

[*1] In the Matter of Jesus Berrios, appellant, v Board of Education of Yonkers City School District, et al., respondents. (Index No. 23910/09)

2010-02768

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

2011 NY Slip Op 5804; 2011 N.Y. App. Div. LEXIS 5663

July 5, 2011, Decided

CASE SUMMARY

PROCEDURAL POSTURE: Petitioner teacher brought a proceeding pursuant to CPLR art. 78 in the Supreme Court (Westchester County) (New York) to review the decision of respondents, a board of education and a superintendent, to terminate his employment without a hearing. The trial court granted respondents' summary judgment motion, and the teacher appealed.

OVERVIEW: The teacher said he was entitled to a hearing before being terminated, under [Education Law § 3020-a](#), because, combining his substitute teaching experience under an intern certificate during one year with his probationary service for two years, he met the three-year probationary requirement and acquired tenure by estoppel. The appellate court held he did not acquire tenure by estoppel because (1) he did not have a teaching certificate when he taught under an intern certificate, (2) he ordinarily had to serve a three-year probationary term before being awarded tenure, (3) while he could serve as a teacher without a teaching certificate, he could not earn credit towards achieving tenure without a teaching certificate, and, (4) to earn "Jarema" credit, reducing the period he had to serve to earn tenure, under [Education Law § 2573\(1\)\(a\)](#), he had to have a teaching certificate, so his first year of teaching as a substitute pursuant to an intern certificate was properly not credited toward tenure.

OUTCOME: The trial court's judgment was affirmed.

CORE TERMS: teacher, certificate, tenure, teaching, school district, school year, substitute teacher, probationary period, intern, estoppel, regular, probationary, school board, terminated, certificate issued, provisional, teach, summary judgment, full-time, educator, qualify, earn, petitioner's contention, teacher education, notice of appeal, time spent, public school, probationary teachers, tenured teachers, immediately preceding

LexisNexis® Headnotes Hide Headnotes

Education Law > Faculty & Staff > Tenure in Elementary & Secondary Schools > Attainment
Education Law > Faculty & Staff > Tenure in Elementary & Secondary Schools >
Probationary Status

HN1 Generally, prior to receiving a grant of tenure, eligible educators must serve in their positions for a probationary period of up to three years ([Education Law § 3014\(1\)](#)). The legislature designed the tenure system

to foster academic freedom in the 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.

Education Law > Faculty & Staff > Discipline & Dismissal > Administrative Proceedings > Statutory Procedures

Education Law > Faculty & Staff > Tenure in Elementary & Secondary Schools > Institutional Compliance

Education Law > Faculty & Staff > Tenure in Elementary & Secondary Schools > Probationary Status

[HN2](#) The Education Law specifically distinguishes probationary teachers and tenured teachers. The employment of probationary teachers can be terminated at any time during the probationary period, without any reason and without a hearing ([Education Law §§ 2509\(1\)\(a\), 3014\(1\)](#)). By contrast, tenured teachers hold their positions during good behavior and competent service, and are subject to dismissal only after formal disciplinary proceedings ([Education Law §§ 2509\(2\), 3020-a](#)).

Education Law > Faculty & Staff > Tenure in Elementary & Secondary Schools > Attainment

[HN3](#) Pursuant to [Education Law § 2573\(1\)\(a\)](#), a teacher in a large city school district is required to serve a three-year probationary period before being awarded tenure.

Education Law > Faculty & Staff > Tenure in Elementary & Secondary Schools > Attainment

[HN4](#) An educator's tenure by estoppel results when a school board accepts the continued services of a teacher or administrator, but fails to take the action required by law to either grant or deny tenure prior to the expiration of the teacher's probationary term.

Education Law > Faculty & Staff > Tenure in Elementary & Secondary Schools > Attainment

Education Law > Faculty & Staff > Tenure in Elementary & Secondary Schools > Probationary Status

[HN5](#) Service as a substitute teacher does not constitute probationary service for purposes of obtaining tenure as a regular teacher.

Education Law > Faculty & Staff > Tenure in Elementary & Secondary Schools > Attainment

Education Law > Faculty & Staff > Tenure in Elementary & Secondary Schools > Probationary Status

[HN6](#) See [Education Law § 2573\(1\)\(a\)](#).

Education Law > Faculty & Staff > Tenure in Elementary & Secondary Schools > Attainment

Education Law > Faculty & Staff > Tenure in Elementary & Secondary Schools > Probationary Status

[HNZ](#)

In order to qualify for Jarema credit reducing the probationary period required to attain tenure, a teacher must serve as a regular substitute continuously for at least one school term immediately preceding the probationary period. Thus, where a teacher has not served as a regular substitute in the year immediately preceding a probationary appointment, such service will not count towards Jarema credit.

Education Law > Faculty & Staff > Qualifications > Certification & Licensure > Lack of Certification

Education Law > Faculty & Staff > Qualifications > Certification & Licensure > Requirements

[HNS](#)

In order to be a "teacher" in the New York State public school system, one must possess a valid teacher's certificate issued by the Commissioner of the New York State Education Department or a valid regional credential ([Education Law § 3001\(2\)](#)). However, [Education Law § 3001\(2\)](#) specifically allows a "practice" teacher enrolled in an approved teacher education program to teach without the presence of a certified teacher in the classroom, provided that a classroom-certified teacher is available at all times and retains supervision of the "practice" teacher. Furthermore, pursuant to [8 NYCRR 80-5.4\(c\)\(2\)](#) and [\(3\)](#), a person may be employed as a substitute teacher on a regular basis even if he or she does not possess a valid teaching certificate.

Education Law > Faculty & Staff > Qualifications > Certification & Licensure > Requirements

Education Law > Faculty & Staff > Tenure in Elementary & Secondary Schools > Attainment

[HN9](#)

While an educator need not have a valid teacher's certificate to be employed as a substitute teacher, such an educator must possess a valid teacher's certificate in order to qualify as a "teacher" and earn Jarema credit reducing the probationary period required to attain tenure. Jarema credit cannot be awarded to a regular substitute teacher who does not possess a valid New York State teacher's certificate.

COUNSEL: [**1] Sussman & Watkins, Goshen, N.Y. (Michael H. Sussman of counsel), for appellant.

Donoghue, Thomas, Auslander & Drohan, LLP, Hopewell Junction, N.Y. (James P. Drohan and Laura M. Del Gaudio of counsel), for respondents.

JUDGES: WILLIAM F. MASTRO, J.P., PETER B. SKELOS, JOHN M. LEVENTHAL, SHERI S. ROMAN, JJ. MASTRO, J.P., SKELOS and ROMAN, JJ., concur.

OPINION BY: JOHN M. LEVENTHAL

OPINION

APPEAL by the petitioner, in a proceeding pursuant to [CPLR article 78](#), inter alia, to review a determination of the Board of Education of the Yonkers City School District dated June 17,

2009, which, without a hearing, terminated his employment as a teacher, from a judgment of the Supreme Court (William Wetzel, J.), entered in Westchester County on February 16, 2010, which, upon an order of the same court entered on January 12, 2010, granting the motion of the Board of Education of the Yonkers City School District, Yonkers City School District, and Bernard P. Pierorazio, as Superintendent of the Yonkers City School District, for summary judgment, in effect, denying the petition, is in favor of the Board of Education of the Yonkers City School District, Yonkers City School District, and Bernard P. Pierorazio, as Superintendent of the [**2] Yonkers City School District, and against him, in effect, denying the petition, and dismissing the proceeding. The notice of appeal from the order is deemed to be a notice of appeal from the judgment (see [CPLR 5512\[a\]](#)).

OPINION & ORDER

LEVENTHAL, J. The narrow issue presented on this appeal, apparently one of first impression for an appellate court in this State, is whether a substitute teacher may accumulate tenure credit for time spent teaching pursuant to an intern certificate. For the reasons set forth below, we answer this question in the negative.

The facts of this case are not in dispute. The petitioner, Jesus Berrios, taught middle-school mathematics for the Yonkers City School District (hereinafter the District) for four years. During the 2005-2006 school year, the petitioner worked as a substitute math teacher pursuant to an intern certificate, which he received on September 1, 2005¹ On September 1, 2006, the petitioner [*2] obtained his initial public school teaching certificate² The District hired the petitioner on a probationary full-time basis for the 2006-2007 school year. The petitioner continued teaching for the District during the 2007-2008 and 2008-2009 school years.

----- Footnotes -----

¹ An [**3] intern certificate is "the certificate issued a student in a registered or approved graduate program of teacher education which includes an internship experience(s) and who has completed at least one-half of the semester hour requirement for the program" ([8 NYCRR 80-1.1\(b\) \[24\]](#)).² An initial certificate is "the first teaching certificate obtained by a candidate that qualifies that individual to teach in the public schools of New York State" ([8 NYCRR 80-1.1\(b\) \[22\]](#)).

----- End Footnotes-----

On June 17, 2009, based on the recommendation of Bernard P. Pierorazio, the Superintendent of the Yonkers City School District (hereinafter the Superintendent), the Board of Education of the Yonkers City School District (hereinafter the Board) terminated the petitioner's employment without a hearing. The termination was effective on July 17, 2009.

The petitioner then commenced this [CPLR article 78](#) proceeding against the Board, the District, and the Superintendent (hereinafter collectively the respondents), by filing a notice of petition and verified petition. The petitioner sought, among other things, review of the Board's determination, reinstatement of his employment, and back pay. The petitioner argued that, combining his substitute [**4] teaching experience under his intern certificate during the 2005-2006 school year with his probationary service for the 2006-2007 and 2007-2008 school years, he satisfied the three-year probationary requirement and acquired tenure by estoppel, effective September 2008. The petitioner asserted that, as a consequence, his employment could not have been lawfully terminated in June 2009, absent a hearing pursuant to [Education Law § 3020-a](#).

Thereafter, the respondents moved for summary judgment, contending that the petitioner did not obtain tenure by estoppel because he did not have a valid teaching certificate during the 2005-2006 school year. According to the respondents, without a valid teaching certificate, the petitioner's 2005-2006 employment could not be credited toward completion

of his probationary period. In an order entered January 12, 2010, the Supreme Court granted the respondents' motion for summary judgment. In a judgment entered February 16, 2010, the Supreme Court, in effect, denied the petition, and dismissed the proceeding on the merits. The petitioner appeals.

[HN1](#)

Generally, prior to receiving a grant of tenure, eligible educators must serve in their positions for a probationary [****5**] period of up to three years (see [Education Law § 3014\[1\]](#); see also [Matter of Speichler v Board of Coop. Educ. Servs., Second Supervisory Dist.](#), 90 NY2d 110, 114, 681 N.E.2d 366, 659 N.Y.S.2d 199; [Matter of Putnam N. Westchester Bd. of Coop. Educ. Servs. v Mills](#), 46 AD3d 1062, 1063, 847 N.Y.S.2d 292). The Legislature designed the tenure system "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 Board of Educ. of City School Dist. of City of N.Y.](#), 47 NY2d 385, 391, 391 N.E.2d 1322, 418 N.Y.S.2d 345; see [Matter of Kaufman v Fallsburg Cent. School Dist. Bd. of Educ.](#), 91 NY2d 57, 689 N.E.2d 894, 666 N.Y.S.2d 1000; see also [Matter of Speichler v Board of Coop. Educ. Servs., Second Supervisory Dist.](#), 90 NY2d at 118 ["tenure rules . . . should be read so as to discourage a board's use of technical obstacles and manipulable labels that can deprive a qualified teacher of tenure rights"]).

[HN2](#)

The Education Law specifically distinguishes probationary teachers and tenured teachers. The employment of probationary teachers can be terminated at any time during the probationary period, without any reason and without a hearing (see [Education Law § 2509\[1\]\[a\]](#); [§ 3014 \[1\]](#)). By contrast, tenured [****6**] teachers hold their positions during good behavior and competent service, and are subject to dismissal only after formal disciplinary proceedings (see [Education Law § 2509 \[2\]](#); [§ 3020-a](#)).

[HN3](#)

Pursuant to [Education Law § 2573\(1\)\(a\)](#), a teacher in a large city school district such as the District is required to serve a three-year probationary period before being awarded tenure. Here, the petitioner worked as a substitute teacher in the District pursuant to an intern certificate during the 2005-2006 school year. The petitioner contends that this period of employment facilitated his completion of the statutory requirements to earn tenure. The petitioner argues that, since he worked as a substitute teacher for one year prior to his probationary period, he shortened his probationary period to one year and obtained "tenure by estoppel" in September 2008 (see [Education Law § 2573\[1\]\[a\]](#)). ^{[HN4](#)}

Tenure by estoppel results "when a school board accepts the continued services of a teacher or administrator, but fails to take the action required by law to either grant or deny tenure prior to the expiration of the teacher's probationary term" ([Matter of McManus v Board of Educ. of Hempstead Union Free School Dist.](#), 87 NY2d 183, 187, 661 N.E.2d 984, 638 N.Y.S.2d 411 [***3**] ; [****7**] see [Matter of Triana v Board of Educ. of City School Dist. of City of N.Y.](#), 47 AD3d 554, 556, 849 N.Y.S.2d 569).

[HN5](#)

Service as a substitute teacher does not constitute probationary service for purposes of obtaining tenure as a regular teacher (see [Ricca v Board of Educ. of City School Dist. of City of N.Y.](#), 47 NY2d at 393). However, the Court of Appeals has held that a substitute teacher's

three-year probationary period can be reduced to one year through "Jarema" credit, named for the bill's sponsor, Assemblyman Stephen J. Jarema ([Matter of Speichler v Board of Coop. Educ. Servs., Second Supervisory Dist., 90 NY2d at 114](#))³ [HN6](#)

"[I]n the case of a teacher who has rendered satisfactory service as a regular substitute for a period of two years . . . and has been appointed to teach the same subject in day schools on an annual salary, the probationary period shall be limited to one year" ([Education Law § 2573\[1\]\[a\]](#)). [HNZ](#)

In order to qualify for Jarema credit, a teacher must serve as a *regular substitute* continuously for at least one school term immediately preceding the probationary period (see [Matter of Speichler v Board of Coop. Educ. Servs., Second Supervisory Dist., 90 NY2d at 111](#); [Matter of Lifson v Board of Educ. of Nanuet Pub. Schools, 66 NY2d 896, 489 N.E.2d 761, 498 N.Y.S.2d 792](#); [\[**8\]](#) see also [Matter of Barbaccia v Board of Educ. of Locust Val. Cent. School Dist., 282 AD2d 674, 723 N.Y.S.2d 407](#)[holding that a permanent per diem substitute who was employed on an annual basis and received different assignments each day substituting for different teachers and in different subject areas was not a regular substitute within the meaning of the Jarema Act]). Thus, where a teacher has not served as a regular substitute in the year immediately preceding a probationary appointment, such service will not count towards Jarema credit.

- - - - - Footnotes - - - - -

[3](#) Although the Court of Appeals' decision in [Speichler](#) addressed [Education Law § 2509](#) , for the purposes of this appeal, that statute is the functional equivalent of [Education Law § 2573](#).

- - - - - End Footnotes - - - - -

[HN8](#)

In order to be a "teacher" in the New York State public school system, one must possess a valid teacher's certificate issued by the Commissioner of the New York State Education Department or a valid regional credential (see [Education Law § 3001\[2\]](#) ["No person shall be employed or authorized to teach in the public schools of the state who is . . . [n]ot in possession of a teacher's certificate issued under the authority of this chapter"]; [8 NYCRR 80-1.1\[b\]\[39\]](#) [a "teacher" is defined [\[**9\]](#) as "the holder of a valid teacher's certificate issued by the Commissioner of Education or a valid regional credential"]). However, [Education Law § 3001\(2\)](#) specifically allows a "practice" teacher enrolled in an approved teacher education program to teach without the presence of the certified teacher in the classroom, provided that a classroom-certified teacher is available at all times and retains supervision of the "practice" teacher. Furthermore, pursuant to [8 NYCRR 80-5.4\(c\)\(2\)](#) and [\(3\)](#), a person may be employed as a substitute teacher on a regular basis even if he or she does not possess a valid teaching certificate.

Construing the relevant statutes and regulations, it is apparent that [HN9](#)

while an educator need not have a valid teacher's certificate to be employed as a substitute teacher, such an educator must possess a valid teacher's certificate in order to qualify as a "teacher" and earn Jarema credit. As discussed below, case law supports our conclusion that Jarema credit cannot be awarded to a regular substitute teacher who does not possess a valid New York State teacher's certificate.

In [Matter of Pierce v Monroe 2-Orleans Bd. of Coop. Educ. Servs. \(195 Misc 2d 178, 757 N.Y.S.2d 715, affd 12 A.D.3d 1046, 784 N.Y.S.2d 459\)](#), [\[**10\]](#) the Supreme Court denied a teacher's petition seeking mandamus to compel a school board to grant him tenure because the teacher did not have his teacher's certificate. In *Pierce*, the teacher was first appointed to a full-time teaching position on March 3, 1997. At the time of appointment, the teacher

did not possess either a provisional or permanent teacher's certificate⁴ The teacher was instructed to submit a letter of interest if he wished to be considered for a position with the school board for the following year. For each of the next three years, the teacher submitted letters expressing his interest in returning. The teacher was notified on May 29, 2002, that his employment was being terminated. The petitioner asserted that since he was employed by the school board as a full-time teacher for more than five years, he obtained tenure by estoppel. In rejecting the petitioner's contention, the Supreme Court held that allowing a regular substitute teacher who did [*4] not possess a valid teaching certificate to receive Jarema credit could lead to the "anomalous result of earning tenure by estoppel prior to even obtaining a provisional [teaching] certificate" (*id. at 182*; see *Appeal of [**11] Goldberg*, 47 Ed Dept Rep 489). Although the Supreme Court determined that dismissal of the petition was not warranted on the ground that the teacher failed to exhaust his administrative remedies, it concluded that denial of the petition was warranted on the ground that the teacher's consecutive terms of employment, during which he failed to obtain a teaching certificate, did not constitute a probationary period.

----- Footnotes -----

⁴ Prior to February 2, 2004, the entry-level certificate for classroom teachers were denominated "provisional" and are now "initial."

----- End Footnotes-----

In the instant case, as in *Pierce*, the petitioner's provisional certification was not effective until after the substitute service was completed. Allowing a substitute teacher to accumulate tenure credit for time spent teaching pursuant to an intern certificate would mandate that a school board grant or deny tenure to that teacher before he or she obtained a valid teacher's certificate. Here, the petitioner did not possess an initial teaching certificate when he was teaching as a substitute during the 2005-2006 school year; rather, his initial certificate was not effective until September 1, 2006. The petitioner's entire service with the District [**12] for the 2005-2006 school year was under an intern certificate. The petitioner was working toward obtaining his teacher certificate while attending college; he performed these teaching duties during the 2005-2006 school year as part of an internship for the purpose of receiving college credit. Accordingly, we reject the petitioner's contention that he acquired tenure by estoppel. A contrary determination would discourage school districts from employing students teaching pursuant to intern certificates, thereby depriving both the school districts and the teachers of that valuable experience.

In light of the foregoing, the Supreme Court correctly determined that the petitioner did not earn tenure by estoppel because his first year of teaching as a substitute pursuant to an intern certificate was properly not credited toward tenure. Thus, the Supreme Court properly, in effect, denied the petition, and properly dismissed the proceeding.

Accordingly, the judgment is affirmed.

MASTRO, J.P., SKELOS and ROMAN, JJ., concur.

ORDERED that the judgment is affirmed, with costs.