

**Matter of Zampieron v Board of Educ. of the City  
School Dist. of the City of N.Y.**

2010 NY Slip Op 33655(U)

December 10, 2010

Supreme Court, New York County

Docket Number: 109677/2010

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 109677/2010  
**ZAMPIERON, RICHARD**  
 vs.  
**BOARD OF EDUCATION**  
 SEQUENCE NUMBER : 001  
 ARTICLE 78

INDEX NO. \_\_\_\_\_  
 MOTION DATE 12/21/10  
 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 \_\_\_\_\_

**UNFILED JUDGMENT**  
 This judgment has not been entered by the County Clerk and notice of entry cannot be given thereon. To obtain entry, counsel or other representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

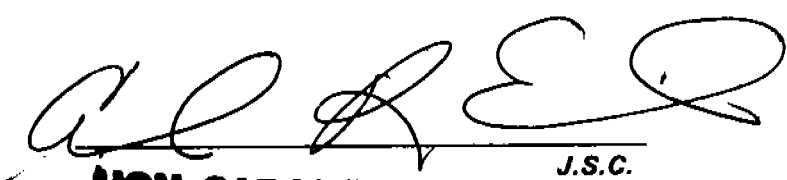
In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED and ADJUDGED that petitioner's request for a judgment (1) declaring that respondents' denial of legal representation and indemnification of expenses he incurred in defense of a civil proceeding was arbitrary, capricious and contrary to law and an abuse of discretion; (2) directing that respondents provide him with legal representation in the civil proceeding pursuant to Education Law §§ 2560 and 3028 and General Municipal Law § 50-k; and (3) directing that respondents reimburse him attorney's fees and defense costs pursuant to Edu. Law §§ 2560, 3023, and 3028 and GML § 50-k, is denied, and the petitioner is dismissed; and it is further

ORDERED that respondents serve a copy of this order with notice of entry upon all petitioner within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 12/10/10

  
 \_\_\_\_\_  
 J.S.C.

**HON. CAROL EDMEAD**

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK:PART 35

-----X  
In the Matter of RICHARD ZAMPIERON,

Index No. 109677/2010

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,

-----X  
HON. CAROL R. EDMEAD, J.S.C.

**UNFILED JUDGMENT**

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

MEMORANDUM DECISION

In this Article 78 proceeding against the Board of Education of the City School District of the City of New York (the "DOE"), Joel I. Klein, as Chancellor of the City School District of the City of New York, and the City of New York (the "City") (collectively "respondents"), petitioner Richard Zampieron ("petitioner") seeks a judgment (1) declaring that respondents' denial of legal representation and indemnification of expenses he incurred in defense of a civil proceeding was arbitrary, capricious and contrary to law and an abuse of discretion; (2) directing that respondents provide him with legal representation in the civil proceeding pursuant to Education Law ("Edu. Law") §§ 2560 and 3028 and General Municipal Law ("GML") § 50-k; and (3) directing that respondents reimburse him attorneys' fees and defense costs pursuant to Edu. Law §§ 2560, 3023 and 3028 and GML § 50-k.<sup>1</sup>

*Factual Background*

Petitioner is a tenured physical education teacher assigned to Frederick Douglas Academy

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<sup>1</sup> Petitioner sets forth no substantive arguments explaining how Edu. Law §§ 2560 and 3023 were violated, and only addresses Edu. Law § 3028 and GML § 50-k in his memorandum of law.

VII ("PS 514") in Brooklyn. According to petitioner, on January 20, 2009, he was overseeing a lunch period, when he went to a stairwell leading toward the lunch room to check on a commotion he heard. There he found a student, Molink McMichael ("McMichael"), blocking other students from exiting the stairwell. Petitioner repeatedly told McMichael to move his arm to allow the students to exit the stairwell, and McMichael refused. Petitioner then placed his hand on McMichael's hand to move it from the handrail. However, McMichael spun around petitioner, and held petitioner in a tight bear hug from behind. Petitioner managed to break free and shove McMichael away. When McMichael made another move toward petitioner, petitioner again shoved him away.

The record indicates that three days later, petitioner and his union representative met with the Assistant Principal Perry Rainey ("AP Rainey") in connection with his investigation of the incident.<sup>2</sup> After interviewing the parties involved and witnesses, AP Rainey concluded (in a report dated January 26, 2009), that what started out as "playing" led to McMichael wrapping his arms around petitioner. After McMichael let go of petitioner (at petitioner's request), McMichael began walking away toward the cafeteria. Petitioner is stated as having told AP Rainey that he pushed McMichael to "get some space" and the parties exchanged words. Based on the accounts of the remaining witnesses, petitioner pushed McMichael into the cafeteria door, causing McMichael to sustain a bruise to the corner of his left eye. To AP Rainey, petitioner was "embarrassed or upset that [McMichael] appeared to have gotten the upper hand when the two of them were tussling."

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<sup>2</sup> The incident was reported to the Office of Special Investigations, and forwarded to the Principal for investigation.

AP Rainey later advised petitioner (by letter dated January 28, 2009) of his conclusions and that he “violated Chancellor’s Regulation A-420 which prohibits corporal punishment.”

Thereafter, McMichael’s mother commenced a personal injury action against petitioner, the City, and the DOE (the “underlying action”), and petitioner requested that respondents defend and indemnify him in the underlying action. By letter dated April 2, 2010, respondents denied his request, stating that a review was conducted pursuant to GML § 50-k and “[w]e have concluded after careful consideration that we are unable to represent you in this matter” (the “April 2, 2010 letter”).

In support of his petition, petitioner argues that respondents violated Edu. Law §§ 2560 and 3028, and GML § 50-k in denying him legal representation.

In his first cause of action, petitioner claims that as a tenured pedagogue for the DOE, he is entitled to legal representation and indemnification for legal fees pursuant to Edu. Law § 3028. Petitioner took disciplinary action against McMichael because of McMichael’s failure to heed petitioner’s requests, and petitioner imposed such discipline while in the discharge of his supervising duties as a teacher. Any disciplinary action petitioner took was within the scope of his employment and part of his duties as a teacher. The underlying action arose out of the disciplinary action petitioner took against McMichael. There is no exclusion or exception to respondents’ obligation to defend and indemnify petitioner based on the specific conduct at issue. Thus, respondents’ failure to comply with its obligations under Edu. Law § 3028 constitutes an abuse of discretion and is arbitrary and capricious.

In his second cause of action, petitioner claims that by refusing to provide for petitioner’s defense in the underlying action, and by failing to set forth any reason for this refusal,

respondents acted in an arbitrary and capricious manner, and violated GML § 50-K. GML § 50-K places an affirmative duty upon the City to defend and indemnify an employee while that employee was acting within the scope of his employment and not in violation of any rule or regulation at the time of the alleged incident. Respondents failed to demonstrate that petitioner was not acting within the scope of his employment and in the performance of his duties when the incident occurred, as required to properly refuse him legal representation. In the underlying action, it is alleged that petitioner was employed by respondents "at all times" referenced therein and that petitioner's actions, with respect to McMichael, occurred "during the course of [petitioner's] employment" with the DOE. Further, respondents failed to provide any factual basis for their denial as required, and such failure is arbitrary, capricious, and an abuse of discretion. Had respondents carefully considered the facts and circumstances of the underlying action, as claimed in the April 2, 2010 letter, respondents would have known that petitioner was acting within the scope of his employment and in the performance of his duties. The April 2, 2010 letter does not attribute respondents' denial to any violation of any rule or regulation at the time the alleged incident occurred. Even assuming that petitioner's actions violated a rule or regulation, the scope of employment has been interpreted by the First Department to include many actions which violate an employer's rule and regulations. It was foreseeable that in the course of petitioner's duties, he may have needed to take disciplinary action against a student, and the discipline of a student is a normal, customary part of a pedagogical employee's employment. Thus, respondents had no basis to determine that petitioner acted outside the scope of his employment at the time of the incident.

In his third cause of action, petitioner alleges that respondents' failure to indemnify him

for any judgment or settlement violated GML § 50-K(3).

In opposition, respondents initially argue that Edu. Law § 3028 concerning generally the liability of “school district[s] for cost and attorneys’ fees” is inapplicable. Edu. Law § 2560, concerning the liability of “board of education and community school boards in a city having a population of one million or more. . .,” such as the City herein, provides legal representation subject to GML §50-k, which in turn, conditions such representation on a finding by the Corporation Counsel that no violation of a DOE rule or regulation occurred. Unlike section 3028 (which was not amended after 1977), section 2560 was amended in 1979 to incorporate GML § 50-k. Since the prior, general statute, Edu. Law § 3028, applicable to the State of New York, conflicts with the later specific statute, Edu. Law § 2560, applicable the City, the latter statute applies to the subject determination. Legislative history demonstrates that section 2560 was intended to supersede section 3028. Further, respondents argue, petitioner does not address section 2560.

Respondents argue that their determination pursuant to GML § 50-K and Edu. Law § 2560 was not arbitrary and capricious, but rationally based on Corporation Counsel’s review of the April 2010 report. The April 2010 report found that petitioner violated Chancellor’s Regulation A-420 prohibiting the use of corporal punishment by a teacher. Respondents point out that petitioner concedes that representation is unavailable where a City employee violates a rule or regulation, and fails to address the fact that he violated the above Regulation. Further, his physical altercation with and intentional actions against McMichael are distinguishable from the cases in which the teacher was found to be within the scope of employment. Nor should petitioner’s conduct be construed as disciplinary action, since it arose after petitioner’s tussle

with McMichael. Also, petitioner is not entitled to representation under any of the sections he cited because his conduct did not amount to disciplinary action taken while in the discharge of his duties within the scope of his employment. The purpose of excluding representation of an employee who violated a rule or regulation is to avoid the conflict of interest that would result if both the City and the employee are named defendants in an action, and defendants take contrary positions on whether misconduct has occurred. In such instance, the Corporation Counsel, who owes its first allegiance to the City, cannot represent the employee if the employee's defense is contrary to the City's position. Here, the underlying action names petitioner, the City and DOE.

Nor is respondents' determination arbitrary or capricious for failure to state the basis for the denial. The standard in an Article 78 proceeding is whether the determination lacks a factual basis.

Respondents also argue that indemnification under GML § 50-K is unwarranted, since petitioner did not allege that he retained an attorney or incurred any legal expenses. Nor is there any statutory right to reimbursement of private legal fees where the Corporation Counsel declines representation; GML § 50-k only authorizes representation by Corporation Counsel. Any determination as to indemnification is also premature, in the absence of any judgment or settlement. Respondents also point out that the April 2010 letter does not make any reference to indemnification.

Petitioner is not entitled to be saved from financial loss under Edu. Law § 3023, since he does not make any arguments in his petition and memorandum of law under this statute.

In reply, petitioner argues that caselaw, including two trial court decisions,<sup>3</sup> hold that Edu. Law § 3028 applies to the DOE. None of the terms and provisions of Edu. Law § 3028 exclude its application to school districts in cities with populations of more than one million inhabitants. In addition, Edu. Law § 3028 is limited to actions arising solely out of disciplinary action taken against a student, and does not include an indemnification provision. A careful reading of GML § 50-k illustrates that GML § 50-k does not impair any rights under State or Federal law. Further, Edu. Law § 3028 is more specific in scope than Edu. Law § 2560, in that section 3028 does not provide indemnification, but only defense and defense costs, and only for an action arising from disciplinary action taken against a student; section 2560 does not contain any such limitation. Further, the recommendations and proposed amendments in the legislative history cited by respondents were never enacted. Thus, Edu. Law § 2560 does not apply to respondents to the exclusion of Edu. Law § 3028.

Petitioner also argues that the two sections do not conflict with each other; 3028 applies to civil and criminal actions arising out of disciplinary action taken against a pupil whereas 2560 applies to civil actions arising from an employee's action in the scope of employment.

Petitioner maintains that he is entitled to representation even if his conduct violated the rules and regulations, since Edu. Law § 3028 does not exclude employees whose conduct may be in violation of the rules or regulations. Chancellor Regulation A-420 defines corporal punishment as "any act of physical force upon a pupil for the purpose of punishing that pupil." Therefore, in determining that petitioner violated Chancellor Regulation A-420, AP Rainey

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<sup>3</sup> Petitioner submits *Morel v City of New York, et al.*, (116668/2009) (Solomon, J.), and *Matter of Deborah Sagal-Cotler* (Index No. 104406/2010) (Huff, J).

ultimately found that petitioner's act of physical force against McMichael was for the purpose of punishing him. Further, courts have interpreted the scope of employment broadly to include many actions, such as striking students, which violate an employer's rules.

Petitioner argues that he is entitled to be saved from financial loss under Edu. Law § 3023. Edu. Law § 3023 permits school district employees to seek defense and indemnification from financial loss arising from an act of the employee that resulted in another's bodily injury where the employee, such as petitioner herein, was acting within the scope of his or her employment.

And, if the Court finds that indemnification is premature, petitioner seeks leave to file a plenary action for indemnification upon the entry of judgment or settlement in the underlying action, pursuant to Edu. Law § 3023 and GML § 50-k.

In response, respondents contend that the two cases submitted by petitioner have little precedential value since (1) they are not published in the official reports, (2) respondents in those two cases did not argue, as they do here, that GML § 50-k applied, and (3) respondents are appealing the two decisions. Respondents contend that in *Morel*, they focused on whether petitioner therein had acted outside the scope of his employment, and not whether there was a conflict between Edu. Law § 2560 and Edu. Law § 3028 or whether Edu. Law § 2560 or Edu. Law § 3028 controlled. And, although respondents argued, in *Sagal-Cotler*, that Edu. Law § 2560 (and GML § 50-k) applied, they did not explain the purpose and background of such statutes. Petitioner mischaracterized respondents' arguments and the law, and fails to acknowledge that Edu. Law § 2560 only applies to DOE because the City of New York is the only city within the State of New York with a population of a million or more residents; thus, §

2560 is not a “general” statute.

In a sur-reply, petitioner argues that the cases cited by respondents support petitioner’s position, and even if GML § 50-k controls, petitioner is still entitled to the relief sought. And, the two Supreme Court cases, which were directly on point, were provided as persuasive authority.

*Discussion*

This court’s review of DOE’s determination consists of whether the determination was arbitrary and capricious or an abuse of discretion (*Matter of Pell v Board of Ed.*, 34 NY2d 222, 356 NYS2d 833 [1974]; see *Cummins v New York City Dept. of Educ.*, 26 Misc 3d 122, 907 NYS2d 99 [Sup Ct, New York County 2010]; *In re Ronga*, 23 Misc 3d 1103 [Sup Ct, New York County 2009]). An action is arbitrary and capricious, or an abuse of discretion, when the action is taken “without sound basis in reason and . . . without regard to the facts” (*Pell* at, 231). Rationality is the key in determining whether an action is arbitrary and capricious or an abuse of discretion (*Pell*, at 231). The court’s function is completed on finding that a rational basis supports an agency’s determination (*Howard v Wyman*, 28 NY2d 434, 438 [1971]). Further, where the agency’s interpretation is founded on a rational basis, that interpretation should be affirmed even if the court might have come to a different conclusion (*Mid-State Management Corp. v New York City Conciliation and Appeals Board*, 112 AD2d 72 [1<sup>st</sup> Dept 1985], *affd* 66 NY2d 1032 [1985]).

“Judicial review of the propriety of any administrative determination is limited to the grounds invoked by the agency in making its determination (*Missionary Sisters of Sacred Heart, Ill. v New York State Div. of Housing and Community Renewal*, 283 AD2d 284, 288, 724 NYS2d

742 [1<sup>st</sup> Dept 2001]; *Gill v Hernandez*, 22 Misc 3d 390, 865 NYS2d 843 [Sup Ct, New York County 2008] (“A court reviewing an Article 78 proceeding must judge the propriety of an administrative action solely on the reasons cited by the administration”) *citing Scherbyn v Wayne-Finger Lakes Bd. of Coop. Educ. Servs.*, 77 NY2d 753, 758, 570 NYS2d 474 [1991]).

Here, respondents denied petitioner’s request for representation pursuant to GML § 50-k, and no other statutory basis was provided. There was no denial pursuant to Edu. Law § 3028, and there is no indication that petitioner requested that respondents reconsider his application for representation pursuant to Edu. Law § 3028 subsequent to his receipt of respondents’ April 2, 2010 denial letter. Therefore, this Court’s initial review is limited to whether respondents’ “determination” to deny petitioner’s request was affected by an error of law, or was arbitrary and capricious or an abuse of discretion pursuant to GML § 50-k.

In this regard, Edu. Law § 2560, entitled “Liability of board of education and community school boards in a city having a population of one million or more inhabitants,” states the following, in pertinent part:

1. Notwithstanding any inconsistent provision of law, general, special or local, or the limitation contained in the provisions of any city charter, any duly appointed *member of the board of education in a city 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 and of each such community school board, member of a committee on special education or subcommittee thereof or authorized participant in the school volunteer program in such city shall be entitled to legal representation and indemnification pursuant to the provisions of, and *subject to the conditions, procedures and limitations contained in [GML § 50-k]* . . . .  
(Emphasis added).

GML § 50-k(2) provides, in relevant part:

. . . the city [of New York]<sup>4</sup> shall provide for the defense of an employee of any agency in any civil action or proceeding . . . arising out of any alleged act or omission which the corporation counsel finds occurred 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 his agency at the time the alleged act or omission occurred.* . . . (Emphasis added).<sup>5</sup>

Petitioners' reliance on Edu. Law § 3028 is misplaced. To the extent Edu. Law § 3028 conflicts with GML § 50-k(2), GML § 50-k(2) must control.

Edu. Law § 3028 provides the following, in pertinent part:

Notwithstanding any inconsistent provision of any general, special or local law, or the limitations contained in the provisions of any city charter, *each 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 [sic] 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.*(Emphasis added).

“[W]here two statutes cannot be harmonized the subsequent provision prevails over the pre-existing and irreconcilably conflicting provision” (*Tyson v Roswell Park Cancer Institute Corp.*, 4 Misc 3d 556, 780 NYS2d 704 [N.Y.Ct.Cl. 2003] *citing* 708 McKinney's Cons. Laws of N.Y., Book 1, Statutes § 398), and a prior general statute ordinarily must yield to a later specific or special statute (*Tyson, citing Erie County Water Authority v Kramer*, 4 AD2d 545, 550, 167 NYS2d 557 [4<sup>th</sup> Dept 1957], *affd.* 5 NY2d 954, 184 NYS2d 833 [1959]; *Dutchess County Dept.*

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<sup>4</sup> GML § 50-k(1)(b) defines “City” as “the city of New York.”

<sup>5</sup> As to indemnification, GML § 50-k(3) provides, in pertinent part:

The city shall indemnify and save harmless its employees in the amount of any judgment obtained against such employees . . . , or in the amount of any settlement of a claim . . . provided that the act or omission from which such judgment or settlement arose occurred 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 his agency at the time the alleged damages were substantiated;* . . . (Emphasis added).

*of Social Services ex rel. Day v Day*, 96 NY2d 149, 726 NYS2d 54 [2001]; *see also, Bluebird Partners, L.P. v First Fidelity Bank, N.A.*, 297 AD2d 223, 746 NYS2d 475 [1<sup>st</sup> Dept 2002]).

As between Education Law § 2560(1) and § 3028, section 2560(1) grants teachers in a city having a population of one million or more the right to defense (pursuant to the provisions of GML § 50-k), and section 3028, on the other hand, imposes a duty upon the “board of education” generally to provide a representation where an action arises out of disciplinary action taken by a teacher against a student while in the discharge of his or her duties within the scope of his employment.

It may be stated that a teacher employed by a board of education is entitled to representation pursuant to the terms of both Edu. Law § 2560 and Edu. Law § 3028. However, upon a closer reading, Edu. Law § 2560 applies specifically to employees of a board of education in cities having a population of more than one million residents (*i.e.*, New York City), and expressly excludes, by reference to GML §50-k, employees who have violated a “rule or regulation of his agency” (*see Inglis v Dundee Cent. School Dist. Bd. of Educ.*, 180 Misc 2d 156, 687 NYS2d 866 [Sup Ct, Yates County 1999] (stating that the “limitation imposed by the legislature under [GML] § 50-k(2), involving civil actions against employees of the City of New York” excludes representation if the employee violated a rule or regulation; Edu. Law § 3028 “does not provide that representation is excluded if [an] employee has violated a rule or regulation of the Education Department of the State of New York)).

Read together, it appears that a board of education has a duty to provide legal representation to a teacher where an action against the teacher arises out of disciplinary action taken by the teacher against a student while in the discharge of his or her duties within the scope

of his employment, pursuant to 3028, *unless*, such teacher is a *member of the board of education in a city having a population of one million or more* pursuant to section 2560 and did not violate “any rule or regulation of his agency” pursuant to GML §50-k. Since Edu. Law 2560 and GML § 50-k) circumscribe the duty of a board of education to provide representation to a teacher in New York State, this Court finds that Edu. Law § 2560, is a specific statute, and thus, governs petitioner’s right to legal representation by the respondents.

In *Morel v City of New York, et al.* (Solomon, J.), plaintiff, a tenured teacher, challenged the respondents’ denial of legal representation also pursuant to GML § 50-k in an action in which plaintiff was accused of punching a student. Petitioner, like petitioner herein, sought relief from the Court pursuant to GML § 50-k *and* Edu. Law §§ 3028. The Supreme Court held that Edu. Law § 3028 was a specific statute, which “carved out an exception to GML 50-k(2) for claims arising a teacher’s disciplinary actions. The Court held that Edu. Law § 3028 “is the controlling statute” and the “only ground upon which representation can be refused is scope of employment.” (p. 4). Similarly, the Court in *Matter of Deborah Sagal-Cotler* (Huff, J), a paraprofessional requested legal representation in a matter resulting from an incident in which the paraprofessional struck a student in the face. Petitioner cited to § 3028, while respondents cited to § 2560. The Court held that Edu. Law § 3028 “is the more specific statute, because it provides specifically for situations involving disciplinary action in an education context.” (p. 3), and proceeded to address the question of whether petitioner acted within the scope of her employment or duties during the alleged incident. While persuasive, this Court opines that the greater restrictions placed by Edu. Law § 2560, and by incorporation GML § 50-k, upon a New York State’s teacher’s right to legal representation render § 2560 more “specific” in nature, and

thus controlling herein.

The case cited by petitioner, *Timmerman v Board of Educ. of City School Dist. of City of New York* (50 AD3d 592, 856 NYS2d 103 [1<sup>st</sup> Dept 2008]) is not controlling. The trial court decision (reversed on appeal), indicates that petitioner therein called the parents of three female students to report their disruptive behavior in the classroom. A few days later, the students reported to school officials “that petitioner had touched them inappropriately.” The following day, petitioner was arrested and then arraigned on charges of, *inter alia*, sexual abuse in the first, second and third degrees. In response to petitioner’s request for legal representation, respondent DOE stated that petitioner’s “criminal proceeding does not fall within the scope of Education Law § 3028.” In the ensuing Article 78 proceeding to compel representation, the trial court held that “the Board had a reasonable basis to determine that the proceeding against petitioner did not arise from disciplinary conduct. [O]n its face, the criminal action arose from allegations that petitioner inappropriately touched two of his students, not from allegations that petitioner called their parents or took any other disciplinary action against them. Thus, when approaching the question of reimbursement, the Board reasonably determined that the criminal proceeding fell outside the scope of Education Law § 3028. The behavior underlying the charges against petitioner could not be said to have been intended as disciplinary action or to have been undertaken ‘while in the discharge of his duties within the scope of his employment.’” On appeal, however, the First Department reversed, stating “since the record shows that the criminal 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.” Unlike herein, the DOE denied representation pursuant to GML § 50-k, not

Edu. Law § 3028, and neither the trial court nor the First Department addressed the issue of whether GML § 50-k applied.

Here, the Corporation Counsel has the statutory authority to determine whether or not the subject “act or omission ... occurred 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 [his] agency at the time the alleged act or omission occurred” (*Perez v City of New York*, 43 AD3d 712, 841 NYS2d 559 [1<sup>st</sup> Dept 2007] citing § 50-k[2]).

The Corporation Counsel’s determination is amply supported by the record. AP Rainy’s January 26, 2009 report, request for representation,<sup>6</sup> and subsequent letter to petitioner, indicates that petitioner violated Chancellor’s Regulation A-420, which prohibits corporal punishment.

Specifically, Chancellor’s Regulation A-420 defines corporal punishment as follows:

(2) . . . corporal punishment means *any act of physical force upon a pupil for the purpose of punishing that pupil, except as otherwise provided in paragraph (3) of this subdivision.*

(3) In situations in which alternative procedures and methods not involving the use of physical force cannot reasonably be employed, *nothing contained in this section shall be construed to prohibit the use of reasonable physical force for the following purposes:*

(i) *to protect oneself from physical injury;*

(ii) *to protect another pupil or teacher or any person from physical injury;*

(iii) *to protect the property of the school, school district or others; or*

(iv) *to restrain or remove a pupil whose behavior is interfering with the orderly exercise and performance of school or school district functions, powers and duties, if that pupil has refused to comply with a request to refrain from further disruptive acts.*

The April 2010 report recites that AP Rainy reviewed the accounts by McMichael, five witnesses, and petitioner. AP Rainy found that the witnesses were credible and consistent in

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<sup>6</sup> Petitioner’s application for legal representation includes a section completed by Principal Tamika Matheson, in which she notes that petitioner violated “CRA-420” and was given a disciplinary letter in connection with the incident.

several respects. Based on the investigation, AP Rainy found that McMichael was initially blocking the stairwell and petitioner asked McMichael to stop. The parties began to “tussle,” perhaps playing at first; however, after McMichael wrapped himself around petitioner, petitioner asked McMichael to let him go, to which McMichael complied. Thereafter, *when McMichael headed towards the cafeteria, petitioner pushed him into the door, causing McMichael's injuries.*

Whether petitioner was acting within the scope of his employment and in the discharge of his duties at the time of the incident is not determinative. While petitioner arguably may have been excused from using physical force to stop McMichael from blocking the stairwell after McMichael allegedly refused to comply, even assuming, as petitioner alleges, that he shoved McMichael when McMichael “made another move towards” him (Petition, ¶16), the record also indicates that he shoved McMichael into the cafeteria door in order to “create space,” and/or when McMichael was headed toward the cafeteria (*see Cargill v Sobol*, 165 AD2d 131, 565 NYS2d 902 [3d Dept 1991] (finding Commissioner’s determination rational, where petitioner’s “initial response seems justified and within the bounds of the board policy [relating to corporal punishment], it is his further action of pushing the student against the chalkboard that was both unnecessary and unjustified in light of the circumstances”; the Commissioner based his finding of guilt not on petitioner's action in grabbing the student, but on the additional aggressive act of “pushing” the student against the chalkboard)). Contrary to petitioner’s contention, a finding of that his conduct violated the rules and regulations precludes him from representation by respondents. Therefore, since a factual basis exists to support the conclusion that petitioner violated a rule or regulation, the Corporation Counsel’s determination was not arbitrary or capricious, or an abuse of discretion.

Nor can it be said that respondents' determination is arbitrary or capricious for failure to state the basis for the denial. The April 2010 letter refers to a review of the facts and circumstances of the matter, and petitioner was given a copy of AP Rainy's letter explaining the findings and conclusions he reached in his investigation, of which petitioner was also aware.

As to indemnification of legal fees incurred by petitioner, Edu. Law § 2560 provides for defense and indemnification, subject to the conditions and limitations of GML § 50-k. Since under GML § 50-k, qualified employees are entitled only to a defense by respondents, petitioner's application for indemnification of any legal fees expended for private counsel is unwarranted. Thus, even if petitioner's request is premature (*see Mercurio v City of New York*, 758 F 2d 862 [2d Cir 1985]), GML § does not provide for indemnification and/or reimbursement of petitioner's attorneys' fees, if any.

Nor is indemnification warranted pursuant to Edu. Law § 3023, which provides:

Notwithstanding any inconsistent provision of law, general, special or local, or the limitation contained in the provisions of any city charter, it shall be the duty of each board of education . . . *in any school district having a population of less than one million . . . to save harmless and protect all teachers . . . from financial loss arising out of any claim, demand, suit or judgment by reason of alleged negligence or other act resulting in accidental bodily injury to any person, . . . provided such teacher . . . at the time of the accident or injury was acting in the discharge of his duties within the scope of his employment . . . .*

First, petitioner raises arguments under this section for the first time in reply. Second, respondents' determination was not made pursuant to this section. Third, it appears that this section does not apply to the respondents herein, as the DOE does not qualify as a school district having a population of less than one million.

Consequently, petitioner's request for leave to file a plenary action for indemnification upon the entry of judgment or settlement in the underlying action, pursuant to Edu. Law § 3023

and GML § 50-k lacks merit, for the reasons stated above.

*Conclusion*

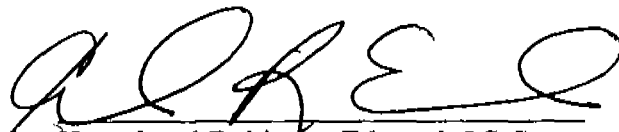
Based on the foregoing, it is hereby

ORDERED and ADJUDGED that petitioner's request for a judgment (1) declaring that respondents' denial of legal representation and indemnification of expenses he incurred in defense of a civil proceeding was arbitrary, capricious and contrary to law and an abuse of discretion; (2) directing that respondents provide him with legal representation in the civil proceeding pursuant to Education Law §§ 2560 and 3028 and General Municipal Law § 50-k; and (3) directing that respondents reimburse him attorney's fees and defense costs pursuant to Edu. Law §§ 2560, 3023, and 3028 and GML § 50-k, is denied, and the petitioner is dismissed; and it is further

ORDERED that respondents serve a copy of this order with notice of entry upon all petitioner within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: December 10, 2010



Hon. Carol Robinson Edmead, J.S.C.

**HON. CAROL EDMEAD**

**UNFILED JUDGMENT**  
This judgment has not been entered by the County Clerk  
and notice of entry cannot be entered hereon. To  
obtain entry, a writ of habeas corpus representative must  
appear in person at the Judgment Clerk's Desk (Room  
141B).