Date: August 2, 1978

From: Office of the University Counsel and Vice Chancellor for Legal Affairs

Subject: Defense and Indemnification of State Officers and Employees (New Section 17 of the Public Officers Law)

I'm pleased to advise that the Governor has signed a bill enacting new section 17 of the Public Officers Law which greatly strengthens the protection available to state officers and employees against personal liability when such officers and employees are sued individually as a result of any cause of action which may arise by reason of an act or omission which occurs "while the employee was acting within the scope of his public employment or duties...". Former employees and certain volunteers are also covered where appropriate.

The new legislation strikes a wise balance between the important but sometimes conflicting public interests in protecting private rights while preserving a climate in which public officials neither fear nor fail to exercise their best judgment in resolving the many complex questions which come before them for decision.

The present law, now repealed, could have been read to protect against negligence actions only, thus excluding certain federal civil rights claims, contract and quasi-contract cases as well as various other forms of action. The new legislation extends to any civil action and specifically includes the federal civil rights actions which were previously in question. Intentional injuries and those caused by a reckless disregard of foreseeable consequences, of course, continue to be excluded.

The new law, for the first time, recognizes the conflict of interest which may arise in an action against an individual employee involving an event which, arguably, falls outside the scope of official duty or involves a question of willfulness or recklessness. In any such event, the Attorney General or the court in which the action is pending may permit the retainer of private counsel by the individual defendant-employee. Under these circumstances, legal fees of private counsel are also subject to indemnification by the State.
To invoke the protection of the statute, the individual employee, as before, must deliver to the Attorney General the original or a copy of the summons, complaint, or other process served upon the employee within five days after service as well as cooperate fully with the Attorney General in the defense of the claim. (See Memorandum to Presidents, Vol. 76, No. 26, November 12, 1976.)

When sued in an individual capacity, all personnel located at State-operated campuses outside New York City and Long Island should send the summons, complaint, or other process, with the individual defendant's request for representation and defense pursuant to section 17 of the Public Officers Law, to the Attorney General at the State Capitol, Albany, New York 12224. All personnel located at State-operated campuses in New York City, Nassau and Suffolk Counties, should send the legal papers and request to the Attorney General, Two World Trade Center, New York, New York 10047. Following receipt of this material, the Attorney General will determine whether the Law Department will assume the defense of the litigation and will so advise the individual officer or employee. In all cases, a copy of the letter and papers should also be sent to the Office of the University Counsel.

In situations where the summons or notice must be answered immediately, the Office of the University Counsel should be contacted by telephone so that we may make arrangements with you to deliver the necessary papers to the nearest regional bureau of the Office of the Attorney General.

Where the legal papers name the State University, the State of New York, or State University officers or employees described by their official title as the party or parties defendant, the summons or summons and complaint should be forwarded to this office in the usual manner. Where there may be some doubt as to whether the defendants are named in a corporate or personal capacity, we'll be glad to advise by telephone.

The new law on indemnification, copy attached, will take effect on the 60th day after July 6, 1978 (Chapter 466 of the Laws of 1978). A companion bill affecting community colleges awaits action in the Legislature. We will keep you advised.

Walter J. Relihan, Jr.

Attachment
This memorandum addressed to:

Presidents, State-operated Campuses

Copies for information only sent to:

Presidents, Community Colleges
Deans, Statutory Colleges
President Rose
Vice President Cook

cc: Board of Trustees
Chairmen, Councils
Chairman, Board of Trustees of College of Environmental Science and Forestry
Chairmen, Boards of Trustees, Community Colleges
AN ACT to amend the public officers law, the correction law, the executive law, the mental hygiene law, the public authorities law, and the workers' compensation law, in relation to the indemnification and defense of state officers and employees and to repeal section seventeen of the public officers law, subdivisions three, four, five and six of section twenty-four and section twenty-four-a of the correction law, subdivision two of section eight-a of the court of claims act, subdivision four of section two hundred fifty-nine-q and sections two hundred fifty-nine-r and five hundred one-a of the executive law, sections 7.35 and 13.35, subdivision (d) of section 19.13 and section 81.12 of the mental hygiene law, section two hundred thirty-five-a of the military law, section fourteen-a of the public health law, and section nineteen-c of the workers' compensation law relating thereto.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section seventeen of the public officers law is hereby repealed and a new section seventeen is hereby added thereto to read as follows:

§ 17. Defense and indemnification of state officers and employees. 1. As used in this section, unless the context otherwise requires the term "employee" shall mean any person holding a position by election, appointment or employment in the service of the state, whether or not compensated, or a volunteer expressly authorized to participate in a state-sponsored volunteer program, but shall not include an independent contractor. The term employee shall include a former employee, his estate or judicially appointed personal representative.

2. (a) Upon compliance by the employee with the provisions of subdivision four of this section, the state shall provide for the defense of the employee in any civil action or proceeding in any state or federal court arising out of any alleged act or omission which occurred or is alleged in the complaint to have occurred while the employee was
acting within the scope of his public employment or duties, or which is brought to
enforce a provision of section nineteen hundred eighty-one or nineteen hundred
eighty-three of title forty-two of the United States code. This duty to provide for a
defense shall not arise where such civil action or proceeding is brought by or on behalf
of the state.

(b) Subject to the conditions set forth in paragraph (a) of this subdivision, the
employee shall be entitled to be represented by the attorney general, provided, however,
that the employee shall be entitled to representation by private counsel of his choice in
any civil judicial proceeding whenever the attorney general determines based upon
his investigation and review of the facts and circumstances of the case that
representation by the attorney general would be inappropriate, or whenever a court of
competent jurisdiction, upon appropriate motion or by a special proceeding,
determines that a conflict of interest exists and that the employee is entitled to be
represented by private counsel of his choice. The attorney general shall notify the
employee in writing of such determination that the employee is entitled to be
represented by private counsel. The attorney general may require, as a condition to
payment of the fees and expenses of such representation, that appropriate groups of
such employees be represented by the same counsel. If the employee or group of
employees is entitled to representation by private counsel under the provisions of this
section, the attorney general shall so certify to the comptroller. Reasonable attorneys'
fees and litigation expenses shall be paid by the state to such private counsel from
time to time during the pendency of the civil action or proceeding subject to
certification that the employee is entitled to representation under the terms and
conditions of this section by the head of the department, commission, division, office
or agency in which such employee is employed and upon the audit and warrant of the
comptroller. Any dispute with respect to representation of multiple employees by a
single counsel or the amount of litigation expenses or the reasonableness of attorneys'
fees shall be resolved by the court upon motion or by way of a special proceeding.

(c) Where the employee delivers process and a request for a defense to the attorney
general as required by subdivision four of this section, the attorney general shall take
the necessary steps including the retention of private counsel under the terms and
conditions provided in paragraph (b) of subdivision two of this section on behalf of
the employee to avoid entry of a default judgment pending resolution of any question
pertaining to the obligation to provide for a defense.

3. (a) The state shall indemnify and save harmless its employees in the amount of
any judgment obtained against such employees in any state or federal court, or in the
amount of any settlement of a claim, provided that the act or omission from which such
judgment or settlement arose, occurred while the employee was acting within the scope
of his public employment or duties; the duty to indemnify and save harmless
prescribed by this subdivision shall not arise where the injury or damage resulted
from intentional wrongdoing or recklessness on the part of the employee.

(b) An employee represented by private counsel shall cause to be submitted to the
head of the department, commission, division, office or agency in which he is
employed any proposed settlement which may be subject to indemnification by the
state and if not inconsistent with the provisions of this section such head of the
department, commission, division, office or agency in which he is employed shall
certify such settlement, and submit such settlement and certification to the attorney
general. The attorney general shall review such proposed settlement as to form and
amount, and shall give his approval if in his judgment the settlement is in the best
interest of the state. Nothing in this subdivision shall be construed to authorize the
state to indemnify or save harmless an employee with respect to a settlement not so
reviewed and approved by the attorney general.

(c) Nothing in this subdivision shall authorize the state to indemnify or save
harmless an employee with respect to punitive or exemplary damages, fines or
penalties, or money recovered from an employee pursuant to article seven-a of the state finance law.

(d) Upon entry of a final judgment against the employer, or upon the settlement of the claim, the employer shall cause to be served a copy of such judgment or settlement, personally or by certified or registered mail within thirty days of the date of entry or settlement, upon the head of the department, commission, division, office or agency in which he is employed; and if not inconsistent with the provisions of this section, such judgment or settlement shall be certified for payment by such head of the department, commission, division, office or agency. If the attorney general concurs in such certification, the judgment or settlement shall be paid upon the audit and warrant of the comptroller.

4. The duty to defend or indemnify and save harmless prescribed by this section shall be conditioned upon (i) delivery to the attorney general or an assistant attorney general at an office of the department of law in the state by the employee of the original or a copy of any summons, complaint, process, notice, demand or pleading within five days after he is served with such document, and (ii) the full cooperation of the employee in the defense of such action or proceeding and in defense of any action or proceeding against the state based upon the same act or omission, and in the prosecution of any appeal. Such delivery shall be deemed a request by the employee that the state provide for his defense pursuant to this section.

5. The benefits of this section shall inure only to employees as defined herein and shall not enlarge or diminish the rights of any other party nor shall any provision of this section be construed to affect, alter or repeal any provision of the workers' compensation law.

6. This section shall not in any way affect the obligation of any claimant to give notice to the state under section ten of the court of claims act or any other provision of law.

7. The provisions of this section shall not be construed to impair, alter, limit or modify the rights and obligations of any insurer under any policy of insurance.

8. The provisions of this section shall apply to all actions and proceedings pending upon the effective date thereof or thereafter instituted.

9. Except as otherwise specifically provided in this section, the provisions of this section shall not be construed in any way to impair, alter, limit, modify, abrogate or restrict any immunity available to or conferred upon any unit, entity, officer or employee of the state or any other level of government, or any right to defend and/or indemnification provided for any governmental officer or employee by, in accordance with, or by reason of, any other provision of state or federal statutory or common law.

10. If any provision of this section or the application thereof to any person or circumstance be held unconstitutional or invalid in whole or in part by any court of competent jurisdiction, such holding of unconstitutionality or invalidity shall in no way affect or impair any other provision of this section or the application of any such provision to any other person or circumstance.

§ 2. Subdivisions three, four, five and six of section twenty-four of the correction law are hereby repealed.

§ 3. Subdivision seven of section twenty-four of such law, as added by chapter two hundred eighty-three of the laws of nineteen hundred seventy-two, is hereby renumbered to be subdivision three and amended to read as follows:

3. This section shall apply with respect to claims arising on or after the effective date of this section. [Claims arising prior thereto shall be governed by section seventeen of the public officers law.]

§ 4. Section twenty-four-a of such law is hereby repealed, and a new section twenty-four-a is hereby added thereto to read as follows:

§ 24-a. Actions against persons rendering health care services at the request of the department; defense and indemnification. The provisions of section seventeen of the
public officers. law shall apply to any person holding a license to practice a profession pursuant to article one hundred thirty-one, one hundred thirty-one-A, one hundred thirty-one-B, one hundred thirty-two, one hundred thirty-three, one hundred thirty-seven, one hundred thirty-nine, one hundred forty-three, one hundred fifty-six or one hundred fifty-nine of the education law, who is rendering or has rendered professional services authorized under such license while acting at the request of the department or a facility of the department in providing health care and treatment or professional consultation to inmates of state correctional facilities, without regard to whether such health care and treatment or professional consultation is provided within or without a correctional facility.

§ 5. Subdivision two of section eight-a of the court of claims act is hereby repealed.

§ 6. Section two hundred fifty-seven-a of the executive law, as added by chapter six hundred eighty of the laws of nineteen hundred seventy-five, is hereby amended to read as follows:

§ 257-a. Civil actions against local department volunteers. 1. For the purposes of this section the term “volunteer” means a person authorized by a local probation department’s director of the volunteer services program to participate in the local department’s volunteer services program.

2. The state shall provide and a local probation department may provide an attorney for and pay such attorney fees and expenses necessarily incurred in the defense of a volunteer in any civil action commenced against him by reason of a claim of alleged negligence or other act of such person arising out of and in the course of participating in a local department volunteer services program, and the state shall save and a local probation department may save harmless and indemnify such person from financial loss arising out of any claim, demand, suit of judgment by reason of the alleged negligence or other act of such person provided that, at the time that such claim arose or damages were sustained, such person was acting in the discharge of his duties and within the scope of his authorized duties and that such claim or cause of action or damages sustained did not result from the willful and wrongful act or gross negligence of such person.

3. Neither the state nor a local probation department authorizes indemnification under this section, however, shall be subject to the obligations imposed by this section unless such volunteer shall, within five days of the time he is served with any summons, complaint, process, notice, demand or pleading, deliver the original or a copy thereof to the state department and unless such person shall cooperate fully with the state or local probation department in the defense of said claim, demand or suit. Upon such delivery the state or local probation department may assume control of the representation of such person.

4. This section shall not in any way impair, limit or modify the rights and obligations under any policy of insurance.

5. The benefits of this section shall inure only to volunteers and shall not enlarge or diminish the rights of any other party.

§ 7. Subdivision three of section two hundred fifty-nine-q of such law, as added by chapter nine hundred four of the laws of nineteen hundred seventy-seven, is hereby amended to read as follows:

3. The state shall save harmless and indemnify any officer or employee of the division from financial loss resulting from a claim filed in a court of the United States for damages arising out of an act done or the failure to perform any act that was (a) within the scope of the employment and in the discharge of the duties of such officer or employee, and (b) not done or omitted with the intent to violate any rule or regulation of the division or of any statute or governing case
I&W the state or of the United States at the time the damages were sustained, provided that the officer or employee shall comply with the provisions of subdivision four of [this] section seventeen of the public officers law.

§ 8. Subdivision four of section two hundred fifty-nine-q of such law is hereby repealed and a new subdivision four is hereby added thereto to read as follows:

4. (a) The provisions of this section shall supplement, and be available in addition to, the provisions of section seventeen of the public officers law and, insofar as this section is inconsistent with section seventeen of the public officers law, the provisions of this section shall be controlling.

(b) The provisions of this section shall not be construed in any way to impair, modify or abrogate any immunity available to any officer or employee of the division under the statutory or decisional law of the state or the United States.

§ 9. Section two hundred fifty-nine-q of such law is hereby repealed.

§ 10. Section five hundred one-a of such law is hereby repealed and a new section five hundred one-a is hereby added thereto to read as follows:

§ 501-a. Actions against persons designated foster parents of the division; defense and indemnification. The provisions of section seventeen of the public officers law shall apply to persons designated foster parents whose duties involve the care, treatment or supervision of persons admitted to institutions operated by the division, whether within such institutions or released therefrom pursuant to section five hundred twenty-three of this act, or whose duties involve services to or for applicants while rendering such care, treatment or services.

§ 11. Section 7.35 of the mental hygiene law is hereby repealed and a new section 7.35 is hereby added thereto to read as follows:

§ 7.35 Actions against persons rendering professional services at the request of the office; defense and indemnification.

The provisions of section seventeen of the public officers law shall apply to any physician, psychologist, nurse or certified social worker, licensed to practice pursuant to the New York education law, who is rendering professional treatment authorized under such license at the request of the office or an office facility to patients receiving care or professional consultation from the office while rendering such professional treatment.

§ 12. Section 13.35 of such law is hereby repealed and a new section 13.35 is hereby added thereto to read as follows:

§ 13.35 Actions against persons rendering professional services at the request of the office; defense and indemnification.

The provisions of section seventeen of the public officers law shall apply to any physician, psychologist, nurse or certified social worker, licensed to practice pursuant to the New York education law, who is rendering professional treatment authorized under such license at the request of the office or an office facility to patients receiving care or professional consultation from the office while rendering such professional treatment.

§ 13. Subdivision (c) of section 19.13 of such law, as added by chapter nine hundred seventy-eight of the laws of nineteen hundred seventy-seven, is hereby amended to read as follows:

(c) The state shall save harmless and indemnify such officer or employee from financial loss resulting from a claim filed in a court of the United States for damages arising out of an act done or the failure to perform any act that was (1) within the scope of the employment and in the discharge of the duties of such officer or employee, and (2) was not in violation of any rule or regulation of the office or of any statute or governing case law of the state or of the United States at the time the alleged damages were allegedly sustained; provided that the
officer or employee shall comply with the provisions of subdivision [(d)] of this section, four of section seventeen of the public officers law.

§ 14. Subdivision (d) of section 19.13 of such law is hereby repealed and a new subdivision (d) is hereby added thereto to read as follows:

(d) (1) The provisions of this section shall supplement, and be available in addition to, the provisions of section seventeen of the public officers law and, insofar as this section is inconsistent with section seventeen of the public officers law, the provisions of this section shall be controlling.

(2) The provisions of this section shall not be construed in any way to impair, modify or abrogate any immunity available to any officer or employee of the officer under the statutory or decisional law of the state or the United States.

§ 15. Section 19.15 of such law, as added by chapter nine hundred seventy-eight of the laws of nineteen hundred seventy-seven, is hereby amended to read as follows:

§ 19.15 Use and indemnification of volunteers.

[(a)] The use of volunteers by the office shall be encouraged. The chairman and each director may establish regulations governing such volunteer services for functions of the commission and the divisions.

[(b)] The state shall provide an attorney or attorneys for, and pay such attorney fees and expenses necessarily incurred in the defense of an authorized participant in any of the volunteer programs of the office in any civil action commenced against him by reason of a claim of alleged negligence or other act of such person while participating in any such volunteer program and the state shall save harmless and indemnify such person from financial loss arising out of any claim, demand, suit or judgment by reason of the alleged negligence or other act by such person provided that at the time that such claim arose or damages were sustained such person was acting in the discharge of his duties and within the scope of his authorized duties and that such claim or cause of action or damages sustained did not result from the willful and wrongful act or gross negligence of such person. The state, however, shall not be subject to the obligations imposed by this section unless such person shall, within five days of the time he is served with any summons, complaint, process, notice, demand or pleading, deliver the original or a copy thereof to the office.

Upon such delivery the state may assume control of the representation of such person. Such person shall cooperate fully with the state in the defense of said claim, demand or suit.

This section shall not in any way impair, limit or modify the rights and obligations under any policy of insurance.

§ 16. Article nineteen of such law is hereby amended by adding thereto a new section, to be section 19.21, to read as follows:

§ 19.21 Actions against persons rendering professional services at the request of the office, defense and indemnification.

The provisions of section seventeen of the public officers law shall apply to any physician, psychologist, nurse or certified social worker, licensed to practice pursuant to the New York education law, who is rendering professional treatment authorized under such license at the request of the office or an office facility to patients receiving care or professional consultation from the office while rendering such professional treatment.

§ 17. Section 81.12 of such law is hereby repealed.

§ 18. Section two hundred thirty-five-a of the military law is hereby repealed.

§ 19. Subdivision three of section thirty hundred twenty of the public authorities law, as added by chapter one hundred sixty-eight of the laws of nineteen hundred seventy-five, is hereby amended to read as follows:
3. The state shall save harmless and indemnify directors, officers and employees of and representatives to a corporation pursuant to section seventeen of the public officers law, against any claim, demand, suit, or judgment arising by reason of any act or omission to act by such director, officer, employee or representative occurring in the discharge of his duties and within the scope of his service on behalf of such corporation. In the event of any claim, demand, suit or judgment based on allegations that financial loss was sustained by any person in connection with the acquisition, disposition or holding of securities or other obligations of a corporation (or those of any other public corporation if such loss allegedly resulted from its dealing with a municipal assistance corporation), a director, officer or employee of or representative to a municipal assistance corporation shall be saved harmless and indemnified, notwithstanding the limitations of subdivision one of section seventeen of the public officers law, unless such individual is found by a final judicial determination not to have acted in good faith, for a purpose which he reasonably believed to be in the best interest of such corporation or not to have had reasonable cause to believe that his conduct was lawful.

§ 20. Section fourteen-a of the public health law is hereby repealed.

§ 21. Section nineteen-c of the workers' compensation law is hereby repealed and a new section nineteen-c is hereby added thereto to read as follows:

§ 19-c. Actions against health services personnel; defense and indemnification. The provisions of section seventeen of the public officers law shall apply to actions and proceedings, against physicians, nurses and other employees of the board whose duties involve medical examinations under this chapter and the volunteer firemen's benefit law or other health services, arising out of emergency medical treatment given to board employees while at work or to claimants, their attorneys, licensed representatives, witnesses, employers, their representatives and representatives of carriers, while visiting the offices of the board or the hearing points at which proceedings are conducted or any other person properly on board premises.

§ 22. Subdivision three of section eighty-seven-a of such law, as amended by chapter eight hundred seventy of the laws of nineteen hundred seventy-five, is hereby amended to read as follows:

3. Notwithstanding any other provision of law, including the provisions of subdivision one of section seventeen of the public officers law, no state officer with custody or responsibility for the investment of the assets thereof shall incur or suffer any liability whatsoever to any person beneficially interested in such system by reason of actions taken pursuant to the authorization and direction of subdivision one and such fund shall save harmless and indemnify all such officers and any investment advisors from financial loss arising out of any claim, demand, suit, action or judgment for alleged negligence, waste or breach of fiduciary duty by reason of any investment of any monies of the state insurance fund in obligations of the municipal assistance corporation for the city of New York provided that such person shall, within five days after the date on which he is served with any summons, complaint, process, notice, demand, claim or pleading, deliver the original or a true copy thereof to the legal advisor of such system. Upon such delivery the legal advisor of the state insurance fund may assume control of the representation of such person in connection with such claim, demand, suit, action or proceeding. Such person shall cooperate fully with the legal advisor of the system or any other person designated to assume such defense in respect of such representation or defense.

§ 23. Subdivision three of section eighty-seven-b of such law, as added by chapter eight hundred seventy-three of the laws of nineteen hundred seventy-five, is hereby amended to read as follows:

3. Notwithstanding any other provision of law, including the provisions of
section seventeen of the public officers law, no state officer, with custody or responsibility for the investment of the assets thereof shall incur or suffer any liability whatsoever to any person beneficially interested in such system by reason of actions taken pursuant to the authorization and direction of subdivision one and such fund shall save harmless and indemnify all such officers and any investment advisors from financial loss arising out of any claim, demand, suit, action or judgment for alleged negligence, waste or breach of fiduciary duty by reason of any investment of any moneys of the state insurance fund in obligations of the city of Yonkers provided that such person shall, within five days after the date on which he is served with any summons, complaint, process, notice, demand, claim or pleading, deliver the original or a true copy thereof to the legal advisor of such system. Upon such delivery, the legal advisor of the state insurance fund may assume control of the representation of such person in connection with such claim, demand, suit, action or proceeding. Such person shall cooperate fully with the legal advisor of the system or any other person designated to assume such defense in respect of such representation or defense.

§ 24. This act shall take effect on the sixtieth day after it shall have become a law but shall not be construed to impair any rights or interests of any state employee accrued, incurred or conferred prior to the effective date of this act, including the rights of any employee under an employment contract or collective bargaining agreement.