

No Argument Requested

Supreme Court of the State of New York
Appellate Division – Second Department

DOCKET No. 2008-04815

In the Matter of the Application of:

EAST MEADOW UNION FREE SCHOOL DISTRICT,

Petitioner,

Pursuant to Executive Law § 298

- against -

NEW YORK STATE DIVISION OF HUMAN RIGHTS,

Respondent.

BRIEF OF *AMICI CURIAE*
ADVOCATES FOR CHILDREN OF NEW YORK, INC. ET AL. IN
SUPPORT OF RESPONDENT'S MOTION FOR REARGUMENT OR
LEAVE TO APPEAL

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PRELIMINARY STATEMENT

Amici curiae Advocates for Children of New York, Inc., Anti-Defamation League, Canine Companions for Independence, Empire State Pride Agenda, Guide Dog Foundation for the Blind, Guiding Eyes for the Blind, Lambda Legal Defense and Education Fund, Inc., NAACP Legal Defense and Educational Fund, Inc., and Parents, Families and Friends of Lesbians and Gays (“*Amici*”)¹ respectfully urge this Court to grant the motion by Respondent New York State Division of Human Rights (the “Division” or “Respondent”) dated November 9, 2009, in which Respondent requests reargument of this cause or, in the alternative, leave to appeal to the New York Court of Appeals. *Amici* submit this brief to supplement the arguments made by Respondent, and to further specify ways in which the Court “overlooked [and] misapprehended” various points of law, *see* 22 N.Y.C.R.R. § 670.6(a), when it ruled that New York Human Rights Law (“NYHRL”) § 296(4), codified at N.Y. Exec. Law § 296(4), does not apply to public school districts. *See E. Meadow Union Free Sch. Dist. v. N.Y. State Div. of Human Rights*, 65 A.D.3d 1342 (2d Dep’t 2009) (No. 2008-04815) (“*East Meadow*”).

¹ *Amici*’s Statements of Interest are set forth in the original brief submitted by *Amici* in this case on September 8, 2008. *See* Brief of *Amici Curiae* Advocates for Children of New York et al. (Supporting Respondent) at 2-10, *E. Meadow Union Free Sch. Dist. v. N.Y. State Div. of Human Rights*, 65 A.D.3d 1342 (2d Dep’t 2009) (No. 2008-04815). *Amici*’s original brief is attached as Exhibit B to the Affirmation of Michael D.B. Kavey submitted to the Court with this brief on November 20, 2009.

As further described below, the Court should grant reargument and reconsider its decision in *East Meadow* because the decision failed to apply the NYHRL's express mandate of liberal construction; overlooked and misapplied various provisions of the General Construction Law; did not sufficiently take into account rulings from other Departments of the Appellate Division; and misapprehended the meaning of "association" under New York law. Should the Court deny reargument, *Amici* support Respondent's alternative request for leave to appeal, which is appropriate given the importance to public school students throughout the state of the issue presented, the far-reaching consequences of the Court's holding, and the conflict that *East Meadow* creates among Departments of the Appellate Division on the scope of NYHRL § 296(4).

ARGUMENT

A. The Court Should Grant the Motion for Reargument, Because the *East Meadow* Decision Overlooked and Misapprehended Several Issues of Law

Because the decision in *East Meadow* overlooked and misapprehended several points of law, *Amici* respectfully submit that the Court should grant reargument and reconsider its holding. *See* 22 N.Y.C.R.R. § 670.6(a) (providing that briefs in support of a motion for reargument should "state the points claimed to have been overlooked or misapprehended by the court").

1. The Court overlooked the NYHRL's explicit mandate of liberal construction and failed to consider that its holding thwarts the NYHRL's express purposes.

The Court's decision in *East Meadow* failed to acknowledge the NYHRL's express requirement that courts construe its provisions "liberally for the accomplishment of the [statute's] purposes." NYHRL § 300. The decision thus marks a dramatic departure from the approach taken by the Court of Appeals, which has repeatedly emphasized the rule of liberal construction as a central guiding principle in NYHRL cases. *See, e.g., Cahill v. Rosa*, 89 N.Y.2d 14, 20 (1996) ("*Analysis starts* by recognizing that the provisions of the Human Rights Law must be liberally construed to accomplish the purposes of the statute." (emphasis added)); *see also Aurecchione v. N.Y. State Div. of Human Rights*, 98 N.Y.2d 21, 26 (2002) ("[A] liberal reading of the statute is explicitly mandated to effectuate the [NYHRL's] intent."); *Scheiber v. St. John's Univ.*, 84 N.Y.2d 120, 125-126 (1994) ("The Human Rights Law effects this State's fundamental public policy against discrimination by establishing equality of opportunity as a civil right. . . . We are mandated to read the [statute] in a manner that will accomplish its strong antidiscriminatory purpose." (citations omitted)); *Schenectady v. State Div. of Human Rights*, 37 N.Y.2d 421, 428 (1975) ("[I]t is the duty of courts to make sure that the 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.”).² As emphasized by *Amici* in their original brief, see Brief of *Amici Curiae* Advocates for Children of New York et al. (Supporting Respondent), *E. Meadow Union Free Sch. Dist. v. N.Y. State Div. of Human Rights*, 65 A.D.3d 1342 (2d Dep’t 2009) (No. 2008-04815) (“*Amici* Original Br.”), the Court of Appeals applies the rule of liberal construction not only to determine *what* the NYHRL prohibits, but also to determine *to whom* and *to what institutions* it applies. See *Cahill*, 89 N.Y.2d at 20; *Amici* Original Br. at 12-13.

The failure to consider the rule of liberal construction is of particular significance in this case, given that the Court’s holding – which deprives all public school students of the NYHRL’s protections, reserving the protections for students in private schools – thwarts the express purposes of the NYHRL. Those purposes include (1) protecting against discrimination by the state and its subdivisions, see NYHRL § 290(2) & n.1 (citing N.Y. Const. Art. 1, § 11)³ and (2) preventing discrimination in “educational institutions” and “public services.” NYHRL § 290(3); see also *id.* § 291(2) (declaring the opportunity to obtain education without discrimination to be a “civil right”); *Amici* Original Br. at 23-27 (analyzing

² See also *Binghamton GHS Employees Fed. Credit Union v. State Div. of Human Rights*, 77 N.Y.2d 12,18 (1990) (applying rule of liberal construction in NYHRL case); *Koerner v. State*, 62 N.Y.2d 442, 449 (1984) (same); *U.S. Power Squadrons v. State Human Rights Appeal Bd.*, 59 N.Y.2d 401, 411-12 (1983) (same); *Imperial Diner, Inc. v. State Human Rights Appeal Bd.*, 52 N.Y.2d 72, 77 (1980) (same); *Argyle Realty Assocs. v. N.Y. State Div. of Human Rights*, 65 A.D.3d 273, 282-83 (2d Dep’t 2009) (same).

³ See also *Koerner*, 62 N.Y.2d at 448 (“Clearly, the elimination of discrimination in the provision of basic opportunities is the predominant purpose of [the NYHRL]; *all the more invidious is such discrimination when it is practiced by the State.*” (emphasis added)).

purposes of NYHRL, rule of liberal construction, and importance of providing all students access to the Division).⁴ Even the New York State School Boards Association, Inc. (“NYSSBA”), which is not aligned with Respondent in this case, has emphasized the importance of interpreting the NYHRL in light of the purposes discussed above, and has agreed that the NYHRL applies to students in public school districts. *See* Brief *Amicus Curiae* of the NYSSBA at 4-7, *E. Meadow Union Free Sch. Dist. v. N.Y. State Div. of Human Rights*, 65 A.D.3d 1342 (2d Dep’t 2009) (No. 2008-04815).⁵

⁴ Petitioner suggests that limiting the NYHRL’s protections to students in private education should not cause concern, because public school students will still have access to various other civil rights laws. *See* Pet. East Meadow Union Free School District’s Reply to the Brief of the *Amici Curiae* (“Pet. Reply Br.”) at 10. The other laws cited by petitioner, however, are not nearly as protective as the NYHRL, because they do not enumerate as many prohibited bases of discrimination (even when considered as a whole), do not expressly bar schools from “permit[ting] . . . harassment,” do not provide access to the uniquely affordable resources of the Division or a comparable agency, and/or limit their scope to institutions of higher education. *See, e.g.*, 20 U.S.C. § 1681 *et seq.*; 29 U.S.C. § 794; N.Y. Educ. Law § 313(2)(a). In any event, regardless of what other statutes provide, Petitioner fails to explain why the legislature would enact a statute for the express purposes of, *inter alia*, eliminating discrimination by the state and its subdivisions and preventing discrimination in “educational institutions” and “public services,” and then limit the statute’s protections to students in private education. *See supra* note 3 & accompanying text.

Petitioner also claims, without citation, that the legislature “correctly recognized that issues relating to students attending public schools are best left to educational professionals.” Pet. Reply Br. at 16. This assertion is difficult to reconcile with Petitioner’s earlier claims regarding the various state civil rights protections purportedly available to students. It also fails to explain why the legislature would not take a similar hands-off approach to discrimination against students in private education.

⁵ *Amici* do not express any view in this brief regarding any other arguments advanced by the NYSSBA.

2. The Court overlooked and misapprehended various provisions of the General Construction Law.

Though the Court indicated in *East Meadow* that it would rely on the General Construction Law (“GCL”) to determine the meaning of “education corporation,” the Court did not cite or acknowledge the definition of that term provided by GCL § 66(6). *See East Meadow*, 65 A.D.3d at 1343. As explained in *Amici*’s original brief, that definition plainly provides that the term “education corporation” includes all corporations “formed under” the Education Law, and thus includes school districts. *See* GCL § 66(6) (incorporating the definition of N.Y. Educ. Law § 216-a(1)); *Amici* Original Br. at 12 & ns. 5-7; *id.* at 14-15; *see also Pocantico Home & Land Co. v. Union Free Sch. Dist. of the Tarrytowns*, 20 A.D.3d 458, 461 (2d Dep’t 2005) (“School districts in this State are creatures of statute, which can only be formed, dissolved, or altered in accordance with . . . the Education Law.”).⁶

⁶ While *Amici* agree with Respondent’s ultimate conclusion regarding NYHRL 296(4)’s applicability to school districts, *Amici* disagree with Respondent’s argument that the GCL’s definition of “education corporation” excludes school districts. *See Amici* Original Br. at 14-15. Should the Court grant reargument, however, it is free to adopt *Amici*’s position and is not bound by the legal interpretations offered by the parties, given that the issues presented are purely questions of law and statutory construction. *See Newark Valley Cent. Sch. Dist. v. Pub. Employment Relations Bd.*, 83 N.Y.2d 315, 320 (1994) (explaining that “statutory construction is the function of the courts” and that the Court would “independently examine” an issue of law); *cf. U.S. Nat’l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 446 (1993) (“[W]hen an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law” (citations and internal quotation marks omitted)).

The Court instead relied on GCL § 65(c), which provides that a “corporation formed other than for profit” shall be either an “education corporation” or one of four other corporation types therein specified. The Court interpreted this provision to mean that *all* education corporations *must* be classified as “corporation[s] formed other than for profit” (and therefore cannot be “public corporations,” like school districts). *East Meadow*, 65 A.D.3d at 1343. This line of reasoning is flawed, however, because it mistakenly assumes that if a given statement is true (*e.g. all squares are rectangles*), the converse must also be true (*all rectangles are squares*). Put differently, if the General Construction Law provided that *Type X corporations must be A, B, or C*, it would not logically follow that *All As, Bs, and Cs must be Type X corporations*. In any event, even if the classification provisions created some ambiguity, other controlling considerations, including the definition in GCL § 66(6) and the rule of liberal construction governing application of that definition to the NYHRL, make clear that the term “education corporation” encompasses public school districts.

Moreover, even if school districts were not “education corporations” under the GCL definition, the GCL’s interpretive provision would render that definition inapplicable to NYHRL § 296(4), because the NYHRL’s purposes indicate a different meaning. *See* GCL § 110 (providing that the GCL does not apply where “general object” of the statute being considered or the “context of the language

construed . . . indicate that a different meaning or application was intended”); *see also Amici Original Br.* at 15 n.22. The Court overlooked this aspect of GCL § 110 in its *East Meadow* analysis.⁷

3. The Court overlooked and misapprehended relevant authority from other Departments of the Appellate Division.

In holding that the NYHRL does not protect public school students, the Court overlooked contrary authority from the Third Department. The Court also erred in analyzing a Fourth Department case, and in doing so contradicted a key element of its own analysis in *East Meadow*.

- a. Authority from the Third Department

In *East Meadow*, the Court overlooked various decisions from the Third Department that conflict with its analysis. *See Mountain View Coach Lines, Inc. v. Storms*, 102 A.D.2d 663, 665 (2d Dep’t 1984) (explaining that this Court “should accept the decisions of sister departments as persuasive,” even though such decisions are not binding).

In *Planck v. State University of New York Board of Trustees*, a former student sued the Board of Trustees of the State University of New York (“SUNY”)

⁷ The court’s holding that a municipal corporation cannot be an education corporation also contradicts *Bovich v. East Meadow Public Library*, 16 A.D.3d 11 (2d Dep’t 2005). *See id.* at 17 (“While there is authority for the proposition that a public library is an ‘education corporation,’ this does not mean that it cannot also be a municipal corporation.” (citations omitted)).

– a public corporation⁸ – 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). The Third Department exercised subject matter jurisdiction over the plaintiff’s NYHRL claims against the SUNY Board, 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.* It is evident from the court’s *sua sponte* reference to NYHRL § 296(4), its examination of jurisdictional issues, and its decision to reach the merits of the § 296(4) claim against the SUNY Board that the Court viewed § 296(4) as applying to public corporations. The *Planck* holding thus conflicts with this Court’s ruling in *East Meadow* that NYHRL § 296(4) does not apply to public corporations. *See East*

⁸ Education Law § 352 established SUNY as a public corporation within both the state Education Department and the University of the State of New York. The Board of Trustees, established by Education Law § 353, is the corporate body that governs SUNY and exercises all of its corporate powers. *See* N.Y. Educ. Law § 353; *see also Moore v. Bd. of Regents of Univ. of State of N.Y.*, 59 A.D.2d 44, 47 (3d Dep’t 1977); *Eden v. Bd. of Trs. of State Univ. of N.Y.*, 49 A.D.2d 277, 279 (2d Dep’t 1975).

Meadow, 65 A.D.3d at 1343; *see also Amici Original Br.* at 19 n.37 (citing *Planck*).⁹

The following year, the Third Department confirmed its view that NYHRL § 296(4) encompasses public schools in *Matter of 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, the Third Department specifically cited NYHRL § 296(4), along with other sources of state law, as establishing an "explicit and compelling public policy to protect children . . . in an educational setting." *Peacock*, 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. This Court's conclusion in *East Meadow* that § 296(4) provides no protection to

⁹ For similar reasons, the *East Meadow* decision is at odds with the Third Department's 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). The Third Department affirmed that determination without questioning the Division's exercise of jurisdiction over a public entity; indeed, the 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.*

students in public schools is clearly at odds with the Third Department's reliance on NYHRL § 296(4) as helping to establish a state policy protecting students from a public school teacher's misconduct. *See also Amici Original Br.* at 19 & n.36 (discussing *Peacock*).

b. Authority from the Fourth Department

The Court's ruling in *East Meadow* also conflicts with *State Division of Human Rights v. Board of Cooperative Educational Services* ["BOCES"], in which the Fourth Department held that the respondent BOCES 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 958, 958-59 (4th Dep't 1983). In *East Meadow*, this Court found the Fourth Department's holding to be distinguishable on the ground that BOCES are "created pursuant" to the Education Law. *See East Meadow*, 65 A.D.3d at 1344. But as this Court itself has explained, school districts are created pursuant to the Education Law as well. *See Pocantico*, 20 A.D.3d at 461; *see also* N.Y. Educ. Law §§ 1501, 1504, 1522; *Amici Original Br.* at 12 & ns. 5-7; *id.* at 14-15.

Furthermore, by accepting that the Fourth Department correctly applied the NYHRL § 296(4) to a BOCES, this Court contradicted its own analysis in *East Meadow*. BOCES, established by Education Law § 1950, are public corporations.

See, e.g., Cordero v. County of Nassau, 2 A.D.3d 567, 568-69 (2d Dep't 2003) (applying General Municipal Law § 50-e's provisions regarding claims against a public corporation to a BOCES); *Schmidt v. Bd. of Co-op. Educ. Servs. of Nassau County*, 253 A.D.2d 433, 434-35 (2d Dep't 1998) (same); *see also* N.Y. Gen. Mun. Law § 119-n(a). Thus, by accepting that NYHRL § 296(4) applies to BOCES, *see East Meadow*, 65 A.D.3d at 1344, this Court recognized that § 296(4) can apply to public corporations. This directly contradicts the Court's conclusion earlier in its opinion that public corporations such as school districts are not subject to NYHRL § 296(4). *See East Meadow*, 65 A.D.3d at 1343.

4. The Court overlooked and misapprehended several authorities regarding the meaning of "association."

The Court concluded in *East Meadow* that school districts, as "public corporations," could not be education "association[s]" for purposes of the NYHRL, because a corporation and an association, in the Court's view, were "different things." *East Meadow*, 65 A.D.3d at 1343. The only cases cited by the Court for this argument, however, do not support it; rather, the cited cases stand for the proposition that not *all* associations are incorporated, and that *unincorporated* associations are not corporations. *See Martin v. Curran*, 303 N.Y. 276, 280 (1951); *In re Estate of Graves*, 171 N.Y. 40, 47 (1902). The cases are also of limited use in that they did not involve the NYHRL and its express mandate of liberal construction.

The Court's conclusion that a "corporation" and an "association" are necessarily "different things" also failed to account for numerous provisions of New York law – including the New York State Constitution – that recognize in a variety of contexts that the terms "corporation" and "association" may overlap. *See, e.g.*, N.Y. Const. Art. 10, § 4; N.Y. Educ. Law § 1618; N.Y. Gen. Oblig. § 5-521(1); N.Y. P'ship Law § 2; N.Y. Tax Law § 1080(2); N.Y. Transp. Law § 2(11); *see also Mohonk Trust v. Bd. of Assessors of Town of Gardiner*, 47 N.Y.2d 476, 482-83 (1979) (explaining that "'association' is a broad term which may be used to include a wide assortment of differing organizational structures . . . depending on the context"). In light of the "broad" nature of the word "association," *see id.*, and the rule of liberal construction, *see supra* Part A.1, "education . . . association" as used in NYHRL § 296(4) is best understood to include school districts. *See also Amici Original Br.* at 17-18.

B. In the Alternative, the Court Should Grant Respondent's Request for Leave to Appeal

In the event the Court denies reargument, *Amici* support Respondent's alternative request for leave to appeal to the New York Court of Appeals. Leave to appeal is warranted where the question presented is of sufficient importance, *see, e.g., Niesig v. Team I*, 156 A.D.2d 650, 650 (2d Dep't 1989), or where review by the Court of Appeals is necessary to resolve a conflict among Departments of the Appellate Division, *see, e.g., Misicki v. Caradonna*, 12 N.Y.3d 511, 518 (2009).

Here, the issue presented by the Respondent for appeal is of substantial importance, given that the Court's holding would deprive all public school students in the jurisdiction of the NYRHL's protections, thereby also denying them access to the unique remedies for discrimination provided by the Division. *See Amici Original Br.* at 24-27 (discussing consequences that would result from a ruling that NYHRL § 296(4) does not apply to public school districts, and describing the public and private interests served by allowing all students facing discrimination to access the Division's resources and remedies). Leave to appeal is also warranted in view of the conflict that would exist among the Departments of the Appellate Division if this Court allows its *East Meadow* decision to stand. *See supra* Part A.3.

CONCLUSION

For the foregoing reasons, *Amici* respectfully urge this Court to grant reargument or, in the alternative, leave to appeal to the New York Court of Appeals.

CERTIFICATE OF COMPLIANCE
PURSUANT TO 22 N.Y.C.R.R. § 670.10.3(f)

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CERTIFICATE OF SERVICE

I, Michael D. B. Kavey, hereby certify that on November 20, 2009, I served three true copies of the annexed **BRIEF OF *AMICI CURIAE* ADVOCATES FOR CHILDREN OF NEW YORK, INC. ET AL. IN SUPPORT OF RESPONDENT'S MOTION FOR REARGUMENT OR LEAVE TO APPEAL** by forwarding the same in a sealed envelope with postage prepaid via overnight Federal Express to:

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