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November 6, 2019

Hon. Catherine O'Hagan Wolfe, Clerk of Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall U.S. Courthouse
40 Foley Square
New York, New York 10007

Re: *New Hope Family Services, Inc. v. Poole*
Docket No. 19-1715

Dear Ms. Wolfe:

Please accept this letter on behalf of appellee Sheila Poole, Commissioner of the New York State Office of Children and Family Services ("OCFS"), in response to a request the Court made in its decision granting the motion of appellant New Hope Family Services ("New Hope") for a preliminary injunction. In that decision, the Court specifically requested clarification regarding the source of OCFS's authority to require New Hope to file a close-out plan for its adoption program. ECF No. 160, at 2 n.1. Although the Court contemplated that the parties could provide such clarification in their submissions to the merits panel, *id.*, by the time of the Court's request, appellee Poole had already submitted her responsive brief in accordance with the Court's scheduling order. We therefore respectfully seek permission to provide the requested clarification now and ask that our letter be provided to the panel hearing oral argument in this matter next Wednesday, November 13, 2019.

OCFS's authority to require New Hope to file a close-out plan for its adoption program derives from OCFS's general statutory authority both to enforce the Social Services Law and implementing regulations and also to approve and supervise New Hope's adoption program on an ongoing basis. N.Y. Soc. Servs. Law ("SSL") §§ 34(3)(e), 371(10).

New Hope was incorporated in 1965 with the corporate purpose of operating, among other child welfare programs, an authorized adoption program in New York. (JA66.) Its certificate of incorporation was approved by OCFS's predecessor agency, as required by law, *see* SSL § 460-a(1), and the duration of its certificate of incorporation was made "perpetual" by a 1967 filing with the Secretary of State (JA73). Consistent with its corporate purpose, New Hope operates as an "authorized agency," defined as an agency organized under New York law with corporate authority to place out children for adoption. *See* SSL § 371(10).

OCFS has broad enforcement authority, including specific authority to enforce the Social Services Law and implementing regulations. *See* SSL § 34(3)(e). Further, as an authorized agency, New Hope "shall submit and consent to the approval, visitation, inspection and supervision of [OCFS] as to any and all acts in relation to the welfare of children performed or to be performed under this title." SSL § 371(10)(a). This oversight authority is necessarily separate from, and in addition to, the approval that OCFS's predecessor agency provided for New Hope's certificate of incorporation, because it does not involve New Hope's corporate status. Rather, it involves New Hope's "acts in relation to the welfare of children performed or to be performed under [the Social Services Law]," SSL § 371(10), i.e., the operation of its adoption program. And OCFS's oversight authority is necessarily exercised on an ongoing basis; just as OCFS can approve a program in the first instance, it can withdraw approval when circumstances warrant a withdrawal.

While OCFS also has specific authority to prevent an authorized agency from placing out children if it has acted contrary to the health and well-being of a child in specifically enumerated ways, *see* SSL

§ 385(1), that specific authority is in addition to the broad authority vested in OCFS to enforce the Social Services Law and regulations and to visit, inspect, supervise and approve an authorized agency on an ongoing basis. This broad authority necessarily includes authority to withhold continued approval where an agency is proceeding in violation of governing statutes or regulations. Were this not so, OCFS would be unable to ensure compliance and lawful operation, notwithstanding violations discovered through its inspection and oversight activities. Accordingly, a program that is not operated in compliance with the governing regulations and statutes will not be approved by OCFS for continued operation. And there is no question that the nondiscrimination rule was authorized by OCFS's specific authority to establish standards for the evaluation of adoption applicants. *See* SSL § 372-e(2).

When OCFS became aware that New Hope was operating its adoption program in violation of the nondiscrimination regulation, it informed New Hope that if it did bring its policy into compliance with the regulation, "OCFS will be unable to approve continuation of [New Hope's] current adoption program and [New Hope] will be required to submit a close-out plan for the adoption program." (JA87.) *See also* ECF 101, at 40 (August 9, 2019 letter). By providing for a close-out plan, OCFS enabled New Hope to wind its activities down and account for children already in its custody. OCFS's authority to require a close-out plan thus derives directly from its statutory authority to visit, inspect, supervise, and approve the programs of adoption agencies and to enforce applicable provisions of the Social Services Law and its own regulations.

Respectfully submitted,

/s/ Laura Etlinger

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cc: Roger Brooks, Esq.
(via ECF)