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

Application of NEWFIELD CENTRAL SCHOOL DISTRICT, Petitioner-Respondent, For a Judgment Pursuant to NY CPLR Article 78 - against - THE NEW YORK STATE DIVISION OF HUMAN RIGHTS, Respondent-Appellant.	Case No. 506944 Tompkins County Index No. 08-0460

NOTICE OF MOTION OF
ADVOCATES FOR CHILDREN OF NEW YORK, INC., ET AL.
FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

PLEASE TAKE NOTICE, that upon the annexed Affirmation of Michael D. B. Kavey, sworn to the 14th day of May, 2009 ("Kavey Affirmation") and the attached exhibits, a motion will be made at a term of this Court to be held in the City of Albany, New York, on the 25th day of May, 2009, for an order granting 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., and Parents, Families and Friends of Lesbians and Gays leave to file the brief attached as Exhibit A to the Kavey Affirmation as *amici curiae*, and for such other and further relief as the court may deem just and proper in the circumstances.

PLEASE TAKE FURTHER NOTICE that pursuant to 22 N.Y.C.R.R. § 800.2(a) answering papers, if any, must be filed before 11:00 a.m. on Friday, May 22, 2009.

PLEASE TAKE FURTHER NOTICE that pursuant to 22 N.Y.C.R.R. § 800.2(a) this motion will be submitted on the papers and that personal appearance in opposition to the motion is neither required nor permitted.

* * *

Dated: New York, New York
May 14, 2009

LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.

By: _____

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

Application of NEWFIELD CENTRAL SCHOOL DISTRICT, Petitioner-Respondent, For a Judgment Pursuant to NY CPLR Article 78 - against - THE NEW YORK STATE DIVISION OF HUMAN RIGHTS, Respondent-Appellant.	Case No. 506944 Tompkins County Index No. 08-0460

AFFIRMATION OF MICHAEL D. B. KAVEY IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*

MICHAEL D. B. KAVEY, an attorney duly admitted to practice in the State of New York, hereby affirms under penalty of perjury as follows:

1. I am an attorney with Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal"), and I submit this affirmation in support of the Motion 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., and Parents, Families and Friends of Lesbians and Gays (collectively, "*Amici*") for Leave to File Brief as *Amici Curiae* in the above-titled action.

2. Attached hereto as Exhibit A is a copy of the brief that *Amici* wish to submit to the Court (the "brief"). *Amici* have duly authorized me to submit this brief on their behalf.

3. *Amici* seek leave to file the brief because this appeal presents questions of law that are of great importance to *Amici* and their members. Specifically, *Amici* and their members have an interest in ensuring that the New York Human Rights Law ("NYHRL") is properly interpreted to protect students, including public school students, from discrimination and harassment based on race, sex, religion, disability, sexual orientation and other factors. The interests of individual *amici* are more fully set forth in the statements of interest included in the attached brief. *Amici* submit the brief to support the New York State Division of Human Rights' position that NYHRL § 296(4) applies to public education institutions.

4. Collectively, *Amici* have significant expertise, developed through decades of experience, in the areas of civil rights, nondiscrimination and

equal educational opportunity, including but not limited to discrimination against public school students and proceedings under the NYHRL.

5. Given *Amici*'s substantial interest and expertise as described above and in the attached brief, I respectfully submit that the brief will be of special assistance to the Court in determining the proper interpretation of NYHRL § 296(4). Accordingly, I respectfully request that the instant motion be granted in all respects and that *Amici* be given leave to file the attached brief in this appeal.

Dated: New York, New York
May 14, 2009

LAMBDA LEGAL DEFENSE
AND EDUCATION FUND, INC.

By: _____

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EXHIBIT A

No Argument Requested

CASE NO. 506944

Supreme Court of the State of New York

Appellate Division – Third Department

Application of

NEWFIELD CENTRAL SCHOOL DISTRICT,

Petitioner-Respondent,

For a Judgment Pursuant to NY CPLR Art. 78

- against -

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Respondent-Appellant.

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 EDUCATION FUND, INC., NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND PARENTS, FAMILIES AND FRIENDS OF LESBIANS AND GAYS

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PRELIMINARY STATEMENT

The New York Human Rights Law (NYHRL) provides crucial civil rights protections to the state's schoolchildren. Far more specific and inclusive than federal antidiscrimination statutes, the NYHRL not only bars direct discrimination by schools, but also expressly prohibits them 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. NYHRL § 296(4).[1] Through the New York State Division of Human Rights (NYSDHR, the "Division," or "Appellant"), the statute provides a uniquely affordable and accessible forum for students 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 statute'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; *see also id.* § 291.

Respondent Newfield Central School District ("Respondent" or "Newfield") would, however, eradicate these protections for all students in public schools, reserving the protections instead for those students attending private educational institutions. The crux of Respondent's argument, erroneously adopted by the court below, is its misguided claim that the term "education corporation or association"

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

as used in NYHRL § 296(4) does not include public school districts or other public educational institutions. *Amici* submit this brief to assist the Court in understanding how the adoption of that argument would contradict both the statute's text and this Court's precedents, disrupt a consensus among other state and federal courts favoring application of the NYHRL to public institutions, violate the statute's requirement of liberal construction, *see id.* § 300, thwart the legislature's clearly expressed intent, and produce absurd and unjust results.

To be clear, the sole purpose of this brief is to address whether the NYHRL's antidiscrimination and antiharassment protections for students apply to school districts and other public educational institutions. The brief does not address other legal issues identified by the parties, such as the issue identified in Point I of the Division's brief. Appellant's Br. at 6-13 (addressing whether the "extraordinary writ of prohibition [lies] to stop the Division from considering a discrimination complaint"). And, while *amici* are unified in their opposition to unlawful discrimination in education based on sex and other impermissible factors, this brief takes no position on the merits of the underlying factual claims in this case pertaining to allegations of discriminatory treatment.

STATEMENTS OF INTEREST

Advocates for Children of New York, Inc. (AFC): For over 37 years, 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 New York State Human Rights Law to public school students.

Anti-Defamation League (ADL): 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 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 League 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 NYHRL 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 *amici* to defend particularly the rights of students to challenge an unsafe learning environment.

Disability Advocates, Inc.: 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 Disability Advocates' 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 of 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.

Empire State Pride Agenda: Founded in 1990, the Empire State Pride Agenda is New York's statewide civil rights and advocacy organization 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 has as part of its core priorities working 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 organization was instrumental in passage of New York's Sexual Orientation Non-Discrimination Act (SONDA) which amended the state Human Rights Law in 2003 to add sexual orientation, and is currently working to pass the Gender Expression Non-Discrimination Act (GENDA) to similarly add gender identity and expression.

The Gay, Lesbian and Straight Education Network (GLSEN): 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 NYHRL's protections to public school students.

The Ithaca Lesbian Gay Bisexual Transgender Task Force: 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 NYHRL 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): 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). Because NYHRL § 296(4) specifically prohibits schools from denying the use of their facilities or "permit[ting] the harassment" of students based on 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.

NAACP Legal Defense and Educational Fund, Inc.: The NAACP Legal Defense and Educational Fund, Inc. (LDF) is a non-profit legal organization that assists African Americans and other people of color to secure 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.

Parents, Families and Friends of Lesbians and Gays (PFLAG): PFLAG is a national 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 gay, lesbian, 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 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, PFLAG joins this *amici* brief to support application of the protections of the New York State Human Rights Law to public school students.

* * *

ARGUMENT

I. NEW YORK HUMAN RIGHTS LAW § 296(4) APPLIES TO PUBLIC SCHOOL DISTRICTS

The NYHRL makes it unlawful for a nonsectarian, tax-exempt "education corporation or association" to deny the use of its facilities or "permit the harassment" of any student based on race, color, religion, disability, national origin, sexual orientation, military status, sex, age or marital status. NYHRL § 296(4). A straightforward reading of the governing statutes makes clear that public school districts, including Newfield, are both "education corporation[s]" and "education association[s]" for purposes of this provision, and thus are subject to its antidiscrimination requirements.[2] The holdings of this Court fully support this view, as do other state and federal court decisions.

More fundamentally, as described in Subpart I.D, *infra*, the construction advocated by Respondent and adopted by the court below would thwart an extremely powerful and longstanding state policy in favor of equal educational opportunities for all of the state's children – including and especially those children in the state's own schools. The NYHRL's provisions embody the state's unwavering commitment to this policy, and expressly call on courts to liberally construe the statute's provisions to accomplish its broad remedial purposes. *See*

[2] There is no dispute in this case – nor could there be – that public school districts are nonsectarian and that they are tax-exempt for purposes of NYHRL § 296(4). *See* Real Prop. Tax Law § 408.

NYHRL §§ 290, 291, 296(4), 300; *see also Cahill v. Rosa,* 89 N.Y.2d 14, 20 (1996). The court below failed to acknowledge either this fundamental state policy or the statutory mandate of liberal construction, instead accepting Respondent's argument that public schools are not educational corporations; its decision undermines the safety of schoolchildren throughout the state by improperly restricting the NYHRL's protections to students receiving private education. *Amici* respectfully submit that, to the extent this Court reaches this issue,[3] the supreme court's narrow interpretation of the statute should be rejected and the supreme court's judgment reversed.

A. The Terms "Education Corporation" and "Education Association" Encompass Public School Districts

General Construction Law § 66(6) defines "education corporation" to include all "corporation[s] . . . formed under" the Education Law. Gen. Constr. Law § 66(6) (incorporating the definition in Educ. Law § 216-a(1)).[4] Because public school districts in New York are defined by both statute and the state constitution as "corporations," N.Y. Const. art. 10, § 5; Gen. Constr. Law § 66(2),

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[3] As noted in the Preliminary Statement, *amici* do not address the issue identified in Point I of the Division's brief, namely, whether the "extraordinary writ of prohibition [lies] to stop the Division from considering a discrimination complaint." Appellant's Br. at 6-13.

[4] Other subsections of Education § 216-a provide that the Not-for-Profit Corporation Law (NPCL) shall apply to education corporations in certain circumstances. However, 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).

Section 216-a's provisions regarding the NPCL are not incorporated into the General Construction Law's definition of "education corporation." *See* Gen. Constr. Law § 66(6) (incorporating only subdivision one of Education Law § 216-a).

and because they are "formed under" the Education Law, *see, e.g.*, Educ. Law §§ 1501, 1504, 1522, there is no question they are "education corporations." *See also 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.").[5]

In the context of the NYHRL, moreover, the term "education corporation" must be "liberally construed" to effectuate the NYHRL's broad antidiscriminatory purposes, NYHRL § 300, which include "eliminat[ing] and prevent[ing] discrimination in . . . educational institutions," *id.* § 290, 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). The Court of Appeals applies this rule of liberal construction not only to determine *what* the NYHRL prohibits, but also to determine *to whom* and *to what institutions* its provisions apply. *See, e.g.*, *Cahill*, 89 N.Y.2d at 20 (applying the rule of liberal construction to hold that private dental offices were "public accommodations" subject to the NYHRL's antidiscrimination

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

requirements); *see also* Part I.D., *infra*. Thus, even if there were any ambiguity in the statutory definition of "education corporation" – which there is not – the rule of liberal construction would compel a broad understanding of the term to include public school districts in the context of NYHRL § 296(4).[6]

Although Respondents argued below that "education corporation" refers only to private nonprofit organizations and cannot include public "municipal corporations" such as school districts, Appellant's App. at A23-A24 (Resp.'s Mem. in Supp. of Art. 78 Pet.), there is nothing in New York law that limits the term "education corporation" to private entities. Many public corporations are education corporations under New York law, including not only school districts, but boards of education, *see* Educ. Law §§ 1701, 1804,[7] charter schools, *see id.* § 2853(1)(a), (c),[8] state universities, *see id.* § 352, public libraries,

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[6] Adopting the approach of the Commissioner of Human Rights in *New York State Division of Human Rights v. East Meadow Union Free District,* Case No. 10115533, slip op. at 10 (NYSDHR Mar. 10, 2008), *appeal sub judice*, No. 2008-04815 (2d Dep't argued Apr. 17, 2009), the Division's brief in this case does not rely on General Construction Law § 66(6) or Education Law § 216-a in reaching the conclusion that public school districts are "education corporations." Appellant Br. at 16. As explained below, *see infra* note 13, *Amici* respectfully disagree in substantial part with this aspect of the Division's and Commissioner's analysis. *Amici* agree, however, with the Division's (and the Commissioner's) ultimate conclusion, namely, that public school districts are "education corporations" for purposes of NYHRL § 296(4). *See infra* note 13.

[7] *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).

[8] *See also N.Y. Charter Schs. Ass'n, Inc. v. DiNapoli*, 60 A.D.3d 119, 123 (3d Dep't 2009) (holding that charter schools "retain[] characteristics that place[] them squarely within the state's public school system"); 2000 N.Y. Op. Att'y Gen. 7, 2000 WL 420375 (Apr. 7, 2000).

see id. § 255,[9] the New York State Higher Education Services Corporation, *see id.* § 652,[10] and boards of cooperative educational services, *see State Div. of Hum. Rights v. Bd. of Coop. Educ. Servs.*, 98 A.D.2d 958, 958-59 (4th Dep't 1983).

In ruling that § 296(4) does not apply to public school districts, the supreme court referred to its earlier decision in *Ithaca City School District v. New York State Division of Human Rights*, which concluded that "[b]ecause an 'education corporation' is defined in [General Construction Law] Section 66(6)[,] it is wholly distinct from a municipal corporation." *Ithaca City Sch. Dist. v. N.Y. State Div. of Hum. Rights*, No. 2007-0785, slip op. at 3 (Sup. Ct. Tompkins County Sept. 11, 2007); *see also* Appellant's App. at A7 (decision below). *Amici* respectfully submit that this reasoning is flawed. The fact that the General Construction Law contains a provision defining "education corporation" and another defining "municipal corporation" does not mean that the definitions can never overlap. As the Second Department explained in a related context, "[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 County Pub. Library*, 30 A.D.3d 814, 817 (3d Dep't 2006) ("[W]e are

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

[10] *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 County 1990); N.Y. Jur. 2d Schools § 800.

persuaded that the Second Department's analysis in *Bovich v. East Meadow Pub. Lib.* is correct . . . ." (citation omitted)). The supreme court in the instant case, rather than drawing conclusions from the mere existence of the various statutory definitions, should have focused on each definition's content. School districts, as municipal corporations "formed under" the Education Law, clearly fit the definition of both "municipal corporation" and "education corporation." *See* Gen. Constr. Law § 66(2), (6); Educ. Law § 216-a(1).[11]

In any event, independent of the fact that school districts are "education corporations," they are also subject to NYHRL § 296(4) as "education . . . association[s]." NYHRL § 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). Applying the NYHRL's rule of liberal construction to § 296(4)'s broad language, the New York Commissioner of Human Rights has properly held that the provision's reference to "education . . . association[s]" encompasses public schools. *See N.Y. State Div. of Hum. Rights v.*

[11] Though its reasoning is not entirely clear, the supreme court may have believed that because General Construction Law § 65 contemplates that certain nonpublic corporations will be "education corporations," Gen. Constr. Law § 65, this must mean that all education corporations are private entities. This reasoning would also be flawed; the fact that *some* education corporations will be classified as private corporations does not compel the conclusion that *all* education corporations must be so classified. Again, the court should have focused on the actual content of the relevant definitions, which makes clear that public school districts fall within the scope of the "education corporation" definition *See* Gen. Constr. Law §§ 65, 66; Educ. Law § 216-a(1).

E. Meadow Union Free Sch. Dist., Case No. 10115533, slip op. at 10-11 (NYSDHR Mar. 10 2008), *appeal sub judice*, No. 2008-04815 (2d Dep't argued Apr. 17, 2009). The supreme court in this case failed even to consider § 296(4)'s reference to "education . . . association[s]."

B. Case Law, Including This Court's, Clearly Establishes That NYHRL § 296(4) Applies to Public Educational Institutions

This Court's decisions clearly establish that the NYHRL applies to student discrimination claims against public educational institutions.[12] 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 disability discrimination, relying on various state and federal laws including unspecified provisions of the NYHRL. *See* 18 A.D.3d 988 (3d Dep't 2005). This Court exercised subject matter jurisdiction over the plaintiff's NYHRL claims, which, the Court noted, were "presumably" based on § 296(4). 18 A.D.3d at 991. While the 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-NYHRL) claims against the Board for lack of subject matter jurisdiction. *Id.* Clearly, the Court conducted a

[12] *Amici* thus respectfully disagree with the Division's suggestion that this Court has not yet addressed NYHRL § 296(4)'s application to public educational institutions. Appellant's Br. at 15. The Division's brief does not address the Third Department cases discussed herein.

close examination and would not have exercised jurisdiction over the § 296(4) claims against a public educational institution had the Court considered the statute to be restricted to private entities.

The following year, the Court confirmed its view that NYHRL § 296(4) encompasses public schools in *In re Binghamton City School District (Peacock)*, 33 A.D.3d 1074 (3d Dep't 2006). The *Peacock* case involved an arbitration decision imposing a one-year suspension on a Binghamton City School District teacher for his inappropriate relationship with a female public school student. The lower court, relying on its authority to overturn arbitration decisions violating public policy, had vacated the arbitrator's decision as unduly lenient, remitting the matter for imposition of a new penalty. Affirming that decision, this Court specifically cited NYHRL § 296(4), along with other sources of state law, as establishing an "explicit and compelling public policy to protect children . . . in the educational setting." 33 A.D.3d at 1076. The one-year suspension violated this state policy, the Court held, because it would "not adequately protect students from the teacher in the future." *Id.* at 1077. Respondent's argument that § 296(4) provides no protection to students in public schools cannot be reconciled with this Court's prior reliance on NYHRL § 296(4) as helping to establish a state policy protecting students from a public school teacher's misconduct.

Respondent's position is also at odds with this Court's recent decision in *Momot v. Rensselaer County*, 57 A.D.3d 1069 (3d Dep't 2008). In *Momot*, the State Division of Human Rights had dismissed a student's discrimination claim against a public college as "completely without proof and absurd on its face." *Id.* at 1070 (citation omitted). This Court affirmed that determination without questioning its own jurisdiction to consider a student's NYHRL claim against a public entity. Nor did the Court question the exercise of jurisdiction by the court below or by the Division of Human Rights; 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 similarly interpreted NYHRL § 296(4) to apply to public as well as private organizations. In *State Division of Human Rights v. Board of Cooperative Educational Services* (BOCES), the Fourth Department flatly rejected the argument that the term "education corporation" refers exclusively to private organizations. 98 A.D.2d 958, 958-59 (4th Dep't 1983). The court held that respondent 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 NYHRL § 296(4). 98 A.D.2d at 958-959.

While other courts have not found it necessary to analyze the specific meaning of "education corporation or association," their holdings reflect a broad consensus that the NYHRL applies to protect students in public schools. Federal courts in the Northern, Eastern and Southern Districts of New York, for example, have allowed discrimination claims brought by students under the NYHRL 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 WL 1456221, at *21 n.18 (E.D.N.Y. May 16, 2007). It is telling, moreover, that while several published decisions from state and federal courts have rejected § 296(4) claims against school districts and other public institutions on various grounds, none of these decisions rested their holdings on an argument that § 296(4) applies only to private educational institutions; indeed, the courts appear not to have even believed that the narrow interpretation favored by Respondent warranted contemplation. *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).

The New York Commissioner of Human Rights has also rejected the narrow reading of § 296(4) favored by Respondent and the court below. In *NYSDHR v. East Meadow Union Free School District* (*East Meadow*), the Commissioner held that a public school district was both an "education corporation" and an "education association" for purposes of NYHRL § 296(4). *See East Meadow*, slip op. at 10-14. The Commissioner properly followed the NYHRL's rule of liberal construction, and noted that "[c]ourts have consistently interpreted the [NYHRL] so [as] to accord individuals with the fullest of civil rights and the fullest of protections from discrimination, including, specifically, in the area of education." *Id.* at 12.[13]

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[13] In analyzing the term "education corporation," the Commissioner declined to rely on the definition of that term in General Construction Law § 66(6), finding that that definition had "no application" to public schools. *East Meadow*, slip op. at 10. While *amici* agree with the Commissioner's ultimate conclusion – that school districts are education corporations under NYHRL § 296(4) – we submit that she erred in interpreting General Construction Law § 66(6) not to include such schools. This error in the Commissioner's otherwise cogent analysis appears to be based on a misreading of the statutory text, which the *East Meadow* opinion misquotes. Though General Construction Law § 66(6) – through its incorporation of Education Law § 216-a(1) – defines "education corporation" to include all "corporation[s] . . . formed under this chapter," thereby referring to all corporations formed under the Education Law, *see* Educ. Law § 1, the Commissioner's quotation of the statute replaces the words "this chapter" with the words "Section 216 of the Education Law." *East Meadow*, slip op. at 10. There is nothing to justify this alteration of the statute's text; the term "this chapter" clearly refers to the Education Law in its entirety. *See* Education Law § 1 ("This chapter shall be known as the 'Education Law.'"). Indeed, hundreds of provisions within the Education Law, including other subdivisions of § 216-a, use the word "chapter" to refer to the Education Law. *See id.* § 216-a(4); *see also, e.g.*, *id.* §§ 2, 112, 293, 355, 501, 712, 1004-a, 1501, 1950. (*continued on following page*)

The supreme court in the instant case relied on the Second Department's decision in *Student Press, Inc. v. New York State Human Rights Appeal Board*, which rejected the NYSDHR's exercise of jurisdiction over a public college. 44 A.D.2d 558 (2d Dep't 1974). That decision, however, does not properly guide resolution of the issues here. First of all, the *Student Press* court did not explain the legal or factual basis for its statement rejecting the Division's jurisdiction; nor did it cite any authority.[14] Moreover, the court deemed the complaint in that case "untenable" on constitutional grounds. *Id.* at 558. More importantly, even if the court's comment regarding the NYSDHR's jurisdiction was based on an unstated belief that a public educational institution cannot be an "education corporation or association" under NYHRL § 296(4), that aspect of the court's analysis has been superseded by statute. The legislature enacted the current definition of "education corporation" – which includes all corporations formed under the Education Law – after the facts giving rise to the *Student Press* case took place, and the new

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(*continued from previous page*)
Even assuming *arguendo*, however, that the definition provided by the General Construction Law does not include public schools, the Commissioner was correct to conclude that NYHRL § 296(4)'s reference to "education corporation[s]" would still encompass such schools. *See East Meadow*, slip op. at 11-12; *see also* Gen. Constr. Law § 110 (providing that the General Construction Law does not apply where the "general object" of the statute being applied "or the context of the language" being construed "indicate[s] that a different meaning or application was intended" from that provided by the General Construction Law).

[14] No published court decision has ever cited the *Student Press* decision in the 35 years since it was issued.

language did not take effect until after the *Student Press* court issued its decision.[15] Finally, even if *Student Press* provided support to Respondent's argument, the decision is at odds with this Court's precedents and should not be followed.[16]

C. Respondent's Arguments Based on the Real Property Tax Law Lack Merit

Lacking any support for its unduly restrictive interpretation of "education corporation or association," Respondent has resorted to a confusing and misleading argument regarding the NYHRL's relationship to the Real Property Tax Law (RPTL). The NYHRL and the RPTL are indeed related, because NYHRL § 296(4) limits its antidiscrimination requirements to institutions which, like Respondent, are tax-exempt under RPTL Article Four. NYHRL § 296(4). In its arguments before the lower court, however, Respondent concocted a new theory of the laws'

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[15] The Second Department decided *Student Press* on March 4, 1974, and the facts giving rise to the case took place no later than January 4, 1972. *See Student Press*, 44 A.D.2d at 558. 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.

[16] Other school districts seeking to evade NYHRL § 296(4) have pointed to a 1998 case decided by the Commissioner of Education – a case which did not involve the NYHRL or its rule of liberal construction. *See Appeal of Stayton*, Decision No. 13,788 (Comm'r of Educ. July 18, 1997), *available at* http://www.counsel.nysed.gov/Decisions/volume37/d13788.htm (last visited May 14, 2009). After dismissing an appeal as moot, the Commissioner in *Stayton* commented in dicta that a "[c]ity school district is not an education corporation." *Id.* It is clear from context, however, that the Commissioner was not analyzing whether school districts generally fit the statutory definition of "education corporation"; the Commissioner's point was rather that the Not-for-Profit Corporation Law (NPCL) could not properly be applied to defeat the purposes of the Education Law. *Id.* This is, in fact, precisely what subdivision four of § 216-a provides. *See* Educ. Law § 216-a(4) (providing that the NCPL applies to education corporations only to the extent that the NCPL is consistent with provisions of the Education Law). The Commissioner's dicta has no bearing on the issue of whether school districts are "education corporations" as a general matter or in the context of an NYHRL claim.

relationship, first by erroneously stating that § 296(4) refers to the RPTL to "qualif[y]" the meaning of "education corporation or association." Appellant's App. at A23 (Resp.'s Mem. in Supp. of Art. 78 Pet.). Respondent then fixated on a single provision of RPTL Article Four – RPTL § 420-a – which it described as the only RPTL provision to use the term "education corporation or association." Appellant's App. at A23 (Resp.'s Mem.). Section 420-a, however, does *not* use the term "education corporation or association." And even if it did, it is entirely unclear why Respondent believes this would matter. Contrary to what Respondent seems to imply, NYHRL § 296(4) does not mention or cite RPTL § 420-a, but refers rather to RPTL Article Four in its entirety. Respondent has actually conceded the only fact about RPTL Article Four that is relevant here: that public school districts fall within one of Article Four's tax-exemption provisions – RPTL § 408 – thereby triggering NYHRL § 296(4)'s antidiscrimination requirements. Appellant's App. at A23 (Resp.'s Mem.); *see* NYHRL § 296(4); RPTL § 408.

Finally, to the extent Respondent suggests, as it did below, that a public education institution cannot be considered a "corporation . . . organized or conducted exclusively for . . . educational . . . purposes," RPTL § 420-a, Respondent's argument has been rejected by the Court of Appeals. *See Bd. of*

Coop. Educ. Servs., Second Supervisory Dist., Westchester County v. Buckley, 15 N.Y.2d 971, 973 (1965).[17]

D. Excluding Public School Districts from § 296(4)'s Reach Would Violate the Rule of Liberal Construction, Thwart the NYHRL's Purposes, and Lead to Absurd and Unjust Results

The NYHRL 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." NYHRL § 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) – discrimination that 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 v. St. John's Univ.*, 84 N.Y.2d 120, 125 (1994) ("The Human Rights Law effects this State's fundamental public policy against discrimination by establishing equality of opportunity as a civil right." (citations omitted)).

[17] *In Buckley*, the Court of Appeals held that a board of cooperative education services was entitled to a tax-exemption under RPTL § 420, the tax-exemption provision that the legislature later renumbered as RPTL § 420-a. 15 N.Y.2d 971, 973.

The eradication of discrimination in education lies at the heart of the NYHRL's concerns. In its opening provisions, the statute declares 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." NYRHL §§ 290, 291. The statute "explicitly mandate[s]" that courts construe its provisions "liberal[ly]" for the accomplishment of the law's purposes. *Aurecchione v. N.Y. State Div. of Hum. Rights*, 98 N.Y.2d 21, 26 (2002) (citing, *inter alia*, NYHRL § 300)); *see also Scheiber*, 84 N.Y.2d at 126 ("We are mandated to read the Human Rights Law in a manner that will accomplish its strong antidiscriminatory purpose."); *Braschi v. Stahl Assocs.*, 74 N.Y.2d 201, 207-08 (1989) ("It is fundamental that in construing the words of a statute '[t]he legislative intent is the great and controlling principle.' Indeed, 'the general purpose is a more important aid to the meaning than any rule which grammar or formal logic may lay down.'" (citations omitted)); *City of Schenectady v. State Div. of Hum. Rights*, 37 N.Y.2d 421, 428 (1975) ("[I]t is the duty of courts to make sure that the Human Rights Law 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.").

To carry out its strong antidiscriminatory purpose, the NYHRL 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, NYHRL § 296(4) specifically 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." NYHRL § 296(4). Other student civil rights provisions 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.*; 42 U.S.C. § 2000d *et seq.*; Educ. Law § 313.

In view of the NYHRL's strong policy against state-sponsored discrimination, its special concern with protecting equal opportunities in education, its unusually broad and inclusive nature, and its explicit mandate of liberal construction, it is simply preposterous to argue – as Respondent does – that courts should interpret the law to protect *private* school students from discrimination while leaving students in the state's own schools entirely without recourse to the Division of Human Rights. Adopting Respondent's strained construction of NYHRL § 296(4) would render the statute's broad statements of purposes an empty promise for the vast majority of the state's youth, and set New York apart as

perhaps the only state that reserves its strongest school civil rights protections for children whose families can afford private education. It is well established that courts must interpret statutes to avoid such absurd and unjust results. *See 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*, 74 N.Y.2d at 208 ("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 adoption of Respondent's interpretation is made even more apparent when one considers the enormous procedural and financial benefits of the NYHRL'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 NYSDHR 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.[18]

[18] The *Freudenthal* court rejected the judicial imposition of procedural requirements on NYHRL complainants (specifically, the requirement to bring a notice of claim), noting that such requirements would be inconsistent "with the Legislature's intent to provide aggrieved parties a

Respondent's construction of the statute would also deny to public school students – and to the public at large[19] – 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 the *Freudenthal* court observed, the NYSDHR has "decades of special experience in weighing the merit and value of [NYHRL] 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. As a result, "[t]he administrative forum offers a complainant remedies not available from a court." *Id.* at 291. Among these remedies is the the agency-run "conciliation" attempt that follows a preliminary finding of probable cause. As the Court of Appeals noted, "because conciliation efforts are an integral

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simplified alternative to litigation as a means to resolve discrimination claims." 99 N.Y.2d at 292.

Indeed, the "user-friendliness" of the NYSDHR is readily apparent from perusing its website, which invites aggrieved parties to file complaints – without a filing fee or the need for an attorney – via any regional office or by simply downloading an online document and mailing the filled-out, notarized form to the agency. *See* NYSDHR, *How To File a Complaint, available at* http://www.dhr.state.ny.us/how_to_file_a_complaint.html (last visited May 14, 2009). 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 NYSDHR 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.

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

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 NYHRL and the executive agency that enforces it. The supreme court's opinion, which would improperly reserve these resources for students receiving private education, should be rejected.

II. FEDERAL PRIVACY PROTECTIONS DO NOT CONFLICT WITH NYHRL § 296(4)

The court below understandably ignored Respondent's suggestion that the federal Family Educational Rights and Privacy Act (FERPA), *see* 20 U.S.C. § 1232g, necessarily conflicts with, and thus preempts, the NYHRL in cases involving public educational institutions. To prevail on this conflict-preemption argument, Respondent must "clearly demonstrate" that compliance with both state and federal law is "physically impossible" or that state law "stands as an obstacle to the accomplishment and execution of the full congressional purposes and objectives" of federal law. *Madeira v. Affordable Housing Found., Inc.*, 469 F.3d 219, 241 (2d Cir. 2006). Preemption is warranted only where "the repugnance or conflict" between state and federal law "is so direct and positive that the two [laws] cannot be reconciled or consistently stand together." *Id.* at 241-42 (citation and internal quotation marks omitted).

While *amici* agree that a school district must take appropriate steps to guard student privacy, Respondent has not provided a reason to believe – much less "clearly demonstrate[d]" – that the disclosure of confidential identifying information covered by FERPA would be required in this case.[20] Respondent may not subvert New York's student civil rights protections simply by declaring in the most general and conclusory terms that their enforcement would violate federal law. Even assuming, moreover, that a conflict between FERPA and the NYHRL were to arise in this matter, it would not justify Respondent's extreme proposition that the NYHRL's safeguards for public school students be eliminated altogether.[21]

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[20] FERPA 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. *See* 20 U.S.C. § 1232g (b)(1)(J)(ii), (b)(2)(a), (b)(2)(b); *United States v. Bertie County Bd. of Educ.*, 319 F. Supp. 2d 669, 671-72 (E.D.N.C. 2004); *see also* 20 U.S.C. § 1232g(a)(4); *Rome City Sch. Dist. v. Grifasi*, 10 Misc. 3d 1034, 1037 (Sup. Ct. Oneida County 2005) (holding that protected "education records" under FERPA did not include a videotape "recorded to maintain the physical security and safety of the school building" where the videotape did "not pertain to the educational performance of the students" recorded). Nor does FERPA apply where personally identifying information about a student is properly redacted prior to the record's release. *See, e.g.*, *Ragusa v. Malverne Union Free Sch. Dist.*, 549 F. Supp. 2d 288, 293 (E.D.N.Y. 2008).

[21] If respondent believes that compliance with the NYHRL would violate FERPA in this case, the proper procedure would be to notify the Federal Department of Education within forty-five days, giving the citation and text of the purportedly conflicting law. *See* 34 C.F.R. § 99.61. Respondent appears not to have followed that procedure here.

CONCLUSION

In view of the NYHRL's plain language, the relevant case law, the state's powerful policy against state-sponsored discrimination in education, and the many public and private interests served by making the NYSDHR's resources available to public schools students, this Court should reverse the supreme court's judgment and hold that NYHRL § 296(4) prohibits discrimination by public schools.

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STATE OF NEW YORK
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NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Complainant,

v.

EAST MEADOW UNION FREE SCHOOL DISTRICT,

Respondent.

Case No. **10115533**

This matter arises under the New York State Human Rights Law, which prohibits, among other things, discrimination by educational entities against people with disabilities, including, specifically, those who use guide, hearing, and/or service dogs. *See* N.Y. Exec. Law, Art. 15 ("Human Rights Law" or "Law") §§ 296.4, -.14. Specifically, the Complaint in this matter alleges that the East Meadow Union Free School District ("East Meadow" or "Respondent") discriminates against students with disabilities who use guide, hearing, and/or service dogs, in violation of both Section 296.4 and Section 296.14 of the Law. East Meadow claims that it is not an educational entity encompassed by the Law and that it does not discriminate, as alleged, in any event. After consideration of the Administrative Law Judge's recommended Findings of Fact, Decision and Opinion, and Order ("Recommended Order") and of East Meadow's submissions, including its briefs submitted to the Administrative Law Judge ("ALJ") and its objections to the Recommended Order, I find that the Division has jurisdiction over this matter, and that East Meadow's

policy and practices with respect to the use of guide, hearing, and service dogs by students with disabilities violate the New York Human Rights Law: Both Section 296.4 and Section 296.14 grant an absolute right to students with disabilities, as defined by the Law, who use guide, hearing, and/or service dogs, as defined by Human Rights Law § 292, to have those guide, hearing, and/or service dogs with them in school and during all school-related activities, except, perhaps, in exceptional circumstances, which are not present here.

PROCEEDINGS IN THE CASE

On January 8, 2007, a verified complaint was filed with the Division, charging East Meadow with unlawful discriminatory practices "by preventing the use of guide dogs, hearing dogs or service dogs by hearing impaired or other [students] with disabilities in educational facilities." Complaint ("Compl.") at 3. Specifically, the Complaint alleges that both Section 296.4 and Section 296.14 provide an absolute right to students with disabilities to bring their guide, hearing, and service dogs into school with them, including blind students who use guide dogs and hearing-impaired students who use service dogs. Compl. at ¶ 6. East Meadow has never recognized this as a right of their students and, instead, has used, and is using, a balancing test to assess whether guide, hearing, and/or service dogs should be allowed. (ALJ's Exhibit 4)

The Long Island Regional Office of the Division commenced an investigation into the allegations in the Complaint. After its investigation, it found that the Division has jurisdiction over the Complaint and that probable cause exists to

believe East Meadow had engaged and was engaging in the alleged unlawful discriminatory practices. The case was referred to a public hearing before an Administrative Law Judge.

After the finding of probable cause and before commencement of the hearing, East Meadow sued the Division and the Long Island Regional Director in Supreme Court, seeking to enjoin the hearing. *See East Meadow Union Free School District v. New York State Division of Human Rights & Jefferson*, No. 07-6475, 2007 N.Y. Misc. LEXIS 6004 (N.Y. Sup. Ct. Aug. 7, 2007) ("Supreme Court Order"). In that proceeding, East Meadow did not argue that the Division lacked jurisdiction over it because it was not encompassed by Section 296.4. Rather, it argued that the Division's proceeding was precluded based on a prior Federal court case commenced against East Meadow by one of its students with a disability who was not allowed to bring his service dog into school with him and who was also alleged in the present Complaint to be one of the students affected by East Meadow's alleged discriminatory policy and practice. *See* Supreme Court Order at 2.[1] The Supreme Court disagreed, finding that "the School District's transparent attempt to superimpose the alleged findings of the [Federal] District Court fails for several

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[1] In that case, the Federal District Court denied plaintiffs' motion for a preliminary injunction, finding that they failed to show that they were likely to succeed on the merits. *See Cave v. E. Meadow Union Free Sch. Dist.*, 480 F. Supp. 2d 610 (E.D.N.Y. 2007). The Second Circuit, however, reversed and remanded the case to the District Court to dismiss for lack of jurisdiction, finding that the plaintiffs had not exhausted their administrative remedies. *See Cave v. E. Meadow Union Free Sch. Dist.*, 2008 U.S. App. LEXIS 1239 (2d Cir. Jan. 23, 2008).

reasons," including, among others, the fact that the "School District's overall policy regarding service animals was not and could not be made an issue in the District Court proceeding," and, thus, "res judicata does not apply." *Id.* at 10. It concluded that the "School District's policy relating to service animals in general is subject to review before the [Division]." *Id.* at 11.

The matter then proceeded to hearing, before ALJ Lilliana Estrella-Castillo, on that precise issue. After the hearing, the ALJ allowed both parties to file post-hearing submissions, and both parties made timely submissions. On January 16, 2008, ALJ Estrella-Castillo issued a Recommended Order, finding that the Division has jurisdiction over this matter and that East Meadow's policy violates Section 296 of the Human Rights Law.

The Commissioner's Office requested the parties' view on the Recommended Order, and East Meadow submitted timely objections to it, arguing principally that it is not a "education corporation or association" encompassed by the Human Rights Law. After full consideration of the Recommended Order and East Meadow's objections thereto, I find that East Meadow Union Free School District is encompassed by Sections 296.4 and 296.14 of the Human Rights Law, and that East Meadow's "balancing test" policy with respect to use of guide, hearing, and service dogs by its students with disabilities violates both sections of the Law.

FINDINGS OF FACT

1. According to its website,

   The East Meadow Union Free School District, formed in 1814, is made up

> of nine schools serving the communities of East Meadow and Westbury, New York. Located on Long Island, the district is in the heart of Nassau County and has a long and accomplished history. There are more than 8,000 students attending our schools.

http://www.eastmeadow.k12.ny.us.[2]

2. The schools that comprise this district share the same Board of Education and the same mission. *See* http://www.eastmeadow.k12.ny.us/board (board information); http://www.eastmeadow.k12.ny.us/board/missionstatement (mission statement).

3. East Meadow claims that it is a "statutory political subdivision of the State of New York." (ALJ's Exhibit 6)

4. East Meadow contends that it addresses the needs of students with disabilities, including those who require the use of guide, hearing, or service dogs, "on a case-by-case basis." Under this policy, when presented with a request for the use of a guide, hearing, or service dog on school grounds or in educational facilities, East Meadow "utilizes a balancing test" that weighs the potential benefits to the student with the disability against "the risks inherent in having a service animal in the school building." (ALJ's Exhibit 4)

5. According to East Meadow, this test was based primarily on, adopted, and implemented in accordance with Federal law. (ALJ's Exhibit 4)

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[2] The Division may take official notice of facts "of which judicial notice could be taken and of other facts within the specialized knowledge of the agency," SAPA § 306.4, including publicly-available information.

6. This policy was in effect in 2007 and was used in that year to prevent a student with a disability from entering school with his service dog on at least four occasions. (ALJ's Exhibits 1, 4, 5)[3] The policy remained in effect through the conclusion of the hearing in this matter, in November 2007. (ALJ's Exhibit 4)

OPINION AND DECISION

The Human Rights Law was the first anti-discrimination law in the country. It was enacted in 1945 to cover discrimination based on employment and has been expanded ever since to have far-reaching effect to prevent and fight discrimination in the State. *See Board of Higher Education v. Carter*, 14 N.Y.2d 138, 145, 250 N.Y.S.2d 33, 34 (1964). The New York Legislature has made clear that the purpose of the Law is to, among other things, ensure that "every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the State." Human Rights Law § 290.3. To achieve that purpose, it declared the "opportunity to obtain education . . . without discrimination" to be a "civil right" in this State. Human Rights Law § 291.2.

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[3] East Meadow contends that it was justified in refusing entry to this particular student as he did not meet the then-definition of hearing-impaired under Human Rights Law § 296.14. (ALJ's Exhibit 5) This is no defense to its actions or to this Complaint: East Meadow concedes that its policy was based on a balancing test, not on Human Rights Law § 296; East Meadow concedes that it used this balancing test for all students with disabilities, not just those with hearing impairments; the then-definition of hearing-impaired under Human Rights Law § 296.14 was not applicable to Human Rights Law § 296.4, and cannot be used as a defense to a violation to that Section of the Law; Section 296.14 has since been amended so to remove the hearing-impairment test; and East Meadow's balancing test policy remains intact since that change.

The New York State Division of Human Rights ("Division") is the State agency mandated and empowered to enforce the Human Rights Law. Its mission is to accomplish the Law's objectives by "eliminat[ing] and prevent[ing] discrimination . . . in educational institutions," among other areas, Human Rights Law § 290.3, and the Legislature granted it broad authority to do so, including police powers, *see* Human Rights Law § 297.

In light of the importance of the Law and the vast mandate and authority of the Division, in enacting the Law, the Legislature also made crystal clear that "[t]he provisions of this [Law] shall be construed liberally for the accomplishment of the purposes thereof." Human Rights Law § 300. And, courts have done just that. *See, e.g., Aurecchione v. N.Y. State Div. of Human Rights*, 98 N.Y.2d 21, 26, 744 N.Y.S.2d 349, 351 (2002) ("a liberal reading of the statute is explicitly mandated to effectuate the statute's intent"); *Miller v. Ravitch*, 60 N.Y.2d 527, 537, 470 N.Y.S.2d 558, 563 (1983) ("[Respondent's procedure must] also conform to the protective mandate of the antidiscrimination law which requires that its provisions 'be construed liberally'"); *Sanders v. Winship*, 57 N.Y.2d 391, 395, 456 N.Y.S.2d 720, 722 (1982) ("the [Human Rights Law], expressive of fundamental state policy, . . . is to be regarded as remedial in nature and, therefore, liberally construed.").[4]

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[4] In addition, as the Fourth Department has recognized, "[d]eference should be paid to the assessments of [the Division] in view of the 'important objectives of the Human Rights Law, the discretion vested in the agency to achieve those objectives, and its . . . decades of special experience in weighing the merit and value of such claims.'" *Father Belle Community Center v. New York State Div. of Human Rights*, 221 A.D.2d 44, 57, 642 N.Y.S.2d 739, 749 (4th Dept. 1996) (citation omitted).

It is against this backdrop that this matter is decided.

I. THE STATE'S LAW WITH RESPECT TO DISABILITIES

The Human Rights Law is one of the broadest in the country with respect to disabilities. *See State Div. of Human Rights ex rel. McDermott v. Xerox Corp.*, 65 N.Y.2d 213, 218, 491 N.Y.S.2d 106, 109 (1985). It is far broader than the Federal statute addressing the rights of people with disabilities, the American with Disabilities Act ("ADA"), in many important respects. Specifically, for purposes of this case, the ADA does not include a specific provision with respect to the use of guide, hearing, and/or service dogs by students with disabilities. *See* 42 U.S.C. §§ 12101-12213. And, the ADA generally requires entities only to provide reasonable accommodations to people with disabilities. *Id.*

The Human Rights Law, on the other hand, prohibits "education corporations and associations" from, among other things, denying people with disabilities use of their facilities:

> It shall be an unlawful discriminatory practice for an education corporation or association [that] holds itself out to the public to be non-sectarian and exempt from taxation . . . of the real property tax law to deny the use of its facilities to any person otherwise qualified, or to permit the harassment of any student or applicant, by reason of . . . [the person's] . . . disability . . . .

Human Rights Law § 296.4.

And, it expressly bans discrimination based on the use of a guide, hearing, or service dog. Up until October 2007, the relevant provision of the Law read as follows:

> It shall be an unlawful discriminatory practice for any person engaged in any activity covered by this section to discriminate against a blind person, a

> hearing impaired person who has a hearing impairment manifested by a speech discrimination score of forty percent or less in the better ear with appropriate correction as certified by a licensed audiologist or otolaryngologist . . . or a physician who has examined such person . . . or a person with a disability on the basis of his or her use of a guide dog, hearing dog or service dog.

Human Rights Law § 296.14.

In 2007, Section 296.14 was amended, so to make clear that all persons with a hearing impairment have the right to use a guide, hearing, or service dog. Thus, as of October 1, 2007, Section 296.14 provides:

> It shall be an unlawful discriminatory practice for any person engaged in any activity covered by this section to discriminate against a blind person, a hearing impaired person or a person with a disability on the basis of his or her use of a guide dog, hearing dog or service dog.

Human Rights Law § 296.14 (as amended).

The Law also was amended to define "guide, service, and hearing dogs," as used in the Law, to mean dogs that are "trained to aid a person" with a disability by a "recognized service dog training center or professional dog trainer," and that are "actually used for such purpose." Human Rights Law §§ 292.31 to -.33.

Thus, the New York State Human Rights Law now prohibits discrimination by "an education corporation or association" against any person with a disability, as defined by the Law and regardless of level of impairment, on the basis of her/his use of a guide, hearing, and service dog, which discrimination includes, among other things, denying access to educational facilities.

II. EAST MEADOW UNION FREE SCHOOL DISTRICT IS COVERED BY SECTION 296 OF THE HUMAN RIGHTS LAW

East Meadow argues that the Division has no jurisdiction over it in this case because it is not an "education corporation or association," within the meaning of Human Rights Law § 296.4. Because "education corporation or association" is not defined in the Human Rights Law, East Meadow urges the adoption of the State's General Construction Law's definition of "education corporation," which does not encompass school districts such as East Meadow:

> The term "education corporation" . . . means a corporation (a) chartered or incorporated by the regents or otherwise formed under [Section 216 of the Education Law], or (b) formed by a special act of this state with its principal purpose an education purpose and which is a member of the university of the state of New York, or (c) formed under laws other than the statutes of this state which, if it were to be formed currently under the laws of this state, might be chartered by the regents, and which has been authorized to construct its activities in this state by the regents or as an authorized foreign education corporation with the consent of the commissioner.

Gen. Constr. Law § 66(6) (citing Education Law § 216-a(1)).

The General Construction Law's definition of "education corporation" has no application here.

As an initial matter, the General Construction Law defines only "education corporation," not education association, and the East Meadow Union Free School District is clearly an "education association." By its own characterization, East Meadow is "made up of nine schools serving the communities of East Meadow and Westbury, New York," sharing the same mission and being governed by a single Board. http://www.eastmeadow.k12.ny.us. According to Webster's Dictionary, an "association" is "the act of associating," or the "state of being associated," which is to

be "joined" or "connected." *The Merriam-Webster Dictionary* 53 (11th ed. 2004). The nine schools here are clearly "joined" and/or "connected," by, among other things, a shared mission and the same governing Board, to "serve the communities of East Meadow and Westbury New York." http://www.eastmeadow.k12.ny.us/board. Thus, under the plain language of the Human Rights Law -- that is, specifically, the term "education association" -- East Meadow is encompassed by the Section 296.4. *See Amorosi v. South Colonie Independent Central School District*, 9 N.Y.3d 367, 372, 849 N.Y.S.2d 485 (2007) ("we have correspondingly and consistently emphasized that where the statutory language is clear and unambiguous, the court should construe it so as to give effect to the plain meaning of the words used"); *Comptroller of City of N.Y. v. Mayor of City of N.Y.*, 7 N.Y.3d 256, 264, 819 N.Y.S.2d 672 (2006) ("unambiguous language is determinative, and courts must give effect to the plain meaning of a statute's terms"); *Theroux v. Reilly*, 1 N.Y.3d 232, 240, 771 N.Y.S.2d 43, 45 (2003) ("a statute's plain meaning must be discerned without resort to forced or unnatural interpretations"); *State Div. of Human Rights v. Berler*, 46 A.D.3d 32, 40, 848 N.Y.S.2d 183, 188 (2nd Dept. 2007) ("the starting point of analysis must be the plain meaning of the statutory language"); *State Div. of Human Rights v. Board of Cooperative Education Services*, 98 A.D.2d 958, 958, 470 N.Y.S.2d 209, 210 (4th Dept. 1983) (terms in Section 296 are "intended to be interpreted in its accepted and dictionary meaning").

With respect to the term "education corporation," the General Construction Law's definition cannot be engrafted onto Section 296 because doing so would

undermine completely the intent of that provision, which, as the Legislature has made clear, the General Construction Law cannot do. As the General Construction Law expressly provides, a definition in that law will govern only where it will not conflict with the intent of the statute being interpreted. *See* Gen Const. Law § 110 ("This chapter is applicable . . . unless its 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 [under] this chapter."). Here, the General Construction Law's definition will have such an effect.

As noted above, the principal purpose of the Human Rights Law is to ensure that "every individual shall have an equal opportunity to participate fully in the economic, cultural and intellectual life of the State." Human Rights Law § 290.3. And, thus, in enacting the Law, the Legislature expressly declared the "opportunity to obtain education . . .without discrimination" to be a "civil right" in this State, Human Rights Law § 291.2, and mandated and empowered the Division to enforce that civil right by fighting "discrimination . . . in educational institutions," Human Rights Law § 290.3. Lest there be any doubt about the importance of this Law, including in the area of education, the Legislature included an express provision instructing that "[t]he provisions of this [Law] shall be construed liberally for the accomplishment of the purposes thereof." Human Rights Law § 300.

Courts have consistently interpreted the Human Rights Law so to accord individuals with the fullest of civil rights and the fullest of protections from discrimination, including, specifically, in the area of education. *See, e.g., Board of*

Higher Education v. Carter, 14 N.Y.2d 138, 153, 250 N.Y.S.2d 33, 41 (1964) (in holding that Section 296 covers boards of education, the court cites to Section 300, finding that it "require[d]" the court to make "a liberal reading"). And, thus, it has found that the Human Rights Law encompasses a broad array of educational entities -- from boards of education,[5] to city school systems,[6] to "state agency programs for formal and informal education."[7]

Indeed, at least one court has found an educational entity similar in structure to East Meadow to be an "education corporation" under Section 296. In *State Div. of Human Rights v. Board of Cooperative Education Services*, the Fourth Department was faced with a disability discrimination claim against the Board of Cooperative Education Services ("BOCES"). *State Div. of Human Rights v. Board of Cooperative Education Services*, 98 A.D.2d 958, 958-59, 470 N.Y.S.2d 209, 210-11 (4th Dept. 1983). In that case, BOCES argued, among other things, that it was not an "education corporation or association," within the meaning of Section 296.4. *Id.* The court rejected BOCES' argument, holding that because BOCES "exists for the purpose of carrying out a program of shared educational services in the schools of

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5 *See, e.g., Board of Higher Education v. Carter*, 14 N.Y.2d at 42, 250 N.Y.S.2d at 153; *Board of Education v. State Div. of Human Rights*, 42 A.D.2d 473, 474, 349 N.Y.S.2d 25, 27 (3rd Dept. 1973).

6 *See e.g., Maloff v. City Comm. on Human Rights*, 38 N.Y.2d 329, 333, 379 N.Y.S.2d 788, 791 (1975).

7 *Board of Higher Education v. Carter*, 14 N.Y.2d at 38, 250 N.Y.S.2d at 149.

the supervisory district," it is an "education corporation," within the meaning of Section 296.4. *Id.*

In short, the intent of Section 296 is to prevent and fight discrimination in education and in access to educational facilities, programs, and activities, and includes schools that are organized and/or overseen in a variety of ways. To exclude East Meadow because the term "education corporation" is not defined in the Human Rights Law to include school districts would be contrary to the language of the statute (which expressly includes "education associations"), to common law (which expressly defines an "education corporation" as an entity that is comprised of several schools in one district, as well as public schools, their programs, their boards, and their "school systems"), and to the intent of the Law (which is to protect students with disabilities in education and educational facilities).

Thus, East Meadow Union Free School District is an "education corporation and association," within the meaning of Section 296.4 of the Human Rights Law;[8]

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[8] To the extent that East Meadow is suggesting that it is somehow immune from the Human Rights Law or the Division's reach because it is a "political subdivision," it is simply wrong. Courts construing the Human Rights Law have consistently held that "political subdivisions," such as school districts, are encompassed by the Law and are barred from discriminating in the State of New York. *See Union Free Sch. Dist. No. 6 of of Islip and Smithtown v. New York Div. of Human Rights Appeal Bd.*, 35 N.Y.2d 371, 381, 362 N.Y.S.2d 139, 146 (1974) (school district's employment policies constituted discrimination based on sex); *Rochester City Sch. Dist. v. Donaldson*, 38 A.D.3d 1280, 1280, 834 N.Y.S.2d 919, 919 (4th Dept. 2007) (Division order finding discrimination by a school district affirmed); *Bayport–Blue Point Sch. Dist. v. State Div. of Human Rights*, 131 A.D.2d 849, 850, 517 N.Y.S.2d. 209, 211 (2nd Dept. 1987) (Division's determination that the complainant was unlawfully discriminated against by the school district was ruled to be supported by substantial evidence).

is bound to the terms of that provision and to Section 296.14; and is subject to the Division's jurisdiction under those provisions.

III. EAST MEADOW'S POLICY AND PRACTICES WITH RESPECT TO THE USE OF GUIDE, HEARING, AND SERVICE DOGS BY STUDENTS WITH DISABILITIES WHO USE SUCH DOGS VIOLATE BOTH SECTION 296.4 AND SECTION 296.14 OF THE HUMAN RIGHT LAW

The Complaint alleges that students with disabilities who use guide, hearing, and/or service dogs have a right to have such dogs with them while they are in school or engaging in school-related activities, and that the failure to recognize and honor that right constitutes unlawful discrimination in education and in the use of educational facilities, in violation of Sections 296.4 and 296.14 of the Human Rights Law.

East Meadow contends that its policy and practice, based on the "balancing of interests," is lawful and necessary. In defending this policy and practice, East Meadow does not cite to the language of the Law, but rather to its manual, which establishes "Programs for Students with Disabilities" and "Access to Individualized Education Program," and to the decision in *Perino v. St. Vincent's Medical Center of Staten Island*, 132 Misc. 2d 20, 502 N.Y.S.2d 921 (N.Y. Sup. Ct. 1986). East Meadow's reliance on the manual and/or *Perino* is misplaced.

The manual upon which East Meadow relies is irrelevant because it does not address the New York State Human Rights Law and is based on the Americans with Disabilities Act, which does not contain a provision regarding the use of guide, hearing, or service dogs. Moreover, as New York courts have held, the Americans with Disabilities Act and its interpretations by Federal courts do not govern the

Division or the courts of New York with respect to the New York Human Rights Law. *See, e.g., Brooklyn Union Gas Co. v. New York State Rights Appeal Bd.*, 41 N.Y.2d 84, 85, 390 N.Y.S.2d 884, 886 (1976); *Doe v. Bell*, 194 Misc. 2d 774, 781, 754 N.Y.S.2d 846, 852 (N.Y. Sup. Ct. 2003). The Human Rights Law is viewed more broadly, and ought to be since the ADA is narrower in scope and has been narrowly interpreted. *See, e.g.*, 42 U.S.C. § 12102 (narrower definition of "disability"); *id.* at § 12111 (narrower definition of "employer"); *id.* at § 12117(a) (shorter statute of limitations period). It is unclear why East Meadow relies on a manual that is based principally on the ADA, but the fact that it does so does not relieve it of its responsibility under the State's Human Rights Law.

Nor does *Perino* protect East Meadow from liability in this action. *Perino* involved the use of a service animal in a hospital delivery room during a delivery. *Perino*, 132 Misc. 2d at 20. The court there was faced with a serious clash between the Public Health Law's strict guidelines regarding delivery rooms and the control and prevention of infectious diseases and the individual's right to have guide dog with him in the delivery room, and found that adhering to the Human Rights Law in that situation would have required the hospital to violate the Public Health Law, which the court found the Human Rights Law did not intend. *Id.* at 23.

Perino cannot control here. First, this case involves education, which has been recognized in this State as a civil right, and access to education and educational facilities as an exercise of that right. Second, the *Perino* decision was based solely on a previous decision involving the right of a person in a wheelchair to

participate in a road race -- not the rights of students with disabilities who use guide, hearing, and/or service dogs in education and/or to access educational facilities, programs, and activities. And, even East Meadow would have to admit that access to a road race by a person in a wheelchair is not the same thing and does not have the same import as a student's access to education. Third, and perhaps most importantly, unlike the defendant in *Perino,* East Meadow is not faced with the Hobson's choice of breaking one law or another by the allowance of a dog in the delivery room during a delivery. The court there just merely confirmed the correctness of the hospital's choice to adhere to the law with respect to the sanitary conditions of a delivery room during a birth. In short, *Perino* is of no significance to the case before us.

East Meadow suggests that it, in fact, does face a Hobson's choice, like the hospital in *Perino,* because there are or may be students, faculty, and staff who may be allergic to dogs, and it has a responsibility to those individuals. East Meadow is correct: It does have a responsibility to those individuals who may suffer from such a disability (temporary or permanent). And, the Human Rights Law has a provided for such situations -- that is, to reasonably accommodate <u>those</u> individuals, not to abrogate the right of students with disabilities to use their guide, hearing, and/or service dogs in school, which is absolute except, perhaps, in extremely limited circumstances, such as the one in *Perino*.[9]

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[9] As the court recognized in *United Veterans Mut. Housing No. 2 Corp. v. New York City Comm'n on Human Rights*, 207 A.D.2d 551, 552, 616 N.Y.S.2d 84, 85 (2nd

(continued . . .)

And this right is conferred by both Section 296.4 and Section 294.14 of the Law. Under Section 296.4, East Meadow cannot "deny the use of its facilities" by reason of a person's disability. Clearly, to refuse entry into a school facility to a student with a disability who uses a guide, hearing, and service dog, as defined by the Law, with that dog is a denial of use of that facility "by reason" of that person's disability. Needless to say, that student would not need and could not have such a dog absent her/his disability. Thus, refusing entry to a school facility to that student with her/his guide, hearing, or service dog is unlawful discrimination under Section 296.4.

It is also unlawful discrimination under Section 296.14. That provision forbids discrimination "against a blind person, a hearing impaired person or a person with a disability on the basis of his or her use of a guide dog, hearing dog or service dog." Human Rights Law § 296.14. To deny a student the use of her/his guide, hearing, and service dog -- which has been trained specifically to aid the student in overcoming obstacles presented by her/his impairment, so that s/he can function and enjoy life and the opportunities of life, such as education, as fully as a student without such an impairment -- because of the problems allegedly caused by

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(continued . . .)
Dept. 1994), "[l]egislation [that] is designed to prevent discrimination in general and to protect the disabled in particular is intended to promote the general welfare of the community," which "undoubtedly . . . commonly burdens some more than others."

the dog's presence is discrimination against the student because of the dog. And, that is simply unlawful under Section 296.14.[10]

In short, because Section 296.4 and Section 296.14 simply and clearly provide that students with a disability, as defined by the Law, who use guide, hearing, and/or service dogs, as defined in Human Rights Law § 292, are entitled to access to education, educational facilities, and all education-related activities and programs with their guide, hearing, and service dogs, the "balancing test" that East Meadow employs violates the Human Rights Law. And, we trust that a school district that is dedicated to ensuring that their students "acquire the knowledge and skills needed to lead a productive, responsible, and culturally enriched life in the 21st century," and "develop attitudes that reflect empathy and caring for others and respect for the differences and diversity in our society,"[11] will embrace both the letter and the spirit of the Human Rights Law and of this decision.

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10 Again, this case involves the use of guide, hearing, and service dogs defined by Section 292 of the Law -- not the use of other animals or dogs that do not meet the Section 292 definition. However, animals who do not meet the Section 292 definition may nonetheless be considered under provisions of the Law other than Section 296.14.

11 http://www.eastmeadow.k12.ny.us/board/mission_statement.htm (mission statement).

ORDER

In light of the foregoing and pursuant to the provisions of the Human Rights aw and the Division's Rules of Practice, it is hereby

ORDERED that East Meadow, its agents, representatives, employees, uccessors, and assigns, shall cease and desist immediately from using its alancing test" against students in their use of guide dogs, hearing dogs, or service gs;

ORDERED that East Meadow, its agents, representatives, employees, ccessors, and assigns, shall adopt a new policy and new practices with respect to e use of guide, hearing, and service dogs by students in activities, programs, and cilities (including classrooms) and on school grounds that shall comply with the uman Rights Law, a copy of which shall be distributed to all faculty, staff, and udents;

ORDERED that East Meadow, its agents, representatives, employees, ccessors, and assigns, shall adopt a training program or session for all that may affected or called upon to implement and/or enforce the new policy and practices;

ORDERED that East Meadow, its agents, representatives, employees, ccessors, and assigns, shall submit its new policy and new practices and its aining program or session to Caroline Downey, General Counsel, New York State ivision of Human Rights, One Fordham Plaza, 4th Floor, Bronx, NY 10458, within xty (60) days of this Order;

ORDERED that East Meadow, its agents, representatives, employees, successors, and assigns, shall allow all students with disabilities who use guide, hearing, and service dogs (including those with hearing impairments) to bring their guide, hearing, and service dogs into school or school-related activities, programs, and facilities (including classrooms) and onto school grounds;

ORDERED that East Meadow, its agents, representatives, employees, successors, and assigns, shall submit to Caroline Downey, at the address above, a list of all students with disabilities who use guide, hearing, and/or service dogs who have been allowed to bring their dogs into into school or school-related activities, programs, and facilities (including classrooms) and onto school grounds and the date of first admittance;

ORDERED that East Meadow, its agents, representatives, employees, successors, and assigns, shall prominently post a copy of the Division's poster (available at the Division's website at www.dhr.state.ny.us under the homepage heading "NYS Division of Human Rights is . . .") in places on Respondent's premises where students, faculty, and staff are likely to view it; and

ORDERED, that East Meadow, its agents, representatives, employees, successors and assigns, shall cooperate with the representatives of the Division

during any investigation into compliance with the directives contained in this Order.

DATED: March 10, 2008
Bronx, New York

N.Y. STATE DIVISION OF HUMAN RIGHTS

KUMIKI GIBSON
Commissioner

THE STATE OF NEW YORK
SUPREME COURT COUNTY OF TOMPKINS

ITHACA CITY SCHOOL DISTRICT,

Petitioner,

vs. Index No. 2007-0785

THE NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Respondent.

BEFORE: HON. ROBERT C. MULVEY
Supreme Court Justice

APPEARANCES:

BOND, SCHOENECK & KING
By: Subhash Viswanathan, Esq.
Attorneys for Petitioner
One Lincoln Center
Syracuse, New York 13202

STATE OF NEW YORK DIVISION OF HUMAN RIGHTS
By: Michael K. Swirsky, Esq., Senior Attorney
Attorneys for Respondent
One Fordham Plaza, 4th Floor
Bronx, New York 10458

DECISION & ORDER

Mulvey, Robert C., J.

In this proceeding under Article 78 of the Civil Practice Law and Rules, the petitioner Ithaca City School District seeks a determination that the respondent New York State Division of Human Rights ("SDHR") lacks jurisdiction to consider complaints against it under the New York State Human Rights Law ("NYSHRL").

The petitioner contends that it is not an "education corporation or association" as set forth in Section 296(4) of the NYSHRL. The respondent contends that it has jurisdiction under that statute, citing the holding of the Appellate Division, Fourth Department in State Division of Human Rights v. Board of Cooperative Educational Services [98 AD2d 58 (Fourth Dept., 1983)].

BACKGROUND

The respondent SDHR has concluded that probable cause exists with regard to a complaint against the petition alleging an unlawful discriminatory practice and that a public hearing must be conducted thereon. The SDHR denied the petitioner's application to reopen the investigation and the public hearing is scheduled to commence on October 1, 2007.

The SDHR asserts jurisdiction under Section 296(4) of the NYSHRL which provides as follows:

> "It shall be an unlawful discriminatory practice for an education corporation or association which holds itself out to the public to be non-sectarian and exempt from taxation pursuant to the provisions of article four of the real property tax law to deny the use of its facilities to any person otherwise qualified, or to permit the harassment of any student or applicant, by reason of his race, color, religion, disability, national origin, sexual orientation, military status, sex, age or marital status, except that any such institution which establishes or maintains a policy of educating persons of one sex exclusively may admit students of only one sex."

DISCUSSION

The petitioner has advanced persuasive arguments that it is not an "education corporation or association" within the meaning of Section 296(4). In sum, the petitioner contends that the term "education corporation" in that statute refers to private not for profit corporations formed for an educational purpose. It points out that the General Construction Law identifies three categories of corporations: public, other than for profit, and for profit (GCL Section 65). Because a school district is a municipal corporation it falls within the definition of public corporation and therefore cannot be considered a not

for profit. Because an "education corporation" is defined in GCL Section 66(6) it is wholly distinct from a municipal corporation.

Since a Board of Cooperative Educational Services (BOCES) is included in the list of municipal corporations defined in Section 119-n of the General Municipal Law, it appears that a BOCES could not be considered an "educational corporation."

Nevertheless, in 1983, the Fourth Department rejected the SDHR's position that a BOCES did not fall within its jurisdiction and held that it was an education corporation. **Id.**

Because a BOCES is listed as a municipal corporation and is a creature of several component school districts, this Court cannot distinguish the Fourth Department holding from the present case.

In view of the lack of any other precedent on this issue, the doctrine of *stare decisis* requires that this Court follow the Fourth Department's holding until the Appellate Division of this Department or the Court of Appeals pronounces a contrary rule. See, **In the Matter of Patrick BB** , 284 AD2d 636639 (Third Dept., 2001), **Mountain View Coach Lines, Inc. v. Storms**, 102 AD2d 663, 664 (Second Dept., 1984).

For the foregoing reasons, the Court has no basis to conclude that the respondent is acting without jurisdiction in considering the instant complaint.

CONCLUSION

The petition is denied.

This decision shall also constitute the order of the court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts. To commence the statutory time period for appeals as of right [CPLR 5513(a)] a copy of this decision and order, with notice of entry, must be served upon all parties.

Signed this 11TH day of September, 2007.

ROBERT C. MULVEY, J.S.C.

CERTIFICATE OF SERVICE

I, Michael D. B. Kavey, hereby certify that on May 14, 2009, I served two true copies of the annexed **BRIEF OF *AMICI CURIAE* ADVOCATES FOR CHILDREN OF NEW YORK, INC., ET AL.** on each party by sending a copy via electronic mail and by forwarding the same in a sealed envelope with postage prepaid via overnight Federal Express to:

James F. Young, Esq.
SAYLES & EVANS
Attorney for Petitioner-Respondent
One West Church Street
Elmira, NY 14901
jyoung@saylesevans.com

Caroline J. Downey, General Counsel
Michael K. Swirsky, Of Cousel
STATE DIVISION OF HUMAN RIGHTS
Attorneys for Respondent-Appellant
One Fordham Plaza
Bronx, NY 10458
mswirsky@dhr.state.ny.us

Dated: May 14, 2009

Michael D. B. Kavey

CERTIFICATE OF SERVICE

I, Michael D. B. Kavey, hereby certify that on May 14, 2009, I served a true copy of the annexed **NOTICE OF MOTION OF ADVOCATES FOR CHILDREN OF NEW YORK, INC., ET AL. FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND AFFIRMATION OF MICHAEL D. B. KAVEY IN SUPPORT** on each party by sending a copy via electronic mail and by forwarding the same in a sealed envelope with postage prepaid via overnight Federal Express to:

James F. Young, Esq.
SAYLES & EVANS
Attorney for Petitioner-Respondent
One West Church Street
Elmira, NY 14901
jyoung@saylesevans.com

Caroline J. Downey, General Counsel
Michael K. Swirsky, Of Cousel
STATE DIVISION OF HUMAN RIGHTS
Attorneys for Respondent-Appellant
One Fordham Plaza
Bronx, NY 10458
mswirsky@dhr.state.ny.us

Dated: May 14, 2009

Michael D. B. Kavey

Case No. 506944

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

Application of

NEWFIELD CENTRAL SCHOOL DISTRICT,

Petitioner-Respondent,

For a Judgment Pursuant to NY CPLR Art. 78

- against -

THE NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Respondent-Appellant.

NOTICE OF MOTION OF ADVOCATES FOR CHILDREN OF NEW YORK, INC., ET AL. FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND AFFIRMATION OF MICHAEL D. B. KAVEY IN SUPPORT

LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
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