No Argument Requested

Case No. 510106

Supreme Court of the State of New York

Appellate Division – Third Department

ITHACA CITY SCHOOL DISTRICT,

Petitioner-Respondent,

- vs. -

NEW YORK STATE DIVISION OF HUMAN RIGHTS,
on the Complaint of AMELIA KEARNEY ON BEHALF
OF HER MINOR CHILD EPIPHANY KEARNEY

Respondents-Appellants.

BRIEF OF *AMICI CURIAE* ADVOCATES FOR CHILDREN OF NEW YORK, INC., ANTI-DEFAMATION LEAGUE, DISABILITY ADVOCATES, INC., EMPIRE STATE PRIDE AGENDA, THE GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK, THE ITHACA LESBIAN GAY BISEXUAL TRANSGENDER TASK FORCE, LAMBDA LEGAL DEFENSE AND EDUCATIONAL FUND, INC., NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., THE NEW YORK CIVIL LIBERTIES UNION, AND PARENTS, FAMILIES AND FRIENDS OF LESBIANS AND GAYS

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PRELIMINARY STATEMENT

The New York State Human Rights Law ("HRL") provides crucial civil rights protections to the state's schoolchildren. Far more specific and inclusive than federal antidiscrimination statutes, the HRL bars direct discrimination by schools and also expressly prohibits them from permitting the harassment of any student based on race, color, religion, disability, national origin, sexual orientation, military status, sex, age or marital status. Exec. Law§ 296(4).[1] And, through the New York State Division of Human Rights (the "Division" or "Appellant"), the HRL provides students with a uniquely affordable and accessible forum in which to seek remedies and redress for violation of their rights. *See id.* §§ 295, 297. These comprehensive protections play a critical role in carrying out the HRL's express purpose of ensuring equal opportunity in education and "fulfill[ing] . . . the provisions of the constitution of this state concerning civil rights." *Id.* § 290(2); *see also id.* § 291.

Despite § 296(4)'s plain text and relevant case precedents, the court below interpreted it to be inapplicable to Respondent Ithaca City School District ("Respondent" or the "School District") because, the court concluded, the term "education corporation or association" as used in § 296(4) does not include public school districts or other public educational institutions. Under that interpretation,

[1] The HRL is codified in the state's Executive Law. *See* Exec. Law §§ 290 to 301.

millions of students who attend public schools—the vast majority of New York's schoolchildren—would be deprived of the HRL's protection. *Amici* submit this brief to assist the Court in understanding that the adoption of that argument would contradict the statute's text and this Court's precedents, be inconsistent with decisions of state and federal courts favoring application of the HRL to public institutions, violate the statute's mandate of liberal construction, thwart the legislature's clearly expressed intent, and produce absurd and unjust results.

Amici are unified in their opposition to discrimination and harassment in education, whether based on race or any other impermissible factor. The sole purpose of this brief, however, is to address whether the HRL's prohibition of discrimination in and by education corporations and associations applies to school districts and other public educational institutions, and the brief takes no position on the other issues raised by the parties.

STATEMENTS OF INTEREST OF *AMICI CURIAE*

For almost 40 years Advocates for Children of New York, Inc. ("AFC") has been working with low-income families to secure quality and equal public education services for their children. AFC provides a range of direct services, including free individual case advocacy, technical assistance, and trainings, and also works on institutional reform of educational policies and practices. As advocates for fair treatment and protection against discrimination for young people in public schools, AFC joins this *amici* brief to support application of the protections of the HRL to public school students.

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States, the Anti-Defamation League ("ADL") is today one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. As part of that mission, ADL is a leading provider of anti-bias education and diversity training programs that help create and sustain inclusive home, school, community, and work environments. Further, over the past decade, the ADL has been recognized as a leading resource on effective responses to violent bigotry, drafting model hate crime statutes for state legislatures and lobbying on behalf of strengthened prevention and deterrence initiatives. The HRL provides a crucial recourse for New York's residents to stand up against

bigotry, bullying, harassment and discrimination in the community. This case compels the ADL to file as *amicus* to defend particularly the rights of students to challenge an unsafe learning environment.

Since 1989, it has been Disability Advocates' mission to protect and advance the rights of adults and children who have disabilities. We assist persons with disabilities in freely making the decisions that affect their lives, enforcing their rights, and fully participating in community life. Our advocacy and litigation has defeated efforts to exclude persons with disabilities from community housing, assured the accessibility of movie theaters and state operated community residences, established the right to counsel at public expense for indigent persons subject to guardianship proceedings, stopped dangerous experiments on patients in state psychiatric hospitals, and obtained compensation for victims of unnecessary and unconsented prostate surgery. More information about our past and present advocacy for persons with disabilities is available at www.disability-advocates.org.

A major focus of our work involves assisting students with disabilities who face discrimination or denial of rights by public school districts. Because the demand for our assistance far exceeds our resources, we frequently refer persons with disabilities to the New York State Division for Human Rights, which can investigate, mediate and remedy discrimination suffered without the need for a lawyer, and without incurring litigation expenses. If this forum becomes

unavailable to students of public schools, there will often be no other forum and no other remedy available to redress the discrimination they have suffered.

Founded in 1990, the Empire State Pride Agenda ("Pride Agenda") is New York's statewide civil rights and advocacy group committed to winning equality and justice for lesbian, gay, bisexual and transgender ("LGBT") New Yorkers and their families. The Pride Agenda has offices in New York City, Albany and Rochester and is one of the largest statewide LGBT organizations in the country. It is dedicated to ensuring that all New Yorkers are protected from discrimination and bias-motivated harassment and violence, and as part of its core priorities has worked to secure measures that protect teachers and other staff from employment discrimination and public school students from bullying and discrimination based on sexual orientation and gender identity and expression. The Pride Agenda was instrumental in passage of New York's Sexual Orientation Non-Discrimination Act ("SONDA") which in 2003 added sexual orientation to the state's Human Rights Law, and is currently working to pass the Gender Expression Non-Discrimination Act ("GENDA") to similarly add gender identity and expression. The Pride Agenda was also among the lead groups advocating for the Dignity for All Students Act passed in 2010 to prevent and address bias based bullying and discrimination in the New York State's public schools.

The Gay, Lesbian and Straight Education Network ("GLSEN") is the leading national education organization focused on ensuring safe schools for all students. Established nationally in 1995, GLSEN envisions a world in which every child learns to respect and accept all people, regardless of sexual orientation or gender identity/expression. GLSEN seeks to develop school climates where difference is valued for the positive contribution it makes to creating a more vibrant and diverse community. As an advocate for fair treatment and protection against discrimination for young people in public schools, GLSEN joins this *amici* brief to support application of the HRL's protections to public school students.

The Ithaca Lesbian Gay Bisexual Transgender Task Force is a 501(c)(3) non-profit organization based in Ithaca, New York, and serves the Tompkins County area. We advocate for the creation of a social and cultural environment that nurtures a wide range of gender, sexuality, and family arrangements. We encourage an awareness of issues affecting LGBT people by conducting public meetings, informational programs, artistic events, and social activities to work towards the elimination of prejudice and discrimination and to improve relationships and understanding among and between LGBT and heterosexual people. We believe that if the HRL is found to not apply to public school districts, it would have a devastating effect on the safety of LGBT students in New York by

stripping away the strongest legal protections available to them against discrimination and harassment in school.

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work. Advocacy on behalf of students who face discrimination, harassment, violence and censorship at school on the basis of sexual orientation and gender identity has long formed a central part of Lambda Legal's work. *See, e.g.*, *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996); *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001); *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135 (C.D. Cal. 2000); *E. High Sch. PRISM Club v. Seidel*, 95 F. Supp. 2d 1239 (D. Utah 2000); *E. High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 81 F. Supp. 2d 1166 (D. Utah 1999).

In New York, Lambda Legal has played an active role in controversies surrounding the proper interpretation of the HRL's protections for students. Because§ 296(4) specifically prohibits schools from denying the use of their facilities or "permit[ting] the harassment of any student" on the basis of sexual orientation, this Court's interpretation of the statute's scope will have a profound impact on the young people served by Lambda Legal's mission in New York.

The NAACP Legal Defense & Educational Fund, Inc. ("LDF") is a non-profit legal organization that assists African Americans and other people of color in securing their civil and constitutional rights. For more than six decades, LDF has worked to dismantle racial segregation and ensure equal educational opportunity. In support of this mission, LDF has played and continues to play a critical role in ensuring that laws prohibiting discrimination are upheld and vigorously applied.

The New York Civil Liberties Union ("NYCLU") is a non-profit organization deeply devoted to the protection and enhancement of basic rights and liberties. Among the most important of these rights is the right of equal educational opportunity, which embraces the right to obtain a public school education free from discrimination. The HRL serves, along with other constitutional and statutory provisions, as a principal vehicle by which the right of equal educational opportunity is protected. Indeed, in enacting the HRL, the State Legislature expressly declared the "opportunity to obtain education . . . without discrimination" to be a "civil right" and empowered the State Division of Human Rights to enforce and protect that "civil right." Exec. Law §§ 290, 291. The effort of the petitioner school district to escape the reach of the statute ignores this legislative commitment, ignores the principle that the HRL is to be liberally construed to effect its purpose, and ignores judicial precedent on this issue. As an organization deeply devoted to upholding the right of all students to a public

education free from discrimination, the NYCLU hereby joins this *amici curiae* brief defending the application of the HRL to public schools.

Parents, Families and Friends of Lesbians and Gays (PFLAG) National is a non-profit organization with over 200,000 members and supporters in all 50 states and the Commonwealth of Puerto Rico. PFLAG promotes the health and well-being of lesbian, gay, bisexual and transgender persons, their families and friends through: support, to cope with an adverse society; education, to enlighten an ill-informed public; and advocacy, to end discrimination and to secure equal civil rights. We provide the opportunity for dialogue about sexual orientation and gender identity, and act to create a society that is healthy and respectful of human diversity. PFLAG works to create a world in which all young people may grow up and be educated with freedom from fear of violence, bullying and other forms of discrimination, regardless of their actual or perceived gender identity or sexual orientation or that of their families. As advocates for fair treatment and protection against discrimination for young people in public schools, PFLAG joins this *amici* brief to support application of the protections of the HRL to public school students.

ARGUMENT

THE HUMAN RIGHTS LAW APPLIES TO PUBLIC SCHOOL DISTRICTS.

Under New York's HRL, a nonsectarian and tax-exempt "education corporation or association" may not deny the use of its facilities to—and may not permit the harassment of—any student based on race, color, religion, disability, national origin, sexual orientation, military status, sex, age or marital status. Exec. Law § 296(4). A public school district is both an "education corporation" and an "education association" for purposes of the HRL, and therefore may neither discriminate nor permit discriminatory harassment.[2] That conclusion is supported by this Court's holdings and by decisions of other New York state and federal courts.

This Court should not underestimate the significance of an interpretation excluding public schools from § 296(4)'s scope. The New York State Department of Education reports that during the 2005-2006 academic year (when the events at issue in this case occurred), more than three million students attended elementary, middle and high school in New York. Approximately 2.75 million of those

[2] There can be no serious dispute that a public school district meets § 296(4)'s only other two conditions of applicability: that the entity be nonsectarian; and that it be exempt from taxation under Article 4 of the Real Property Tax Law. *See* Real Prop. Tax Law § 408.

schoolchildren—over 85% of the total—attended public schools.[3] Nearly 400,000 schoolchildren attended religiously affiliated schools that are beyond the reach of §296(4), which applies only to entities that are "nonsectarian." Under the interpretation adopted by the court below, the HRL would protect a scant number of students—barely more than 2% of New York's school-age population.

The court below adopted a construction of the HRL that thwarts the extremely strong and longstanding state policy of equal educational opportunities for all of the state's children, and instead offers equal opportunity to only a small number of students attending private schools. The HRL embodies the state's unwavering commitment to a policy of equal opportunity—including educational opportunity—and expressly calls on courts to liberally construe its provisions to accomplish its broad remedial purposes. *See* Exec. Law §§ 290, 291, 296(4), 300; *see also Cahill v. Rosa,* 89 N.Y.2d 14, 20 (1996). The court below acknowledged neither this fundamental policy of equal education opportunity nor the liberal construction mandate of the HRL itself. Its decision undermines the safety of schoolchildren throughout the state by improperly restricting the HRL's protection to only a tiny percentage of student population—those attending schools that are

[3] The data in this paragraph is drawn from tables compiled by the New York State Education Department of Non-Public School Enrollment. Table 2, Trends of Nonpublic School Enrollment by Affiliation, Grades K-12, New York State 2005-06 to 2009-10, *available at* http://www.emsc.nysed.gov/irts/statistics/nonpublic/TABLE2.pdf; Table 4, Trends of Public and Nonpublic Enrollment, Grades K-12 New York State 1970-71 to 2009-10, *available at* http://www.emsc.nysed.gov/irts/statistics/nonpublic/TABLE4.pdf.

nonsectarian as well as private. Amici respectfully submit that this Court should reject that interpretation of the HRL and reverse the supreme court's judgment.

A. A public school district is an "education corporation or association" under the HRL.

The HRL protects students from discrimination by, and discriminatory harassment in, any "education corporation or association." Exec. Law § 296(4).[4] The General Construction Law ("GCL") incorporates the definition of "education corporation" set forth in § 216-a(1) of the Education Law—a definition that expressly includes all "corporation[s] . . . formed under" the Education Law. Gen. Constr. Law § 66(6).[5] Public school districts in New York are defined as "corporations" both in the state constitution and in statute. Const. Art. 10, § 5; Gen. Constr. Law § 66(2). And public school districts are "formed under" the Education Law. *See, e.g.*, Educ. Law §§ 1501, 1504, 1522. *See also Pocantico Home & Land Co. v. Union Free Sch. Dist. of the Tarrytowns*, 20 A.D.3d 458, 461

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[4] As explained in section C below, the HRL is to be construed liberally to effectuate its broad purposes. Exec. Law § 300. The HRL's purposes include "eliminat[ing] and prevent[ing] discrimination in . . . educational institutions," *id.* § 290(3), and "eliminat[ing] . . . discrimination by the state or any agency or subdivision of the state." *Bd. of Higher Educ. of City of N.Y. v. Carter*, 16 A.D.2d 443, 447 (1st Dep't 1962) (citation and internal quotation marks omitted), *aff'd as modified on other grounds*, 14 N.Y.2d 138 (1964).

[5] Other subsections of Education Law § 216-a provide that the Not-for-Profit Corporation Law ("NPCL") shall apply to education corporations in certain circumstances. But the NPCL "shall not apply" to education corporations where the NPCL's provisions "conflict[] with a provision of [the Education Law]." Educ. Law § 216-a(4)(a). And § 216-a's provisions regarding the NPCL are not incorporated into the GCL's definition of "education corporation." *See* Gen. Constr. Law § 66(6) (incorporating only subdivision one of Education Law § 216-a). *See also* footnote 7 below.

(2d Dep't 2005) ("School districts in this State are creatures of statute, which can only be formed, dissolved, or altered in accordance with . . . the Education Law.").[6] Therefore, public school districts are "education corporations."[7]

Furthermore, independent of its existence as an "education corporation," a school district is an "education . . . association" governed by the HRL. Exec. Law § 296(4). The term "association" is interpreted "broad[ly]" under New York law "to include a wide assortment of differing organizational structures . . . , depending on the context." *Mohonk Trust v. Bd. of Assessors of Gardiner*, 47 N.Y.2d 476, 483 (1979). Numerous provisions of New York law, including the State Constitution, recognize in a variety of contexts that the terms "corporation" and "association" can—and do—overlap. *See, e.g.*, Const. Art. 10, § 4 (defining "corporations" under §§ 1-4 of Article 10 of the state Constitution to include certain

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[6] Even school districts pre-dating the Education Law or originally formed pursuant to a different statute are deemed "formed under" the Education Law, because Education Law § 1501(1) provides that "[a]ll school districts organized either by special laws or pursuant to the provisions of a general law are hereby continued."

[7] In its brief in this appeal, the Division does not rely on GCL § 66(6) or Education Law § 216-a in reaching the conclusion that public school districts are "education corporations." Appellant Br. at 22. Amici respectfully disagree with that analysis—but do agree with the Division's ultimate conclusion, namely, that public school districts are "education corporations" for purposes of § 296(4). Specifically, the Commissioner's otherwise cogent analysis does not account for the fact that GCL § 66(6)—through its incorporation of Education Law § 216-a(1)—defines "education corporation" to include all "corporation[s] . . . formed under this chapter." The term "this chapter" refers to the Education Law in its entirety. *See* Educ. Law § 1 ("This chapter shall be known as the 'Education Law.'"). Hundreds of provisions in the Education Law—including other subdivisions of § 216-a—use the word "chapter" to refer to the entire Education Law. *See id.* § 216-a(4)(a); *see also, e.g., id.* §§ 2, 112, 293, 355, 501, 712, 1004-a, 1501, 1950.

"associations"); Coop. Corp. Law § 61 (referring to "associations, incorporated or otherwise"); P'ship Law § 2 (defining "person" to include "corporations[] and other associations"); Pub. Auths. Law § 1836-b(4) (referring to "corporation[s] or other association[s]"); *see also* Educ. Law § 1618; Gen. Oblig. Law § 5-521(1); Tax Law § 1080(b)(2); Transp. Law § 2(11).

Without explanation or elaboration, the court below cited only one case to support its holding that the HRL does not protect students against discrimination and harassment in public schools: the nonbinding ruling in *East Meadow Union Free School District v. New York State Division of Human Rights*, 65 A.D.3d 1342 (2d Dep't 2009). But Amici respectfully submit that the reasoning in *East Meadow* is not persuasive and should not be followed. The Second Department did not acknowledge, much less fulfill, the HRL's mandate of liberal construction, *see* Exec. Law § 300, when it held that the term "education corporation" cannot include public school districts.[8] Its decision omits any reference to that term's definition in GCL § 66(6) and focuses instead on GCL § 65(c), which provides that a "corporation formed other than for profit" shall be either an "education corporation" or one of four other corporation types therein specified. *E. Meadow*, 65 A.D.3d at 1343. The court interpreted this provision to mean that *all* education corporations *must* be classified as "corporation[s] formed other than for profit" and

[8] *Amici* discuss the HRL's liberal construction mandate in more detail in Section C below.

therefore cannot be "public corporation[s]," like school districts. *Id.* But this reasoning mistakenly assumes that if a given statement is true (*e.g. all squares are rectangles*), the converse must also be true (*all rectangles are squares*). Nothing in New York law limits the term "education corporation" to private entities, and in addition to school districts, many public corporations are education corporations under New York law, including:

- boards of education; *see* Educ. Law §§ 1701, 1804;[9]
- charter schools; *see id.* § 2853(1)(a), (c);[10]
- state universities; *see id.* § 352;
- public libraries; *see id.* § 255;[11]
- the New York State Higher Education Services Corporation; *see id.* § 652;[12] and

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[9] *See also Perrenod v. Liberty Bd. of Educ. for Liberty Cent. Sch. Dist.*, 223 A.D.2d 870, 870-71 (3d Dep't 1996) (noting that a board of education is a "municipal corporation organized under" the Education Law); *cf. Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 243-44 (2d Cir. 2006).

[10] *See also N.Y. Charter Schs. Ass'n, Inc. v. DiNapoli*, 13 N.Y.3d 120, 125 (2009) (explaining that, under the Education Law, a charter school is both an "education corporation" and "an independent and autonomous public school" supervised and overseen by "public agents"—the school's charter entity and the State Board of Regents (citations and internal quotation marks omitted)); 2000 N.Y. Op. Att'y Gen. 7 (Apr. 7, 2000).

[11] *See also Bovich v. E. Meadow Pub. Library*, 16 A.D.3d 11, 17 (2d Dep't 2005).

[12] *See also Bulson v. Control Data Corp.*, 164 A.D.2d 141 (3d Dep't 1990); *Oliver Schs., Inc. v. Sobol*, 147 Misc. 2d 622, 623 (Sup. Ct. Albany Cnty. 1990); 95 N.Y. Jur. 2d Schools § 800.

- boards of cooperative educational services. *See State Div. of Hum. Rights v. Bd. of Coop. Educ. Servs.* (*BOCES*), 98 A.D.2d 958, 958-59 (4th Dep't 1983).

Indeed, the Second Department itself has recognized that the GCL's definitions of "education corporation" and "municipal corporation" are not mutually exclusive, and it explained in a related context that "[w]hile there is authority for the proposition that a public library is an 'education corporation,' this does not mean that it cannot also be a municipal corporation." *Bovich v. E. Meadow Pub. Library*, 16 A.D.3d 11, 17 (2d Dep't 2005) (citations omitted); *see also Grasso v. Schenectady Cnty. Pub. Library*, 30 A.D.3d 814, 817 (3d Dep't 2006) ("[W]e are persuaded that the Second Department's analysis in *Bovich v. East Meadow Pub. Lib.* is correct . . . ." (citation omitted)). School districts, as municipal corporations "formed under" the Education Law, fit the definition of both "municipal corporation" and "education corporation." *See* Gen. Constr. Law §§ 66(2) ("municipal corporation"), (6) (incorporating the definition of "education corporation" in Educ. Law § 216-a(1) ("'education corporation' . . . means a corporation (a) chartered by or incorporated by the regents *or otherwise formed under this chapter* . . .") (emphasis added)).

The court below followed the Second Department's faulty logic that said if public school districts are municipal "corporation[s]," they cannot also be

"association[s]"—asserting that a "corporation" and an "association" are necessarily "different things." *E. Meadow*, 65 A.D.3d at 1343. But as explained above, other provisions of law make clear that the two are not necessarily "different things," and the two cases cited by the court do not support so sweeping a premise. Rather, one of those cases explains only that not all associations *are* incorporated. *See In re Estate of Graves*, 171 N.Y. 40, 47 (1902). The other case explains that *unincorporated* associations are not corporations. *See Martin v. Curran*, 303 N.Y. 276, 280 (1951). Moreover, those cases do not control, because they did not involve the HRL and its express mandate of liberal construction. *See* Exec. Law § 300.

Properly construed, therefore, a public school district is an "education corporation or association" that is subject to liability under the HRL for discrimination against or permitting harassment of its students.

B. Relevant precedents support applying § 296(4) to public educational institutions, including school districts.

Prior decisions of this Court clearly establish that the HRL protects students against discrimination and harassment in public educational institutions.[13] In *Planck v. State University of New York Board of Trustees*, a former student sued the State University of New York (SUNY) Board and other public entities for

[13] Amici respectfully disagree with the Division's suggestion that this Court has not yet addressed § 296(4)'s application to public educational institutions. Appellant's Br. at 20. The Division's brief does not address the Third Department cases discussed herein.

disability discrimination, relying on various state and federal laws including unspecified provisions of the HRL. 18 A.D.3d 988 (3d Dep't 2005). In *Planck*, this Court exercised subject matter jurisdiction over claims that this Court noted were "presumably" based on § 296(4). *Id.* at 991. While this Court affirmed the dismissal of all claims against the SUNY Board, it made clear that its dismissal of the § 296(4) claims rested solely on plaintiff's failure to allege sufficient facts linking the SUNY Board to any discriminatory conduct. In contrast, the Court dismissed plaintiff's *other* (non-HRL) claims against the Board for lack of subject matter jurisdiction. *Id.* Clearly, the Court conducted a close examination and would not have exercised jurisdiction over the § 296(4) claims against a public educational institution had the Court considered the HRL to be restricted to private entities.

The following year, this Court confirmed that § 296(4) encompasses public schools in *In re Binghamton City School District (Peacock)*, 33 A.D.3d 1074 (3d Dep't 2006). In *Peacock*, an arbitration decision suspended a Binghamton City School District teacher for one year because of his inappropriate relationship with a female public school student. The supreme court, relying on its authority to overturn arbitration decisions violating public policy, had vacated the arbitrator's decision as unduly lenient and remitted the matter for imposition of a new penalty. This Court affirmed that decision, citing § 296(4) as one of the sources of state law

that established an "explicit and compelling public policy to protect children . . . in the educational setting." *Id.* at 1076. This Court held that a mere one-year suspension violated this policy, because it would "not adequately protect students from the teacher in the future . . . ." *Id.* at 1077. An interpretation of § 296(4) that provides no protection to students in public schools cannot be reconciled with this Court's prior reliance on that very statute as helping to establish an "explicit and compelling" policy of protecting students from public school teachers' misconduct. *Id.* at 1076.

And in *Momot v. Rensselaer County*, 57 A.D.3d 1069 (3d Dep't 2008), this Court did not even question whether the Division had jurisdiction over a student's discrimination complaint against a public college, which the Division had dismissed as "completely without proof and absurd on its face." *Id.* at 1070 (internal quotation marks omitted). This Court affirmed that determination without questioning the Division's jurisdiction to consider a student's HRL claim against a public education entity. Indeed, this Court noted approvingly that the Division had undertaken a "thorough investigation" of the student's claim against the public college but had found it to be without merit. *Id.*

The Fourth Department has interpreted § 296(4) similarly. In *BOCES*, the court rejected the argument that the term "education corporation" refers exclusively to private entities. 98 A.D.2d at 958-59. The court held that BOCES,

a public institution, was "an education corporation organized and existing under section 1950 of the Education Law, nonsectarian and exempt from real property taxes under section 408 of the Real Property Tax Law[,]" (the "RPTL") and therefore subject to § 296(4). *Id.* at 958-959.

While other courts have not found it necessary to analyze the meaning of "education corporation or association," their holdings reflect a consensus that the HRL protects students in public schools. Federal courts in the Northern, Eastern and Southern Districts of New York have allowed discrimination claims brought by students under the HRL to proceed against public schools and their employees. *See Miotto v. Yonkers Pub. Schs.*, 534 F. Supp. 2d 422, 429 (S.D.N.Y. 2008); *Hayut v. State Univ. of N.Y.*, 127 F. Supp. 2d 333, 340-41 (N.D.N.Y. 2000); *Meehan v. Patchogue-Medford Sch. Dist.*, 29 F. Supp. 2d 129, 134 (E.D.N.Y. 1998); *see also Scaggs v. N.Y. State Dep't of Educ.*, 06 Civ. 799, 2007 U.S. Dist. LEXIS 35860, at *75 n.18 (E.D.N.Y. May 16, 2007). And it is telling that prior to *East Meadow*, the published decisions of state and federal courts that did reject § 296(4) claims against school districts and other public institutions on *other* grounds never held or even suggested that § 296(4) applies only to private organizations. *See, e.g., Cave v. E. Meadow Union Free Sch. Dist.*, 480 F. Supp. 2d 610, 643 (E.D.N.Y. 2007), *aff'd on other grounds*, 514 F.3d 240, 250 (2d Cir. 2008); *DT v. Somers Cent. Sch. Dist.*, 588 F. Supp. 2d 485, 500-01, (S.D.N.Y.

2008); *Tesoriero v. Syosset Cent. Sch. Dist.*, 382 F. Supp. 2d 387, 399-400 (E.D.N.Y. 2005); *Momot*, 57 A.D.3d 1069; *Planck*, 18 A.D.3d 988; *Lowinger v. State Univ. of N.Y. Health Sci. Ctr. of Brooklyn*, 180 A.D.2d 606 (1st Dep't 1992).

Decisions by this Court and other courts support application of the HRL to prevent discrimination and harassment of students in public educational entities—including public schools.

C. Excluding public school districts from § 296(4)'s reach would violate the rule of liberal construction, thwart the HRL's purposes, and lead to absurd and unjust results.

The HRL's strong policy against state-sponsored discrimination, its special concern with protecting equal opportunity in education, its unusually broad and inclusive nature, and its explicit mandate of liberal construction would all be thwarted by interpreting the HRL to protect only the relatively few students who attend nonsectarian private schools from discrimination and harassment—leaving public school students entirely without recourse to the Division of Human Rights.

The HRL expressly mandates that courts construe its provisions "liberally for the accomplishment of the [statute's] purposes . . . ." Exec. Law § 300. The New York Court of Appeals has repeatedly emphasized the rule of liberal construction as a guiding principle in HRL cases. *See, e.g.*, *Cahill*, 89 N.Y.2d at 20 ("*Analysis starts* by recognizing that the provisions of the [HRL] must be liberally construed to accomplish the purposes of the statute." (emphasis added));

see also Aurecchione v. N.Y. State Div. of Human Rights, 98 N.Y.2d 21, 26 (2002) ("[A] liberal reading of the statute is explicitly mandated to effectuate the [HRL's] intent."); *Scheiber v. St. John's Univ.*, 84 N.Y.2d 120, 125-126 (1994) ("The [HRL] effects this State's fundamental public policy against discrimination by establishing equality of opportunity as a civil right. . . . We are mandated to read the [statute] in a manner that will accomplish its strong antidiscriminatory purpose." (citations omitted)); *City of Schenectady v. State Div. of Human Rights*, 37 N.Y.2d 421, 428 (1975) ("[I]t is the duty of courts to make sure that the [HRL] works and that the intent of the Legislature is not thwarted by a combination of strict construction of the statute and a battle with semantics.").[14]

The HRL exists to "protect[] . . . the public welfare, health and peace of the people of [the] state" and to "fulfill[] . . . the provisions of the constitution of this state concerning civil rights." Exec. Law § 290. As a "function of the equal protection guarantee," *Bd. of Educ. of Union Free Sch. Dist. No. 2, E. Williston,*

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[14] *See also Binghamton GHS Emps. Fed. Credit Union v. State Div. of Human Rights*, 77 N.Y.2d 12, 18 (1990) (applying the rule of liberal construction in a case under the HRL); *Koerner v. State*, 62 N.Y.2d 442, 449 (1984) (same); *U.S. Power Squadrons v. State Human Rights Appeal Bd.*, 59 N.Y.2d 401, 411-12 (1983) (same); *Imperial Diner, Inc. v. State Human Rights Appeal Bd.*, 52 N.Y.2d 72, 77 (1980) (same); *300 Gramatan Ave. Assocs. v. State Div. of Human Rights*, 45 N.Y.2d 176, 183 (1978) (same). Consistent with these precedents, every Department of the Appellate Division has applied the rule of liberal construction in matters involving the HRL; the Second Department itself has done so in cases both pre-dating and post-dating its ruling in *East Meadow*. *See Argyle Realty Assocs. v. N.Y. State Div. of Human Rights*, 65 A.D.3d 273, 282-83 (2d Dep't 2009); *Dunn v. Fishbein*, 123 A.D.2d 659, 660 (2d Dep't 1986); *see also D'Amico v. Commodities Exch. Inc.*, 235 A.D.2d 313, 314 (1st Dep't 1997); *N.Y. State Dep't of Corr. Servs. v. State Div. of Human Rights*, 215 A.D.2d 908, 909 (3d Dep't 1995); *State Div. of Human Rights v. Xerox Corp.*, 102 A.D.2d 543, 550 (4th Dep't 1984).

Town of N. Hempstead v. N.Y. State Div. of Hum. Rights, 42 A.D.2d 49, 52 (2d Dep't 1973), *aff'd*, 35 N.Y.2d 673 (1974), the statute embodies the state's "extremely strong" policy against discrimination. *See Batavia Lodge No. 196, Loyal Order of Moose v. N.Y. State Div. of Hum. Rights*, 35 N.Y.2d 143, 146 (1974). As the Court of Appeals has recognized, discrimination is "all the more invidious . . . when it is practiced by the State." *Koerner v. State,* 62 N.Y.2d 442, 448 (1984); *see also Scheiber*, 84 N.Y.2d at 125 ("The Human Rights Law effects this State's fundamental public policy against discrimination by establishing equality of opportunity as a civil right." (citations omitted)).

Ending discrimination in education is at the heart of the HRL. Its opening provisions declare that the "opportunity to obtain education . . . without discrimination" is a "civil right," and expressly describes the purposes of the law to include the "eliminat[ion] and prevent[ion of] discrimination in . . . educational institutions" and "public services." Exec. Law §§ 290, 291. To carry out its strong antidiscriminatory purpose, the HRL employs broader and more inclusive language than that found in other state and federal civil rights protections for students. In addition to barring discrimination in access to educational facilities, § 296(4) explicitly prohibits schools and universities from "permit[ting] the harassment of any student" based on "race, color, religion, disability, national origin, sexual orientation, military status, sex, age or marital status." Exec. Law § 296(4). Other

student civil rights protections under state and federal law do not enumerate as many prohibited bases of discrimination, do not expressly bar schools from "permit[ting] . . . harassment," and/or limit their scope to institutions of higher education. *See, e.g.*, 20 U.S.C. § 1681 *et seq.*; *id.* § 1400 *et seq.*; 29 U.S.C. § 794; 42 U.S.C. § 2000d *et seq.*; Educ. Law §§ 313, 3201, 3201-a, 4404. Furthermore, courts have not recognized a right to recover compensatory damages through a court action under several of these provisions.[15] In any event, regardless of what other statutes provide, neither the School District nor any court has explained why the legislature would enact a statute for the express purposes of, *inter alia*, eliminating discrimination by the state and its subdivisions and preventing discrimination in "educational institutions" and "public services," and then drastically limit the statute's protections to cover only students in private schools.[16]

Construing § 296(4) to exclude public schools would leave only two percent of the student population protected by the HRL, making its promise of equal educational opportunity an empty one for nearly all of the state's youth. *See*

[15] *E.g.*, Educ. Law §§ 313, 3201, 3201-a.

[16] Courts have long rejected the argument that nondiscrimination provisions in the Education Law somehow divest the Division of Human Rights of jurisdiction to investigate and remedy HRL violations. *See, e.g., N.Y. Univ. v. N.Y. State Div. of Human Rights*, 84 Misc. 2d 702, 707 (Sup. Ct. N.Y. Cnty. 1975) (holding that Education Department and Division of Human Rights had concurrent jurisdiction, and observing that "'[l]egislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination'" (quoting *Alexander v. Gardner Denver Co.*, 415 U.S. 36, 47 (1974))); *accord BOCES*, 98 A.D.2d at 959.

footnote 3, *supra*. It would set New York apart as perhaps the only state that reserves its strongest school civil rights protections for a privileged few of its children. That is precisely the type of absurd and unjust result that courts seek to avoid. *See, e.g., People v. Garson*, 6 N.Y.3d 604, 614 (2006) ("[W]e must interpret a statute so as to avoid an unreasonable or absurd application of the law." (citation and internal quotation marks omitted)); *Braschi v. Stahl Assocs. Co.*, 74 N.Y.2d 201, 208 (1989) ("Statutes are ordinarily interpreted so as to avoid objectionable consequences and to prevent hardship or injustice."); *N. Dutchess Rod & Gun Club, Inc. v. Town of Rhinebeck*, 29 A.D.3d 587, 590 (2d Dep't 2006) ("[I]t is well-settled law that the words of a statute should not be interpreted to achieve an absurd result."); *see also* Stat. §§ 143, 145, 146.

The injustice that would result from adopting the lower court's interpretation is even more apparent when one considers the enormous procedural and financial benefits of the HRL's administrative enforcement mechanisms. As the Court of Appeals noted in *Freudenthal v. County of Nassau*, 99 N.Y.2d 285 (2003), a proceeding before the Division is "designed to be affordable; it allows a complainant to avoid filing fees and other expenses related to commencement of a civil action and facilitates prosecution of the claim without hiring an attorney."

Id. at 291.[17] Indeed, the Division's "user-friendliness" is readily apparent from its website, which invites aggrieved parties to file complaints—without a filing fee or the need for an attorney—through any regional office or by simply downloading an online document and mailing the filled-out, notarized form to the agency. *See* Division website, *How To File a Complaint,* http://www.dhr.state.ny.us/how_to_file_a_complaint.html (last visited October 18, 2010). Investigative procedures are similarly user-friendly, which may be especially important to young people who may be having a first encounter with discrimination. In the course of investigating, the Division assumes the burden of notifying respondents, may copy the complaint to other relevant agencies, can direct written inquiries, field investigation, or investigatory conferences, and, if probable cause is determined, will assign a Division attorney or agent to present the case in support of the complaint. *Id.* Obviously, these procedures and supports differ significantly from typical court processes.

A construction of the HRL that excludes public school districts would also deny to public school students—and to the public at large[18]—the benefit of having

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[17] The *Freudenthal* court rejected the judicial imposition of procedural requirements on HRL complainants (specifically, the requirement to bring a notice of claim), noting that those types of procedural requirements would be inconsistent "with the Legislature's intent to provide aggrieved parties a simplified alternative to litigation as a means to resolve discrimination claims." *Id.* at 292.

[18] "A construction of a statute which tends to sacrifice or prejudice the public interests will be avoided." Stat. § 152.

discrimination complaints involving school districts resolved by an agency with significant expertise and unique flexibility to craft appropriate remedies—remedies that are unavailable through traditional litigation. As the Court of Appeals observed in *Freudenthal*, the Division has "decades of special experience in weighing the merit and value of [HRL] claims," and the Commissioner of Human Rights has "greater discretion in effecting an appropriate remedy than under strict common-law principles." 99 N.Y.2d at 290-91 (citations and internal quotation marks omitted). As a result, "[t]he administrative forum offers a complainant remedies not available from a court." *Id.* at 291 (citation and internal quotation marks omitted). Among these remedies is the agency-run "conciliation" attempt that follows a preliminary finding of probable cause. And as the Court further observed, "because conciliation efforts are an integral part of the administrative process, it provides a unique vehicle—effective in some instances—to resolve claims expeditiously." *Id.*

New York's public school students have long benefited from the affordable, accessible, specially designed resources provided by the HRL and the executive agency that enforces it. Reserving those resources solely for students receiving private non-religious education would thwart, not serve, the HRL's purposes.

CONCLUSION

All of the relevant tools of statutory interpretation— the text of the HRL itself, the relevant case law interpreting and applying it, the state's powerful policy against state-sponsored discrimination in education, and the many public and private interests served by making the resources of the Division of Human Rights available to public school students—point to one conclusion: Exec. Law § 296(4) prohibits discrimination by public schools. Respectfully, this Court should reverse the judgment of the supreme court.

Dated: New York, New York
October 21, 2010

ADVOCATES FOR CHILDREN OF NEW YORK, INC., ANTI-DEFAMATION LEAGUE, DISABILITY ADVOCATES, INC., EMPIRE STATE PRIDE AGENDA, THE GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK, THE ITHACA LESBIAN GAY BISEXUAL TRANSGENDER TASK FORCE, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE NEW YORK CIVIL LIBERTIES UNION, AND PARENTS, FAMILIES AND FRIENDS OF LESBIANS AND GAYS

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION – THIRD DEPARTMENT

ITHACA CITY SCHOOL DISTRICT, Petitioner-Respondent, - against - THE NEW YORK STATE DIVISION OF HUMAN RIGHTS, on the Complaint of AMELIA KEARNEY ON BEHALF OF HER MINOR CHILD EPIPHANY KEARNEY Respondents-Appellants.	Case No. 510106 Tompkins County Index No. 0742/2009 **AFFIRMATION OF SERVICE OF BRIEF OF *AMICI CURIAE***

Thomas W. Ude, Jr., a member of the Bar of the State of New York, subscribes and affirms under penalty of perjury that he is a person over the age of eighteen years who is not a party to this action and that on October 21, 2010, he served the Brief of Advocates for Children of New York, Inc., Anti-Defamation League, Disability Advocates, Inc., Empire State Pride Agenda, The Gay, Lesbian and Straight Education Network, The Ithaca Lesbian Gay Bisexual Transgender Task Force, Lambda Legal Defense and Educational Fund, Inc., NAACP Legal Defense and Education Fund, Inc., The New York Civil Liberties Union, and Parents, Families and Friends of Lesbians and Gays as *Amici Curiae* upon each party's attorney by dispatching two true copies thereof by Federal Express, an overnight delivery service, for overnight

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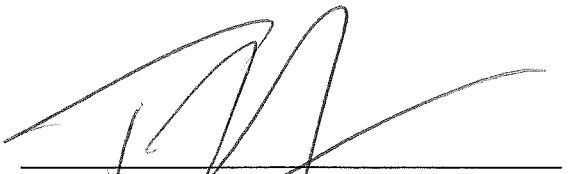

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