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

PART IA PART 16

Index Number : 108728/2010

MARTIN, KEVIN

VS.

BOARD OF EDUCATION

SEQUENCE NUMBER : 001

ARTICLE 78

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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~~ Article 78 petition is denied and the proceeding is dismissed in accordance with the accompanying memorandum decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice 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).

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

Dated: APR 12 2011

ALICE SCHLESINGER J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

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

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In the Matter of

KEVIN MARTIN,

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,

Index No. 108728/10

Motion Seq. No.001

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

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SCHLESINGER, J.:

At issue here is the interplay of three state statutes, Education Law §3028, Education Law §2560, and General Municipal Law §50-k. All three relate to a teacher's right to legal representation in a civil lawsuit commenced by a student against the teacher based on actions taken by the teacher to discipline the student. Interestingly, a split exists in recent decisions issued by various justices in this courthouse as to which of the statutes controls under circumstances like those presented here. While there is appellate authority discussing the various statutes, none determines the specific issue in this case; that is, whether the Corporation Counsel of the City of New York can withhold legal representation of a teacher in a student's lawsuit against him based on disciplinary charges filed by the Department of Education (DOE) against the teacher after the representation was requested, when the DOE is not actively pursuing those disciplinary charges.

Background Facts

Petitioner Kevin Martin, a tenured teacher employed by the New York City Department of Education, was assigned to the Aspire Preparatory School, a public middle school in the Bronx. On or about December 17, 2008, an issue arose while Martin was teaching a class at the school. Specifically, Martin asserts that one of the seventh-grade students (identified in petitioner's papers but anonymous here) was disrupting the class by sitting on top of the teacher's desk with his feet on a student chair in front of him, speaking loudly to fellow students. According to Martin, he repeatedly asked the student to return to his seat and quiet down, but the student ignored him. Martin then asked the student to leave the classroom and report to the Dean's office, but the student continued to ignore him and further disrupt the class. Martin then pulled the chair from beneath the student's feet. Although witness accounts and the parties' positions vary dramatically on this point, Martin contends that he "lost control of the chair" while pulling it and that it "fell to the floor at the student's feet." (Petition, ¶13).

As a result of this incident, the student's mother commenced a civil action in the Bronx Supreme Court against Martin, the City of New York, and the DOE in October 2009, ten months after the incident, under Index No. 350586/09. (Petition Exh A). There the mother claims that Martin, "without cause or provocation, willfully, maliciously and brutally assaulted [the student] and used unwarranted excessive force in the circumstances then and there existing, including, but not limited to, throwing a chair at the infant-plaintiff, striking him and injuring him thereat." (Complaint ¶23, attached as Exh A to the Petition).

Using the pre-printed form intended for that purpose, Martin promptly requested that the City defend and indemnify him in connection with the civil action. (Petition, Exh B). About four months later, by letter dated March 1, 2010 from Assistant Corporation Counsel Judith Davidow (Exh C), the City declined to represent Martin, stating that:

> Pursuant to Section 50-k of the General Municipal Law, our office has reviewed the facts and circumstances relating to the above referenced action in which you are named as an individual defendant. We have concluded after careful consideration that we are unable to represent you in this matter.

The letter included no explanation of the basis for the decision, nor any discussion of the cited provision of law. Nor did the letter reference any other provision of law.

Before the Corporation Counsel denied representation in March 2010, the DOE investigated the December 17, 2008 incident. Specifically, DOE's Office of Special Investigations (OSI) began an investigation based on its receipt from the Dean of the school of a Corporal Punishment Reporting Form on or about the date of the incident. (Answer, Exh 1).The Dean's form simply indicated the names of the teacher and the student and the date and time of the incident. The section entitled "Witness Information" was left blank. The form further indicated that the police had not been notified.[1] The OSI report written upon the conclusion of the investigation is dated February 9, 2010, which is approximately fourteen months after the incident occurred and three weeks before the Corporation Counsel denied Martin legal representation. (Answer, Exh 3).

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[1] Martin was arrested the day after the incident, but the charges were later dismissed. (Answer, ¶ 58). It is unclear whether someone from the school or the parents notified the police. (Reply, Exh 3).

According to the OSI report, on the date of the incident DOE obtained a written statement from the student dated December 17, 2008. (Answer, Exh 2). There the student reported that he had been talking with some friends in class when the teacher called his name twice. In response to the second call, the student responded "What." According to the student, the teacher then "picked up the chair from under me and threw it in front of me and it hit me on the bottom of my thigh." Significantly, the student indicated that the chair had been thrown in front of him, suggesting that it had hit him by accident, contrary to counsel's allegation in this proceeding or the parent's allegation in the civil complaint that Martin intentionally threw the chair at the student.

On or about the date of the incident, DOE also obtained written statements from 28 students in the class. (Reply, Exh B). Many students denied having seen anything. Some acknowledged having seen Mr. Martin throw a chair, but very few actually indicated that Martin had thrown the chair at the student.

As part of the investigation, OSI also interviewed a number of school personnel a few weeks after the incident and detailed those interviews in the report. Principal Cobbs reported that the student had told him that Martin had thrown the chair to the floor and that "the chair bounced up, and hit him on the thigh, causing a bruise. "The Principal later reported that the student's family had relocated to Florida at the end of the 2008-2009 school year and that he had not received any documentation regarding the student's alleged injury.

The Dean who had escorted the student from the classroom to his office on the date of the incident recalled that the student had told him that Martin had "thrown a chair across the room" but had not noted any injuries. The school nurse recalled that the student had reported to her office complaining of a leg injury but not indicating how

he had received the injury. She gave him an ice pack and kept him in her office until his parents arrived. She had no documentation of the alleged injury or treatment provided.

In addition, OSI interviewed twelve students. Of those students, only three indicated that Martin had thrown the chair at the student; most indicated that the chair had been thrown or knocked to the floor. When OSI interviewed Martin on June 4, 2009 with his union representative present, he declined to answer questions on the advice of the representative.

The OSI report ends with the following paragraph entitled Conclusion: "Based on the above-referenced interviews, the allegation that Mr. Martin threw a chair, thereby injuring Student A, is substantiated." Significantly, OSI did not conclude that Martin had thrown the chair at the student. Indeed, such a conclusion would have been specious, as both the student and the majority of the witnesses had stated otherwise. The OSI investigator then recommended that the report be sent to the proper unit to "determine the appropriate disciplinary action to be taken against Mr. Kevin Martin."

The following month, on March 1, 2010, DOE determined to file disciplinary charges against Martin based on the December 17, 2008 incident. This decision to commence disciplinary proceedings was made a full fifteen months after the incident had occurred and nearly five months after Martin's November 13, 2009 request for legal representation in the Bronx lawsuit, though the decision to reassign Martin outside the classroom was apparently made promptly. The Corporation Counsel notified Martin of its decision to deny representation at or about the time that the disciplinary proceedings were commenced. As of December 2010, a full two years after the incident, the disciplinary proceedings remained open.

Once Martin learned in March 2010 that the City would not represent him in the Bronx civil action, he retained private counsel to defend him. In addition, he served a Notice of Claim upon the respondents in this case based on their denial of his request for legal representation (Exh D), which respondents simply acknowledged by letter dated June 18, 2010, reminding Martin of the statute of limitations for any lawsuit (Exh E). This Article 78 proceeding was timely commenced shortly thereafter.

In this proceeding, Martin, challenges as arbitrary and capricious the City's decision denying him legal representation in the Bronx civil action that the student commenced against him. Martin seeks an order directing the City to provide him legal representation going forward and to reimburse him for all expenses, including attorneys' fees, that he has incurred in connection with his defense in the civil action. He asserts primarily that he is entitled to this relief under Education Law §3028 because the civil action arose out of disciplinary action he took against the student in the scope of his employment.

The City respondents oppose, insisting that the Corporation Counsel properly declined representation pursuant to General Municipal Law §50-k and Education Law §2560 because Martin's actions relating to the student were in violation of Chancellor's Regulation A-420 prohibiting corporal punishment of a student by a teacher. In their Answer (at ¶¶51-52), respondents contend that when Martin took the chair out from under the student's feet, he "threw it at or towards the Student [and] the chair hit the Student, injuring his leg." Notably, this statement differs from OSI's Conclusion in its report, discussed above, that the teacher simply threw the chair, which hit the student. Respondent further asserts that Martin has no right to reimbursement of any fees paid to private counsel or any type of indemnification.

The Governing Statutory Authority

As noted above, the resolution of this proceeding involves the interplay of three state statutes. The first statute, Education Law §3028, promulgated in 1960 and amended in 1971 and again in 1976, is entitled "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." It provides for a teacher's legal defense in a lawsuit filed against him or her arising out of disciplinary action that the teacher has taken against a student in the scope of employment, stating in relevant part that:

> 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 ... in any civil or ciminal [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.

The next relevant statute, Education Law §2560, originally promulgated in 1947 and amended numerous times thereafter through 1986, is entitled "Liability of board of education and community school boards in a city having a population of one million or more inhabitants." By virtue of the 1979 amendment, §2560 does little more than indicate in general terms that legal representation of teachers in large cities such as New York is governed by General Municipal Law §50-k. Specifically, subdivision 1 of §2560 states in relevant part that:

> 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 ... shall be entitled to legal representation and indemnification pursuant to the provisions of, and subject to the conditions, procedures and limitations contained in section 50-k of the general municipal law ...

The referenced §50-k of the General Municipal Law is quite extensive, consisting of nine separate paragraphs and relating to virtually all New York City employees. The statute, entitled "Civil actions against employees of the city of New York," was promulgated in 1979 and never amended. Thus, the promulgation of §50-k and the relevant amendment to §2560 followed the promulgation of §3028 by three years.

Subdivision 2 of GML §50-k addresses legal representation. Like Education Law §3028, GML §50-k provides for representation based on actions taken by employees in the scope of employment. However, GML §50-k differs from the earlier statute Education Law §3028 in three significant respects: (1) 50-k covers all City public employees, whereas 3028 applies only to teachers: (2) 50-k covers all lawsuits against the employee based on actions taken in the scope of employment, whereas 3028 applies only to actions taken in the scope of employment to discipline students; and (3) 50-k provides an exception to the representation rule if the teacher is in violation of an agency rule or regulation, whereas 3028 includes no such limitation.

Further, and quite significantly, GML §50-k empowers the Corporation Counsel to make a preliminary determination as to whether the exception to the rule applies. Specifically, subdivision 2 of GML §50-k provides in relevant part that:

> the city [of New York] shall provide for the defense of an employee of any agency in any civil action or proceeding in any state or federal court ... 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 ....

As to indemnification, GML §50-k, subd. 3, similarly limits the City's duty based on actions taken in the scope of employment and not in violation of any rule, providing that:

> The city shall indemnify and save harmless its employees in the amount of any judgment obtained against such employees in any state or federal court ..., 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; ....

The only explicit mention of disciplinary proceedings in all of GML §50-k is in subdivision 5. That subdivision is directly relevant here as it indicates the very limited circumstances when representation may be withheld based on those proceedings:

> In the event that the act or omission upon which the court proceeding against the employee is based was or is also the basis of a disciplinary proceeding by the employee's agency against the employee, representation by the corporation counsel and indemnification by the city may be withheld (a) until such disciplinary proceeding has been resolved and (b) unless the resolution of the disciplinary proceeding exonerated the employee as to such act or omission.

The apparent rationale behind that limitation is the conflict of interest rule applicable to attorneys. In other words, the Corporation Counsel's first allegiance is to the City of New York. If a City agency such as DOE is proceeding with disciplinary action against the employee teacher, the Corporation Counsel cannot simultaneously represent the City in the disciplinary action against the teacher while also defending the teacher in the lawsuit by the student based on the same conduct if that defense would be at odds with the City's position. *See Mercurio v The City of New York,* 758 F.2d 862, 864 (2d Cir. 1985), citing NY Jud. Law Code of Prof. Resp. EC 5-15, DR 5-105; *see also Blood v Board of Educ. Of City of New York,* 121 AD2d 128,132-33 (1st Dep't 1986); *Brown v NYC Department of Education*, 26 Misc. 3d 862, 870 (Sup. Ct., NY Co. 2009). The statute allows the Corporation Counsel to make those factual determinations in the first instance, which "determinations [the court can] set aside only if they are not supported by the evidence or are in some other sense 'arbitrary and capricious'." *Mercurio*, 758 F2d at 864, quoting *Williams v City of New York*, 64 NY2d 800, 802 (1985).

Discussion

On their face, Education Law §3028 and General Municipal Law §50-k (incorporated into Education Law §2560 by reference) appear inconsistent. The former contains sweeping language entitling a teacher to legal representation in a lawsuit commenced against him arising out of disciplinary action taken against the student, so long as the action was taken in the scope of the teacher's employment. Section 50-k abrogates that right with respect to a teacher in the City of New York if the Corporation

Counsel finds that the teacher's actions, even if taken in the scope of employment, were in violation of an agency rule or regulation. Education Law §3028 says that it applies "notwithstanding any inconsistent provision of any general, special or local law." That identical language is found at the beginning of Education Law §2560. In addition, subdivision 9 of General Municipal Law §50-k contains similar language, stating that: "The provisions of this section shall not be construed in any way to impair, alter, limit, modify or abrogate or restrict ... any right to defense and/or indemnification provided for any ... employee by, in accordance with, or by reason of, any other provision of state, federal or local law or common law."

The question presented thus is how to reconcile these conflicting statutes when each claims to prevail, notwithstanding any language to the contrary elsewhere. The answer turns on various rules of statutory construction. While it is the duty of the courts to attempt to harmonize statutes, when a conflict exists between a statute of general applicability and one of special or specific applicability, the specific or special controls. Statutes §397; *see also Dutchess County Dept. Of Social Services ex rel. Day v Day*, 96 NY2d 149, 153 (2001); *Board of Managers of Park Place Condominium v Town of Ramapo*, 247 AD2d 537 (2nd Dep't 1998).

Petitioner argues that Education Law §3028 is the more specific statute as it expressly applies only to lawsuits arising out of action taken by a teacher to discipline a student. Respondents argue that General Municipal Law §50-k (applicable to teachers by virtue of Education Law §2560) is the more specific as it applies only in large cities and limits legal representation of an employee whose conduct is found by the

Corporation Counsel to violate an agency rule or regulation. In fact, both statutes include specific limitations that differ from each other.

Interestingly, Justice Jane Solomon and Justice Carol Huff recently adopted the view favoring §3028 as espoused by the petitioning teacher in *Morel v City of New York,* Index No. 11668/09, Slip Op. dated August 3, 2010, and *Sagal-Coltler v Board of Education,* Index No. 104406/10, Slip Op. dated September 22, 2010. In contrast, a few months later by decision dated December 10, 2010, Justice Carol Edmead adopted the City respondent's view favoring GML §50-k in *Zampieron v Board of Education of the City of New York*, 30 Misc. 3d 1210(A). While all three decisions are persuasive, this Court agrees with the view in *Zampieron*, which is urged by the City respondents here, but with significant limitations discussed below.

Petitioner has pointed to no appellate authority that holds that Education Law §3028 takes precedence over GML §50-k. Contrary to petitioner's claim, *Timmerman v Board of Educ. of City of New York,* 50 AD3d 592 (1st Dep't 2008), is not dispositive. That case involved a teacher's request for reimbursement of attorney's fees incurred in defending criminal charges pressed by a student arising out of disciplinary action taken by the student against the teacher. The City respondents had denied the request on the ground that a "criminal proceeding does not fall within the scope of Education Law § 3028." The Appellate Division emphasized that its review was "limited to the grounds invoked by the agency in making its determination." 50 AD3d at 593, quoting *Matter of Missionary Sisters of Sacred Heart Ill. v New York State Div. of Hous. & Community Renewal*, 283 AD2d 284, 288 (2001). As the agency had not invoked GML §50-k,

neither the Appellate Division nor the trial court discussed that statute or its interplay with Education Law §3028. Thus, the ruling directing the City to reimburse the teacher for attorney's fees incurred in the criminal action offers no guidance on that point.

An additional factor in this Court's determination that GML §50-k prevails is another principle of statutory construction — that the statute promulgated later in time will control if a conflict exists. Statutes §398; *see also Zampieron*, 30 Misc. 3d at 6, citing *Dutchess County Dept. of Social Services, supra*. As noted above, and as respondents emphasize in this case, General Municipal Law §50-k was promulgated in 1979 and Education Law §2560 was simultaneously amended in 1979 to specifically incorporate GML §50-k and thereby confirm its application to teachers in the City of New York. In contrast, Education Law § 3028 was last amended three years earlier in 1976. Therefore, the Legislature last acted on this issue when it promulgated GML §50-k and amended Education Law §2560.

Further, the legislative history for GML §50-k cited by respondents and appended to their memorandum of law indicates that the express purpose of that statute was to establish a uniform standard for all agency employees in the City of New York. See Laws of New York, 1979 Regular Session, ch. 673 and Governor's Bill Jacket. To the extent that other state statutes may have been inconsistent, GML §50-k was intended to prevail in the City of New York. The applicability of the statute to New York City public school teachers was confirmed when Education Law §2560 was amended to explicitly incorporate the provisions of GML §50-k by reference, implicitly taking precedence over the previously promulgated Education Law §3028. While petitioner here correctly notes that the Legislature could have amended §3028 at that

time but did not, that failure to act does not outweigh the clear and unequivocal action affirmatively taken by the Legislature to make GML §50-k applicable to New York City public school teachers.

In this Court's opinion based on all of the above facts and circumstances, it would contravene the letter and the spirit of GML §50-k if one were to construe Education Law §3028 as overriding Education Law §2560 and GML §50-k simply because 3028 expressly refers to disciplinary actions. Such a view would further ignore the fact noted above (at p 9) that subdivision 5 of GML §50-k also expressly refers to disciplinary actions by indicating when the City may withhold legal representation of employees involved in disciplinary proceedings.

The better view is to read the statutes together, as did the court in *Zampieron,* to mean that the DOE in the City of New York 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 the teacher's duties within the scope of employment *unless* the Corporation Counsel determines that the teacher's conduct was in violation of an agency rule or regulation. If such a determination is made, representation may be withheld pursuant to GML §50-k, subd. 5, "until such disciplinary proceeding has been resolved and unless the resolution of the disciplinary proceeding exonerated the employee ..."

It is that last proviso that gives the Court great concern in this case, as the DOE is arguably using it to withhold legal representation from Mr. Martin for an unreasonably long period of time under somewhat specious circumstances. The first area of concern is the determination by the Corporation Counsel in the first instance to withhold legal

representation. Granted, judicial review of such a determination by the Corporation Counsel is limited, and the courts may set such a determination aside "only if it lacks a factual basis, and in that sense, is arbitrary and capricious." *Williams v City of New York*, 64 NY2d 800, 802 (1985); *see also Perez v City of New York*, 43 AD3d 712713 (1st Dep't 2007), *lv denied* 10 NY3d 711, citing *Wong v City of New York,* 174 AD2d 486 (1991). Nevertheless, as the First Department emphasized in *Blood v Board of Educ. of City of New York,* 121 AD2d 128, 132 (1st Dep't 1986), the representation rule was designed to help, not hinder, employees, and the courts should remain mindful of the public policy goals favoring representation of teachers:

> Indeed, the plain purpose of the statute is not to protect the city from its employee's negligence, or even in the main to afford the city a means of preserving its defenses. To the contrary, the statute is primarily directed at saving imperfect and, therefore, fallible public employees from the potentially ruinous legal consequences following from unintentional lapses in the daily discharge of their duties. It is in this light that the Corporation Counsel's defense obligation must be viewed.

The question, then, is whether an adequate factual basis exists for the Corporation Counsel's decision in this case, in light of the policy considerations. Petitioner argues that this Court must reject the City's decision because it fails to state the reasons upon which it is based, as required by *Weill v New York City Dept. of Educ,* 61 AD3d 407 (1st Dep't 2009). The Corporation Counsel merely indicated in its letter to Martin that it was "unable to represent" him "pursuant to Section 50-k of the General Municipal Law" based on "the facts and circumstances." While a fuller explanation would have better served the interests of the parties and aided the Court by focusing

the arguments and limiting judicial review, this Court will not reject the decision on that ground. The *Weill* case and others relied upon by petitioner here are all distinguishable.

As to the merits, the only two grounds under GML §50-k on which the decision could be based are "scope of employment" and/or a "violation of an agency rule or regulation." Turning to the first, this Court firmly rejects respondents' claim that Martin's conduct was outside the scope of employment. The incident occurred while Martin was attempting to settle down a disruptive student so he could proceed with teaching the class. This conduct falls squarely within the "scope of employment" as defined by our courts.

The Court of Appeals has defined the phrase broadly, stating the test in *Riviello v Waldron,* 47 NY2d 297, 302-303 (1979) to be "whether the act was done while the servant was doing his master's work, no matter how irregularly or with what disregard of instructions." Indeed, the Court added there (at p 304) that "even intentional tort situations have been found to fall within the scope of employment."

Particularly instructive on this point is the First Department's decision in *Blood v Board of Educ. of City of New York,* 121 AD2d 128, referenced above. In *Blood* the Appellate Division reversed the decision of the trial court which had denied the teacher's Article 78 challenge to the Corporation Counsel's decision denying the teacher's request for legal representation in a civil lawsuit commenced by a student based on the following facts. The teacher had reportedly been angered by the lateness of a particular student and had picked up his book bag abruptly. As she did so, another student sitting nearby turned his head in that direction and was hit by the metal reinforced corner of the still moving bag. Although the event was characterized as an

accident, the teacher received an unsatisfactory rating due to the teacher's "inappropriate display of anger." The student commenced a personal injury action against the teacher, and the teacher requested legal representation. Relying on GML §50-k, the Corporation Counsel denied the request on the ground that the teacher was not acting within the scope of her employment at the time of the incident. In the Article 78 proceeding, the Corporation Counsel pointed to the unsatisfactory rating in support of his position.

While the lower court accepted the determination, the Appellate Division did not. It stated that neither the unsatisfactory rating, nor even a finding of negligence by the teacher, in itself established that the conduct was beyond the scope of the teacher's employment. In construing "scope of employment" broadly, the Court stated (at pp 131-31) that:

> Only classroom conduct maliciously motivated or so extreme as to remove itself from any natural connection with a teacher's occupational duties would constitute an adequate factual basis for a determination by the Corporation Counsel pursuant to General Municipal law §50-k(2) that the scope of employment had been exceeded. To hold otherwise would permit the city to deny representation to its employees based upon facts amounting to no more than ordinary negligence.

The facts alleged by Martin here appear quite similar to those in *Blood*. He insists that he did not throw the chair at the student; instead, he lost control of the chair when he pulled it from beneath the student's feet, and the chair then hit the student. As noted above, various student witnesses in their statements — and even the student himself — recited a similar series of events. Thus, as in *Blood*, the incident could be characterized as an accident. Even if that were not the case, the conduct was within the

scope of Martin's employment as defined in the cases discussed above. *See also Brown v New York City Department of Education,* 26 Misc. 3d 862 (Sup. Ct., NY Co. 2009)(manner in which principal chose candidate for spelling bee and her disqualification of special education student were actions within the scope of employment); *Inglis v Dundee Cent. School Dist. Bd. Of Educ.*, 180 Misc.2d 156 (Sup. Ct., Yates Co. 1999)(teacher was acting within scope of employment when she "grazed" or "slapped" student playing the piano who disregarded instruction to stop).

Having found that no basis exists for denying Martin legal representation based on a claim that his conduct was outside the scope of employment, this Court turns to the next issue; that is, whether a factual basis exists for the Corporation Counsel's decision to withhold representation because Martin's conduct was in violation of an agency rule or regulation. The facts here are borderline, at best. As previously detailed, neither the teacher, the student, nor the majority of the witnesses stated that the teacher had thrown the chair at the student. Nor did the OSI report reach that conclusion; rather, the investigation merely substantiated that "Martin threw a chair, thereby injuring Student A." Whether that conduct constitutes corporal punishment or otherwise violates a DOE rule or regulation has yet to be determined by DOE.

Equally significant is the time line of events detailed above. The incident occurred December 17, 2008. The student commenced the civil suit against Martin ten months later, in October 2009. Martin promptly requested representation when served in November 2009. The OSI did not issue its report until February 9, 2010. On or about March 1, 2010 — more than a year after the incident and months after Martin requested legal representation — DOE commenced disciplinary charges against Martin. At or

about that same time, by letter dated March 1, 2010, the Corporation Counsel notified Martin of its decision to deny him legal representation. Counsel confirmed in oral argument in late December 2010 that the disciplinary proceedings had still not been determined, and no notice of a decision has been provided to the Court since that time.

The OSI's equivocal finding, combined with the City's delay in proceeding with disciplinary charges, raises issues as to whether an adequate basis exists for the Corporation Counsel's decision to deny Martin legal representation based on a violation of an agency rule or regulation. Nevertheless, this Court is constrained to defer to the decision based on the record presented and the extremely limited scope of judicial review. For while the City does not directly argue this point, the *Blood* case cited by petitioner is distinguishable because no disciplinary charges were ever filed there. In contrast to this case, the teacher in *Blood* had received only an unsatisfactory rating, which the Appellate Division found was an insufficient basis for a finding that the teacher had violated an agency rule or regulation. Petitioner has not cited, nor has this Court found, any appellate authority upholding a court's decision to vacate the Corporation Counsel's finding of an agency rule violation when disciplinary charges against the teacher are pending.

However, that does not mean that the filing of disciplinary charges is necessarily dispositive, as the DOE must have a good faith basis to file the charges. In the instant case, the time line of events causes the Court some concern in this regard because the DOE delayed more than a year before issuing its OSI report and filing disciplinary charges against Martin, leaving him in legal limbo for months after the student

commenced suit.[2] Subdivision 5 of GML §50-k allows the Corporation Counsel to withhold representation based on a pending disciplinary proceeding, but representation must be provided going forward if the employee is exonerated in those proceedings.

By delaying the commencement and then the resolution of the disciplinary proceedings for an excessive period of time, the City deprives the teacher of his statutory right to legal representation, which the *Blood* court found to be a significant right indeed. If a teacher in such a situation cannot afford to retain private counsel to defend him in the student's civil action, the result could be "potentially ruinous" for the teacher, as the Appellate Division emphasized in *Blood,* even if the teacher is ultimately exonerated. The Legislature surely did not intend such a result.

What is more, the Corporation Counsel has not demonstrated here that a true conflict of interest exists justifying its decision to deny Martin legal representation. The City has failed to submit to this Court copies of the disciplinary charges filed against Martin, or a copy of its Answer filed in the civil action and an explanation of its defense there. Thus, the Court cannot ascertain whether the Corporation Counsel is actually asserting conflicting positions in the two cases so as to create an ethical issue.

In sum, the record here certainly does raise questions as to the propriety of the Corporation Counsel's decision to deny Martin legal representation based on a violation of an agency rule or regulation. However, the record does not justify a finding that the decision lacks a factual basis and is arbitrary and capricious, which is the standard that this Court must apply. Nevertheless, while this Court will not annul the Corporation

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[2] Martin has also been in "teaching limbo" for an even longer time, having been removed from the classroom in or about December 2008 when the incident occurred, pending the conclusion of the investigation and any charges.

Counsel's decision in this case at this time, the Court does caution the City that a point may come when the City's excessive delays will serve to undermine any good faith factual basis for the decision and compel its vacatur.

Similarly, the Court is compelled at this time to deny Martin's request for the reimbursement of attorney's fees incurred in his defense in the Bronx civil action. A teacher is entitled to legal representation under the terms of GML §50-k, but the statute does not provide for reimbursement of legal fees. Nevertheless, the courts have found that reimbursement may be appropriate in "extraordinary circumstances." *Blood*, 121 AD2d at 134, citing *Corning v Village of Laurel Hollow*, 48 Ny2d 348; *Mercurio v City of New York, supra* at 865. Upon the conclusion of the disciplinary proceeding — hopefully soon — Martin may well be entitled to commence a plenary action seeking reimbursement based on such extraordinary circumstances, such as the City's excessive delay in proceeding with administrative action.

As to Martin's request for indemnification of any judgment or settlement amount, that request is premature as no evidence has been provided that the civil action has resulted in a judgment or settlement. Also premature is Martin's request pursuant to CPLR §3023 to be "save[d] harmless ... 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..." It is not the role of this Court to determine whether Martin's acts constituted negligence or resulted in accidental bodily injury to the student. Such arguments can be made by Martin in the disciplinary proceeding or a plenary action, but they cannot be suitably determined here. Further, as of yet, no "financial loss" has been established.

Accordingly, it is hereby

ADJUDGED that this Article 78 petition is denied and this proceeding is dismissed without costs or disbursements to the extent provided herein. The Clerk is directed to enter a judgment in favor of respondents in accordance with the terms of this decision.

Dated: April 12, 2011

APR 12 2011

J.S.C.
ALICE SCHLESINGER

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice 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).