No Argument Requested

TOMPKINS COUNTY INDEX NUMBER 0742/2009
APPELLATE DIVISION, THIRD DEPARTMENT DOCKET NO. 510106

State of New York
Court of Appeals

ITHACA CITY SCHOOL DISTRICT

Petitioner-Appellant,

– vs. –

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

Respondents-Respondents.

BRIEF OF *AMICI CURIAE* ADVOCATES FOR CHILDREN OF NEW YORK, INC., ANTI-DEFAMATION LEAGUE, ASIAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, DISABILITY ADVOCATES, INC., EMPIRE STATE PRIDE AGENDA, GAY, LESBIAN & STRAIGHT EDUCATION NETWORK, ITHACA LESBIAN GAY BISEXUAL TRANSGENDER TASK FORCE, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC., NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., NEW YORK CITY GAY AND LESBIAN ANTI-VIOLENCE PROJECT, INC., NEW YORK CIVIL LIBERTIES UNION, AND PARENTS, FAMILIES AND FRIENDS OF LESBIANS AND GAYS IN SUPPORT OF RESPONDENTS-RESPONDENTS NEW YORK STATE DIVISION OF HUMAN RIGHTS AND AMELIA KEARNEY

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Court of Appeals Rule 500.1(f), *amici curiae* hereby disclose that they do not have any corporate parents, subsidiaries or affiliates, except as follows: *amici* Gay, Lesbian and Straight Education Network and Parents, Families and Friends of Lesbians and Gays each have local affiliated chapters throughout the United States; *amicus* the New York Civil Liberties Union is the New York State affiliate of the American Civil Liberties Union.

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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 Respondent-Respondent the New York State Division of Human Rights (the "Division" or "Respondent"), 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.

The Third Department below correctly concluded, based on § 296(4)'s text and relevant case precedents, that the HRL protects students who attend public schools. *See Matter of Ithaca City Sch. Dist. v. N.Y. State Div. of Human Rights*, 87 A.D.3d 268 (3d Dep't 2011), *lv. to app. granted* 17 N.Y.3d 716 (2011). Petitioner-Appellant Ithaca City School District (the "School District") would have

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

this Court eradicate these protections for students throughout the state, arguing that 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, 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 the School District's interpretation of the HRL 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.

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

STATEMENTS OF INTEREST OF *AMICI CURIAE*

For over forty 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 *amicus* 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.

The Asian American Legal Defense and Education Fund ("AALDEF"), founded in 1974, is a national organization that protects and promotes the civil rights of Asian Americans. By combining litigation, advocacy, education, and organizing, AALDEF works with Asian American communities across the country to secure human rights for all. AALDEF works with local community groups on a broad range of social justice issues affecting Asian American youth, including educational equity, juvenile justice, affirmative action, racial discrimination, and post-9/11 hate violence and racial targeting.

Since 1989, it has been Disability Advocates' mission to protect and advance the rights of adults and children who have disabilities. Disability Advocates assists persons with disabilities in freely making the decisions that affect their lives, enforcing their rights, and fully participating in community life. Disability Advocates' 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 Disability Advocates' past and present advocacy for persons with disabilities is available at www.disabilityadvocates.org. A major focus of Disability Advocates' work involves assisting students with disabilities who face discrimination or denial of rights by public school districts. Because the demand for assistance far exceeds resources, Disability Advocates frequently refers 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 (the "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 and Albany, 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 & 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 *amicus* brief to support application of the HRL's protections to public school students.

The Ithaca Lesbian Gay Bisexual Transgender Task Force ("The Task Force") is a 501(c)(3) nonprofit organization based in Ithaca, New York, and serves the Tompkins County area. The Task Force advocates for the creation of a

social and cultural environment that nurtures a wide range of gender, sexuality, and family arrangements. It encourages 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 and cisgender people. The Task Force believes that if the HRL is found not to 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.

For nearly 40 years, Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal"), a national organization with headquarters in New York, has been 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); *Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135 (N.D.N.Y. 2011); *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001); *Colín 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 in New York served by Lambda Legal's mission.

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is the nation's leading not-for-profit civil rights legal organization. Through litigation, advocacy, and public education, LDF seeks structural changes to expand democracy, eliminate racial disparities, and achieve racial justice in a society that fulfills the promise of equality for all. From its inception over seventy years ago, LDF has had a unique focus on public education, litigating a number of seminal cases involving racial justice and opportunity in education, including *Brown v. Board of Education*. Today LDF carries on that legacy, working to dismantle racial segregation, open doors to educational access and opportunity and remove systemic barriers that yield disparate impacts for African-Americans and people of color. 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 City Gay and Lesbian Anti-Violence Project, Inc. ("AVP") is a nonprofit direct service and public policy organization. Founded in 1980, AVP's mission is to empower lesbian, gay, bisexual, transgender, queer ("LGBTQ"), and HIV-affected communities and allies to end all forms of violence through organizing and education, and support survivors through counseling and advocacy. AVP is the largest LGBTQ and HIV-affected anti-violence organization in the United States providing services to LGBTQ survivors of violence. AVP serves thousands of LGBTQ and HIV-affected survivors of violence each year and provides hundreds of trainings to institutions such as the courts, law enforcement, social service providers and community-based organizations annually. AVP created and implemented some of the first-ever school-based trainings addressing hate violence, sexual violence and domestic violence among and against school-aged youth and conducts these trainings in schools, at youth centers, and for service providers working with young people who experience violence. AVP takes the position that school districts, including the Ithaca City School District, are governed by New York Human Rights Law's provision stating that education corporations or associations may not deny access to or permit harassment of

students based on traits including but not limited to race, sex, sexual orientation and disability.

The New York Civil Liberties Union ("NYCLU") is the New York State affiliate of the American Civil Liberties Union. It is a nonprofit, nonpartisan membership organization whose mission is to defend and promote federal and state constitutional rights, as well as statutory rights that protect core civil rights and liberties. Defending and enhancing the constitutional and statutory rights of all students to obtain a public education free from discrimination, harassment, and bullying is a core part of the NYCLU's work. The NYCLU routinely represents and advocates in both judicial and administrative fora on behalf of public school students who are the victims of discrimination and harassment by public school administrators, teachers, or their peers. The NYCLU also frequently appears before this Court as a party or *amicus* in cases that raise civil rights and civil liberties questions with widespread import. Because this case implicates every New York public school student's right to equal educational opportunity, and because its resolution will affect a group of New Yorkers that the NYCLU frequently serves and represents, NYCLU joins this *amicus curiae* brief defending the application of the NYHRL to public schools.

PFLAG National (Parents, Families and Friends of Lesbians and Gays) is a nonprofit organization with over 200,000 members and supporters in all fifty 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. PFLAG provides the opportunity for dialogue about sexual orientation and gender identity, and acts 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 *amicus* brief to support application of the protections of the HRL to public school students.

ARGUMENT

THE NEW YORK HUMAN RIGHTS LAW PROTECTS STUDENTS ATTENDING PUBLIC SCHOOLS AGAINST DISCRIMINATION BY AND HARASSMENT IN THEIR 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 jurisprudence 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 2007-2008 academic year (when the complaint at issue in this case was filed), more than three million students attended elementary, middle and high school in New York. Approximately 2.7 million of those schoolchildren—nearly eighty-six percent of the total—attended public

[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.

schools.[3] Of the children attending nonpublic schools, more than 380,000 (approximately fourteen percent) attended religiously affiliated schools that are beyond the reach of § 296(4), which applies only to entities that are "nonsectarian." Under the interpretation advocated by the School District, the HRL would protect only a scant number of students – approximately 68,000 statewide, or barely two percent of New York's school-age population.[4]

The School District seeks a construction of § 296(4) placing public school districts and their students beyond the HRL's reach. Such a construction would thwart the extremely strong and longstanding state policy of equal educational opportunities for all of the state's children. Instead, equal educational opportunity would be offered to only the small number of students attending non-religious private schools. The HRL embodies New York's unwavering commitment to a policy of equal opportunity – including educational opportunity – and expressly

[3] The data in this paragraph is drawn from tables compiled by the New York State Education Department, reporting on public and non-public school enrollment. Table 2, Trends of Nonpublic School Enrollment by Affiliation, Grades K-12, New York State 2006-07 to 2010-11, *available at* http://www.p12.nysed.gov/irs/statistics/nonpublic/TABLE2.pdf; Table 4, Trends of Public and Nonpublic Enrollment, Grades K-12 New York State 1970-71 to 2010-11, *available at* http://www.p12.nysed.gov/irs/statistics/nonpublic/TABLE4.pdf.

[4] The data for enrollment during other academic years is similar. For example, during the 2010-2011 academic year, 3,053,621 students attended elementary, middle and high school in New York State. Of those, 2,637,578 (more than 86%) attended public schools, and nearly 350,000 attended religiously-affiliated schools – with less than 68,000 (or about 2%) attending schools that are both private and nonsectarian. Table 2, Trends of Nonpublic School Enrollment by Affiliation, Grades K-12, New York State 2006-07 to 2010-11, *available at* http://www.p12.nysed.gov/irs/statistics/nonpublic/TABLE2.pdf; Table 4, Trends of Public and Nonpublic Enrollment, Grades K-12 New York State 1970-71 to 2010-11, *available at* http://www.p12.nysed.gov/irs/statistics/nonpublic/TABLE4.pdf.

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 School District acknowledges neither this fundamental policy of equal education opportunity nor the liberal construction mandate of the HRL itself. Its argument, if adopted, would undermine the safety of schoolchildren throughout the state by improperly restricting the HRL's protection to only a tiny fraction of the student population – those attending schools that are not only private but also nonsectarian. *Amici* respectfully submit that the proper conclusion is that § 296(4) protects students against discrimination and harassment in public schools, as the Third Department concluded below. *See Ithaca City Sch. Dist.*, 87 A.D.3d at 273.

A. A public school district is an "education corporation or association" that, under the Human Rights Law, may neither discriminate against nor permit discriminatory harassment of its students.

The HRL protects students against discrimination by, and discriminatory harassment in, any "education corporation or association[.]" Exec. Law § 296(4).[5] The Third Department below squarely addressed § 296(4)'s scope and held that public school districts are encompassed within its protections. *Ithaca City Sch.*

[5]As explained in section B 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).

Dist., 87 A.D.3d 268. In rejecting the School District's challenge to the Division's HRL-based jurisdiction over the complaint of Respondent-Respondent Amelia Kearney ("Respondent" or "Ms. Kearney"), the Third Department "conclude[d] that public school districts are among the 'educational institutions' over which [the Division] has jurisdiction and that Executive Law § 296(4) is the statutory mechanism by which it can seek to eliminate any discrimination by such school districts." *Id*. at 273.

The Third Department explained that (consistent with this Court's repeated admonitions, summarized in Section B below) the HRL "must be liberally construed to accomplish its beneficial purposes – one of which is to eliminate discrimination in 'educational institutions' (Exec. L. § 290, 300) – 'and to spread its beneficial results as widely as possible." *Id.* at 273 (citing *Matter of Rizzo v. N.Y. State Div. of Hous. & Cmty. Renewal*, 6 N.Y.3d 104, 114 (2005); *Matter of Crucible Materials Corp. v. N.Y. Power Auth.*, 50 A.D.3d 1353, 1355-56 (2008), *aff'd* 13 N.Y.3d 223 (2009)). It held that it would be "clearly contrary to the express purpose of the [HRL]" to limit its protection "to only a minuscule percentage of students whose families can afford to send them to private, non-religious schools, relegating public school students to other more onerous and/or less comprehensive remedies." *Id.* at 273. In reaching that conclusion, the Third Department rejected arguments that a different conclusion was required based on

definitions in the General Construction Law ("GCL") – without deciding the correct interpretation of the GCL definitions – because a construction of § 296(4)'s terms that would exclude public school districts from the HRL's coverage would be "inappropriate and unreasonable," *id.*, and GCL § 110 provides that its definitions are not intended to apply if the "general object, or the context of the language construed, or other provisions of law indicate that a different meaning or application was intended from that required to be given by the [GCL]." *Ithaca City Sch. Dist.*, 87 A.D.3d at 273 (quoting GCL § 110).

Although the Third Department deemed it unnecessary to address the proper construction of the GCL's definitions of "education corporation" and "education association," those definitions, properly construed, do encompass public school districts. The 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. GCL § 66(6).[6] 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

[6] 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.

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 (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.").[7] Therefore, public school districts are "education corporations."[8]

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,

[7]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."

[8] In its brief in this appeal, the Division, like the Third Department below, does not rely on GCL § 66(6) or Education Law § 216-a in reaching the conclusion that public school districts are "education corporations." Division Br. at 33-36. *Amici* respectfully urge incorporation of analyses of both of these provisions, and in any case agree with the Division's ultimate conclusion, namely, that public school districts are "education corporations" for purposes of § 296(4). Specifically, the Division'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.

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 "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).

Like the Third Department below, the Fourth Department has interpreted § 296(4) to include public educational entities. In *State Division of Human Rights v. Board of Cooperative Educational Services ("BOCES")*, the court rejected the argument that the term "education corporation" refers exclusively to private entities. 98 A.D.2d 958, 958-59 (4th Dep't 1983). 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[,]" and therefore subject to § 296(4). *Id.* at 958-959.

In its arguments below, the School District relied primarily on only one case to support its argument that the HRL does not protect students against discrimination and harassment in public schools: the nonbinding ruling in *Matter*

of 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 be rejected. In marked contrast to the Third Department's decision below, 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.[9] 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 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:

[9] *Amici* discuss the HRL's liberal construction mandate in more detail in Section B, below.

- boards of education; *see* Educ. Law §§ 1701, 1804;[10]
- charter schools; *see id.*§ 2853(1)(a), (c);[11]
- state universities; *see id*. § 352;
- public libraries; *see id.* § 255;[12]
- the New York State Higher Education Services Corporation; *see id.* § 652;[13] and
- boards of cooperative educational services. *See BOCES*, 98 A.D.2d at 958-59.

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).

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[10]*See also Perrenod v. Liberty Bd. of Educ. for the 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).

[11]*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).

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

[13]*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.

School districts, as municipal corporations "formed under" the Education Law, fit the definition of both "municipal corporation" and "education corporation." *See* GCL §§ 66(2) ("municipal corporation"), (6) (incorporating the definition of "education corporation" in Educ. Law § 216-a(1) ("'education corporation' . . . means a corporation (a) chartered or incorporated by the regents *or otherwise formed under this chapter*") (emphasis added)).

The Second Department's faulty logic suggested that 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 in *East Meadow* 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.

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.*, No. 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 rejected § 296(4) claims against school districts and other public institutions did so on *other* grounds and never held, or even suggested, that § 296(4) applies only to private organizations.[14] *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 v. Rensselaer Cnty.*, 57 A.D.3d 1069 (3d Dep't 2008); *Planck v. State Univ. of N.Y. Bd. of Trs.*, 18 A.D.3d 988 (3d Dep't 2005);

[14] Subsequent to *East Meadow* and before *Ithaca City*, at least one federal court has expressed "serious reservations" about the correctness of *East Meadow*'s interpretation of § 296(4), but deferred to its conclusion in the absence of other appellate authority. *See Pratt v. Indian River Cent. Sch. Dist.*, 803 F. Supp. 2d 135, 148-49 (N.D.N.Y. 2011).

Lowinger v. State Univ. of N.Y. Health Sci. Ctr. of Brooklyn, 180 A.D.2d 606 (1st Dep't 1992).

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

B. Excluding students attending public schools from § 296(4)'s protection would violate the rule of liberal construction, thwart the Human Rights Law'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 § 296(4) 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.

The HRL expressly mandates that courts construe its provisions "liberally for the accomplishment of the [statute's] 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).

This Court 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 and citation omitted)); *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.").[15]

[15]*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-

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, 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 this Court 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 describe the purposes of the law to include the "eliminat[ion] and prevent[ion of] discrimination in . . . educational

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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).

institutions" and "public services." Exec. Law §§ 290, 291. To carry out its strong anti-discriminatory purpose, the HRL employs broader and more inclusive language than that found in other state and federal civil rights protections for students that are currently in effect.[16] 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). Student civil rights protections

[16] In its decision below, the Division's ALJ determined that the evidence established the School District's deliberate indifference to the racial harassment Ms. Kearney's daughter suffered at the hands of other students. A26-28. There is a serious question whether deliberate indifference – a standard derived from federal Title IX – is, in fact, the appropriate standard to apply in student harassment cases under NY HRL. *Amici* submit that New York courts should not automatically incorporate Title IX's more restrictive "deliberate indifference" standard to govern HRL student harassment claims. Title IX's liability standard is purposefully set quite high for reasons wholly unrelated and inapplicable to New York's HRL harassment provision. *See, e.g., Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (explaining the Court's reasons for establishing Title IX's deliberate indifference liability standard); *L.W. v. Toms River Reg'l Sch. Bd. of Educ.*, 915 A.2d 535, 549-50 (N.J. 2007) (rejecting Title IX's deliberate indifference standard for claims under New Jersey's Law Against Discrimination, and holding that a school district is liable if it "knew or should have known of the harassment, but failed to take action reasonably calculated to end the harassment"). The HRL furthers the New York legislature's plenary authority over political subdivisions of the state, including school districts, and the text of § 296(4) goes further than federal education antidiscrimination laws by explicitly stating that a covered entity may not permit discriminatory harassment of students. Those words must have meaning; they cannot be reduced to redundant surplusage. They should be interpreted to provide students with additional protection from harassment – as courts in other states have interpreted their similar laws. *See, e.g., L.W., supra.*

However, the Court need not resolve this thorny question. As explained by Ms. Kearney, the issue was not properly preserved and is not properly before the court. *See* Kearney Br. at 19-22. But, more importantly, even if it were, the Court can affirm the Third Department's unanimous conclusion that there was substantial evidence to support the finding that the School District discriminated, and reserve for another day – in a case where the issue has been joined and fully briefed – whether the appropriate standard of liability is deliberate indifference.

under federal law do not enumerate as many prohibited bases of discrimination and do not expressly bar schools from "permit[ting] . . . harassment." *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.*

Many of the state's laws, similarly, do not expressly address harassment, and/or their scope is limited to institutions of higher education. *See, e.g.*, Educ. Law §§ 313, 3201, 3201-a, 4404. The recently enacted Dignity for All Students Act is comprehensive and, by requiring schools to undertake specific actions to address bullying, does expressly address harassment based on a broad range of traits.[17] But that law does not take effect until July 1, 2012,[18] and, while courts have not yet been called upon to address the vehicles for that law's enforcement, the statute's terms do not expressly afford those complaining of violations with access to remedies through the Division. And as for other state statutory protections, courts have not recognized a right to recover compensatory damages through a court action under several of them.[19]

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[17] The Dignity for All Students Act requires proactive measures by public school districts to address discrimination and harassment based on – but not limited to – one's actual or perceived race, color, national origin, ethnicity, sexual orientation, religious practice, disability, weight, gender or sex. 2010 N.Y. Laws 482 § 12. Its enactment left other protections for students, such as the HRL, intact. *Id.* at § 17 (providing that "nothing in [the Dignity for All Students Act] shall . . .preclude or limit any right or cause of action provided under any local, state or federal ordinance, law or regulation").

[18] *See* 2010 N.Y. Laws 482 § 5 ("This act shall take effect July 1, 2012[.]").

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

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 curtail the statute's protections to cover only students in a relatively tiny number of private schools.[20] For those same reasons, the School District's claim that Education Law § 3201 is the only statute proscribing racial discrimination in public schools must be rejected as absurd. The legislature has repeatedly amended the HRL and other state antidiscrimination laws to proscribe discrimination based on traits in addition to race, creed, color or national origin – the only traits that § 3201 addresses. When enacting comprehensive statutory protections against discrimination based on disability, sexual orientation, or military status, the legislature cannot have intended that students were to remain exposed to such discrimination or discriminatory harassment upon entering (and until graduating from) their public school.

[20]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.

As this Court has explained, the HRL is to be interpreted so as "to spread its beneficial results as widely as possible[.]" *Rizzo*, 6 N.Y.3d at 114. 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* footnotes 3 and 4, *supra*. Such an interpretation 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 School District's interpretation is even more apparent when one considers the enormous procedural and financial benefits of the HRL's administrative enforcement mechanisms. As this Court 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.[21] 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, *How To File a Complaint*, http://www.dhr.state.ny.us/how_to_file_a_complaint.html (last visited March 7, 2012). Investigative procedures are similarly user-friendly, which may be especially important to young people (and their parents) who may be having a first encounter with discrimination proceedings. 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. *Freudenthal*, 99 N.Y.2d at

[21] In *Freudenthal*, this 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.

290. 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,[22] the benefit of having 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 this Court 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, "the 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 this 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.*

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

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 diminish students' rights and protections throughout New York State, and 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 public school districts from discriminating against or permitting harassment of their students. Respectfully, this Court should so hold.

Dated: New York, New York
March 8, 2012

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