

**New Jersey Commissioner of Education**  
**Final Decision**

Heather Garcia,

Petitioner,

v.

Board of Education of the Borough of Norwood,  
Bergen County

Respondent.

**Synopsis**

The petitioner, a member of the Board of Education of the Borough of Norwood (BOE), also sits on the Board of Trustees of the Valley Kids Matter Foundation, Inc. (VKMF), an organization that advocates for children with special needs. In a separate action, fellow members of the BOE filed a School Ethics complaint alleging that petitioner's board membership with VKMF is in conflict with her responsibilities to the BOE, and therefore petitioner's removal as a member of the BOE is appropriate and necessary to protect the interests of the BOE. In the instant matter, petitioner sought indemnification for the fees and costs of defending herself in the School Ethics case, as well as for the costs associated with the within petition. The parties filed cross motions for summary decision.

The ALJ found, *inter alia*, that: there is no genuine issue as to any material fact here, and the matter is ripe for summary decision; the issue of indemnification of members of boards of education against the cost of legal proceedings is governed by *N.J.S.A. 18A:12-20*, which provides for indemnification when a legal action against a board member arises out of and in the course of the performance of their duties as a member of the board; the issue in this case is whether *N.J.S.A. 18A:12-20* requires that petitioner be indemnified for legal fees and expenses incurred in connection with her defense against a School Ethics complaint filed by fellow members of the BOE. The ALJ concluded that those allegations arose out of petitioner's private activities involving VKMF, not her service as a member of the BOE. Accordingly, the ALJ granted the Board's motion for summary decision, denied petitioner's cross motion, and dismissed the petition.

Upon review, the Commissioner concurred with the ALJ that the allegations against petitioner in this matter are based on private actions and therefore petitioner is not entitled to indemnification under *N.J.S.A. 18A:12-20*. Accordingly, the Commissioner denied petitioner's motion for summary decision, and granted the Board's cross-motion for summary decision. The petition of appeal was dismissed.

This synopsis is not part of the Commissioner's decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commissioner.

9-22

OAL Dkt. No. EDU 04851-21

Agency Dkt. No. 78-5/21

**New Jersey Commissioner of Education**

**Final Decision**

Heather Garcia,

Petitioner,

v.

Board of Education of the Borough of  
Norwood, Bergen County,

Respondent.

The record of this matter, the Initial Decision of the Office of Administrative Law (OAL), the exceptions filed by petitioner pursuant to *N.J.A.C. 1:1-18.4*, and the Board's reply thereto, have been reviewed and considered.

Petitioner, who is a member of the Norwood Board of Education, is the subject of a complaint alleging that she is in violation of the School Ethics Act (Act) because she also serves on the Board of Trustees of the Valley Kids Matter Foundation, Inc. (VKMF), an organization that advocates for children with special needs and is alleged to be in conflict with petitioner's responsibilities to the Board.<sup>1</sup> In the instant matter, petitioner seeks indemnification for the fees and costs of defending herself in the School Ethics matter, as well as for those associated with the instant petition. Following cross-motions for summary decision, the Administrative Law Judge (ALJ) concluded that the allegations against petitioner in the School Ethics complaint are based on private action, outside the performance of her duties as a member of the Board. Accordingly, the ALJ concluded that petitioner is not entitled to indemnification and granted the Board's cross-motion for summary decision.

---

<sup>1</sup> The School Ethics complaint is pending separate adjudication and this decision does not address the merits of that complaint.


In her exceptions, petitioner argues that the School Ethics complaint does not accuse petitioner of doing anything unethical by forming VKMF, but rather only alleges that petitioner improperly received confidential information, participated in discussions, and voted to further VKMF's objectives. Petitioner contends that these actions clearly arise out of her duties as a Board member and thus she is entitled to indemnification.

In reply, the Board argues that all of the violations alleged in the School Ethics complaint arose with the incorporation of VKMF, and none pertain to any act or omission petitioner performed as a member of the Board. Therefore, the Board contends, petitioner is not entitled to indemnification.

Upon review, the Commissioner concurs with the ALJ that the allegations against petitioner are based on private actions and therefore petitioner is not entitled to indemnification. The Commissioner does not find petitioner's exceptions, which reiterate arguments made below that were considered and rejected by the ALJ, to be persuasive. *N.J.S.A.* 18A:12-20 provides for indemnification when a legal proceeding against a board member arises out of and in the course of the performance of her duties. Here, the allegations arise out of petitioner's activities involving VKMF, not her activities involving the Board.

Accordingly, the petitioner's motion for summary decision is denied, and the Board's cross-motion for summary decision is granted. The petition of appeal is hereby dismissed.

IT IS SO ORDERED.<sup>2</sup>

  
ACTING COMMISSIONER OF EDUCATION

Date of Decision: January 19, 2022  
Date of Mailing: January 19, 2022

---

<sup>2</sup> This decision may be appealed to the Appellate Division of the Superior Court pursuant to *N.J.S.A.* 18A:6-9.1. Under *N.J.Ct.R.* 2:4-1(b), a notice of appeal must be filed with the Appellate Division within 45 days from the date of mailing of this decision.



**State of New Jersey**  
OFFICE OF ADMINISTRATIVE LAW

**INITIAL DECISION**

**SUMMARY DECISION**

OAL DKT. NO. EDU 04851-21

AGENCY REF. NO. 78-5/21

**HEATHER GARCIA,**

Petitioner,

vs.

**BOARD OF EDUCATION OF THE  
BOROUGH OF NORWOOD,  
BERGEN COUNTY,**

Respondent.

---

**David B. Rubin, Esq.,** for Petitioner (Law Office of David B. Rubin, LLC,  
attorneys)

**Stephen R. Fogarty, Esq.,** for Respondent (Law Office of Fogarty & Hara,  
attorneys)

Record Closed: November 29, 2021

Decided: December 9, 2021

BEFORE: **JOHN P. SCOLLO**, ALJ:

**STATEMENT OF THE CASE**

The matter at hand in Heather Garcia v. Norwood Board of Education, OAL Docket Number EDU 04851-21 (referred to as the "Indemnification Matter") deals with

the question of whether Heather Garcia (hereinafter referred to as “Garcia”) is entitled under N.J.S.A. 18A:12-20 to be indemnified for attorney’s fees, expenses and costs associated with her defense of another OAL matter, I/M/O Heather Garcia, Norwood Board of Education, OAL Docket Number EEC-10392-20.

## **BACKGROUND**

I/M/O Heather Garcia, Norwood Board of Education (soon to be re-titled School Ethics Commission v. Heather Garcia) concerns a Complaint filed under the School Ethics Act, N.J.S.A. 18A:12-21 to 24 and under the Code of Ethics for School Board Members, N.J.S.A. 18A: 12-24.1 alleging that Heather Garcia (hereinafter, “Garcia”), a current member of the Norwood Board of Education (hereinafter, the “BOE”) is in violation of several provisions of said laws in connection with her incorporation of, membership on the Board of Trustees of, and affiliation with a New Jersey 501(c)(3) non-profit corporation named Valley Kids Matter Foundation, Inc. (referred to herein as “VKMF”) while simultaneously serving as a member of the Norwood Board of Education.

In essence, the Complaint filed by fellow BOE members alleges that VKMF is an advocate for parents of special needs children (referred to herein as “special needs parents”) who reside in the same school district (Northern Valley) wherein Norwood is located; that VKMF’s avowed purpose is to advocate on behalf of said parents and children (it clients) including being involved in actions brought against said school district and / or Norwood BOE; that as a member of both the Norwood BOE and VKMF, Garcia would repeatedly find herself in situations where her loyalties must necessarily be divided between the BOE and the clients of VKMF; that Garcia’s membership on the Norwood BOE places her in a position to obtain information that is not generally available to the public and to use that information against the interests of the BOE and the District; that Garcia would thereby place herself into a conflict of interest with respect to her duties to the BOE, and also with respect to her duties to VKMF’s clients; and that, inasmuch as her affiliation with VKMF conflicts with her duties to the Norwood

BOE, her removal from the BOE's Board is appropriate and is necessary to protect the interests of the BOE.

By way of further background information, Garcia asked the School Ethics Commission (the "SEC") for an Advisory Opinion seeking to determine (1) whether her or her husband's (Daniel Garcia's) role or participation with VKMF poses a potential conflict of interest with her membership on the Norwood BOE, (2) whether there is "an ethical prohibition or issue with the organization (VKMF) performing fundraising activities designed to pay for private services, directly to the provider of the services, such as physical therapy, occupational therapy, equine or canine therapy, or the like"; and (3) if there is a conflict related to Heather Garcia's or Daniel Garcia's participating in the foundation (i.e., VKMF), or in other words, "Would a non-immediate family member who is not an elected or appointed school board trustee possess such a conflict?". On April 21, 2020, the SEC, in response to Garcia's request, issued Advisory Opinion A07-20. This April 21, 2020 Advisory Opinion A07-20 is attached to Garcia's Summary Decision Motion papers as Exhibit 'B'.) The essence of the Advisory Opinion is that

" [T]he [School Ethics] Act does not prohibit [Garcia's] involvement in [VKMF] generally, or in a leadership role specifically. Therefore, and based on your representations set forth in your request, there is *no current prohibition* on your involvement with the foundation. However, although you are permitted to be involved with the foundation in the capacity that you described, *you would violate* the Act if [Garcia], [Garcia's] spouse, or any other member of [Garcia's] foundation provided services to the families of the students who attend the District's schools." [Emphasis supplied.]

### **ISSUE TO BE DECIDED HEREIN**

The issue in EDU 04851-21 is: Under the circumstances of this matter, does N.J.S.A. 18A: 12-20 require that Garcia be indemnified for her legal fees and expenses incurred in connection with her defense against the charges of the Amended Complaint

filed on March 30, 2020 by her fellow members of the Board of Education, which is the subject of EEC 10392-20?

### **PROCEDURAL HISTORY**

Carlos Guzman and five other members of the Norwood BOE filed a Complaint on March 17, 2020 with the School Ethics Commission (the "SEC"), which the SEC found deficient. After curing the deficiencies, an Amended Complaint was filed on March 30, 2020 and served on Heather Garcia, on April 1, 2020. On April 1, 2020, the SEC issued a letter to Garcia and to the Norwood BOE in which Garcia (therein referred to as the "Respondent" for purposes of the Complaint) was directed to file an Answer or a Motion to Dismiss within twenty days.

On May 4, 2020, after receiving an extension, Garcia sought to dismiss the March 30, 2020 Amended Complaint by filing a Motion to Dismiss in Lieu of Answer (hereinafter, the "Motion to Dismiss"). The Complainants (Guzman, et als.) filed a response to the Motion to Dismiss. The SEC considered the filings at its meeting of June 23, 2020 and on July 21, 2020 voted to deny the Motion to Dismiss and directed Garcia to file her Answer. Moreover, the SEC found that the Complaint was not frivolous and denied Garcia's Motion for sanctions. Garcia filed her Answer to the Amended Complaint on August 10, 2020.

On September 21, 2020 the SEC notified the Norwood BOE and Garcia that the SEC would place this matter on its agenda for September 29, 2020 to make a determination regarding probable cause. Having considered the filings on September 29, 2020, the SEC, at its meeting on October 27, 2020, voted to find probable cause for all of the allegations of the March 30, 2020 Amended Complaint and also voted to transmit the matter (hereinafter referred to as the "Ethics Matter") to the Office of Administrative Law (OAL). Sometime after the October 27, 2020 finding of probable cause, Garcia hired David B. Rubin, Esq. to represent her.

The above-mentioned Ethics matter was filed with the OAL on November 4, 2020 under Docket Number EEC 10392-20 as a contested case pursuant to N.J.S.A. 52:14B-1 to -15; N.J.S.A. 52: 14F-1 to -13 and assigned to a judge. (Thereafter, in June, 2021, the Ethics Matter was re-assigned to John P. Scollo, ALJ, who held an Initial Telephone Conference on June 25, 2021 and issued a Pre-hearing Order on June 28, 2021.)

On an unspecified date, a request for indemnification for legal fees, costs and expenses was sent to the SEC. On May 11, 2021, the SEC determined that it was not obligated to indemnify Garcia and notified her of its decision. On May 17, 2021, Garcia's counsel filed a Verified Petition of Appeal seeking indemnification. On June 4, 2021 Stephen R. Fogarty of Fogarty & Hara filed an Answer to the Petition of Appeal. Garcia's counsel filed a Petition (hereinafter referred to as the Indemnification Matter) with the OAL seeking indemnification for her legal fees, costs and expenses. The Indemnification Matter was filed under OAL Docket Number EDU 04851-20 on June 4, 2021. The Indemnification matter was assigned to John P. Scollo, ALJ, who held an Initial Telephone Conference on June 22, 2021 and issued a Pre-Hearing Order on June 24, 2021.

On October 19, 2021, counsel for Garcia filed a Motion for Summary Decision. Counsel for the Norwood BOE filed Opposition papers and the BOE's Cross-Motion for Summary Decision on November 12, 2021. On November 29, 2021, counsel for Garcia filed Reply papers to the BOE's Opposition, which also served as Opposition to the BOE's Cross-Motion, and the record closed that day.

### **FINDINGS OF FACT**

A reading of the parties' submissions, shows that both sides agree that: (1) Heather Garcia has been and presently is a member of the Norwood Board of Education; (2) Heather Garcia and her husband Daniel Garcia, formed a New Jersey 501(c)(3) non-profit corporation named Valley Kids Matter Foundation, Inc. (VKMF) on January 9, 2020; (3) Heather Garcia, Daniel Garcia and Anthony Shand, Heather



Garcia's father, compromise the entire membership of VKMF's board of trustees; (4) according to its Certificate of Incorporation, VKMF's purpose clause reads as follows: "To provide support to families of special needs children by providing support groups, educational speakers, community events and financial assistance for therapy, and advocacy services"; (5) there are no factual issues standing in the way of deciding the legal issue set forth above; and (6) The School Ethics Commission issued Advisory Opinion A07-20 on April 21, 2020.

### **APPLICABLE LAW**

The definition of "relevant evidence" is set forth in Rule 401 of the New Jersey Rules of Evidence:

"Relevant evidence" means evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action.

### **Relevant Portions of the School Ethics Act**

The School Ethics Act at N.J.S.A. 18A:12-21 et seq. at 18A:12-24 (Conflicts of Interest), in pertinent parts, (i.e., omitting sections (b), (e), (h), (i) (j) and (k)) provides:

(a) No school official or member of his immediately family shall have an interest in a business organization or engage in any business, transaction, or professional activity, which is in substantial conflict with the proper discharge of his duties in the public interest;

(c) No school official shall act in his official capacity in any matter where he, a member of his immediate family, or a business organization in which he has an interest, has a direct or indirect financial involvement that might reasonably be expected to impair his objectivity or independence of judgment. No school official shall act in his official capacity in any matter where he or a member of his immediate family

has a personal involvement that is or creates some benefit to the school official or member of his immediate family;

(d) No school official shall undertake any employment or service, whether compensated or not, which might reasonably be expected to prejudice his independence of judgment in the exercise of his official duties;

(f) No school official shall use, or allow to be used, his public office or employment, or any information, not generally available to members of the public, which he receives or acquires in the course of and by reason of his office or employment, for the purpose of securing financial gain for himself, any member of his immediate family, and or any business organization with which he is associated;

(g) No school official or business organization in which he has an interest shall represent any person or party other than the school board or school district in connection with any cause, proceeding, application or other matter pending before the school district in which he serves or in any proceeding involving the school district in which he serves or, for officers or employees of the New Jersey School Boards Association, any school district. This provision shall not be deemed to prohibit representation within the context of official labor union or similar representational responsibilities.

#### Relevant Portions of the Code of Ethics for School Board Members

The School Ethics Act at N.J.S.A. 18A:12-24.1 (Code of Ethics for School Board Members), in pertinent parts, requires a school board member, in the performance of his duties, to set aside his own interests and the interests of others and to exercise independence of judgment. Specifically, under the following sections of N.J.S.A. 18A:12-24.1 (omitting sections (a), (b), (d), (h) and (j)) the Board member under oath pledges:

(c) I will confine my board action to policy making, planning, and appraisal, and I will help to frame policies and plans only

after the board has consulted those who will be affected by them;

(e) I will recognize that authority rests with the board of education and will make no personal promises nor take any private action that may compromise the board;

(f) I will refuse to surrender my independent judgment to special interest or partisan political groups or to use the schools for personal gain or for the gain of friends;

(g) I will hold confidential all matters pertaining to the schools, which if disclosed, would needlessly injure individuals or the schools. In all other matters, I will provide accurate information and, in concert with my fellow board members, interpret to the staff the aspirations of the community for its school.

(i) I will support and protect school personnel in proper performance of their duties.

The Law of Indemnity of Members of Boards of Education Against Cost of Defense of Civil and Criminal Actions

N.J.S.A. 18A:12-20 governs the issue of indemnification of members of boards of education against the cost of legal proceedings brought against them. The law reads as follows:

Whenever a civil, administrative, criminal or quasi-criminal action or other legal proceeding has been or shall be brought against any person *for any act or omission arising out of and in the course of the performance of his duties as a member of a board of education*, and in the case of a criminal or quasi-criminal action such action results in final disposition in favor of such person, the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal, if any, and shall save harmless and protect such person from any financial loss resulting therefrom. Indemnification for exemplary or punitive damages shall not be mandated and shall be governed by the standards and procedures set forth in N.J.S.A. 59:10-4. Any board of education may arrange for

and maintain appropriate insurance to cover all such damages, losses and expenses. [Emphasis supplied.]

### **ANALYSIS OF THE PARTIES' ARGUMENTS AND CONCLUSIONS**

The Complaint asserts that Garcia violated the School Ethics Act N.J.S.A. 18A:12-24 (a),(c) (d) and (f) and the Code of Ethics for School Board Members 18A:12-24.1 (c), (f) and (i), when she formed VKMF and took a seat on the Board of Trustees of VKMF. The Complainants allege that the goals of VKMF and the business of the BOE are in substantial conflict and are such that they will certainly be adversaries in the foreseeable future. This being so, the BOE asserts that Garcia will find herself in a position where her loyalty must be divided between these opposing entities, the one representing the clients of VKMF and the other being the BOE.

#### **Petitioner-Norwood BOE's Position**

The BOE's positions are as follows. As a member of the BOE, Garcia is obligated under N.J.S.A. 18A:12-24(a) not to have an interest in a business organization or to engage in any business, transaction, or professional activity, which is (or will be) in substantial conflict with the proper discharge of her duties to the schools. In regard to the charge brought pursuant to N.J.S.A. 18A:12-24(a), the BOE points out that Garcia and her husband are board members of VKMF, an entity whose purpose is to advocate on behalf of parents of special needs students in obtaining services from schools. In other words, VKMF exists to assist special needs parents to obtain services from the school districts and school boards. As everyone would agree, such services cost money and there are frequent disagreements between special needs parents on the one hand, and school districts on the other hand over the appropriateness and cost of such services, which can and does lead to costly litigation. The BOE argues that because of the likelihood of such disputes and litigation, there exists a substantial conflict between the duties Garcia owes to the BOE and her activities on behalf of VKMF and the clients VKMF serves. The BOE argues that Garcia's involvement with VKMF creates the type

of conflict of interest contemplated by N.J.S.A. 18A:12-24(a) and so, the conflict makes Garcia ineligible for continued membership on the Norwood BOE.

As a member of the BOE, under N.J.S.A. 18A:12-24(c), Garcia would be prohibited from acting on any matter where the business organization she has an interest in (VKMF) has a direct or indirect financial involvement that might reasonably be expected to impair her objectivity or independence of judgment. The BOE's position is that its Complaint is not based on any of Garcia's particular BOE-related actions (i.e., Garcia's participation in BOE meetings or BOE votes). Rather, the BOE takes the position that its Complaint is based on Garcia's formation of and involvement with VKMF, private actions which are outside her duties to the Board of Education. The BOE's position is that Garcia's involvement with VKMF runs counter to the provisions of N.J.S.A. 18A:12-24(c) because it can reasonably be expected that it will result in a direct or indirect financial involvement (i.e., on behalf of VKMF's clients) regarding whether or not they obtain services or increased benefits from boards of education or school districts, and thus can reasonably be expected to impair Garcia's objectivity or independence of judgment.

Under N.J.S.A. 18A:12-24(d), Garcia, as a school official, would be prohibited from undertaking any services (compensated or uncompensated) which might reasonably be expected to prejudice her independence of judgment in the exercise of her official duties.

The BOE views VKMF as an advocacy organization formed to advocate for special needs parents whose interests can be reasonably expected to result in disputes with boards of education. The BOE takes the position that Garcia's continued involvement with VKMF runs counter to the provisions of N.J.S.A. 18A:12-24(d) because it raises a reasonable expectation of prejudice to Garcia's independence of judgment.

Finally, under N.J.S.A. 18A:12-24(f), Garcia would be prohibited from using information made known to her in the course of and by reason of her position as a member of the Board of Education, for the purpose of securing a financial gain for any business organization with which she is associated. In accordance with the goals of N.J.S.A. 18A:12-24(f), the BOE's concern is that while being involved with VKMF, whose clients will be adversaries of the BOE in foreseeable disputes, Garcia would have access to information not generally available to the general public and which could be used to the advantage of VKMF's clients and to the detriment of the BOE. While not accusing Garcia of having disclosed such information to anyone who might use it against the interests of the BOE, the BOE argues that the potential for disclosure of such information requires Garcia's termination as a board member of the BOE.

In regard to the Code of Ethics for School Board Members, N.J.S.A. 18A:12-24.1, the BOE maintains that Garcia is in violation of several sections due to her involvement with VKMF and her simultaneous membership on the BOE's board. Under N.J.S.A. 18A: 12-24.1(c), Garcia as a member of the Norwood board (BOE) must confine her board action to policy making, planning, appraisal, and must help to frame the BOE's policies and plans. The BOE views VKMF's purpose clause and foreseeable advocacy on behalf of its clients, including activity that can lead to litigation, as adverse to the interests of the Northern Valley School District and to the Norwood BOE. Therefore, the BOE maintains that Garcia's formation of and involvement with VKMF will inevitably include the rendering of services to VKMF clients and thus interfere with her duties to the BOE regarding policy making, planning, etcetera.

Under N.J.S.A. 18A:12-24(f), Garcia is obligated not to surrender her independent judgment to special interest groups or to partisan political groups. The BOE maintains that VKMF is a special interest group. The BOE maintains that VKMF is a partisan group, which according to its purpose clause, exists to advocate on behalf of special needs parents against school districts and boards of education. Therefore, the BOE maintains that Garcia's formation of and involvement with VKMF will interfere with

her independent judgment when and where the interests of VKMF and the school authorities differ.

Under N.J.S.A. 18A:12-24(i), Garcia is obligated to support school personnel in the proper performance of their duties. The BOE maintains that VKMF is a special interest group which exists to advocate for special needs parents and that that advocacy will inevitably bring VKMF's clients into disputes with the BOE. Therefore, the BOE maintains that Garcia's formation of and involvement with VKMF will compromise her duty to work with her fellow BOE board members for the interests of the BOE.

To sum-up, the BOE's positions demonstrate its concern, as reflected in the cautionary language of Advisory Opinion A07-20, that in simultaneously serving two different and foreseeably opposed masters, VKMF and its clients on the one hand and the BOE on the other hand, Garcia will be unable to adequately serve either one. Insofar as the BOE's interests are concerned, it believes that it is within its rights to remove Garcia from her current position on the board due to obvious conflicts of interest arising out of her formation of and involvement with VKMF.

Having set forth its case that Garcia's membership on the BOE is fraught with conflicts of interest, the BOE maintains that it does not seek Garcia's removal as a result of actions she has taken as a BOE member. The BOE maintains that in having formed and involved herself with VKMF, an entity dedicated to advocating for special needs parents, Garcia has already placed herself between the interests of two masters whose interests conflict. Therefore, these conflicting interests presently disable Garcia from performing and fulfilling her duties to and for the BOE and her removal is therefore justified.

#### Respondent-Garcia's Position

The essence of Garcia's position is that the Complaint against which she is defending was brought against her for reasons arising out of the performance of her

duties as a member of the BOE. Garcia maintains that since she is defending herself against an action occasioned by her activities as a BOE member, she comes within the ambit of N.J.S.A. 18A:12-20's indemnification provisions and therefore should be afforded indemnification for her attorney's fees, expenses and costs of suit and for any financial losses resulting from the action.

Garcia argues that the Complaint was brought because she participated in BOE meetings which necessarily involve her participation in board business such as discussions, reviewing of information and materials (which are not necessarily of the type generally available to members of the public) and her participation in votes made on board resolutions. Inasmuch as the aforementioned activities are regular parts of fulfilling her duties as a BOE member, it follows that the Complaint arose out of or, put another way, had a substantial connection with her duties as a board member. This being so, it logically follows that N.J.S.A. 18A:12-20's indemnification provisions must be afforded to her. Garcia adds that the scope of the phrase "act or omission arising out of and in the course of the performance of his [or her] duties as a member of a board of education" has been viewed with liberality by the courts due to the policy of promoting free expression and protecting school board members when they speak and act for the public good.

Garcia amplifies her argument for indemnification by analogizing her demand for indemnification under N.J.S.A. 18A:12-20 with an insured's invoking an insurance carrier's duty to defend the insured (as well as to indemnify the insured in the event of an adverse judgment).

In this matter, Garcia substitutes N.J.S.A. 18A:12-20 in place of the typical liability insurance policy and asks the Tribunal to apply the same analysis that a court would use when deciding an insurance coverage case.



## Analysis

The duty to defend, in the insurance context, arises out of a contract between the insurance carrier and the policyholder, the language of which can vary from contract to contract written at different times by various companies. In the insurance context, the duty to defend is based on the agreement of the parties to the contract. Hartford Accident & Indem. Co. v. Aetna Life & Cas. Ins. Co., 98 N.J. 18, 22 (1984). In cases where the parties find themselves in a dispute about coverage, a court may be called upon to interpret the meaning of the words and phrases employed in the language set forth in the insurance contract. This can involve an analysis of and balancing of competing interpretations of the language of the contract taking into account the literal meaning of the words employed, the discerning of any alleged ambiguities in the policy language, and the reasonable expectations of the parties to the contract. This Tribunal appreciates the analogy offered by counsel for Garcia, but as with most arguments by analogy, the argument has its limitations.

In the case at bar, the duty to indemnify is not created by the parties to a contract, but by passage of a law by the Legislature. In passing N.J.S.A. 18A:12-20, the Legislature declared that whenever an action is brought against a school board member for any act or omission arising out of and in the course of the performance of her duties as a member of the board of education, the board of education shall defray all costs of defending such action, including reasonable counsel fees and expenses. As noted above, the courts of New Jersey have viewed this with liberality. It is also clear that in cases dealing with a insurance carrier's duty to defend, the courts of New Jersey recognize and uphold the principle that it is the nature of the claim that triggers the obligation to defend, not the details of accident or the ultimate outcome. Danek v. Hommer, 28 N.J. Super. 68 (App. Div. 1963), *aff'd*, 15 N.J. 573 (1954).

In the matter at bar, the deciding factor in determining whether indemnification is to be afforded or not afforded turns on whether the Complaint charges Garcia with violations that arose out of and in the performance of (i.e., within) her duties as a board

member or whether the Complaint charges Garcia with violations that arose outside (i.e., private action) the performance of her duties as a board member.

Garcia argues that it would be impossible to interpret her participation in board meetings (involving acquiring information from written documents and by spoken words, discussing issues and ideas and voting on resolutions) as being anything other than actions arising out of and in the performance of her duties as a member of the school board. Garcia's claim for indemnification (as well as at least part of her anticipated defense in the Ethics matter) rests on this base. Garcia's claim is that the Complaint charges her with actions that she performed within her board-related duties. However, the BOE argues that the Complaint does not charge Garcia with having committed any act or omission that was violative of any board-related duty. The BOE maintains that Garcia's incorporation of VKMF and taking a seat on its board of trustees was a private action well outside the bounds of her board-related duties, and one which immediately created a conflict of interest. Therefore, the BOE maintains that it is within its rights to seek Garcia's removal from the BOE.

At this point in time (in the matter captioned EDU 04851-21), this Tribunal must concern itself only with deciding the Indemnification issue. The decision regarding the Ethics Issue (ECC 10392-20) will await determination at a later date.

I **CONCLUDE** that the School Ethics Commission accurately assessed the situation when it issued Advisory Opinion A07-20.

I **CONCLUDE** that the School Ethics Commission found that the formation of VKMF by Garcia and her husband was an activity that was outside the control, oversight or management of the BOE.

I **CONCLUDE** that the language of the School Ethics Commission's Advisory Decision A07-20 means that Garcia's incorporation of VKMF was a private action and

her involvement with VKMF is a private action unrelated to the duties of a member of a board of education.

I **CONCLUDE** that the School Ethics Commission's Advisory Opinion A07-20 means that Garcia is permitted to be involved with VKMF based on the representations made in her application for the advisory opinion.

I **CONCLUDE** that the School Ethics Commission found that the School Ethics Act did not prohibit Garcia's involvement with VKMF generally, or in a leadership role specifically.

I **CONCLUDE** that the School Ethics Commission did not state that Garcia has violated any duties she owes to the BOE by either act or omission.

However, I **CONCLUDE** that in Advisory Opinion A07-20, the School Ethics Commission issued a warning to Garcia; that warning is that if she, her husband or any member of VKMF provides services to the families of the students who attend the Northern Valley School District, then she would be in violation of the School Ethics Act.

I **CONCLUDE** that the language used in the School Ethics Commission's warning means that if VKMF provides any service to any special needs parent regarding any issue that can or does result in aiding a special needs parent in advocacy or in a dispute with the school district, then Garcia would, by virtue of being associated with or involved with VKMF, be deemed to be in violation of the School Ethics Act.

I **CONCLUDE** that the School Ethics Commission was referring specifically to N.J.S.A. 18A:12-24(a), which prohibits a school official from having an interest in an organization or taking part in any professional activity which is in substantial conflict with her duties as a school board member, and likely to other sections of the School Ethics Act or the Code of Conduct for School Board Members.

Where a Complainant refers in his Complaint to facts in setting-out his cause of action, the court analyzes the facts alleged as part of the process it uses to reach its conclusion(s) of law. Reviewing the contents of a Complaint and discerning what causes of action it contains, as well as what causes of action it does not contain, is a matter of law for the court to decide.

Having closely analyzed the language and substance of the Complaint, I **CONCLUDE** that the allegations of Garcia's violations of the Act are not based on actions which arose out of and in the performance of her duties as a member of the board of education, but rather are based on private action outside her performance of her duties to the board of education.

Having concluded that the Complaint charges Garcia with violating the School Ethics Act by taking actions that are outside her school board-related duties, it follows that I must **CONCLUDE** that Garcia is not entitled to indemnification under N.J.S.A. 18A:12-20.

### **ORDER**

Based upon the foregoing, it is **ORDERED** that the Respondent-Norwood Board of Education' Cross-Motion for Summary Decision on the issue of Indemnification under N.J.S.A. 18A:12-20 is **GRANTED**; and it is further

**ORDERED** that Petitioner-Garcia's Motion for Summary Decision seeking Indemnification under the provisions of N.J.S.A. 18A:12-20 is **DENIED**.

I hereby **FILE** this initial decision with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION** for consideration.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION**, who by law is authorized

to make a final decision in this matter. If the Commissioner of the Department of Education does not adopt, modify or reject this decision within forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, PO Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.



December 9, 2021

DATE

JOHN P. SCOLLO, ALJ

Date Received at Agency:

\_\_\_\_\_

Date Mailed to Parties:

\_\_\_\_\_

db