

**Matter of Erikson v Schenectady City Sch. Dist.**

2023 NY Slip Op 33006(U)

August 28, 2023

Supreme Court, Schenectady County

Docket Number: Index No. 2022-0828

Judge: Michael R. Cuevas

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## I. INTRODUCTION

By an Order to Show Cause, returnable June 10, 2023, Petitioner Justine Erikson (“Erikson”) seeks an Immediate Stay of Enforcement of the Schenectady City School District Board of Education’s (the “Board’s”) resolution that terminated her appointment and employment.<sup>1</sup> 22 NYCRR 202.7 (f). The Order to Show Cause provided that until the hearing and determination of the Order to Show Cause, the termination of employment was to be enjoined and restrained. The underlying Verified Petition and Complaint seeks a declaratory judgment under *CPLR Section 3001*, and a writ of *certiorari* and *mandamus* to review the Board’s decision to terminate Erikson’s appointment and employment as a tenured teacher with the Schenectady City School District (the “District”) Under *CPLR Article 78*. In support of her claims, Petitioner asserts tenure by estoppel; that the denial of tenure was contrary to law; that the denial of tenure was arbitrary and capricious, and the denial was made in retaliation for her exercise of her First Amendment rights. The District and the Board oppose the Petition and the temporary restraining order and preliminary injunction. This Court finds that because Erikson has demonstrated a likelihood of success on the merits on the basis of tenure by estoppel, the risk of irreparable harm, and that the balancing of the equities leans in her favor, there is no need to evaluate her other bases for her claim for purposes of determining the preliminary injunction. Accordingly, Erikson has established entitlement to a stay of the enforcement of the determination to terminate her employment effective on June 24, 2022 pending hearing and decision on her Petition.

## II. STATEMENT OF FACTS

### A. AFFIDAVIT OF JUSTICE ERIKSON

Erikson is a certified Elementary Education School teacher who has taught in New York State for 23 years.<sup>2</sup> She began her career as an elementary education teacher in the

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<sup>1</sup> The Order to Show Cause was accompanied by a memorandum of law and a motion for leave to exceed page limitation. The Motion was not brought prior to the filing of the Order to Show Cause. It asks for permission to submit the memorandum that exceeds the 7,000 word limit because it is in support of the Verified Petition and Complaint and the application for injunctive relief with restraining order. It does not contain a factual affidavit. Despite the procedural questions, this Court will accept and grant the motion and consider the entirety of the arguments and law presented.

<sup>2</sup> *Erickson Aff.* ¶1.

Lansingburgh Central School District (“Lansingburgh”) in Troy, New York.<sup>3</sup> She was employed with them from 1998 to 2004.<sup>4</sup> She was granted tenure in Lansingburgh effective August 31, 2001, in the area of elementary education.<sup>5</sup> Erikson resigned from Lansingburgh to take a second grade position with the Saratoga Springs City School District (“Saratoga”).<sup>6</sup> She began working for Saratoga in 2004-2005 school year.<sup>7</sup> On September 1, 2006, two-years after her probationary period was over she was granted tenure.<sup>8</sup> She remained employed with Saratoga until 2009, when she resigned due to pregnancy complications.<sup>9</sup> Barbara Messier was her hiring Principal and Janice White was the Superintendent of the Saratoga Springs City School District while she was there.<sup>10</sup> Erikson did not receive an annual professional performance review (“APPR”) as such review did not exist at the time.<sup>11</sup>

In 2014, Erikson worked at St. Kateri Tekakwitha Parish School where she was employed until 2016.<sup>12</sup> She resigned from St. Kateri to accept a position as a Building Substitute Teacher at Paige Elementary School, which is part of the District.<sup>13</sup> She began at Paige on November 16, 2016, as the only Building Substitute Teacher.<sup>14</sup> Erikson’s appointment was for a term from December 5, 2016 to June 23, 2017.<sup>15</sup> A Building Substitute Teacher is entitled to the same benefits as a regular substitute teacher.<sup>16</sup> During her period of employment she reported every day, for a full-day (7:45 a.m.-2:45 p.m.).<sup>17</sup> She worked in many different classrooms and prepared lesson plans to teach those classes.<sup>18</sup> She was relied on.<sup>19</sup> When

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<sup>3</sup> *Erickson Aff.* ¶2.

<sup>4</sup> *Erickson Aff.* ¶2.

<sup>5</sup> *Erickson Aff.* ¶2.

<sup>6</sup> *Erickson Aff.* ¶2.

<sup>7</sup> *Erickson Aff.* ¶3.

<sup>8</sup> *Erickson Aff.* ¶4.

<sup>9</sup> *Erickson Aff.* ¶4.

<sup>10</sup> *Erickson Aff.* ¶3.

<sup>11</sup> *Erickson Aff.* ¶4.

<sup>12</sup> *Erickson Aff.* ¶5.

<sup>13</sup> *Erickson Aff.* ¶5.

<sup>14</sup> *Erickson Aff.* ¶6.

<sup>15</sup> *Erickson Aff.* ¶6.

<sup>16</sup> *Erickson Aff.* ¶8.

<sup>17</sup> *Erickson Aff.* ¶9.

<sup>18</sup> *Erickson Aff.* ¶9.

<sup>19</sup> *Erickson Aff.* ¶9.



she was not solely teaching a classroom, she worked to aid Alicia LeGere in her classroom, helping with students that needed one-on-one instruction.<sup>20</sup> The instruction was seamless.<sup>21</sup> Schenectady uses a general education co-teach model, and this classroom was taught similarly.<sup>22</sup> Only certified teachers can co-teach a class.<sup>23</sup> When co-teaching with LeGere, she also created and wrote lessons.<sup>24</sup>

Upon the end of her time as a Building Substitute teacher, Erickson was appointed as a probationary elementary school teacher at Pleasant Valley Elementary School ("Pleasant") on September 20, 2017, effective September 1, 2017, which is a part of the District.<sup>25</sup> Erickson asserts that she has now learned that her probationary period was supposed to be three years, and her time as a Building Substitute Teacher should have been considered.<sup>26</sup> This should have made her probationary period end date as December 5, 2019.<sup>27</sup> As she did not know that her probationary period should have ended, she continued to work as a second-grade probationary teacher at Pleasant.<sup>28</sup> During the 2017-2018 and 2018-2019 school years, her principal was Sean Inglee, and her APPR score was "Effective" and "Highly Effective."<sup>29</sup> Inglee suffered an injury and left the school during the 2018-2019 school year.<sup>30</sup> Tiffany Giardano, stepped in as acting principal.<sup>31</sup> Schenectady then began a search for candidates to take over the principal position vacated by Inglee.<sup>32</sup> Erickson was asked, and agreed to be on the Interview Committee.<sup>33</sup> The committee consisted of Tiffany Girandano, George Jenkins, Celia Adone, Mesiti and Michelle Mosteller.<sup>34</sup> Christina Howard was one of the candidates

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<sup>20</sup> Erickson Aff. ¶10.

<sup>21</sup> Erickson Aff. ¶10.

<sup>22</sup> Erickson Aff. ¶11.

<sup>23</sup> Erickson Aff. ¶11.

<sup>24</sup> Erickson Aff. ¶12.

<sup>25</sup> Erickson Aff. ¶14.

<sup>26</sup> Erickson Aff. ¶14.

<sup>27</sup> Erickson Aff. ¶14.

<sup>28</sup> Erickson Aff. ¶15.

<sup>29</sup> Erickson Aff. ¶16.

<sup>30</sup> Erickson Aff. ¶17.

<sup>31</sup> Erickson Aff. ¶18.

<sup>32</sup> Erickson Aff. ¶19.

<sup>33</sup> Erickson Aff. ¶19.

<sup>34</sup> Erickson Aff. ¶19.

interviewed.<sup>35</sup> The interview committee members were asked to provide commentary in writing.<sup>36</sup> They interviewed 2 to 3 candidates. Erikson, among other committee members, did not feel that Howard was the best candidate for the principal position.<sup>37</sup> Erikson wrote, “as a district administrator she did not speak to the district’s high leverage practices.”<sup>38</sup> This refers to teacher strategies while planning and teaching.<sup>39</sup> In spite of the committee’s concerns, Howard was hired as the Pleasant principal by the Board effective October 7, 2019 through October 6, 2023.<sup>40</sup> Covid-19 shut down school in March 2020.<sup>41</sup>

In February 2020, Erikson wrote an email to Howard asking about her tenure appointment:

Is this my tenure year or is it next year? This is my 3<sup>rd</sup> full year in the district. I have been tenured in both the Lansingburg and Saratoga Springs school districts. If this is my tenure year when is my portfolio due?

Thanks, Justine.<sup>42</sup>

Howard responded that Erikson’s probationary period would end on September 1, 2021. Howard detailed that NYS law provides for a 4 year probationary period, even with previous tenure.<sup>43</sup> However, in March, 2020, prior to the Covid-19 shut down, Erikson received a letter from Christiana Mahoney, the District Director of Human Resources, stating that she was eligible for an abbreviated probationary period due to her prior tenure in other schools.<sup>44</sup> The letter requested that she complete a Tenure Verification Form and return it to the District Office.<sup>45</sup> Erikson completed the form on March 17, 2020, which included a confirmation letter from Saratoga, that she was tenured on September 1, 2006.<sup>46</sup>

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<sup>35</sup> *Erickson Aff.* ¶20.

<sup>36</sup> *Erickson Aff.* ¶20.

<sup>37</sup> *Erickson Aff.* ¶20.

<sup>38</sup> *Erickson Aff.* ¶20.

<sup>39</sup> *Erickson Aff.* ¶20.

<sup>40</sup> *Erickson Aff.* ¶21.

<sup>41</sup> *Erickson Aff.* ¶22.

<sup>42</sup> *Erickson Aff.* ¶22.

<sup>43</sup> *Erickson Aff.* ¶22.

<sup>44</sup> *Erickson Aff.* ¶24.

<sup>45</sup> *Erickson Aff.* ¶24.

<sup>46</sup> *Erickson Aff.* ¶25.

At the conclusion of the 2019-2020 school year Erikson received an APPR score of Effective.<sup>47</sup> During the 2020-2021 school year, the District went through a significant series of layoffs.<sup>48</sup> Acting Superintendent, Dr. Aaron Bochniak, included both remote and hybrid classes.<sup>49</sup> Erikson volunteered to teach hybrid classes.<sup>50</sup> After winter 2021, Howard began to criticize her work.<sup>51</sup> In early March 2021, Howard told Erikson that she was not recommending her for tenure.<sup>52</sup> She was asked to sign a *Juul* agreement extending her probationary appointment to August 31, 2022.<sup>53</sup> As she did not know that she should have already been appointed tenure, Erikson signed the *Juul* agreement for fear of being terminated.<sup>54</sup> In April 2021, Howard placed her on a Teacher Improvement Plan (“TIP), which is generally only done for a teacher that has received a rating of “developing or ineffective through an annual professional performance review.”<sup>55</sup> 8 NYCRR 30-2.11.<sup>56</sup>

Erikson became concerned about Howard’s treatment of her.<sup>57</sup> She was suspicious when during the first TIP meeting Howard gave her a pile of materials to review that included the district’s “High Leverage Practices” Handbook.<sup>58</sup> Howard explained that she wanted Erikson to include these practices in her classroom, which was not possible due to Covid 19 protocol.<sup>59</sup> Erikson asked Howard to review her tenure binder for comments, but Howard appeared upset that the binder was prepared, and Erikson felt that her reaction meant that Howard never intended to recommend her for tenure.<sup>60</sup>

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<sup>47</sup> *Erickson Aff.* ¶26.

<sup>48</sup> *Erickson Aff.* ¶28.

<sup>49</sup> *Erickson Aff.* ¶28.

<sup>50</sup> *Erickson Aff.* ¶28.

<sup>51</sup> *Erickson Aff.* ¶29.

<sup>52</sup> *Erickson Aff.* ¶30.

<sup>53</sup> *Erickson Aff.* ¶30.

<sup>54</sup> *Erickson Aff.* ¶30.

<sup>55</sup> *Erickson Aff.* ¶31.

<sup>56</sup> *Erickson Aff.* ¶32. *Erikson contends that according to the regulations she also should not have been placed on a TIP until October 1, 2021.*

<sup>57</sup> *Erickson Aff.* ¶33.

<sup>58</sup> *Erickson Aff.* ¶33.

<sup>59</sup> *Erickson Aff.* ¶34.

<sup>60</sup> *Erickson Aff.* ¶35.



In May 2021, Erikson asked for Bochniak to assist her, despite being told by colleagues that when Howard found out, she would deny her tenure.<sup>61</sup> On June 4, 2021 and July 16, 2021, she met with Bochniak, and they also exchanged emails.<sup>62</sup> Bochniak was impressed with her work.<sup>63</sup> She asked about the possibility of a transfer to another school in the district as she felt she was not being evaluated fairly.<sup>64</sup> Unfortunately, Bochniak left to become the Assistant Superintendent of the Hamilton-Fulton-Montgomery BOCES.<sup>65</sup>

Erikson continued to teach her second grade class at Pleasant during the 2021-2022 school year.<sup>66</sup> She continued to meet with Howard, and also Sarah Meixner (her union representative), as part of her TIP.<sup>67</sup> During one meeting, Howard stated that Bochniak had observed her not teaching her class, which Erikson asserts cannot possibly be true as he never entered the classroom during that time period to observe her.<sup>68</sup>

Howard observed Erikson three-times during the 2021-2022 school year.<sup>69</sup> In the first observation she was rated effective in 11 out of 14 categories.<sup>70</sup> Howard also conducted the second and third observations, which Erikson claims violate *Education Law* as at least one observation must be performed by “an impartial independent trained evaluator.”<sup>71</sup> *Educ. L. §3012-d (4)(b)*. At the second observation, Howard rated her effective in 4 out of 4 categories.<sup>72</sup> In her last observation, Howard rated her as effective in all categories (including two highly effective ratings), and one category as developing.<sup>73</sup> Erikson contends that the average of the ratings should have resulted in an overall effective rating.<sup>74</sup>

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<sup>61</sup> *Erickson Aff.* ¶136.

<sup>62</sup> *Erickson Aff.* ¶136.

<sup>63</sup> *Erickson Aff.* ¶137.

<sup>64</sup> *Erickson Aff.* ¶137.

<sup>65</sup> *Erickson Aff.* ¶137.

<sup>66</sup> *Erickson Aff.* ¶138.

<sup>67</sup> *Erickson Aff.* ¶138.

<sup>68</sup> *Erickson Aff.* ¶138.

<sup>69</sup> *Erickson Aff.* ¶139.

<sup>70</sup> *Erickson Aff.* ¶139.

<sup>71</sup> *Erickson Aff.* ¶139.

<sup>72</sup> *Erickson Aff.* ¶139.

<sup>73</sup> *Erickson Aff.* ¶139.

<sup>74</sup> *Erickson Aff.* ¶139.



On April 1, 2022, Howard pulled Erikson in for a meeting with her, Joe DiCaprio (head of elementary principals), Lyn Rutnick (new assistant superintendent), and Juliet Benaquisto (union president).<sup>75</sup> The second grade aid, Ms. Ramnauth told Erikson that Howard had asked her to cover her classroom during the meeting, but that Ramnath was asked not to tell Erikson about the meeting.<sup>76</sup> When she learned of the meeting, Erikson contacted Benaquisto and Meixner and was told that she was not being recommended for tenure.<sup>77</sup> The meeting was scheduled for April 5, 2022.<sup>78</sup> At that meeting, Howard asked Erikson to resign, which she refused.<sup>79</sup> Howard stated that she was being denied tenure because she did not hit all of the marks on the TIP.<sup>80</sup> Both Erikson and Meixer expressed shock, as no issues had been raised in the prior TIP meetings.<sup>81</sup> Howard had a letter prepared that was signed by Superintendent Anibal Solar, Jr.<sup>82</sup>

Erikson retained Cooper Erving & Savage, LLP on April 8, 2022.<sup>83</sup> Attorney Carlo A.C. de Oliveira wrote to Soler and the Board that Erikson should be granted tenure and the *Juul* agreement rescinded, and that she should be separated from Howard as her actions appeared retaliatory.<sup>84</sup> Schenectady and the Board refused to award Erikson tenure and ignored her concerns regarding Howard.<sup>85</sup> During a Board meeting on May 4, 2022, Erikson's appointment and employment with Schenectady was terminated effective June 24, 2022.<sup>86</sup>

Erikson has learned from colleagues that Howard retaliated against her because of her unfavorable opinion of her as a member of the interview committee.<sup>87</sup> These colleagues also

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<sup>75</sup> *Erickson Aff.* ¶140.

<sup>76</sup> *Erickson Aff.* ¶140.

<sup>77</sup> *Erickson Aff.* ¶140.

<sup>78</sup> *Erickson Aff.* ¶140.

<sup>79</sup> *Erickson Aff.* ¶141.

<sup>80</sup> *Erickson Aff.* ¶141.

<sup>81</sup> *Erickson Aff.* ¶141.

<sup>82</sup> *Erickson Aff.* ¶141.

<sup>83</sup> *Erickson Aff.* ¶142.

<sup>84</sup> *Erickson Aff.* ¶142.

<sup>85</sup> *Erickson Aff.* ¶143.

<sup>86</sup> *Erickson Aff.* ¶145.

<sup>87</sup> *Erickson Aff.* ¶146.

fear retaliation.<sup>88</sup> An independent assessment of Schenectady's environment shows a history of retaliation against employees.<sup>89</sup>

### **B. AFFIDAVIT OF ALICIA LAGERE**

LaGere was employed with Schenectady for thirty-two years and is now retired.<sup>90</sup> During the 2016-2017 school year, LaGere had a large number of special needs second grade students that required a lot of support.<sup>91</sup> Erikson was assigned to assist in her classroom, when she wasn't in another classroom.<sup>92</sup> Erikson acted as a co-teacher.<sup>93</sup> Erikson exhibited extensive knowledge of the curriculum and strategies used by teachers to instruct.<sup>94</sup> Erikson prepared her own lesson plans that she shared with LaGere.<sup>95</sup> Erikson also worked directly with students that demonstrated disruptive behaviors.<sup>96</sup> This was a duty normally performed by a classroom teacher.<sup>97</sup> Erikson's knowledge of the curriculum standards allowed for a co-teach environment where LaGere could depend on her to work with students in an effective way.<sup>98</sup>

### **C. AFFIDAVIT OF JANICE WHITE, ED. D.**

Janice White was an education administrator for 37 ½ years before she retired.<sup>99</sup> She met Erikson when they were both with Lansingburgh.<sup>100</sup> White was Erikson's direct supervisor for one-school year.<sup>101</sup> As an elementary school teacher, Erikson met and exceeded professional requirements.<sup>102</sup> She was recommended and granted tenure at the end of her

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<sup>88</sup> *Erickson Aff.* ¶46.

<sup>89</sup> *Erickson Aff.* ¶47.

<sup>90</sup> *LaGere Aff.* ¶1.

<sup>91</sup> *LaGere Aff.* ¶2.

<sup>92</sup> *LaGere Aff.* ¶2.

<sup>93</sup> *LaGere Aff.* ¶4.

<sup>94</sup> *LaGere Aff.* ¶4.

<sup>95</sup> *LaGere Aff.* ¶4.

<sup>96</sup> *LaGere Aff.* ¶5.

<sup>97</sup> *LaGere Aff.* ¶5.

<sup>98</sup> *LaGere Aff.* ¶5.

<sup>99</sup> *White Aff.* ¶1.

<sup>100</sup> *White Aff.* ¶2.

<sup>101</sup> *White Aff.* ¶2.

<sup>102</sup> *White Aff.* ¶2.

probationary period.<sup>103</sup> In 2001, White was appointed as Deputy Superintendent of the Saratoga Springs City School District, and was responsible for recruitment.<sup>104</sup> On July 1, 2007, White was appointed to the position of Superintendent of Saratoga.<sup>105</sup> In 2004, Erikson applied for a teaching position with Saratoga.<sup>106</sup> White supported the Principal and Director of Elementary Education's recommendation of Erikson for a elementary teaching position.<sup>107</sup> During her tenure with Saratoga, Erikson excelled at her position and was awarded tenure at the end of her probationary period.<sup>108</sup> White did unofficial visits to Erikson's classrooms.<sup>109</sup> Erikson never received an unsatisfactory performance evaluation and was never disciplined under *Education Law Section 3020-a*.<sup>110</sup> Erikson received a proficient rating every year that White worked with her in Lansingburgh and Saratoga (except her last year that wasn't reviewed).<sup>111</sup> White recommended Erikson for employment with Schenectady.<sup>112</sup>

#### **D. AFFIDAVIT OF CHRISTINA HOWARD**

Howard explains that she has been employed by Schenectady since September 2015.<sup>113</sup> She currently possesses certificates issued by the State Education Department in the areas of English grades 7-12 and School District Administrator.<sup>114</sup> Howard's first position in Schenectady as Instructional Supervisor where she supervised delivery of instruction within the school.<sup>115</sup> She was tenured in this position effective September 1, 2019.<sup>116</sup> In May 2019 she was assigned to serve as Acting Principal of Pleasant for the remainder of the 2018 to 2019 school year, when Inglee went on leave.<sup>117</sup> In August or September 2019, she applied

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<sup>103</sup> White Aff. ¶2.

<sup>104</sup> White Aff. ¶3.

<sup>105</sup> White Aff. ¶3.

<sup>106</sup> White Aff. ¶4.

<sup>107</sup> White Aff. ¶4.

<sup>108</sup> White Aff. ¶5.

<sup>109</sup> White Aff. ¶6.

<sup>110</sup> White Aff. ¶6.

<sup>111</sup> White Aff. ¶7.

<sup>112</sup> White Aff. ¶8.

<sup>113</sup> Howard Aff. ¶1.

<sup>114</sup> Howard Aff. ¶1.

<sup>115</sup> Howard Aff. ¶2.

<sup>116</sup> Howard Aff. ¶2.

<sup>117</sup> Howard Aff. ¶3.



for the position of Principal of Pleasant Valley.<sup>118</sup> She had two interviews.<sup>119</sup> The first interview was in September 2019 before a committee made up of staff members and the District's Assistant to the Superintendent, Patricia Paser.<sup>120</sup> She recalls that Erikson was on the committee.<sup>121</sup> She denies any knowledge of anything that Erikson said about her candidacy for Principal.<sup>122</sup> Her second interview was before the Board in September or early October 2019.<sup>123</sup> At the Board meeting she was appointed to the probationary position of Principal effective October 7, 2019.<sup>124</sup> She began the position on October 16, 2019, and has served in that position since that date.<sup>125</sup> As part of her duties she supervised the performance of all teachers, including Erikson.<sup>126</sup> She has observed Erikson's performance on several occasions and has observed several deficiencies in her teaching.<sup>127</sup> Howard admits that Erikson received effective ratings for 2019-2020 and 2020-2021, although she notes that because these ratings occurred during Covid-19 they aren't accurate reflections of her performance.<sup>128</sup>

Howard's purported concern about Erikson's performance began in 2019-2020 when she observed that Erikson's students' performance lagged those in other classes.<sup>129</sup> This review signaled that she should assess Erikson's performance going forward.<sup>130</sup> During Covid-19 Erikson was assigned to a hybrid schedule, which meant she taught in person (morning) and remotely (afternoon).<sup>131</sup> Howard's concerns grew as she conducted walk-through evaluations and observed little or no meaningful instruction occurring.<sup>132</sup> Howard did not want to recommend Erikson for tenure in 2020-2021 and spoke with top administrators in the District

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<sup>118</sup> Howard Aff. ¶3.

<sup>119</sup> Howard Aff. ¶7.

<sup>120</sup> Howard Aff. ¶8.

<sup>121</sup> Howard Aff. ¶8.

<sup>122</sup> Howard Aff. ¶9.

<sup>123</sup> Howard Aff. ¶10.

<sup>124</sup> Howard Aff. ¶11.

<sup>125</sup> Howard Aff. ¶12.

<sup>126</sup> Howard Aff. ¶13.

<sup>127</sup> Howard Aff. ¶14.

<sup>128</sup> Howard Aff. ¶14.

<sup>129</sup> Howard Aff. ¶15.

<sup>130</sup> Howard Aff. ¶15.

<sup>131</sup> Howard Aff. ¶17.

<sup>132</sup> Howard Aff. ¶17.

and they recommended that Erikson be put on another year of probation, i.e. the *Juul* agreement.<sup>133</sup> The agreement was approved by the Board on April 14, 2021, and the probationary appointment extended through August 31, 2022.<sup>134</sup> The TIP plan was developed in April 2021.<sup>135</sup> Erikson's performance during the 2021-2022 school year did not improve to the level that Howard believed warranted a grant of tenure and Howard discussed these concerns with District level administrators.<sup>136</sup> Howard recommended that Erikson be denied tenure at the end of her probationary term and Soler then advised Erikson that he would not recommend her for an appointment of tenure.<sup>137</sup> Howard contends that the recommendation that Erikson not receive tenure was based solely upon her performance as a teacher.<sup>138</sup>

#### **E. AFFIDAVIT OF DEBORAH MACDERMENT**

Deborah MacDerment was employed at Schenectady in various capacities from 1994 until she retired in 2018.<sup>139</sup> From 2010 to 2018 she was the Principal at the District's Paige Elementary School.<sup>140</sup> She asserts that a Building Substitute is a certified teacher who reports to a designated school building each day and is assigned to whatever duties may be required on that particular day.<sup>141</sup> Building Substitutes are assigned to a variety of tasks, including serving as a substitute for any classroom teacher who may be absent, working with individual or small groups of students on teacher-assigned schoolwork or special projects, and generally being available to be assigned wherever a need arises.<sup>142</sup> In addition to Building Substitutes the District hires "long-term" or "regular" substitute teachers to fill in for specific classroom teachers that are absent from their duties for extended periods of time due to illness or

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<sup>133</sup> *Howard Aff.* ¶18.

<sup>134</sup> *Howard Aff.* ¶19.

<sup>135</sup> *Howard Aff.* ¶21.

<sup>136</sup> *Howard Aff.* ¶21.

<sup>137</sup> *Howard Aff.* ¶21.

<sup>138</sup> *Howard Aff.* ¶22.

<sup>139</sup> *MacDerment Aff.* ¶1

<sup>140</sup> *MacDerment Aff.* ¶2.

<sup>141</sup> *MacDerment Aff.* ¶5.

<sup>142</sup> *MacDerment Aff.* ¶5.

approved leave of absence.<sup>143</sup> The long-term or regular substitute duties include lesson planning, grading, communicating with parents, and attending faculty meetings. She contends that the Building Substitutes do not share in these duties.<sup>144</sup>

MacDerment details that she supervised Erikson during her time as Building Substitute.<sup>145</sup> Erikson was assigned to be a substitute for various absent teachers for less than 50% of her time.<sup>146</sup> Erikson spent the majority of the rest of her time in LeGere's classroom, where she helped to work with three students from the class that have behavioral issues.<sup>147</sup> The sessions were devoted to reinforcing the academic content that had been taught by LaGere.<sup>148</sup> At no time did Erikson's service as a building substitute did she take over the classroom of another teacher for an extended period of time.<sup>149</sup> MacDerment asserts that Erikson also had no responsibilities for lesson planning for an entire class, assigning grades, and did not engage in communications with parents.<sup>150</sup> During the time that she was a building substitute she was not considered a "teacher of record" of any students under the regulations of the Commissioner of Education and was not subject to the "annual professional performance review" required by the Education Law of classroom teachers, including regular substitute teachers.<sup>151</sup>

### III. LAW AND DISCUSSION

#### A. STANDARD OF LAW

A decision made by an administrative body will be overturned if it is in violation of lawful procedure, was affected by an error of law or was arbitrary or capricious. *CPLR §7803 (3)*. A stay of an administrative decision may be issued under *CPLR Section 7805* where it is under review. *CPLR §7805; Matter of Town of East Hampton v. Jurling*, 181 A.D. 2d 781 (2d Dept.

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<sup>143</sup> *MacDerment Aff.* ¶7.

<sup>144</sup> *MacDerment Aff.* ¶8.

<sup>145</sup> *MacDerment Aff.* ¶9.

<sup>146</sup> *MacDerment Aff.* ¶10.

<sup>147</sup> *MacDerment Aff.* ¶10.

<sup>148</sup> *MacDerment Aff.* ¶10.

<sup>149</sup> *MacDerment Aff.* ¶11.

<sup>150</sup> *MacDerment Aff.* ¶11.

<sup>151</sup> *MacDerment Aff.* ¶12.



1992). A stay will be granted where the moving party demonstrates: likelihood of success on the merits; irreparable injury; and a balancing of the equities stemming from a grant or denial of the relief. *Harbor View Ass'n v. Sucher*, 237 A.D. 2d 488 (2d Dept. 1997); *Matter of Yung Bros. Real Estate Co. Inc. v. Limandri*, 26 Misc. 3d 1203 (A) (Sup. Ct. NY County 2009). The Court does not have to give equal weight to each of those factors and maintains broad discretion when determining whether to grant a stay. *Matter of Ricelli Enters, Inc. v. State of N.Y. Workers' Comp. Bd.*, 2012 N.Y. Misc. LEXIS 2241 \*84 (Sup. Ct., Onondaga County 2012), *aff'd* 117 A.D. 3d 1438 (4<sup>th</sup> Dept. 2014).

**B. INJUNCTIVE RELIEF MUST BE GRANTED AS THERE IS CLEAR AND CONVINCING EVIDENCE OF LIKELIHOOD OF SUCCESS ON THE MERITS.**

A preliminary injunction shall only be granted based upon petitioner's demonstration, by clear and convincing evidence, of the likelihood of success on the merits. *Etter v. Littwitz*, 47 Misc. 2d 473 (Monroe Cty. Sup. Ct. 1965); *Metz v. People*, 73 Misc. 2d 219 (Nassau Cty. Sup. Ct. 1973). Petitioner must also demonstrate that irreparable injury will result if the injunction is not granted, and that a balance of the equities favors petitioner. *See, Town of Warrensburg v. Mollica*, 171 A.D. 2d 995 (3d Dept. 1991), *citing, Nassau Roofing & Sheet Metal Co., Inc.*, 70 A.D. 2d 1021 (3d Dept. 1979). Erikson provides four bases for relief: tenure by estoppel; wrongful termination; violation of *Education Law Section 2509 (2)(b)* for the failure to provide Erikson with tenure given her favorable APPR ratings; and retaliation.

**1. FAILURE TO PERFORM A DUTY ENJOINED ON THEM BY LAW: TENURE BY ESTOPPEL.**

*i. Erikson Has Shown A Likelihood Of Success In Obtaining The Three-Year Probationary Period For Previously Tenured Teachers.*

*Education Law Section 2509 (1)(a)(ii)* provides that teachers appointed after July 1, 2015 shall be appointed for a probationary period of four years. However, where the teacher has previously received tenure in another school district, within the state, that probationary period shall only be three-years (where they were not dismissed for charges under a separate section). The three-year probationary period is only implemented where that teacher

demonstrates receipt of an annual APPR rating<sup>152</sup> The APPR rating was not introduced until the 2010 amendment of the *Education Law*, and this was after Erikson left her last tenured employment. The 2010 amendments modified the teachers' evaluation process and created the Annual Professional Performance Rating ("APPR") system under *Section 3012-d*. (L 2010, ch 103, §1, eff. July 1, 2010). This provision was amended again in 2015 to create the Highly Effective, Effective, Developing, and Ineffective ("HEDI") scores for teacher evaluation. (See, *L. 2015, ch. 56, §2 (Part EE, Subpart E)*, effective April 13, 2015).

In 2015, *Section 2509* governing the appointments of teachers by City School Districts was also amended. (See, *L. 2015, ch. 56 §§1, 2 [Part EE, Subpt. D]*, eff. April 13, 2015). Prior to April 2015, a teacher who previously received tenure in another school district within New York, who was not dismissed from employment for misconduct, had a probationary period that should not exceed two-years. (See, *Educ. Law §2509 (1)(a)(ii)(2014)*. This was changed to three years, provided that the teacher demonstrated that they received an APPR rating in their final year of service in the school district. *Educ. Law, §2509 (1)(a)(ii); L 2015 ch. 56, §§1, 2 [Part EE, Subpt. D]*, eff. April 13, 2015).

Respondents' argue that Erikson is disqualified from the three-year reduced period, and that she is beholden to the current rules under *Education Law Section 2509 (1)(a)(ii)* which was enacted in 2015, prior to her probationary appointment. However, when changes in the law would affect the substantive rights of a party it should not be applied retroactively. See, *Chevron Oil CO. v. Huson*, 404 U.S. 97 (1971) (laws should not be applied retroactively where such application would be inequitable). Further, "a statute has no retroactive effect if it would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed, thus impacting substantive rights." *Matter of Regina Metro Co., LLC v. New York State Div. of Hous. & Community Renewal*, 35 N.Y. 3d 332 (2020), citing, *Landgraf v. Usi Film Prods.*, 511 U.S. 244 (1994); *American Economy Ins. Co. v. State of New York*, 30 N.Y. 3d 136 (2017), cert. denied, 138 S. Ct. 2601

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<sup>152</sup> *Educ. Law. § 3012-c* which was effective April 13, 2015); or *Educ. Law. § 3012-d* which was effective May 13, 2022. *Section 2509* was effective May 13, 2022.



(2018). Unless the Legislature expressly states so, there is a presumption against retroactive application of laws that would impact substantive rights. *Regina, supra*, 35 N.Y. 3d, at 332. Where there is no express statement, it shall be interpreted that the Legislature considered the retroactive impact on substantive rights and intended the rights shall be preserved and the new law not be applied retroactively.

Erikson was appointed as a probationary elementary education teacher effective on September 1, 2017. In March, 2020, Erikson submitted a completed Tenure Verification Form, without the annual performance evaluation from Saratoga, as the evaluations did not exist at the time she was tenured. During her four years of employment as a probationary teacher with Schenectady, Erikson never received an APPR rating lower than “Highly Effective” or “Effective” during the 2017-2018, 2018-2019, 2019-2020, and 2020-2021 school years. Retroactive application of the law would violate her due process rights by denying her the benefits that she accrued before the amendments to the law occurred. Since the Legislature never expressly stated that retro-application was their intention, the Court shall assume that it wasn't. Moreover, the Court of Appeals clearly stated that tenure rules should be read broadly in favor of the teacher. *Speichler v. BOCES*, 90 N.Y. 2d 110 (1997). Accordingly, requiring Erikson to provide an APPR score, when such a score did not exist during the time of her last tenure, would be inequitable and inconsistent with the Legislature's intent to construe requirements for tenure in a teacher's favor. The Court of Appeals detailed, the legislative intent is that “the interests of the public in the education of our youth can best be served by a system designed to foster academic freedom in our schools and to protect competent teachers from the abuses they might be subjected to if they could be dismissed at the whim of their supervisors.” *Ricca v. Bd. Of Educ.*, 47 N.Y.2d 385 (1979).

Tenure by estoppel occurs when a school board fails to act to grant or deny tenure prior to the end of the probationary period; and, with knowledge (actual or constructive) and consent allows that teacher to continue to teach past the expiration of their probationary term. *Gould, supra*, 81 N.Y. 2d, at 451; *see also, Maras v. Bd. of Educ.*, 275 A.D. 2d 551 (3d Dept. 2000).



A teacher that has acquired tenure by estoppel, but is improperly terminated, is entitled to reinstatement retroactive to the last date of employment, back pay, and all accrued benefits. *Matter of Brown v. Bd. of Educ. Of Mahopac Cent. Sch. Dist.*, 129 A.D. 3d 1067 (2d Dept. 2015), *citing, Ricca, supra*, 47 N.Y. 2d, at 385; *Matter of Walters v. Amityville Union Free School Dist.*, 251 A.D. 2d 590 (2d Dept. 1998).

Erikson has demonstrated a likelihood of success on the merits relating to tenure by estoppel as the law favors that the statutory amendments of 2015 should not be retroactively applied. This is exemplified by legislative intent and the lack of express statutory requirement. Additionally, since the school sent Erikson the tenure forms and informed her of a shortened probationary period due to her prior tenure, the school was on notice that Erikson was entitled to the shortened probationary period. Despite this, the Board failed to grant or deny tenure, as required, while allowing her to teach beyond her probationary period. Since she began her probationary period on September 1, 2017, Erikson has a likelihood of success in demonstrating that she should have received tenure on September 1, 2020.

ii. *Erikson Has Shown A Likelihood Of Success In Obtaining Accrued Time During Her Time As A Building Substitute.*

Where a previously tenured teacher has worked as a “regular substitute, they may use up to two years of their substitute time towards their three-year probationary period. *Ed. L. §2509 (1)(a)(ii)*. The teacher must have served at least a full-term in the substitute teacher position, and must demonstrate that she served as a “regular substitute”. *See, Matter of Lifson v. Bd. of Educ. Of Nanuet Pub. Schools*, 109 A.D. 2d 743 (2d Dept. 1985), *aff’d* 66 N.Y. 2d 896 (1985); *Ricca*, 47 N.Y. 2d, at 389. Erikson argues that her probationary term began when she was hired as a building substitute for the period of December 5, 2016 through June 23, 2017. If the seven months of Erikson’s time as a Building Substitute are applied her probation would have expired in December 2019. This is based upon the provision of *Education Law Section 2509* that provides that if a teacher’s probationary appointment comes immediately after having

served as a regular substitute for at least a term (semester) or more, than that substitute service counts in satisfaction of up to two-years of the probationary term, also called a *Jarema* credit.

Respondents' argue that Erikson was a Building Substitute she did not qualify as a "regular substitute." Respondents' argue that Erikson's substitute service does not fit case law determination of what constitutes qualifying substitute service and cite to *Speichler, supra*, 90 N.Y. 2d, at 110; *Barbaccia v. BOE, Locust Valley CSD*, 282 A.D. 2d 674 (2d Dept. 2001) (not regular substitute service where teacher did not take over any particular class for a sustained duration of time, and had different assignments each day); *Appeal of Triana v. Bd. of Educ. Of City Sch. Dist. of N.Y. City*, 47 A.D. 3d 554 (1<sup>st</sup> Dept. 2009). In *Matter of Speichler*, the Court of Appeals stated that whether one served as a "regular substitute" is determined based upon the actual nature and the continuity of the substitute service. *Speichler*, 90 N.Y. 2d, at 110. As detailed in *Speichler*, the Commissioner of Education cautioned school districts not to use technicalities to deny teachers credit for actual regular substitute service. *Id.*

Here, Erikson worked as a "Building Substitute Teacher" every day, full-time, from December 5, 2016 to June 23, 2017. While witnesses differ as to how Erikson spent her time, such differences may very well work in Erikson's favor once all of the testimony is provided and credibility determinations are made. Erikson has asserted that as a Building Substitute she was entitled to the same benefits, including pension benefits, as any other regular teachers. She also taught classes every day, or engaged in co-teaching a class, including lesson plan preparation. Consequently, Erikson has a likelihood of success on her argument that she was entitled to a *Jarema* credit towards her probationary period.

**C. ERIKSON WILL SUFFER IRREPARABLE HARM IF A STAY IS NOT GRANTED.**

Erikson asserts that she will suffer irreparable harm if the stay is not granted as it is highly unlikely that she will be able to secure a teaching position at the same salary grade level that she currently has based upon her age and years of experience. Erikson is a single mother of two disabled children that require a significant amount of medical treatment. If her employment is terminated she will not only lose her income but she will also lose her health



insurance that her family depends upon. She will not be able to afford health insurance without an income. Respondents assert that injunctive relief is not appropriate when the claimed harm can be remedied by back pay and reinstatement. *Armitage v. Carey*, 49 A.D. 2d 496 (3d Dept. 1975); *Cohen v. Department of Social Services of State of New York*, 37 A.D. 2d 626 (2d Dept. 1971), *aff'd* 30 N.Y. 2d 571 (1972). In so asserting, Respondents' fail to address Erikson's personal situation regarding her need to medically insure her children that seemingly cannot afford to go without coverage. Such need is not one that can be remedied by back pay and reinstatement at a later date.

**D. THE BALANCE OF THE EQUITIES FAVORS A STAY.**

A stay is issued when a petitioner can show significant injuries or harm that is both irreparable and more burdensome than any harm the respondent would suffer. *CPLR§7805; Matter of Riccelli Enters, Inc.*, 2012 N.Y. Misc. LEXIS 2241 \*246 (Sup. Ct., Onondaga County 2012). The Courts consider a variety of factors, including the public interests, if any; the fairness of the situation as between the parties; and the availability of other remedies. *Id.* Courts will grant the stay where maintaining the *status quo* is a relatively minor inconvenience for respondent. *Grammercy Co. v. Benenson*, 223 A.D. 2d 497 (1<sup>st</sup> Dept. 1996).

Erikson has illustrated that she will be harmed if the requested relief is not granted. As a single mother, she will lose benefits, and her family will be harmed by the lack of health insurance and income that is necessary for her children's medical care. Respondents' argue that the children enrolled in the District would suffer from having an ineffectual teacher within the District. However, the evidence adduced so far demonstrates that Erikson has always maintained an effective or highly effective teacher rating, and was competent enough to receive tenure at not one, but two, prior districts. Additionally, the public interest in not allowing the rules of tenure to be manipulated against competent teachers greatly outweighs any inconvenience to Respondents.



**THE COURT'S RULING**

Based upon the foregoing, it is hereby:

ORDERED that Petitioner Justine Erikson is hereby granted an preliminary injunction, restraining and preventing the Respondent Schenectady City School District Board of Education from terminating her appointment and employment effective on June 24, 2022, pending the final determination of this action/proceeding; and it is further

ORDERED that Petitioner Justine Erikson is entitled to a hearing on her Petition, the date of which shall be set at a scheduling conference; and it is further

ORDERED, that this Decision and Order constitutes the Order of this Court.

Dated: August 28, 2023  
at Schenectady, New York



HON. MICHAEL R. CUEVAS  
Supreme Court Justice

**PAPERS CONSIDERED:**

**PETITIONER**

- Notice of Presentation
- Order to Show Cause for Preliminary Injunction
- Verified Petition and Complaint
- Memorandum of Law in Support of Order to Show Cause
- Affidavit of Justine Erikson

- Exhibit A: Resolution 161116
- Exhibit B: Duties Building Substitute Teacher
- Exhibit C: Background Building Substitute Teacher
- Exhibit D: Resolution 170920
- Exhibit E: Performance Evaluation 2018
- Exhibit F: Performance Evaluation 2019
- Exhibit G: Resolution 191002
- Exhibit H: Email dated February 26, 2020
- Exhibit I: March 3, 2020 Letter and Completed Tenure Verification Form
- Exhibit J: Performance Evaluation for 2020
- Exhibit K: Juul Agreement
- Exhibit L: Teacher improvement plan dated 4/16/21
- Exhibit M: Performance Evaluation 2021
- Exhibit N: Email dated July 16, 2021
- Exhibit O: de Oliveira Letter dated April 8, 2022

Exhibit P: Harren Letter dated April 26, 2022  
Exhibit Q: de Oliveira Email dated April 26, 2022  
Exhibit R: Board Resolution dated May 4, 2022  
Exhibit S: A Needs Assessment of the Schenectady City School  
District Fall 2020

Affidavit of Alicia A. LeGere

Affidavit of Janice White

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**RESPONDENT**<sup>153</sup>

Memorandum of Law in Opposition

Affidavit of Christina Howard

Affirmation of Kevin H. Harren, Esq.

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<sup>153</sup> The Affidavit of Keith H. Harren, Esq., references an Affidavit of Deborah MacDerment, the building principal, that is purportedly attached. The MacDerment Affidavit was not attached to the Harren Affidavit but was attached to Exhibit P. The Court received the responsive papers via email dated June 7, 2022, that states that Counsel was unable to upload their papers to NYSEF. The email notes that the papers served were 1) Attorney Affirmation of Keith H. Harren, Esq., in opposition to the application; 2) Affidavit of Christina Howard; and 3) Memorandum of Law. It does not mention an Affidavit of Deborah MacDerment. The Court contacted the Schenectady County Clerk who indicated that no papers in Opposition to the Application were filed in that office. The failure to properly file the responsive papers could be considered an no Opposition having been filed. The Court has chosen not to do so and to consider the opposition papers submitted to the Court and opposing counsel and directs that all papers be properly filed on NYSCEF.