

# Educ. Law § 3014-b: Takeover Statute Confers Rights on the Most Senior of the BOCES Teachers in the Tenure Area Who Are Excused Because of the Takeover

Lorraine Novinski

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

---

### Recommended Citation

Novinski, Lorraine (1983) "Educ. Law § 3014-b: Takeover Statute Confers Rights on the Most Senior of the BOCES Teachers in the Tenure Area Who Are Excused Because of the Takeover," *St. John's Law Review*: Vol. 57 : No. 4 , Article 8.  
Available at: <https://scholarship.law.stjohns.edu/lawreview/vol57/iss4/8>

This Recent Development in New York Law is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [lasalar@stjohns.edu](mailto:lasalar@stjohns.edu).

that "danger invites rescue." The court rejected this claim, holding that the instinctive reaction necessary to plead a cause of action under the rescue doctrine was absent. It is hoped that *The Survey's* discussion of these topics will be of service to our readers.

#### EDUCATION LAW

*Educ. Law § 3014-b: Takeover statute confers rights on the most senior of the BOCES teachers in the tenure area who are excused because of the takeover*

New York Education Law § 3014-b<sup>1</sup> provides that whenever a school district takes over a program formerly operated by a board of cooperative educational services (BOCES),<sup>2</sup> each of the teachers

---

<sup>1</sup> N.Y. EDUC. LAW § 3014-b (McKinney 1981). The relevant sections of this statute provide:

1. In any case in which a school district duly takes over the operation of a program formerly provided by a board of cooperative educational services, each teacher employed in such a program by such a board of cooperative educational services at the time of such takeover by the school district shall be considered an employee of such school district, with the same tenure status he maintained in such board of cooperative educational services.

4. In the event that more than one school district duly takes over the operation of a program formerly provided by a board of cooperative educational services, then each teacher employed in such program by such board of cooperative educational services at the time of such takeover by more than one school district, shall select the particular school district in which he shall be considered an employee, with all of the rights and privileges provided by the other provisions of this section. Such selection of the particular school district by such teacher is to be based upon each teacher's seniority in such board of cooperative educational services, with the right of selection passing from such teachers with the most seniority to such teachers with least seniority.

5. This section shall in no way be construed to limit the rights of any such teachers set forth in this section granted by any other provision of law.

*Id.*

<sup>2</sup> Boards of cooperative educational services (BOCES) are organized pursuant to section 1950 of the New York Education Law, N.Y. EDUC. LAW § 1950 (McKinney Supp. 1982-1983), "for the primary purpose of providing to school districts within the supervisory district a program of shared [educational] services in those areas where the districts, because of sparsity of pupils or for other reasons, cannot economically provide such educational offerings." *In re Coutant*, 2 N.Y. Dep't Ed. R. 53, 54 (1961). BOCES is a "body corporate" whose relationship with participating school districts is exclusively contractual. N.Y. EDUC. LAW § 1950(4)(d), (6) (McKinney Supp. 1981). The participating districts are required to pay BOCES for all services received. *Id.* § 1950(4)(d). BOCES' administrative budget is apportioned among the component districts according to statutory formulas. *Id.* § 1950(4)(b). BOCES is authorized to provide school districts with services of personnel such as school nurse teachers, instructors of art, music, or vocational subjects, guidance counsel-

employed in a BOCES program at the time of the takeover shall be deemed a district employee, and shall maintain the same tenure<sup>3</sup> status he enjoyed in BOCES.<sup>4</sup> The class of teachers protected by

---

ors, psychologists and teachers of special classes for the handicapped. *Id.* § 1950(4)(d). BOCES may also provide support services such as financial accounting and cafeteria services, "and such other services as the commissioner of education may approve." *Id.*

<sup>3</sup> Under the common law, an employer generally has the right to hire and fire his employees at will. *Gunther v. San Diego & Ariz. E. Ry. Co.*, 198 F. Supp. 402, 408 (S.D. Cal. 1961), *aff'd*, 336 F.2d 543 (9th Cir. 1964), *rev'd on other grounds*, 382 U.S. 257 (1965). In the case of public school teachers, however, this right typically is modified by tenure statutes. See, e.g., CAL. EDUC. CODE § 44882 (West 1978); ILL. ANN. STAT. ch. 122, § 24-11 (Smith-Hurd Supp. 1982-1983); MICH. COMP. LAWS ANN. § 38.101 (1967). These statutes usually provide that, after satisfactory completion of a probationary period of several years, the teacher may be dismissed only for cause. See Comment, *Teachers' Tenure Legislation*, 37 MICH. L. REV. 430, 432 (1939). In adopting tenure statutes, legislatures were motivated by the desire to end politically motivated discharges of teachers and to "establish[] merit as the essential basis for the right of permanent employment." *McSherry v. City of St. Paul*, 202 Minn. 102, 108, 277 N.W. 541, 544 (1938) (emphasis in original); see Comment, *Tenure and Remedies Under School Teachers' Contracts*: Board of Education of Washington County v. Cearfoss, 3 MD. L. REV. 97, 100-01 (1938).

New York's first tenure statute was enacted in 1917. Act of June 8, 1917, ch. 786, [1917] N.Y. Laws 2501 (current version at N.Y. EDUC. LAW § 3012(1)(a) (McKinney 1981)). The current statute provides for a probationary period of 3 years, during which a teacher may be discharged by a majority vote of the board of education upon the recommendation of the superintendent of schools. N.Y. EDUC. LAW § 3012(1)(a) (McKinney 1981). After completion of the probationary period, teachers hold their positions "during good behavior and efficient and competent service, and shall not be removed except for . . . (a) insubordination, immoral character or conduct unbecoming a teacher; (b) inefficiency, incompetency, physical or mental disability, or neglect of duty; [or] (c) failure to maintain certification." *Id.* § 3012(2). New York's tenure laws are designed "to attract qualified persons to teaching and to provide job protection to teachers who have given years of satisfactory service." *In re Baer v. Nyquist*, 34 N.Y.2d 291, 295, 313 N.E.2d 751, 753, 357 N.Y.S.2d 442, 445 (1974). The effectiveness of the tenure laws in achieving these goals, however, has been questioned. See Lanzarone, *Teacher Tenure—Some Proposals for Change*, 42 FORDHAM L. REV. 526, 527-28 (1974).

<sup>4</sup> N.Y. EDUC. LAW § 3014-b (McKinney 1981). There are two takeover provisions within the Education Law. Section 3014-a applies when BOCES takes over the operation of a program previously conducted by a school district. *Id.* § 3014-a. Section 3014-b applies in situations in which a school district takes over a program formerly operated by BOCES. *Id.* § 3014-b. The two statutes were enacted separately, section 3014-a in 1972, Act of Apr. 25, 1972, ch. 158, [1972] N.Y. Laws 976, and section 3014-b in 1975, Act of May 5, 1975, ch. 66, [1975] N.Y. Laws 91.

The Memorandum of New York State Teachers' Association, *reprinted in* [1972] N.Y. LEGIS. ANN. 113 [hereinafter cited as *NYSTA Memorandum*], makes clear that section 3014-a was designed to protect the rights of a teacher who rendered years of faithful service to a school district in a program subsequently taken over by BOCES. *Id.* Referring to the protection afforded teachers by section 3014-a, Assemblyman Stavisky stated: "The purpose of this bill [section 3014-b] is to provide the identical protection to teachers in a BOCES program in the event that program is taken over by a school district." Memorandum of Assemblyman Stavisky, *reprinted in* [1975] N.Y. LEGIS. ANN. 158 [hereinafter cited as *Stavisky Memorandum*]. A comparison of the two sections reveals that section 3014-b is

the statute, however, has not been clearly defined.<sup>5</sup> The Commissioner of education has held that the statute applies not only to teachers who have worked in the particular district effectuating the takeover but also to other teachers in the same BOCES program.<sup>6</sup> Recently, in *In re Acinapuro v. Board of Cooperative Educational Services*,<sup>7</sup> the Appellate Division, Second Department, further extended the statute's coverage by holding it applicable to teachers employed in other BOCES programs within the tenure area of the program being taken over.<sup>8</sup>

In *Acinapuro*, the Hempstead and East Meadow school districts had contracted with BOCES to participate in an itinerant teaching program for learning disabled and physically impaired children during the 1979-1980 school year.<sup>9</sup> BOCES provided the

---

virtually identical to section 3014-a except for the interchanging of the phrases "school district" and "BOCES" and the addition of a subsection providing for a takeover of a BOCES program by more than one school district. See N.Y. EDUC. LAW §§ 3014-a, 3014-b (McKinney 1981). Although both statutes were amended in 1981, the effect was merely to change from 4 to 7 years the period for which a preferred eligible list must be used to fill certain positions. See Act of July 27, 1981, ch. 835 §§ 2, 3, [1981] N.Y. Laws 2220, 2221.

<sup>5</sup> The ambiguity in the statute results from the phrase "each teacher employed in such a program." See N.Y. EDUC. LAW § 3014-b(1), (4) (McKinney 1981). The language is susceptible to at least three possible interpretations. A narrow interpretation would limit the scope of the statute only to those BOCES teachers employed in the target program who serve in the district effecting the program takeover. A broader interpretation would expand the coverage to include BOCES teachers serving other school districts within the same program. An even broader construction would include teachers in other BOCES programs. Relatively few cases have interpreted the statute. See *Baden v. Board of Educ.*, 65 App. Div. 2d 955, 955-56, 411 N.Y.S.2d 215, 215-16 (4th Dep't 1978) (when several districts take over a BOCES program, a teacher's request for a position in a particular district must still be honored, even if such position becomes available after the teacher has accepted employment in another district); *In re Owlett*, 16 N.Y. Dep't Ed. R. 317, 318-19 (1977) (statute not limited to teachers who taught in the particular district executing the takeover); *In re McArdle*, 15 N.Y. Dep't Ed. R. 425, 426-27 (1976) (statute did not apply to BOCES psychologist when the district did not enjoy services of a psychologist after withdrawal from the BOCES program).

<sup>6</sup> *In re Owlett*, 16 N.Y. Dep't Ed. R. 317, 319 (1977). Owlett was a full-time driver education teacher whose position with BOCES was reduced to part time when the Hornell school district withdrew from the BOCES program and created its own full time driver education position. *Id.* at 317. The Commissioner held that Owlett was entitled to the newly created position, despite the fact that he had never been assigned to Hornell while it was participating in the BOCES program, since "3014-b is not limited to BOCES teachers who worked in the school district taking over a BOCES program." *Id.* at 319.

<sup>7</sup> 89 App. Div. 2d 329, 455 N.Y.S.2d 275 (2d Dep't 1982).

<sup>8</sup> *Id.* at 337, 455 N.Y.S.2d at 280.

<sup>9</sup> *Id.* at 331, 455 N.Y.S.2d at 277. Contracts between school districts and BOCES are formed in a statutorily prescribed manner. See *supra* note 2. By the 15th of January of each year, participating districts file requests for services with BOCES for the following year, after which BOCES submits a plan to the commissioner of education. N.Y. EDUC. LAW §

districts with teachers who worked with the children at the schools they regularly attended.<sup>10</sup> In the spring of 1980, both districts notified BOCES that they no longer wished to participate in the itinerant teaching program.<sup>11</sup> Each district then established its own program to provide instruction for the students formerly taught by BOCES personnel.<sup>12</sup> The establishment of these programs created four new teaching positions, which the districts filled by hiring probationary teachers.<sup>13</sup> The petitioners, four tenured teachers employed by BOCES at the time of the districts' withdrawal, were excessed for budgetary reasons.<sup>14</sup> Although each of the petitioners was employed in the general special education tenure area,<sup>15</sup> which included the itinerant teaching program, none worked in the program itself.<sup>16</sup> The petitioners brought a special proceeding in the nature of mandamus under CPLR article 78<sup>17</sup> to compel BOCES and the two districts to comply with the requirements of section 3014-b, and specifically to "reinstate" the petitioners as full time teachers in the two districts.<sup>18</sup> The Supreme Court, Special Term, found that a takeover had occurred within the meaning of the stat-

---

1950(4)(d) (McKinney Supp. 1982-1983). After its plan has been approved by the Commissioner, BOCES must apprise the component districts of the available services by March 15th. *Id.* § 1950(4)(d). Each district then must specify the programs in which it intends to participate by April 1st. *Id.*

<sup>10</sup> 89 App. Div. 2d at 331, 455 N.Y.S.2d at 277.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* Section 3012 of the Education Law provides that teachers be appointed for a probationary period of 3 years, during which their services may be terminated at any time. N.Y. EDUC. LAW § 3012(1)(a) (McKinney 1981).

<sup>14</sup> 89 App. Div. 2d at 331, 455 N.Y.S.2d at 277.

<sup>15</sup> The general special education tenure area is one of 30 special subject tenure areas established by the Board of Regents. [1981] 8 N.Y.C.R.R. § 30.8. It includes the "education of emotionally disturbed children . . . ; multiply handicapped children; and children with specifically defined learning disabilities." *Id.* § 30.8(7). In addition, the regulations also create an elementary tenure area; a middle grades tenure area for schools which do not have departmentalized instruction in grades seven and eight; and five academic tenure areas for teachers who instruct students at the seventh grade level or above in English, social studies, mathematics, science and foreign languages. *Id.* §§ 30.4-7.

<sup>16</sup> 89 App. Div. 2d at 331, 455 N.Y.S.2d at 277. Two of the petitioners were employed at the Cerebral Palsy School, while the other two were employed in the Transitional Program and the Primary Program. *Id.* at 331-32, 455 N.Y.S.2d at 277.

<sup>17</sup> An article 78 proceeding is available to parties seeking to challenge the actions of an administrative agency. See CPLR 7801 (1981). This judicial proceeding replaces the three common-law writs of certiorari to review, mandamus, and prohibition. SIEGEL § 557, at 774 (1978). Proceedings in the nature of mandamus are appropriate to compel the performance of a duty only when the right to performance is absolute. *Id.* § 558, at 776.

<sup>18</sup> 89 App. Div. 2d at 332, 455 N.Y.S.2d at 277.

ute and that the newly created positions should be offered to the petitioners, the four most senior BOCES teachers within the tenure area, who were excessed because of the takeovers.<sup>19</sup>

On appeal, the school districts argued that no takeover had occurred within the meaning of the statute,<sup>20</sup> and asserted alternatively that the statute conferred no rights on the petitioners because they were not employed in the particular program which was taken over.<sup>21</sup> Commenting that the statute was intended to protect BOCES teachers whose positions are affected by a takeover, Presiding Justice Mollen, writing for a unanimous court,<sup>22</sup> found the school districts' position to be inconsistent with the underlying purpose of the legislation.<sup>23</sup> Thus, the court held that the petitioners were within the class of teachers protected by the statute, a result it deemed consistent with the "overall statutory aim of providing job protection to teachers who have given years of satisfactory service."<sup>24</sup> The court observed that section 2510 of the Education Law requires that when a position within a tenure area is abolished, the least senior teacher within that tenure area must be dismissed.<sup>25</sup> Since teachers in a given tenure area serve in many

---

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 334, 455 N.Y.S.2d at 279. The threshold issue of whether there actually has been a takeover must be answered affirmatively for section 3014-b to apply. *See* N.Y. EDUC. LAW § 3014-b (McKinney 1981). In both the trial and the appellate courts, respondent school districts argued that there had been no takeover, since BOCES continued to operate an itinerant teaching program despite the districts' withdrawal. 89 App. Div. 2d at 334, 455 N.Y.S.2d at 279. The appellate division rejected this argument, reasoning that such a view would undermine the purpose of section 3014-b "except in the relatively rare circumstances in which districts utilizing a particular BOCES program simultaneously decide to withdraw all their students therefrom." *Id.* at 334-35, 455 N.Y.S.2d at 279. The court found that such a narrow construction of the statute would conflict with the interpretation of the commissioner of education in *In re Owlett*, 16 N.Y. Dep't Ed. R. 317, 318 (1977), *see supra* note 6 and accompanying text, and would thus violate the principle that the Commissioner's view should be accepted unless it is irrational, *see Lombardi v. Nyquist*, 63 App. Div. 2d 1058, 1059, 406 N.Y.S.2d 148, 149 (3d Dep't 1978).

<sup>21</sup> 89 App. Div. 2d at 335, 455 N.Y.S.2d at 279. The statute's provisions are triggered when a district "takes over the operation of a program formerly provided by [BOCES] . . ." N.Y. EDUC. LAW § 3014-b (McKinney 1981). The rights afforded by the statute are granted only to "teacher[s] employed in such a program." *Id.*

<sup>22</sup> Justices Thompson, Bracken, and Brown concurred in the opinion by Presiding Justice Mollen.

<sup>23</sup> 89 App. Div. 2d at 335-36, 455 N.Y.S.2d at 279-80.

<sup>24</sup> *Id.* at 336, 455 N.Y.S.2d at 280.

<sup>25</sup> *Id.* at 336, 455 N.Y.S.2d at 279-80. Section 2510 of the New York Education Law prohibits the discharge of a tenured teacher whose position is eliminated, unless no vacancy or position filled by a teacher with less seniority exists within his tenure area. N.Y. EDUC. LAW § 2510(2) (McKinney 1981); *see Silver v. Board of Educ.*, 46 App. Div. 2d 427, 431, 362

different programs,<sup>26</sup> the court reasoned that it must be expected that a takeover will affect teachers in programs other than the one taken over.<sup>27</sup> The appellate division concluded that if the statutory purpose was to protect teachers affected by a takeover, and if teachers in other programs may foreseeably be affected through other statutory provisions, then it would undermine the purpose of section 3014-b if the statute were not construed to protect teachers employed in other programs as well.<sup>28</sup>

It is submitted that the *Acinapuro* court correctly found that there had been a takeover of a BOCES program by the school districts. Nonetheless, it is contended that petitioners were not among the class of teachers whose rights are safeguarded by the statute. Thus, the *Acinapuro* court's reasoning that they were entitled to the positions errs in two respects. First, the original purpose of the statute was not to protect the rights of BOCES teachers whose positions are merely "affected by a takeover," as the court states,<sup>29</sup> but rather to protect BOCES teachers "when the particular program in which such teachers render service is taken over."<sup>30</sup> This

---

N.Y.S.2d 638, 642 (4th Dep't 1975). A teacher excessed in accordance with section 2510 is placed on a "preferred eligible list" from which vacancies in similar positions that occur within 7 years of his termination must be filled. N.Y. EDUC. LAW § 2510(3) (McKinney 1981 & Supp. 1982-1983). New York courts have stated that the purpose of this statute is "[t]o prevent the use of favoritism and personal preference in the retention of teachers," 46 App. Div. 2d at 431, 362 N.Y.S.2d at 643, and "to prevent a school board from abolishing a position as a method for disposing of unwanted tenured personnel," *Weimer v. Board of Educ.*, 99 Misc. 2d 47, 56, 415 N.Y.S.2d 318, 324 (Sup. Ct. Suffolk County 1978), *rev'd on other grounds*, 74 App. Div. 2d 574, 424 N.Y.S.2d 475 (2d Dep't 1980); *see supra* note 3. The rules applying to the elimination of a position in accordance with section 2510 are set forth in [1981] 8 N.Y.C.R.R. § 30.13.

<sup>26</sup> *See* [1981] 8 N.Y.C.R.R. § 30.8; *supra* note 16. For example, only one academic tenure area exists in mathematics for grades seven and above. *See* [1981] 8 N.Y.C.R.R. § 30.8; *supra* note 15. Thus, instructional programs ranging from remedial mathematics to algebra, geometry and calculus all fall within the same tenure area. Similarly, the single tenure area of general special education incorporates programs for the teaching of emotionally disturbed, mentally retarded, physically handicapped and multiply handicapped children, as well as those for children with specific learning disabilities. In *Acinapuro*, all of the petitioners were employed within the same tenure area despite their diverse employment backgrounds. *See* 89 App. Div. 2d at 331-32, 445 N.Y.S.2d at 277; *supra* note 16.

<sup>27</sup> 89 App. Div. 2d at 336, 455 N.Y.S.2d at 280.

<sup>28</sup> *See id.*

<sup>29</sup> *Id.* at 335-36, 455 N.Y.S.2d at 279.

<sup>30</sup> *Stavisky Memorandum, supra* note 4, at 158. The legislative history of section 3014-b reveals the true scope of the act: "This bill protects the tenure and other rights of teachers earned through employment by a [BOCES] when the particular program in which such teachers render service is taken over by a school district." *Id.* The statute identifies the protected class as "each teacher employed in such a program by such a [BOCES] at the

legislative goal can be realized if the statute is construed to benefit only the limited class of teachers employed in the target program, an interpretation which would be consistent with the narrow construction of the statute that the court is obliged to follow.<sup>31</sup>

Second, it is submitted that the court erred in failing to distinguish the takeover of a program from the abolition of a position. The court correctly noted that the termination of a position triggers section 2510 of the Educational Law, placing the loss of employment upon the least senior teacher within the tenure area of the eliminated position.<sup>32</sup> It is suggested, however, that the court

---

time of such takeover. . . ." N.Y. Educ. Law § 3014-b(1) (McKinney 1981). The holding of the appellate division, in effect, construed the word "program" to mean "tenure area," so that the protection of the statute extends to all teachers within the tenure area of the program being taken over. This sharply contrasts with the intent of the New York State Teachers' Association to protect teachers who lose tenure and other employment benefits due to a BOCES takeover of their program, even though they continue to teach the same children in the same building. See *NYSTA Memorandum, supra* note 4, at 113. Had it been the intent of the legislature to make tenure area, rather than employment in the particular program, the criterion for conferring the benefits of section 3014-b, it would not have been difficult for the legislature to phrase the statute in such a manner. Section 2510, enacted more than 20 years prior to section 3014-b, makes tenure area the criterion for determining which teacher is discharged when a position is abolished. Ch. 762, [1950] N.Y. Laws 2023, (codified at N.Y. Educ. Law § 2510 (McKinney 1981 & Supp. 1981-1982)).

While it is true that the commissioner of education has expanded the class of teachers protected by the statute, see *supra* note 6, and that the commissioner's construction of the statute must be upheld, *Lombardi v. Nyquist*, 63 App. Div. 2d at 1059, 406 N.Y.S. 2d at 149, it is suggested that the commissioner's expansion of the statute's original scope does not warrant further expansion by the judiciary.

<sup>31</sup> See 89 App. Div. 2d at 335, 455 N.Y.S.2d at 279. It is well established that tenure statutes must be strictly construed. *LaBarr v. Board of Educ.*, 425 F. Supp. 219, 223 (E.D.N.Y. 1977) (tenure laws, being "in derogation of common law freedom to contract," are strictly construed); see *O'Connor v. Emerson*, 196 App. Div. 807, 813, 188 N.Y.S. 236, 241 (4th Dep't), *aff'd*, 232 N.Y. 561, 134 N.E. 572 (1921). While the *Acinapuro* court refused to adopt a literal interpretation of section 3014-b, the Court of Appeals has demonstrated a willingness to construe section 2510 strictly. In *Chauvel v. Nyquist*, 43 N.Y.2d 48, 371 N.E.2d 473, 400 N.Y.S.2d 753 (1977), the Court held that seniority within the tenure area, the criterion established in subdivision 2 of section 2510 for dismissing a teacher upon abolition of a position, is not interchangeable with the criterion provided in subdivision 3 of the same section for rehiring a teacher after such a dismissal, namely, the similarity of the new position to that formerly held by the tenured teacher. *Id.* at 52-53, 371 N.E.2d at 475, 400 N.Y.S.2d at 755. The statute expressly provides that upon elimination of a position, "the services of the teacher having the least seniority in the system within the tenure [area] of the position abolished shall be discontinued," N.Y. Educ. Law § 2510(2) (McKinney 1981). The fact that a newly created position is in the same tenure area as the one formerly held by the dismissed teacher does not entitle him or her to the new position. Instead, for the purpose of the teacher's "recall rights," the similarity of the two positions, not the tenure area, governs. 43 N.Y.2d at 53, 371 N.E.2d at 475, 400 N.Y.S.2d at 755; see also *Ward v. Nyquist*, 43 N.Y.2d 57, 57, 371 N.E.2d 477, 477, 400 N.Y.S.2d 757, 757 (1977).

<sup>32</sup> 89 App. Div. 2d at 336, 455 N.Y.S.2d at 279-80; see *supra* note 25. The tenure area

acted incorrectly in applying this statute to a takeover situation. A takeover of a program "is not a true abolishment of position."<sup>33</sup> Indeed, the enactment of the takeover statutes after section 2510 had been in effect for over 20 years suggests that the legislature was dissatisfied with the application of section 2510 to takeover situations.<sup>34</sup> Thus, it is submitted that the court's reliance on section 2510 in broadening the scope of section 3014-b was misplaced.

Perhaps the most problematical aspect of the *Acinapuro* decision is its potential ramifications on school districts participating in BOCES programs. Even if narrowly construed, section 3014-b clearly interferes with the school district's ability to select its own employees.<sup>35</sup> As the class of teachers to which the statute grants

---

concept is critical to the application of section 2510, since it delineates the group of teachers who are candidates for dismissal and provides the procedure for selection of teachers to be dismissed from within the identified group. See Note, *New York's Teacher Tenure Area—A Blackboard Jungle*, 44 BROOKLYN L. REV. 409, 411-12 (1978). In *Steele v. Board of Educ.*, 40 N.Y.2d 456, 354 N.E.2d 807, 387 N.Y.S.2d 68 (1976), the majority construed the phrase "least seniority in the system within the tenure of the position abolished" to mean that only seniority earned within the tenure area may properly be considered. *Id.* at 465-66, 354 N.E.2d at 811-12, 387 N.Y.S.2d at 72. This limited interpretation was adopted despite the vigorous dissent of Judge Fuchsberg, who argued that the phrase was intended to mean seniority within the school system. *Id.* at 469, 354 N.E.2d at 815, 387 N.Y.S.2d at 74 (Fuchsberg, J., concurring in part and dissenting in part).

<sup>33</sup> *NYSTA Memorandum*, *supra* note 4, at 113. It seems appropriate to consider a takeover not as eliminating a position, but rather as transferring a position from BOCES to a school district or vice versa. See *id.* The fiction of continuity of the position thus makes possible the teacher's retention of tenure and other rights upon the substitution of one employer for another.

<sup>34</sup> The legislature may have viewed the takeover statutes as a means of remedying a deficiency in subdivision 1 of section 2510. This provision requires that when a board of education abolishes a position and creates another with similar duties, it must appoint to that new position the teacher whose position was abolished. N.Y. EDUC. LAW § 2510(1) (McKinney 1981). A narrow reading of the statute suggests that it applies only to situations where the board both abolishes the old position and creates the new one. Without the takeover statutes, it therefore might have been possible to escape application of the provision if the board, instead of creating a new position within the district, contracted with BOCES to provide the same services. It is suggested that the legislature enacted the takeover statutes to avoid such a discharge in circumvention of section 2510 since, under section 3014-a, such a teacher would be deemed an employee of BOCES. See N.Y. EDUC. LAW § 3014-a (McKinney 1981).

<sup>35</sup> An examination of a district that participates in a BOCES program for 1 year and then withdraws because of dissatisfaction with BOCES services illustrates the difficulties encountered even under a narrow construction of section 3014-b. If that district creates a new position to provide the same services, section 3014-b would seem to require it to accept the undesired BOCES instructor as its employee, with the same tenure status and other rights he enjoyed with BOCES. See N.Y. EDUC. LAW § 3014-b (McKinney 1981); *supra* note 4. If the teacher had been appointed on tenure by BOCES, he could then only be dismissed by the district for one of the causes stated in the statute. See N.Y. EDUC. LAW § 3012(2)

rights expands from the teachers serving the particular district effecting the takeover, to teachers serving other districts through the same BOCES program,<sup>36</sup> and finally to BOCES teachers serving other districts in different programs,<sup>37</sup> it is suggested that the relationship between the protected teachers and the school district becomes correspondingly more remote and legislative intervention is thus less warranted. Since the statute unduly encroaches upon a school district's ability to select and grant tenure to its own personnel,<sup>38</sup> alternative means of protecting BOCES teachers should be considered.<sup>39</sup> While statutory reform is properly left to the leg-

---

(McKinney 1981). If, however, the district initially had created a position and hired a new teacher, it would have had the statutory 3-year probationary period in which to evaluate the teacher's performance and to determine whether or not to grant tenure, while retaining the right to dismiss him at any time during that period. N.Y. EDUC. LAW § 3012(1)(a) (McKinney 1981).

Some commentators have suggested that additional emphasis be placed on allowing boards of education greater flexibility to address the problems of increasing costs and declining enrollment. See, e.g., Comment, *Improving New York State Public Schools: Will Proposals to License Teachers Eliminate Incompetence?*, 29 BUFFALO L. REV. 371, 371-72 (1980) ("the problems of our public schools will not be resolved as long as outdated education laws limit the discretion of school boards and protect the incompetent or unneeded teacher") (footnotes omitted); Note, *supra* note 32, at 427. The Court of Appeals also has recognized problems in the tenure statutes and has urged the legislature to review the current Education Law. See, e.g., *Amos v. Board of Educ.*, 43 N.Y.2d 706, 706-07, 372 N.E.2d 41, 41-42, 401 N.Y.S.2d 207, 207-08 (1977).

<sup>36</sup> See *In re Owlett*, 16 N.Y. Dep't Ed. R. 317, 319 (1977).

<sup>37</sup> 89 App. Div. 2d at 336, 455 N.Y.S.2d at 280.

<sup>38</sup> The cases identify two ways for a teacher to acquire tenure in a school district: by direct award of the board of education on the recommendation of the superintendent of schools pursuant to section 3012 of the Education Law, and by estoppel through acquiescence of the school district in permitting the teacher to continue teaching beyond the expiration of his probationary period. *LaBarr v. Board of Educ.*, 425 F. Supp. 219, 222-23 (E.D.N.Y. 1977); *Matthews v. Nyquist*, 67 App. Div. 2d 790, 791, 412 N.Y.S.2d 501, 502-03 (3d Dep't 1979); *Marcus v. Board of Educ.*, 64 App. Div. 2d 475, 477, 410 N.Y.S.2d 178, 180 (3d Dep't 1978). In effect, the takeover statute creates a third way in which a teacher may acquire tenure—by requiring a school district to recognize the tenure already awarded that teacher by BOCES. Arguably, this directly conflicts with the exclusive power of the board of education to grant tenure. See, e.g., *Morris Cent. School Dist. Bd. of Educ. v. Morris Educ. Ass'n*, 54 App. Div. 2d 1044, 1046, 388 N.Y.S.2d 371, 373 (3d Dep't 1976) ("since questions of tenure . . . are solely within the province of the school board . . . it would be beyond the powers of the public employer to contract to the contrary") (citations omitted); *Central School Dist. No. 2 v. Livingston Manor Teachers Ass'n*, 44 App. Div. 2d 876, 877, 355 N.Y.S.2d 834, 836 (3d Dep't 1974) ("power to grant tenure is vested exclusively in the Board of Education"), *aff'd*, 36 N.Y.2d 988, 337 N.E.2d 120, 374 N.Y.S.2d 605 (1975).

<sup>39</sup> It is suggested that the legislature, in enacting section 3014-b, may have been unduly influenced by the apparent symmetry between a BOCES takeover of a school district program and a district takeover of a BOCES program. As a result, the lawmakers failed to account for some significant differences between these two situations. Perhaps the greatest difference lies in the fact that itinerant teaching programs, such as those in *Acinapuro*,

islature, it is suggested that the adoption of a strict construction of section 3014-b by the courts may minimize the problems the statute has created.

*Lorraine Novinski*

### REAL PROPERTY LAW

#### *Real Prop. Law § 235-b: Implied warranty of habitability held applicable to New York City-owned residential property*

Section 235-b of the Real Property Law provides that every residential lease contains an implied warranty that the leased premises are fit for human habitation.<sup>40</sup> For more than a decade,

---

involve pupils who remain enrolled in the school district, both before and after any takeover. While both BOCES and the district are interested in protecting the rights of teachers, the district has the additional responsibility of protecting the best interests of the children. See N.Y. EDUC. LAW § 1709 (McKinney 1969 & Supp. 1982-1983). Moreover, while BOCE'S obligations in regard to the participating district are limited to those imposed by contract, see 89 App. Div. 2d at 276, 455 N.Y.S.2d at 330, the school districts have a statutory duty to insure that instruction is given by competent teachers, see N.Y. EDUC. LAW § 3204 (McKinney 1981). In view of this important difference, there appears to be significant justification for requiring BOCES to accept a district's decision to award tenure to its teachers while not requiring the district to accept BOCE'S tenure determinations. It is therefore suggested that the legislature's intention to afford teachers identical rights in the two takeover situations, see *Stavisky Memorandum, supra* note 4, at 158, may have been ill-advised.

<sup>40</sup> Section 235-b of the Real Property Law provides:

1. In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties.

2. Any agreement by a lessee or tenant of a dwelling waiving or modifying his rights as set forth in this section shall be void as contrary to public policy.

N.Y. REAL PROP. LAW § 235-b (McKinney Supp. 1982-1983).

Under traditional concepts of real property law, a lease was regarded as a conveyance of real property for a specified term. *Park West Management Corp. v. Mitchell*, 47 N.Y.2d 316, 322, 391 N.E.2d 1288, 1291, 418 N.Y.S.2d 310, 313, cert. denied, 444 U.S. 992 (1979); 2 R. POWELL, REAL PROPERTY ¶ 221[1], at 179 (P. Rohan ed. 1977); Note, *Recovery Under the Implied Warranty of Habitability*, 10 FORDHAM URB. L.J. 285, 286 (1982); see, e.g., *Fowler v. Bott*, 6 Mass. 62, 67 (1809). The lessor was obligated by law only to deliver possession of the premises and to provide for continued quiet enjoyment by the lessee. *Park West*, 47 N.Y.2d at 322, 391 N.E.2d at 1291, 418 N.Y.S.2d at 313; Note, *supra*, at 286. Absent an express provision to the contrary, the landlord was under no duty to maintain the premises