

Sharply Divided New York Court of Appeals Rules Human Rights Law Does Not Apply to Student Discrimination Claims Against Public Schools

The New York Court of Appeals, the state's highest court, ruled 4-3 on June 12, 2012, that Section 296(4) of the N.Y. Executive Law, a provision of the state's Human Rights Law, which bans discrimination in the use of its facilities by an "education corporation or association," does not apply to the public schools of the state. *North Syracuse Central School District v. N.Y.S. Division of Human Rights*, 2012 WL 2092954. One practical impact of the decision is that public school students suffering discrimination will have to bring their complaints to federal education authorities or the state education department. Another, unspoken in the opinion, is that public school students suffering sexual orientation discrimination (a category of discrimination expressly covered under state law but not under federal law) will be left to resort to constitutional litigation, denied an administrative forum for their claims.

According to the opinion for the court by Judge Eugene F. Pigott, Jr., the legislature's intention in using this phrase, which is not defined in the statute, was to take its meaning from the Real Property Tax Law, which first used it in 1896 to describe real property tax exemptions for private schools, and which, as amended in 1935, provided that a private school that held itself out to the public as "non-sectarian and exempt from tax" could not "deny the use of its facilities to any person otherwise qualified, by reason of his race, color or religion." Public school property is, of course, government property, and thus automatically exempt from real estate taxes, but the 1896 enactment was intended to extend the tax exemption to private schools. The 1935 amendment to the Tax Law, says the court, was intended to impose a non-discrimination requirement on those tax exempt private schools that were non-sectarian. (Religious schools are exempted from the non-discrimination requirement, at least as far as the real estate tax requirements go.)

The court's decision concerns appeals in two cases that were consolidated for hearing, arising from allegations of racial harassment by African-American students attending public schools in Syracuse and Ithaca. When the students filed complaints with the State Division of Human Rights (SDHR), the schools took the position that the SDHR lacked jurisdiction over the matter. In the Ithaca case, the Appellate Division, 3rd Department, upheld an award of damages to the complainant. In the Syracuse case, in which the school district affirmatively sued to block an SDHR investigation of the complaint, the Appellate Division, 4th Department, held that the district could not bring suit directly, but had to raise its jurisdictional argument as a defense in appealing a decision of the SDHR.

Judge Pigott's decision provides a detailed history of the tax law provision, which clearly deals with the issue of property tax exemption for private schools, and then pointed out that the language used in the Human Rights Law "was taken almost verbatim from Tax Law Sec. 4(6). The term 'education corporation or association' is retained in Executive Law sec. 296(4) to this day. The Human Rights Law is silent as to what constitutes an 'education corporation or association,' but the fact that such language was taken directly from the Tax Law and move to Executive Law sec. 296(4) bespeaks the Legislature's intention that the term was to have the same meaning in the Executive Law as it did in former Tax Law sec. 4(6). Moreover, the use of the phrase 'non-sectarian' was plainly included in Executive Law sec. 296(4) to carve out an exception for parochial schools, while reserving for the SDHR the jurisdiction to investigate sec. 296(4) complaints against private, non-sectarian education corporations or associations."

Judge Pigott also premised his ruling on differences between governmentally-operated schools and private schools. "The vicious attacks to which these students were subjected are deplorable," he wrote, "and our holding is not to be interpreted as indifference to their plight, since the merits of their underlying discrimination claims are not at issue on these appeals. Nor does our holding leave public school students without a remedy. In addition to potential remedies under federal law, public school students may file a complaint with the Commissioner of Education." Pigott also pointed out the recent enactment of the Dignity for All Students Act (DASA), without mentioning its lack of a private right of action by students for individual harassment claims. DASA is intended to require schools to adopt anti-harassment policies and implement appropriate training.

Dissenting, Judge Carmen Ciparick argued that "the exclusion of public school children from the full protection of the Human Rights Law contradicts the plain language of the statute, the Legislature's declared purpose and New York's fundamental public policy against discrimination." She pointed out that the phrase "education corporation or association" is not defined in the Human Rights Law, but observed: "It is beyond cavil that public school district are corporations organized for education purposes and public schools hold themselves out to the public as non-sectarian and are exempt from taxation pursuant to article 4 of the RPTL [Real Property Tax Law]. Section 296(4) brings within the protection of the Human Rights Law private educational institutions, which had not previously been covered. That it used identical language, as the RPTL, does not work to now exclude public school districts. Thus, a plain reading of the statute indicates that the Legislature intended to confer authority to SDHR over both public and private schools and the historical statutory analysis performed by the majority runs counter to the plain language of the statute."

She also observes that the statement of legislative purpose in the Human Rights Law supports a broad jurisdictional reading, noting that the purposes articulated in the statute itself included "to assure that every individual with this state is afforded an equal opportunity to

enjoy a full and productive life and that the failure to provide such equal opportunity, whether because of discrimination, prejudice, intolerance or inadequate education, training, housing or health care not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health, safety and general welfare of the state and its inhabitants." She further notes that the provision establishing the SDHR and describing the "places of public accommodations" to which its jurisdiction extends uses the phrase "educational institutions" rather than the phrase "education corporations or associations," clearly signaling, in her view, a broader reach to all educational institutions, not just private schools.

"This language clearly indicates that 'every individual' - including every school age child - has a right to adequate education and that the SDHR has the authority, on behalf of 'every individual,' to prevent discrimination in 'educational institutions.' The majority's limitation of the SDHR's jurisdiction to only private schools does little to promote the broad purposes of the Human Rights Law, which is to provide a bias free education for every individual." She also noted the specific provision of the statute providing for liberal construction "for the accomplishment of the purposes thereof."

Concluded Ciparick, "It is antithetical to the purpose of the Human Rights Law to exempt public schools from its mandate. . . It is implausible that the Legislature intended to exempt public schools and the thousands of children who attend these schools from the protection of the Human Rights Law and the oversight of the SDHR."

Although the cases arose from racial harassment complaints, the court's ruling is particularly harmful to LGBT students. Students with race discrimination claims can clearly take them to the U.S. Department of Education, which has jurisdiction to address claims of racial harassment in public schools that receive federal financial assistances -- which is pretty much all of them. But federal law does *not* expressly cover claims of discrimination based on sexual orientation by educational institutions, which are covered by the New York Human Rights Law. (Federal law does cover sex discrimination claims, and there is some authority that gender identity claims may come within the sex discrimination coverage; at least, several federal courts have accepted the argument that gender identity discrimination is sex discrimination, as did the Equal Employment Opportunity Commission in a recent jurisdictional ruling under Title VII of the Civil Rights Act of 1964.)

Michael K. Swirsky, an appellate attorney for the Division of Human Rights, argued the case in the Court of Appeals on behalf of the agency, with amicus curiae participation by Cecilia C. Chang for the Attorney General. Amicus briefs were filed by Advocates for Children of New York, Inc. (lead amicus party for a dozen organizations concerned with children's rights, civil rights, LGBT rights, including Lambda Legal), and the New York State School Boards Association (arguing that public schools were not subject to the Human Rights Law). The North Syracuse Central School District was represented by Frank W. Miller; the Ithaca City School District by Jonathan B. Fellows.