Lambda Legal
making the case for equality

July 22, 2008

BY US MAIL, EMAIL AND FACSIMILE

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Newfield Central School District
247 Main Street
Newfield, NY 14867

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

To the Members of the Newfield Central 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 (LGBT) people and those with HIV, to urge you to reconsider your position in current litigation regarding the scope of the New York Human Rights Law (NYHRL), and to call your attention to potential consequences of your legal strategy that you may not fully appreciate. As set forth in detail below, if appellate courts were to accept your argument that NYHRL § 296(4) does not apply to public schools, **the only statute under state or federal law that expressly protects public school students in New York from discrimination and harassment based on sexual orientation would be nullified.**

While your position is deeply flawed as a matter of law and unlikely to prevail on appeal, the repercussions of an appellate ruling in your favor would be so disastrous for the state's youth that it is simply unconscionable for you to press forward with your current strategy. Though we acknowledge your right to defend yourself against specific charges of discrimination, including the charges of sex discrimination underlying the current litigation, we urge you to abandon your unnecessarily broad attack on human rights protections for the state's schoolchildren.

No Alternative State or Federal Statute Would Provide Specific and Effective Protection for New York's Public School Students Against Discrimination and Harassment Based on Sexual Orientation

We understand that in response to complaints of sex discrimination against the Newfield Central School District (NCSD), you have elected not simply to present a defense on the merits, but to argue that public school districts are not "education corporation[s] or association[s]" for purposes of NYHRL § 296(4), and therefore that § 296(4)'s prohibition on discrimination against students by such corporations and associations does not apply to the NCSD. In short, you seek to establish that the state's Human Rights Law does not prohibit your school district from discriminating against its students based on their race, sex, religion, sexual orientation and other enumerated categories.

NCSD school officials have suggested that eliminating the NYHRL's protections for public school students should not raise concerns because, the officials claim, other effective avenues of relief, such as federal civil rights law and the New York Education Law, remain available to students who face discrimination. NCSD Superintendent William Hurley commented: "There are already existing venues. What's one more?"[1] This cavalier disregard of the NYHRL's significance is distressing for a number of reasons, including the simple fact that the so-called "existing venues" to which Mr. Hurley refers do *not* actually exist for many students. As noted above, for example, neither the New York Education Law nor federal civil rights law specifically reference "sexual orientation" in provisions addressing discrimination in secondary schools.[2] While some courts have correctly interpreted Title IX, a federal sex-discrimination statute, to protect LGBT students in cases involving sex stereotyping, sex discrimination and sexual harassment, Title IX's failure to explicitly reference "sexual orientation," combined with its stringent liability standard, can limit the statute's effectiveness in cases involving antigay harassment and violence. Thus, the NCSD's effort to gut the NYHRL would eliminate the *only* statutory protection that specifically and effectively addresses antigay harassment in New York's public schools.

Antigay Discrimination and Harassment Take a Serious Toll on Students' Health and Education

The NCSD's litigation strategy is especially disturbing in view of the difficult life challenges that LGBT youth so often face. Just this year, a broad coalition of professional medical, psychological and educational organizations, including the American Academy of Pediatrics, American Psychological Association, American School Health Association, American Association of School Administrators, National Association of Social Workers, and National Education Association, reissued a report describing these challenges. The report explains that lesbian and gay youth face "prejudice, discrimination and violence . . . in their own families, schools, and communities," and that the resulting "marginalization" makes these young people "more likely than heterosexual students to report missing school due to fear, being threatened by other students, and having their property damaged at school."[3] The report observes that the "result[s] of the isolation and lack of support experienced by some lesbian, gay, and bisexual youth [include] higher rates of emotional distress, suicide attempts," and other adverse reactions linked to harassment.[4]

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[1] Aaron Munzer, *Ruling May Mean Less Legal Protection For Students*, Ithaca Journal (July 11, 2008), *available at* www.theithacajournal.com/apps/pbcs.dll/article?AID=/20080711/NEWS01/807110348.

[2] New York Education Law § 313 addresses discrimination based on sexual orientation in education but only applies to "post-secondary" institutions. New York Civil Rights Law § 40-c contains a general prohibition on sexual-orientation-based discrimination and harassment that deprives a person of his or her "civil rights," but violations are only 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, 2000 WL 1530021, at *1 (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.

[3] American Academy of Pediatrics et al., *Just the Facts About Sexual Orientation and Youth*, at 2-3 (2008), *available at* www.apa.org/pi/lgbc/publications/justthefacts.pdf.

[4] *Id.* at 3.

New York is not immune from this nationwide crisis. According to a 2005 study, 61% of LGBT students in New York felt unsafe at school because of their sexual orientation, and over a third had been physically harassed because of their sexual orientation in the previous year.[5]

It is alarming that you would commit your community's resources to depriving these young people in New York of their only statutory protection to explicitly address antigay harassment, rather than simply defending yourself on the merits against the specific complaints of sex discrimination recently filed against you.

The NCSD's Jurisdictional Argument Lacks Merit

None of the above is meant to suggest, of course, that we find merit in the NCSD's legal argument about the NYHRL's scope. The basis of the NCSD's challenge is its belief that because the district is a public entity, it is neither an "education corporation" nor an "education association" for purposes of the NYHRL provision prohibiting discrimination against students. However, New York law unambiguously defines "education corporation[s]" to include all corporations formed under the Education Law.[6] Because school districts are statutorily – and constitutionally – defined as corporations,[7] and because they are "formed under" the Education Law,[8] there is no question that they are "education corporations."[9] Case law supports this view.[10]

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[5] GLSEN, *Inside New York Schools: The Experiences of LGBT Students*, at 1-2, *available at* www.glsen.org/binary-data/GLSEN_ATTACHMENTS/file/000/001/1008-1.pdf

[6] N.Y. Educ. Law § 216-a(1) (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(1)'s definition of "education corporation").

[7] N.Y. Const. Art. 10 § 5; N.Y. Gen. Constr. Law § 66(6).

[8] *See, e.g., 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.").

[9] To the extent the Tompkins County Supreme Court judge believed that an "education corporation" cannot also be a "municipal corporation," the law does not support that conclusion. *See, e.g., Bovich v. E. 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." (citations omitted)).

Moreover, independent of the fact that school districts are "education corporations," they are also subject to § 296(4) as "education . . . association[s]." 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 Town of Gardiner*, 392 N.E.2d 876, 879 (N.Y. 1979). The "broad" nature of the term "association," considered in light of the NYHRL's rule of "liberal[]" construction, NYHRL § 300, makes clear that public school districts are "education . . . association[s]" for purposes of NYHRL § 296.

[10] *See State Div. of Human Rights v. Bd. of Coop. Educ. Servs.*, 98 A.D.2d 958, 958-59 (4th Dep't 1983); *see also Scagg v. N.Y. State Dep't of Educ.*, 06 Civ. 799, 2007 WL 1456221, at *21 n.18 (E.D.N.Y. 2007); *Hayut v. State Univ. of N.Y.*, 127 F. Supp. 2d 333, 340-41 (N.D.N.Y. 2000). Significantly, court decisions rejecting § 296(4) claims against school districts and other public educational institutions have *not* based their holdings on an argument that § 296(4) covers only private educational institutions; indeed, the courts appear not to have even considered the possibility that the statute would be so limited. *See, e.g., Planck v. SUNY Board of Trustees*, 18 A.D.3d 988 (3d Dep't 2005); *see also Cave v. E. Meadow Union Free Sch. Dist.*, 480 F. Supp. 2d 610, 643 (E.D.N.Y. 2007); *Tessoriero v. Syosset Ctr. Sch. Dist.*, 382 F. Supp. 2d 387, 399-400 (E.D.N.Y 2005).

The NYHRL, moreover, provides that its provisions must be construed "liberally" to effectuate the law's purposes.[11] These purposes include "eliminat[ing] and prevent[ing] discrimination in . . educational institutions," as well as "fulfill[ing] . . . the provisions of the constitution of this state concerning civil rights"[12] and "eliminat[ing] discrimination by the state or any agency or subdivision of the state."[13] It is preposterous to argue, as the NCSD does, that in enacting a statute for such purposes, the New York legislature intended only to protect students in *private* educational institutions from discrimination while leaving students in public institutions entirely without recourse to the Division of Human Rights.

The weakness of the NCSD's position is further laid bare by the dizzying illogic that comprises the NCSD's April 9, 2008, Memorandum of Law to the Supreme Court of Tompkins County.[14] In one section, for example, the Memorandum quotes language in the New York Education Law defining education corporations to include all "corporation[s] . . . formed under" the Education Law, and then declares that the NCSD does not fit the definition, without making any effort to reconcile this assertion with the Memorandum's earlier concessions that (1) the NCSD is a "corporation," and (2) the NCSD was formed under the Education Law.[15]

The NSCD Memorandum is also rife with misleading assertions of law. Immediately after quoting New York Education Law § 216-a's definition of "education corporation," for example, the Memorandum purports to summarize that definition by stating, "[i]n short, New York Education Law § 216-a provides that the Not-for-Profit Corporation Law [NPCL] applies to education corporations."[16] This apparent attempt to suggest that education corporations are necessarily not-for-profit corporations falls flat. First of all, contrary to what the NCSD Memorandum suggests, the subsections of Education Law § 216-a that refer to the NPCL do *not* form part of § 216-a's definition of "education corporation" and are *not* incorporated into the General Construction Law's definition of "education corporation," which is the only definition that matters for purposes of the NYHRL.[17] In any event, it is grossly misleading to say that "Education Law § 216-a provides that the [NPCL] applies to education corporations," because § 216-a specifically provides that the NPCL does *not* apply to such corporations where the NPCL conflicts with the Education Law.[18]

Similarly misleading is the Memorandum's description of NYHRL § 296(4)'s relationship to New York's Real Property Tax Law (RPTL). The statutes are indeed related, because NYHRL § 296(4) limits its antidiscrimination requirement to institutions which, like the NCSD, are tax exempt under RPTL Article 4. The NCSD Memorandum, however, concocts its own original theory of the laws' relationship, first by falsely claiming that NYHRL § 296(4) refers to

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[11] NYHRL § 300. The New York Court of Appeals has applied the NYHRL's rule of liberal construction not only to determine *what* the NYHRL prohibits, but also to determine *to whom* and *to what institutions* the law applies. *See, e.g., Cahill v. Rosa*, 674 N.E.2d 274, 276 (N.Y. 1996).

[12] NYHRL § 290.

[13] *Bd. of Educ. of City of N.Y. v. Carter*, 228 N.Y.S.2d 704, 707 (1st Dep't 1962) (citation and internal quotation marks omitted), *aff'd as modified on other grounds*, 14 N.Y.2d 138 (1964).

[14] 4/9/08 Mem. in Law in Support of NCSD's Petition Pursuant to N.Y. C.P.L.R. Art. 78 ("NCSD Mem."), *Newfield Cent. Sch. Dist. v. N.Y. State Div. of Human Rights*, Index No. 2008-0460 (N.Y. Sup. Ct. June 19, 2008).

[15] *Id.* at 4; *see also id.* at 1, 3.

[16] *Id.* at 4.

[17] N.Y. Educ. Law § 216-a; *see also* N.Y. Gen. Constr. Law § 66(6) (referring only to "subdivision one" of N.Y. Educ. Law § 216-a for the definition of "education corporation").

[18] N.Y. Educ. Law § 216-a(4)(a).

the RPTL in order to "qualif[y]" the meaning of "education corporation or association."[19] The NCSD Memorandum then focuses on an entirely irrelevant provision of the RPTL – § 420-a – which the Memorandum describes as the only RPTL provision to use the term "education corporation or association."[20] This assertion is bizarre for a number of reasons, beginning with the fact that the cited provision does *not* use the term "education corporation" or "education association."[21] And even if it did, the NCSD Memorandum fails to offer a coherent or logical explanation for why it would matter. Notably, the Memorandum does not contest the only fact about the RPTL that is relevant here; namely, that the NCSD falls within one of the tax-exemption provisions of RPTL Article 4 – RPTL § 408 – thereby triggering NYHRL § 296(4)'s antidiscrimination requirements.

Given the distortions in the NCSD's Memorandum, it is no surprise that the Supreme Court of Tompkins County did not adopt the Memorandum's legal analyses, despite holding in the NCSD's favor. Instead, the court premised its ruling primarily on a 1974 Second Department decision, which held that the Division of Human Rights lacked jurisdiction to entertain a complaint against a public college. That case, however, is not controlling. At the time the facts of the 1974 Second Department case arose, the definition of "education corporation" in the General Construction Law had not yet been enacted. As already explained, the definition that now exists clearly encompasses public school districts. Thus, the 1974 Second Department decision does not properly guide resolution of this dispute.[22]

Nevertheless, the fact that your legal arguments are fundamentally flawed does not allay our concerns regarding the NCSD's litigation strategy. As evidenced by the June 19 Supreme Court decision, there is always a risk that courts will err in their interpretation of the law. The NCSD's current strategy increases the chance that an erroneous and devastating interpretation of the law will prevail. And, regardless of the ultimate outcome, your willingness to pursue such destructive challenges to human rights protections – even where the law contradicts your position – sends a disturbing message to your students and to the community members who entrust their children to your care.

The NCSD's Privacy Concerns Do Not Justify Its Extreme Position

Superintendent Hurley has reportedly attempted to justify the NCSD's position by suggesting that submitting to the jurisdiction of the Division of Human Rights would force the district to violate federal laws protecting student privacy. However, the federal privacy law in question – the Family Education Rights and Privacy Act (FERPA) – does not bar all disclosure of information about students. For example, it does not apply in cases of parental consent or a

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[19] NCSD Mem. at 3.

[20] *Id.*

[21] *See* RPTL § 420-a. The provision refers to corporations and associations organized for various charitable purposes, including "religious," "hospital," and "educational" purposes, but it does not use, much less define, the term "education corporation." *Id.*

[22] The Second Department decided *Student Press, Inc. v. N.Y. State Human Rights Appeal Bd.*, 352 N.Y.S.2d 674 (2d Dep't 1974), on March 4, 1974, and the facts giving rise to the case took place no later than January 4, 1972. *See id.* at 675. The amendment to the General Construction Law defining "education corporation" was approved in 1973 and took effect in September 1974, several months after the *Student Press* decision. *See* 1973 N.Y. Laws ch. 451 § 3.

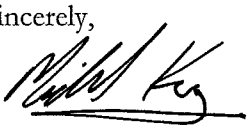
lawfully issued subpoena.[23] Thus, while we agree that the school should take appropriate steps to protect students' privacy, we believe there are methods of complying with FERPA that stop well short of the NCSD's attempt to eliminate a crucial civil rights law protecting the state's students. FERPA, after all, is designed to *protect* students; it distorts the law's purpose for a government body to wield the statute as a weapon against students seeking to enforce their civil rights.

The NCSD May Defend Itself Without Undermining the State Human Rights Law

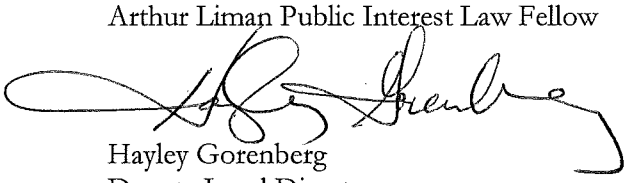
According to the Ithaca Journal, Superintendent Hurley views this matter as an "isolated" disciplinary issue, and he finds it strange that the case has "gotten to this point."[24] If it is true, however, that this matter represents nothing more than an isolated disciplinary dispute, what is truly bizarre is the school district's decision to respond to the complaints with a sweeping attack on one of the state's most important human rights provisions.

We do not question the NCSD's legal right to defend itself against complaints of discrimination. There is no justification, however, for your broader attack on the scope of the NYHRL. Should further proceedings implicating the law occur, we urge you not to oppose the Division's position on the application of the NYHRL to public schools.

Sincerely,



Michael Kavey
Arthur Liman Public Interest Law Fellow



Hayley Gorenberg
Deputy Legal Director

cc: William J. Hurley, NCSD Superintendent
James F. Young, Esq.
New York Division of Human Rights
Attorney General Andrew M. Cuomo

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[23] *See* 20 U.S.C. § 1232g(a)(4), § 1232g(b)(1)(J)(ii), § 1232g(b)(2)(A), § 1232g(b)(2)(B); *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).

[24] Aaron Munzer, *Ruling May Mean Less Legal Protection For Students*, Ithaca Journal (July 11, 2008), *available at* www.theithacajournal.com/apps/pbcs.dll/article?AID=/20080711/NEWS01/807110348.