

United Fedn. of Teachers v City of New York

2025 NY Slip Op 34870(U)

December 15, 2025

Supreme Court, New York County

Docket Number: Index No. 158654/2018

Judge: Debra A. James

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

PRESENT: HON. DEBRA A. JAMES

PART 59

Justice

-----X

UNITED FEDERATION OF TEACHERS, LOCAL 2,
AMERICAN FEDERATION OF TEACHERS, AFL-CIO, by its
President, MICHAEL MULGREW,

Petitioner,

INDEX NO. 158654/2018

MOTION DATE 05/19/2025

MOTION SEQ. NO. 001

- v -

CITY OF NEW YORK; CORPORATION COUNSEL OF THE
CITY OF NEW YORK; NEW YORK CITY LAW
DEPARTMENT; and BOARD OF EDUCATION OF THE
CITY SCHOOL DISTRICT OF THE CITY OF NEW YORK,

Respondents.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 1, 2, 3, 4, 7, 16, 77, 85, 90, 93, 102, 109, 110, 111, 112, 113, 114, 118, 119, 120

March 5, 2025 Transcript of Oral Argument (not filed in NYSCEF)

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

ORDER

Upon the foregoing documents, it is

ORDERED, that to the extent that the Petition seeks a declaratory judgment that, as written, the additional requirement in the Policy violates General Municipal Law § 50-k, Education Law §§ 2560, 3020, and 3020-a, such Petition is granted; and it is further

ORDERED, ADJUDGED and DECLARED that such additional requirement in the Policy is irrational and exceeds Respondents' authority; and it is further

ORDERED, ADJUDGED and DECLARED that the new provision in the Policy is null and void, and the portions of any representation agreement entered into between Corporation Counsel and/or the New York City Law Department and UFT-represented employees that include such additional requirement are null and void; and it is further

ORDERED that Respondents are enjoined from including the challenged additional requirement in future representation letters to UFT represented employees; and it is further

ORDERED that Respondents shall inform those UFT represented employees who have received the letter of this ruling;¹ and it is further

ORDERED that the remainder of the Petition is denied.²

DECISION

On September 11, 2018, Petitioner United Federation of Teachers, Local 2, American Federation of Teachers, AFL-CIO, by its President, Michael Mulgrew (UFT), commenced this Article 78 proceeding against Respondents City of New York (the City),

¹ Petitioner has not shown that the Law Department does not inform employees of any adverse determination regarding representation, including the grounds for the determination. Absent such a showing, the remainder of Petitioner's request is unnecessary.

² As the court lacks jurisdiction over third-parties to whom the Law Department has provided confidential information, the court declines to issue an injunction against them. It also is unnecessary to enjoin Respondents to follow the rules of professional conduct, as this obligation already exists and courts expect compliance with such rules once the law is clarified.

Corporation Counsel of the City of New York (Corporation Counsel), New York City Law Department (City Law Department), and/or Board of Education of the City School District of the City of New York (the Board) (collectively, Respondents). The proceeding challenges a City policy (the Policy) “that improperly infringes upon the statutory right of public employees to legal defense in matters arising from their employment (‘the Policy’)” (NYSCEF Doc. No. 1, ¶ 1). According to UFT, the law forces public employees who request representation by Respondents to waive either their right to attorney-client privilege or their statutory right to a legal defense and indemnification (NYSCEF Doc. No. 1). In their May 10, 2024 answer, the City Respondents challenge the allegations in the petition and raise several affirmative defenses (NYSCEF Doc. No. 109). The court discusses the proceeding below.

Petitioner UFT is an unincorporated association that represents and is the exclusive bargaining entity for “teachers, non-supervisory pedagogical staff, and paraprofessionals” who are employees of the BOE (NYSCEF Doc. No. 1, ¶ 8). Among other things, Respondent the New York City Law Department (the Law Department), which is headed by respondent Corporation Counsel of the City of New York (Corporation Counsel), provides legal defense to City employees who are sued for alleged acts or omissions that occurred within the course of their employment.

The right of representation applies to any BOE employee in New York City, a city of at least one million residents (see General Municipal Law [GML] § 50-k; see also Education Law § 2560 [enabling statute]). GML § 50-k (2), which further provides that the Law Department shall provide representation if “the corporation counsel finds [that the act or omission] occurred while the employee was acting within the scope of his public employment and in the discharge of his [or her] duties and was not in violation of any rule or regulation of his [or her] agency.” Additionally, under GML § 50-k (3), the employee is indemnified for any judgment or settlement as long as the act or omission falls within the purview of GML § 50-k (2) (see Education Law § 3028 [enabling statute]). The Law Department has the discretion to decline representation. It also may withdraw representation under certain specified circumstances. A negative decision by the Law Department is subject to Article 78 review.

On May 14, 2018, the Board, by its Chief Executive for Labor Relations Lawrence Becker, emailed UFT’s General Counsel Adam S. Ross, of its policy regarding the Law Department’s duties in the course of its representation of UFT members and other City agency employees (NYSCEF Doc. No. 1, ¶ 32). Specifically, the email, entitled “new policy,” stated:

- 1) in cases in which the Law Department decides not to represent an individual employee because it believes the hostile work environment claim has merit and/or the employee violated City policy . . . and there has not yet been a completed agency investigation into the employee's conduct, the Law Department will make a referral to the agency, setting forth the facts upon which the Law Department determined the employee acted improperly.
- 2) In cases in which the Law Department [initially] determine[ed] that representation of an . . . employee was appropriate, but subsequent information . . . suggests that the employee engage[d] in inappropriate conduct, the Law Department will either [settle the case or ask to be relieved as counsel In either event, the Law Department will make a referral to the agency, setting forth the facts that altered the Law Department's preliminary decision to represent the employee (NYSCEF Doc. No. 2).

The Petition states, on information and belief, that since the promulgation of the Policy, the Law Department has not provided representation to any UFT-represented employee unless the employee agrees in writing that the Law Department may "violate attorney-client privilege and inform on the employee if, in the Law Department's opinion, facts emerge indicating that the employee may have violated an agency rule, regulation or otherwise acted improperly" (NYSCEF Doc. No. 1, ¶ 36). Petitioner has submitted a redacted copy of a Law Department letter to a DOE employee, which agrees to represent the employee but states, among other things, that "if we learn of facts

indicating that you . . . acted criminally or otherwise violated any applicable law, regulation, or agency rule, that information will be provided to DOE and any relevant City agency for whatever action it deems appropriate. *You understand and agree that the DOE has the exclusive right to waive any privilege you may have with respect to any such information. . . .*" (NYSCEF Doc. No. 3, *3 [emphasis supplied]). The petition additionally asserts that Respondents have neither included the Policy in a Regulatory Agenda nor in another way provided notice or dissemination of the Policy, and they have not provided a public forum by which individuals and organizations can comment on or object to the Policy.

The petition asserts five claims. The first claim states that the Policy subverts the purpose of GML § 50-k and Education Law § 2560, which "is not to provide a means of defense to the City and/or Board, but, rather, is a term and condition of employment providing protection to public employees from the potential cost of legal defense arising from their official duties" (NYSCEF Doc. No. 1, ¶ 51). On this point, the petition adds that the cited laws do not allow for the waiver of the attorney-client privilege, and therefore Respondents' Policy improperly supersedes the State statute by conditioning representation on such waiver. The petition notes that the Law Department may refuse representation or later withdraw from

representation, but the additional waiver of the attorney-client privilege "would effectively prevent an employee from being able to challenge the Law Department's decision" (id., ¶ 55).

In the second claim, the petition alleges a violation of the indemnification provisions of GML § 50-k and Education Law § 3028. According to the petition, the Education Law provides that Respondents cannot implement policies that limit an employee's right to legal defense or require the Law Department attorneys to violate the attorney-client privilege or their duty of loyalty to current and future clients. It reiterates that the Policy hampers a DOE employee's chance of prevailing in an Article 78 challenge to a decision on representation. As such, the petition states, Respondents have exceeded their power.

In its memorandum of law on this point (see NYSCEF Doc. No. 77, *7), Petitioner quote Blood v Board of Educ. Of City of N.Y. (121 AD2d 128, 132 [1st Dept 1986]), which provides that "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 argues that the Policy subverts the statutory purpose by shifting its protection from the employee to Respondents. Petitioner further points out that in Matter of Sagal-Cotler v Board of Educ. Of the City Sch. Dist. of the City of N.Y. (20 NY3d 671, 674-675 [2013] [*Sagal-*

Cotler]), the Court of Appeals indicated that Education Law § 3028, which relates to indemnification, has a broader scope than GML § 50-k - specifically, by requiring Respondents "to provide an attorney not just in civil, but also in criminal cases," even where the employee violated DOE regulations (*Sagal-Cotler*, 20 NY3d at 676). As such, the petition alleges, the Policy improperly supersedes the employees' statutory rights (NYSCEF Doc. No. 77, *8, citing, e.g., Matter of Board of Educ. Of City School Dist. of City of N.Y. v Mills, 250 AD2d 122, 126 [3d Dept 1998] [Mills]).

Third, Petitioner asserts that the Policy violates Education Law §§ 3020 and 3020-a, and GML 50-k, which provides that tenured employees do not have to participate in investigations into their misconduct (see NYSCEF Doc. No. 77, *8, citing Matter of Condon v Sabater, 113 AD3d 203, 204 [1st Dept 2013] [stating that tenured employees need not testify at disciplinary hearings]). Specifically, the Petition alleges that the Policy improperly requires the tenured employees "to provide information/evidence that the employee would not otherwise be required to provide to the Board [or its representatives]" (NYSCEF Doc. No. 1, ¶ 68), and, under the Policy, the Law Department may disclose this information to DOE for use in a potential disciplinary proceeding against a tenured employee. As

such, the petition states that the Policy improperly turns the Law Department attorneys into Board investigators.

Fourth, Petitioner argues that the Policy violates rules 1.1 (definitions); 1.2 (scope of representation); 1.4 (duty to communicate); 1.6 (confidentiality of information); 1.7 (conflict of interest); 1.8 (specific conflict of interest rules); 1.9 (duties to former clients); 1.16 (duty to "take steps" to avoid prejudice to an individual when the attorney declines or terminates representation); 1.18 (imposing duty not to reveal damaging information about prospective clients, even when attorney declines representation); 2.1 (duty as advisor to client); 2.3 (lawyer should not provide negative information gathered in evaluation to someone other than the client absent informed consent); 3.4 (fairness to opposing party); 5.1 (obligation of supervisors and the like to ensure compliance with the rules); and/or 5.2 (responsibility of subordinate attorney to comply with rules even when actions are at the direction of a supervising attorney) of the Rules of Professional Conduct (id., ¶ 72). These rules require an attorney to be loyal to and to represent the interests of his or her client and, collectively, require a duty of confidentiality with respect to potentially harmful information about the client. According to the Petition, the Policy compromises the attorney's loyalty, potentially violates the attorney-client

privilege, and in other ways impedes the attorney from fully representing the client.³ In its memorandum of law, Petitioner cites cases and ethics opinions that discuss the importance of protecting a client's confidential information (see NYSCEF Doc. No. 77, *16).

Fifth, the Petitioner contends that implementation of the Policy violates the City Administrative Procedure Act (CAPA) (New York City Charter §§ 1401-1047). CAPA provides the mandatory procedure a City agency must follow whenever it implements a rule (see generally CAPA § 1043). Under CAPA § 1041 (5), a rule is "the whole or part of any statement or communication of general applicability that (i) implements or applies law or policy, or (ii) prescribes the procedural requirements of an agency including an amendment, suspension, or repeal of any such statement or communication." According to the petition, the Policy qualifies as a rule under this definition. Therefore, it continues, Respondents should have adhered to CAPA's purpose and followed its mandates.

Finally, UFT demands the following relief:

³Petitioner notes that under Code of Federal Regulations § 50.15 (a) (3), when Department of Justice attorneys determine whether a federal employee is entitled to representation, "[a]ny adverse information communicated by the client-employee to an attorney during the course of such attorney-client relationship shall not be disclosed to anyone, either inside or outside the Department, other than attorneys responsible for representation of the employee, unless such disclosure is authorized by the employee." This language is not present here.

- "1. An order directing limited discovery to ascertain the identity of UFT represented employees to whom the Policy has been applied . . . ;
2. An order directing Respondents to inform UFT represented employees to whom the Policy has been applied . . . [about the nature of the information provided];
3. A declaration that the Policy violates Gen. Mun. Law § 50-k, Educ. Law § 2560, Educ. Law § 3020, Educ. Law § 3020-a, Educ. Law § 3028, Attorney Rules of Professional Conduct, and/or CAPA;
4. A declaration that the Policy is arbitrary, capricious, irrational, in bad faith, affected by error of law, in violation of law, in violation of lawful procedure, in excess of Respondents' individual and/or collective authority and/or jurisdiction, and/or contrary to strong public policy;
5. A declaration that the Policy is null and void;
6. A declaration that such portions of any representation agreement . . . between [Respondents] and UFT represented employees that applied the Policy are null and void;
7. An order to enjoin Respondents from further . . . enforcement of the Policy against any UFT represented employees;
8. An order to enjoin Respondents, any City agency, and/or any other third-party to whom [Respondents] provided confidential information about a UFT represented employee from using such information against the employee in any matter or proceeding;
9. An order directing the Corporation Counsel and/or Law Department comply with the Rules of Professional Conduct" (id., *16-17).

In their answer, Respondents deny the substantive challenges to the Policy. Their counterstatement of facts asserts that the Policy constitutes a "reasoned and lawful

determination to obtain proper informed consent from municipal employees afforded joint representation with their municipal employer" (NYSCEF Doc. No. 109, ¶ 83). Further, they stress that municipal employees have a duty to report illegality. Respondents argue that Petitioner misinterprets the law and that its

"claims . . . suggest an absurd requirement that municipal attorneys, upon undertaking joint representation of a municipal employee, must ignore their oath to support and protect the Constitution and the laws of this state as well as legal directives obligating them to report fraud, misconduct and abuse by public employees and, instead, actively conceal another public employee's malfeasance" (*id.*, ¶ 87).

They assert that Petitioner's argument ignores the limitations of GML § 50-k. Further, they contend that the law department represents both DOE employees and DOE and that, accordingly, it is appropriate for the attorneys to "speak with one of the jointly represented clients about information obtained from the other" (*id.*, ¶ 91).

According to Respondents, the Policy properly balances the potentially competing interests of the represented parties. They stress that DOE employees who are represented by the law department never are inoculated from the possibility that they will be subject to termination or criminal consequences. Although the governing laws mandate that Respondents provide

legal defense and indemnification with only limited exceptions, Respondents state that employees have the option to decline representation if they do not wish to provide informed consent that, in appropriate circumstances, their legal representatives will share evidence of wrongdoing that they obtain in the course of their representation (id., ¶¶ 94-98).

As its first affirmative defense, the answer asserts that Petitioner lacks organizational standing. In their memorandum of law, they note that an organization establishes standing when it shows “(1) that some or all of its members have standing to sue; (2) that the interests advanced in the case are sufficiently related to the UFT’s organizational purposes to satisfy the court that the UFT is an appropriate representative of those interests; and (3) that the participation of the individual members is not required to assert the claim or to afford the UFT complete relief” (Mulgrew v Board of Educ. of the City School Dist. of the City of N.Y., 75 AD3d 412, 413 [1st Dept 2010] [Mulgrew] [internal quotation marks and citation omitted]). Respondents argue that the petition does not satisfy the first prong because it does not show that any UFT members have suffered harm as the result of the Policy. Instead, Respondents contend that the petition alleges an “amorphous allegation of potential future injury,” and this is insufficient (NYSCEF Doc. No. 110, quoting Matter of Association for a Better Long Is.,

Inc. v New York State Dept. of Env'tl. Conservation, 23 NY3d 1, 7 [2014] [Association for a Better Long Is.]). Respondents also assert that Petitioner does not satisfy the third prong of the test, as it allegedly is necessary to show whether Respondents violated each employee's rights (NYSCEF Doc. No. 110, *5 [citing Matter of Patrolman's Benevolent Assn. of Southampton Town, Inc. v Town of Southampton, 79 AD3d 891 [2d Dept 2010] [Patrolman's Benevolent Assn.] [finding that where association challenged decisions not to promote several police officers to the rank of detective, the individual circumstances underlying each decision was necessary to determine the merit of the claims])). For similar reasons, Respondents argue that the matter is not ripe for resolution (see NYSCEF Doc. No. 110, *4 n 1, quoting Association for a Better Long Is., 23 NY3d at 9).

In addition, Respondents argue that the Petition is untimely under the four-month limitations period for Article 78 challenges. First, pointing to the employees' right to bring an Article 78 challenge if the Law Department declines or withdraws from representation, they contend that there is no final determination. Second, Respondents state that the challenged Policy is not new, but instead is a longstanding policy which the May 14, 2018 email merely clarified. In support of this contention, they annex redacted copies of letters to employees that predate the 2018 email, all of which purportedly include

the language to which Petitioner objects here (NYSCEF Doc. Nos. 112-114). Therefore, to the extent that Petitioner challenges the policy itself, Respondents argue that Petitioner's challenge is years late.

For its fourth affirmative defense, Respondents argue that the petition does not state a viable cause of action. According to Respondents, "the Petition sets forth no facts demonstrating that there is an administrative determination at issue here, that there is an administrative determination made by Respondents requiring review by this Court, nor {sic} that there was an administrative determination, or, for that matter, a final determination, made by Respondents in error or in violation of law" (NYSCEF Doc. No. 110, *8). Also on this point, Respondents suggest that because the Petition makes several statements on information and belief and does not point to any instances in which a DOE employee has been harmed, it does not support its contentions sufficiently.

As their fifth and sixth affirmative defenses, Respondents argue that the Policy is consistent with GML § 50-k, Education Law §§ 2560 and 3028, and the Rules of Professional Conduct. They note that a 2019 Bronx County Criminal Court case, People v Acosta (2019 NY Slip Op 30676 [U] [Sup Ct, Bronx County 2019] [Acosta]) upheld the validity of the waiver. Additionally, they contend that the Policy advances the public interest and that it

does not violate Education Law §§ 3020 or 3020-a. According to Respondents, strong policy considerations, such as the protection of the general public, justify the imposition of the Policy. Respondents assert that the Policy properly balances these considerations against the interest and legal rights of the prospective client.

Further, Respondents state that the Policy is consistent with the cited statutes because the duty to defend only exists if the employee's action "[arose] 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" (GML § 50-k [2]). They stress that the right to defense and indemnification is conditional, as it exists only where the aggrieved employee notifies Corporation Counsel in a timely fashion and fully cooperates with the law department throughout the course of the litigation (GML § 50-k [4]). Respondents quote Blood for the proposition that the cited statutes only aim to "sav[e] imperfect and, therefore, fallible public employees from the potentially ruinous legal consequences following from unintentional lapses in the daily discharge of their duties" (121 AD2d at 132). As such, Respondents argue that the Policy imposes a reasonable condition on their statutory

duty of representation. They state that the Rules of Professional Responsibility allows them to share information with DOE, which the Law Department often represents jointly in such cases.⁴

Next, Respondents argue that DOE employees have no expectation of privacy when the Law Department jointly represents the employee and DOE (citing Texi-Plex, Inc. v Meyner and Landis, 89 NY2d 123, 136 [1996]⁵; Talvy v American Red Cross in Greater N.Y., 205 AD2d 143, 150 [1st Dept 1994] [dicta], *affd* 87 NY2d 826 [1995]). Respondents note that the 2018 letter emphasizes that the Law Department jointly represents DOE and the employee and that this joint representation vitiates the legal duty to keep damaging information about the employee from DOE. Further, Respondents argue that because the DOE is financially responsible for any adverse judgment, it always is a party-in-interest when the employee acts within the scope of his or her job. Further, they reiterate that the employee is free to hire outside counsel if he or she does not want this information to be shared.

⁴ Respondents purportedly cite the Petition for this principle, but the citation is misleading. Instead, the cited paragraph criticizes Respondents for requiring a waiver of the attorney-client privilege (see NYSCEF Doc. No. 1, ¶ 36).

⁵ Respondents quote language in the decision that merely quoted the appellants' argument, which was ultimately rejected as irrelevant to the legal issues at hand.

Additionally, Respondents contend that the information in the letters of representation satisfies the Law Department's ethical obligations. They note that Rule 1.6 (a) (1) of the Rules of Professional Responsibility prohibits the disclosure of confidential information unless the client, by informed consent, waives the attorney-client privilege. Under Rule 1.0 (j), informed consent exists if "the lawyer has communicated information adequate for the person to make an informed decision" and "adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives." Respondents also contend that the waiver is limited in scope, reasonable, and consistent with their policy goals and with the employees' statutory guarantee of legal representation. They claim that the protection of students is a fundamental goal of the City and DOE and the Policy furthers this goal by allowing the Law Department to share information pertinent to the students' safety. Respondents reject the argument that the Policy violates Education Law §§ 3020 and 3020-a, noting that these statutes relate to internal disciplinary procedures and are unrelated to litigation, which is at issue here.

Finally, Respondents state that CAPA is inapplicable here. Respondents emphasize that, for the purposes of CAPA, a rule "[does] not include any (i) statement or communication which

relates only to the internal management or personnel of an agency which does not materially affect the rights of or procedures available to the public . . .” (CAPA § 1041 [5] [b]). Here, Respondents state, the Policy relates solely to the internal management of UFT members and does not impact the general public. As such, Respondents contend that Petitioner’s reliance on Matter of Council of the City of N.Y. v Department of Homeless Servs. of the City of N.Y., 22 NY3d 150 [2013] [*Dept. of Homeless Servs.*], which involved a policy that impacted all single adults who sought temporary housing assistance, is misplaced.

Petitioner’s verified reply generally denies the allegations in the answer and, moreover, states that “Respondents fail to articulate any statements to support, explain or put Petitioner on notice of any of the material elements of the affirmative defenses set forth in the Verified Answer as required by CPLR § 3013” (NYSCEF Doc. No. 118, ¶ 18). Accordingly, it seeks dismissal of the affirmative defenses in their entirety.

In its memorandum in reply (NYSCEF Doc. No. 120), Petitioner also sets forth the three-part test for organizational standing. The first component of the test requires a showing that there is an injury-in-fact to at least one of Petitioner’s members, and that this injury is within the

zone of interests the organization protects. Petitioner asserts that its members have sustained an injury-in-fact because of their legal right to defense and indemnification from the Law Department (see NYSCEF Doc. No. 1, ¶¶ 15, 21). According to Petitioner, in their assertion that there has not been an injury-in-fact, Respondents conflate the concept of injury with that of interest (NYSCEF Doc. No. 120, *8, citing Matter of Tibaldi v Brezenoff, 65 NY2d 710, 711 [1985] ["standing of the union turns on whether all members of the union could maintain the action by reason of their interest"]). Additionally, according to Petitioner, the compulsory waiver of UFT members' attorney-client privilege in order to obtain their statutorily guaranteed representation is, in itself, an injury.

In support of the argument that individual members have sustained a concrete injury, Petitioner submits the supplemental affirmation of Robert T. Reilly, is Petitioner's attorney of record (NYSCEF Doc. No. 119). Reilly states that "[s]ince at least May of 2018, representatives affiliated with Petitioner . . . have asked attorneys associated with my office to counsel UFT members in connection with the process applicable to requests for legal representation from Respondents" (id., ¶ 5). More precisely, he contends that his office has assisted at least 59 UFT-represented employees, and that the employees ultimately signed the representation letter, including the

waiver of attorney-client privilege, so they could obtain legal support. Thus, he concludes that these individuals have sustained harm due to the challenged policy.

Under the second prong, courts examine whether the purpose of the litigation furthers the organization's institutional purpose. Here, Petitioner notes that Respondents have not asserted a challenge. Thus, they implicitly concede that Petitioner satisfies this prong.

As for the third prong, Petitioner argues that complete relief is possible without the participation of individual union members. Petitioner contends that the issue does not require a case-by-case resolution. Instead, they argue that because the Policy impacts all UFT members, "[i]t is enough to allege the adverse effect of the decision sought to be reviewed on the individuals represented by the organization" (NYSCEF Doc. No. 120, *4, quoting Matter of Dental Socy. of State of N.Y. v Carey (61 NY2d 330, 334 [1984])).

Next, Petitioner contends that the proceeding is timely. Petitioner denies that the Policy merely clarifies an existing policy. Instead, Petitioner states that the letters Respondents have sent to UFT employees since the May 14, 2018 email add the requirement that "DOE has the exclusive right to waive any privilege [the employee] may have" (NYSCEF Doc. No. 3). It stresses that this statement does not appear in the three

earlier redacted letters Respondents submitted (see NYSCEF Doc. Nos. 112-114). As Petitioner commenced the proceeding within four months of the May 14, 2018 policy statement, Petitioner contends that the matter is timely.⁶

Petitioner also argues that the petition states a viable claim. It cites Walton v New York State Dept. of Correctional Servs. (8 NY3d 186, 194 [2007]), which states that Article 78 is a proper vehicle for a challenge “to the quasi-legislative acts and decisions of administrative agencies . . .” (NYSCEF Doc. No. 120, *7, also citing Matter of City of New York v New York State Pub. Serv. Commn., 105 AD3d 1200, 1202 [3d Dept 2013]).

According to Petitioner, the Petition is sufficiently clear and detailed in its discussion of the Policy and statutory violations, and it properly outlines the “unlawful, unethical additional requirements imposed on prospective clients in exchange for the statutory representation that they are entitled to . . .” (NYSCEF Doc. No. 120, *7).

Petitioner also adheres to its position that Respondents violate the municipal laws and statutes at issue every time it conditions its members’ right to representation on a waiver of attorney-client privilege. It notes that GML § 50-k and

⁶Additionally, Petitioner contends that its CAPA claim is timely because, if CAPA is violated, the Policy is void ab initio (NYSCEF Doc. No. 120, *6-7).

Education Law §§ 2560 and 3028 do not allow for the reduction of the employee's right to a legal defense. Citing Mills (250 AD2d at 126) and Matter of Condon v Sabater (113 AD3d 203, 205 [1st Dept 2013]), Petitioner argues that because of the alleged conflict between the Policy and the statutes, Respondents have exceeded their authority.

Finally, Petitioner reiterates its position that Respondents implemented the Policy in violation of CAPA. It rejects Respondents' contention that the Policy is merely a communication related to Respondents' internal management. Instead, they contend that, as it is "a rigid, numerical policy invariably applied across-the-board ... without regard to individualized circumstances or mitigating factors ... fall plainly within the definition of a rule" the meaning of CAPA (citing New York State Rest. Assn. v New York City Dept. of Health & Mental Hygiene, 5 Misc 3d 1009 [A], *5, 2004 NY Slip Op 51290 [U] [Sup Ct, NY County 2004] [*Rest. Assn.*] [internal quotation marks and citation omitted]).⁷ It argues that this rigidity that triggers CAPA.

Analysis.

"Standing is a threshold determination . . . that a person should be allowed access to the courts to adjudicate the merits

⁷The quoted language refers to the State Administrative Procedure Act, but the court applies the principle in the context of CAPA.

of a particular dispute that satisfies the other justiciability criteria" (Association for a Better Long Is., 25 NY3d at 6 [internal quotation marks and citation omitted]). As lack of standing mandates the dismissal of the proceeding, courts do not apply standing in an overly restrictive manner, especially if a negative determination would shield the agency's action from judicial review (*id.* at 6-7; see New York Univ. v City of New York, 230 AD3d 416, 420-421 [1st Dept 2024]). Here, the issue is whether UFT, through its president, have organizational standing under Society of Plastics Indus. v County of Suffolk (77 NY2d 761, 775 [1991] [Society of Plastics]; see Mulgrew, 76 AD3d at 413).

The promulgation of the Policy, which affects UFT's members along with the employees of other city agencies, confers organizational standing on UFT (see Matter of Stuyvesant Town-Peter Cooper Vil. Tenants Assn. v New York State Div. of Hous. & Community Renewal, 232 AD3d 484, 485-486 [1st Dept 2024]). The court agrees with Petitioner that the Policy impacts UFT employees' right to legal representation, as it transfers employees' attorney-client privilege to the Board and/or the City (*see* NYSCEF Doc. No. 3, *3). Thus, the alleged restriction impacts all UFT employees who seek Law Department representation. To the extent that Respondents aver that a

concrete injury to individual employees is necessary,⁸ Petitioner submits the Reilly affirmation, which states that he has advised at least 59 UFT members who required representation about their rights under the Policy. For this last reason, the affirmative defense of ripeness also fails.

As stated, Respondents do not dispute that Petitioner satisfies the second prong of the Society of Plastics test, as “it has suffered an injury in fact and . . . its concerns fall within the zone of interests sought to be protected by the statutory provision under which the government agency has acted” (Matter of Lawyers for Children v New York State Off. of Children & Family Servs., 218 AD3d 913, 915 [3d Dept 2023] [internal quotation marks and citation omitted]). The Petition satisfies the third prong, which states that the organization does not need to join individual members as Petitioners in order to achieve full relief. Petitioner correctly alleges that the Policy impacts all UFT members who seek their statutory right to legal representation, and that the policy does not distinguish between those individuals who seek representation. Petitioner also is correct that Respondents do not explain what individual factors would require individuals to participate in the litigation. In Patrolman’s Benevolent Assn., on which

⁸The court does not decide this issue, as unnecessary to determine.

Respondents rely, it was necessary to determine whether each of the individuals who were not promoted asserted a meritorious claim for failure to promote (79 AD3d at 893). In contrast, here, the Policy is enforced uniformly, regardless of the specifics or merits of the claims against the employees.

The court rejects Respondents' argument that the stated injury is too amorphous to support an Article 78 proceeding. Association for a Better Long Is., on which Respondents rely, is distinguishable. In Association for a Better Long Is., the Court of Appeals stated that "[a]s the United States Supreme Court has recognized, a litigant's 'someday' intentions—without any description of concrete plans, or indeed even any specification of when the someday will be—do not support a finding of the 'actual or imminent' injury that our cases require' " (*id.*, quoting Lujan v Defenders of Wildlife, 504 US 555, 564 [1992]). Here, as in Association for a Better Long Is., the agency's intention is clear, as Respondents already have implemented it.

Further, in contrast to the case at hand, the court in New York State Assn. of Nurse Anesthetists v Novello (2 NY3d 207 [2004]) the organization challenged a guideline which recommended "that the supervising physician be *qualified by law* to perform and supervise the administration of anesthesia" on the ground that it threatened the ability of nurses to perform

anesthesia independently (id. at 213). The court found that the organization's argument was amorphous because it was

"founded on two layers of speculation--that the Guidelines will be rigorously enforced as regulations and that, as such, they will effectively harm CRNAs. At this juncture, it is not at all 'obvious' that, even if enforced as regulations, the Guidelines would in fact injure any of plaintiff's members as claimed" (id.).

Again, in the case at hand, Respondents already have adhered to the Policy rigidly, as its form letters contain the language at issue and make the transfer of the attorney-client privilege a prerequisite for representation. There is no question that the Policy has and will continue to have the stated impact.

The third affirmative defense also raises a threshold challenge, that of untimeliness. The statute of limitations for a challenge to the institution of a policy is four months from its enactment (see RNC Indus. v State of N.Y. Pub. Serv. Commn., 58 Misc 3d 1211 [A], *1, 2017 NY Slip Op 51966 [U] [Sup Ct, Albany County 2017]). In this context, the court "consider[s] the completeness of the administrative action and make[s] a pragmatic evaluation as to whether a position has been reached that inflicts an actual, concrete injury" (Matter of Capital Dist. Regional Off-Track Betting Corp. v New York State Racing & Wagering Bd. 97 AD3d 1044, 1046 [3d Dept 2012] [Regional Off-Track Betting Corp.]). Thus, in Regional Off-Track Betting Corp., the court found that the Petitioners' participation in a

conference call about the change in policy would have triggered the statute of limitations if an actual injury had occurred (id.).⁹

As Respondents assert, Petitioner had actual or constructive notice of the fact that, to obtain representation, a UFT employee had to acknowledge that the Law Department might share damaging information with DOE if and when it came to its attention (see NYSCEF Doc. Nos. 112-114). However, the portion of the Policy that states that a UFT member must “understand and agree that the DOE has the exclusive right to waive any privilege you may have with respect to any such information” - the language that implements the “new policy” addressed in the email - did not exist previously (NYSCEF Doc. No. 3, *2; see NYSCEF Doc. No. 1, ¶¶ 38-39).¹⁰ Thus, the matter is timely.

Next, under CAPA, when an agency adopts a rule, it must follow a detailed procedure that includes the publication of the rule in the City Record; the transmission of copies of the rule to a specified list of recipients; the posting of information about the hearing on the agency website; and the hearing itself (CAPA § 1043 [2]). If CAPA applies to the Policy, then it is

⁹The court did not reach the question of whether there had been a concrete injury.

¹⁰ The court notes that the email purported to inform Petitioner of a “new policy,” although the message did not notify Petitioner of the specifics of the change (see NYSCEF Doc. No. 2). It is the representation letter that contains the new provision (see NYSCEF Doc. No. 3).

void ab initio (see Matter of Lynch v New York City Civilian Complaint Review Bd., 183 AD3d 512, 518 [1st Dept 2020] [Lynch]). Thus, if the court finds that the Policy is subject to CAPA, its inquiry is at an end.

For the purposes of CAPA, a rule "implements or applies law or policy" and may be an amendment "of any such statement or communication" (CAPA § 1041 [5]). A policy is a rule if it "is to be 'invariably applied across-the-board' to segments of the population within its ambit 'without regard to individual circumstances or mitigating factors'" (1700 York Assoc. v Kaskel, 182 Misc 2d 586, 593 [Civ Ct, NY County 1999], quoting Matter of Schwartfigure v Hartnett, 83 NY2d 296, 301 [1994] [Schwartfigure]). However, as Respondents stress, if the policy at issue does not have general applicability or "relates only to the internal management or personnel of an agency which does not materially affect the rights of or procedures available to the public," it is not a rule for the purposes of CAPA (CAPA § 1041 [5] [a]). This is because CAPA "gives the public an opportunity to comment on a proposal before it becomes effective, which is consistent with the legislative desire to give the citizenry a voice in the operation of government" (Ousmane v City of New York,

7 Misc 3d 1016 [A], *4, 2005 NY Slip Op 50634 [U] [Sup Ct, NY County 2005]).¹¹

Although the Policy in question is applied uniformly “without regard to other facts and circumstances” and shares other characteristics of a rule (Dept. of Homeless Servs., 22 NY3d at 154 [internal quotation marks and citation omitted]), CAPA does not apply. The Policy relates to the internal management of the agency and does not “materially affect the rights of or procedures available to the public” (New York City Charter § 1041 [5][b][i]). As such, it is distinguishable from cases such as Rest. Assn. (5 Misc 3d 1009 [A], 2004 NY Slip Op 51290 [U]), where the implementation of the rule would lead to the cancellation of restaurants’ licenses, and Matter of Singh v Taxi & Limousine Commn. of City of N.Y. (282 AD2d 368 [1st Dept 2001]), where the implementation of the rule impacted a taxi driver’s ability to renew his or her license (see also Homeless Servs., 22 NY3d 150 [rule that affected eligibility of individuals for homeless services]).

Further, Petitioner’s argument in reply is not persuasive, as the cases it cites are distinguishable. Matter of Connell v

¹¹ Respondents argue the Policy is not a rule because it “simply provide[s] additional detail and clarification as to how [regulatory] standards are met by the public and upheld by the agency” (*Matter of Plainview-Old Bethpage Congress of Teachers v New York State Health Ins. Plan*, 140 AD3d 1329 [3d Dept 2016]). For the reasons above, the court rejects this argument.

Regan (114 AD2d 273 [3d Dept 1986]), the nearly 40-year-old Third Department case upon which Petitioner relies, is not controlling. Moreover, the court there found that the rule took away the State employees' property right when it reduced the Petitioner's pension and, potentially, reduced the pensions of all New York State government employees who did not follow the rule. The rule in Schwartfigure impacted unemployment benefits for everyone in the State. In Matter of New York State Coalition of Pub. Empls. v New York State Dept. of Labor (60 NY2d 789 [1983]), in which the Labor Commissioner did not file and publish the proposed rule with the Department of State, the court did not invalidate the rule but instead required the commissioner to comply with the publication and filing requirements. Finally, in Matter of Gill v New York State Racing & Wagering Bd. (50 AD3d 494, 495 [1st Dept 2008]), the court did not allow an agency to avoid the requirements of SAPA by repeatedly extending the rule's effectiveness due to an alleged emergency.

Next, the court turns to the principle arguments. "The attorney-client privilege is the oldest of the privileges for confidential communications tracing its origins back nearly 450 years to 1577 England" (Project Veritas v New York Times Co., 74 Misc 3d 515, 524 [Sup Ct, Westchester County 2021] [internal quotation marks and citations omitted]). The privilege

encourages trust between the attorney and client, fosters complete, frank communication by the clients. As such, it “promote[s] broader public interests in the observance of law and administration of justice’” (*id.*, quoting Upjohn Co. v United States, 449 US 383, 389 [1981]). The language in CPLR § 4503 stresses the importance and scope of the privilege:

“Unless the client waives the privilege, an attorney or his or her employee . . . shall not disclose, or be allowed to disclose [a confidential communication made between the attorney or his or her employee and the client in the course of professional employment], nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof.”

Further, “in New York, only a client may waive the privilege” (Tompkins v R.J. Reynolds Tobacco Co., 92 F Supp 2d 70, 76 [ND NY 2000]).

In the context of the Education Law § 3028 and GML § 50-k, which provide that the Law Department represents the DOE employee “out of disciplinary action taken against any pupil of the district while in the discharge of his [or her] duties within the scope of his [or her] employment” (Education Law § 3028; *accord* GML § 50-k), the Law Department represents the DOE employee in his or her capacity as a representative of DOE.

Further, the Law Department also represents the DOE. Petitioners do not dispute that, as a longstanding practice, this gives the Law Department the power to share information about the employee with the DOE, including information as to why it has denied or withdrawn from representation of the employee. Here, then, the question is narrow: Does the addition of the provision that, as a condition of representation, employees must “understand and agree that the DOE has the exclusive right to waive any privilege you may have with respect to any such information. . . .” (NYSCEF Doc. No. 3, *3), violate the rights of UFT members.

After careful consideration, the court concludes that the new provision does violate the members’ right to counsel and the attorney-client privilege. Although the intent of the additional language presumably is to clarify that the Law Department may share negative information about the conduct at issue in the litigation with DOE, the wording suggests a much broader waiver. Specifically, the new provision suggests that DOE can waive the employee’s privilege in any context - waiving the privilege and providing information to the plaintiffs in the lawsuit against the employee, for example, or sharing the information with future employers without the employee’s consent. Further, it does not provide an end date beyond which DOE loses the right to waive the employee’s attorney-client privilege.

Respondents' arguments to the contrary are unpersuasive. The protection to the public and the balance of this protection against the employee's rights already exists, as before Respondents implemented the Policy, the employee already had a conditional rather than an absolute right to representation (see Education Law § 3028; GML § 50-k). The difference is that the new language in the representation letter suggests that the employee permanently loses the right to waive or protect his or her own attorney-client privilege with respect to the subject matter at issue. Thus, the language does not clarify but confuses the scope of the waiver.

As stated, Respondents also argue that the complete transfer of the employee's attorney-client privilege to DOE is not coercive because, if this transfer is problematic, he or she can decline representation by the Law Department and seek independent counsel. The court rejects this argument because of its practical impact, which is that not every employee can afford, or comfortably afford, his or her own counsel. This is true even though there is a potential for future indemnification if the court finds the employee did not intentionally act outside the scope of employment. In light of this impediment, the employee may feel that he or she has no alternative but to consent to the waiver. As such, the additional language impairs

the right to representation that is guaranteed to employees under the applicable statute and municipal law.

Petitioner has not shown why discovery is necessary, especially in light of the court's determination. Therefore, the court denies such relief.

Debra A. James

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<u>12/15/2025</u>			<u>DEBRA A. JAMES, J.S.C.</u>
DATE			
CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE