

**Matter of Sagal-Cotler v Board of Educ. of the City  
School Dist. of the City of NY**

2010 NY Slip Op 32657(U)

September 22, 2010

Supreme Court, New York County

Docket Number: 104406/10

Judge: Carol E. Huff

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PART 32

PRESENT: CAROLE E. HUFF  
Justice

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and Office of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Index Number : 104406/2010  
MAGAL-COTLER, DEBORAH  
BOARD OF EDUCATION  
SEQUENCE NUMBER : 001  
ARTICLE 78

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this \_\_\_\_\_

motion is decided in accordance  
with accompanying memorandum decision

not been entered by the County Clerk and Office of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: SEP 22 2010

CEH  
**CAROLE E. HUFF**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASONS

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 32

-----X

In the Matter of : Index No. 104406/10

DEBORAH SAGAL-COTLER, :

Petitioner, :

- against -

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK, :

JOEL I. KLEIN, as Chancellor of the City School District of the City of New York, and :

THE CITY OF NEW YORK, :

Respondents, :

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules. :

-----X

CAROL E. HUFF, J.:

In this Article 78 petition, Petitioner seeks an order directing respondents to provide her with legal representation, indemnification, reimbursement for attorneys' fees, and to hold her harmless for any financial losses resulting from the civil action, Watson v City of New York, Index No. 17534/09 (Sup Ct, Kings Cty). Respondents oppose the petition on the ground that the statute Petitioner relies upon, Education Law § 3028, is inapplicable.

The uncontested facts are that on December 22, 2008, Petitioner, a paraprofessional working at the Roy Campanella Occupational Training Center (P.S. 721), was assigned the duty of supervising and escorting a class to the school cafeteria. One of the students began singing aloud in the school elevator and refused to accompany Petitioner to the cafeteria. Petitioner

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requested that the student accompany her at least three times, and then “yelled [the student’s] name and struck him in the face.” Verified Petition, ¶ 13. As a result of this incident, the student’s mother commenced a civil action (Watson) against Petitioner. Petitioner filed a request for legal representation in the matter, but was denied in a letter from the City of New York Law Department dated December 3, 2009.

Petitioner contends that she is entitled to relief pursuant to Education Law § 3028, titled “Liability of school district for cost and attorney’s fees of action against, or prosecutions of, teachers, members of supervisory and administrative staff or employees, and school volunteers,” which provides, in relevant part:

[E]ach board of education, trustee or trustees in the state shall provide an attorney or attorneys for, and pay such attorney’s fees and expenses necessarily incurred in the defense of a teacher, member of a supervisory or administrative staff or employee, or authorized participant in a school volunteer program in any civil or criminal action or proceeding arising out of disciplinary action taken against any pupil of the district while in the discharge of his duties within the scope of his employment or authorized volunteer duties.

Respondents argue that Education Law § 2560 controls:

. . . [I]n a city of having a population of one million or more, the members of each community school board in such city, the teaching or supervising staff, officer or employee of such board . . . shall be entitled to legal representation and indemnification pursuant to the provisions of . . . section fifty-k of the general municipal law.

General Municipal Law § 50-k(2) provides for representation and indemnification for such persons “while the employee was acting within the scope of his public employment and in the discharge of his duties and was not in violation of any rule or regulation of the agency at the time the alleged act or omission occurred.”

Petitioner concedes that her action violated board rules against corporal punishment.

Therefore, if § 50-k(2) were to apply, she would not be entitled to the relief she seeks.

“It is well settled that, in a conflict between a statute of general applicability and one of specific applicability, the special statute controls.” Board of Managers of Park Place Condominium v Town of Ramapo, 237 AD2d 537 (2d Dept 1998). Education Law § 3028 is the more specific statute, because it provides specifically for situations involving disciplinary action in an education context. This conclusion is borne out by the First Department, in Timmerman v Bd. of Educ. of the City Sch. Dist. of the City of New York, 50 AD3d 592 (1<sup>st</sup> Dept 2008).

Applying § 3028 in a New York City case, the Court found that since the “proceeding against petitioner clearly arose out of disciplinary actions that he took against pupils, respondents should reimburse petitioner for the attorneys' fees and expenses he incurred in defending himself.” Id. at 593. The case involved alleged sexual abuse. See also Cutler v Poughkeepsie City School Dist., 73 AD2d 967 (2d Dept 1980) (applying § 3028 in another case of alleged sexual abuse).

A remaining question is whether Petitioner acted within the scope of her employment or duties during the incident. In Blood v Bd. of Educ. of the City of New York, 121 AD2d 128 130 (1<sup>st</sup> Dept 1986), the Court found that, although in violation of regulations, a teacher acted within the scope of her duties where, angered by a student, she swung a book bag that injured another student:

Surely, it is not so unusual an occurrence that a teacher loses her temper with her class. Indeed, displays of anger in the classroom cannot be regarded as other than natural and sometimes necessary incidents of a teacher's work. Nor can it be reasonably expected that a teacher's anger will always be well gauged to the occasion and unaccompanied by impulsive behavior. Such behavior, although undesirable, is a generally foreseeable eventuality of teaching and, as such, must be deemed within the scope of a teacher's employment (Rivjello v Waldron, 47 NY2d 297 (1979)).

Applying this language to the uncontested facts, Petitioner's conduct fell within the scope of her employment.

In an Article 78 proceeding, "The standard of judicial review . . . is whether the result reached was arbitrary and capricious or without a rational basis in the administrative record." Nelson v Roberts, 304 AD2d 20, 23 (1st Dept 2003). Because respondents' misapplication of General Municipal Law § 50-k(2) was arbitrary and capricious, that part of the petition seeking legal representation and reimbursement for attorneys' fees in the Watson case is granted. However, her claims for indemnification and to be held harmless are premature and are denied without prejudice pending the outcome of the Watson case.

Accordingly, it is .

ADJUDGED that the part of the petition seeking legal representation and reimbursement for attorneys' fees in the case, Watson v City of New York, is granted; and it is further

ADJUDGED that the parts of the petition seeking indemnification and to be held harmless are denied without prejudice; and it is further

ORDERED that, pursuant to Education Law § 3028, Corporation Counsel is directed to file a notice of appearance for Petitioner in the Watson action, or make other arrangements for her representation in that action, within 20 days of service of a copy of this Order and Judgment with notice of entry; and it is further

ORDERED that respondents shall reimburse Petitioner Deborah Sagal-Cotler for all reasonable legal fees incurred in her defense of the Watson action, and the issue of the amount due to Petitioner from Respondents is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties,

as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the issue; and is further

ORDERED that entry of a final judgment is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Special Referee (Room 119) to arrange a date for the reference to a Special Referee.

Dated: SEP 22 2010

  
**CAROL E. HUFF**  
J.S.C.

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