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New York Supreme Court

Appellate Division – Fourth Department

ROCHESTER CITY SCHOOL DISTRICT, and the BOARD OF EDUCATION OF THE ROCHESTER CITY SCHOOL DISTRICT,

Petitioners-Respondents, -against-

CITY OF ROCHESTER, LOVELY A. WARREN as Mayor of the City of Rochester, COUNCIL OF THE CITY OF ROCHESTER, and the MONROE COUNTY BOARD OF ELECTIONS

Respondents-Appellants.

BRIEF OF RESPONDENTS-APPELLANTS CITY OF ROCHESTER, LOVELY A. WARREN and COUNCIL OF THE CITY OF ROCHESTER

TIMOTHY R. CURTIN CITY OF ROCHESTER CORPORATION COUNSEL
PATRICK BEATH, ESQ. *Attorneys for Respondent-Appellants City of Rochester, Lovely A. Warren and*

Council of the City of Rochester 30 Church Street, Rm. 400A Rochester, New York 14614 Telephone (585) 428-6812

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

QUESTIONS INVOLVED 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 3

ARGUMENT 9

POINT I: Local Law No. 4, "Our Children, Our Future," Is Not Preempted by State Law and Is Subject to a Mandatory Referendum 9

SUBPOINT A: City Charter Sections 2-1, 2-8 and 2-13, As They Pertain to Commissioners of Schools, Are Hybrid State-Local Laws That Complement and Are Not Preempted By the Education Law 10

SUBPOINT B: The District's Continued Payment of Salaries to the Commissioners of Schools and the Commissioners' Acceptance of Those Salaries Demonstrate That The City Charter Sections to Be Amended By Local Law Number 4 Are Not Preempted by State Law and Continue to Have Independent Legal Significance 18

POINT II: The Court Below Erred In Holding That the Mayor's July 12, 2019 Letter was Impermissibly Advocative 23

CONCLUSION 28

TABLE OF AUTHORITIES

CASES *Bd of Ed of City of Syracuse v. King*, 280 AD 458 [4th Dept 1952] 16, 17

Bd of Ed of City School Dist of City of New York v. City of New York, 41 NY2d 535 [1977] 16

Dean v. State, 91 AD2d 805 [3d Dept 1982]

.....19

Dean v. State, 111 Misc2d 97 [NY Ct Cl 1981]
.....19

Di Prima v Wagner, 10 NY2d 728 [1961]
.....12

Di Prima v Wagner, 14 AD2d 36 [1st Dept 1961] .....
11-12

DJL Rest. Corp. v City of NY, 96 NY2d 91 [2001] 10

Garcia v NY City Dept. of Health & Mental Hygiene, 31 NY3d 601 [2018]....
10-11

Hedman v. City of Rochester, 64 AD2d 817 [1978]
.....16

James v Alderton Dock Yards, Ltd., 256 NY 298 [1931]
.....23

Lanza v. Wagner, 11 NY2d 317 [1962] 14, 15,
17

Metzger v Swift, 258 NY 440 [1932] 18

People v Diack, 24 NY3d 674 [2015]
.....11

Phillips v. Mauer, 67 NY2d 672 [1986] 25,
27

Schaefer v. Long Beach, 271 NY 81 [1936]
.....19

Schultz v. McCall, 220 AD2d 984 [3d Dept 1995]

.....25

Schultz v. State, 86 NY2d 225 [1995] 24, 27

Stern v. Kramarsky, 84 Misc2d 447 [NY Cty Sup 1975] 25

STATUTES Civil Practice Law and Rules § 3001 23

Education Law § 2553 22

Education Law § 2554 ..... 20, 22

Education Law § 2573 20

Education Law § 2576 16

Municipal Home Rule Law 1

Municipal Home Rule Law §20 7

Municipal Home Rule Law §23 ..... 7, 10

NY Constitution, Article IX 13

NY Laws of 1907, Chapter 755 ..... 11, 12, 20-21

NY Laws of 1909, Chapter 21 12-13

NY Laws of 1910, Chapter 140 13

NY Laws of 1917, Chapter 786 13

NY Laws of 1971, Chapter 141 ..... 13, 14

Public Officers Law § 67 ..... 19, 22

Rochester City Charter § 2-1 ..... *passim*

Rochester City Charter §2-8 ..... *passim*

Rochester City Charter § 2-13 ..... *passim*

SECONDARY MATERIALS 19 NY Jurisprudence 2d § 236 19

QUESTIONS INVOLVED

I. Does the Municipal Home Rule Law require that City of Rochester Local Law Number 4 of 2019, entitled "Our Children, Our Future," which would amend the Rochester City Charter to temporarily abolish the elective offices of Commissioners of Schools and would reduce the salary of the Commissioners of Schools during their current term, be subject to a mandatory referendum?

ANSWER: The Court below incorrectly held that the Municipal Home Rule Law does not mandate a referendum on Local Law No. 4 and that the referendum called for by Local Law No. 4 is advisory.

II. Does Mayor Warren's letter of July 12, 2019 engage in impermissible advocacy in favor of a "yes" vote on the referendum called for by Local Law No. 4?

ANSWER: The Court below incorrectly found that the July 12, 2019

informational letter was
advocative.

STATEMENT OF THE CASE

City of Rochester Local Law Number 4 of 2019, entitled "Our Children, Our

Future" was passed by Rochester City Council on June 18, 2019 and approved by

Rochester Mayor Lovely A. Warren on July 8, 2019. R.140-142. Section 5 of the Local

Law provided that it was to be submitted for the approval of the electors of the City of

Rochester at the general election to be held on November 5, 2019. *Id.*

On July 29, 2019, Petitioner-Respondents Rochester City School

District

("RCSD" or "District") and Board of Education of the Rochester City School District

("Board") commenced this Article 78 Proceeding by Notice of Petition, Verified

Petition, and Order to Show Cause, seeking to declare the referendum called for by

Local Law No. 4 to be an unlawful advisory referendum and also seeking a permanent

injunction to restrain the City of Rochester, Rochester City Council and Mayor Warren

(collectively "City") and the Monroe County Board of Elections from placing the

referendum on the November ballot. R.98-110. The City opposed the action, arguing

that the Board and District did not have standing to maintain the proceeding, that the

referendum called for by Local Law No. 4 was mandated by the Municipal Home Rule

Law and that statements by the City concerning the referendum were educational, not

advocative. R.150-154.

On July 30 the District and the Board filed a Notice of Amended Petition and

Verified Amended Petition that purported to add two additional petitioners—School

Board President Van Henri White and School Board Vice President Cynthia Elliott.

R.233-242. City Respondents filed a Verified Answer to the Verified Amended Petition

on July 31, 2019 that raised a Counterclaim. R.260-267. On July 31, 2019, the District

and Board filed a Reply to the Counterclaim. R.268-271. The Monroe County Board of

Elections appeared in the case on July 30, 2019, and took no position as to the merits of

the proceeding. R.243. On August 1, 2019 the Court held argument. R.272

The Court issued a Decision, Order and Judgment ("Judgment") on August 2,

2019, granting the relief sought by the District and the Board in the Verified Petition and

denying the City's Counterclaim. R.81-97. The Judgment was entered that same day.

R.43-80. The City filed a Notice of Appeal on August 2, 2019 and an Amended Notice

of Appeal on August 5, 2019. R3-41.

STATEMENT OF FACTS

"The Rochester City School District is a system that has historically underperformed. It is in dire need if improvement." R.156, 165. So reports Distinguished Educator Jaime R. Aquino, who was appointed by former State Education Department Commissioner MaryEllen Elia in August of 2018 "to provide support in improving the District's systems, structures, and operations, as well as to address significant gaps in student services and academic performance." *Id.*

In his November 14, 2018 report, the Distinguished educator found that "[o]ver the years, parents, staff, community organizations, and other stakeholders have expressed their frustrations with the school system and the continued lack of progress of

its students. Though the District has responded by implementing a number of strategies and approaches aimed at improving student performance, most of these efforts have only had minimal impact." R.166. In diagnosing the reason for this minimal impact, the Distinguished Educator highlighted that the District "has been plagued by high leadership turnover, with five superintendents in the last ten years" and urged the Board to "ask itself why it cannot retain its superintendents." R.170-171. Further, the report found that "Board Commissioners could not clearly define their roles and responsibilities, which interfered with the Superintendent's ability to lead effectively." R.171. The Board Commissioners were also found to "act as if they were the superintendent trying to manage day-to-day operations off the District," but the Distinguished Educator found that assuming such management responsibilities had the effect of "undermin[ing] the superintendent's role." *Id.* The Distinguished educator further noted that "[t]hese observations pertain not only to the current Board, but also to

previous ones." *Id.*

> The Distinguished Educator also found that "significant tensions have developed

among Board Commissioners, and between the Board and the Superintendent. Though

all of these participants have good intentions and want to do right by the students, the

behavior of district leadership does not always match their stated values and beliefs." R.

179.

> Altogether, the Distinguished Educator determined that "if RCSD's schools are

going to transform into places where all students thrive, the District must undertake a

total reset of the way in which the District operates." R.166. "The District's goal must

be nothing short of total transformation, so that everyone will be proud to send their own

children to Rochester's public schools."
R.177.

> In an attempt to bring about this total transformation, State Education

Commissioner Elia and State Regents T. Andrew Brown and Wade Norwood have

outlined a Plan, which has been memorialized in legislation proposed in the State

Assembly, to temporarily remove elected members of the RCSD Board of Education and

replace them with a five-member "excellence task force" appointed by the Board of

Regents. R.112, 117-119, 156,
224-226.

Implementation of this Plan would require not only changes to State law, but also

to the City's Charter. Specifically, the Rochester City Charter has, since its

implementation by the State Legislature in 1907, provided that the Commissioners of

Schools that make up the Board are local elective officers. R.156. The 1907 Charter

established a City "Department of Public Instruction" which was to provide a free

education to the youth of the City. R.156-157. In furtherance of this goal, the 1907

Charter also created elective offices of Commissioners of Schools comprising the

Board

of Education, which acted as the head of the Department of Public Instruction. *Id.* The

1907 Charter specified annual salaries to be paid to the Commissioners of $1,200.00. *Id.*

> Much of this framework changed in 1917 when the State Education Law was

amended such that the Boards of Education "in each City of the State" were to comport

with and be controlled by State, not local, law. R.157. The 1917 law explicitly repealed

sections 381 through 404 of the City's original 1907 Charter that had established the

Department of Public Instruction. *Id.* However, the 1917 law left undisturbed those

portions of the 1907 City Charter that created the Commissioners of Schools as elective

officers of the City and that set the salary for these Commissioners. *Id.* Accordingly,

even today, the City Charter and the State Education Law each independently (and

harmoniously) provide that the members of the Board of Education for the RCSD are to

be elected by the electors of the City of Rochester and serve terms of four years. *Id.* In

essence, each member of the Board simultaneously holds two largely overlapping

offices: an office created by the State Education Law and another created by Rochester

City Charter; only the latter of these two offices allows for payment of the salary that

RCSD Board members have collected since 1907.

Given the foregoing legal framework, the City of Rochester realized that, in order

for the State Plan to replace the RCSD Board with an excellence task force to be

implemented, the City Charter had to be amended to eliminate the local elective offices

of Commissioners of Schools and the payments of salaries therefor. R.158.

Accordingly, the City of Rochester passed and adopted Local Law No. 4 of 2019,

entitled “Our Children, Our Future.” R.124-142, 158, 227-228. Local Law No. 4 seeks

to amend the Rochester City Charter to remove, for a five-year period, any reference to

"Commissioners of Schools" as elective offices of the City of Rochester and to eliminate

the authorization for the payment of salaries for these elective offices.
Id.

> While a local law amending the Charter can be passed by action of Council and

Mayor alone (*see generally* Municipal Home Rule Law ("MHRL") § 20), where the

local law would "[a]bolish[] an elective office, or change[] the method of nominating,

electing or removing an elective officer, or change[] the term of an elective office, or

reduce[] the salary of an elective officer during his term of office" it is subject to a

mandatory referendum (*see* MHRL § 23(2)(e)). Because Local Law No. 4 amended the

City Charter to suspend for a period of five years the local elective offices of

Commissioners of Schools and to eliminate the salaries therefor, it is to be subject to a

referendum.
R.227-228.

On July 12, 2019, following the July 8, 2019 adoption of Local Law No. 4, "Our

Children, Our Future," Mayor Warren continued to educate the public about the State

Plan, the local law and the upcoming referendum by sending a letter explaining the

Local Law and referendum. R. 143-144, 159. The letter recited the history of failure of

the RCSD, referred to the findings of the Distinguished Educator, related the history of

chronic turnover of superintendents, provided statistical information concerning student

performance under the current Board, explained the upcoming referendum, and

encouraged people to vote, so that "once and for all, we know exactly what you – our

parents and citizens – want." R.144. The July 12, 2019 letter did not tell constituents

how to vote or exhort them to vote in a particular fashion. *Id.*

On July 29, 2019, the District and Board commenced this action to enjoin the City

from placing the referendum on the November ballot and to declare the referendum to be

advisory and Mayor Warren's letter of July 12, 2019 to be unlawful advocacy in favor of

a "yes" vote on the referendum. R.98-107. The trial Court issued a Decision, Order, and

Judgment on August 2, 2019, which found that those sections of the Charter that Local

Law No. 4 sought to amend, specifically sections 2-1, 2-8 and 2-13, were field-

preempted by State Law and that, accordingly, the referendum was advisory and not

mandatory. R.81-97. The Court also found that the Board and District had standing to

maintain this proceeding and that the Mayor's letter of July 12, 2019 was advocative,

rather than educational. *Id.*

The City now appeals the August 2, 2019 Order, because the determination that

City Charter Sections 2-1, 2-8 and 2-13 are preempted by State law was error, as was

the

determination that the Mayor's July 12, 2019 letter was advocative.[1]

ARGUMENT

I. Local Law No. 4, "Our Children, Our Future," Is Not Preempted by State Law and Is Subject to a Mandatory Referendum

The central holding of the decision below—and sole basis for determining that the

referendum called for by Local Law No. 4 is advisory—is that those sections of the City

Charter concerning the elective offices of Commissioners of Schools are field-preempted

by the State Education Law and, accordingly, are without independent legal authority,

rendering any alteration of those portions of the law "meaningless," and any referendum

to effect such alteration "advisory." In reaching this plainly erroneous holding, the

Court below outlined the field preemption doctrine in broad strokes while turning a blind

eye (or perhaps not turning an eye at all) to the history and present function of the

laws

here at issue. Specifically, the Court failed to consider that (1) the Charter sections at

[1] The Court's August 2, 2019 Order and Judgment also denied the City's Counterclaim. The City does not appeal the denial of the Counterclaim. Nor does the City raise the standing argument on appeal.

issue were originally enacted by the State Legislature in 1907 making them a co-equal

complement to the State Education Law but subject to revision at the local level in

accordance with the Municipal Home Rule Law; (2) the sole authority for the Board

members to be paid their salaries (which they continue to collect notwithstanding their

preemption argument) is through the very City Charter provisions that the Court below

found to be preempted and, therefore, without legal authority. Because City Charter

Sections 2-1, 2-8 and 2-13 are valid laws that establish the local elective offices of

Commissioners of Schools and salaries therefore, and because Local Law No. 4 would

eliminate for a period of five years those offices and the salaries therefor, a

referendum

is mandated by Municipal Home Rule Law § 23(2)(e).

A. City Charter Sections 2-1, 2-8 and 2-13, As They Pertain to Commissioners of Schools, Are Hybrid State-Local Laws That Complement and Are Not Preempted By the Education Law

The Court below erroneously held that, notwithstanding the lack of any conflict

between City Charter §§ 2-1, 2-8 and 2-13 and the State Education Law, these Charter

provisions are preempted by State law because the "State unequivocally occupies the

entire field of public education." R.87. "The State Legislature may expressly articulate

its intent to occupy a field, but it need not. It may also do so by implication" (*DJL Rest.*

Corp. v City of NY, 96 NY2d 91, 95 [2001]). "Intent to preempt the field may 'be

implied from the nature of the subject matter being regulated and the purpose and scope

of the [s]tate legislative scheme, including the need for [s]tate-wide uniformity in a

given area'" (*Garcia v NY City Dept. of Health & Mental Hygiene*, 31 NY3d 601, 618

[2018][quoting *People v Diack*, 24 NY3d 674, 679 [2015]][brackets original to *Garcia*]).

The Court below did not identify any express articulation of the State's purported intent

to occupy the field of public education, and relied instead on language in the New York

Constitution, the New York State Education Law and prior Court decisions to conclude

that field preemption was implied and that, because State law occupied the field, the

subject Charter provisions must fail. Yet in reaching this conclusion, the Court below

failed to realize that these provisions of the Rochester City Charter are, themselves,

enacted by the State legislature and, as such, comprise the "field" along with the

Education Law—they complement the Education Law and are not preempted thereby.

They operate in conjunction with State law, not in spite of State law.

The Rochester City Charter was passed by the State legislature in 1907

and

established a form of government for the City of Rochester (*see* L 1907, ch 755). As the

Courts have
explained:

> The granting of city charters is *purely a legislative function which was originally exercised by the Legislature itself with or without regard to the wishes of the local population as the Legislature saw fit*, and it was not until 1914 that any restriction was put on the power (Optional City Government Law; L. 1914, ch. 444). And it was not until 1923 that the Legislature even had the power to delegate to the cities the right to adopt a

> charter by local law (*Matter of Mooney v. Cohen*, 272 N. Y. 33).”]). This was by virtue of the constitutional home rule amendment (art. IX, § 11 at that time art. XII, § 2).

(*Di Prima v Wagner*, 14 AD2d 36, 40 [1st Dept 1961][emphasis added] *affd Di Prima v*

Wagner, 10 NY2d 728 [1961]). As such, the Rochester City Charter has the authority of

State law, but may be altered by either the State legislature or local government
in

accordance with the Municipal Home Rule
Law.

Local Law No. 4 seeks to amend City Charter §§ 2-1, 2-8 and 2-13 to remove any

reference therein to Commissioners of Schools as elective offices under the Charter.

These Charter provisions concerning Commissioners of Schools have been a part of the

City Charter since 1907. The 1907 Charter established a City "Department of Public

Instruction" which was to provide a free education to the youth of the City (L 1907, ch

755 at §§ 381-405). In furtherance of this goal, the 1907 Charter created local elective

offices of Commissioners of Schools comprising the Board of Education, which acted as

the head of the Department of Public Instruction (L 1907, ch 755 at §§ 14, 17). The

1907 Charter also specified annual salaries to be paid to the Commissioners (*id.* at § 21).

These provisions establishing Commissioners of Schools as elective local offices with

four-year terms and salaries are presently set forth at Charter §§ 2-1, 2-8 and 2-13.

In 1909, two years after the State implemented the Rochester City Charter, the

Education Law was established as Chapter 21 of the Consolidated Laws (*see* L 1909, ch

21; L 1910, ch 140). Thereafter, in 1917, the State Education Law was amended such

that the Boards of Education "in each City of the State" were to comport with and be

controlled by State, not local, law (L 1917, Ch 786). The 1917 law explicitly repealed

sections 381 through 404 of the City's original 1907 Charter, which sections established

the Department of Public Instruction. However, the 1917 law left undisturbed those

portions of the 1907 City Charter that established the Commissioners of Schools as

elective officers of the City and that set the salary for these Commissioners—those

Charter provisions remain good law today.

> The Court below began its preemption analysis with the NY Constitution, which,

at Article IX, Section 3, reserves to the State legislature the power to legislate

concerning the "maintenance, support or administration of the public school

system."

This Constitutional language is entirely consistent with the forgoing history and current

provisions of the City Charter—it was the State legislature that established (and since

that time has chosen not to disturb) those City Charter provisions establishing School

Commissioners as local elective offices with salaries authorized exclusively through the

Rochester City Charter. And as the Education Law has changed, the City's Charter has

been amended by the State so as to harmonize with the Education Law. For instance, in

1971, the Education Law was amended to increase the number of members of the RCSD

Board of Education from five to seven (*see* L 1971, ch 141 at §1). The State law

amending this portion of the Education Law specifically provided that "[t]he charter of

the city of Rochester is hereby amended to conform with the provisions of this act" (L

1971, ch 141 at §4). Thus, far from construing the Education Law as preempting the

Rochester City Charter, the State legislature has continued to treat the Rochester

City

Charter as an independent source of law and has amended the City Charter as necessary

to maintain consistency between these two coequal and complementary laws. The State

has implemented, amended and maintained these Rochester City Charter provisions in

furtherance of its Constitutional obligation to provide for the "maintenance, support or

administration of the public school
system."

None of the cases relied upon by the Court below undermine the foregoing

analysis of the non-preemptive relationship between these provisions of the City Charter

and the State Constitution and Education Law. *Lanza v. Wagner*, 11 NY2d 317 [1962]

involved a challenge by three former elected New York City School Board members

who were removed from office as a result of changes to State law that enabled the

Mayor to directly appoint Board members. The former board members argued that the

State legislation violated the local voters' rights under the home rule provisions of the

State Constitution. In dismissing the suit, the Court of Appeals held that the members of New York City's Board of Education were not "city officers" for purposes of the home rule section of the State Constitution. However, there was no evidence in *Lanza* that the New York City Charter expressly identified Commissioners of Schools as local elective offices, as the Rochester City Charter does here. *Lanza*, therefore, is not on point.

> *Lanza* is instructive, though, insofar as it illustrates that the Rochester City Charter amendments to be effected by Local Law No. 4 are specifically aimed at *avoiding* a situation like that which led to the protracted *Lanza* litigation. The City of Rochester anticipates that the State will take action similar to the legislation that precipitated *Lanza*—the removal of elected School Board members and appointment of new members. By enacting Local Law No. 4, Rochester will amend its Charter to eliminate any potential conflict between the Charter and revised State Law so that any such State

legislation may be implemented more effectively and efficiently than in *Lanza* (i.e.

without litigating to the Court of Appeals). In short, the City agrees with the holding in

Lanza that the State has the authority to pass legislation removing elected RCSD Board

members—but that does not rob the City of its own coequal authority to amend its

Charter in accordance with the Municipal Home Rule Law to pave the way for just such

reform at the state level.[2]

[2] The City recognizes that, given the hybrid State-local nature of these portions of the City Charter, the State could itself amend the Charter simultaneous to passing legislation at the State level to remove the current board and appoint an excellence task force. But the City does not have to wait for that moment or hope that the State amends the Charter in a manner satisfactory to the City—the Municipal Home Rule Law provides the City independent authority to amend its own Charter, and that is exactly what Local Law No. 4 proposes to do. To take from the local government the right to amend its own Charter would violate the rights of local governments under Article IX of the Constitution.

The other cases relied upon by the Court are similarly inapt.[3] The Court contends

that the Fourth Department case of *Hedman v. City of Rochester*, 64 AD2d 817 [1978]

speaks to the "precise point" at issue in this litigation. Yet *Hedman* did not address the

status of Commissioners of Schools as local elected officials or the interplay of the

Rocheter City Charter and the State Education law. Rather, *Hedman* determined that the

City of Rochester cannot be legally liable for injuries occurring on school property,

because such property "is under the exclusive control of the Rochester City School

District which is a separate legal entity from the defendant city" (*id.* at 818). The

Charter provisions here at issue do not concern premises liability—far from addressing

the "precise point" before the Court, *Hedman* is a distraction from the real issue.

> *Bd of Ed of City of Syracuse v. King*, 280 AD 458 [4th Dept 1952]("*King*") is also

inapt. There, the Court held that the City of Syracuse did not have authority under

Education Law § 2576 or any other law to oversee the expenditures of the School

District so long as expenditures remained "within the total amount appropriated" in the

budget (*id.* at 460-461). The only reference to the Syracuse City Charter in that case was

a far cry from the language of the Rochester City Charter at issue

here:

> The only reference to the 'Department of education' in the city charter is section 21 which completely nullifies any claim of

[3] The matter of *Bd of Ed of City School Dist of City of New York v. City of New York*, 41 NY2d 535 [1977] hardly calls for any analysis as it simply parrots the holding of *Lanza* at page 542 and, accordingly, is distinguishable on the same grounds.

> right of the city council, board of estimate or city auditor to reaudit or approve or disapprove expenditures of educational moneys from the fund credited to the board of education in the hands of the city treasurer so long as the expenditures are for educational purposes and do not exceed the appropriation. Section 21 of the city charter reads: 'Department of education. This charter shall not apply to or affect the maintenance, support or administration of the educational system'.

(*Id.* at 462-463). Unlike the Rochester City Charter which, through State legislation, explicitly makes Commissioners of Schools local elective offices, the Syracuse City Charter expressly disclaimed any application to the "maintenance, support or administration of the educational system." *King* has no bearing on the instant matter.

> In short, without engaging in any real analysis of the provenance, status and

interaction of the laws here at issue, the Court below collected a series of sound bites

from disparate appellate cases standing for the proposition that "public education shall

be beyond the control by municipalities and politics" (*Lanza*, 11 NY2d at 326 [1962]).

Yet here, the State legislature, pursuant to its Constitutional authority to provide for the

"maintenance, support or administration of the public school system," specifically

enacted Rochester City Charter provisions establishing Commissioners of Schools as

local elective offices and providing for payment of a salary to those Commissioners.

The State legislature has amended these portions of the Charter from time to time, but

has never repealed them (despite having repealed other sections of the City Charter that

concerned public education). Thus, while matters of public education may typically "be

beyond the control of municipalities," in this specific instance, the State legislature

has

purposefully and expressly given to the City of Rochester a measure of control of the

public education system as set forth in Charter §§ 2-1, 2-8 and 2-13 by making

Commissioners of Schools local elective officials (*accord Metzger v Swift*, 258 NY 440,

443 [1932]["True indeed it is that education is a State or governmental function. This

does not mean that one fulfilling such a function is invariably a State as distinguished

from a city officer"][internal citations omitted]). These sections of the City Charter,

established through State legislative action and holding the authority of State law,

complement and operate in conjunction with the Education Law—they are not

preempted by the Education Law. As such, the City is entitled to amend these laws as it

would any other portion of its Charter. Where, as here, those amendments would abolish

an elective office and reduce the salaries of elective officers, they are subject to a

mandatory referendum pursuant to the Municipal Home Rule Law.

B. The District's Continued Payment of Salaries to the Commissioners of Schools and the Commissioners' Acceptance of Those Salaries Demonstrate That The City Charter Sections to Be Amended By Local Law Number 4 Are Not Preempted by State Law and Continue to Have Independent Legal Significance

The foregoing historical and legal analysis establishing that City Charter §§ 2-1,

2-8 and 2-13 are not preempted by State law and, in fact, complement the State

Education Law, is reinforced by the District's history of payment of salaries to the

School Commissioners over the past 112 years, and the Commissioners' acceptance

thereof. The sole legal authority for such payments are Rochester City Charter §§ 2-1,

2-8 and
2-13.

It is black letter law in New York that "a public officer may only collect and retain

such compensation as is specifically provided by law" (19 NY Jur 2d Civil Servants and

Other Public Officers and Employees § 236). "If a salary or compensation is fixed

without any authority in law, a public officer cannot recover for services rendered as he

cannot base his claim upon any valid provision of law awarding him a salary or

compensation" (*Schaefer v. Long Beach*, 271 NY 81, 86 [1936]). "Public policy,

embodied in the State Constitution, statute, and the common law, prohibits a public

officer from being compensated for his services unless there is statutory authority to do

so" (*Dean v. State*, 111 Misc2d 97, 98 [NY Ct Cl 1981], *affd Dean v. State*, 91 AD2d

805 [3d Dept 1982]). Public Officers Law § 67(1) provides that "[e]ach public officer

upon whom a duty is expressly imposed by law, must execute the same without fee or

reward, except where a fee or other compensation therefor is expressly allowed by law"

and subjects a public officer who receives compensation without such statutory authority

to criminal liability and "treble damages."[4]

> Thus, without a statutory basis, salary payments or other compensation paid to the

Commissioners of Schools are not authorized and may expose those taking such funds to

criminal prosecution and triple damages. Nothing in the State's Education Law provides

a statutory basis to compensate the RCSD Board members. While Education Law §§

2554 and 2573 give the Board of Education the authority to create, staff and pay the

positions of "superintendent of schools, such associate, assistant, district and other

superintendents, examiners, directors, supervisors, principals, teachers, lecturers, special

instructors, medical inspectors, nurses, auditors, attendance officers, secretaries, clerks,

custodians [and] janitors," there is no provision in the Education Law for the Board of

Education to establish or pay its Commissioners' salaries.

> Since 1907, the sole statutory authority for the payment of RCSD Board member

salaries has been the Rochester City Charter. Article II, § 17 of the original 1907 Charter provided:

> The annual salary of the mayor is five thousand dollars; of the comptroller, three thousand five hundred dollars; of the treasurer, three thousand five hundred dollars; *of each commissioner of schools, twelve hundred dollars*; of the president of the common council, one thousand dollars; of each alderman, seven hundred and fifty dollars. The salary of each midwife examiner is ten dollars per day for each day actually engaged in the performance of duties as such.

(L 1907, ch 755)(emphasis added). This section of the Charter concerning the salary to be paid to Commissioners of Schools has undergone a number of revisions and was amended most recently in 1979 to read at present as follows:

[4] School Board members are public officers under the Public Officers Law (*see, e.g., Komyathy v Bd. of Educ*., 75 Misc 2d 859, 860 [Dutchess Cty Sup 1973]["Plaintiff and the six other individuals which comprise the defendant school board are public officers within the meaning the section 2 of the Public Officers Law"][citing *Metzger v. Swift*, 258 NY 440[1932]).

> §2-13 Salaries of School Board members
>
> The annual salary of each Commissioner of Schools and the annual salary of the President of the School Board shall be prescribed by the School Board of the Rochester City School District, within the limits of the total annual appropriation for school purposes, and for so long as all the members of the School Board are elected, and provided that changes shall take effect on the first day of the next fiscal year.

This section of the Rochester City Charter continues to provide the sole statutory

authority for payment of salaries to RCSD Board members. Counsel for the Board and

District admitted this fact during oral argument. R.275 (admitting that "[t]he City

Charter is the only law currently on the books wherein the Board of Education members'

salaries are discussed."). And it is exclusively under the authority granted by this

Charter provision that the RCSD Board has seen fit to pay its members at rates higher

than any other School Board in the State. R.155, 160-162.

The District's payment of these salaries and the Board members' acceptance

thereof, all pursuant to Charter Section 2-13, further prove that the City Charter and the

Education Law are valid laws that operate in tandem—that each RCSD Board member

effectively holds dual elective offices: one under § 2553 of the Education Law, pursuant

to which the Board member exercises the authority granted to Boards of Education under

Education Law § 2554, and a second local elective office under §§ 2-1 and 2-8 of the

Rochester City Charter, which office entitles these Board members to the payment of a

salary under Charter § 2-13. That these sections of the City Charter are not preempted

by the Education Law is made plain by the Board members' continued acceptance of

salaries. If, contrarily, Board members have accepted these salaries despite their belief

that City Charter §§ 2-1, 2-8 and 2-13 are preempted by State law and, therefore, of no

effect, they may be answerable in triple damages for any unauthorized monies

taken

from the public fisc (Public Officers Law §67).[5]

The payments of salaries to locally elected Commissioners of Schools pursuant to

Rochester City Charter §§ 2-1, 2-8 and 2-13 demonstrate that these Charter provisions

are not preempted. The City, therefore, may amend these provisions by Local Law just

as it may amend any other provisions in its Charter. But because the amendments called

[5] In the unlikely event that this Court were to affirm the decision below and hold that these City Charter provisions are preempted by State Law, this Court should also clearly declare that, accordingly, there exists to basis at law for RCSD Board members to continue to draw their salaries.

for by Local Law No. 4 would abolish the elective offices of Commissioners of Schools

and reduce the salaries therefor during the Commissioners' terms, a referendum is

mandated by the Municipal Home Rule Law. The referendum is not advisory and

should appear on the November 2019 ballot.

II. The Court Below Erred In Holding That the Mayor's July 12, 2019 Letter was

Impermissibly
Advocative

CPLR § 3001 provides that the trial court may "render a declaratory judgment

having the effect of a final judgment as to the rights and other legal relations of the

parties to a justiciable controversy[.]" "The use of a declaratory judgment, while

discretionary with the court, is nevertheless dependent upon facts and circumstances

rendering it useful and necessary. The discretion must be exercised judicially and with

care" (*James v Alderton Dock Yards, Ltd.*, 256 NY 298, 305 [1931]). "Where there is no

necessity for resorting to the declaratory judgment it should not be employed" (*id.*).

Here, the District and Board raised the July 12, 2019 letter in support of their

application to restrain the City from expending public funds in support of a purportedly

advisory referendum, but admitted at oral argument that they were not seeking any relief

concerning the July 12, 2019 letter and could not articulate the manner in which they had

been caused any harm by the letter. R.279-280. Because the letter did not cause the petitioners any harm and because they sought no particular relief relative to the letter, it

was not necessary for the Court to decide any issue concerning the letter and was an abuse of discretion to reach that issue. The portion of the Order and Judgement concerning the letter should be reversed for this reason alone.

But the Court's determination was also wrong on the merits. Under the New York Constitution, public funds may not be used "to pay for the production and distribution of campaign materials for a political party or a political candidate or partisan cause in any election" because such would "constitute a subsidization of a nongovernmental entity—a political party, candidate or political cause advanced by some nongovernmental group" (*Schultz v. State*, 86 NY2d 225, 234 [1995]). But such funds may be expended "to educate, to inform, to advocate or to promote voting on any issue . . . provided it is not

to

persuade nor to convey favoritism, partisanship, partiality, approval or disapproval by a

State agency of any issue, worthy as it may be" (*id*. at 234-235 [internal quotation

omitted])
.

> While the trial Court cited at length from Court of Appeals cases and Appellate

Division cases articulating the distinction between advocacy and education, it failed to

engage in any meaningful analysis of the actual content of the Mayor's July 12, 2019

missive. Rather, the Court gave the conclusory assurance that it had "carefully

examined the July 12th letter" and found it to advocate some position—yet the Court

remained mum as to what position it found the letter to have advocated. The Court

proclaimed that "[t]he letter's message is a loud and clear endorsement of the

Referendum, and strongly suggests that the voter should be too [sic]." R.93. Setting

aside the glaring grammatical problems with this sentence, there is nothing wrong with a

"loud and clear endorsement of the Referendum"—the referendum is the act of voting

the Local Law up or down. An endorsement of the referendum is just what the Mayor

set out to do: educate the public about the referendum and encourage them to get out and

vote.[6]

> The Order's next sentence reads: "Although the letter does not squarely tell the

residents what their vote should be, *i.e.*, yes or no, it nevertheless conveys that same

recommendation." Here, the Court admits that nowhere does the Mayor's letter tell

readers how to vote—as such, it is easily distinguishable from *Phillips v. Mauer*, 67

NY2d 672 [1986], *Schultz v. McCall*, 220 AD2d 984 [3d Dept 1995], *Stern v.*

Kramarsky, 84 Misc2d 447 [NY Cty Sup 1975], each of which involved the government

entity expressly advocating for a particular "yes" or "no" vote on a pending proposition.

But the Court faults the letter for "nevertheless convey[ing] that same recommendation."

What recommendation? The Court doesn't say. The Court does not set forth a single

[6] The second phrase of the quoted sentence ("and strongly suggests that the voter should be too") is difficult to comprehend but seems to reflect the fact that the letter is encouraging readers to vote on the referendum question just as Mayor Warren will be doing.

passage from the letter to exemplify the "conveyance" of any purported

"recommendation."

> The trial Court goes on: "From the letter's phrasing, the author's position is

evident." What phrasing evidences the author's position? We never find out—the Court again fails to cite to any language in the letter. What position does the Court find the author to have taken? Again—no answer. No citations. No analysis.

> Next sentence: "In fact, the letter's ending asks the reader to 'join with me and

vote.'" The Court's rhetoric here suggests that this is some smoking gun demonstrating

the Mayor's illicit advocacy—but it is just the opposite: it is a ringing endorsement of

the propriety of the letter. The Mayor is encouraging the electorate to get to the polls,

which is exactly what she, herself, will be doing come election day. She is exhorting

readers to vote, not telling them how to
vote.

> The Court concludes the paragraph: "In isolation, this could appear innocuous, but

construed with the entirety of the letter, it smacks of prohibited activity." What could

appear innocuous? The mayor's initial "loud and clear endorsement of the

Referendum"—yes, the endorsement of the right to vote is innocuous. The fact that the

Mayor "does not squarely tell the residents what their vote should be"? Innocuous. That

the letter tells the readers that the Mayor will be voting and they should too? Innocuous

again. The Order cites nothing but innocuous statements all calculated to educate the

public and get people to the polls—what led the Court to exclaim that the letter "smacks

of prohibited advocacy" remains a
mystery.

Sometimes, of course, facts speak for themselves. The Mayor's letter recounts a series of facts about the long-term failings of the RCSD and the conclusions of the Distinguished Educator calling for a total reset of the governance of the District. These facts alone may have suggested to the Court below that there was really only one way to vote on the referendum—or they may not have: the Court simply doesn't tell us what language in the letter led it to its conclusions. Whatever the case may be, the July 12, 2019 letter was not an outright encouragement to vote one way or another and it was not "patently designed to exhort the electorate to [make an avowed, public commitment] in support of a particular position advocated by [one political faction]" (*Schulz v State*, 86 NY2d at 236 [quoting *Phillips*, 67 NY2d at 674][brackets original to *Schulz*]). As such, the determination of the Court below was error.

CONCLUSION

For all the above reasons, the City respectfully requests that this Court reverse the

Order and Judgment below, deny the permanent injunction, dismiss the petition and

grant to the City respondents their costs, fees and disbursements in this action. In the

unlikely event that the Court affirms the decision below that City Charter §§ 2-1, 2-8 and

2-13 are preempted by State law, the Court should acknowledge that there is no statutory

basis for the RCSD Board members to be paid a salary unless and until the State amends

the Education Law to provide for such compensation.

Respectfully submitted,

TIMOTHY R. CURTIN Corporation Counsel

/s/ Patrick Beath PATRICK BEATH, Esq. *Attorneys for Respondent-Appellants City of Rochester, Lovely A. Warren and Council of the City of Rochester* 30 Church Street, Room 400A Rochester, New York 14614 Telephone: (585) 428-6812
patrick.beath@cityofrochester.gov

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