STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

JOHN KEONI WRIGHT, GINET BORRERO,
TAUANA GOINS, NINA DOSTER,
CARLA WILLIAMS, MONA PRADIA,
and ANGELES BARRAGAN,

Plaintiffs,

Index No. A00641/2014

-against-

STATE OF NEW YORK, REGENTS OF THE
UNIVERSITY OF THE STATE OF NEW YORK,
MERRYL H. TISCH, CHANCELLOR OF THE
BOARD OF REGENTS, JOHN B. KING,
COMMISSIONER OF EDUCATION AND
PRESIDENT OF THE UNIVERSITY OF
THE STATE OF NEW YORK,

Oral Argument is Requested

Defendants,

-and-

SETH COHEN, DANIEL DELEHANTY, ASHLI SKURA DREHER,
KATHLEEN FERGUSON, ISRAEL MARTINEZ, RICHARD
OGNIBENE, JR., LONNETTE R. TUCK, and KAREN E. MAGEE,
Individually and as President of the New York State United Teachers,

Proposed Intervenors-Defendants.

MEMORANDUM OF LAW IN SUPPORT OF PROPOSED INTERVENORS-DEFENDANTS' MOTION TO INTERVENE

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PRELIMINARY STATEMENT

In this action, plaintiffs seek a declaration that certain state statutes, which define in part the employment safeguards and obligations of New York's public school teachers and other pedagogues, are unconstitutional. Plaintiffs ask this Court to strip teachers of these vested safeguards, which protect their right to teach and to effectively advocate for their students, and which protect them from arbitrary dismissal, discipline or layoff.

Each of the proposed individual intervenors-defendants is a public school teacher who has been appointed on tenure by her or his school board. As such, each of them, under authoritative judicial precedent, has a protected liberty interest in her or his right to teach, and a constitutionally protected property interest in her or his public employment.

The laws plaintiffs seek to eviscerate have been carefully designed and continually and rationally refined by the Legislature, over the course of more than a century, to attract and retain qualified, dedicated public school teachers, and to protect them from arbitrary dismissal, in the interest of promoting the best possible education for New York's students. The evisceration of these laws would not only damage the legal and professional interests of school teachers, but would impair the right of New York's students to a sound basic education.

As is demonstrated below, the proposed intervenors-defendants have a real and substantial interest in the outcome of this case. Accordingly, their motion to intervene should be granted.

ARGUMENT

THE MOTION TO INTERVENE SHOULD BE GRANTED BECAUSE THE PROPOSED INTERVENORS-DEFENDANTS HAVE A REAL AND SUBSTANTIAL INTEREST IN THE OUTCOME OF THIS ACTION.

A. The Standards Governing the Instant Motion

A motion to intervene can be made either as of right or by permission, and under the relevant liberal rules of construction, "whether intervention is sought as a matter of right under CPLR §1012(a), or as a matter of discretion under CPLR §1013 is of little practical significance." *Perl v. Aspromonte Realty Corp.*, 143 A.D.2d 824, 825 (2d Dep't 1988), lv. dismissed 74 N.Y.2d 649 (1989). Moreover, "[I]ntervention should be

permitted where the intervenor has a real and substantial interest in the outcome of the proceedings." *Id.* *Accord, Norstar Apartments, Inc. v. Town of Clay*, 112 A.D.2d 750 (4th Dep't 1985).

Here, the proposed intervenors-defendants seek to intervene both as of right and, alternatively, as a matter of discretion. *Berkoski v. Bd. of Trustees, Inc. Vill. of Southampton*, 67 A.D.3d 840 (2nd Dep't 2009); *City of Buffalo v. State Board of Equalization and Assessment*, 44 Misc.2d 716 (Sup. Ct. Albany Co. 1964). Intervention as of right is appropriate when, among other grounds, "the representation of the person's interest by the parties is or may be inadequate and the person is or may be bound by the judgment." CPLR §1012. *Village of Spring Valley v. Village of Spring Valley Housing Auth.*, 33 A.D.2d 1037 (2nd Dep't 1970); *Romeo v. New York State Department of Education*, 39 A.D.3d 916 (3rd Dep't 2007).

CPLR § 1013 allows for intervention by permission. According to that section, "[u]pon timely motion, any person may be permitted to intervene in any action when a statute of the state confers a right to intervene in the discretion of the court, or when the person's claim or defense and the main action have a common question of law or fact." CPLR §1013; *Berkoski, supra.* The CPLR addresses the court's discretion on such motions, requiring that "[i]n exercising its discretion, the court shall consider whether the intervention will unduly delay the determination of the action or prejudice the substantial rights of any party." CPLR §1013.

B. The Interests of Proposed Intervenors-Defendants in the Outcome of this Action are Substantial.

As tenured teachers, the proposed intervenors-defendants have substantial interests in upholding the challenged laws, which protect them from being arbitrarily

dismissed, or disciplined or laid off. In this action, plaintiffs challenge the validity of various provisions of the Education Law, including those that protect teachers who have passed probation and have been granted tenure from being terminated without just cause (Education Law §§2509, 2573, 3012, 3012-c, 3020 and 3020-a), and the laws that ensure that seniority is respected when layoffs take place (Education Law §§2510, 2588 and 3013).

That the rights being attacked by plaintiffs in this case are indeed substantial. Statutes protecting tenured teachers' rights not to be removed from employment except for cause have been in existence in one form or another in New York since 1897. *See e.g., People ex rel. Murphy v. Maxwell*, 177 N.Y. 494, 497 [1904]). Statutes requiring that teachers not be laid off except by inverse seniority in the relevant tenure area have existed in New York since 1940. Indeed, the first tenure laws were enacted just three years after the Education Article (Article 11§1) was added to the State Constitution in 1894.

Individual teachers who have been appointed on tenure have a constitutionally protected property interest in their continued employment. *Gould v. Sewanhaka Central High School District*, 81 N.Y. 2d 446, 451 (1993). To ordinary working people, including school teachers, the property interest in one's employment is of fundamental importance. As the U.S. Supreme Court has noted:

> . . . the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. [citations omitted] While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.

Cleveland Board of Education v. Loudermill, 470 U.S. 532, 543 (1985).

The tenure statutes not only confer a substantial private property interest on tenured teachers, they reflect an important public interest - - protection from arbitrary removal for educators who have successfully completed a probationary period. As stated by the Court of Appeals in *Holt v. Bd. of Educ., Webutuck Cent. School Dist.*, 52 N.Y.2d 625, 632 (1981):

> One of the bulwarks of that tenure system is section 3020-a of the Education Law which protects tenured teachers from arbitrary suspension or removal. **The statute has been recognized by this court as 'a critical part of the system of contemporary protections that safeguard tenured teachers from official or bureaucratic caprice.'** (emphasis supplied, quoting from *Abramovich v. Bd. of Educ. of Cent. School Dist. No. 1 of Towns of Brookhaven & Smithtown*, 46 N.Y.2d 450, 454 [1979].)

The Court of Appeals has also instructed that the tenure system must be vigilantly protected against strategies that attempt to circumvent the will of the Legislature, and that the protections of the tenure statutes must be broadly construed in favor of teachers who have successfully completed their probationary periods. As stated in *Ricca v. Bd. of Educ., City School Dist. of City of New York*, 47 N.Y.2d 385, 391 (1979):

> [The tenure system] . . . is a legislative expression of a firm public policy determination 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. In order to effectuate these convergent purposes, it is necessary to construe the tenure system broadly in favor of the teacher, and to strictly police procedures which might result in the corruption of that system by manipulation of the requirements for tenure.

* * *

> Even 'good faith' violations of the tenure system must be forbidden, lest the entire edifice crumble from the cumulative effect of numerous well-intentioned exceptions.

Another court described the tenure and seniority protections as follows:

> Education Law §§3012 and 3013 provide teachers with two fundamental protections. They are tenure and its protection from political or economically motivated firing, and seniority preservation during periods of layoffs. The tenure and seniority provisions serve a firm public policy to protect the interests of the public in the education of our youth which 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 Board of Educ.*, 47 NY2d 385, 391 (1979)). Academic freedom is the goal for those to whom the minds of our children are entrusted.

Lambert v. Bd. of Educ., Middle Country CSD, 174 Misc.2d 487, 489 (Sup. Ct. Nassau Co. 1997).

In addition to a property interest in continued employment unless removed for just cause, the proposed intervenors-defendants have a constitutionally protected liberty interest in their right to pursue their chosen profession. *See, e.g., Meyer v. Nebraska*, 262 U.S. 390 (1923). In *Meyer*, the Court, invalidating a law restricting the teaching of foreign languages, stated as follows:

> Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare . . . [Plaintiff's] right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the [Fourteenth] amendment.

Id., 262 U.S. at 400. *Accord, Knutsen v. Bolas*, 114 Misc. 2d 130, 132 (Sup. Ct. Erie Co. 1982), *aff'd*, 96 A.D. 2d 723 (4th Dep't 1983), *lv. denied*, 60 N.Y.2d 557 (1983) (explaining that "[l]iberty under the Fourteenth Amendment . . . includes the right of an individual to engage in any of the common occupations of life").

These authorities make it clear that protecting teachers from being removed or laid off in an arbitrary manner is not only about protecting their rights, but also serves the public's interest in academic freedom. *Ricca, supra.* In this way, the tenure statutes, contrary to plaintiffs' claim, actually protect students' right to a sound basic education as guaranteed by the Education Article of the State Constitution (Article 11, §1). In sum, plaintiffs are seeking by this lawsuit to destroy very substantial individual safeguards to the detriment of very substantial public interests.

Plaintiffs describe the challenged statutes as "archaic." It is true that the tenure an seniority laws are long-standing, even though they have been continually refined by the legislature. (*See, e.g.*, L. 2008, c. 296, §2 and c. 325, §2; L. 2010, c. 103, §§3-5; L. 2012, c. 57, Part B, §1, each significantly amending the challenged tenure laws.) But, contrary to plaintiffs' assertion, the safeguards provided by tenure are no less important to teachers today. Under recent U.S. Supreme Court precedent, when a public employee speaks in her capacity as a public employee, she may have no first amendment protection. *See Garcetti v. Ceballos*, 547 U.S. 410, 426 (2006). Thus, today tenure remains as perhaps the last redoubt of academic freedom, and of teachers who advocate for their students.

It is clear, therefore, that the proposed intervenors-defendants will be adversely affected if plaintiffs are successful in this litigation. In particular, if this Court were to grant the relief the plaintiffs seek, declaring the Education Law's seniority and tenure

safeguards to be unconstitutional, the proposed intervenors-defendants would be stripped of these crucial statutory protections.

The proposed individual intervenors have served their districts and the students they teach for many years. Each has served with distinction and has been recognized as an effective educator. Three of the individual proposed intervenors-defendants have been named Teacher of the Year by the State Education Department (Affidavit of Ashli Skura Dreher at ¶4; Affidavit of Richard Ognibene, Jr. at ¶7; Affidavit of Kathleen Ferguson at ¶5). Other distinctions earned by the proposed intevenors-defendants include the prestigious National Board Certification for Professional Teaching Standards and numerous local awards for teaching and other service to the community. *See* Affidavit of Daniel Delehanty at ¶7; Affidavit of Lonnette Riley Tuck at ¶8; Ognibene Affidavit at ¶12; Skura Dreher Affidavit at ¶8; and Ferguson Affidavit at ¶6.

Notwithstanding these achievements, each of the proposed intervenors-defendants would be subject to removal or other discipline for arbitrary reasons were it not for the protection of Education Law §3020-a which plaintiffs seek to have invalidated (Complaint ¶¶49-65). And, in the case of layoffs, each would be subject to being terminated without regard to their years of faithful service if the seniority statutes were invalidated as plaintiffs seek (Complaint ¶¶66-76). Indeed, because of their years of service, their higher pay would make them tempting targets for budget cutters.

Proposed intervenor-defendant New York State United Teachers (NYSUT) also has a real and substantial interest in the outcome of this lawsuit. NYSUT counts among its over 600,000 members nearly every K-12 teacher in New York State, all of whom are covered by the laws being challenged in this case. NYSUT furnishes legal counsel to its

members who are brought up on charges under Section 3020-a, and gives advice and legal representation to members in enforcement of the laws governing probation, tenure and seniority. Also, as part of New York's successful effort to obtain over $700 million in federal education aid, NYSUT was involved in developing the teacher evaluation law, Education Law §3012-c, which is also being challenged in this case. *See* Casagrande Affirmation at ¶¶14-27; and Affidavit of Karen E. Magee, submitted in support of the motion.

The relevant case law supports granting the motion to intervene. *Berkoski v. Bd. of Trustees, Incorp. Vill. of Southampton*, 67 A.D.3d 840 (2nd Dep't 2009) (holding that day laborers had a real and substantial interest in the outcome of a case brought to enjoin a village from setting aside park land for day laborers to gather in for purposes of being hired; there was at least one common question of law raised by the village's answer and the intervenors' proposed answer and there was no showing that the intervention would cause undue delay); *City of Buffalo v. State Board of Equalization and Assessment*, 44 Misc.2d 716 (Albany Co. 1964) (motion to intervene granted so that the moving parties could defend, just as the intervenors would do here, the constitutionality of a statute); *Village of Spring Valley v. Village of Spring Valley Housing Auth.*, 33 A.D.2d 1037 (2nd Dep't 1970) (holding that the trial court should have allowed low-income persons residing in sub-standard housing to intervene in a proceeding brought to dissolve the housing authority, because there were common questions of law and fact raised by the Authority's and intervenors' answers, the intervenors' interests may not have been adequately represented by the authority, and intervenors may have been bound by the judgment).

Here, the proposed intervenors-defendants will be bound by the judgment if plaintiffs prevail, and obviously there are common issues of law and fact as between the allegations in the complaint and the defenses in the proposed answer (Casagrande Affirmation Exhibit "A"). In addition, the defendants may not adequately represent the interests of the proposed intervenors-defendants. While the state has an interest in defending generally the constitutionality of the statutes at issue, none of the defendants currently in the case, unlike the proposed intervenors-defendants, individually possess the statutory rights threatened by this lawsuit.

There would be no undue delay or prejudice to any party if the motion to intervene is granted. The case is still in its early stages. The state defendants have made a motion, returnable on September 3, 2014 in Richmond County Supreme Court, to consolidate[1] the instant action with the similar case, entitled *Davids, et al., v. State of New York* (Richmond County Index No. 101105/14).

Further, defendants in the instant action have obtained an extension of time to respond to the complaint, until September 19, 2014. *See* Casagrande Affirmation at ¶31. Clearly, granting the instant motion will not create undue delay or prejudice to the plaintiffs or defendants.

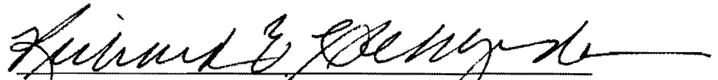
[1] Proposed intervenors-defendants do not oppose the motion to consolidate.

CONCLUSION

For the reasons set forth above, the motion to intervene should be granted, along with such other and further relief as is deemed just and proper.

Dated: August 28, 2014
Latham, NY

Respectfully submitted,



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