UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT

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NICOLE WILLIAMS,

Petitioner,

-against-

BOARD OF EDUCATION OF THE POUGHKEEPSIE CITY SCHOOL DISTRICT,

Appeal No. 20813

Respondent.

From actions of the Board of Education violating Petitioner's statutory authority with respect to the Board's investigation of compliance with graduation requirements.

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RESPONDENT'S MEMORANDUM OF LAW
IN OPPOSITION TO A REQUEST FOR A STAY

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PRELIMINARY STATEMENT

One of the core responsibilities of a Board of Education is to ensure that its students graduate from high school "college and career ready." By definition, this means that high school diplomas must be bona fide, reflecting scholarly achievement in accordance with state mandates. Anything short of this fails students.

With respect to this appeal, during a public Board meeting on September 6, 2017, Dr. Elizabeth A. Ten Dyke ("Dr. Ten Dyke"), the District's Director of Data Analysis and Accountability, made a presentation to the Board regarding the District's graduation cohorts and graduation rates. Petitioner Dr. Nicole Williams attended the presentation. The presentation, and subsequent emails on which Dr. Williams was copied, raised concerns that several dozen students in the 2013 cohort were improperly awarded high school diplomas on the basis of their graduation appeals.

By law, it is the responsibility of the Superintendent of Schools to determine graduation appeals.[1] Despite being expressly made aware of the potential that fraudulent appeals may have been granted, Dr. Williams took no action to investigate the matter. It would have been simple enough for Dr. Williams to have requested the records of the students in question and consulted with anyone she deemed necessary to determine whether each particular student was properly granted an appeal.

Dr. Williams at no time, even as of the date of this memorandum of law, conducted such an inquiry. In fact, it has come to the Board's attention that back in June 2017, Dr. Ten Dyke offered to recheck the bona fides of the graduation diplomas, but Dr. Williams refused that offer. Dr. Williams' inaction to such a serious issue does not morph in a right to stay the Board's needed action.

[1] *See* 8 NYCRR 100.5[a][7][iv]; April 2017 SED Field Memo (Exhibit "A" hereto).

Fraudulently issued high school diplomas strike as the very heart of academic integrity. Given the gravity of the situation, the Board had not just a right but a legal duty to appoint special counsel to conduct an independent review. That review consisted of reviewing extensive student records and conducting numerous witness interviews. A preliminary report was issued on November 14, 2017. **Despite being keenly aware that there were concerns about the legitimacy of many high school diplomas, Dr. Williams took no action between September 6, 2017 and November 14, 2017, to conduct any inquiry whatsoever about the graduation issue.** During the investigation it became clear that Dr. Williams had failed to fulfill her legally mandated duty to determine graduation appeals.

Dr. Williams was provided with the preliminary report on November 15, 2017. She now contends that the investigation should be stayed because, in her view, it is her sole right to conduct workplace investigations in the District even when she may be one of the wrongdoers who is being investigated. Dr. Williams fails to cite a single case for this proposition.

Dr. Williams also claims that the investigation is retaliatory. This claim is demonstrably false. The issue was brought to the Board's attention by an administrator **well before** Dr. Williams filed her first appeal to the Commissioner. The special investigator reported his preliminary findings to the State Education Department. Had there been any improper motive, the Board would not have sought the involvement of SED.

We are very mindful that in Dr. Williams' prior appeal the Commissioner admonished both parties to mend fences. This appeal, however, is a missive that detracts from any healing. At bottom, the District's administration raised serious concerns about fraudulent diplomas issued after a defective internal appeal process. Independent counsel has determined that those

concerns are founded. SED has been informed. That process should be allowed to play out without being artificially blocked by a stay.

STATEMENT OF FACTS[2]

During a public Board meeting conducted on September 6, 2017, Dr. Ten Dyke made a presentation to the Board regarding the District's graduation cohorts and graduation rates. Dr. Ten Dyke's presentation generated a number of questions during the September 6, 2017 Board meeting. Dr. Watson, President of the Board of Education, addressed those questions to Dr. Ten Dyke in a follow-up e-mail to her dated September 12, 2017. Dr. Williams and the full Board were copied on the September 12, 2017 e-mail to Dr. Ten Dyke. Sometime shortly thereafter, Dr. Ten Dyke contacted Dr. Watson and informed her, that upon reviewing graduation data in response to the September 12, 2017 e-mail, she had detected a number of concerning irregularities with respect to the District's graduating Class of 2017, which caused her to believe that twenty-four (24) students were improperly graduated as part of the District's Class of 2017 because they did not satisfy one or more graduation requirements.

Dr. Watson promptly scheduled a conference call for September 14, 2017, between her, Dr. Ten Dyke and attorneys Howard M. Miller and John A. Miller, who are with the law firm that serves as the District's and Board's general counsel. During the September 14, 2017 conference call, Dr. Ten Dyke reiterated her concerns about the irregularities she had discovered, and she followed up by e-mail later that same day, in which she recommended an independent review of the students' transcripts to determine whether the students actually qualified for the Regents or local diplomas they received.

[2] The statement of facts is derived from the affidavits of Dr. Felicia Watson and Todd Aldinger and the exhibits annexed thereto.

During this same period of time, Dr. Ten Dyke copied Dr. Williams on her replies to the Board. These reply e-mails included information about potentially improper 504 meetings and accommodations, thereby alerting Dr. Williams to irregularities that had been identified. On September 26, 2017 at 7:09 a.m., Dr. Watson e-mailed the Board's Special Counsel, Attorney Todd J. Aldinger ("attorney Aldinger"), who previously had been appointed via resolution adopted by the Board on July 7, 2017, to request that Attorney Aldinger begin working with Dr. Ten Dyke to investigate the matter.

During the weeks that followed, Attorney Aldinger conducted an investigation into the suspected improprieties with respect to the District's graduating Class of 2017. Attorney Aldinger subsequently provided a "preliminary" report to the Board dated November 14, 2017, regarding the suspected graduation improprieties, wherein he indicated, based on his initial investigation, that an even greater number of students may have been improperly graduated as part of the District's Class of 2017, potentially as many as 43 or 44 students in total.

Dr. Williams was provided with a copy of the report on November 15, 2017. The Board directed Dr. Williams to respond to this preliminary report by November 21, 2017. Dr. Williams did not review the student records. Instead, Dr. Williams protested, stonewalled and repeatedly requested to conduct her own independent investigation. Instead of responding to Attorney's Aldinger's preliminary report, Dr. Williams further requested that the District's general counsel be made available to her, in effect to serve as her own personal legal advisor with respect to the serious and significant irregularities identified by Attorney Aldinger.

Dr. Williams finally met with Attorney Aldinger in late December, 2017. She was accompanied by her private attorney. During this meeting, Dr. Williams refused to answer

questions, and disclaimed any responsibility for the improper graduations. This appeal and stay application ensued.

POINT I

THE PETITION IS TIME-BARRED AND SHOULD BE DISMISSED PURSUANT TO 8 N.Y.C.R.R. § 276.9

Under Section 275.16 of the Regulations of the Commissioner, an appeal to the Commissioner must be brought within thirty (30) days from the acts of which the petitioner complains. In the present case, the acts about which Dr. Williams complains took place at the latest, November 15, 2017, when she received the preliminary report (Petition at ¶22). Because this appeal was not commenced until January 2, 2017, it is time-barred and should be dismissed in its entirety pursuant to 8 N.Y.C.R.R. § 276.9. *See, e.g., Appeal of Jodre*, Dec. No. 16, 162 (2010)(dismissing as untimely Petition challenging modification of administrator's duties where such modification occurred more than 30 days prior to the filing of the Petition).

Additionally, while the Commissioner may excuse an untimely appeal for good cause shown, "no cause for this delay has been asserted." *Appeal of Rosanne W.*, 39 Ed. Dept.Rep. 808 (2000). Section 275.16 states expressly that the reasons for such a failure to timely file an appeal "shall be set forth in the Petition." The Petition in this case fails to comply with this mandate and should be dismissed accordingly. *Id.*

POINT II

THE PETITION FAILS TO STATE A CLAIM

Assuming, *arguendo*, that the appeal is timely, it should still be dismissed because it is without merit. It is well-settled that, in an appeal to the Commissioner, "the petitioner has the burden of demonstrating a clear legal right to the relief requested and the burden of establishing the facts upon which she seeks relief." *Appeal of Dillon*, 43 Ed. Dep't. Rep. 333, 335; Dec. No.

15,010 (2004); 8 N.Y.C.R.R. § 275.10. As will be demonstrated below, Dr. Williams does not meet this exacting standard.

Dr. Williams claims that the investigation conducted by special counsel violates Section 2508 of the Education Law and Board Policy 3120, which she contends give her sole authority over investigations into misconduct. Nowhere in the Education Law or policy is the Board divested of authority to appoint counsel to conduct an investigation. To the contrary, the Board's authority to hire counsel is provided by the Board's statutory powers and duties.

Board's Authority to Hire Counsel

Section 2503(3)[3] of the Education Law provides that the board of education :

> Shall have in all respects the superintendence, management and control of the educational affairs of the district, and, therefore, shall have all the powers reasonably necessary to exercise powers granted expressly or by implication and to discharge duties imposed expressly or by implication by this chapter or other statutes.

It is axiomatic that such power includes the power to hire outside counsel. *See Fleischmann v. Graves*, 235 N.Y. 84 (1923); 1 Ed. Dept. Rep. 736 (1951). Here, the need for special counsel cannot be gainsaid. If in fact students graduated from Poughkeepsie High School without having met the state mandates for diplomas, the legal issues would be myriad. For example, 3020-a charges or other disciplinary action may need to be brought as a consequence of fraudulent diplomas.

In its most basic sense, we trust that the Commissioner would agree that a Board of Education is within its rights and has the responsibility to conduct an independent investigation when the specter of academic fraud is raised. Most import for purposes of a stay, Dr. Williams has failed to provide the Commissioner with legal authority holding that a superintendent of

[3] *See also*, NY Education Law §1709(33) which contains virtually identical language.

schools can unilaterally divest a board of education of its power to appoint legal counsel to conduct an investigation. Were the rule otherwise, a superintendent could always immunize himself or herself from charges of misconduct by appointing himself or herself as the sole investigator of same. The law has never permitted such a result, and this case should not be the first to so hold, especially in the context of a stay.

Dr. Williams Chose Not to Investigate

Dr. William's main thesis -- that she has been denied the right to investigate -- is simply not true. Dr. Williams had ample opportunity to conduct an investigation. As Superintendent of Schools, who is legally mandated to determine graduation appeals, she had every opportunity to review the student records in question and to determine whether the graduations in question were bona fide.

As discussed above, Dr. Williams was asked by Dr. Ten Dyke back in June 2017 about reviewing the graduations. Dr. Williams demonstrated no interest in doing so. After the September 6, 2017 Board meeting and subsequent emails in September, Dr. Williams still had no interest in and took no action to investigate the matter. Dr. Williams had more than two months between the September 6, 2017 board meeting and her November 15, 2017 receipt of the preliminary report to obtain the specific students' records and review them. These documents are readily available to her as the Superintendent. She made no effort to do so. Indeed, even though Dr. Williams is required by law to determine graduation appeals (8 NYCRR 100.5[a][7][iv]), she has made no effort to confirm that the diplomas in question based upon appeals under her jurisdiction had been properly conferred. This is true even at this late date.

Dr. Williams only expressed interest in conducting an "investigation" after the preliminary report indicated that she had abdicated her responsibility to determine graduation

appeals. At that point, once Dr. William's own conduct became an issue, she wanted to control the matter and wrest it away from independent counsel. But, once it became clear that Dr. Williams may have been culpable in students improperly being awarded diplomas, it was no longer appropriate to let Dr. Williams control the investigation. She was, nonetheless, given ample time to review the student records and refute any allegations of impropriety regarding those records, a task she inexplicably and steadfastly refuses to undertake.[4]

Finally, the pot-shots Dr. Williams makes about Mr. Aldinger's credentials and competence are unbecoming and irrelevant. As John Adams famously observed:

> Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passion, they cannot alter the state of facts and evidence.[5]

Here, Dr. Williams does not dispute that she failed to comply with 8 NYCRR 100.5[a][7][iv]. Derailing the Board's investigation will not alter that fact. Nor will any "investigation" on her part. She has had at all times and still continues to have the right to review the specific student records that are at issue in this case and report her findings to the Board and to the State. Since it is Dr. Williams who has the responsibility to determine graduation appeals, she cannot be heard to complain that she lacks the wherewithal to conduct such a review. There is simply no basis to issue a stay in this matter.

Assistance of Counsel

Dr. Williams claims that after the November 14, 2017 preliminary report she had the right to access to the District's legal counsel to refute the findings therein. She is mistaken. Dr. Williams has been responsible for graduation appeals for her entire tenure as Superintendent in

[4] The records in question are annexed to the accompanying Affidavit of Todd Aldinger. Dr. Williams is welcome to review those records and determine whether graduation appeals were properly granted - - **which was her responsibility in the first instance**.

[5] John Adams, *Argument in Defense of the Soldiers in the Boston Massacre Trials*, December 1770.

the District. At any time, she could have asked for any legal advice she needed regarding graduation requirements. Indeed, if Dr. Williams had questions about graduation requirements at the end of this past school year, it was incumbent on her as Superintendent to avail herself of the advice of the District's legal counsel at that time, so as to address any such questions **before** graduating the students to whom her questions pertained. Evidently she did not do so, or she would not be seeking answers to such questions for the first time in the midst of the Board's graduation investigation.

Even in September 2017, when questions were raised about the June 2017 graduates, Dr. Williams did not seek legal advice from the District's counsel regarding the specific concerns that had been raised. Instead, Dr. Williams only expressed an interest in legal advice after she became aware that the Board had been informed that she neglected her obligations to determine graduation appeals. At that point, however, her interests became adverse to those of the District.

The Public Officers Law and the New York State Education Law authorize defense and indemnification for actions brought by third-parties against school officials. The law, however, does not permit defense and indemnification when there is a proceeding by the school board against a school officer. *See*, *generally*, *Leo v. Barnett*, 48 A.D.2d 463, 369 N.Y.S.2d 789 (2d Dep't 1975)(absent specific legislative authority, public officer could not be reimbursed for attorney's fees incurred in successfully suing to be reinstated), *aff'd* 41 N.Y.2d 879 (1975); 1989 N.Y. St. Comp. 74 (1987)(no duty to provide defense to employee when a proceeding is brought "by or at the behest of the public entity employing such employee.").

Put simply, Dr. Williams is not entitled to have the District pay its own counsel or Dr. Williams' counsel to represent her in connection with Attorney Aldinger's investigation which involves her breach of legal obligations. *See* 1983 N.Y. St. Comp. 241 (1983)("there is no

statutory authority allowing a Town officer to be reimbursed for expenses incurred in hiring private legal counsel to challenge a proceeding instituted at the behest of a town board to investigate an allegation of misconduct made against such officer, and therefore, no such reimbursement may be made.")

POINT III

NO THREATENED IRREPARABLE HARM EXISTS THAT WOULD WARRANT THE EXTRAORDINARY ISSUANCE OF A STAY

At present, Dr. Williams has not cited, nor are we aware of, any legal precedent that supports enjoining the board of education of a public school district from using independent special counsel to conduct an investigation into potential academic misconduct.

Courts that have had the occasion to rule on applications to enjoin investigations, routinely rejected them. *See Avco Fin. Corp. v. CFTC*, 929 F. Supp. 714 (S.D.N.Y. 1996)(declining to enjoin investigation). In this case, any further investigation will not irreparably harm Dr. Williams.

Indeed, to the extent that Dr. Williams is fearful that the investigation will result in disciplinary charges against her, she has extensive due process protections in her employment contract. The outgoing Board gave Dr. Williams a last minute five-year contract extension which requires any charges against Dr. Williams to be heard by an arbitrator favorable to employees and provides for Dr. Williams to be reimbursed for her attorney's fees should she prevail in a disciplinary proceeding. Consequently, any alleged harm to Dr. Williams is at best speculative. In sharp contrast, the harm to the District if a stay is granted is concrete. The Board has a responsibility to thoroughly review all of the investigative findings, and in conjunction with SED, to take proper remedial measures. Disciplinary action may also be warranted due to the issuance of fraudulent diplomas. To the extent that further fact-finding is required, the

District will be irreparably harmed if it is enjoined from seeking the truth. Dr. Williams has failed to present one iota of evidence that a single statement in the preliminary reports is not accurate. A stay should not be granted.

CONCLUSION

For the foregoing reasons, the application for a stay should be denied and the Petition should be dismissed.

Dated: Garden City, New York
January 10, 2017

Respectfully submitted,

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