Lambda Legal
making the case for equality

BY FED-EX & FASCIMILE TRANSMISSION
Ithaca City School District Board of Education
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October 18, 2007

Re: Board Challenge to New York Human Rights Law § 296(4)

To the Ithaca City School District Board of Education:

We write on behalf of Lambda Legal Defense and Education Fund, the largest and oldest national legal organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV, to urge that you reverse your position regarding the scope of the New York Human Rights Law and its application to public schools. Lambda Legal has been a leader on school discrimination issues, from winning the nation's first ruling against a public school for failing to stop antigay harassment, to defending teachers and administrators who are supportive of lesbian, gay, bisexual, and transgender rights.

We understand that at your meeting on Tuesday, October 23, 2007, the Board of Education will consider a proposal to discontinue its appeal of a jurisdictional question in current litigation involving charges of racial discrimination under the New York Human Rights Law (NYHRL). We write to express support for this proposal and to voice concern over the Board's current litigation strategy – a strategy with potentially grave implications that the Board may not fully appreciate. Specifically, if the Board were to prevail on its erroneous argument that the NYHRL does not apply to public schools, not only would civil rights protections for all students generally be weakened, but ***the only statutory provision under New York or federal law that specifically protects New York public school students from antigay discrimination and harassment would be nullified.***

Though the Board of Education's challenge to the NYHRL lacks merit and will likely be rejected by the courts, the repercussions of a Board of Education victory on this issue could be so severe for the state's youth that it is simply unconscionable for the Board to press forward with its argument challenging the law's scope. While we acknowledge the Board's legal right to defend itself against specific charges, we urge the Board to reconsider its broader attack on New York's civil rights protections.

No Alternative State or Federal Statutes Specifically Protect New York's Public School Students from Discrimination and Harassment Based on Sexual Orientation

According to the September 11, 2007 decision issued by the Supreme Court of the County of Tompkins, the Board has asserted that NYHRL § 296(4) does not apply to public school districts because such districts are not "education corporation[s] or association[s]" as those terms are used in the statute.[1] Newspaper reports indicate that the Board has suggested that prevailing on this argument would not cause substantial harm to the civil rights of public school students as a general matter, because students would still have recourse under federal law as well as under the New York Education Law. With respect to antigay discrimination, however, the Board is incorrect. Neither federal law nor the New York Education Law contains *any* provision expressly addressing antigay discrimination against public school students.[2] Thus, if the Board's arguments on appeal were to prevail, there would be no statute specifically protecting the state's public school students against antigay discrimination and harassment.[3]

Antigay Discrimination and Harassment Take a Serious Toll on All Students

The Board of Education's effort to nullify civil rights protections for New York public school students, including clear protections against antigay discrimination and harassment, is especially troubling in light of the pervasive nature of antigay discrimination in schools. As the American Academy of Pediatrics, the American School Health Association, the National Education Association and numerous other organizations have jointly explained, youth who are part of sexual minorities face "prejudiced, discriminatory, and violent behavior and messages in their families, schools, and communities" that "negatively affect the[ir] health, mental health and education."[4] These students, the organizations note, "are more likely than heterosexual students to report missing school due to fear, being

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[1] See Ithaca City Sch. Dist. v. N.Y. State Div. of Human Rights, No. 2007-0785 (N.Y. Sup. Ct. Sept. 11, 2007).

[2] New York Education Law § 313 addresses discrimination based on sexual orientation in education but only applies to "post-secondary" institutions. With respect to federal law, Title IX of the Education Amendments of 1972 provides some protection to gay, lesbian and bisexual students, as well as transgender students, in cases involving sex discrimination and sexual harassment. See 20 U.S.C. §§ 1681 to 1688. The statute does not include "sexual orientation" or "gender identity," however, and the Supreme Court has imposed a difficult standard on students bringing Title IX claims. See Davis v. Monroe County Bd. of Ed., 526 U.S. 629 (1999).

[3] New York Civil Rights Law § 40-c contains a general prohibition on sexual-orientation-based discrimination and harassment that deprive a person of his or her "civil rights," but violations are punished with a maximum penalty of $500; the statute makes no mention of injunctive relief; and the availability of a private cause of action has been called into question by at least one federal court. See N.Y. Civ. Rights Law §§ 40-c, 40-d; Casella v. Hugh O'Kane Elec. Co., No. 00 Civ. 2481 (S.D.N.Y. Oct. 17, 2000); Abrams v. Holiday Inns, Inc., 656 F. Supp. 675, 682 n.8 (W.D.N.Y. 1984); see also Spitzer v. Kraeger, 160 F. Supp. 2d 360, 378 (N.D.N.Y. 2001) (awarding only $200 for a violation of § 40-c that involved "egregiously harassing and physically pushing" the victim). There is no statute or case law, moreover, explaining how the law's terms would apply in the public secondary school context.

[4] American Academy of Pediatrics *et al.*, Just the Facts About Sexual Orientation & Youth: A Primer for Principals, Educators and School Personnel (1999).

threatened by other students, and having their property damaged at school."[5] It is disturbing, to say the least, that the Board would consider attempting to deprive these young people of state legal protections. These youth, moreover, are not the only victims of antigay attitudes. For example, surveys demonstrate that over a third of all boys have been the targets of antigay taunting at school.[6]

The School Board's Argument Is Dangerous Despite Its Lack of Merit

None of the above is meant to suggest, of course, that the Board's argument is likely to prevail. The Board has argued that the school district is not covered by § 296(4) because that provision applies only to "education corporation[s] and association[s]" – terms which, in the Board's view, include only private--not public--educational institutions.[7] New York law, however, explicitly defines "education corporation[s]" to include *all* corporations formed under the Education Law; this necessarily includes public school districts.[8] Case law bolsters this view.[9]

Nevertheless, the mere fact that the Board's legal arguments are weak does not allay our concerns regarding the Board's litigation strategy. As evidenced by the Tompkins County Supreme Court's decision, there is always a risk that courts will err in their

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[5] Id.; see also Harris Interactive and GLSEN, From Teasing to Torment: School Climate in America; A Survey of Students and Teachers (2005).

[6] See, e.g., American Association of University Women Educational Foundation, Hostile Hallways: Bullying, Teasing, and Sexual Harassment in School (2001).

[7] See Ithaca City Sch. Dist. v. N.Y. State Div. of Human Rights, No. 2007-0785 (N.Y. Sup. Ct. Sept. 11, 2007), at 2.

[8] N.Y. Educ. Law § 216-a (defining "education corporation[s]" to include corporations "formed under" the Education Law); N.Y. Gen. Constr. Law § 66(6) (incorporating by reference N.Y. Educ. Law § 216-a's definition of "education corporation"); Pocantico Home & Land Co. v. Union Free Sch. Dist. of Tarrytowns, 20 A.D.3d 458, 461 (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.").

The notion that "education corporation[s]" include only private institutions is also inconsistent with the law's explicit definition of that term to include corporations "chartered or incorporated" by the state regents, as well as certain education institutions "formed by a special act of th[e] state." N.Y. Educ. Law § 216-a; N.Y. Gen. Constr. Law § 66(6).

Moreover, to the extent the Tompkins County Supreme Court suggested that an "education corporation" cannot also be a "municipal corporation," the law does not support that conclusion. See, e.g., Bovich v. East Meadow Pub. Library, 16 A.D.3d 11, 17 (2d Dep't 2005) ("While 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." (internal citations omitted)). Nor is it significant that the NYHRL excludes public schools from the definition of "public accommodation." NYHRL § 292(9). The fact that the legislature did not intend for provisions relating specifically to public accommodations to apply to public schools does not evidence an intent to exempt public schools from the NYHRL altogether.

[9] See State Div. of Human Rights v. BOCES, 98 A.D.2d 958, 958-59 (4th Dep't 1983) (holding that the term "education corporation or association" in NYHRL § 296(4) encompasses "public educational institution[s]"); see also N.Y. Exec. Law § 300 (providing that the NYHRL "shall be construed liberally for the accomplishment of [its] purposes").

interpretation of the law. The Board's current position increases the probability that an erroneous and potentially devastating construction of the NYHRL will prevail.

The Board's Privacy Concerns Do Not Justify the Board's Extreme Position

School officials have attempted to justify the Board's position publicly by arguing that an application of the NYHRL to this case would result in a public hearing, and that the district would be unable to defend itself adequately at such a hearing unless it violated federal laws protecting student privacy – in particular, the federal Family Education Rights and Privacy Act (FERPA). FERPA, however, does not bar all disclosure of information about students. For example, it does not apply in cases of parental consent or a lawfully issued subpoena, and it has been found not to cover certain records maintained for the purpose of law enforcement at school.[10] Thus, while we agree that the school should take prudent steps to protect students' privacy, we believe there are methods of complying with FERPA that stop well short of the Board's attempt to dismantle a fundamental human rights protection for the state's children. FERPA, after all, is designed to protect *students*; it would distort the law's purpose for a government body to wield the statute as a weapon against students seeking to enforce their civil rights.

The Board's Actions Are Inconsistent with the Community's Values and Its History of Protecting All People from Harassment and Discrimination

The Board's efforts to gut NYHRL § 296(4) are at odds with the local community's commendable tradition of supporting broad human rights protections. Tompkins County enacted antidiscrimination provisions that included sexual orientation more than ten years before similar provisions were enacted at the state level,[11] and in 2000, Ithaca's Common Council unanimously adopted one of the first laws in New York to include explicit protections for transgender people.[12] The Board of Education's own policies include detailed provisions addressing discrimination and harassment, including harassment based on race, sex, and sexual orientation.[13] The current attack on statewide antidiscrimination protections is a disappointing retreat from the community's longstanding position at the forefront of civil rights movements.

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[10] See § 1232g(a), (b)(1), (b)(2); Gonzaga Univ. v. Doe, 536 U.S. 273, 288 (2002); United States v. Bertie County Bd. of Ed., 319 F. Supp. 2d 669, 671-72 (E.D.N.C. 2004); Storck v. Suffolk County Dep't of Soc. Servs., 62 F. Supp. 2d 927, 947 (E.D.N.Y. 1999); Culbert v. City of New York, 254 A.D. 2d 385, 387 (2d Dep't 1998); see also Rome City Sch. Dist. Disciplinary Hearing v. Grifasi, 806 N.Y.S. 2d 381, 382-83 (N.Y. Sup. Ct. 2005) (finding that FERPA did not apply to a videotape that "was recorded to maintain the physical security and safety of the school building").

[11] See Tompkins County Code § 92.

[12] See Ithaca City Code § 215-28 et seq.

[13] Board of Education Policy 5020.

We acknowledge the Board's legal right to defend itself. To elect a defense that would undermine crucial human rights protections, however, is a shortsighted, unjustified and potentially destructive strategy that flies in the face of the Board's broader duty to stand up for all students. We strongly urge the Board to abandon this strategy.

Sincerely,

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Deputy Legal Director

Michael Kavey*
Arthur Liman Public Interest Fellow

Cc: New York State Division of Human Rights
Dr. Judith C. Pastel, Superintendent, Ithaca City School District

* Admission to New York State bar pending