a time when the school district was and is in fiscal crisis. The relief requested in the petition

does not include removal of individual respondents, and the petition does not include the notice required pursuant to 8 NYCRR §277.1(b). Accordingly, such a claim is not properly before me in this appeal, and nothing in this decision should be construed to preclude a future proceeding under Education Law §306 on such basis. In the interim, the individual respondents accept defense and indemnification at their own risk, and if ultimately determined not to have acted in good faith or not to be entitled to full indemnification because their claimed attorneys' fees are determined not to be reasonable, they will be individually liable to the school district for any amounts paid by the district in excess of the amount lawfully payable under Education Law §3811 and, where applicable, Public Officers Law §18.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that that September 13, 2012 resolution of the Board of Education of the East Ramapo Central School District relating to defense and indemnification of Daniel Schwartz in the Federal Action is annulled insofar as it provides for unconditional indemnification; and

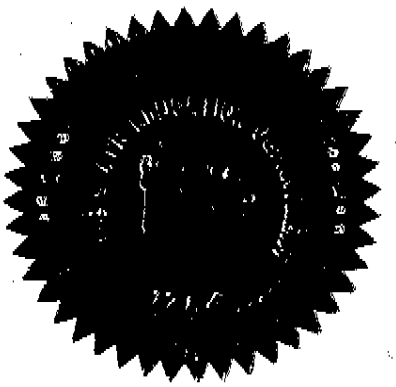
IT IS FURTHER ORDERED that that September 13, 2012 resolution of the Board of Education of the East Ramapo Central School District relating to defense and indemnification of Moses Friedman in the Federal Action is annulled insofar as it provides for unconditional indemnification; and

IT IS FURTHER ORDERED that that September 13, 2012 resolution of the Board of Education of the East Ramapo Central School District relating to defense and indemnification of Yehuda Weissmandl in the Federal Action is annulled insofar as it provides for unconditional indemnification; and

IT IS FURTHER ORDERED that that September 13, 2012 resolution of the Board of Education of the East Ramapo Central School District relating to defense and indemnification of Richard Stone in the Federal Action is annulled insofar as it provides for unconditional indemnification; and

IT IS FURTHER ORDERED that the October 2, 2012 resolution of the Board of Education of the East Ramapo

Central School District relating to defense and indemnification of unnamed individuals in an Attorney General Investigation is hereby annulled insofar as it applies to the Remaining Individual Respondents.



IN WITNESS WHEREOF, I, John B. King, Jr., Commissioner of Education of the State of New York, for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 18th day of November 2014.

Commissioner of Education