NEW YORK STATE EDUCATION DEPARTMENT
COMMISSIONER OF EDUCATION

In the Matter of

The request for resolution filed pursuant to section 100.19(g)(5)(iii)(d) of the Commissioner's regulations.

BUFFALO PUBLIC SCHOOLS.
-submitting party

- AND -

BUFFALO TEACHERS FEDERATION, INC.
-responding party

MEMORANDUM OF LAW FILED ON BEHALF OF THE RESPONDING PARTY BUFFALO TEACHERS FEDERATION, INC. RESPONDING TO A REQUEST FOR RESOLUTION OF DISPUTES REGARDING RECEIVERSHIP AGREEMENTS

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ORAL ARGUMENT REQUESTED

BUFFALO PUBLIC SCHOOLS,
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- AND -

BUFFALO TEACHERS FEDERATION, INC.
-responding party

PRELIMINARY STATEMENT

The Buffalo Teachers Federation, Inc. ("BTF") submits this memorandum of law, along with the accompanying affidavit and declarations as its responding papers, responding to the request for resolution filed by Buffalo Public Schools' ("District") with the Commissioner on October 28, 2015 pursuant to section 100.19(g)(5)(iii)(d) of the Commissioner's regulations. The district requests that the Commissioner resolve outstanding issues in connection with bargaining for a receivership agreement. The district's request for resolution, however, fails to comply with the applicable regulations. It does not comply with the applicable regulations because it does not provide sufficient rationales for the district's proposals and because the district has not bargained in good faith. Accordingly, the Commissioner should deny the request for resolution. Should the Commissioner, nonetheless, consider the request for resolution, the Commissioner should direct the district to accept the proposals made by the BTF.

STATEMENT OF FACTS

In his October 28, 2015 letter making declarations supporting the district's request for review, the district's superintendent, Dr. Kriner Cash, states, among other things, that "While I would have preferred to have resolved these proposals at the bargaining table, it is clear that the parties were unable to reach agreement on these issues within the timelines established by law." As set forth in the accompanying declarations, in the request for resolution, the Superintendent states; "an extension of time has not been agreed to by the parties" and "the parties were unable to reach agreement on these issues within the timelines established by law". But it is the Superintendent/District that has not agreed to an extension of time not the BTF (**Attachment B**).

Negotiations were proceeding and making progress. The changes from the Superintendent/District initial proposal (**Attachment C**) and their most recent proposal (**Attachment D**) reflect some of the progress made. On October 14, 2015, in order to clarify District's proposals and facilitate negotiations, the BTF submitted written requests for information (**Attachment E**). On October 22, 2015, the BTF sought further clarification to Darren Browns' response to our October 14, 2015 request for clarification of District proposals (**Attachments F, G**). On October 19, 2015, the BTF submitted proposals relating to District proposals 4, 6 & 8 (**Attachment H**). On October 22, 2015, the BTF submitted a proposal relating to District proposal 10 (**Attachment I**). On October 22, 2015, the BTF addressed all of the Districts proposals (**Attachment J**). On October 23, 2015, the BTF provided the Superintendent/District with its proposals for inclusion in a Receivership agreement. Said proposals would increase student success and achievement (**Attachment K**).

The Superintendent/District has not complied with (100.19 (5) d (2) ii). For example, the Superintendent/District has not provided an explanation of the rationale for the proposed contract language. Instead, the following is stated (**Attachment A**):

Bullet 1 - "In order to ensure that each after school, recreational or part time vacancy at the persistently struggling schools are filled with the most qualified teacher,"

Bullet 2 - "In order to ensure that each teaching vacancy at the persistently struggling schools is filled with the most qualified teacher,"

Bullet 3 - "In order to ensure that effective and highly effective teachers at the persistently struggling schools continue to teach at those schools,"

Bullet 4 - "In order to ensure that that the administration at the persistently struggling schools have ample opportunity to communicate with the faculty as a while,

Bullet 5 - "In an effort to ensure that the persistently struggling schools are stuffed with the most qualified teachers to meet the needs of the studentsion those buildings,"

Bullet 6 - "In an effort to increase student exposure to enriched curriculum, provide additional opportunities to increase student achievement, and to increase targeted professional development opportunities for each teacher,"

Bullet 7 - "In an effort to ensure that the starting and ending times of the school day are at times that contribute to increased student achievement,"

Bullet 8 - "In an effort to ensure that the teachers at the persistently struggling school are using all of the technological tools available that will contribute to student achievement,"

Bullet 9 - "In order to ensure that teachers and administrators have maximum flexibility for common planning time,"

Bullet 10 - "In an effort to ensure that teachers attend and receive appropriate professional development,"

As is obvious from reading the bulleted items, the Superintendent/District has not described "how adoption of the proposed language would be consistent with collective bargaining principals, such as any applicable factors set forth in Civil Service Law section 209 (4) (c) (v)". (100.19 5 (iii) (d)(2)(ii).

Similarly, the Superintendent/District has not provided all the information requested in the BTF correspondence dated September 1, 2015 (**Attachment L**).

Ultimately, the District proposals are unmanageable and will not improve student learning and achievement but may well undermine it (**Attachment D**). The BTF addressed the District's 14 proposals as follows:

1. a. Currently, the CBA gives preference to the teachers at the school for whose students the programs are designed to ensure continuity of instruction, familiarity with the school programs, and knowledge of the needs of the students at that school. If there are insufficient applicants, the positions are available district wide.
   b. There is no maximum number, or specific qualifications for the committee members, e.g. you could have fifteen (15) Receiver members but one (1) teacher member.
   c. Principals already have the right to interview candidates. Teachers do not go to a school where the principal has indicated they are not wanted.
   d. There is no recourse for teachers who believe they have been treated unfairly or denied a position based upon favoritism.
2. See one (1) above.
3. Why would the District want to force a teacher to stay at a school from which they seek a transfer? Keeping an employee in a situation in which they are not happy undermines the teachers, excellent teacher morale and sense of being treated fairly that are critical to a positive teaching and learning environment.
4. a. There are already ten (10) faculty meetings per year with five (5) available for teacher professional development.
   b. If the school day is increased by a significant amount, after and additional hour, some teachers may not arrive at home until after 6 p.m.
   c. The District hourly rate of pay is not the proportionate a increase in salary that is required.
5. The BTF has made a proposal on this to address concerns (**Attachment H**).
6. a. Transferring a teacher "for any reason" is a violation of the intent of the laws and regulations. There are no restrictions, delineation of academic concerns or prevention from abuse and vindictiveness.
   Having the ability to transfer a building union delegate for "any reason" undermines the spirit and intent of all labor laws.
7. This proposal provides for the unacceptable unlimited extension of the school day or school year without a rationale for what the time will be used.

The BTF has made a proposal to address the concerns relating to this proposal (**Attachment H**).

8. Just changing the starting and ending times does nothing to improve the education of students.
9. The BTF has a proposal to address the concerns raised in this proposal. (**Attachment H**).
10. There is no delineation of how this would be accomplished not how exactly the CBA would be modified.
11. The BTF are assuming there is proportional compensation and not an hourly rate submitted a proposal addressing the concerns with this proposal (**Attachment I**).
12. Agree
13. Agree
14. Agree

With this response, the BTF requests that the Commissioner reject the District's request for a resolution for the reasons set forth in these declarations as well as in the accompanying affidavit and memorandum or law; or alternatively, the BTF requests that the Commissioner resolve the matter by directing the District to accept the BTF proposals, including its proposal negotiating class size (Attachment M and N), because doing so would clearly improve teaching and learning (**Attachment K**).

ARGUMENT

POINT I

THE COMMISSIONER CANNOT NULLIFY THE PARTIES' COLLECTIVE BARGAINING AGREEMENT

The right to bargain collectively is a strong and sweeping public policy of the state. (*City of Watertown v. New York State PERB*, 95 N.Y.2d 73, [2000]). And, here, the parties already have reached an agreement on many of the issues identified in section 211-f(8)(a) of the Education Law, that agreement being their existing collective bargaining agreement. Even when such agreements are expired, the terms and conditions of those collective bargaining agreements continue in effect by operation of law. (Civil Service Law 209-a.1(e)). Clearly, the Legislature, by enacting section 211-f of the

Education Law or otherwise, could not impair the parties' collective bargaining agreement. (*E.g., Ass'n of Surrogates v. State*, 79 N.Y.2d 39, ___ [1992]).) Likewise the Commissioner could not use §§211-f as a basis for nullifying or otherwise impairing the parties' Collective bargaining agreement. Accordingly, the terms of the parties' collective bargaining must, to use a metaphor, be the floor below which the Commissioner cannot go in terms of dispute resolution.

Similarly, the Legislature could not have intended to require the employee organization to bargain, so to speak, against itself. Such "bargaining" would occur where the public employer uses its "proposals" merely to identify which terms and conditions addressed by the collective bargaining agreement it wants to nullify and then submits those empty proposals for "dispute" resolution if the employee organization refuses to "agree" to them. Allowing an employer to do that would mean the employee organization's collective bargaining agreement was nullified and, thus, unconstitutionally impaired by section 211-f (*E.g., Ass'n of Surrogates v. State*, 79 N.Y.2d 39, [1992]).

Indeed, the matter at hand is based on a "request" to negotiate a receivership agreement to modify an existing collective bargaining agreement. (Education Law 211-f). The underlying agreement remains intact; section 211-f does not require the parties to change any particular provision of that agreement. In other words, the parties are not starting the negotiations from the proverbial blank slate; rather, the backdrop for any negotiations must be the existing collective bargaining agreement, which remains in effect, unless and until the parties themselves agree to modify it through good faith negotiations.

POINT II

THE DISTRICT'S SUBMISSION DOES NOT MEET THE REQUIREMENTS SET FORTH IN SECTION 100.19 OF THE COMMISSIONER'S REGULATIONS

Since the Legislature clearly intended that any receivership agreement negotiated have as its purpose to "maximize the rapid achievement of students," any proposals made in the context of negotiating a receivership agreement would need to be justified on that basis. The intent of the Legislature, surely, was that the parties sitting down together and negotiating in good faith, in accordance with the strong and sweeping policy of the state favoring collective bargaining, might identify modifications that could be made to the collective bargaining agreement that would result in "the maximiz[ation] of the rapid achievement of students." Such modifications, if any, might very well enhance, rather than diminish, the parties' collective bargaining agreement by, for example, providing teachers with additional resources to draw upon when providing instructional services to the students of the struggling schools, resources needed perhaps to counteract the pernicious effect of poverty, effects of poverty that are prevalent throughout the struggling and persistently struggling schools covered by 211-f. The Commissioner should be well aware of the effects of poverty, as she must use poverty as a factor to use when measuring student growth. (4 NYCR §§30-3.2(p); 30-3.2(v); 30-3.4(b)(1)(ii), 30-3.4(b)(2)(ii)). Obviously, diminishing the terms and conditions in a collective bargaining agreement, alone, does nothing to "maximize of the rapid achievement of students." No doubt, that is why the district provides almost no rationale for its proposals

Rather than being "an effort to maximize the rapid achievement of students" the district's proposals seem nothing but an effort to void certain provisions of the existing collective bargaining agreement giving complete discretion to the district receiver to

determine terms and conditions of employment in those matters subject to its proposals. Any lip service to wanting to staff schools with qualified and effective teachers seems to be pre-textual.

For example, the district's third and firth proposals concern transfers. The parties' collective bargaining agreement, however, addresses transfers in detail at Article XIV, an article generally allowing, among other things, teachers to request a transfer. .According to Article XIV, "in evaluating such request, it will be necessary to consider: (1) that a balanced staff be maintained at each school; (2) that the probationary teachers be expected to complete the probationary period in the school originally assigned, except where conditions seem to indicate that a transfer is desirable; (3) that the wishes of the individual teacher be honored whenever possible." Under Article XIV, among other things, teachers who request a transfer will have their names put on a list and the transfer itself will be implemented based on (1) the length of the teacher's teaching experience in the district and the date of the request of the transfer. And, generally, involuntary transfers according to Article XIV must be made based on seniority when a teacher's preference cannot be honored. Nothing, however, about these provisions of Article XIV is inconsistent with the goal of "maximizing the rapid achievement of students."

Yet, the district's proposal would give the receiver the discretion to deny voluntary transfers and the discretion to make involuntary transfers. And it makes the proposal without providing any explanation whatsoever as to why such proposal is needed "to maximize the rapid achievement of students," without any explanation of the rationale for the proposed contract language except to say that it wants to staff struggling schools with effective and qualified teachers, and without any explanation of how the

adoption of the proposed language would be consistent with collective bargaining principles. And, specifically, the district does not explain how giving full effect to Article XIV would be inconsistent with staffing schools with effective and qualified teachers.

Under the Current Regulations, in effect at the time the District's submission was filed, § 100.19(g)(5)(iii)(d)(2)(ii) provides:

> A request for resolution shall specifically describe the unresolved issues and the position of the submitting party on each unresolved issue, including the specific contract language recommended by the party for the receivership agreement and an explanation of the rationale for the proposed contract language and how adoption of the proposed language would be consistent with collective bargaining principles, such as any applicable factors set forth in Civil Service Law section 209(4)(c)(v).

Further, Education Law § 211-f(8)(a) and section 100.19(g)(5)(i) of the Commissioner's Regulations provide that the purpose of bargaining a receivership agreement is to "maximize the rapid achievement of students at the applicable school." It follows that the rationale for any proposed provision in a receivership agreement should be for the express purpose of "maximizing the rapid achievement of students" at that particular school.

The District's submission merely consists of a list of their bargaining proposals with brief, conclusory statements relating to the purpose of each proposal. It is nearly indistinguishable from a laundry list. The submission fails to state a rationale for the specific language proposed, and fails to identify how such language can maximize the rapid achievement of students. Most of the proposed language submitted by the District contains broad language that is not specific to any school identified as persistently

struggling. Rather, the proposed language would grant the receiver broad and exclusive power to implement any changes relating to subjects permitted to be addressed in a receivership agreement, *i.e.* the length of the school day, the length of the school year, and professional development for teachers and administrators. *See* 8 NYCRR § 100.19(g)(5)(i).

The District's submission also fails to identify how the proposed language would be consistent with "collective bargaining principles," and fails to identify any specific factors considered in proposing such language.

The deficiencies in the District's submission, and the clear lack of a specific direction for each persistently struggling school, are further evidence that the parties should continue bargaining to reach mutual agreement on a receivership agreement(s). Thus, the District's submission should be rejected in its entirety.

POINT III

THE DISTRICT HAS NOT BARGAINED IN GOOD FAITH

If the Commissioner is going to consider the district's request for resolution, according to section 211-f, she must use "standard collective bargaining principles." However, the term "standard collective bargaining principles" is not defined anywhere.

Nonetheless, one collective bargaining principle under the Taylor Law as well as the Education Law, is that the parties must bargain in good faith. Civ Serv Law 204(3); Ed Law 211-f(8)(b). Here, there is no evidence that district bargained in good faith. Another collective bargaining principle is the requirement to provide information. Hampton Bays Teachers Assn., 41 PERB ¶ 3008 (2008). Here, the district did not provide information. Accordingly, the district's request for resolution must be denied.

Education Law § 211-f(8)(b) and 8 NYCRR§ 100.19(g)(5)(iii) require bargaining for a receivership agreement to be conducted "in good faith." The New York State Public Employment Relations Board ("PERB") has explained that:

> "... the duty to negotiate in good faith means that both parties approach the negotiating table with a sincere desire to reach an agreement. Thus, essentially good faith is a matter of intention ... [I]t would seem clear, that where a public employer refuses to discuss proposals and rejects, out of hand, an employee organization's demands, this would not meet the requirements of good faith negotiations." *Town of Southampton*, 2 PERB ¶ 3011 (1969).

As PERB has further stated "parties are not required in meeting their duty to bargain in good faith to reach any specific concession, nor are they required to reach any particular agreement. It is well established, however, that a party's failure to make any concessions or to reach any agreements are factors that may properly be considered in assessing a party's good faith. A party negotiates in good faith only by actively participating in deliberations so as to indicate a present intent to find a basis for agreement. *Deposit Cent. Sch. Dist.*, 27 PERB ¶ 3020 (1994).

It has been held that where an employer freezes its position in a fixed take-it-or-leave it attitude, and its conduct reflects that it is just awaiting submission of the issue to interest arbitration, the employer has not engaged in good faith bargaining. *Incorporated Village of Lynbrook*, 10 PERB ¶ 3067 (1977). Likewise, it was held to be improper surface bargaining where an employer made a fixed demand, and thereafter insisted on it without any further movement and, to the contrary, the employer set a deadline for the union to agree. *Herman-Dekalb Cent. Sch. Dist.*, 12 PERB ¶ 4537 (1979).

In regard to the negotiations for a receivership agreement between the District and BTF, the District's submission to the Commissioner seeking unilateral implementation of its proposals without continued bargaining is strong evidence that the District did not bargain the receivership agreement in good faith. Throughout the course of bargaining in October 2015, each party submitted proposals. Following requests for clarification and responses to the District's numerous proposals, BTF submitted its proposals for inclusion in the receivership agreement on October 23, 2015. To date, the District has not responded to BTF's October 23, 2015 proposals, instead, the District made the submission to the Commissioner for "unresolved issues" on October 28, 2015 requesting that the Commissioner impose their proposals upon BTF and its members.

Moreover, by letter dated October 27, 2015, BTF asked the District to agree to an extension of time to continue bargaining the receivership agreement, as newly authorized by the Current Regulations. *See* 8 NYCRR § 100.19(g)(5)(iii)(b). In its October 28, 2015 submission to the Commissioner, the District states that "an extension of time has not been agreed to by the parties." This statement is disingenuous, as it is clear that only the District rejected an extension of time. Further, the District's refusal to agree to an extension of time expressly provided for by the Current Regulations, is evidence if bad faith.

It is clear that the purpose of submitting "unresolved issues" in bargaining a receivership agreement to the Commissioner is not to unilaterally impose one party's proposals. According to section K.4 of the New York State Education Department Office of Accountability's Frequently Asked Questions relating to section 100.19 of the Commissioner's Regulations, "the goal of the process is to secure agreement, not to

impose terms when the parties are close to agreement. Alternatively, the receiver could at any time withdraw the request for negotiations and then make a new request for negotiations, which would trigger a new 30 day period." In the spirit of collective bargaining and the desire for parties to reach mutual agreement, the District's submission should be rejected in its entirety.

CONCLUSION

For the reasons set forth above, the district's request for resolution should be denied.

Dated: October 30, 2015
Latham, New York

Respectfully submitted,

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