



JIM RYAN

ATTORNEY GENERAL
STATE OF ILLINOIS



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FILE NO. 96 -015

SCHOOLS AND SCHOOL DISTRICTS:
Indemnification of Officers and
Employees of Financial Oversight Panels

Mr. Joseph A. Spagnolo
State Superintendent of Education
Illinois State Board of Education
100 North First Street
Springfield, Illinois 62777-0001

Dear Mr. Spagnolo:

I have your letter wherein you inquire whether members and employees of a financial oversight panel appointed pursuant to article 1B of the School Code (105 ILCS 5/1B-1 et seq. (West 1994)) are entitled to be represented and indemnified under the provisions of the State Employee Indemnification Act (5 ILCS 350/0.01 et seq. (West 1994)). For the reasons hereinafter stated, it is my opinion that members, officers and employees of financial oversight panels are to be considered State employees, for purposes of that Act, who are therefore entitled to be defended and indemnified in accordance with its terms.

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Section 1 of the State Employee Indemnification Act (5 ILCS 350/1 (West 1994)) defines the terms "State" and "employee", in relevant part, as follows:

"Definitions. For the purpose of this Act:

(a) The term 'State' means the State of Illinois, the General Assembly, the court, or any State office, department, division, bureau, board, commission, or committee, the governing boards of the public institutions of higher education created by the State, the Illinois National Guard, the Comprehensive Health Insurance Board, any poison control center designated under the Poison Control System Act that receives State funding, or any other agency or instrumentality of the State. It does not mean any local public entity as that term is defined in Section 1-206 of the Local Governmental and Governmental Employees Tort Immunity Act or a pension fund.

(b) The term 'employee' means any present or former elected or appointed officer, trustee or employee of the State or of a pension fund * * * individuals who serve on any public entity (whether created by law or administrative action) described in paragraph (a) of this Section * * *."

The key issue is whether a financial oversight panel is a "State office, department, division, bureau, board, commission, committee * * * or any other agency or instrumentality of the State" within this definition, or, in the alternative, a local public entity as defined in section 1-206 of the Local Governmental and Governmental Employees Tort Immunity Act (745 ILCS 10/1-206 (West 1994)). Financial oversight panels are not among the

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entities specifically identified as local public entities in section 1-206. Further, although they do not appear to be departments, divisions, bureaus, boards or commissions of the State, they may nevertheless be other agencies or instrumentalities of the State.

Although there is no absolute formula for determining whether an entity is a State agency or instrumentality, many reported cases have discussed the question of whether a particular entity is an agency of the State or Federal government for various purposes. In making this determination, the courts have generally examined the statute creating the entity for indicia of intent, including: the extent to which the entity is free from direct governmental control; its existence as a corporate entity; its funding; the status of the entity's employees; its ownership; the manner of selection of its officers; the governmental nature of the function it performs; and the manner in which the entity is treated in other statutes. (See, e.g., Guse v. Board of Trustees of Public School Teachers' Pension and Retirement Fund (1990), 203 Ill. App. 3d 111, 115-119 (teachers' pension fund board is not a State agency for purposes of the Illinois Administrative Procedure Act).) A similar analysis may be employed in determining whether a financial oversight panel is a State agency.

A financial oversight panel is established as a body corporate and politic upon approval of the State Board of Educa-

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tion of a petition by a local board of education or the State Superintendent showing a financial emergency with respect to the local school district. (105 ILCS 5/1B-4 (West 1994).) A panel is made up of three members who are appointed by the State Superintendent and serve at his pleasure. (105 ILCS 5/1B-5 (West 1994).) A panel reports to the State Superintendent and the State Board and is directed to cooperate with the State Superintendent in the exercise of its powers. From three to ten years after its establishment, it may be dissolved by the State Board upon petition of the local board. (105 ILCS 5/1B-5 (West 1994).)

The purpose of a financial oversight panel is to exercise financial control over a local school board so that the local board can provide public education while meeting its obligations to creditors and holders of notes and bonds. In order to carry out its purpose, the panel has the power, among others, to approve the appointment of the local district's chief financial officer, to approve the issuance or sale of debt instruments, to approve tax levies, budgets, contracts and other obligations, to administer any emergency financial assistance approved by the State Board, and, if circumstances require, to recommend dissolution or reorganization of the district. (105 ILCS 5/1B-6 (West 1994).) In addition, the financial administrator appointed by the panel has the power to guide the local board in developing its financial plan and budget, and to direct it to

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reorganize its accounting and budgetary systems, under direction of the panel. (105 ILCS 5/1B-7 (West 1994).)

A panel is funded either from emergency financial assistance approved for the local district, or, if none is approved, from deductions from the district's general State aid. (105 ILCS 5/1B-8 (West 1994).) The full amount of any approved emergency financial assistance must be repaid to the State by the local district. (105 ILCS 5/1B-8 (West 1994).) Thus, in either case, the initial source of funding is the State but the local district effectively pays the expenses of the panel, either by a reduction in State aid or by repayment of financial assistance.

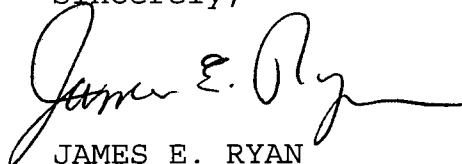
Financial oversight panels, while enjoying a separate corporate existence, are clearly subject to considerable control by the State Board and the State Superintendent who establish the panels, appoint or remove their members, approve the source of funding, and work with the panels in the exercise of statutory powers, in addition to receiving annual reports. While funding for panels ultimately is to be repaid by local districts, its initial source is from the State and from funds controlled by the State Board. The nature of the panels' functions is clearly governmental, and is closely related to the duties of the State Board and the State Superintendent. The local school board has no control over panel decisions or functions; rather, the panels are the means by which the State enforces and oversees certain

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no control over panel decisions or functions; rather, the panels are the means by which the State enforces and oversees certain State requirements with respect to the local boards. For these reasons, it is my opinion that financial oversight panels are State agencies or instrumentalities, for purposes of the State Employee Indemnification Act.

You have noted that section 1B-18 of the School Code (105 ILCS 5/1B-18 (West 1994)) specifically permits financial oversight panels to indemnify their members, officers, employees or agents who become parties to litigation. The penultimate paragraph of the section, however, provides that the provisions thereof do not limit any right which protected parties may have to other indemnification. Therefore, the existence of section 1B-18 does not limit any right to defense or indemnity which exists under the State Employee Indemnification Act. I would note, however, that if a panel elects to provide for indemnification under section 1B-18 of the School Code, by commercial insurance or otherwise, coverage pursuant to the State Employee Indemnification Act will be afforded only to the extent that liability exceeds the limits of the coverage otherwise provided.

Sincerely,

A handwritten signature in cursive script, appearing to read "James E. Ryan".

JAMES E. RYAN
ATTORNEY GENERAL