

President PHILIP RUMORE



June 5, 2015

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**MEMO TO:** All Buffalo Teachers

**FROM:** Philip Rumore, President, BTF

**RE:** Mayoral Control – A Violation of Law

The BTF and NYSUT have been working with State Legislators to prevent the passage of the Mayoral Control Legislation.

As you may have read for the last several weeks, the legislation will not be passed. We have had meetings and conversations with most of our local representatives to ensure the legislation doesn't pass.

We understand Assemblywoman Peoples-Stokes' desire to end the Board of Education's dysfunction brought about by just a few Board members. We agree with her that something needs to be done. We just do not agree with this method.

In an abundance of caution, we asked the NYSUT attorneys to determine the legality of said legislation.

In short, the legal opinion states:

“Were it to be enacted, the bill would be subject to legal challenge under the provisions in the New York Constitution regarding home rule and under the Municipal Home Rule Law.”

PR:su

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**MEMORANDUM**

*Via pdf E-Mail*

TO: Philip Rumore

FROM: Robert T. Reilly

*QAR 6/5/2015*

DATE: June 5, 2015

SUBJECT: **Buffalo Home Rule**  
**(New Matter No.: 17440A1415.540)**

This responds to your questions about the “city of Buffalo school district governance reform act” (A7680), the mayoral control bill for the City of Buffalo being sponsored in the Assembly by Crystal D. Peoples-Stokes from Assembly District 141.

QUESTION PRESENTED

Were the bill to be enacted, would it be subject to legal challenge?

SHORT ANSWER

Were it to be enacted, the bill would be subject to legal challenge, in that it may violate the home rule provisions in the New York Constitution and in the Municipal Home Rule Law.

## STATEMENT OF FACTS

### City Charter

According to the city charter for the City of Buffalo, "one member of the board of education of the city of Buffalo" is "to be elected" from each of the six city school subdistricts established by the charter. City Charter §1-5 (City School Subdistricts). In other words, the city charter contemplates an elected school board, with its members elected on a subdistrict, rather than an at large, basis.

### Assembly Bill A7680

The bill, however, would change the board of education from an elected board to an appointed commission. Under the terms of this bill, the board of education would become the "education commission," with nine members, all appointed by the mayor. They would need to be residents of the city, and, although the mayor would be encouraged to appoint one from each city district, they would not need to be appointed from any particular district. They would serve two year terms at the pleasure of the mayor. They could not hold or be a candidate for any other office or be an employee of the city. The board would need to hold at least one meeting a month. The board would advise the superintendent on matters of policy and would have no executive powers, except that it would have all the powers and obligations of board of education of common schools and it would be the employer. The board would have enumerated powers, those powers typically held by a school board, except, curiously, some powers typically held by a school board are given by the bill to the superintendent.

The mayor, according to the bill, also would appoint the superintendent. The superintendent would have enumerated powers, mostly the powers typically held by a superintendent, but some additional powers peculiar to this bill, powers that typically are held by the board of education.

For example, the bill gives the superintendent the power to get health insurance for the teachers, whereas the prior law and the laws applicable to other districts state that it is the board of education - in other words, the employer - that has the power to get health insurance for teachers. This is cause for concern because the BTF and the district have had a number of disputes about health insurance over the years, some of which are still pending.

Similarly, the bill would add a new Section 2591 to provide for a local maintenance of effort for local school funding, and although this simply restates current law, with the new language largely repeating what is already in Section 2576, in this bill it is the superintendent who prepares the itemized estimate of spending, whereas under current law the school board does this.

The bill specifies that, in addition to the superintendent and the school board, there would be an advisory council, whose members would be appointed by the superintendent. The council would have no executive powers, but it could review certain matters and provide input to the

superintendent. Presumably, this advisory council is to have some community involvement, possibly to balance the mayoral control, although the power would remain in the hands of the mayor's appointees.

The bill goes into detail about how the superintendent would be able to close schools and the process that would need to be followed in that event. The superintendent would need to develop a protocol that would need to be approved by the board of education. The superintendent would have the final say about which schools are closed, but no school could be closed until the protocol is followed and the public hearings that must be included in that protocol are held for the school at issue.

The bill provides that staff are appointed for a three year probationary period -- as opposed to the 4 year new probationary period set up in this year's budget.

The bill, for the most part, would sunset on July 31, 2017.

The bill is very similar to an earlier bill we reviewed, that being LBDC 10770-05-5. It looks like the current bill made nominal changes to section 2591-e(2)(y) changing "bi-annually" to "quarterly" and specifying why the information will be put on the website; and it added an entirely new section, section 2591-j regarding the "custody and disbursement of funds, essentially requiring all the money go to the city before it gets into the hands of the board of education.

### LEGAL AUTHORITY

#### Municipal Home Rule Law

Article 9 of the New York Constitution provides for home rule powers for local governments, and it includes a "bill of rights" for local government. N.Y. Const. Art. 9, §1. Section 2 of Article 9 sets forth the powers and duties of the Legislature with regard to local governments and sets forth the home rule powers of local governments. N.Y. Const. Art. 9, §2. In order to implement Article 9 of the Constitution, the Legislature enacted the Municipal Home Rule Law, allowing, among other things, local governments to pass local laws relating to their property, affairs or government as long as they are not inconsistent with the Constitution or the general laws of the State. *E.g., Baldwin Union Free Sch. Dist. v. County of Nassau*, 105 A.D.3d 113 (2<sup>nd</sup> Dept. 2013).

However, the mayor of a city, with the concurrence of the legislative body of that city, can request the Legislature to pass a specific bill relating to the property, affairs or government of that city upon the declaration of necessity for such bill, a declaration known in the vernacular as a "home rule message." MHRL §40; *Niagara Falls Urban Renewal Agency v. O'Hara*, 57 A.D.2d 471 (4th Dept. 1977). That section is based on section 2 of Article 9 of the New York Constitution, which states, in part, that the Legislature:

(b) Subject to the bill of rights of local governments and other applicable provisions of this constitution, the legislature:

\* \* \*

(2) Shall have the power to act in relation to the property, affairs or government of any local government only by general law, or by special law only (1) on request of two-thirds of the total membership of its legislative body or on request of its chief executive officer concurred in by a majority of such membership, or (b) . . . , on certificate of necessity from the governor reciting facts which in the judgment of the governor constitute an emergency requiring enactment of such law and, in such latter case, with the concurrence of two-thirds of the members elected to each house of the legislature.

Thus, in general, “a special law that relates to the property, affairs or government of a local municipality requires a home rule message.” *City of New York v. State*, 94 N.Y.2d 577, 589 (2000).

The reality and practice is not so simple, however, because “where State interests are involved ‘to a substantial degree, in depth or extent,’ the State may freely legislate without a home rule approval, notwithstanding the legislation’s impact on local concerns.” *City of New York v. State*, 94 N.Y.2d 577, 590 (2000). “However, the special law must bear a reasonable relationship to the legitimate, accompanying substantial State concern.” *City of New York v. State*, 94 N.Y.2d 577, 590 (2000). And, clearly, nothing would prevent the State from acting with regard to “matters other than the property, affairs or government of local government,” which, again, involve matters of substantial State concern. *Empire State Chapter of Associated Builders and Contractors, Inc. v. Smith*, 21 N.Y.3d 309, 317 (2013).

And although courts will look to see that there is a matter of substantial state concern when reviewing a law dealing with the property, affairs or government of a local government, that review is not particularly rigorous. For example, the court’s “review concerning what constitutes a substantial state interest is not dependent on what historically has been the domain of a given locality.” *Greater New York Taxi Ass’n v. State*, 21 N.Y.3d 289, 302 (2013). Rather, the court’s “determination is dependent on the ‘stated purpose and legislative history of the act in question.’” *Greater New York Taxi Ass’n v. State*, 21 N.Y.3d 289, 302 (2013).

In those cases where the Court of Appeals has found a special law to be unconstitutional, it did so, in part, “because the legislation failed to identify a substantial state interest and/or the legislative history did not support the State’s reason for enacting it.” *Greater New York Taxi Ass’n v. State*, 21 N.Y.3d 289, 302 (2013). Additionally, in order for a statute to be upheld as constitutional, an act must bear a reasonable relationship to State concerns. *Greater New York Taxi Ass’n v. State*, 21 N.Y.3d 289, 304 (2013).

## ANALYSIS

Under the bill the board members would only have two years terms, terms which may be the shortest of any district in the state. Typically, school board members hold office for three years (which is the current term length in Buffalo of the six (6) district representatives; the (3) three at-large representatives have five (5) year terms), but school board members in Syracuse and Rochester have longer terms, lasting four years, twice the length of the terms proposed for Buffalo.

### Municipal Home Rule Law

#### *City Council Concurrence with home rule message*

In general, in order for the Legislature to enact a special law regarding the property, affairs or government of the City of Buffalo, the mayor would need to send the Legislature a home rule message. The city council would need to "concur" with the mayor in any home rule message. N.Y. Const.Art. 9, sec 2(b)(2); MHRL §40; *Niagara Falls Urban Renewal Agency v. O'Hara*, 57 A.D.2d 471 (4th Dept. 1977). What such "concurrence" would look like the statute does not specify, but certainly passing a resolution would be one way to show it. In any event, there has been no home rule message at all, let alone one that with a concurrence by the city council. On this basis, a legal challenge could be brought were the bill to be enacted into law, unless a court found that there were substantial enough state interests involved that the Legislature could act without a home rule message.

#### *The need for a home rule message*

The State can act even in the absence of any home rule message from the mayor, whether the city council concurred with it or not, where there are substantial state interests involved, and the court looks at the legislative history to determine if such State interests exist. *Greater New York Taxi Ass'n v. State*, 21 N.Y.3d 289 (2013).

The sponsor's memo in support does not demonstrate any such substantial state interest. In fact, it does not address any state interest at all. In this light, the bill, lacking a home rule message, likely would violate the City's right to home rule.

#### *Standing to bring a claim*

Someone within the zone of interests sought to be protected by the statute upon which he relies would have standing. *Gizzo v. Town of Mamaroneck*, 36 A.D.3d 162, 167 (2<sup>nd</sup> Dept. 2006). In this case, an elector in the city, someone eligible to vote for a member of the school board, likely would have standing to assert a violation of home rule. See, *Gizzo v. Town of Mamaroneck*, 36 A.D.3d 162, 168 (2<sup>nd</sup> Dept. 2006)(petitioner was not an elector and thus was not within the zone of interest the statute sought to protect and therefore was without standing).

### CONCLUSION

Were it to be enacted, the bill would be subject to legal challenge under the provisions in the New York Constitution regarding home rule and under the Municipal Home Rule Law.

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