



CITY OF CAMBRIDGE

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January 19, 1979

To The Honorable City Council
City Hall
Cambridge, Massachusetts

Dear Councillors:

You have requested my opinion relative to any liability coverage that is afforded to the City Council and School Committee Members in the event a judgment in a lawsuit is rendered against them as a result of any action or vote cast in their official capacities.

Chapter 512 of the Acts of 1978 was passed by the Legislature in July of that year, retroactive to August 16, 1977 and was entitled "An Act establishing a claims and indemnity procedure for the Commonwealth, its municipalities, counties and districts and the officers and employees thereof." This Act abolished governmental (sovereign) immunity in Massachusetts, making the Commonwealth, its counties, municipalities and districts liable for property damage, death or personal injury caused by the negligent or wrongful conduct of public employees who are acting within the scope of their employment. It also provides personal immunity to public employees, in many instances.

Chapter 512 is fairly lengthy, extremely broad and, due to its newness, has not been interpreted by the Appellate Courts of the Commonwealth. Therefore, the Act is open to various interpretations and all of its various sections will not be clarified and understood until either the Act is amended or numerous appellate cases have been decided.

With the above in mind, I will attempt to answer your inquiry.

Chapter 512 of the Acts of 1978 was enacted into the Massachusetts statutory scheme as Massachusetts General Laws, Chapter 258. All further section references are keyed to Chapter 258 rather than the Act (Chapter 512). Section 2 of Chapter 258 provides that the members of the City Council and School Committee are considered public employees and are not liable for

for their negligent or wrongful acts or omissions, but the public employer is liable up to the amount of one hundred thousand (\$100,000.00) dollars.

The members of the Council and Committee are liable for intentional torts and for acts and omissions which constitute a violation of the civil rights of any person. However, Section 9 provides that the City may indemnify Council and Committee members in an amount not to exceed one million dollars provided he or she was acting within the scope of his or her official duties or employment. However, no such employee or official shall be indemnified for violations of any civil rights if he or she acted in a grossly negligent, willful or malicious manner.

Chapter 512 also repealed General Laws, Chapter 41, Sections 100I and J which were the mandatory one million dollar indemnification provisions relating to municipal employees and officials which had been accepted by the City Council. Therefore, at the present time, the City may indemnify members of the Council and Committee as described in the above paragraphs.

In addition to this indemnification procedure, Chapter 258, Section 10 provides exceptions to the liability of the municipality under certain circumstances. It is not clear whether the employee is immune from liability. However, for the purposes of this opinion, Section 10, paragraph 2 provides immunity to the employer for discretionary acts of its employees. This immunity extends to acts done within the scope of the employee's office or employment, whether or not the discretion is abused. Obviously, the liability of the employer and employee turns upon the interpretation of "discretionary". As I indicated earlier, the Appellate Courts of the Commonwealth have not interpreted this new statute and therefore a definitive answer is impossible to formulate.

A review of recent Supreme Judicial Court decisions gives some indication of the thinking of the Court in this area.

In Whitney v. City of Worcester, 366 N.E. 2nd 1210 (1977) the Court, in a discussion of this problem stated the following:

We think that the appropriate dividing line (between liability and immunity) falls between those functions which rest on the exercise of judgment and discretion and represent planning and policymaking, and those functions which involve the implementation and execution of such governmental policy or planning....When the particular

conduct which caused the injury is one characterized by a high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning, governmental entities should be immune from liability. To inquire into such decisions in a tort suit might jeopardize the quality and efficiency of government itself, and endanger the creative exercise of political discretion and judgment through the inhibiting influence of potential legal liability asserted with the advantage of hindsight.... On the other hand, when the particular conduct claimed to be tortious involves rather the carrying out of previously established policy or plans, such acts should be governed by the established standards of tort liability applicable to private individuals or entities, and the government entity in question held liable for the injuries resulting from such acts.

Whether a particular act is "discretionary" or not turns on several different areas of inquiry. In Whitney the Court asked the following questions:

"Was the injury-producing conduct an integral part of governmental policy-making or planning? Might the imposition of tort liability jeopardize the quality and efficiency of the governmental process? Could a judge or jury review the conduct in question without usurping the power and responsibility of the legislative or executive branches? Is there an alternate remedy available to the injured individual other than an action for damages?
(Page 1219)

A closer examination of the Whitney case reveals that, factually, it involved a grade-school student who was totally blind in one eye as a result of disease and was then blinded in the other eye after having been struck by a door at a public school. The student alleged that the school committee negligently adopted a policy of integrating handicapped children into the public schools and the committee and superintendent did not provide any special supervision to the handicapped children.

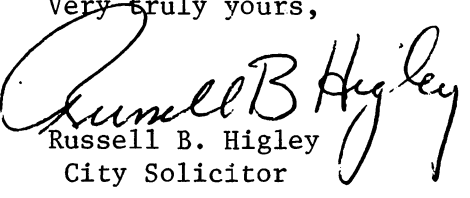
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On the day of the incident the student was directed to go to the schoolyard by his teacher without any further supervision, even though the parent had informed the teacher that the student had hemorrhaged from one of his eyes earlier in the day. The door that struck the student was alleged to have been defective for some time and finally, neither the teacher nor assistant principal obtained immediate medical attention for the student.

The Court held that the members of the school committee would be immune from liability. It held further that the superintendent would also be immune from liability. However, the actions of the teacher by directing the student to go to the schoolyard unassisted and the assistant principal by not obtaining immediate medical assistance were ministerial and not discretionary in nature and, therefore would expose them to liability.

Therefore, in light of all of the above, it is my opinion that the members of the City Council and the School Committee would be immune from liability for the consequences of their discretionary acts done in their official capacities and for votes cast within the scope of their official duties and employment. If it is determined that the conduct of a member was such as to constitute an intentional tort and judgment was entered against the member, the member may be indemnified up to one million dollars, provided there were no violations of an individual's civil rights which were deemed to be grossly negligent, willful or malicious. Finally, as you are aware, the City does not have any liability coverage, as such, pursuant to any insurance company contract or agreement.

Very truly yours,



Russell B. Higley
City Solicitor

RBH:jl

Calendar # 1

S-417B

RE: liability coverage of the City Council
and School Committee.

In City Council

July 16, 1979