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August 8, 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. No. 19-1715
Motion to Remove Appeal from the XAC

Dear Ms. Wolfe:

I represent appellee New York State Office of Children and Family Services Commissioner Poole in this appeal. Please accept this letter in reply to appellant New Hope Family Services' response to our motion to remove the appeal from the expedited appeals calendar (XAC) or, in the alternative, for a thirty-day extension of the deadline for appellee's brief.

First, I write to update the Court regarding the parties' negotiations regarding a partial stay of OCFS's enforcement activities, which was referenced by the parties in their motion papers. Presently, it no longer seems likely that the negotiations will result in a stay agreement.

Second, I write to correct a misrepresentation in appellant's response to our motion. Contrary to appellant's claim, 2d Cir. Docket

No. 19-1715, ECF No. 38, at 5¹, we did *not* concede in our motion that the district court had committed a “fatal defect” in reviewing the sufficiency of appellant’s constitutional claims on the merits. Rather, we pointed out that the issue before the district court was not whether the complaint contained sufficient factual allegations to state an established claim, but whether appellant could successfully assert a constitutional claim to enforcement of a neutral, generally-applicable non-discrimination law with a rational basis. *See* NDNY Docket No. 18-cv-01419, ECF No. 38, at 14. In determining this issue, the district court did not resolve questions of fact, but merely applied the governing law to the facts alleged.

For the reasons outlined in this letter and in our motion papers, appellee respectfully requests that the Court remove this appeal from the XAC or, in the alternative, grant a thirty-day extension of the deadline for filing appellee’s brief.

Respectfully submitted,

/s/Laura Etlinger

LAURA ETLINGER
Assistant Solicitor General

CC: Roger Brooks, Esq.
via ECF

¹ References are to documents filed in this appeal (2d Cir. Docket No. 19-1715) or in the underlying district court matter (NDNY Docket No. 18-cv-1419).