STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

BUFFALO TEACHERS FEDERATION, INC.,

Petitioner-Plaintiff,

For an Order and Judgment Pursuant to
CPLR Article 78

-against-

Index No.

MARYELLEN ELIA as Commissioner of the New York State Education Department, the NEW YORK STATE EDUCATION DEPARTMENT, the STATE OF NEW YORK, DR. KRINER CASH, as the Superintendent of the Buffalo Public Schools, the BOARD OF EDUCATION OF THE BUFFALO PUBLIC SCHOOLS, and the BUFFALO PUBLIC SCHOOLS, also known as the BUFFALO CITY SCHOOL DISTRICT,

Respondents-Defendants.

MEMORANDUM OF LAW ON BEHALF OF PETITIONER-PLAINTIFF IN SUPPORT OF ARTICLE 78 PETITION

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PRELIMINARY STATEMENT

The Buffalo Teachers Federation ("BTF") brings this hybrid Article 78 proceeding/declaratory judgment action seeking an order and judgment vacating and annulling the November 8, 2015 decision and order of the Commissioner of Education. The decision and order purportedly resolved alleged disputes between the BTF and Dr. Kriner Cash, the Superintendent of the Buffalo City School District, disputes allegedly arising during their negotiations for a so-called receivership agreement. Negotiations for such agreements were purportedly required by section 211-f of the Education Law, a new section added by the Legislature in April 2015. Without section 211-f, the BTF could not have been compelled to re-open its collective bargaining agreement for renegotiation except under very limited grounds allowed by the Taylor Law, grounds not present here.

However, with her decision and order – the very first of its kind -- the Commissioner re-wrote long standing terms of the BTF's collective bargaining agreement, unilaterally imposing entirely new terms and conditions of employment. The BTF submits that the Commissioner's unprecedented act of re-writing its collective bargaining agreement was arbitrary and capricious, was affected by errors of law, violated lawful procedures, and was *ultra vires* given that it exceeded her jurisdiction. Notwithstanding section 211-f, the Commissioner's decision was irrational, unreasonable and unlawful.

The BTF is entitled to Article 78 relief because: (A) the Commissioner's decision and order was *ultra vires*, applying to schools outside of her jurisdiction, schools other than the "persistently struggling" schools covered by section 211-f; (B) the Commissioner refused to consider whether the Superintendent bargained in good faith as

he was required to do under section 211-f ; (C) the Commissioner considered the Superintendent's submission even though it did not include all of the elements required by the applicable law and regulations for a proper submission; (D) the Commissioner refused to consider the BTF's proposal on class size, even though class size is expressly identified by section 211-f as a subject for bargaining; (E) the Commissioner deemed BTF's proposals to be untimely based on a time frame that was not evident and that could not have been known to the BTF prior to reading her decision and order; (F) the Commissioner failed to hold an adjudicatory hearing to develop the necessary factual record on which to base her decision and order; (G) the Commissioner did not make sufficient findings of fact to allow intelligent judicial review; (H) the Commissioner's actions showed the appearance of bias or demonstrated actual bias, and, in either event, she pre-judged the case having been personally involved in the matter; (I) the Commissioner refused to consider reasonable alternatives to her unreasonable order; (J) the Commissioner's decision and order overall was entirely unworkable in the context of the affected schools, the existing contract, and the applicable law. In sum, it was arbitrary and capricious.

The BTF also seeks declaratory relief because section 211-f on its face and as applied by the Commissioner violated the BTF's constitutional rights under the Contracts Clause and the Due Process Clauses of the New York and United States Constitutions.

STATEMENT OF FACTS

The Legislature Adds Section 211-f to the Education Law

In the underlying matter -- the first of its kind -- the Commissioner invoked the jurisdiction of an entirely new section of the Education Law: section 211-f. (Pet. ¶16; Ex.

"A", p. 1). In April, the Legislature enacted chapter 56 of the laws of 2015, adding section 211-f to the Education Law pertaining to school receivership. (Pet. ¶10; Ex. "A", p. 1). The Legislature intended section 211-f to increase student achievement, not nullify collective bargaining.

Under section 211-f, the Commissioner, among other things, must periodically identify certain schools as "persistently failing" or, more appropriately, "persistently struggling." (Education Law §211-f(1); 8 NYCRR §100.19 (b)(1)). She made her first designations in July. (Pet. ¶17). The designation of a school as "persistently struggling" purportedly triggered certain rights and obligations on the Superintendent and the BTF. (Education Law §211-f). One such obligation on the BTF was that, upon demand made by the Superintendent acting as receiver, it was to bargain a separate receivership agreement for each such school. (Education Law §211-f(8)). A so-called receivership agreement is an entirely new type of agreement, one created by section 211-f, a section that purportedly requires bargaining units to renegotiate their collective bargaining agreements in ways that would maximize rapid student achievement. (Education Law §211-f(8)). Again, the focus is on helping students, not hurting teachers; indeed, the interests of students and teachers are aligned in this regard.

The receivership agreement may address the length of the school day; the length of the school year; professional development for teachers and administrators; changes to the programs, assignments, and teaching conditions in the school in receivership; and class size. (Education Law §211-f(8)(a); 8 NYCRR §100.19 (g)(5)(i)).

Although section 211-f allows the receiver to request negotiations for a receivership agreement with the collective bargaining unit representing teachers, it does

not limit the collective bargaining unit from making proposals or counter-proposals in any resulting negotiations, with such bargaining unit proposals addressing any of the subjects the statute identifies for bargaining. (Education Law §211-f(8)). Section 211-f, therefor, anticipates that both parties to the agreement -- both the receiver and the bargaining unit representative -- would be able to make proposed changes to terms and conditions of employment, changes that could lead to rapidly improved student achievement, the express goal of section 211-f. (Education Law §211-f(8)). This makes sense. It makes sense because section 211-f anticipates that all professional educators, whether they are superintendents, administrators or teachers, would have worthwhile proposals about how to maximize the rapid achievement of students. (Education Law §211-f(8)(a)).

Similarly, the negotiation of receivership agreements takes place within the context of school receivership, a context where the receiver is informed not only through collective bargaining with the district's negotiating units, but also through continuous feedback from the school's community engagement team ("CET") and other local stakeholders. (Education Law §211-f). Ultimately, the receiver must develop a school intervention plan. (Education Law §211-f(2)(a)). But the receiver can develop that plan only after consulting the various local stakeholders, and the receiver must develop the plan in accordance with any applicable collective bargaining agreements. (Education Law §211-f(4); 8 NYCRR §100.19(f)(3)).

Section 211-f itself fits within the larger context of the Elementary and Secondary School Education Act of 1965 ("ESEA"), as amended, the overarching Federal legislation addressing education. (20 U.S.C.A. Chapter 70). Any analysis of section

211-f must use the ESEA for a backdrop. (*E.g.*, 8 NYCRR §100.19). In many respects, section 211-f and the ESEA are intertwined. (8 NYCRR §100.18(b)(29)). Under the ESEA, the designation of a school as a "priority" school is based on the level of student achievement and progress at the school, the school's graduation rate, and the school's eligibility for school improvement ("SIG") grants, eligibility based on the SIG plans they developed under the ESEA. (Reilly Aff. ¶12) With section 211-f, the State took the term "priority" school from the ESEA context and included it in its definition of struggling and persistently struggling schools, such that "state struggling" schools are federal "priority schools" with a new name. (Education Law §211-f(1)).

And, the Commissioner promulgated regulations in order to comply with the ESEA, recently amending them to include "struggling" and "persistently struggling" schools, the types of school expressly addressed by section 211-f. (8 NYCRR §100.18(b)(29)). Furthermore, in her decision and order, the Commissioner took note of whether the schools at issue had SIG plans, and she considered those SIG plans, plans developed under the ESEA, as the schools' provisionally approved intervention plans, plans the schools needed to have under section 211-f. (Pet. Ex. "A", pp. 8-9). In fact, if the schools had no such SIG plans or other approved intervention plans in place, they would not have been "eligible for the exercise of the powers of a superintendent receiver pursuant to Education Law §211-f(1)(c(i)." (Pet. Ex. "A", p. 9).

Notably, although the ESEA allows state or local education agencies to engage in certain "corrective actions," it does not allow such agencies to alter collective bargaining agreements. (20 U.S.C.A. §6316(d)). Both federal law and state regulation in this area,

while focusing on student improvement, recognize that collective bargaining rights are protected interests.

And, the application of section 211-f should be informed by the policy debate currently taking place across the country about education at both the federal and the state level. On December 10, 2015, President Barack Obama signed a reauthorization of the ESEA. (Reilly Aff. ¶13). Coincidentally, on that same day, the New York Common Core Task Force issued its final report to the Governor. (Reilly Aff. ¶14 and Ex. "H"). The Task Force's very first recommendation was to "adopt high quality New York education standards with input from local districts, educators and parents through an open and transparent process." (Reilly Aff. ¶15 and Ex. "H"). Clearly, the proposals of educators regarding education standards and student achievement are to be embraced, not ignored.

This discussion of the ESEA and the Task Force sheds light on how section 211-f as well as the receivership agreements and school intervention plans made under 211-f are to be applied to the specific schools at issue. Both the school intervention plans and the receivership agreements are best made on a school-by-school basis, not a district-wide basis. (Education Law §211-f(3)). Indeed, under section 211-f, they cannot be made on a district-wide basis. (*Id.*) Each plan should be adjusted for the needs of the specific school's community and be targeted to the students attending and the resources available to that particular school. (Education Law §211-f(3). That, no doubt, is why the requirements of section 211-f incorporate "community schools." (Education Law §211-f(7)(a)).

The Need for Community Schools

Section 211-f and its implementing regulations reference "community schools" as a means of addressing the challenges facing persistently struggling schools. (Education Law §211-f(7)(a)). Independent receivers must convert persistently struggling schools to community schools; superintendent receivers may do so. (Education Law §211-f(7)(a)); 8 NYCRR §100.19(d)(3), 100.19(f)(8)).

A community school is a school operating in partnership with one or more agencies with an integrated focus on rigorous academics and the fostering of a positive and supportive learning environment. (8 NYCRR §100.19(a)(8)). Such partnership should be able to offer a range of school-based and school-linked programs and services, each program and service designed to lead to improved student learning, stronger families, and healthier communities. (8 NYCRR §100.19(a)(8)). These would include programs addressing the social service, health, and mental health needs of students in the school and their families in order to, among other things, help students arrive and remain at school ready to learn. (8 NYCRR §100.19(a)(8)). Such programs should be tailored to the needs of the particular school at issue. (Education Law §211-f(7)). The community school requirement recognizes that students in struggling schools may not have access to such programs at home, necessitating the need for such programs at school. (Education Law §211-f(7); 8 NYCRR §100.19(a)(8)). The community school requirement recognizes that many persistently struggling schools will be found within impoverished urban districts.

Receivership Schools Are In Urban Impoverished Districts

With few exceptions, the persistently struggling schools identified by the Commissioner are in urban school districts with pockets of students living in severe poverty. (Pet. ¶35). Such students often do not have the necessary resources at home to be successful in school. This is true, for example, of many students in Buffalo. (Applebee Aff. ¶¶ 5-12).

On July 15, 2015, the Commissioner identified five Buffalo schools as persistently struggling: Buffalo Elementary School of Technology, Burgard Vocational High School, Marva J. Daniel Futures Prep School, South Park High School, and West Hertel Elementary School. (Pet. Ex. "A", p. 9). These schools are subject to the ESEA and receive Title I funds. (Pet. ¶24; *E.g.* 8 NYCRR 100.18(b)(29)). Each of those five schools enrolls a student body suffering from a high rate of poverty. (Applebee Aff. ¶12 and Exs. "A" through "E"). The vast majority of the teachers of the schools, however, are rated "effective" or "highly effective" under the Commissioner's own standards. (Applebee Aff. ¶¶13-14 and Exs. "A" through "E").

Although students suffering from the effects of poverty are disadvantaged, such students, in fact, can succeed, but in order for those students to succeed, the District must provide them with the appropriate expanded platform of services. (*Campaign for Fiscal Equity v. State of New York*, 187 Misc.2d 1, 51, 76, 114 (New York Co. 2001), *reversed*, 295 A.D.2d 1 (1st Dept. 2002), *modified*, 100 N.Y.2d 893 (2003)). Specifically, students in high poverty districts need an expanded platform of services for at risk students, services targeted to address their needs. (*Id.*) In other words, it is not enough for their teachers to be rated "effective" or even "highly effective." Rather, such expanded

platform of services should include a student and family support team, with such team including social workers, school nurses, guidance counselors, and parent and community liaison personnel – the services provided by community schools. (Education Law §211-f; 8 NYCRR §100.19(a)(8)). In addition, the expanded platform of services should include academic interventions for at-risk students. (*CFE*, 187 Misc.2d at 57, 76.) They may include smaller class sizes. (*Id.*).

While such expanded platform calls for extended learning time, it does not call for simply making the school day or school year longer or merely changing the starting and ending time of the school day; instead, it requires more time on task or, in other words, more instruction. (*CFE*, 187 Misc.2d at 76).

The Need for Additional State Aid

Many of the students who attend receivership schools are impoverished. (Pet. ¶37). The Buffalo Public School District itself is impoverished, having been chronically underfunded by the State. (*See* Applebee Aff. ¶¶15-27). Buffalo relies on State aid for approximately eighty-five percent (85%) of its school district budget, but the State has continually shorted the District promised State aid. (Applebee Aff. ¶15). For example, for the 2015-2016 school year alone, the District is owed approximately $100 million in State aid. (Applebee Aff. ¶20). All told, over the last several years the State has underfunded the District by more than one billion dollars. (Applebee Aff. ¶27).

It was against that backdrop of high rates of poverty, and the severe shortage of State aid that the negotiations of a receivership agreement between the Superintendent and the BTF began. (Pet. ¶44).

The Background in Buffalo

BTF and the District are parties to a collective bargaining agreement, a contract. (Rumore Aff. ¶4 and Ex. "A"). BTF and the District are presently in negotiations for a new contract, having held their most recent negotiating session on January 26, 2016. (Rumore Aff. ¶5). By letter dated August 27, 2015, the Superintendent demanded that BTF "modify the collective bargaining agreement between the parties" for District schools that had been labeled by the Commissioner as "persistently struggling." (Rumore Aff. ¶8 and Ex. "B").

The Receivership Negotiations

By memo dated September 1, 2015, BTF requested certain information from the Superintendent. (Rumore Aff. ¶9). BTF sought to know the specific schools where the Superintendent was seeking to have receivership agreements. (Rumore Aff. ¶9 and Ex. "C"). BTF intended to appoint teachers from those schools to serve on the negotiating teams for each of those schools. (Rumore Aff. ¶9). BTF also wanted to know what changes the District was seeking so that it could timely evaluate its own proposals. (Rumore Aff. ¶¶9-10). BTF further sought the recommendations developed by the community engagement team at each school. (*Id.*).

Under the new Education Law provisions, each struggling school was to develop a plan of action to improve. (Rumore Aff. ¶10). *Id.* The plans were to be developed by administrators, teachers and parents. (*Id.*). If a plan proposed something that could not be implemented because of a collective bargaining agreement, BTF wanted to consider that issue. (*Id.*). If the plan did not call for the changes that the District was going to be seeking, BTF would need to know the reason the District wanted that change. (*Id.*). The

claimed goal for this scheme is supposed to be to improve education for children, not to allow a public employer do an "end around" their collective bargaining obligations under the law. (*Id.*). As BTF wrote to the Commissioner at that time "we look forward to working with the District to develop plans that will improve student achievement." (*Id.*).

Under Article VII of the collective bargaining agreement, BTF had a specific contract right to the requested information. (Rumore Aff. ¶12). Furthermore, it is well established that under the Taylor Law a union also has a specific right to such information in negotiations so that it can intelligently negotiate. (*E.g.*, *Hampton Bays Teachers Assn.*, 41 PERB ¶3008, *aff'd*, 62 AD3d 1066 (2009) *lv. den.*, 13 NY3d 711 (2009). Not to provide information is bad faith bargaining, an improper practice under the Taylor Law. (*Id.*)

The applicable emergency regulations at that time specifically provided that such negotiations were to commence within thirty school days of the demand of the superintendent. (Reilly Aff. ¶6; Ex. "D"). There was correspondence between the parties on September 8, 2015, September 9, 2015, and September 25, 2015. (Rumore Aff. ¶15 and Exs. "E" through G"). In the Superintendent's September 25 correspondence, the Superintendent provided its receivership proposals but did not provide the other requested information. (*Id.*). The Superintendent also set a deadline of October 1, 2015, to "accept the proposals or to meet" or he "would move the process forward." (*Id.*).

On September 21, 2015, the Commissioner again adopted new emergency regulations, but now the requirement was that the parties were to complete negotiations within thirty school days of a demand to re-negotiate. (Reilly Aff. ¶7; Ex. "E"). BTF

tried to find out whether, if the demand to renegotiate was made before this new rule, as here, they were covered under the old rule, or whether the demand to re-negotiate should be considered to begin as of the date of the new rule. (Rumore Aff. ¶16). The Commissioner offered no guidance in this regard. *(Id.).*

On September 28, BTF re-inquired about the information it had demanded. (Rumore Aff. ¶17 and Ex. "H"). BTF again asked for the CET plans, saying "we are informed that the school based plans were just due at the District office on or about September 23, 2015." (*Id.*). Again, BTF re-iterated, "we look forward to working with the district to develop a consensus on what will improve student performance." *(Id.).* BTF sent further correspondence to the Superintendent on September 30, 2015, disputing his calculation of the deadline and again requesting the previously demanded information. *(Id.).*

BTF was not provided with information it requested until October 14, 2015, when it received some information about the CET plans. (Rumore Aff. ¶19 and Ex. "M"). It turned out that none of the proposals made by the Superintendent had been requested by any of the CET plans. *(Id.).*

The parties nonetheless thereafter met several times to negotiate, on October 13, 14, 19, and 22. (Rumore Aff. ¶18). BTF responded and sought clarification of the District's proposals. BTF wrote them for clarifications and questions on October 14 and 22, 2015. (Rumore Aff. ¶18 and Exs. "J" and "K"). BTF made counter proposals on October 19 and 22. (Rumore Aff. ¶18). On October 23, 2015, BTF submitted its own proposals. (Rumore Aff. ¶18 and Ex. "L").

On October 27, 2015, one day before the Superintendent's submission to the Commissioner, the Commissioner once again changed the time periods through adoption of yet another set of emergency regulations. (Reilly Aff. ¶8 and Ex. "F"). This time, the bargaining process was supposed to be completed within thirty calendar days of the demand to re-negotiate. (*Id.*; Rumore Aff. ¶20). Depending on how one computed the time with these shifting rules, the parties still had time or were retroactively late. (Rumore Aff. ¶20).

As negotiations were proceeding and the parties seemed to be making progress, BTF asked the Superintendent on October 27, 2015, if he would agree to an extension of time to negotiate, as permitted by the latest emergency regulations. (Rumore Aff. ¶21 and Ex. "N"). The Superintendent ignored the BTF's request, submitting his application for the Commissioner to rule on the matter on October 28, 2015. (Rumore Aff. ¶22).

The Commissioner's Prior Involvement

On July 17, 2015, just two days after issuing her list of struggling and persistently struggling schools, the Commissioner and the Assistant Commissioner, Ira Schwartz, met with Buffalo's Board of Education. (Rumore Aff. ¶¶23-24 and Ex. "O"). During the meeting, the Commissioner and Assistant Commissioner discussed the process for negotiating receivership agreements and how the Commissioner would address any submission for dispute resolution made by the Superintendent. (Rumore Aff. ¶¶24-26 and Ex. "O").

The Commissioner told the Board there were only 17 school districts in the state having any schools on the list, and Buffalo was one of only a few that had several schools on the list. (Rumore Aff. ¶26 and Ex. "O"). "So," she said, "your request would be fast-

tracked into my office and I would review it, talk to you, see what had been done, and make a decision." *(Id.)*.

The Commissioner also said Buffalo should be "impatient" and move quickly, because "this is an important opportunity for the Superintendent to take the reins of this and to move forward to support schools and if necessary change some of the things that are in place." (Rumore Aff. ¶24 and Ex. "O"). When a Board member asked the Commissioner what good faith bargaining meant, Assistance Commissioner Schwartz avoided the question, saying simply that the "statute says that if the issue comes to the Commissioner for a resolution, she must make a determination within five business days." (Rumore Aff. ¶25 and Ex. "O"). When asked by a Board member whether the District could supersede good faith bargaining with the BTF, the Commissioner answered saying "you're in a position in specific schools to supersede that and sit down and make the changes that need to be made; if the union doesn't want to do that, after good faith bargaining . . . ." *(Id.)*.

With that clear implication, the Commissioner and Assistant Commissioner, in effect, signaled to the Board and the Superintendent what the Commissioner would do if the BTF did not agree to the proposals made by the Superintendent: if the BTF did not agree to them, the Commissioner would make the changes the Superintendent proposed.

The Commissioner herself had recommended and pushed for the selection of Dr. Cash to become Superintendent. (Rumore Aff. ¶27 and Ex. "P"). He took office on September 9, 2015, only seven weeks before his submittal to the Commissioner in this matter. (Pet. ¶73).

The Superintendent's Submission to the Commissioner

On October 28, 2015, after ignoring the BTF's request to extend the time for bargaining and before the time period to complete bargaining had elapsed under any of the three sets of the Commissioner's regulations, the Superintendent submitted a request for resolution to the Commissioner. (Reilly Aff. ¶3 and Ex. "A").

The Superintendent's request, however, did not comply with the Commissioner's regulations. For example, the Superintendent's submission did not contain "an explanation of the rationale for the proposed contract language" or an explanation of "how adoption of the proposed language would be consistent with collective bargaining principles." (*See* Reilly Aff. Ex. "A"). Section 211-f requires that any receivership agreement negotiated have as its purpose to "maximize the rapid achievement of students," but the Superintendent in his submission to the Commissioner did not explain how his proposals, made in the context of negotiating a receivership agreement, would be justified on that basis or on any other basis. (Reilly Aff. ¶3, Ex. "A") In fact, the CET did not request any of the changes proposed by the Superintendent during bargaining with the BTF for the receivership agreement. (Rumore Aff. ¶19). The Superintendent's submission to the Commissioner consisted merely of a list of his bargaining proposals with brief conclusory statements relating to the purpose of each proposal. (Reilly Aff. ¶3, Ex. "A").

The BTF's Response

The BTF in its response addressed the merits of the Superintendent's submission and explained its own proposals. (Reilly Aff. ¶4, Ex. "B"). In addition, based on the totality of the Superintendent's conduct, the BTF alleged that the Superintendent did not

negotiate in good faith, arguing that without a finding of good faith bargaining, the Commissioner lacked jurisdiction over the submission. (Reilly Aff. ¶4 and Ex. "B").

The Commissioner's Decision and Order

The Commissioner issued her decision and order on November 8, 2015. (Pet. Ex. "A"). The Commissioner expressly refused to consider whether the Superintendent negotiated in good faith, despite section 211-f's express requirement that she do so. (Pet. Ex. "A," pp. 17-18).

Likewise, the Commissioner accepted the Superintendent's submission for decision even though it did not contain an explanation of the rationale for the proposed contract language or how adopting of the proposed language would be consistent with collective bargaining principles. (Pet. Ex. "A", p. 22). Such elements are required by the Commissioner's own regulations. (8 NYCRR 100.19(g)(5)(iii)(2)(ii)). Additionally, the Commissioner failed to hold an evidentiary hearing, where the parties could have offered and tested such explanations and where a factual record supporting a decision and order under section 211-f could have been made. (Pet. Ex. "A," pp. 12-13). The Commissioner thus made her decision and order without the benefit of having an explanation of the Superintendent's rationale or a factual record to support it.

And, in her decision and order, the Commissioner expressly refused to consider the proposals made by the BTF on October 23, 2015, such as the BTF's proposal on class size. (Pet. Ex. "A", pp. 16-17). Without a rational basis for doing so, she limited her review to only those proposals made on subjects chosen by the Superintendent. (Pet. Ex. "A," pp. 16-17).

Likewise, the Commissioner refused to consider the BTF's assertion that the time for bargaining had not yet elapsed, refused to extend the time for bargaining, and refused to remand the matter for further bargaining between the parties. (Pet. Ex. "A," p. 15). The Commissioner also refused to consider BTF's proposals because she found they were not timely proposed to the Superintendent, a conclusion based on her calculation of the relevant time frame, a time frame not evident to anyone before the November 8, 2015 decision and order. (Pet. Ex. "A", pp. 16-17). Indeed, that time frame could not have been known to the parties prior to the November 8, 2015 decision and order.

The Commissioner imposed all of the proposals made by the Superintendent with only minor changes. (Pet. Ex. "A", p. 73). Specifically, the Commissioner imposed the Superintendent's proposals regarding voluntary and involuntary transfers. (Pet. Ex. "A", pp. 40-47). But, the Superintendent having the authority to involuntarily transfer teachers from persistently struggling schools will necessarily affect the rights of teachers throughout the system, because it is a District-wide system. (Rumore Aff. ¶¶41-46). The transfer of teachers from persistently struggling schools to other schools will necessarily affect the staffing at each school. (Rumore Aff. ¶¶41-46). Thus, the Commissioner's decision and order affects schools outside the Commissioner's jurisdiction under section 211-f(8), jurisdiction limited to persistently struggling schools.

The Action and Proceeding at Bar

The BTF now brings this Article 78 proceeding and declaratory action to vacate and annul the Commissioner's decision and order, alleging violations of Article 78 of the CPLR, as well as the Contracts Clause and the Due Process Clauses of the New York and United States Constitutions.

POINT I

PETITIONER IS ENTITLED TO AN ORDER AND JUDGMENT PURSUANT TO ARTICLE 78 OF THE CPLR VACATING AND ANNULLING THE COMMISSIONER'S DECISION AND ORDER BECAUSE THE COMMISSIONER EXCEEDED HER JURISDICTION AND VIOLATED LAWFUL PROCEDURES, AND BECAUSE HER DECISION AND ORDER WAS IRRATIONAL, ARBITRARY AND CAPRICIOUS, AND AFFECTED BY ERRORS OF LAW.

A court should grant an order and judgment under Article 78 of the CPLR when an officer proceeds without or in excess of jurisdiction or when an officer's determination is made in violation of lawful procedure, is affected by an error of law, or is arbitrary and capricious. (CPLR §7803). An arbitrary action is one taken without a sound or rational basis or one taken without a basis in fact. (*Pell v. Bd. Of Educ., UFSD No. 1, Towns of Scarsdale and Mamaroneck*, 34 NY2d 222, 238 (1974)). The standard used when an action is affected by an error of law or is taken in violation of lawful procedures is similar. (*New York City Health and Hospitals Corp. v. McBarnette*, 84 N.Y.2d 194, 204 (1994)). Likewise, relief is available when an officer acts in an *ultra vires* manner, exceeding her jurisdiction. (*Ahmed v. City of New York*, 129 AD3d 435, 438 (1st Dept. 2015)). Here, regardless of whether the Commissioner's actions are characterized as arbitrary and capricious, *ultra vires* or unlawful, the BTF is clearly entitled to relief under Article 78.

A. The Commissioner's Decision and Order Exceeded Her Jurisdiction Because It Impacted More Than Just the At-Issue Persistently Struggling Schools.

Under section 211-f (8)(a), the Commissioner had jurisdiction only with respect to the five "persistently struggling" schools specifically at issue. (Education Law §211-

f(8)(a)). The Commissioner's decision and order, however, goes beyond that jurisdiction, necessarily affecting all schools in the District generally, as well as the teachers at those various schools. For example, the Commissioner imposed the Superintendent's proposals regarding voluntary and involuntary transfers of teachers. (Pet. Ex. "A," pp. 38-39, 42-43, 45-47). But, giving the Superintendent the authority to change transfer rights at persistently struggling schools will necessarily affect the rights of teachers throughout the system, because it is a District-wide system. (Rumore Aff. ¶¶41-46). Staffing at all schools will be affected. *(Id.).*

B. The Commissioner Refused to Consider Whether the Superintendent Bargained In Good Faith.

Under 211-f, the bargaining between the receiver or the superintendent and the collective bargaining unit must be conducted in good faith. (Education 211-f(8)(b)). Thus, without good faith bargaining, there can be no receivership agreement.

In its response to the Superintendent's submission, the BTF alleged that the Superintendent did not bargain in good faith. (Pet. ¶80; Reilly Aff., Ex. "B"). But, the Commissioner refused to consider whether the Superintendent bargained in good faith. (Ex. "A" to Petition, pp. 17-18). The Commissioner claimed that she lacked jurisdiction to hear allegations that the District failed to negotiate in good faith. (*Id.*). She failed to see, however, that in this context an allegation that the Superintendent refused to bargain in good faith did not raise a question of jurisdiction over an alleged improper employer practice arising under the Taylor Law. Rather it raised a question as to whether she had jurisdiction to entertain the Superintendent's submission under 211-f *ab initio*, because if the Superintendent did not bargain in good faith, there was no bargaining under 211-f, and, hence, there was no dispute for the Commissioner to resolve.

Moreover, PERB has no jurisdiction over the Commissioner. (Pet. ¶114). Therefore, even if PERB were to determine that the Superintendent bargained in bad faith, it would appear that PERB could not set aside the receivership agreement imposed by the Commissioner. BTF thus has no effective means of remedy. Accordingly, the Commissioner's refusal to consider the issue of good faith bargaining has the practical effect of writing the requirement of good faith bargaining out of the statute.

C. The Commissioner Considered the Superintendent's Submission Even Though It Did Not Comply with the Requirements of the Regulations or the Law.

The Commissioner not only refused to consider BTF proposals she should have considered, she considered Superintendent proposals she should not have considered.

According to section 211-f, a receiver or superintendent may request to bargain a receivership agreement with a collective bargaining unit representing teachers in order to "maximize rapid student achievement." (Education Law 211-f(8)(a); 8 NYCRR § 100.19(g)(5)(i)). Under the regulations in effect at the time the Superintendent filed his submission, "[a] request for resolution [needed to] 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 it needed to include "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)." (8 NYCRR §100.19(g)(5)(iii)(d)(2)(ii)). It follows that the rationale for any proposal for a receivership agreement should be for the express purpose of "maximizing the rapid achievement of students" at that particular school.

But the Superintendent's submission contained none of that required content and consisted merely of a laundry list of his bargaining proposals with brief, conclusory statements relating to the purpose of each proposal. (Pet. ¶¶119-122; Reilly Aff., Ex. "A"). It was effectively a wish list of expanded power to act unilaterally with respect to basic terms and conditions of employment. (*Id.*). And, while initially the District refused to provide the BTF with information from the community engagement team, when the District finally produced some information in that regard, it showed that none of the proposals made by the Superintendent had been requested by the CET. (Rumore Aff. ¶¶10, 17 and 19). Accordingly, the Superintendent not only gave no explanation for his proposals, but also had no rationale to give.

Although the Commissioner claims that the five subjects listed for negotiation in section 211-f are linked to student performance generally, there is no evidence in the record that any of the specific proposals made by the Superintendent are linked to student improvement generally, to student performance in Buffalo or student performance at the particular schools at issue, and the Superintendent did not provide any explanation of how they would be.

Similarly, receivership agreements must be negotiated for each particular school, not on a district-wide basis. (Education Law §211-f(3)). Yet, the Superintendent's proposal was to apply to all the schools without distinction.

D. The Commissioner Refused to Consider the BTF's Proposal on Class Size.

The Commissioner erred by refusing to consider the BTF's most recent proposals, particularly its proposal on class size. Section 211-f is clear, identifying five subjects for bargaining: the length of the school day; the length of the school year; professional

development for teachers and administrators; changes to the programs, assignments and teaching conditions in the school in receivership; and class size. (Education Law §211-f(8)(a)). The Commissioner, however, refused to consider class size, finding that the Superintendent had not chosen to negotiate about class size and stating that the BTF was therefore precluded from negotiating class size.

But section 211-f does not at all preclude or limit the collective bargaining unit from making proposals regarding any of the subjects identified by section 211-f(8)(a) as being proper subjects for a receivership agreement, subjects that expressly include class size. Although section 211-f(8)(a) purportedly gives the receiver or superintendent the power to demand bargaining, that section does not expressly limit negotiations to only those subjects chosen for bargaining by the receiver or superintendent.

Likewise, any interpretation of section 211-f that would limit bargaining to only those subjects chosen by the receiver or superintendent would not be in accord with well established notions of statutory interpretation or with the "standard collective bargaining principles" that section 211-f itself requires the Commissioner to apply.

According to well established notions of statutory construction, the first rule is to give effect to the Legislature's clear and unambiguous language. (*See, e.g., People v. Middlebrooks*, 25 N.Y.3d 516 (2015)). Here, the Legislature did not limit the ability of the collective bargaining unit's representative to make proposals or counterproposals during bargaining for a receivership agreement.

And, under standard collective bargaining principles, the BTF should have been allowed to make proposals and counterproposals, and it should have been entitled to have the Commissioner consider all such proposals and counter proposals under section 211-f

when exercising any purported powers to resolve disputes in such collective negotiations. During collective bargaining, it is often the case that a party will make concessions with respect to one subject of bargaining in order to get enhancements on another subject. Thus, standard collective bargaining principles embrace -- indeed depend on -- the ability of a party to trade one thing for another. Such trading is the very essence of collective bargaining. Parties to a collective bargaining agreement usually do not bargain each subject in isolation, but bargain over the agreement as a whole, and the statute recognizes this reality by not limiting either party from making proposals.

No doubt the Legislature wanted to use a two-heads-are-better-than-one approach to finding ways to maximize rapid student achievement. Teachers are not merely minions of the Superintendent, but are themselves professional educators, fully able to make valid proposals on how to maximize the rapid improvement of students. The statute embraces this reality, anticipating that the teachers' bargaining representative would make proposals on the subjects identified for bargaining.

E. The Commissioner Arbitrarily Determined That BTF's Proposals Were Untimely.

The Commissioner refused to consider the BTF's most recent proposal because, in part, she found that they were not timely proposed. She found that the 30 school day time frame for negotiations ran between September 25 and October 28, 2015. (Ex. "A", p. 15). But that time frame was not evident -- indeed it could not have been known -- to anyone prior to the issuance of her November 8, 2015 decision and order.

Furthermore, the dates used by the Commissioner bear no relation to the parties' actual negotiations and are contrary to the Commissioner's own regulations. Between June and October, the Commissioner issued no less than three differing sets of emergency

regulations. On August 27, 2015, when the first demand to bargain was made, the June to September regulations were in effect, providing for 30 school days' notice to commence bargaining, followed by a 30 school day period after commencing bargaining to conclude bargaining. (8 NYCRR § 100.19(g)(5)(iii))(June 23, 2015) (Ex. "D" to Reilly Aff.); (Education Law §211-f(8)(b)). Thus, according to the June to September regulations, the parties' bargaining was not required to commence until on or about October 14, 2015. And, given that the parties actually commenced bargaining on October 13, 2015, they would have had 30 school days, or until November 30, 2015, well after the District's October 28, 2015 submission, to complete bargaining. (Reilly Aff. Ex. "D").

The next set of emergency regulations was in effect from September 21, 2015 to October 26, 2015, giving 30 school days from the date bargaining was demanded in order to complete bargaining. (8 NYCRR § 100.19(g)(5)(iii) (Sept. 21, 2015)(Ex. "E" to Reilly Aff.). Thus, the parties would have had until November 3, 2015 to complete bargaining. (Reilly Aff. Ex "E").

Then, on October 27, 2015 -- only one day prior to the District's submission -- the Commissioner issued her current set of regulations, changing, among other things, school days to calendar days. Pursuant to this set of regulations, a new bargaining period commenced, at the earliest, on October 27, 2015, the date of the regulations. Accordingly, the parties would have had until 30 calendar days later or November 27, 2015 to complete bargaining. (Reilly Aff. Ex. "F").

Furthermore, the regulations in effect at the time of the Superintendent's submission allowed the parties to agree to extend the time to bargain, and the BTF

expressly asked the Superintendent to extend the time. (Rumore Aff. ¶21 and Ex. "N"). Although the Superintendent ignored that request, the Commissioner could have ordered the parties to extend the time for bargaining. And, given the confusing three sets of regulations, extending the time for bargaining would have been the appropriate order for the Commissioner to make.

But, clearly, the Commissioner was anxious to impose an agreement (she told the Board of Education to act quickly), and she imposed an agreement that for all intents and purposes she had promised to give the Superintendent back in July.

F. The Commissioner Should Have Held An Adjudicatory Hearing.

The Commissioner's decision and order was not based on a factual record made at a hearing, notwithstanding a sharp dispute of facts. The Commissioner should have held an adjudicatory hearing to develop a factual record to support her decision and order, particularly if she was going to act as an interest arbitrator. The section of the Taylor Law the Commissioner relied upon for the definition of "standard collective bargaining principles" pertains to interest arbitration, where arbitration hearings are held before a panel of arbitrators on all matters related to the dispute. (Civil Service Law 209(4)(c)(iii)). If the Commissioner was going to rely on the interest arbitration provisions of the Taylor Law, she should have relied on all such provisions and held an adjudicatory hearing. Cherry picking certain factors from section 209(4) without applying them as intended by the Legislature was a wholly arbitrary act. Indeed, it was *ultra vires*.

G. The Commission Did Not Make Sufficient Findings of Fact to Allow Intelligent Judicial Review.

A hearing officer must make sufficient findings of fact to permit intelligent judicial review. (*Matter of Simpson v Wolansky*, 38 N.Y.2d 391, 396 (1975)). "A court cannot surmise or speculate as to how or why an agency reached a particular conclusion." (*Matter of Montauk Improvement v Proccacino*, 41 N.Y.2d 913, 914 (1977)). The failure of the agency "to set forth an adequate statement of the factual basis for the determination forecloses the possibility of fair judicial review and deprives the petitioner of his statutory right to such review." (*Matter of Montauk Improvement v Proccacino*, 41 N.Y.2d 913, 914 (1977)). Without sufficient findings of fact to review, the court is precluded from performing its proper function under Article 78 of the CPLR, and it must remand the matter. (*Filangeri v. Pulichene*, 229 A.D.2d 702, 702 (3d Dept. 1996)). Similarly, an administrative agency must explain its decision, particularly where it is changing course or where, as here, it is setting the course for the first time. (*Charles A. Field Delivery Service, Inc. v. Roberts*, 66 N.Y.2d 516, 520 (1985)).

The goal of section 211-f(8) is to maximize the rapid achievement of the students at the persistently struggling schools. While the Commissioner acknowledged that goal several times in her decision and order (e.g., pages 3 and 9), she, nowhere in that decision and order, made findings of fact regarding how the terms the Superintendent proposed or the terms she imposed will maximize the rapid achievement of those students. Likewise, she did not give any explanation as to how her decision and order will help the District achieve that goal. We are, apparently, simply to assume that the terms she imposed will achieve the stated goal. Such assumptions however cannot support the Commissioner's

decision; rather, findings of fact were required. (*Filangeri v. Pulichene*, 229 A.D.2d 702, 702 (3d Dept. 1996)).

The Commissioner made no findings of fact and gave no explanation at all as to how her decision was based on "collective bargaining principles." (*See* Pet. Ex. "A" pp. 32-33, 38, 42, 45, 49, 56, 57, 62, 71, 73). It is not clear that she even considered collective bargaining principles in her decision, despite her repeated use of the phrase. The Commissioner, it seems, used the phrase "collective bargaining principles" throughout her decision simply as an incantation, as if reciting a dogma that needed no explanation, expressing a faith that it would be heretical to deny. But mere incantations of public policy, or in this case statutory standards, are in themselves not sufficient to support the Commissioner's decision and order. (*E.g., Port Jefferson Stat. Teachers Assn. v. Brookhaven Comsewogue UFSD*, 45 N.Y.2d 858, 899 (1978)).

Despite the decision's length, it comes up short on relevant and material facts. For example, on pages 32-33, the Commissioner claims that her decision was made in the best interests of the students in the impacted schools and in the district as a whole. In her decision and order, however, she does not discuss any particular school, does not discuss any particular students, and does not explain how her decision would benefit any particular schools, any particular students, or the district as a whole. Other than by identifying the District's five persistently struggling schools at page 9 of her decision, the Commissioner makes no findings of fact regarding any particular school.

Indeed, while the Commissioner's decision and order allows the Superintendent to extend the school day, it leaves the instructional time unchanged without explaining what is to happen in the extra time. Likewise, although the order directs increased

teacher pay, it references two different methods of calculating the increase without any explanation as to how the calculation is to be made.

The Commissioner makes no finding of fact and gives no explanation at page 16 of her decision why, before any issues can be presented to her for resolution under section 211-f(8)(a), the Superintendent must have requested negotiations on such issues. Indeed, there could be no such explanation or facts to support it because section 211-f(8)(a) has no such requirement. Under that section, both parties can make proposals; that is the very nature of negotiations.

The Commissioner, at page 22 of her decision, makes no findings of fact and provides no explanation of how the Superintendent's submission met the regulatory requirements for a submission for resolution. The Commissioner said only that while the Superintendent's "submission does not specifically address how adoption of the proposed language would be consistent with collective bargaining principles...", his "reference to the interests and welfare of the public school students in the receivership schools and the parties existing CBA" addressed applicable "collective bargaining principles." (Pet. Ex. "A", p. 22). Although it is not at all clear what the Commissioner meant by that statement, apparently, according to the Commissioner, the Superintendent merely needed to reference a collective bargaining agreement in his submission in order for him to purportedly show that his proposals were consistent with "collective bargaining principles." At best, the Commission's conclusion is based on a tautology. A tautology, of course, offers no explanation, and it is not based on any findings of fact.

On pages 37, 40 and 45 of her decision, the Commissioner makes no findings of fact with respect to how granting the Superintendent's proposals will allow the

Superintendent to fill positions with "the most qualified" teachers. Indeed, if the Commissioner had made any findings of fact, such as by taking notice of her own records (which she did for numerous other self-serving reasons at pages 8 to 9 of her decision and order), she would have found that the teachers at the schools in question are nearly all rated "effective" or "highly effective" under her own standards of measurement, such that at least arguably "the most qualified teachers" already are filling the positions. (*See* Applebee Aff., Exs. "A" through "E"). But the Commissioner made no findings of fact at all as to the quality of the teachers at the schools at issue - none whatsoever.

Likewise, the Commissioner did not make findings of fact with respect to the Superintendent's other proposals, such as, for example, the proposal regarding faculty meetings. (Pet. Ex. "A", pp. 48-49). The Commissioner did not make sufficient findings of fact to support the particular terms she imposed.

And, the Commissioner's entire decision and order generally rests on at least two assumptions that have no support whatever in fact or law. First, based on the language of her decision and order, the Commissioner assumed that the parties' existing collective bargaining agreement did not enable the Superintendent to effectively utilize and deploy personnel. But, there is no factual basis for this assumption anywhere in the record, and the conclusion is not mandated by law -- nor could it be mandated by law, given the protections afforded collective bargaining not only by the Taylor Law, but also by the New York Constitution. (Civil Service Law §200; N.Y. Const. Art. 1, §17).

Second, based on the language of her decision and order, the Commissioner assumed that under the parties' existing collective bargaining agreement, assignments are

not made to the most qualified teachers. Again, there is no factual basis for this assumption anywhere in the record.

The Commissioner did not make sufficient findings of fact, did not hold an evidentiary hearing, did not consider alternatives, and did not veer from her prejudgment of the case.

H. The Commissioner's Actions Showed the Appearance of Bias or Demonstrated Actual Bias.

A hearing officer not only must be unbiased, but also must avoid even the appearance of bias. (*Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 150, (1968)). A deciding officer's decision may be overturned where "the circumstances would give the appearance of bias." *(Syquuia v. Bd. of Educ., Harpursville Cent. Sch. Dist.*, 180 A.D.2d 883, 884-85 (3d Dept. 1992), *aff'd*, 80 N.Y.2d 531 (1992)).

The courts must protect the integrity of the decision making process, making sure such integrity is zealously safeguarded and free from the appearance of bias, notwithstanding any actual bias. (*Goldfinger v. Lisker*, 68 N.Y.2d 225, 232 (1986)). For example, it is improper for an arbitrator to hold private conversations with one party to arbitration, creating the appearance of bias, if not actual partiality. (*Id.* at 230.) The appearance of bias alone is sufficient to warrant vacatur of an arbitration award. (*Matter of Kern v. 303 E. 57th Street Corp.*, 204 A.D.2d 152, 153 (1st Dept. 1994). Given that an arbitration award can be vacated based on an arbitrator's appearance of bias, an administrative decision by the Commissioner certainly can be vacated and annulled based on the Commissioner's appearance of bias.

And, of course, a finding of actual bias would be fatal to a hearing officer's determination. (*Hughes v. Suffolk County Dept. of Civil Service*, 74 N.Y.2d 833, 834 (1989)). Hearing Officer bias is established as a matter of fact, where there is "support in the record for the bias and proof that the outcome flowed from the alleged bias." (*Id.*).

Here, the sheer number of arbitrary acts taken by the Commissioner show the appearance of bias as well as actual bias.

As noted above, the Commissioner refused to even consider, let alone make a finding on, whether the Superintendent had bargained in good faith. Not only did the Commissioner refuse to consider whether the Superintendent bargained in good faith, her actions, in fact, encouraged him to refuse to bargain in good faith, so that the Commissioner could ultimately impose an agreement on the BTF. As noted earlier, a month or more before bargaining began, the Commissioner and Assistant Commissioner assured the Board that, if the BTF did not agree to do so, the Commissioner would make the Superintendent's proposed changes to the collective bargaining agreement. They expressly told the Board that the Commissioner would fast-track the Superintendent's submission, that the Board needed to move fast, and that the Commissioner would have *ex parte* communications with them. Indeed, the Commissioner pushed for the Board to hire Dr. Cash. In the BTF's view, the Superintendent intended all along that he would be seeking to have the Commissioner purportedly "resolve" the matter in the Superintendent's favor upon the creation of alleged disputes, just as the Commissioner said she would do.

In addition, the Commissioner refused to consider BTF's proposals, such as its proposal regarding class size, notwithstanding section 211-f's express identification of

class size as a subject for bargaining. Yet, the Commissioner considered all of the Superintendent's proposals, even though none of those proposals contained the necessary elements of a proper submission.

The Commissioner made her decision and order prematurely, before the time to complete bargaining had elapsed under her own regulations and while the BTF's demand to extend the time for bargaining was still pending, if ignored by the Superintendent. And, the time frame the Commissioner applied in her decision and order was not evident -- indeed it could not have been known -- to anyone prior to the issuance of the Commissioner's decision and order. Likewise, the Commissioner did not extend the time to bargain, as was expressly allowed under her very own regulations.

The Commissioner made her decision and order without having had all of the relevant facts, not having held an evidentiary hearing. Despite giving herself the veneer of an interest arbitrator, by citing to section 209(4) of the Civil Service Law (Taylor Law), she did not fully develop the factual record she needed in order to make a decision and order under section 211-f. Indeed, she did not make the factual findings necessary for intelligent judicial review. Apparently, since, in the BTF's view, she was going to rule in favor of the Superintendent in any event -- as she promised she would in July-- the Commissioner did not need any facts.

The BTF submits that the Commissioner's acts clearly show the appearance of bias, and her award should be vacated and annulled on that ground alone.

The BTF further submits that the Commissioner's determination, in fact, flowed from actual bias. That bias may not be bias in the sense that she harbored any ill-will necessarily toward the BTF. Rather the bias, perhaps, comes from a mistaken belief that

the existing collective bargaining relationship had somehow prevented the Superintendent from taking actions he wanted to make and would have made to realize rapid student improvement had he the ability to act unilaterally. That bias underlies the entire decision and order, even though there is no factual basis at all to support it in the record. And, regardless of the source of the bias, the Commissioner could not act with bias.

At the very least, the Commissioner should have recused herself. She pre-judged the case, having been personally involved in the matter. Where an administrative official has made public comments concerning a specific dispute that is to come before her in her adjudicatory capacity, she will be disqualified on the ground of prejudgment, if a disinterested observer may conclude that she has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it. (*Woodlawn Heights Taxpayers and Community Ass'n. v. New York State Liquor Auth.*, 307 A.D.2d 826, 827 (1st Dept. 2003)). Here, before the Superintendent even demanded that the BTF bargain a receivership agreement, the Commissioner and Assistant Commissioner expressly told the Board of Education that they would fast-track the Superintendent's submission for resolution, that the Board needed to move fast, and that the Commissioner would have *ex parte* communications with them. (Pet. ¶71; Rumore Aff. ¶26 and Ex. "O"). They assured the Board that, if the BTF did not agree to do so, the Commissioner would make the changes to the collective bargaining agreement proposed by the Superintendent.

The Commissioner did not recuse herself because, it seems, she intended all along to impose the terms the Superintendent wanted. It was as though the Commissioner set it up. She recommended the Superintendent for his job. (Pet. ¶72; Rumore Aff. ¶27). She

told the Board of Education that it needed to act quickly and that it could supersede good faith bargaining. (Pet. ¶¶69-71; Rumore Aff. ¶¶23-26). She suggested that if the BTF did not agree to the changes, she would make the changes the Superintendent wanted. (*Id.*). She refused to consider the BTF's proposals. (Pet. ¶86). She required no explanation from the Superintendent in support of his proposals. (Pet. ¶84). And, she made no factual record. (Pet. ¶135). The entire process was perfunctory, leading to its foregone conclusion.

I. The Commissioner Refused to Consider Reasonable Alternatives to Her Unreasonable Order.

The Commissioner did not consider reasonable alternatives, such as converting the schools to community schools, providing an expanded platform of services for the students, or securing additional State aid. While independent receivers operating under 211-f are required to convert their schools to community schools, superintendent receivers are permitted to do so. But, the Commissioner did not order or even suggest that the Superintendent convert the District's persistently struggling schools into community schools. The lack of such order was inexplicable. It certainly was not explained.

Likewise it is well established among education professionals that students suffering from the debilitating effects of poverty, such as many of the students attending the schools at issue, need an expanded platform of services in order to be successful. (*CFE*, 187 Misc.2d at 51, 76, 114). The Commissioner, however, did not order such expanded platform of services.

And, as set forth above, the State, so far, has underfunded the District by more than one billion dollars. Clearly, securing even a percentage of that sum would have been a reasonable alternative to abrogating the BTF's collective bargaining agreement.

J. Overall the Commissioner's Decision and Order was Arbitrary, Unworkable, and Incapable of Performance.

With her decision and order, the Commissioner imposed terms and conditions of employment on the bargaining unit members that are arbitrary and capricious, wholly irrational, and entirely unworkable, some incapable of being performed even if the BTF and the District were inclined to perform them. For example, she grafted statutory preferred eligibility list ("PEL") requirements onto positions for which no PEL requirement applies, and she designed a transfer process that cannot practicably be implemented. Similarly, under the transfer process designed by the Commissioner, teachers involuntarily transferred could find themselves trapped on a transfer list with no position to transfer into, resulting in the effective unlawful abolition of their positions.

The Commissioner directed increased pay for certain increased work by referring to both an hourly rate in the contract and a proportional increase, presumably a portion of 1/200 salary (the daily rate of pay), leaving the actual pay ordered unclear. Similarly, the Commissioner's decision allows the Superintendent to extend the school day, but leaves instructional time unchanged, leaving unanswered the question of what the District is going to do with the students in the extra time.

The Commissioner erred when applying the command of section 211-f that she apply "standard collective bargaining principles." As the basis for the "collective bargaining principles" she used in making her decision and order, the Commissioner purported to rely upon the factors set forth in Civil Service Law §209(4)(c)(v)(b) and (d)

(Ex. "A,", p. 22). But those factors are the factors statutorily mandated to be applied by certain interest arbitrators, not the Commissioner of Education. And, under the Taylor Law, they would not apply to teacher bargaining units. (Civil Service Law §209(d)). While the Commissioner added them to the emergency regulations -- the day before the Superintendent made his submission -- those factors are not the "collective bargaining principles" the Commissioner is to apply under section 211-f. That section makes no reference at all to Civil Service Law §209(4) or any of its subdivisions.

In condoning the Superintendent's refusal to extend the time for negotiations, the Commissioner found that "[t]he mandates of the receivership law are clear that the time is of the essence and that changes to certain areas of a collective bargaining agreement in the first few months of the school year may be needed to make swift demonstrable improvements in these schools," but such alleged "mandates" are not stated anywhere in section 211-f. ("Ex. "A," p. 20).

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 those terms and conditions of 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 simply mean the employee organization's collective bargaining agreement was nullified. Such bargaining would not be in accord with standard collective bargaining principles or the constitutional protections afforded contracts and collective bargaining agreements.

Indeed, as set forth below, the BTF submits that the Commissioner's application of section 211-f violated the Contracts Clause of the United States Constitution as well as the Due Process Clauses of the New York and United States Constitutions. While it seeks declaratory relief for those violations, the Commissioner's violations of those Constitutional provisions also would be errors of law entitling the BTF to Article 78 relief.

POINT II

SECTION 211-F(8) OF THE EDUCATION LAW ON ITS FACE AND AS APPLIED BY THE COMMISSIONER, IS A SUBSTANTIAL IMPAIRMENT OF THE PETITIONER'S COLLECTIVE BARGAINING AGREEMENT. THE COURT SHOULD ISSUE A DECLARATORY JUDGMENT PURSUANT TO SECTION 3001 OF THE CPLR AND 42 USC §1983 DECLARING SECTION 211-f(8) AND THE COMMISSIONER'S APPLICATION OF IT TO BE UNCONSTITUTIONAL UNDER THE CONTRACTS CLAUSE OF THE UNITED STATES CONSTITUTION.

A. The Constitution Protects Contracts from Being Impaired by State Laws.

Contract rights generally have been protected by law for centuries. For example, upon securing their independence from England more than 225 years ago, the nation's founders wrote protections for contract rights directly into the nation's Constitution, ratifying the Contracts Clause in 1788. (U.S. Const. Art. I, §10). In fact, the Contracts Clause predates the 1791 ratification of the Bill of Rights.

Collective bargaining agreements are specifically protected by law. Nearly 80 years ago, New York amended its Constitution to add, among other things, language stating that "Employees shall have the right to organize and to bargain collectively through representatives of their own choosing." (N.Y. Const. Art. I, §17). Nearly 50

years ago, the Legislature enacted the Taylor Law, requiring public employers "to negotiate with, and enter into written agreements with employee organizations representing public employees." (Civil Service Law §200 (1967)). The public policy of the State and the purpose of the Taylor Law is "to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government." (Civil Service Law §200). As the Court of Appeals has "time and again underscored, the public policy of this State in favor of collective bargaining is 'strong and sweeping.'" (*City of Watertown v. State of N.Y. Public Employment Relations Bd.*, 95 N.Y.2d 73, 78 (2000)).

Despite the legal history and the constitutional and statutory protections afforded contracts generally and collective bargaining agreements specifically, the Commissioner of Education nullified long-standing terms and conditions of the parties' collective bargaining agreement, terms and conditions going to the very core of the parties' contract. The Commissioner effectively tore up and re-wrote the contract that BTF had negotiated with the District, casually disregarding the BTF's constitutionally protected contract rights. She did so while relying on section 211-f, recently added to the Education Law by the Legislature.

But Article I, Section 10 of the Constitution prohibits states from passing any law "impairing the Obligation of Contracts." New York's state and federal courts, based on the Contracts Clause, have repeatedly nullified attempts to impair the obligations of public sector collective bargaining agreements. (*Association of Surrogates v. State of New York*, 79 N.Y.2d 39, 45 (1992); *Association of Surrogates v. State of New Yor*k, 940

F.2d 766, 771 (2d Cir. 1991); *Condell v. Bress*, 983 F.2d 415, 417 (2d Cir. 1993); *Donohue v. Paterson*, 715 F.Supp.2d 306, 18 (N.D.N.Y. 2010); *Donohue v. Mangano*, 886 F.Supp.2d 126, 155 (E.D.N.Y. 2012); *New York State Correctional Officers & Police Benevolent Assn., Inc. ("NYSCOBPA") v. State of New York*, 911 F.Supp.2d 111, 137 (N.D.N.Y. 2012)). Here, section 211-f(8) impairs the BTF's contract rights in violation of the Contracts Clause.

To state a cause of action for a violation of the Contracts Clause, a complaint must allege sufficient facts demonstrating that a state law has "operated as a substantial impairment of a contractual relationship." (*Allied Structural Steel Co. v. Spannus*, 438 U.S. 234, 244 (1978); *NYSCOPBA*, 911 F.Supp.2d at 137). Courts consider three factors: (1) whether a contractual relationship exists; (2) whether a change in law impairs that contractual relationship; and (3) whether the impairment is substantial. *(Id.)*. However, a state law that impairs a contractual obligation will not be deemed unconstitutional if: (1) it serves a demonstrated legitimate public purpose, such as remedying a general social or economic problem; and (2) the means chosen to accomplish the public purpose is reasonable and necessary. (*Buffalo Teachers Federation v. Tobe*, 464 F.3d 362, 368 (2d Cir. 2006); *NYSCOPBA*, 911 F.Supp.2d at 137)).

Substantial impairments are those that affect the terms upon which the parties have reasonably relied or that significantly alter the parties' duties under the contract. (*Spannus*, 438 U.S. at 245; *NYSCOPBA*, 911 F.Supp.2d at 142). The primary consideration in determining whether the state law has operated as a substantial impairment is the extent to which reasonable expectations under the contract have been disrupted. (*Sanitation and Recycling Industry, Inc. v. City of New York*, 107 F3d 985,

993 (2d Cir. 1995); *NYSCOPBA,* 911 F.Supp.2d at 142). "[A] law that provides only one side of the bargaining table with the power to modify any term of a contract after it has been negotiated and executed is perhaps the epitome of a substantial impairment." (*Donohue*, 886 F.Supp.2d at 156; *NYSCOPBA*, 911 F.Supp.2d at 142).

When a state law constitutes substantial impairment, the state must show a significant and legitimate public purpose behind the law. (*Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 411-12 (1983); *NYSCOPBA*, 9ll F.Supp.2d at 143). A law that substantially impairs contractual relations must be specifically tailored to "meet the societal ill it is supposedly designed to ameliorate." (*NYSCOPBA*, 911 F.Supp.2d at 143-44). The "reasonable and necessary" analysis involves a consideration of whether the adjustment of the rights and responsibilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption. (*Energy Reserves*, 459 U.S. at 412; *NYSCOPBA*, 911 F.Supp.2d at 144).

Before analyzing whether an act is reasonable and necessary, the court must determine the degree of deference that should be afforded to the Legislature. (*Tobe*, 464 F.3d at 369; *NYSCOPBA*, 911 F.Supp.2d at 144). Where the state impairs a public contract to which it is a party, the state's self-interest is at stake; the court will afford less deference to the state's decision to alter its own contractual obligations. *(Id.)*. "To be reasonable and necessary under less deference scrutiny, it must be shown that the state did not (1) 'consider impairing the ... contracts on par with other policy alternatives' or (2) 'impose a drastic impairment when an evident and more moderate course would serve its purpose equally well,' nor (3) act unreasonably 'in light of the surrounding

circumstances.'" (*Id*). Some factors to be considered under this inquiry include: "whether the act (1) was an emergency measure; (2) was one to protect a basic societal interest, rather than particular individuals; (3) was tailored appropriately to its purpose; (4) imposed reasonable conditions; and (5) was limited to the duration of the emergency." (*Id.*).

B. Section 211-f(8) of the Education Law is Unconstitutional on its Face.

1. *A Contractual Relationship Exists*

The parties' collective bargaining agreement established a contractual relationship. (*Association of Surrogates and Supreme Court Reporters v. State*, 79 N.Y.2d 39, 45 (1992)). That contractual relationship continues, notwithstanding the expiration of the stated term of the agreement, by operation of the Taylor Law. (Civil Service Law §209-a.1(e); *Association of Surrogates and Supreme Court Reporters*, 79 N.Y.2d at 45).

2. *The Change in Law Impairs the Contractual Relationship*

The Legislature added section 211-f to the Education Law with chapter 56 of the laws of 2015 in April, changing the law and, with that change, impairing the parties' contractual relationship. Section 211-f purportedly allows receivers and superintendents acting as receivers to demand that collective bargaining unit representatives, such as the BTF, reopen their existing contracts to renegotiate certain mandatory subjects of bargaining. And, it purportedly allows the Commissioner to resolve alleged disputes in such negotiations by striking out, re-writing, and imposing entirely new terms and conditions on the parties. (Education Law §211-f(8)). Without section 211-f, the BTF would not be -- indeed it could not be -- required to reopen its collective bargaining

agreement for such renegotiations and imposition of terms. (Civil Service Law §209-a.1). Section 211-f, by coercing the BTF to renegotiate the terms of its contract, is no less a contractual impairment than it would be if it simply re-wrote the terms of the contract directly. The State cannot put unconstitutional conditions on the BTF's contract. (*E.g. Northwestern University v. City of Evanston*, 2002 WL 31027981 (N.D. Ill. 2002)). Section 211-f substantially impairs the BTF's contract.

3. *The Impairment is Substantial*

"[A] law that provides only one side of the bargaining table with the power to modify any term of a contract after it has been negotiated and executed is perhaps the epitome of a substantial impairment." (*NYSCOBPA*, 911 F.Supp.2d at 142). Under Section 211-f, only a receiver or superintendent acting as receiver, such as Superintendent Cash, can demand bargaining. And, as interpreted by the Commissioner in her November 8, 2015 decision and order, once bargaining is demanded, bargaining can proceed only on those subjects chosen for bargaining by the receiver or superintendent. That factual scenario is the "epitome of substantial impairment." (*NYSCOBPA, supra*).

In addition, section 211-f affects the terms upon which the parties have reasonably relied, and it significantly alters the duties of the parties. (*See NYSCOPBA*, 911 F.Supp.2d at 142). The bargaining unit members' reasonable expectations under the contract have been disrupted, if not completely shattered, by section 211-f, given that it purportedly allows long-standing terms and conditions of the agreement, terms and conditions chosen unilaterally by the Superintendent, to be removed and entirely re-written by the Commissioner. (Education Law §211-f(8)). In effect, section 211-f (8)

nullifies the collective bargaining units' contract, forcing them to re-open their existing collective bargaining agreements to renegotiate those agreements with respect to subjects chosen by the Superintendent or else have the Commissioner determine through a dispute resolution procedure what the terms and conditions of those agreements will be, at least with respect to those terms and conditions of employment to which receivership agreements apply.

Finally, the impairment presented in this case is greater than the impairments present in *Association of Surrogates* and *Supreme Court Reporters*, and the other cases cited in this brief. The *Surrogates* case concerned a lag payroll. In *Surrogates*, there was no question the employees were going to get paid, it was a question of when. (*See* 79 N.Y.2d at 46-47). On the contrary, in this case, the collective bargaining agreement is being re-written, forever changing employees' transfer rights and appointment rights to certain vacant positions. And, some employees may become trapped on transfer lists, having their jobs effectively abolished.

4. *The Court Should Not Defer to the Legislature*

Although the State itself is not a signatory to the contract at issue, the State's substantial impairment of that agreement should be analyzed using the less deferential standard. In fact, "[t]he presence or absence of a state as a party to the contract is not determinative of the deference issue." (*Tobe*, 464 F.3d at 370). And, at least for the purpose of impairment analysis, the District is an arm of the State, such that the contract at issue should be considered to be the State's own contract. According to the New York Constitution, "[t]he legislature shall provide for the maintenance and support of a system of free common schools, wherein all the children of this state may be educated." (N.Y.

Const. Art. XI, §1). The District is part of that system. According to the Court of Appeals, school districts, like other municipal bodies "are merely subdivisions of the State, created by the State for the convenient carrying out of the State governmental powers and responsibilities as its agents." (*City of New York v. State,* 86 N.Y.2d 286, 289-90 (1995)).

In fact, the District was created by the State pursuant to its Constitution and Education Law, is 85% funded by the State, and is tightly regulated by the State through such agencies as the Board of Regents, the University of the State of New York, and the Education Department. (Education Law Art. 52; Applebee Aff. ¶15). And, indeed, section 211-f purportedly allows the State through the Commissioner to impose a collective bargaining agreement on the parties. In effect, the State has put itself at the bargaining table, as if it were negotiating its own contract.

Furthermore, the State's enactment of section 211-f(8) was self-serving in that while it purports to keep the trappings of good faith collective bargaining between a school district and the bargaining representative of the district's employees, that enactment, in reality, merely created a vehicle for the State, by the Commissioner, to set the terms of conditions of employment that the State believes are appropriate for the teachers at persistently struggling schools. The assumption underlying 211-f(8) seems to be that collective bargaining -- in some entirely unstated and unfounded fashion -- is the reason why some schools are persistently struggling, and that the State is going to purportedly fix that situation, by abrogating those collective bargaining agreements when the collective bargaining representatives do not, with the proverbial gun to their heads, do it themselves. (Of course, the fact that collective bargaining rights are present at the

State's most successful schools as well as its persistently struggling schools -- clearly showing that collective bargaining is not the problem -- seems to have been utterly lost in the legislative process and the Commissioner's decision.)

5. *Assuming the Impairment Has a Legitimate Public Purpose, the Means Chosen Was Not Reasonable and Necessary*

Once a substantial impairment is shown, the burden shifts to the State to show that the law is reasonable and necessary. While "maximiz[ing] the rapid achievement of students" at persistently struggling schools may well be a legitimate public purpose, the means chosen by the Legislature to address that purpose was not reasonable and necessary. And, section 211-f was not specifically tailored to meet the societal ill it was supposedly designed to ameliorate.

For one thing, the collective bargaining agreement between the BTF and the District is not the reason that five of the District schools are persistently struggling. On the contrary, 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, 77 (2000)).

Rather than focusing on the students whose achievement is at issue, the impairments in 211-f, among other things, focus on collective bargaining agreements. Instead of expanding programs and services for students, section 211-f(8) nullifies contractual and statutory rights of teachers, without any explanation of how or why the deprivation of contractual and statutory rights of teachers would benefit students.

Nonetheless, with section 211-f, the Legislature presumes that the way to fix persistently struggling schools is to dissolve collective bargaining rights, and not to put in place any one of a number of more reasonable alternatives.

6. *The State Did Not Consider Other More Reasonable Alternatives*

The Legislature did not consider reasonable alternatives to substantially impairing the BTF's collective bargaining agreement. For example, it could have required the Superintendent to convert the schools to community schools, it could have provided an expanded platform of services for the students, or it could have provided additional State aid, including the approximately $100 million it owes the District in State aid for 2015-2016 alone to counteract the negative effects that poverty has on student achievement.

C. Section 211-f is Unconstitutional as Applied by the Commissioner.

The Contracts Clause extends to instrumentalities of the state exercising delegated legislative authority. (*Ross v. State of Oregon*, 277 U.S. 150, 162 (1913)). And, as applied by the Commissioner, section 211-f entirely eviscerated the voluntary and involuntary transfer provisions of the BTF's collective bargaining agreement, changed the starting and ending times of the work day, and increased the work day and work load. But no factual findings at all were made or shown by the Legislature, the Superintendent or the Commissioner that the five schools at issue have been persistently struggling because of the manner in which teachers are transferred, the length of the school days, the length of the teachers' work days, the current teacher work load or any other term or condition of employment set forth in the BTF's collective bargaining agreement.

In addition, the Commissioner did not consider and, in fact, irrationally precluded herself from considering reasonable alternatives to voiding the parties' collective bargaining agreement. The Commissioner failed to consider alternative means, such as converting the schools to community schools, securing additional State aid including the $100 million the State owes the District and considering the BTF's most recent proposals,

such as its proposal to adjust class size, and, in fact, interpreted 211-f as to preclude her from even considering such reasonable alternatives. Nonetheless, one of the terms she imposed on the BTF would effectively abolish unit member positions without due process of law.

POINT III

SECTION 211-F AND THE COMMISSIONER'S DECISION AND ORDER VIOLATE THE DUE PROCESS RIGHTS OF THE BTF AND ITS BARGAINING UNIT MEMBERS.

Under both the United States and New York Constitutions, "[n]o person shall be deprived of life, liberty or property without due process of law." (U.S. Const. Amend. XIV); (N.Y. Const. Art. 1, §6). In general, State courts use the same analytical framework as do Federal courts in considering due process cases. (*Hernandez v. Robles*, 7 N.Y.3d 338, 362 (2006), abrogated on other grounds, *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015)). That framework consists of two elements: (1) whether the plaintiff possesses a liberty or property interest protected by the Due Process Clauses; and, if so, (2) whether existing state procedures are constitutionally adequate to protect that interest. (*Kapps v. Wing*, 404 F.3d 105 (2d Cir. 2005)).

And, although the primary source of property rights is State law, the "State may not magically declare an interest to be non-property after the fact for Fourteenth Amendment purposes. (*Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 448 (2d Cir. 1980).

A. The BTF Has a Property Interest in Its Collective Bargaining Agreement.

As to the first element, the BTF has a protected property interest in its Collective Bargaining Agreement ("CBA"). That agreement is a contract, clearly a form of property. Contractual rights arising from collective bargaining agreements can give rise to constitutional property rights. (*NYSCOPBA*, 911 F.Supp.2d at 148; *Jackson v. Roslyn Bd. of Educ.*, 652 F.Supp.2d 332, 341 (E.D.N.Y.2009)).

While collective bargaining agreements standing alone may give rise to protected property interests, in New York such agreements do not stand alone, rather they are buttressed by law. Under the Taylor Law, public employers and employee organizations have a duty to negotiate collectively "with respect to wages, hours, and other terms and conditions of employment..." (Civil Service Law section 204(3)). A "mandatory" subject of negotiation must be negotiated on demand of either party, and such subjects include "salaries, wages, hours, and other terms and conditions of employment." (Civil Service Law § 204(3)). A mandatory subject, if not included in a collective bargaining agreement, may also form the basis of an enforceable past practice, and generally may not be unilaterally altered or imposed by the employer. (Civil Service Law §209-a.1(d)). In fact, it is an improper practice to refuse to negotiate mandatory subjects of bargaining in good faith. (Civil Service Law §§ 209-a.1(d), 209-a.2(b)). PERB can hear and determine improper practice charges. (Civil Service Law §209-a.1). The availability of such local law remedies is further evidence of the State's recognition of a protected interest. (*Memphis Light, Gas & Water Division v. Craft,* 436 U.S. 1, 11 (1978)). In *Memphis Light*, the court found that the plaintiffs had a property interest in continued utility service. (*Id.*) The court held that one of the main factors in determining that a

property interest existed was the availability of a State law cause of action to enjoin the utility company from wrongfully threatening termination of utilities. (*Id.* at 11).

Likewise, "public contracts involving extreme dependence or permanence give rise to protected status." (*S & D Maintenance Co. v. Goldin,* 844 F.2d 962 (1998)). An "extreme dependence," however, is not one that necessarily is extraordinary or life sustaining. Rather, it could be as mundane as an interest in an appointment or promotion. For example, an employee's interest in a promotion to Plant Maintenance Mechanic II from Equipment Operator, although not a "once-in-a-lifetime opportunity," may be an interest significant enough to be a property interest. (*Ciambriello v. County of Nassau,* 292 F.3d 307, 318 (2d Cir. 2002)). Furthermore, to determine whether due process requirements apply in the first place, courts must look not to the weight but the nature of the interest at stake. (*Board of Regents v. Roth*, 408 U.S. 564, 571 (1972)).

A statutory framework itself may create a property interest. (*See Kapps*, 404 F.3d at 114; *Basciano v. Herkimer*, 605 F.2d 605 (2d Cir.1978)). To the extent that State law imposes "substantive predicates" that limit the decision-making of public officials, it may confer a constitutionally protected property right. (*Kapps*, 404 F.3d at 114). "Substantive predicates" include eligibility criteria for the receipt of benefits. (*Id.*). In New York, the Taylor Law, in essence, provides such "substantive predicates," requiring public employers to bargain terms and conditions of employment in good faith or be subject to an improper practice charge before PERB.

Regardless of whether the BTF's interest at stake is purely contractual, purely statutory or is derived from the interaction between the two, the BTF has a

constitutionally protected property interest in the terms and conditions of employment expressed in its collective bargaining agreement.

B. The Existing State Procedures Are Not Constitutionally Adequate.

Once it has been established that a property interest exists and has been deprived, the court must determine whether adequate procedural protections were afforded. (*Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538 (1985). In general, individuals whose property interests are at stake are entitled to notice and an opportunity to be heard. (*Dusenbery v. United States*, 534 U.S. 161, 167 (2002)). In other words, before a person is deprived of a protected interest they must be afforded opportunity for some kind of hearing. (*Moffit v. Town of Brookfield*, 950 F.2d 880 (2d Cir. 1991)). Due process requires notice that is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (*Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). To determine what process is due, courts look to three factors: "(1) the private interest affected; (2) the risk of an erroneous deprivation, and the probable value, if any, of additional safeguards; and (3) the government's interest, which may include the fiscal and administrative burdens that additional procedures would impose." (*Kapps,* 404 F.3d at 118, *quoting Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

In the case at bar, the private interest affected is the BTF's collective bargaining agreement. The Commissioner abrogated and re-wrote that agreement depriving BTF of its protected property interests purportedly relying on section 211-f.

The pre-deprivation notice, however, was not adequate; in fact, it was lacking altogether. The Superintendent's submission lacked any explanation – so much so, that it

failed to include the elements necessary for a proper submission. The BTF objected to that lack of explanation in its responsive submission, since it was precluded from addressing any explanation that the Superintendent might have offered. But, without pre-deprivation notice to the BTF that she was going to accept the submission without the required explanation, the Commissioner decided the matter. The BTF did not have any meaningful chance to respond to the reasons, if there were any, why the Commissioner imposed the terms she did. Likewise, the BTF had no pre-deprivation opportunity to explain why the terms the Commissioner imposed were unworkable.

The BTF had no pre-deprivation notice that its proposals were not going to be considered by the Commissioner if the Superintendent chose not to bargain the subject. For example, the Commissioner did not consider the BTF proposals on class size, a subject expressly identified by 211-f as a subject of bargaining. Of course, the Commissioner's refusal to consider the BTF proposals on class size was in itself a deprivation of the BTF's rights, given that the statute plainly identifies class size as a subject for bargaining.

The BTF had no pre-deprivation notice that its proposals were not going to be considered because, according to the Commissioner, they were not timely proposed. The BTF could not have known the time frame the Commissioner was going to use, prior to reading her decision. Of course, if it had known the applicable time frame, it would have made its proposals within that time frame. Rather, it seems the BTF was drawn into a trap for the unwary, although BTF could not have been aware of the trap before it was sprung.

Prior to the decision, the BTF did not know what proposals were going to be considered, what the explanations for those proposals were, or what standards the Commissioner was going to apply.

Without such notice, the BTF had no meaningful opportunity to be heard. All BTF could do pursuant to the Commissioner's regulations was make a written submission in response to the bare bones submission made by the Superintendent. The Commissioner did not hold an adjudicatory hearing, and no such hearing was provided for in section 211-f or in the Commissioner's regulations.

It was not the BTF's burden to demand a hearing. This conclusion flows directly from the Constitution itself, where it says no person shall be deprived of property without due process of law. Constitutional due process requires the State to afford BTF an adequate hearing.

The Commissioner, however, failed to hold an adjudicatory hearing, even though this was a matter of first impression, there was a sharp dispute of fact, and she relied on standards used by interest arbitrators in Taylor Law dispute resolution procedures (not applicable to teacher bargaining units), standards that interest arbitrators would apply only after an arbitration hearing held before a panel of arbitrators. Although the Commissioner allowed the parties to make written submissions, she did not explain at any time prior to issuing her decision what standards she intended to use or how she was going to resolve factual disputes. (And, it turns out, she did not make sufficient findings of fact or explanations of how she applied terms such as "collective bargaining principles in her decision.) Under the circumstances, the ability to write a written submission

responding to the District's written submission was not sufficient process to protect the BTF's property interests.

Indeed, the public policy of the State and the purpose of the Taylor Law is "to promote harmonious and cooperative relationships between government and its employees and to protect the public by assuring, at all times, the orderly and uninterrupted operations and functions of government." (Civil Service Law §200). Furthermore, "the public policy of this State in favor of collective bargaining is 'strong and sweeping.'" (*City of Watertown, supra*). Thus, it is without question that the BTF's interest in the enjoyment of the terms of their collectively bargained agreement is of the highest order, as it has been recognized as one of the main factors in fostering a cooperative and efficient functioning of state government. (*Id.* at 78). Assuming section 211-f allowed the Commissioner to deprive the BTF of its contractual rights, it could not allow that to happen in the absence of a process sufficient to protect the weighty interests at stake.

As noted above, before an interest arbitration panel can make an award, it must hold an arbitration hearing. Similarly, before PERB can determine whether an improper practice occurred affecting terms and conditions of employment, it must hold an adjudicatory hearing. The Due Process Clauses of the New York and United States Constitutions demand no less from the Commissioner of Education.

The risk of an erroneous deprivation is substantial. Certainly, the BTF and its bargaining unit members depend on the rights set forth in the collective bargaining agreement, rights including, for example, the right of appointment to certain vacancies,

the right to request a transfer and the right to be protected from unwanted transfer. These are all significant property rights in and of themselves.

But beyond those individual rights, the Taylor Law recognized that affording public employees collective bargaining rights is an important interest to the general public, in that it protects "the orderly and uninterrupted operations and functions of government." (Civil Service Law §200).

The risk, therefore, of an erroneous deprivation is rather significant. Accordingly, the needed additional safeguards include an adjudicatory hearing where the necessary factual foundations can be laid for any proposed deprivation and where the BTF could establish that the proposed deprivations were, in fact, not necessary or could establish that there are, in fact, more reasonable alternatives.

In this regard, the government's interest is in harmony with the BTF's interests, given the public policy underlying the Taylor Law. Furthermore, the administrative burden would be slight, especially in light of the interests at stake and the risks involved. The Commissioner employs or retains arbitrators and administrative hearing officers for many types of other proceedings, and she easily could have employed one in this matter. (*See, e.g.,* 8 NYCRR Parts 82 and 83).

The facts of the instant case convincingly demonstrate that the procedures used were not adequate. As noted in Pont I, the Commissioner did not make sufficient findings of fact to permit intelligent judicial review. Nor did she adequately explain her decision. (*Charles A. Field Delivery Service, Inc. v. Roberts*, 66 N.Y.2d 516, 520 (1985)).

CONCLUSION

For the reasons set forth above, the relief requested in the verified petition and complaint should be granted and a declaratory judgment should be issued.

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