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**PERSONNEL ADVISORY MEMORANDUM**

November 24, 2003

To: College Presidents  
From: Frederick P. Schaffer   
Re: Representation and Indemnification  
of University Employees

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University employees frequently ask whether (a) they will receive legal representation in the event they are sued in connection with their employment; and (b) they are subject to any personal liability in such lawsuits. This memorandum sets forth the law regarding an employee's right to representation and indemnification.

1. Background

The issue of representation and indemnification of CUNY employees is governed by Section 6205 of the New York State Education Law. That section provides that employees of the CUNY senior colleges shall be represented and indemnified in accordance with Section 17 of the Public Officers Law (the statute governing the defense and indemnification of all state employees.) Section 6205 also provides for the representation and indemnification of CUNY community college employees pursuant to provisions that are modeled on those applicable to other employees of municipalities within the State of New York.

It should be stressed that Section 6205 of the Education Law applies only to current and former CUNY employees, along with members of the CUNY Board of Trustees (this group is referred to herein as "CUNY employees").<sup>1</sup> The representation and indemnification provisions do not apply to employees of outside contractors who work on the CUNY premises, as CUNY is not their employer. Similarly, employees of separately incorporated entities such as the Research Foundation, or of related entities such as college performing arts centers, child care centers or auxiliary enterprise boards, are not entitled to representation or indemnification as CUNY employees. As we have previously advised, it is therefore essential that any separately incorporated entities on your campus have their own insurance coverage.

## 2. Right to Representation

Pursuant to Education Law Section 6205 and Public Officers Law Section 17, CUNY employees are entitled to legal representation by the New York State Attorney General's Office (for senior college employees, including employees of the Central Office) or the New York City Corporation Counsel's office (for community college employees) if they are:

(a) sued in a civil action in either state or federal court; and

(b) the action arises out of "any alleged act or omission to act which occurred or is alleged in the complaint to have occurred while the employee was acting within the scope of his public employment or duties."

The right to representation only applies where the employee is a defendant in a civil action in court. Employees have no statutory right to be represented in criminal matters or in administrative proceedings, such as complaints before the Equal Employment Opportunity Commission or the New York State Division of Human Rights. However, the Office of the General Counsel will generally represent employees who are named as respondents in administrative proceedings resulting from their CUNY activities and responsibilities.

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<sup>1</sup> Although it is not the subject of this memo, students who serve on university or college bodies or committees which are composed of a majority of faculty, administration and trustees, are also entitled to representation and indemnification if they are sued for actions taken as a result of their work on those committees.

In addition, employees are not entitled to representation by the Attorney General or the Corporation Counsel if they are subpoenaed to give testimony in a case where neither CUNY nor the employee is a party (even though the subject matter of the testimony relates to their CUNY work.) In such cases, colleges should contact this office so that an attorney can provide any necessary advice to the employee and/or the college, or make other appropriate arrangements.

The second requirement for obtaining representation, that the employee must have been acting within the "scope of employment" is generally construed very broadly. Even individuals who are accused of conduct that is in violation of CUNY policies, such as discrimination or sexual harassment, are typically represented so long as the complaint alleges that the conduct took place while the individual was performing his or her CUNY responsibilities. (However, those employees may not necessarily be entitled to indemnification, see below.) In the case of a faculty member, the scope of employment includes not only teaching, but duties such as service on College or University committees (such as Personnel and Budget committees or Faculty/Student Disciplinary committees) and working with students on extracurricular activities that have College approval.

Although it is rare for representation to be denied, the State or City may appropriately refuse to represent a CUNY employee where the lawsuit arises out of an activity that is not part of the employee's official job duties. For example, it is possible that a faculty member who took students on an unauthorized trip on a weekend could be denied representation on the ground that this activity was not within the "scope of employment." While these cases are fact specific, it is important to keep in mind that not everything that a CUNY employee may do is necessarily within the scope of his or her employment.

As a procedural matter, the right to representation is contingent upon the employee providing the summons or other paper commencing the action to the Attorney General or Corporation Counsel within five days of receipt. At CUNY, the College's Legal Affairs Designee is responsible for immediately forwarding all legal papers served on the College and any College employee to this office, and for advising us which individual defendants are CUNY employees. We then forward all new cases to the appropriate legal representative and request representation for CUNY and CUNY employees. Employees are also frequently asked by the assigned CUNY attorney to sign a specific request for representation in the particular matter. As a condition of representation, employees are required to cooperate fully in the defense of the action, or in any appeal.

It should also be noted that, where the Attorney General or the Corporation Counsel determines that it would constitute a conflict of interest for it to represent both CUNY and the employee, the employee is entitled to be represented, at State or City expense, by private counsel of his or her choice.

### 3. Right to Indemnification

CUNY employees who are entitled to representation, as set forth above, are usually also entitled to indemnification, that is, to have the costs of any judgment or settlement reimbursed or paid by the State (if the employee is a senior college employee) or City (if the employee works for a community college.) However, employees are not entitled to indemnification if

(a) the facts adduced at trial (as opposed to the allegations in the complaint) demonstrate that the employee was not acting within the scope of his or her employment; or

(b) the injury or damage resulted from "intentional wrongdoing on the part of the employee"; or

(c) in the case of community college employees only, the injury or damage results from "recklessness."

With regard to (a) above, there have been lawsuits where State and City employees have been represented based on allegations that they acted within the scope of employment. However, when the facts were developed during the trial, it was found that they were not acting within the scope of their employment and accordingly, they were not entitled to be indemnified. In one case, for example, a New York appellate court held that a correctional officer who opened a prisoner's jail cell so that the prisoner could be assaulted by other guards was acting outside of the scope of his employment because he acted "contrary to known operating procedures" and engaged in an "intentional course of conduct contrary to institutional rules, training and common sense." Spitz v. Coughlin, 161 A.D.2d 1099, 557 N.Y.S.2d 647 (3d Dep't 1990).

Pursuant to (b) and (c) above, employees are not entitled to be indemnified if they engage in "intentional wrongdoing" or, in the case of community college employees, reckless conduct.<sup>2</sup> There are very few reported legal decisions (other than in prisoner's

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<sup>2</sup> The different standards applicable to senior and community college employees are the result of the fact that different statutes apply to State and City employees.

rights cases) regarding what conduct constitutes "intentional wrongdoing" or "recklessness" for purposes of these statutes. Clearly, however, an employee would not be indemnified for engaging in violent actions or other intentional wrongs, which could include discrimination or harassment that is found to be deliberate. Employees would, however, be indemnified for conduct that is found to be merely negligent.

In summary, there is a broad statutory right to representation and indemnification. However, employees need to understand that they may not be represented if they engage in unauthorized activities and that, even if they are represented, they may be personally liable if they are found to have engaged in intentional wrongdoing or reckless conduct.

c: Chancellor Goldstein  
Cabinet  
Chief Academic Affairs Officers  
Chief Administrative Affairs Officers  
Chief Student Affairs Officers  
Legal Affairs Designees

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