

<b>Wagner v New York City Dept. of Educ.</b>
2022 NY Slip Op 33816(U)
November 10, 2022
Supreme Court, New York County
Docket Number: Index No. 153934/2021
Judge: Frank P. Nervo
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. FRANK P. NERVO PART 04

*Justice*

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ALICE S. WAGNER,

Plaintiff,

- v -

NEW YORK CITY DEPARTMENT OF EDUCATION,  
EMMANUEL POLANCO, MARIBEL HULLA, ROSLY CURET

Defendant.

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INDEX NO. 153934/2021

MOTION DATE 04/22/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 8, 16, 18, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 43, 44, 45

were read on this motion to/for ARTICLE 78 (BODY OR OFFICER).

In this hybrid Article 78 proceeding seeking equitable relief, petitioner seeks an order annulling her discontinuance as a Special Education Teacher with respondent and declaring that petitioner is tenured by estoppel.

“Tenure may be acquired by estoppel 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 [1995]; see also *Matter of Wilson v. Dept. of Educ. of the City of NY*, 169 AD3d 513 [1st Dept 2019]).

Here, petitioner was administratively reassigned for two school years, pending the resolution of criminal charges against her. In her reassigned role, petitioner reviewed Individual Education Plans (IEPs) for students, and conducted meetings related to same. Respondent's reassignment letter (NYSCEF Doc. No. 26) is wholly silent as to the effect this reassignment would have, if any, on petitioner accruing tenure or remaining a probationary employee. Consequently, the record reflects that petitioner was administratively reassigned, respondent continued to accept petitioner's services, and respondent failed to either grant or deny petitioner tenure prior to the expiration of the petitioner's probationary term.<sup>1</sup> That petitioner's reassignment was to a position other than that of a classroom teacher is of no moment (*Matter of Wilson v. Dept. of Educ. of the City of NY*, 169 AD3d 513, granting tenure to teacher reassigned to clerical duties). Accordingly, petitioner has established tenure by estoppel pursuant to *Matter of Wilson* and *Matter of McManus* (*supra*).

[continued on following page]

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<sup>1</sup> To the extent that respondents proffer allegations of fact in their memorandum of law, including that a superintendent advised petitioner that petitioner would not be recommended for tenure, same are unsworn and of no evidentiary value here (*see e.g. Chiarini v. County of Ulster*, 9 AD3d 769 [3d Dept 2004]).

To the extent that respondent contends the instant matter is time barred by the four-month statute of limitations for Article 78 relief, the Court does not so find. The instant matter seeks, inter alia, equitable relief declaring petitioner is tenured and entitled to the appropriate process afforded to tenured teachers before termination/discontinuance of employment. The cases cited by respondent in furtherance of this contention are inapposite, as those cases do not contain claims seeking equitable relief declaring an employee tenured and deal solely with discontinuance of probationary employees (*see e.g. Minkin v. New York City Dept. of Educ.*, 186 AD3d 1159 [1st Dept 2020]). The Court, therefore, finds the instant matter timely, pursuant to CPLR § 213.

Given the Court's finding that petitioner was granted tenure by estoppel by respondent, the landscape of rights afforded to petitioner has greatly shifted. Accordingly, petitioner's claims related to retaliation/discrimination are, at this time, premature.

Accordingly, it is

ORDERED that the petition is granted to the extent of declaring petitioner tenured by estoppel; and it is further

ORDERED that petitioner is reinstated to the employ of respondent as a Special Education Teacher with retroactive benefits, seniority, and back-pay; and it is further

ORDERED that any discontinuance/termination of petitioner's employment must comport with the due process afforded to tenured teachers; and it is further

ORDERED that the amount of back-pay, retroactive benefits, and seniority due petitioner shall be heard by a special referee to hear and report on same; and it is further

ORDERED that petitioner's claims for retaliation/discrimination are dismissed as premature and without prejudice to refiling same should respondent take adverse action against petitioner following completion of process afforded to tenured teachers; and it is further

ORDERED that a Judicial Hearing Officer ("JHO") or Special Referee shall be designated to hear and report to this court on the following individual

issues of fact, which are hereby submitted to the JHO/Special Referee for such purpose:

- (1) the amount of back-pay due petitioner;
- (2) the amount of retroactive benefits due petitioner;
- (3) the issue of petitioner's seniority, following her reinstatement as a Special Education Teacher; and it is further

ORDERED that the powers of the JHO/Special Referee shall not be limited beyond the limitations set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or [spref@nycourts.gov](mailto:spref@nycourts.gov)) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh) at the "References" link), shall assign this matter at the initial appearance to an available JHO/Special Referee to hear and report as specified above; and it is further

ORDERED that counsel shall immediately consult one another and counsel for plaintiff/petitioner shall, within 15 days from the date of this Order,

submit to the Special Referee Clerk by fax (212-401-9186) or e-mail an Information Sheet (accessible at the “References” link on the court’s website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calendar of the Special Referees Part; and it is further

ORDERED that on the initial appearance in the Special Referees Part the parties shall appear for a pre-hearing conference before the assigned JHO/Special Referee and the date for the hearing shall be fixed at that conference; the parties need not appear at the conference with all witnesses and evidence; and it is further

ORDERED that, except as otherwise directed by the assigned JHO/Special Referee for good cause shown, the trial of the issue(s) specified above shall proceed from day to day until completion and counsel must arrange their schedules and those of their witnesses accordingly; and it is further

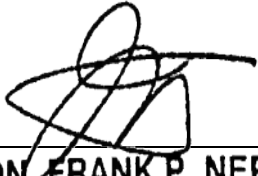
ORDERED that counsel shall file memoranda or other documents directed to the assigned JHO/Special Referee in accordance with the Uniform

Rules of the Judicial Hearing Officers and the Special Referees (available at the “References” link on the court’s website) by filing same with the New York State Courts Electronic Filing System (see Rule 2 of the Uniform Rules); and it is further

ORDERED that any motion to confirm or disaffirm the Report of the JHO/Special Referee shall be made within the time and in the manner specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts; and it is further

ORDERED that, unless otherwise directed by this court in any Order that may be issued together with this Order of Reference to Hear and Report, the issues presented in any motion identified in the first paragraph hereof shall be held in abeyance pending submission of the Report of the JHO/Special Referee and the determination of this court thereon.

THIS CONSTITUTES THE DECISION AND ORDER OF REFERENCE OF THE COURT.

<u>11/10/2022</u> DATE			 HON. FRANK P. NERVO
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<b>J.S.C.</b>
APPLICATION:	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input checked="" type="checkbox"/> REFERENCE