Memorandum to Presidents

Date: August 15, 1980
From: Office of the University Counsel and Vice Chancellor for Legal Affairs
Subject: Defense and Indemnification of Officers and Employees of Community Colleges (New Section 6308 of the Education Law)

Newly enacted legislation will provide protection for community college trustees, officers, employees, and volunteers against personal liability when they are sued individually as a result of a 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." The new law covers civil actions and specifically includes Federal civil rights actions. Intentional injuries and those caused by a reckless disregard of foreseeable consequences are excluded.

This legislation will make uniform the responsibility of community college sponsors operating under the program of State University to defend and indemnify college trustees, officers and employees for financial losses and costs incurred in defending suits, claims, and demands, and in satisfying judgments against them resulting from acts or omissions committed in the discharge of their official duties.

The local sponsor is responsible for providing defense to those covered by this measure. However, in situations where the sponsor determines that representation by its attorney is "inappropriate," or where a court determines that a conflict of interest exists, the employee may be represented by private counsel of his choice and the local sponsor will be responsible for all fees and expenses resulting from such representation.

The sponsor's duty to defend and indemnify an individual employee is predicated upon the employee's compliance with certain requirements. The officer or employee must deliver to the sponsor's main business office any summons, complaint, notice or other legal paper within five days after service. The employee is not required to deliver a special request for sponsor defense. Delivery of the papers within the five-day limit is deemed to be such a request. Also, the employee must cooperate fully with the sponsor in its defense of any action against the employee individually, or against the community college or sponsor when the action is based on the same act or omission of the employee.
This is just a brief summary of the provisions of this measure. Questions will arise as the law is implemented, and we will keep you advised of further developments as they occur. We suggest that copies of this memorandum be shared with representatives of your local sponsor.

The new law (Chapter 457 of the Laws of 1980, attached), will take effect on August 22, 1980 and will cover any actions or proceedings pending on that date.

Sanford H. Levine

Attachment
cc: Chairmen, Community College Boards of Trustees

This Memorandum addressed to:

Presidents, Community Colleges

Copies for information only to:

Presidents, State-operated campuses
Deans, Statutory Colleges
President Neville
Mr. James Spencer
IN ASSEMBLY

June 9, 1980

Senate bill pr. No. 731-A, Rec. 23 by Senators STAFFORD, MARCHI—read once and referred to the Committee on Ways and Means, reported and referred to the Committee on Rules, committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee.

AN ACT to amend the education law, in relation to the indemnification and defense of officers and employees of community colleges and to repeal section sixty-three hundred eight of such law relating thereto.

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

1. Section 1. Section sixty-three hundred eight of the education law is REPEALED and a new section sixty-three hundred eight is added to read as follows:

§ 6308. Defense and indemnification of community college trustees, officers and employees. 1. As used in this section, the term "employee" shall mean any person holding a position by appointment or employment in the service of a community college, whether or not compensated, or a volunteer expressly authorized to participate in a community college 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 local sponsor of a community college 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

EXPLANATION—Matter in *italics* (underscored) is new; matter in brackets [*] is old law to be omitted.

LBD0442641178B
defense shall not arise where such civil action or proceeding is brought
by or on behalf of the local sponsor.

(b) Subject to the conditions set forth in paragraph (a) of this sub-
division, the employee shall be entitled to be represented by the local
sponsor provided, however, that the employee shall be entitled to repre-
sentation by private counsel of his choice in any civil judicial
proceeding whenever the local sponsor determines based upon its investi-
gation and review of the facts and circumstances of the case that repres-
entation by the local sponsor would be inappropriate, or whenever a
court of competent jurisdiction, upon appropriate motion or otherwise 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 local sponsor shall notify the employee in writing of
such determination that the employee is entitled to be represented by
private counsel. The local sponsor may require, as a condition to
payment of the fees and expenses of such representation, that appropri-
ate groups of such employees be represented by the same counsel. The
local sponsor shall certify to the chief fiscal officer that the em-
ployee or group of employees is entitled to representation by private
counsel under the provisions of this section. Reasonable attorneys'
fees and litigation expenses shall be paid by the local sponsor to such
private counsel from time to time during the pendency of the civil pro-
cedure or proceeding subject to certification that the employee is en-
titled to representation under the terms and conditions of this section
by the board of trustees of the community college at which such employee
is employed and upon the audit and warrant of the chief fiscal officer
of the sponsor. 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 local sponsor as required by subdivision four of this section, the
sponsor shall take the necessary steps including the retention of pri-
ivate counsel under the terms and conditions provided in paragraph (b) of
this subdivision 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 local sponsor shall indemnify and save harmless its em-
ployees 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 sub-
mited to the board of trustees of the community college at which he is
employed any proposed settlement which may be subject to indemnification
by the local sponsor and if not inconsistent with the provisions of this
section, such board of trustees of the community college at which he is
employed shall certify such settlement, and submit such settlement and
certification to the local sponsor. The local sponsor shall review such
proposed settlement as to form and amount, and shall give its approval
if, in its judgment the settlement is in the best interest of the local
sponsor and the community college. Nothing in this subdivision shall be
construed to authorize the local sponsor to indemnify or save harmless
an employee with respect to a settlement not so reviewed and approved.
(c) Nothing in this subdivision shall authorize the local sponsor to
indemnify and save harmless an employee with respect to punitive or
exemplary damages, fines or penalties, or money recovered from an em-
ployee pursuant to article seven-a of the state finance law.
(d) Upon entry of a final judgment against the employee, or upon the
settlement of the claim, the employee 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
board of trustees of the community college at 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 board. If the
local sponsor consents in such certification, the judgment or settlement
shall be paid upon the audit and warrant of the chief fiscal officer of
the local sponsor.
4. The duty to defend or indemnify and save harmless prescribed by
this section shall be conditioned upon (i) delivery to the local sponsor
at its main business office 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 cooper-
ation of the employee in the defense of such action or proceeding and in
defense of any action or proceeding against the community college or
local sponsor based upon the same act or omission, and in the prosecu-
tion of any appeal. Such delivery shall be deemed a request by the em-
ployee that the local sponsor 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. The provisions of this section shall not in any way affect the
obligation of any claimant to give notice to the local sponsor under any
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 sponsor or
any other level of government, or any right to defense and/or indemnifi-
cation provided for any governmental officer or employee by, in accord-
ance 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 un-
constitutionality 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. This act shall take effect on the sixtieth day after it shall have become a law but shall not be construed to alter, change, affect, impair, or defeat any rights, obligations or interests heretofore accrued, incurred or conferred prior to the effective date of this act.