228-22

New Jersey Commissioner of Education

Final Decision

Maria Azzaro, The New Jersey Education Association, and Mellk O'Neill,

Petitioner,

v.

Board of Education of the City of Trenton, Mercer County

Respondent.

Synopsis

This matter stems from a successful defense against an Order to Show Cause (OTSC) issued in 2007 to petitioner Maria Azzaro by the New Jersey State Board of Examiners (SBE). Following hearings in the original matter, which occurred between 2012 and 2018 at the Office of Administrative Law (OAL), an Initial Decision dismissing the OTSC was issued by an ALJ in 2019 and adopted by the SBE in February 2020. The matter then closed. Subsequently, petitioners filed the within matter seeking reimbursement from the Trenton Board of Education (Board) under *N.J.S.A*. 18A:16-6 for costs and fees associated with defending against the OTSC. The parties filed cross motions for summary judgment.

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; under *N.J.S.A.* 18A:16-6, a board of education employee may be indemnified for attorney's fees and costs incurred defending civil actions that arise in the course and scope of their employment duties; *N.J.S.A.* 18A:16-6 does not impose an affirmative duty on the employee to notify a board of education at the outset of the underlying litigation; the Board's argument that the petitioners waived the right to indemnification when they did not notify it of the OTSC at the outset and did not request that it provide Azzaro with a defense or indemnify her, is without merit as it is clear from the record that the Board possessed sufficient information such that it was on notice of the charges against Azzaro. The ALJ concluded that petitioners were entitled to indemnification for the costs and fees incurred in defending Azzarro in the SBE proceedings. Accordingly, the ALJ granted the petitioners' motion for summary decision and ordered the Board to reimburse petitioners in the amount of $430,800 in fees and $5,361.60 in costs.

Upon review, the Commissioner disagreed with the ALJ that petitioners are entitled to indemnification, citing to *Edison v. Mezzacca*, 147 *N.J. Super.* 9 (App. Div. 1977) for the proposition that an employee seeking indemnification does not have the absolute right to counsel of their own choosing at municipal expense. The Commissioner found that, consistent with the Appellate Division's holding in *Edison*, Azzaro had no right to be represented by Mellk O'Neill at the Board's expense without the express agreement of the Board. Further, the Commissioner noted that petitioners failed to notify the Board of their request for indemnification until more than a decade of legal bills had accumulated, from a law firm which the Board had no hand in selecting. Accordingly, the Board's motion for summary decision was granted, and the petition was dismissed

228-22

OAL Dkt. No. EDU 09699-20
Agency Dkt. No. 121-5/20

New Jersey Commissioner of Education

Final Decision

Maria Azzaro, The New Jersey Education Association, and Mellk O'Neill,

Petitioners,

v.

Board of Education of the City of Trenton, Mercer County,

Respondent.

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

In 2007, the State Board of Examiners (SBE) of the New Jersey Department of Education issued an Order to Show Cause (OTSC) why petitioner Maria Azzaro's teaching, specialist, and principal certifications should not be revoked or suspended. The proceedings were based on allegations pertaining to scheduling and grading practices at the school where Azzaro was employed. After years of proceedings, the SBE dismissed the OTSC, and Azzaro's certificates were not suspended or revoked. Azzaro, along with the law firm of Mellk O'Neill, who had represented her during the SBE proceedings, and the New Jersey Education Association (NJEA), who had retained Mellk O'Neill on Azzaro's behalf, filed a petition of appeal, seeking

indemnification from the Trenton Board of Education (Board) for the legal fees and costs of her defense. Following cross-motions for summary decision, the Administrative Law Judge (ALJ) concluded that petitioners were entitled to indemnification for the fees and costs of defending Azzarro in the SBE proceedings. The ALJ reviewed the bills submitted by petitioners and, after making some adjustments to the number of hours billed and hourly rates, ordered the Board to reimburse petitioners in the amount of $430,800 in fees and $5,361.60 in costs.

In its exceptions, the Board argues that New Jersey case law requires that an indemnitee must give timely notice to the indemnitor and, absent such notice, cannot demand reimbursement for expenses that the indemnitor had no opportunity to control. The Board notes that its current insurance coverage has a significantly lower limit than the policy that was in place when the SBE proceedings began, such that the Board is prejudiced by the lack of notice that petitioners would seek indemnification. The Board further contends that the hourly rate awarded by the ALJ is not reasonable, and the bills submitted by petitioners lack sufficient detail to properly calculate the fee total.

In reply, petitioners argue that the Board's arguments regarding its insurance coverage are outside the record and therefore improperly included in exceptions. Petitioners contend that the ALJ correctly concluded that the indemnification statute does not require employees to notify a board of education at the outset of litigation. According to petitioners, the Board only had an obligation to indemnify Azzaro once the charges against her were dismissed. Petitioners further state their belief that if the Board controlled the litigation, it would have done so with the aim of minimizing expense, rather than exonerating Azzaro, such that it was imperative for Azzaro to have independent counsel. Finally, petitioners argue that the ALJ appropriately calculated the reasonable fees and costs of Azzaro's defense.

Upon review, the Commissioner disagrees with the ALJ that petitioners are entitled to indemnification. In *Edison v. Mezzacca*, 147 *N.J. Super.* 9 (App. Div. 1977), the Appellate Division held that an employee seeing indemnification "does not have the absolute right to counsel of his own choosing at municipal expense." *Id.* at 14. The Appellate Division specifically noted that a right to absolute reimbursement was provided for only when the municipality's obligation was conditional on the outcome of the litigation. *Ibid.* However, there was no right of reimbursement when "the obligation to provide for the defense arose at the inception of the proceeding . . . and was independent of the outcome of the proceeding." *Id.* at 15.

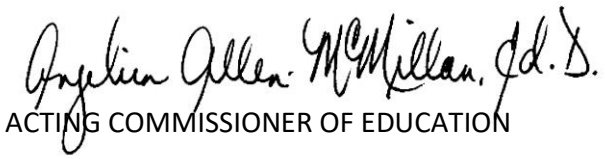
Here, petitioner's right to indemnification is governed by *N.J.S.A.* 18A:16-6, which contains no requirement that the employee be successful in the litigation to be indemnified. The relevant language in *N.J.S.A.* 18A:16-6 can be contrasted with *N.J.S.A.* 18A:16-6.1, which provides for indemnification in criminal actions only when the proceedings are dismissed or result in a final disposition favorable to the employee. Here, there is no dispute that SBE proceedings are an administrative action, not a criminal action. Therefore, although petitioners' claim arises out of a different indemnification statute than the one at issue in *Edison*, it nonetheless bears the same characteristics, in that it arose at the inception of the proceedings and was independent of the outcome of the proceedings.

Petitioners failed to notify the Board of their request for indemnification until more than a decade of legal bills had accumulated. Those bills were generated by a law firm which the Board had no hand in choosing. Consistent with the Appellate Division's holding in *Edison*,

Azzaro had no right to be represented by Mellk O'Neill at the Board's expense without the express agreement of the Board.[1]

Accordingly, the Board's motion for summary decision is granted, and the petition of appeal is hereby dismissed.

IT IS SO ORDERED.[2]



ACTING COMMISSIONER OF EDUCATION

Date of Decision: September 14, 2022
Date of Mailing: September 14, 2022

[1] The Commissioner does not find petitioners' arguments regarding the Board's conflict – that it would prioritize a low-cost defense over a vigorous one that would result in the dismissal of the SBE OTSC – availing. In *Edison*, the Appellate Division noted that an employee does have the right to object to the appointment of an attorney perceived to have a conflict of interest. *Edison*, *supra*, 147 *N.J.* at 16. However, having failed to give the Board the opportunity to appoint an attorney for Azzaro, petitioners cannot now object to any hypothetical appointment. The time for resolution of any disagreements between Azzaro or the NJEA and the Board regarding the appropriate counsel to represent Azzaro was at the commencement of the proceedings, which is yet another reason notice to the Board in advance of an indemnification request is required.

[2] 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

OAL DKT. NO. EDU 09699-20

AGENCY DKT. NO. 121-50/20

MARIA AZZARO, THE NEW JERSEY EDUCATION ASSOCIATION AND MELLK O'NEILL,

Petitioners,

v.

BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,

Respondent.

Edward A. Cridge, Esq., for petitioners (Mellk Cridge, LLC, attorneys)

Rita F. Barone, Esq. for respondent (Flanagan, Barone, O'Brien, attorneys)

Record Closed: April 6, 2022 Decided: June 15, 2022

BEFORE **JUDITH LIEBERMAN**, ALJ

STATEMENT OF THE CASE

PROCEDURAL HISTORY

On June 11, 2007, the SBE filed an OSC in which it directed Azzaro to show cause why her Teacher, Specialist and Principal Certifications should not be revoked or suspended as a result of problems that occurred at a school within the Trenton School District during the 2003-2004 school year. Pet. Exh. A. The OSC was transmitted to the Office of Administrative Law (OAL) on August 13, 2007. It was initially assigned to Administrative Law Judge (ALJ) Anna Viscomi. On or about February 23, 2012, it was transferred to Hon. Edward J. Delanoy, Presiding Administrative Law Judge, after ALJ Viscomi was appointed to the Superior Court. The hearing was conducted during twenty-four days between July 2012, and May 2018. The record remained open after the hearing for the receipt of transcripts and post-hearing submissions, and the record closed on April 29, 2019.

On September 12, 2019, Judge Delanoy issued an Initial Decision dismissing the OSC with respect to Azzaro. Pet. Exh. D. On February 28, 2020, the SBE adopted Judge Delanoy's Initial Decision and ordered the dismissal of the OSC issued to Azzaro. Pet. Exh. E. The SBE's determination was not appealed and the matter was closed.

On or about May 19, 2020, petitioners filed a petition in which they seek payment by respondent of the reasonable costs and attorneys' fees incurred in the successful defense of the OSC issued to Azzaro. Pet. Exh. F.

Petitioners and respondent filed cross-motions for summary decision. They assert that summary decision is appropriate because there is not a genuine issue of material fact. Oral argument on the motions was heard on March 31, 2022. Respondent was asked to submit additional information. Its submission was received on April 5, 2022. Petitioners submitted a letter in response on April 6, 2022, and the record closed that day.

Parties' Arguments

Petitioners contend:

1. Reimbursement pursuant to N.J.S.A. 18A:16-6 is required because the allegations against Azzaro arose from her employment with respondent and that she was found to have been acting within the scope of her duties.

2. Reimbursement is required notwithstanding the fact that the NJEA paid for her representation.

3. Reimbursement shall be of the billable time expended in the defense of Azzaro at a reasonable rate, not the discounted union rate paid by NJEA.

4. $450 per hour is the reasonable rate that should be applied here.

5. Azzaro was not required to demand an initial defense from respondent.

6. Petitioners' demand, $485,550 in legal fees and $5,518.75 in costs, is reasonable given the scope, length and complexity of the matter, counsels' expertise in this specialized area of the law, and a completely successful outcome. The hourly rate upon which this demand is based is reasonable and comparable to that charged by similarly situated counsel.

Respondent contends:

1. The initial matter against Azzaro was brought by the SBE, not the Board. While the matter was pending, petitioners did not notify the Board that Azzaro sought a defense or provide notice that they would seek indemnity if the Board did not provide a defense. This failure deprived the Board of an opportunity to control the defense and its costs, as an indemnitor. Given this failure, and the resultant prejudice suffered by the Board, petitioners are not entitled to payment by the Board, pursuant to indemnification requirements imposed by New Jersey courts.

2. Because the Board should have been permitted to control the defense and set its own costs and fees, it is required to merely pay the minimum, reasonable cost and fees when counsel is selected independently.

3. Petitioners' requested costs and legal fees are excessive, unreasonable and unnecessary. The controlling statute does not provide that the Board is responsible for a market rate. Further, the billing statements here include redundant and unnecessary menial tasks; the requested hourly rate is inappropriate on its face; is well beyond the highest rate that was charged; and excessive compared to what the Board or its insurer would have paid had it been given an opportunity to provide Azzaro's defense.[1]

FACTUAL DISCUSSION

The following, taken from the parties' briefs, certifications and documents, is undisputed and, therefore, I **FIND** the following as **FACT**:

1. The allegations in the OSC were made by the SBE. They were not made at the request of the Board.

2. Petitioners were not advised that the Board would take disciplinary action against Azzaro.

3. The Board did not take disciplinary action against Azzaro.

4. The allegations in the OSC arose from Azzaro's employment with the Board.

[1] Respondent also argued, in a post-hearing submission, that it is further prejudiced by petitioners' delay in seeking indemnification because its current insurance policy limits coverage to 10 percent of the amount of the coverage that was provided by the insurance policy at the time the OSC was initiated. Thus, the Board "was prohibited from defraying the costs using insurance and has been significantly prejudiced." April 5, 2022, Barone letter at 2. This issue was neither included in the pleadings, addressed in briefs nor raised during oral argument. It will thus not be addressed here.

5. The OSC against Azzaro was dismissed in its entirety.

6. Azzaro acted within the scope of her duties as a Board employee during all relevant times.

7. Azzaro's counsel was paid by the NJEA, the union of which she was a member, at a reduced hourly rate to which counsel and the NJEA agreed.

8. Petitioners did not notify the Board of the OSC.

9. Petitioners did not request that the Board provide Azzaro's defense or indemnify her for her defense.

10. Petitioners did not seek reimbursement of the costs of Azzaro's defense until after the OSC was dismissed.

11. There was no Board policy or employment manual that required an employee to notify the Board of an action issued against them by the State Board of Examiners.[2]

I also **FIND** the following as **FACT** because it is taken from the September 12, 2019, Initial Decision dismissing the OSC against Azzaro.[3] In addition to Azzaro, the

[2] April 5, 2022, Barone letter at 2.

[3] Official notice is taken of the facts as set forth in the Initial Decision and a related matter before the OAL that are addressed below. N.J.A.C. 1:1-15.2(a) provides, "Official notice may be taken of judicially noticeable facts as explained in N.J.R.E. 201 of the New Jersey Rules of Evidence." N.J.R.E. 201provides:

> (a) *Notice of Law.* --Law which may be judicially noticed includes the decisional, constitutional and public statutory law, rules of court, and private legislative acts and resolutions of the United States, this state, and every other state, territory and jurisdiction of the United States as well as ordinances, regulations and determinations of all governmental subdivisions and agencies thereof. Judicial notice may also be taken of the law of foreign countries.
>
> (b) *Notice of Facts.* --The court may judicially notice a fact, including:
>
> . . .

Initial Decision addressed Orders to Show Cause issued by the SBE against Board employees Melvin Cummings and Priscilla Dawson.[4] Azzaro was represented by the firm Wills, O'Neill & Mellk.[5]

During the 2004-2005 school year, Azzaro was the vice principal and then the acting principal and guidance counselor coordinator for Trenton Central High School (TCHS); Dawson was the principal of TCHS; and Cummings was vice principal of the Sherman School. Initial Decision at 6, 7, 9.

The DOE Office of Fiscal Accountability and Compliance (OFAC) investigated scheduling and grading practices at the Sherman School during the 2004-2005 school year. Initial Decision at 2. During the school year, the Trenton School District ran a ninth-grade repeater program housed at Sherman. Initial Decision at 2. The District was required to follow the standard educational guidelines for curriculum and awarding of academic credit. Ibid. The investigation found that Azzaro, Dawson and Cummings were involved in the following acts or omissions, which were incorporated into the OSC:

- At least five students had attained sufficient credit for promotion to tenth grade at the end of the 2003-2004 academic year, but were incorrectly assigned to the ninth-grade repeater program at the Sherman School.

- Twenty-nine Sherman students repeated courses that they had successfully completed prior to their assignment to Sherman and were awarded credit for repeating courses. Trenton would not transport students to classes off-site, nor could instructional staff come on-site due to space restrictions.

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(4) records of the court in which the action is pending and of any other court of this state or federal court sitting for this state.

[4] The three matters were consolidated by Judge Viscomi. In addition to Azzaro, Dawson and Cummings, James Lytle was named as a respondent in the OSC. He was the superintendent of Trenton's schools during the 2004–2005 school year. His case was resolved by the parties prior to issuance of the Initial Decision dismissing the OSC. Initial Decision at *10.

[5] The name of the firm has since changed.

- Numerous students assigned to Sherman were awarded credit for courses that did not meet Department of Education Curriculum standards.

- Students were being awarded credit for tenth grade physical education when they had twice repeated ninth grade physical education. Students who repeated other courses were also given credit for honors courses and/or eleventh-grade courses.

- Full course credit was awarded for a three-week independent study program, even though course credit should only be awarded for courses that provide forty minutes of instruction during a 180-day school year. Azzaro and others approved the program, but it was not approved by the Board.

- Seventy-nine students of a sample of 100 had an excessive rate of absenteeism.

- Student academic records at Sherman were altered to indicate the successful completion of courses not offered at Sherman.

[Initial Decision at 2-3].

I also **FIND** as **FACT** that the Initial Decision on the OSC referenced a tenure charge filed against Dawson by the Trenton Board of Education on December 5, 2007: In re Tenure Hearing of Dawson, Sch. Dist. of Trenton, Mercer Cty., EDU 10447-07, Initial Decision (September 8, 2009), adopted, Comm'r (December 4, 2009), http://njlaw.rutgers.edu/collections/oal/. The tenure matter was heard by Judge Viscomi. In her decision, Judge Viscomi detailed the procedural history of the tenure matter. She noted that she had been assigned "four previously filed certificates' matters relating to the alleged conduct herein and involving this respondent and three other former assistant vice principals and school superintendent[.]" Id. at *1. After an April 15, 2008, pre-hearing conference with the parties, Judge Viscomi rejected an application to consolidate the tenure matter against Dawson with the already consolidated OSC matter. Ibid.

The charges against Dawson concerned the Sherman School repeater program during the 2004-2005 school year. The allegations included the inappropriate assignment of students in the program; failure to enable students to attend courses and obtain credits needed to obtain a high school diploma; students were assigned to classes that they had already passed; and students who were eligible for the tenth grade were enrolled in the ninth grade. In addition to several other witnesses offered by the Board, Azzaro and Cummings testified at the hearing. Judge Viscomi found, and the DOE Commissioner agreed, that the Board did not sustain any of its charges against Dawson.

During oral argument on this application for legal fees and costs, the Board's counsel acknowledged that the Board was aware of the OSC.

LEGAL ANALYSIS AND CONCLUSION

The provisions of N.J.A.C. 1:1-12.5, which governs motions for summary decision, mirror the language of R. 4:46-2 of the New Jersey Court Rules governing motions for summary judgment. N.J.A.C. 1:1-12.5 permits early disposition of a case before the case is heard if, based on the papers and discovery which have been filed, it can be decided "that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." N.J.A.C. 1:1-12.5(b). An adverse party does not bear an obligation to oppose the motion, but to survive summary decision, there must be "a genuine issue which can only be determined in an evidentiary proceeding." Ibid. The non-existence of one entitles the moving party to summary decision. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520 (1995). Moreover, even if the non-moving party comes forward with some evidence, this forum must grant summary decision if the evidence is "so one-sided that [the moving party] must prevail as a matter of law." Id. at 536. Here, the parties do not assert that material issues of fact exist and none have been found. Accordingly, this matter is ripe for summary decision.

"Under the civil indemnification statute, N.J.S.A. 18A:16-6, a board of education employee may be indemnified for attorney's fees and costs incurred defending civil

actions arising out of an act or omission that took place in the course and scope of employment duties." L.A. v. Board of Education, City of Trenton of Mercer County, 221 N.J. 192, 201-202 (2015). N.J.S.A. 18A:16-6 provides:

> Whenever any civil or administrative action or other legal proceeding has been or shall be brought against any person holding any office, position or employment under the jurisdiction of any board of education, including any student teacher or person assigned to other professional pre-teaching field experience, for any act or omission arising out of and in the course of the performance of the duties of such office, position, employment or student teaching or other assignment to professional field experience, the board 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; provided that
>
> a. no employee shall be entitled to be held harmless or have his defense costs defrayed in a disciplinary proceeding instituted against him by the board or when the employee is appealing an action taken by the board; and
>
> b. 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. 59:10-4.
>
> Any board of education may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses.

In Bower v. Bd. of Educ., 149 N.J. 416 (1997), the Supreme Court addressed the statutory prerequisite. It held that the statute requires "mere proof by a preponderance of the evidence that the act on which the charges are predicated arose out of and in the course of performance of the duties of employment." Id. at 434. See also Waters v. Bd. of Educ. of Toms River, 2011 N.J. Super. Unpub. LEXIS 3083, *12 (December 22, 2011) ("In the context of the defense of a civil action, the outcome of the litigation is irrelevant, the statute protects both successful and unsuccessful litigants as long as" the cause of action arose out of the performance of the employee's duties and occurred in the

performance of the duties)(citing Lonky v. Bd. of Educ. of Bayonne, OAL Dkt. No. EDU 07205-05, final decision, (July 7, 2008) (slip op. at 3), http://lawlibrary.rutgers.edu/oal/search.shtml).[6] In Lonky, the ALJ observed that, because N.J.S.A. 18A:16-6 does not require a disposition in favor of the employee, "there is an entitlement to indemnification if the sole criteria for satisfying the statute has been met by showing that the employee was performing the job she was hired for when the act occurred." EDU 07205-05 at *3-4.

This is in contrast to N.J.S.A. 18A:16-6.1, the statute that provides for indemnification of education employees charged with criminal or quasi-criminal actions. It provides:

> Should any criminal or quasi-criminal action be instituted against any such person for any such act or omission and should such proceeding be dismissed or result in a final disposition in favor of such person, the board of education shall reimburse him for the cost of defending such proceeding, including reasonable counsel fees and expenses of the original hearing or trial and all appeals. No employee shall be entitled to be held harmless or have his defense costs defrayed as a result of a criminal or quasi-criminal complaint filed against the employee by or on behalf of the board of education.
>
> Any board of education may arrange for and maintain appropriate insurance to cover all such damages, losses and expenses.
>
> [N.J.S.A. 18A:16-6.1(emphasis added).]

This statute expressly conditions indemnification upon dismissal of the charges or a "result in a final disposition in favor" of the employee. The Commissioner of Education explained:

[6] Unpublished Appellate Division and administrative decisions are not precedential. They are offered in this Initial Decision because they provide relevant guidance.

> By its very terms, central to qualifying for protection afforded under [N.J.S.A. 18A:16-6] is that the conduct triggering the legal action against him or her must have 1) arisen out of the performance of his/her duties, and 2) occurred in the course of performing those duties. In the context of a civil action, the outcome of the litigation is irrelevant, the statute protects both successful and unsuccessful litigants as long as the above two criteria are satisfied. However, in the context of a criminal or quasi-criminal charge made against a school employee, in addition to the above referenced criteria, N.J.S.A. 18A:16-6.1 imposes a third criteria as a prerequisite to indemnification, i.e., the legal action must result in a final disposition in favor of the school employee.
>
> [Lonky (Final Decision) at *2-3(emphasis in original).]

The Board contends that petitioners waived the right to indemnification because they did not notify it of the OSC at the start of the matter and request that it provide Azzaro with a defense or indemnify her. There is a dearth of case law providing guidance on this issue. A thorough search has revealed no cases in which a Board employee or their representatives failed to notify the board of education, or the board was otherwise unaware, at the outset of litigation. Indeed, petitioners advised during oral argument that they are not aware of a case in which an employee or their representative did not communicate with the board of education at the early stage of the underlying litigation.

The statute contains no language concerning notice to the board of education. As noted by the Supreme Court, "'Our paramount goal in interpreting a statute is to give effect to the Legislature's intent.'" New Jersey Div. of Child Protection and Permanency v. Y.N, 220 N.J. 165, 178 (2014)(quoting Wilson ex rel. Manzano v. City of Jersey City, 209 N.J. 558, 572 (2012)).

> The starting point of all statutory interpretation must be the language used in the enactment. Farmers Mut. Fire Ins. Co. of Salem v. N.J. Prop. Liab. Ins. Guar. Ass'n, 215 N.J. 522, 536, 74 A.3d 860 (2013); see also N.J.S.A. 1:1-1 (stating that words of statute are customarily construed according to their "generally accepted meaning"). "If the statutory language is clear and unambiguous, and reveals the Legislature's intent,

> we need look no further." Farmers Mut., supra, 215 N.J. at 536, 74 A.3d 860. Only when faithful adherence to the words of the statute leads to more than one plausible interpretation or to an absurd result or to a result at odds with the objective of the overall legislative scheme do we look to extrinsic sources, such as legislative history. Ibid.; DiProspero v. Penn, 183 N.J. 477, 492-93, 874 A.2d 1039 (2005).
>
> [Ibid.]

See also Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, 244 N.J. 75, 99 (2020)("The words chosen by the Legislature have meaning and each is entitled to receive its plain meaning"); Paff v. Galloway Township, 229 N.J. 340, 353 (2017) ("We must presume that the Legislature intended the words that it chose and the plain and ordinary meaning ascribed to those words"); Kaminskas v. Office of the Attorney General, 236 N.J. 415, 422-423 (2019)("If the Legislature's intent is clear from the statutory language and its context with related provisions, we apply the law as written. We turn to extrinsic tools to discern legislative intent only when the statute is ambiguous, the plain language leads to a result inconsistent with any legitimate public policy objective, or it is at odds with a general statutory scheme")(internal quotation marks and citations omitted)).

Unlike N.J.S.A. 18A:16-6, other legislative enactments that provide for indemnification of public employees clearly require notice of the underlying action to the entity that is charged with the duty to indemnify. For example, N.J.S.A. 59:10A-1 provides:

> Except as provided in section 2[7] hereof, the Attorney General shall, upon a request of an employee or former employee of

[7] The Attorney General may refuse to provide for the defense of an action referred to in section 1 if he determines that:

> a. the act or omission was not within the scope of employment; or
> b. the act or the failure to act was because of actual fraud, willful misconduct or actual malice; or
> c. the defense of the action or proceeding by the Attorney General would create a conflict of interest between the State and the employee or former employee.

> the State, provide for the defense of any action brought against such State employee or former State employee on account of an act or omission in the scope of his employment. For the purposes of this section, the Attorney General's duty to defend shall extend to a cross-action, counterclaim or cross-complaint against an employee or former employee.
>
> [emphasis added.]

The Legislative intent here should reasonably be understood to impose a duty upon the Attorney General at the start of the underlying matter when a request has been properly made. Given that the Legislature has expressly required notice in this distinct context, it can reasonably be understood that it opted to not include a notice requirement in the statute at issue here.

Nonetheless, the Board argues that petitioners' failure to provide notice of the OSC and their representation "deprived [it] of their opportunity to control, engage in, or aid the defense of Azzaro." Resp. Br. at 9. In support of this argument, it relies upon S.I. Indus. V. AM. Motorists Ins. Co., 128 N.J. 188, 199-201 (1992), which address an insurer's duty to defend in the absence of notice:

> We stress that the duty to defend is triggered by facts known to the insurer. Although the insurer cannot ignore known information simply because it is not included in the complaint, the insurer has no duty to investigate possible ramifications of the underlying suit that could trigger coverage. Rather, the insured being sued is responsible for promptly conveying to its insurance company the information that it believes will trigger coverage. If it conveys that information properly and promptly, it will be reimbursed for previously-expended defense costs. Cf. Burd v. Sussex Mut. Ins. Co., 56 N.J. 383, 390(1970) (where insurer did not undertake defense initially, duty to defend translated into duty to reimburse insured). However, if the insured does not properly forward the information to the insurance company, the insured cannot demand reimbursement from the insurer for defense costs the insurer had no opportunity to control.
>
> . . .

> Accordingly, when the insured's delay in providing relevant information prevents the insurer from assuming control of the defense, the insurance company is liable only for that portion of the defense costs arising after it was informed of the facts triggering the duty to defend.

Respondent also relies upon Grossman v. Rockaway Twp., 2019 N.J. Super. Unpub. LEXIS 3596 (Law Div. February 7, 2019), in which parents of a student who took her life filed a wrongful death complaint against the child's school's board of education (BOE) and its employees. In a later complaint seeking indemnification pursuant to N.J.S.A. 18A:16-6, an employee argued that she was entitled to choose her own counsel and that the statute requires the BOE to defray the fees and costs of her defense. The School Alliance Insurance Fund, the insurer and an intervenor, filed a declaratory judgment action seeking a determination that, pursuant to the statute and its contract with the BOE, it was obligated to defend the named employee and thus was the only party entitled to select their counsel. The employee, instead, wished to proceed with her selected counsel.

In an unpublished decision, the trial court noted that, at the time of its decision, there was no case that interpreted the statutory requirement that a BOE "defray all costs of defending such actions, including reasonable counsel fees and expenses." Nor was there a decision that "deals with this precise issue." Id. at *7. For guidance. it referred to Edison v. Mezzacca, 147 N.J. Super. 9 (App. Div. 1977), in which the Appellate Division addressed whether police officers against whom a citizen's civil complaint was filed could select their own counsel, independent of their municipal employer. The controlling statute concerning representation and payment of fees and costs provided:

> Whenever a member or officer of a municipal police department or force is a defendant in any action or legal proceeding arising out of or incidental to the performance of his duties, the governing body of the municipality shall provide said member or officer with necessary means for the defense of such action or proceeding, but not for his defense in a disciplinary proceeding instituted against him by the municipality or in a criminal proceeding instituted as a result

> of a complaint on behalf of the municipality. If any such disciplinary or criminal proceeding instituted by or on complaint of the municipality shall be dismissed or finally determined in favor of the member or officer, he shall be reimbursed for the expense of his defense.
>
> [N.J.S.A. 40A:14-155.]

The Edison court observed, "When a statute speaks in term of reimbursement, it focuses on costs already incurred and contemplates governmental liability for expenditures, reasonable in amount, for services rendered by counsel of the employee's own choice." Id. at 4. The statute provided for reimbursement when an officer successfully defended against disciplinary or criminal proceedings that were instituted by the municipality. "Obviously, this would include the reasonable fees of counsel selected by the officer, for the municipality could have no say in the choice of counsel to defend against charges made by it." Id. at 5. The court distinguished the reimbursement provision from the remainder of the statute:

> However, in dealing with the defense of actions other than those initiated by the municipality, the statute does not speak of reimbursement; it requires the municipality "[to] provide said . . . officer with necessary means for the defense . . . ." We conclude that this means that the municipality must provide competent counsel, its own or outside counsel, or it may approve counsel requested by the officer, but the employee does not have the absolute right to counsel of his own choosing at municipal expense. Were this not so, there would have been no need to distinguish between the right to reimbursement provided for in the last sentence of N.J.S.A. 40A:14-155 and the portion relevant to the present appeal; both obligations could easily have been couched in terms of reimbursement. Instead, the Legislature provided for reimbursement only where the municipality's obligation was conditional on the outcome and arose after the fact; no right of reimbursement was provided for where, as here, the obligation to provide for the defense arose at the inception of the proceeding against the officer and was independent of the outcome of the proceeding.
>
> We, therefore, conclude that the municipality's obligation under N.J.S.A. 40A:14-155 does not require it to pay counsel

> chosen by a police officer without the prior agreement of the municipality to do so.
>
> . . .
>
> Although obligated to provide for an officer's defense, the municipality should have some control over costs, and at least be in a position to know in advance what those costs will be. See State v. Horton, 34 N.J. 518, 534 (1961). It cannot do this if required to accept the officer's choice of attorney at his or a court's assessment of a reasonable fee for his services.
>
> [Id. at 14-15.]

The trial court in Goodman, relying largely upon Edison, held:

> [T]he BOE's obligations pursuant to N.J.S.A. 18A:16-6 arise at the inception of the proceeding against the employee and is independent of the outcome of the proceeding, unless exemplary or punitive damages are imposed. The BOE "shall defray all costs of defending such action, including reasonable counsel fees and expenses, together with costs of appeal." N.J.S.A. 18A:16-6. This Court concludes that this language means that the BOE shall provide competent counsel or it may approve counsel selected by the BOE employee, but the employee does not have the absolute right to counsel of his or her own choosing at the BOE's expense. Were this not so, the legislature would not have included the insurance provisions in the last clause of the statute. The Court notes further that there are public policy principles at play. As a matter of practicality it stands to reason that when a public entity is sued and its employees have counsel there are inherent questions with respect to a cohesive strategy and coherent defense.
>
> Accordingly, this Court concludes that the BOE's obligations pursuant to N.J.S.A. 18A:16-6 do not require it to pay counsel fees as to Counsel chosen by an employee of the BOE without the permission of the BOE.
>
> [Id. at *11.]

Grossman relied upon the municipal police officers' defense and indemnification statute, which is not fully analogous to the one at issue here. The police officers' statute imposes an affirmative duty upon their employers to "provide said member or officer with necessary means for the defense" of "any action or legal proceeding [other than criminal or disciplinary] arising out of or incidental to the performance of his duties[.]" The trial court analogized N.J.S.A. 18A:16-6 to this provision notwithstanding its dissimilar language.

Unlike the police officers' statute, N.J.S.A. 18A:16-6 does not mandate provision of a defense. It requires boards of education to defray all costs, including reasonable counsel fees and expenses. The use of "defray" indicates that the Legislature contemplated reimbursement as an option under all circumstances. "Defray" is defined as "to bear or pay all or part of (the costs, expenses, etc.)." Defray Definition & Meaning | Dictionary.com. Further understanding of the Legislature's intent is found in its statement to an amendment to the statute:

> This committee bill expands the indemnification presently provided under the statutes to school board members and school board employees. Currently school board members and employees are indemnified in civil actions and in criminal proceedings if the criminal proceeding results in a final disposition in favor of the board member or employee. The bill expands indemnification to administrative and quasi-criminal actions and other legal proceedings and again stipulates that in the case of a quasi-criminal action indemnification shall only be extended if the proceeding results in a final disposition in favor of the board member or employee. In the case of school board employees, the bill further stipulates that an employee shall not be entitled to indemnification in a disciplinary proceeding instituted against the employee by the board of education or when the employee is appealing an action taken by the board. Similarly, an employee shall not be entitled to indemnification in any criminal or quasi-criminal complaint filed against him by the board of education.
>
> The bill further provides that indemnification for exemplary or punitive damages is not mandated and shall be governed by the standards and procedures set forth at N.J.S.59:10-4. That

> section of law provides for indemnification in the case of exemplary or punitive damages at the discretion of a local public entity only if the actions on which the damages were based did not constitute actual fraud, actual malice, willful misconduct or an intentional error.
>
> [P.L. 2001, c. 178, sec. 2, eff. July 26, 2001; 2000 Bill Text NJ A.B. 1755.]

In its statement, the Legislature referred only to a board's obligation to "indemnify" its employees. "Indemnify" is defined as "to compensate for damage or loss sustained, expense incurred, etc.; to guard or secure against anticipated loss; give security against (future damage or liability)." Indemnify Definition & Meaning | Dictionary.com. Neither the definition of "indemnify" nor "defray" indicates that the obligation is to be satisfied at a particular time and both contemplate reimbursement, e.g., payment to be made after a cost or expense has been incurred. It can thus be concluded that the Legislature intended "defray" to be understood in the same way as "indemnify," and thus authorized reimbursement. It must also be noted that the circumstances presented in Grossman are different from this matter in a significant way: the board of education's insurance company offered to provide representation to the employee and the employee refused.

Nonetheless, petitioners contend that they could not request that the Board defend or indemnify Azzaro until the OSC was resolved in her favor because the Board's obligation to indemnify was "triggered" not by the issuance of the OSC but, rather, by the dismissal of the OSC. Pet. Opp. Br. at 4. That is, they could not have known whether Azzaro was entitled to indemnification until it was found that the alleged acts or omissions arose out of and in the course of the performance of the duties of her employment. This required a finding in her favor at the close of the hearing on the OSC. Petitioners further argue that any potential conflict between Azzaro's interest and that of the Board could not be identified and addressed until that time. Thus, an "internal conflict" between Azzaro and the Board precluded appointment of counsel by the Board. As the allegations against Azzaro in the OSC included "serious unbecoming conduct" and "engaging in a cover up," they "fell outside the scope of her duties and responsibilities." Id. at 5-6. If those charges

had been sustained, the Board would have had no N.J.S.A. 18A:16-6 reimbursement obligation.

In support of this argument, petitioners cite to a line of cases involving a school security guard who was charged criminally with having engaged in unlawful sexual conduct with two minor students. Separate indictments were issued for the charges concerning each of the victims. The security guard pled guilty to some of the charges contained in one of the indictments. The remaining charges in that indictment were dismissed and the second indictment was dismissed in its entirety. The security guard made no admissions regarding the allegations contained in the second indictment. He did, however, admit to engaging in conversations of a sexual nature with the two students, both of whom were "minors and under [his] supervision and that he engaged in an inappropriate touching of at least one of those minors during the course of that day." L.A. v. Board of Educ. of City of Trenton, Mercer County, 221 N.J. 192, 196 (2015). Afterward, a civil complaint against the security guard and the school board was filed on behalf of the second victim. The Board answered the complaint on its own behalf and took no position with respect to the charges against the security guard, who was assigned counsel through the NJEA. The civil complaint was settled without an admission of wrongdoing by the Board or the guard. The guard and his counsel sought reimbursement of legal fees and costs, pursuant to N.J.S.A. 18A:16-6. The ALJ who heard the case did not conduct an evidentiary hearing. Rather, in response to a summary decision motion, he found that there was no proof that the guard acted outside the scope of his duties because the underlying matter was settled without a finding or admission of guilt. The DOE Commissioner agreed and the Appellate Division reversed. The Supreme Court found that disposition of the matter without an evidentiary hearing was inappropriate:

> The ALJ based his determination that L.A. was acting within the scope of his employment responsibilities solely on the fact that L.A. had "not been adjudicated in any prior forum to have committed any criminal act regarding K.O." In so doing, the ALJ failed to consider the extent of any factual overlap between the offenses alleged in the [first] indictment, which L.A. admitted to, and the offenses alleged in the [second]

> indictment. Nor did the ALJ consider L.A.'s admission during his plea colloquy that he spoke inappropriately to [the second victim], or the evidence referred to in the IAIU[8] report substantiating [the second indictment's] allegations.
>
> We note that the IAIU report, being investigative in nature, is distinguishable from an adjudicatory finding. In re R.P., 333 N.J. Super. 105, 116-17, 754 A.2d 615 (App. Div.2000). However, the report could have been offered into evidence at a hearing with the testimony of the DCF investigator, which would have afforded L.A. "an opportunity to cross-examine the investigator and other witnesses [offered] and to present evidence to rebut the charge." Id. at 117, 754 A.2d 615.
>
> Thus, unlike Bower, supra, where dismissal of the criminal indictment and the lack of any additional evidence "clearly satisf[ied] Bower's burden of proof under the statute" to show that he was acting within the scope of his employment, 149 N.J. at 434, 694 A.2d 543, here L.A.'s admission during his plea colloquy and the IAIU report supporting K.O.'s allegations show that there are issues of fact in dispute that are material to determining whether L.A. committed the acts alleged by K.O. in the civil action.
>
> [Id. at 204-205.]

On remand, and after a hearing, the ALJ found and the Commissioner agreed that the security guard "was not acting within the scope of his duties when he touched [the student] inappropriately. Therefore, he has not met the burden required to support indemnification under the statute." L.A. and the Horace Mann Insurance Company v. Board of Education of the City of Trenton, Mercer County, OAL DKT. NO. EDU 06498-15 (on remand EDU 10410-11)(Adopted, Comm'r, December 19, 2016). Consequently, he was not entitled to indemnification for the costs and fees expended in the defense and settlement of the civil lawsuit.

Here, petitioners suggest that the outcome of the OSC here, as in L.A., could possibly have not been favorable for Azzaro and that the Board's interest would be

[8] New Jersey Department of Children and Families, Institutional Abuse Investigation Unit.

contrary to Azzaro's. It's "interest would be in disposing of the case as cursorily as possible, either by pressuring Ms. Azzaro to 'throw in the towel' and surrender her teaching certificates . . . or by providing her with a skeleton defense. An attorney, engaged by the Board to provide her with a defense, however, could not ethically seek such a result." Pet. Opp. Br. at 6. Therefore, petitioners argue, they could not have requested defense or indemnification from the Board until after the OSC was dismissed.

L.A. is not analogous here. It did not address when a board of education employee or their counsel shall communicate with the board of education about a lawsuit or expressly request defense or indemnification. Rather, in L.A., there was clear communication and understanding about the lawsuit, as the Board was a named defendant and had clearly opted to not represent the security guard. There can be no question that all parties were on notice of the lawsuit and the possibility that N.J.S.A. 18A:16-6 would later come into play.

In fact, boards of education and other employers have managed to confront the issue of how to proceed with respect to representation of their employees, and of potential conflicts of interest, prior to the final disposition of the underlying matter. In several cases, boards of education have refused, at the outset of the underlying litigation, to provide a defense based upon its interpretation of the charges against its employees. See e.g., Matthews v. Board of Educ. of the Union County Voc. Tech. Sch., 2014 N.J. Super. Unpub. LEXIS 1915 (App. Div., August 6, 2014)(board's insurer denied to defend and indemnify at the start of the underlying proceeding because the complaint alleged an intentional act, which it did not cover).

Furthermore, the question of whether an alleged wrongdoing arose out of or in the course of the performance of the employees' duties has been addressed during the later indemnification proceeding. For example, in Waters v. Board of Education of Toms River, 2011 N. J. Supra. Unpub. LEXIS 3083 (App. Div. December 22, 2011), a school employee and his board of education (BOE) were named as defendants in a civil lawsuit filed by a student. The employee, through the NJEA, requested that the BOE provide him a

defense. The BOE refused and the NJEA provided coverage through an insurer with which it contracted. The lawsuit was settled with respect to the employee without a finding of liability. The employee and the insurance company brought an action pursuant to N.J.S.A. 18A:16–6 for reimbursement of the settlement and attorney's fees and costs. Although the lawsuit was based on a student's allegations of inappropriate sexual comments by the teacher, the Appellate Division found, "As a teacher, Waters held, at all relevant times, an 'office, position or employment under the jurisdiction of any Board of Education.' The allegations must necessarily be understood to have arisen solely because of and in the course of Waters' employment as a teacher." Id. at *13(quoting Bower v. Bd. of Educ. of E. Orange,149 N.J. 416, 431 (1997)). Having found that the statute applied, the Appellate Division wrote that "the school board must protect its employees by providing legal counsel, liability insurance, reimbursement for legal counsel, or reimbursement for liability insurance." Id. at *16-17. See also Lonky v. Bd. of Educ. of the City of Bayonne, Hudson County, OAL. DKT. NO. EDU07205-07 (Adopted, Comm'r, July 7, 2008).

Moreover, in Edison, the Appellate Division addressed the possibility of conflict between an employer and the employee who is the subject of a lawsuit. It stated that the employee has the "right to object to the appointment of an attorney perceived by them to be in a position of a conflict of interest" and it recognized the propriety of an order requiring the municipality "to retain outside counsel who would, when selected, owe sole allegiance to the [represented police] officers." 147 N.J. Super. at 17.

Based upon the cases that have applied N.J.S.A. 18A:16-6, petitioners' contention that they were precluded from communicating with the Board is not supported by the statute or the cases that have interpreted it.

Nonetheless, as noted above, N.J.S.A. 18A:16-6 does not impose an affirmative duty on the employee to notify a board of education at the outset of the underlying litigation. The cases that have applied the statute have not definitely imposed this requirement. To the extent this been addressed in the context of insurance contracts,

those cases have recognized that the insurer's knowledge of underlying litigation is material. See S.I. Indus. v. Am. Motorists Ins. Co., 128 N.J. 188 (1992). Here, it is undisputed that the Board had ample notice of the OSC, as documented in Judge Delanoy and Judge Viscomi's Initial Decisions. The parties and allegations of the OSC against Azzaro, Dawson and Cummings were significantly similar to those in the Board's disciplinary action against Dawson. They were filed close in time and it is clear that the Board was aware of the OSC, as consolidation of it with the tenure case was discussed. Even if petitioners were obligated to notify the Board at the outset of the OSC, the Board in fact possessed sufficient information such that it was on notice of the charges against Azzaro.[9] Accordingly, I **CONCLUDE** that petitioners are entitled to indemnification of the costs of defending Azzaro in response to the OSC.

Petitioners seek legal fees in the amount of $485,550 (1,079 billable hours at $450 per hour), and costs and expenses in the amount of $5,518.75. Pet. Exh. J, K. With respect to whether reimbursement should be at the discounted rate that was paid by NJEA or at the higher rate sought by petitioners, the Commissioner of Education has found that a non-discounted, reasonable rate was appropriate. In Salaam v. Board of Education of the City of Irvington, Essex County, 2014 N.J. Super. Unpub. LEXIS 268, No. A-5592-11T4, (App. Div. 2014), a criminal charge was filed, in 2008, against an employee of the Irvington School Board ("Irvington"). The charge concerned conduct related to the employee's work duties. Because the employee was a member of the NJEA, he was represented by an attorney through the NJEA Legal Services Program ("Program"). By agreement with the Program, the attorney charged $142 per hour rather than his normal rate of $250 per hour. The NJEA paid the attorney the reduced rate for all the legal services he provided to the employee at the reduced rate. The charge was dismissed in 2009. In 2010, the employee requested reimbursement from Irvington for the cost of his defense, including counsel fees and expenses. Irvington did not respond

[9] Indeed, counsel acknowledged during oral argument that the Board was aware of the OSC. Query whether the Board could have filed a declaratory action seeking a declaration that it was authorized to make determinations concerning Azzaro's defense or indemnification, as the insurer did in Goodman.

to the request. The employee subsequently petitioned the DOE Commissioner for reimbursement pursuant to N.J.S.A. 18A:16-6.1, and the higher rate was awarded.

The Appellate Division agreed that the higher rate was appropriate:

> We reject the Board's argument that the Commissioner erred in awarding a higher hourly rate than that allowed by the NJEA legal services program through which Salaam procured Smith's representation. The NJEA legal fund allowed payment of Smith's fees at a "volume discount rate" of $142 to $145 per hour. However, as noted, N.J.S.A. 18A:16-6.1 mandates the reimbursement of "reasonable" counsel fees. As the ALJ aptly stated, the fact that a third party finances the defense does not relieve the Board of its statutory obligation to pay those reasonable fees. We agree with the ALJ that the purposes and policies of the statute are advanced by allowing a school employee to rely upon his union's insurance policy as a means to fund his legal representation, and thereby "protect himself from the potentially ruinous defense costs," which in turn "cannot inure to the benefit of the Board." [Id. at *12-13.]

The starting point to determine a reasonable attorney fee is the "lodestar," which is "derived by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate." Walker v. Giuffre, 209 N.J. 124, 130 (2012) (citing Rendine v. Pantzer, 141 N.J. 292 (1995)). This requires a determination of the hours that were "reasonably" expended on the matter. Id. at 335. The court should exclude hours that were unreasonably expended. "Hours are not reasonably expended if they are excessive, redundant, or otherwise unnecessary." Rendine, 141 N.J. at 335 (quoting Rode v. Dellarciprete, 892 F.2d 1177, 1183 (3d Cir. 1990)).

In Rode v. Dellarciprete, the court stated that a fee application must include "fairly definite information as the hours devoted to various general activities, e.g., pretrial discovery, settlement negotiations, and the hours spent by various classes of attorneys, e.g., senior partners, junior partners, associates." 892 F.2d at 1190 ((citing Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d.

Cir. 1973)). Although "[i]t is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted nor the specific attainments of each attorney[,] without some fairly definite information as to the hours devoted to various general activities . . . and the hours spent by various classes of attorneys . . . the court cannot know the nature of the services for which compensation is sought." Rendine, 141 N.J. at 337(citing Lindy Bros. Builders, Inc. of Phila. v. Am. Radiator & Standard Sanitary Corp., 487 F.2d 161, 167 (3d. Cir. 1973)).

The court "may exclude hours from the lodestar calculation if in its view the hours expended exceed those that competent counsel reasonably would have expended to achieve a comparable result, in the context of the damages prospectively recoverable, the interests to be vindicated and the underlying statutory objectives." Szczepanski v. Newcomb Med. Ctr., 141 N.J. 346, 355 (1995) (internal citations and quotations omitted). Furthermore, a judge may exclude hours that are "vague" or "improper." N.M. v. A.S., 2018 N.J. Super. Unpub. LEXIS 588, *10 (App. Div. 2018).

"Block billing" is a method by which each lawyer and legal assistant enters their total daily time working on a case, rather than itemizing the time expended on each task specifically. Ibid. (internal citations omitted). Although a substantial number of vague entries may cause reason to exclude hours, block billing may be upheld as reasonable "if the listed activities reasonably correspond to the number of hours billed." FTC v. Circa Direct LLC, 912 F. Supp. 2d 165, 177 (D.N.J. 2012) (internal citations omitted). An appropriate approach is to look at the entire block, compare the listed activities with the time spent, and determine whether the hours reasonably correspond to all activities performed. N.M. v. A.S., 2018 N.J. Super. Unpub. LEXIS 588, at *13 (App. Div. 2018).

As noted previously, this matter here has an extensive procedural history. The case was transferred to the OAL in August of 2007; the hearings occurred in 2012, 2013, 2014 and 2018; and the Initial Decision was issued on September 12, 2019. The law firm's bills for this entire time are "block billed": the bills list the tasks completed, and, below the list, include the total hours for all tasks completed in the aggregate, rather than

indicating the time spent on each task. The bills do not indicate which attorney worked on the case. Rather, the bills all indicate the "Principal Attorney" completed the hours of work.

A careful review of all of the bills reveals that the billing statements include tasks that, in the aggregate, reasonably correspond to the reported hours. Indeed, the firm slightly underestimated the number of hours requested, based upon the bills provided. The bills reasonably correspond to an exceptionally lengthy litigation that spanned over a decade, involved a substantial record and a twenty-four day hearing.

The Board takes issue with portions of the bill, including the regular use of the statement "and necessarily related services" and billing for "attendance to photocopying." See Resp. Br. at 3. However, despite the vagueness of the phrase "necessarily related services," this phrase is positioned at the end of the lists of other tasks that, as noted, correspond to the hours requested in the respective billing statements. Thus, despite the use of that phrase, the hours requested are reasonable in light the actions taken in the case.

With regard to the billing for photocopying, the firm included "attendance to photocopying of documents in preparation for meeting" in a bill dated June of 2007. This bill includes a total of 22.55 hours; however, it does not specify the time spent on each task. Given photocopying is an administrative task that should not be billed at the same rate as a partner of a law firm, a downward adjustment on this bill is warranted. Given a consideration of the various other tasks completed in the June 2007 bill, I find it reasonable to exclude two hours from this bill.

In sum, due to the substantial length of the litigation and the nature of the issues presented, **I GRANT** renumeration of 1,077 hours expended.

The question remains whether the hourly rate sought by petitioners is reasonable. The hourly rate should be calculated according to the "prevailing market rates in the

relevant community" and thus "the court should assess the experience and skill of the prevailing party's attorneys and compare their rates to the rates prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Rendine, 141 N.J. at 337(citing Rode v. Dellarciprete, 892 F.2d at 1183). "The party seeking to recover attorney's fees has the initial burden of producing sufficient evidence of what constitutes a reasonable market rate for the essential character and complexity of the legal services rendered in order to make out a prima facie case." Lanni v. N.J., 259 F.3d 146 149 (3d Cir. 2001). If an adequate showing has been made, the burden shifts to the other party who must rebut the reasonableness with actual evidence. Smith v. Phila. House. Auth., 107 F.3d 223, 225 (3d Cir. 1997).

A reasonable hourly rate is to be calculated according to the prevailing market rates in the relevant community. Rendine, 141 N.J. at 335(internal citation and quotation omitted). The Rules of Professional Conduct (RPC) 1.5(a) requires several factors in consideration of a reasonable fee:

> (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
> (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
> (3) the fee customarily charged in the locality for similar legal services;
> (4) the amount involved and the results obtained;
> (5) the time limitations imposed by the client or by the circumstances;
> (6) the nature and length of the professional relationship with the client;
> (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
> (8) whether the fee is fixed or contingent.
>
> [RPC 1.5(a).]

The "trial court should satisfy itself that the assigned hourly rates are fair, realistic, and accurate, or should make appropriate adjustments." Rendine, 141 N.J. at 337. To

take into account delay of payment, the hourly rate at which compensation should be awarded should be based on current rate at the time of the fee petition rather than the rate when the services were actually performed. See Rendine, 141 N.J. at 337; See also Lanni v. N.J. , 259F.3d 146, 149–150 (3d Cir. 2001).

Once the lodestar has been established, discretion may come into play and a court may adjust the award for a variety of reasons. See Public Interest Research Group of N.J. v. Windall, 51 F.3d 1179, 1185 (3d Cir. 1995).[10] One instance includes cases where the attorney's compensation is entirely or substantially contingent upon a successful outcome, the court may increase the fee "to reflect the risk of nonpayment." Rendine, 141 N.J. at 337. In determining the appropriateness of an enhancement, a trial court must "determine whether a case was taken on a contingent basis, whether the attorney was able to mitigate the risk of nonpayment in any way, and whether other economic risks were aggravated by the contingency of payment." Id. at 339.

Here, petitioner's counsel requests the rate of $450 for all counsel given that (1) the case was "gigantic", (2) the case was complex, and (3) the attorneys are highly experienced and specialized. See Pet. Br. at 13. Billing statements included services rendered from May of 2007 to August of 2020. Petitioners assert that thousands of pages of discovery were exchanged; the case involved issues of admissibility, reliability of student records and discovery processes of confidential information; and that extensive motion practice was utilized. Pet. Br. at 16–19. Also, the underlying issues were complex, as they involved ascertaining what had happened to students during their high school careers based on disparate records. This was made more complicated in part because Trenton School District changed technology in 2004–2005. Id. at 19. Despite this, the firm achieved a favorable disposition for petitioner, as the case was dismissed in its

[10] Such factors include. "(1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill required to perform the legal service properly; (4) the preclusion of alternative employment; (5) the customary fee for similar work; (6) the nature of the fee payment arrangement; (7) time limitations imposed by the client or circumstances; (8) the amount involved and results obtained; (9) the experience, reputation and ability of the attorneys; (10) the undesirability of the case; (11) the nature and length of the attorney-client relationship; and (12) fee awards in similar cases." Id. at 1185 n.8 (internal citation omitted). However, many of these are subsumed in the lodestar calculation. Id.

entirety. It is undisputed that the NJEA paid the law firm between $129 and $182 per hour.

Petitioners supplied certifications from the three attorneys who represented Azzaro. They detail their experience as attorneys, particularly in this specific area of the law, and their successes. Arnold M. Mellk, Esq. has practiced for over fifty years and has extensive experience representing educators, including licensure hearings initiated by the SBE. He has handled several cases that resulted in reported decisions including in the Third Circuit and New Jersey Supreme Courts. Pet Exh. G. Gidian R. Mellk, Esq. has practiced approximately twenty-three years, during which she exclusively represented public employees "in connection with adversarial action taken against them" by government entities. Pet. Exh. H at ¶2. Edward A. Cridge, Esq. has fifteen years' experience, during which he largely represented public employees. Pet. Exh. I. Each attorney has been involved with several prior cases that applied N.J.S.A. 18A:16-6 and -6.1, including some that are cited here. Pet. Exh. G, H, I.

Petitioners also submitted the certification of Steven R. Cohen, Esq., a partner in the firm Selikoff and Cohen who has practiced law since 1977. Pet. Exh. D. Mr. Cohen certified that he "devote[s] a significant portion of [his] practice to the representation of public-sector labor unions and their employees." Id. at ¶1. He served as the chair of the New Jersey State Bar Association's labor and employment section and is currently a member of its executive committee. Id. at ¶2. In addition to other matters, he has handled "hundreds" of matters involving teachers, including tenure hearings and orders to show cause brought by the SBE. Id. at ¶5. He is also a member of the National Employment Lawyers Association-New Jersey, which equips him with knowledge of the "actual rates charged by member attorneys, who are comparable in experience and skill" to Arnold Mellk. Id. at ¶8. Mr. Cohen certified that he has known Arnold Mellk in a "professional capacity for more than forty years and [is] fully familiar with his background, experience, and skill level" and is aware that he is "very highly regarded" in the labor and employment Law community. Id. at ¶6.

Mr. Cohen certified that the prevailing market rate for an attorney of Arnold Mellk's caliber, who has handled a case as complex as this one, is "significantly" higher than $450 per hour. Id. at ¶7. Also, an hourly rate of $400 per hour for senior associates with more than fifteen years of experience comports with the prevailing market rate for complex litigation "of the nature contemplated by this action." Id. at ¶9.

The hourly rates referenced by Cohen are consistent with the fees authorized by New Jersey courts. In FTC v. Circa Direct LLC, 912 F. Supp. 2d 165 (D. NJ 2012), which involved a complaint alleging deceptive trade practices filed by the Federal Trade Commission, the District Court approved $400 per hour for those attorneys with over fifteen years' experience, $350 per hour for the attorney with over twelve years' experience; and $225 per hour for the attorneys who had between two and three years' experience. In assessing the proper rate, the court examined rates that had previously been approved in the southern New Jersey area and found that "[c]ourts have approved rates between $115 and $750 for matters litigated in this vicinage for attorneys, depending on the attorney's experience and skill[.]" Id. at 175. In Williams v. Asbury Park Bd. of Educ., the court upheld a $450 rate for plaintiff's counsel in an LAD case who had twenty years of experience handling discrimination cases. 2015 N.J. Super Unpub. LEXIS 2422, at *9 (App. Div. 2015). In Winyard v. 21st Century Leasing Corp., No.'s A-2714-12T3 and A-3384-12T3 (N.J. App. Div. Jan 21, 2015) (slip op. at 7), the Appellate Division affirmed the trial court's legal fee award to the plaintiff in a settled law division case, where the defendant filed suit against a plaintiff who purchased a motor vehicle from defendant and obtained his license plates and immediately stopped payment on the check; defendant dismissed its complaint without prejudice. The court affirmed an award of $275 per hour for an associate who had been admitted for about six years, and $475 for a partner who had been admitted to practice law since 1977.

Here, however, the bills submitted by the firm are deficient to the extent they do not differentiate which attorneys billed which hours. Exh. J. Rather, all invoices identify only the "principal attorney" and not the other attorneys. This is at odds with counsels' certifications in which they represented that all three attorneys, each with a different level

of experience, worked on this case. Pet. Br. at 19–22. This makes it impossible to ascertain which of the three attorneys performed each billed service. Given that attorneys with various levels of experience are entitled to significantly different rates, it would be inappropriate to award the highest hourly rate for all billed services. Accordingly, a reduction of the proposed hourly rate is warranted.

Attorney Cridge is the least experienced of the attorneys who worked on the matter. He currently has fifteen years of experience, largely in this and related areas. As indicated by Cohen and supported by case law, a rate of $400 per hour is reasonable based upon the current market rate for an attorney with his experience. Without an adequate guide to determine the work that was performed by each attorney, it is appropriate to apply an hourly rate of $400 for all of the work performed by the attorneys. This rate is reasonable based upon the market rate for a case of this nature at present and the circumstances of this case. This rate is a significant increase from the amount provided the NJEA.

Petitioners argue that an "Rendine enhancement" should be applied given that this case was "entirely or substantially contingent on a special income." As discussed above, under N.J.S.A. 18A:16-6, recoupment of attorneys' fees is not contingent upon a favorable result. Rather, the Board must "defray all costs" which includes reasonable legal fees and costs regardless of the result. Even though a subsequent analysis of the context in which the allegations arose may be required, petitioners did not accept the risk that an attorney who is paid on a fully contingent basis would have accepted. Petitioner has not met the burden of proving that this case warrants a departure from the lodestar rate analysis. Thus, no enhancement will be applied to this case.

Therefore, given the market rate for attorneys in this field, the qualifications of the attorneys, the complex nature of the case, and the billing documents provided by counsel, I **CONCLUDE** that all but two of the requested hours (1,077) shall be provided at a rate of $400, for a total of $430,800.

Petitioner also requests costs in the amount of $5,518.75. N.J.S.A. 18A:16-6 mandates that the Board of Education defray all costs, including reasonable counsel fees and costs. Most of the costs demonstrated by petitioners appear to be reasonable and warranted, with a couple of exceptions. Indeed, a detailed review of the invoices and bills provided reveals that the costs enumerated in the invoices in Exh. J and the documentation in Exh. K exceed the requested amount.

However, the following billed costs will be excluded from that total. The invoice from November of 2007 includes a request for $16.20 for travel where no travel was indicated in the billing statement. Exh. J. Thus, the costs shall be reduced by $16.20. Moreover, petitioner submits an invoice ("Conference Detail") dated November 5, 2008, as the last page of Exh. K which states the amount due is $140.95. It is unclear whether the figures from the final invoice in Exh. K were included in a billing statement in Exh. J. It is also unclear which portions of the Conference Detail invoice belong to the present case, or which portions thereof apply. Exh. K. Thus, the Conference Detail amount of $140.95 will be deducted from the costs awarded. Accordingly, I **CONCLUDE** that petitioners shall be reimbursed for costs in the amount of $5,361.60.

ORDER

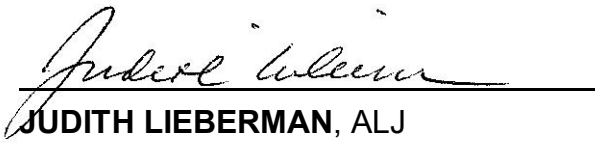
For the foregoing reasons, I **ORDER** that petitioners are entitled reimbursement of their bills at the rate of $400 per hour for 1,077 hours, and of $5,361.60 in costs.

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.

June 15, 2022 
DATE **JUDITH LIEBERMAN**, ALJ

Date Received at Agency: _____

Date Mailed to Parties: _____

mph

APPENDIX

List of Exhibits

For petitioners:

P-A Excerpt of transcript of May 9, 2018, Order to Show Cause hearing
P-B Office of Fiscal Accountability and Compliance Report of Investigation
P-C Order to Show Cause
P-D Initial Decision, EDE 6297-07, 6463-07, 6464-07
P-E February 28, 2020, State Board of Examiners Final Decision
P-F Petition
P-G Certification of Arnold M. Mellk, Esq.
P-H Certification of Gidian R. Mellk, Esq.

P-I Certification of Edward A. Cridge, Esq.

P-J Legal services billing records

P-K Bills for costs

P-L November 19, 2011, email with interrogatory

P-M Billing records prepared by other attorneys

P-N July 11, 2012, Order, Waters v. Board of Education, MER-L-1071-12

P-O Certification of Steven R. Cohen, Esq.

For respondent:

R-A June 11, 2007, Order to Show Cause

R-B May 18, 2020, Petition

R-C Petitioners' billable records

R-D Petitioners' responses to discovery requests

R-E Lawless v. TA Assocs., L.P., 2015 N.J. Super. Unpub. LEXIS 2967

R-F Grossman v. Rockaway Twp., 2019 N.J. Super. Unpub. LEXIS 3596

R-G Salaam v. Bd. of Educ. of Irvington, Essex Cty., 2014 N.J. Super. Unpub. Lexis 268

R-H Trenton Board of Education insurance policies