UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW HOPE FAMILY SERVICES, INC., Plaintiff, -against- SHEILA J. POOLE, in her official capacity as Acting Commissioner for the Office of Children and Family Services for the State of New York, Defendants.	No.: 5:18-cv-1419 (MAD/TWD) ECF Case **DECLARATION OF CAROL MCCARTHY IN OPPOSITION TO DEFENDANTS' MOTION FOR A PRELIMINARY INJUNCTION**

I, Carol McCarthy, declare under the penalties of perjury, pursuant to 28 U.S.C. §1746, that the following is true and correct:

1. I am an employee of the New York State Office of Children and Family Services ("OCFS"). I am not a party to the above-captioned action. I have first-hand knowledge of the facts set forth herein and I make this declaration in opposition to Defendant's motion for a preliminary injunction.

2. I have been employed by OCFS since November 13, 2003. I am currently the Director of Adoption Services within the Division of Child Welfare and Community Services. I have been in this position since April 21, 2015.

3. In my role as the Director of Adoption Services, I oversee the Bureau of Permanency Services. The Bureau of Permanency Services is responsible for, among other things, reviewing applications and renewals for not-for-profit agencies that operate adoption programs within the State of New York; promulgating and managing compliance with

regulations related to the provision of adoption services and practices; providing information and referral assistance on adoption, foster care, and family preservation to parents and professionals through the New York Parents Connection Help Line; processing the placement of children from other states into New York State and from New York State into other states through the Interstate Compact on the Placement of Children; providing adoption technical support; and enhancing public awareness to increase opportunities for adoption of New York's waiting children.

4. OCFS's Division of Child Welfare and Community Services is charged with the responsibility to oversee and regulate programs and services involving foster care, adoption and adoption assistance, child protective services, preventive services for children and families, services for pregnant adolescents, and protective programs for vulnerable adults.

5. OCFS is authorized by State law to promulgate regulations that establish standards and criteria for adoption practices, including standards for evaluating prospective adoptive parents.

6. A not-for-profit agency located in the State of New York is authorized to operate an adoption program and to provide adoption services when it has received a certificate of incorporation, or a certificate of amendment for New York corporations, approved by OCFS that gives the agency the authority to place children for adoption, and when the agency's adoption program including, but not limited to, its policies and practices, have been approved by OCFS.

7. OCFS has continuing authority to monitor services provided by approved, or authorized, adoption agencies.

8. The subject regulation, 18 NYCRR §421.3(d), is critically important to the State's adoption policies and practices, and was promulgated to meet important legislative objectives. The regulation serves the legislative objectives of promoting the safety and well-being of

families and children by prohibiting discrimination on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion or disability. This regulation promotes fairness and equality for applicants seeking adoption services by prohibiting authorized adoption agency programs from adopting policies or establishing practices that imply that the sexual orientation of gay, lesbian, and bisexual prospective parents, but not of heterosexual prospective parents, is relevant when evaluating their appropriateness as adoptive parents.

9. The State has a strong interest in preventing discrimination in the provision of adoptive services. Prohibiting discrimination serves the best interests of vulnerable children. Critical to meeting this objective are policies that provide a broad and diverse pool of adoptive parents, and prohibit disqualifying any potential adoptive parents due to their sexual orientation, or any other characteristic that is wholly unrelated to parenting ability. Prohibiting such discrimination maximizes the number of prospective adoptive parents who may be assessed to determine the safety and suitability of placing a child in their home to determine whether the individual can appropriately meet the needs of a child including the child's safety, health, permanency, well-being and mental, emotional and physical development.

10. The subject regulation also seeks to prevent the trauma and social harm caused by discrimination against lesbian, gay, bisexual, transgender, queer or questioning (LGBTQ) people. The State has a strong interest in preventing the harms caused by excluding LGBTQ people from services otherwise available to the public based solely on their sexual orientation. These harms can be particularly acute where, as here, the adoption program engaging in this discrimination is sanctioned by the State. Furthermore, including LGBTQ people in the pool of

potential adoptive families provides support and affirmation to LGBTQ youth awaiting an adoptive placement.

11. Additionally, the State has a strong interest in preventing discrimination in the provision of government services. Since OCFS authorizes and regulates adoption programs operating in New York, allowing agencies with religious objections to refuse to serve all residents equally would undermine the State's ability to provide government services on a nondiscriminatory basis and without favoring particular religious beliefs. The State has a significant interest in providing state services and benefits on an equal basis to all residents.

12. The subject regulations apply uniformly and neutrally to all authorized adoption agencies. OCFS requires all authorized adoption agencies to comply with applicable laws, regulations, and policies, including 18 NYCRR §421.3. All adoption agencies are prohibited from engaging in discriminatory practices or harassment against applicants for adoption services based on sexual orientation.

13. OCFS conducts program reviews of all authorized agencies that operate adoption programs, including those who received their corporate authority to operate in perpetuity, to determine if the agency meets OCFS standards. OCFS does not target specific agencies for program reviews.

14. New Hope alleges that the families and children served by its program will be potentially impacted if it is not permitted to continue to operate its adoption program and that, in turn, New Hope will suffer irreparable harm. For those children placed with adoptive families who are in the legal custody of New Hope, OCFS has no plans to interfere with those placements and permanency of the children would remain within the authority of the Family Court to determine. Families already approved by New Hope to adopt would retain their status as an

approved adoptive family and would be eligible to receive adoption services and placements from other adoption agencies. OCFS would provide referral services if requested. OCFS would also provide information and referral assistance to any families seeking approval to become adoptive families or to surrender a child. Moreover, New Hope would be permitted to continue to administer any post adoption contact agreements between birthparent families and adoptive families.

Dated: Rensselaer, New York
January 4, 2019

Carol McCarthy
CAROL McCARTHY

Sworn to before me this 4
day of January, 2019.

Serena Joyce White
Notary Public
02WH6267563
Expiration Date: 08/20/2020
Albany County

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

NEW HOPE FAMILY SERVICES, INC.,

Plaintiff,

-against- 18-CV-1419

SHEILA J. POOLE, MAD/TWD

Defendant.

MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

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PRELIMINARY STATEMENT

The New York State Court of Appeals has long held that "neither marital status nor sexual orientation may alone be determinative in an adoption proceeding." In re Jacob, 86 N.Y.2d 651, 663, 667 (1995). In September 2010, New York State amended its Domestic Relations Law to codify the right to adopt by unmarried adult couples and married adult couples regardless of sexual orientation or gender identity. 2010 S.B. 1523, Ch. 509. N.Y. Dom. Rel. Law 110. Thereafter, in January 2011, the New York State Office of Children and Family Services ("OCFS") informed, *inter alia*, authorized adoption agencies in New York that the amendment brought the Domestic Relations Law into compliance with existing case law, and was "intended to support fairness and equal treatment of families that are ready, willing and able to provide a child with a loving home." OCFS Informational Letter 11-OCFS-INF-01 (Jan. 11, 2011).

In an effort to clarify existing regulations in light of the 2010 amendment, OCFS provided further guidance to authorized adoption agencies. A July 2011 OCFS Information Letter advised that

> [i]t is important to recognize that all types of families are potential resources for children awaiting adoption and should be considered as potential adoptive parents. Maturity, self-sufficiency, ability to parent, ability to meet the child's needs, and availability of support systems are the critical assessments in identifying adoptive applicants' appropriateness for specific children.

OCFS Informational Letter 11-OCFS-INF-05 (July 11, 2011). Toward this end, agencies were advised that, *inter alia*, "discrimination based on sexual orientation in the adoption study assessment process" is prohibited. Id. OCFS further stated that

> OCFS cannot contemplate any case where the issue of sexual orientation would be a legitimate basis, whether in whole or in part, to deny the application of a person to be an adoptive parent. The capacity of the prospective adoptive parents to meet the needs of children freed for adoption should be the primary

> consideration when making approval or rejection decisions of an adoptive applicant.

Id. The Informational Letter also reminded authorized agencies that applicants for adoption may only be disapproved if (1) the applicant "is physically incapable for caring for an adopted child;" (2) the applicant "is emotionally incapable of caring for an adopted child;" or (3) the applicant's approval "would not be in the interests of the children awaiting adoption." Id.

In November 2013, OCFS promulgated 18 N.Y.C.R.R. §421.3(d), which, in accordance with existing law, prohibits "discrimination and harassment against applicants for adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability" and requires that agencies authorized by New York State to provide adoption services "shall take reasonable steps to prevent such discrimination or harassment by staff and volunteers, promptly investigate incidents of discrimination and harassment, and take reasonable and appropriate corrective or disciplinary action when such incidents occur." 18 N.Y.C.R.R. §421.3(d).

It is this regulation that plaintiff challenges in the instant proceeding. However, contrary to the position of plaintiff, New Hope Family Services, Inc. ("New Hope"), 18 N.Y.C.R.R. §421.3(d) does not create a new obligation for authorized adoption agencies. Such agencies were not permitted to deny the applications of otherwise qualified prospective adoptive parents based solely on an applicant's marital status or sexual orientation well before the promulgation of 18 N.Y.C.R.R. §421.3(d).

This memorandum of law is submitted on behalf of defendant OCFS Acting Commissioner Sheila Poole in opposition to plaintiff's motion for injunctive relief.

PROCESSING OF ADOPTIVE PARENT APPLICATIONS

Agencies authorized to provide adoption services in New York must comply with all relevant statutory, regulatory and case law. Initially, agencies must receive and respond to inquiries from, conduct orientation sessions for, and offer OCFS-approved applications to prospective adoptive parents. 18 N.Y.C.R.R. §421.11(a)-(f). After an adoption application is received, an adoption study must be completed, id. at §421.13, pursuant to the procedure set forth in 18 N.Y.C.R.R. §421.15. An adoption study must explore the following characteristics of prospective adoptive parents:

(1) capacity to give and receive affection;

(2) ability to provide for a child's physical and emotional needs;

(3) ability to accept the intrinsic worth of a child, to respect and share his past, to understand the meaning of separation he has experienced, and to have realistic expectations and goals;

(4) flexibility and ability to change;

(5) ability to cope with problems, stress and frustration;

(6) feelings about parenting an adopted child and the ability to make a commitment to a child placed in the home; and

(7) ability to use community resources to strengthen and enrich family functioning.

Id. at §421.16. An application may only be rejected if (1) an applicant does not cooperate with the adoption study; (2) an applicant is "physically incapable of caring for an adoptive child;" (3) an applicant is not "emotionally incapable of caring for an adopted child;" or (4) an applicant's approval "would not be in the best interests of children awaiting adoptions."[1] Id. at §421.15(g).

[1] Additionally, an applicant must be at least eighteen years old. 18 N.Y.C.R.R. §421.16(b).

Once an application is approved, the agency must add the applicant to the adoptive parent registry. Id. at §§421.15(i); 424.3(a).

MATCHING OF CHILDREN AND ADOPTIVE PARENTS

Whether the adoption of a particular child by a particular prospective adoptive parent should be approved must be made on the "basis of the best interests of the child." 18 N.Y.C.R.R. §421.18(d). When making placement decisions, the agency should consider (1) the ages of the child and prospective parent(s); (2) the "physical and emotional needs of the child in relation to the characteristics, capacities, strengths and weaknesses of the adoptive parent(s)"; (3) the "cultural, ethnic or racial background of the child and the capacity of the adoptive parent to meet the needs of the child with such a background;" and (4) the ability of a child to be placed in a home with siblings. Id. Additionally, agencies must

> [m]ake an effort to place each child in a home as similar to and compatible with his or her religious background as possible with particular recognition that section 373(3) of the Social Services Law requires a court, when practicable, to give custody through adoption only to persons of the same religious faith as that of the child.

Id. at §421.18(c). Further, the Social Services Law provides that "so far as consistent with the best interests of the child, and where practicable," the religious wishes of the birthparents should be honored. N.Y. Soc. Serv. Law §373(7).

STATEMENT OF FACTS

An entity must qualify as an "authorized agency" under the law before it may provide adoption services. N.Y. Soc. Serv. Law §371(10)(a); see also N.Y. Soc. Serv. Law §374(2). New Hope is an "authorized agency" with the authority to place out or to board out children...," N.Y. Soc. Serv. Law §371(10)(a); see also N.Y. Soc. Serv. Law §374(2), and "receive children for purposes of adoption." N.Y. Dom. Rel. Law §109(4). See Dkt. No. 1-4 at p. 2. As an "authorized agency", New Hope must be "incorporated or organized under the laws of this state

with corporate power or empowered by law to care for, to place out or to board out children . . . *and* submit and consent to the approval, visitation, inspection and supervision of [the office of children and family services] [emphasis added]." N.Y. Soc. Serv. Law §371(10)(a). Moreover, OCFS must approve an agency's certificate of incorporation. N.Y. Soc. Serv. Law §460-a.

New Hope is incorporated under New York Not-For-Profit Corporation Law for myriad purposes, including placing out children in New York for adoption. N.Y. Not-For-Profit Corp. Law §404(b)(1). Under prior applicable law, New Hope was granted perpetual *corporate authority*, meaning that it exists as a corporate structure in perpetuity, but not that it is approved by OCFS to provide adoption services as an "authorized agency" in perpetuity. N.Y. Soc. Serv. Law §371(10). However, New Hope does not have "perpetual authorization" to provide adoption services. Nor may New Hope provide adoption services without the approval of OCFS. N.Y. Soc. Serv. Law §371(10)(a).

The complaint alleges that New Hope operates several programs including a pregnancy resource center, a temporary foster placement program, and adoptions services. Dkt. No. 1 at ¶50. The pregnancy resource center allegedly serves approximately 700 clients per year, Geyer aff. at ¶39, and provides pregnancy tests, baby supplies, referral for ultrasounds, counseling and education services and referrals for medical, community and social services free of charge, id. at ¶¶40, 42, "without consideration of the recipient's marital status, sexual orientation, gender identity, or religious belief." Id. at ¶¶41, 44.

Through its temporary foster placement program, Tender Loving Care, New Hope "recruits families that are willing to take in newborns on short notice," id. at ¶132, when a birth mother has given birth but (1) has not yet decided whether to parent the child or place it for adoption or (2) has decided to place her child for adoption but does not yet have an adoption

plan. Id. at ¶131. New Hope "typically seeks married husband and wife couples to serve as foster parents" through its Tender Loving Care Program, id. at ¶133, and will not recommend unmarried or same sex couples as foster parents in its program. Id. at ¶171.

As an adoption provider, New Hope provides services to birth mothers seeking adoption placements for their infants, Dkt. No. 1. at ¶¶71-102, and single individuals and married opposite-sex couples seeking to adopt. Id. at ¶¶103-134. In this capacity, New Hope has "placed between eight and twelve children in adoptive homes per year," in "recent years," Dkt. No. 15-2 ("Geyer aff.") at ¶¶54, 55, and "generally has between 14 and 20 prospective adoptive families" that it has recommended as adoptive parents. Id. at ¶79. As of October 2018, New Hope had approximately thirteen prospective adoptive parents awaiting children to be placed with them, id. at ¶173, and had legal custody of three children that were placed in adoptive homes in 2018. Id. at ¶184. As part of its adoption services, New Hope facilitates communication and meetings between birth parents and adoptive families after adoptions are finalized in connection with open adoptions. Id. at ¶60-62. New Hope is currently providing these post-adoption services to 117 families. Id. at ¶186.

In 2018, OCFS conducted a review of New Hope's programs. During that review, OCFS discovered that New Hope's policies prohibit the placement of children for adoption with unmarried couples or same sex couples. Dkt. Nos. 1 at ¶188. OCFS thereafter informed New Hope that such policies are in violation of 18 N.Y.C.R.R. §421.3 and, therefore, New Hope would have to provide adoption services to otherwise qualified unmarried and same sex couples or cease the operation of its adoption program. Dkt. No. 1-7. New Hope refuses to comply with 18 N.Y.C.R.R. §421.3. Dkt. No. 1 at ¶191.

ARGUMENT

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTIVE RELIEF SHOULD BE DENIED

Preliminary injunctive relief "'is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion.'" Moore v. Consol. Edison Co. of New York, Inc., 409 F.3d 506, 510 (2d Cir. 2005) (quoting Mazurek v. Armstrong, 520 U.S. 968, 972 (1997)). In general, "a party must establish four elements to prevail on a motion for a preliminary injunction: (1) a likelihood of irreparable harm; (2) either a likelihood of success on the merits or sufficiently serious questions as to the merits plus a balance of hardships that tips decidedly in their favor; (3) that the balance of hardships tips in their favor regardless of the likelihood of success; and (4) that an injunction is in the public interest." Chobani, LLC v. Dannon Co., Inc., 157 F. Supp. 3d 190, 199 (N.D.N.Y. 2016). However, when "the moving party is seeking to enjoin application of a governmental statute or regulation, the movant must demonstrate a 'likelihood of success on the merits' to obtain injunctive relief." It may not rely on "the lesser 'sufficiently serious questions' and 'balance of the hardships' standard." Seneca Nation of Indians v. Paterson, 2010 U.S. Dist. LEXIS 109525, *19 (W.D.N.Y. Oct. 14, 2010) (citing Monserrate v. New York State Senate, 599 F.3d 148, 154 (2d Cir. 2010)).

Chief Judge Suddaby recently articulated this standard as follows:

> [W]here the moving party seeks to stay government action taken in the public interest pursuant to a statutory or regulatory scheme, the district court should not apply the less rigorous "serious questions" standard but should grant the injunction only if the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of his claim. [Citation omitted] This is because "governmental policies implemented through legislation or regulations developed through presumptively reasoned processed are entitled to a higher degree of deference and should not be enjoined lightly." [Citation omitted]

Upstate Jobs Party, et al. v. Kosinski, 18-CV-459 at Dkt. No. 19, p. 15 (GTS/ATB) (N.D.N.Y. May 22, 2018) aff'd 741 Fed. Appx. 838 (July 20, 2018). For the reasons discussed below, plaintiff's submissions are legally insufficient to satisfy the elements necessary to establish entitlement to preliminary injunctive relief.

A. Plaintiff Has Failed to Establish That it Is Likely to Suffer Irreparable Harm if Preliminary Injunctive Relief is Not Granted

To establish irreparable harm, a party seeking preliminary injunctive relief must show that there is a continuing harm which cannot be adequately redressed by final relief on the merits and for which money damages cannot provide adequate compensation." Kamerling v. Massanari, 295 F.3d 206, 214 (2d Cir. 2002) (internal quotation marks omitted). See also JSG Trading Corp. v. Tray-Wrap, Inc., 917 F.2d 75, 79 (2d Cir. 1990) ("it is settled law that when an injury is compensable through money damages there is no irreparable harm."). Injunctive relief should be granted "only on the basis of a showing that the alleged threats of irreparable harm are not remote or speculative but are actual and imminent." State of New York v. Nuclear Regulatory Comm'n, 550 F.2d 745, 755 (2d Cir. 1977). Further, the allegation of some past harm is insufficient to demonstrate a likelihood of future harm. See Amaker v. Fischer, No. 10-CV-0977A, 2012 U.S. Dist. LEXIS 66731, *6 (W.D.N.Y. Sept. 28, 2012) ("a finding of irreparable harm cannot be based solely upon past conduct"), adopted, 2013 U.S. Dist. LEXIS 66731 (W.D.N.Y. May 9, 2013).

In support of its motion for preliminary injunctive relief, New Hope has submitted affidavits of (1) a birth mother who previously placed her child for adoption through New Hope, Dkt. No. 15-4 ("Stultz aff."); (2) a former employee and foster parent for New Hope, Dkt. No. 15-3 ("Loscombe aff."); (3) an adoptive parent whose adoption is scheduled to be completed by

New Hope in 2019[2], Dkt. No. 15-6 ("Johnston aff."); (4) adoptive parents who completed their adoptions through New Hope, but use New Hope to facilitate periodic communications with their children's birth parents, id. Dkt. No. 15-7 ("J. Bleuer aff."); (5) a former adoptive parent who makes donations to New Hope, Dkt. No. 15-5 ("E. Bleuer aff."); and (6) the Interim Executive Director of New Hope (Geyer aff.).

The affidavit of Interim Executive Director Geyer discusses (1) the current status of New Hope's provision of adoptive and foster services and (2) the actions taken by New Hope as a result of OCFS's direction that New Hope comply with §421.3(d). New Hope currently has legal custody of three children placed in adoptive homes in 2018. Geyer aff. at ¶184. It currently has approximately thirteen prospective adoptive families awaiting children, id. at ¶173, and is facilitating post-adoption communication between approximately 117 birth and adoptive families. Id. at ¶186.

In light of its refusal to comply with 18 N.Y.C.R.R. §421.3(d) as directed by OCFS, New Hope has allegedly canceled initial homestudy meetings with six new prospective adoptive families. Id. at ¶174. Four of the six allegedly requested their deposits back from New Hope. Id. Nine additional prospective adoptive families, with whom New Hope is not yet working, have inquired about starting the adoption process and were allegedly advised by New Hope that it may not be able to provide services to them. Id. at ¶175. Additionally, since October 2018, New Hope has allegedly had to tell five pregnant women that it could not provide them with adoption services. Id. at ¶177. New Hope has also had to tell three foster families that New Hope will not be placing newborns with them. Id. at ¶179. Finally, New Hope canceled a

[2]According to New Hope Interim Executive Director Geyer, New Hope adoptions typically take between six to twelve months to complete. Geyer aff. at 117. During that time, New Hope retains legal custody of the child. Id.

training that it was scheduled to provide to other pregnancy resource centers in the state. Id. at ¶180.

The evidence submitted by New Hope fails to establish a likelihood of irreparable harm as a matter of law. First, the experiences of prior clients of New Hope--as birth parents, Stultz aff, foster parents, Loscombe aff., or adoptive parents, E. Bleuer aff.—are irrelevant to whether New Hope will experience any harm now. Amaker, 2012 U.S. Dist. LEXIS 66731 at *6. Second, that New Hope may lose voluntary monetary donations from one donor, id., fails to establish thatNew Hope will suffer any measurable injury, or any injury of non-economic nature. JSG Trading Corp., 917 F.2d at 79. Third, the pendency of one adoption, Johnston aff., and the facilitation of communication between two sets of birth and adoptive families, id.; J. Bleuer aff., do not constitute the type of alleged harm sufficient to establish irreparable harm. Finally, the existence of uncertainty relating to existing ongoing services being provided to families by New Hope similarly fails to meet plaintiff's burden here.

The recent case of Fulton v. City of Philadelphia, 320 F.Supp.3d 661 (E.D.PA 2018), is instructive on this point on very similar facts. In Fulton, the City of Philadelphia Department of Human Services – the government agency responsible for ensuring the well-being of children – contracted with thirty private foster care agencies, including Catholic Social Services ("CSS") and Bethany Christian Services ("Bethany"). Id. at 669-670. Toward this end, CSS and Bethany were authorized to "screen[], train[] and certif[y]" foster parents. Id. at 670. Relevant law prohibited discrimination based on marital status or sexual orientation, id. at 671, and CCS and Bethany refused to provide homestudies to same sex couples as part of applications to adopt, or certify otherwise-qualified same-sex couples as foster parents. Id. 672. As a result, the government suspended referrals of new children to CSS or Bethany for services. Id. at 668, 673.

A lawsuit was brought by CSS and others alleging, inter alia, First Amendment free exercise and free speech claims, id. at 679, and plaintiffs sought preliminary injunctive relief. Id. at 676. Among plaintiffs' claims of irreparable harm were claims that CSS would have to cease operations, id. at 701, the inability of certified foster parents to serve as foster parents, id. at 702, and uncertainty about what would happen to children currently placed with CSS foster families. Id. The court held that these concerns failed to allege irreparable harm sufficient to entitle plaintiffs to preliminary injunctive relief. Id. at 703. Specifically, the court stated that the testimony of foster parents about what impact the closing of CSS would have on CSS foster children and foster families was insufficient to allege irreparable harm. Id. at 702. Additionally, the court stated that any economic harms that may be caused by the agency ceasing operations were not irreparable as a matter of law for purposes of a preliminary injunction analysis. Id. at 701.

The same result should be reached in this case. "While transferring to another agency may be difficult, uncertain, and emotionally challenging" for clients of New Hope[3], Fulton, 320 F.Supp.3d at 702, such a claim does not allege any harm to be suffered by New Hope, the only plaintiff here.

Since New Hope has failed to meet its burden by establishing, with admissible evidence, that it will suffer irreparable harm if preliminary injunctive relief is not granted, its motion should be denied.

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[3] As discussed in the declaration of Carol McCarty, submitted herewith, the concerns raised by the plaintiff will not occur. Specifically, OCFS has no plans to interfere with New Hope's current legal custody of three children, or the placement of those children. McCarhty decl. at ¶14. Families already approved to adopt by New Hope will remain approved, and able to adopt through other agencies. Id. Additionally, New Hope will be permitted to continue administering post-adoption contact agreements to the 117 families it currently serves. Id.

B. Plaintiff Has Failed to Allege Facts Sufficient to Demonstrate that it is Likely to Succeed on the Merits of its Claim, or to Raise Serious Questions as to the Merits

In matching children with prospective adoptive parents, New Hope is required to comply with New York law, including 18 N.Y.C.R.R. §421.3(d). Plaintiff is not likely to succeed on the merits of its claims, and its claims have failed to raise any serious questions as to the merits. Instead, the complaint fails to state any cognizable cause of action and defendant Poole intends to move to dismiss the complaint.[4]

First, the complaint fails to state a First Amendment free exercise claim. To "state a free exercise claim, a plaintiff generally must establish that 'the object of [the challenged] law is to infringe upon or restrict practices because of their religious motivation,' or that the law's 'purpose...is the suppression of religion or religious conduct.'" Congregation of Rabbinical College of Tartikov, Inc. v. Vill. Of Pomona, 915 F.Supp.2d 574, 619 (S.D.N.Y. 2013) (quoting Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993)). The right of the free exercise of religion does not relieve an individual or entity of the obligation to comply with a "valid and neutral law of general applicability." Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U.S. 872 (1990). As a result, where an alleged prohibition on the exercise of religion "is not the object ... but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended." Id. at 878. See also Bloomingburg Jewish Educ. Ctr. v. Village of Bloomingburg, 111 F.Supp.3d 459, 484 (S.D.N.Y. 2015) (stating that a "law or regulation that is neutral and of general applicability is constitutional even if it has

[4] While the parties were awaiting the court's action on defendant's promotion letter, Dkt. No. 26, counsel for New Hope graciously granted defendant an extension of time in which to respond to the complaint. Pursuant to agreement, defendant's response to the complaint is now due January 14, 2019.

an incidental effect on religion"). Therefore, a law that only incidentally imposes a burden on the exercise of religion need only be supported by a rational basis. WTC Families for a Proper Burial, Inc. v. City of New York, 567 F.Supp.2d 529, 539-540 (S.D.N.Y. 2008) (quoting Leebart v. Harrington, 332 F.3d 134, 143 (2d Cir. 2003)).

Religious beliefs are not targeted by 18 N.Y.C.R.R. §421.3(d), and it is plainly not the "object" of the regulation to interfere with plaintiff's, or anyone's, exercise of religion. On its face, 421.3(d) is generally applicable:

> Authorized agencies providing adoption services shall…prohibit discrimination and harassment against applicants for adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion, or disability…

18 N.Y.C.R.R. §421.3(d). The regulation applies to all authorized agencies, regardless of any religious affiliation.

Additionally, 18 N.Y.C.R.R.§421.3(d) is neutral. The neutrality of a law is determined by the consideration of relevant factors, including: "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in questions, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 540 (1993). See also Masterpiece Cakeshop, Ltd. v. Colo. Civil rights Comm'n, __ U.S. __, 138 S.Ct. 1719, 1731 (2018) (applying the neutrality factors).

The evolution of adoption law in New York has been discussed by the courts, which have repeatedly held that the goal of the adoption laws is to further "New York's 'strong policy of assuring that as many children as possible are adopted into suitable family situations,'" In re Jacob, 86 N.Y.2d at 662, and approve adoptions that are in "the child's best interests." Id. at 658. To that end, the expansion of individuals authorized to adopt children in New York State to include

unmarried and same sex couples has been identified by the Court of Appeals as in furtherance of the intention of this State's adoption laws. Id. at 660-664. See also In re Adoption of Carolyn B., 6 A.D.3d 67, 69-70 (4th Dep't 2004) (stating that adoption by unmarried and same sex couples furthers the state's interests in finding families for as many children as possible).

The object of 18 N.Y.C.R.R. §421.3(d) furthers that state interest, since the object of the relevant language of the regulation is to "[p]rohibit[] discrimination on the basis of sexual orientation, gender identity or expression in essential social services." N.Y.S. Register, Nov. 6, 2013, p. 3. The rulemaking documents and subsequent OCFS Information Letters, clearly establish this intent of 18 N.Y.C.R.R. §421.3(d). Therefore, when read in connection with the explicit intended purpose of the regulation, the allegations in the complaint that New Hope's religious beliefs are incidentally affected by the regulation are insufficient to state a First Amendment free exercise claim.[5] Accordingly, New Hope is not likely to succeed on its first cause of action.

Second, the complaint fails to state a First Amendment free speech or expressive association claim. The First Amendment prohibits the promulgation of a law "abridging the freedom of speech," U.S. Const. amend. I, and the applicable free speech analysis differs depending on whether the law is "content-based" or "content-neutral." Universal City Studios v. Corley, 273 F.3d 429, 450-451 (2d Cir. 2001). "The principal inquiry in determining content neutrality…is whether the government has adopted a regulation of speech because of disagreement with the message it conveys…A regulation that serves purposes unrelated to the content of

[5] It is also noteworthy that §421.3(d) has no effect on the various statutes and regulations requiring the consideration of the religious beliefs of birth parents, children and prospective adoptive parents in the matching process. Therefore, nothing about §421.3(d) requires New Hope, or any authorized agency, to place a child with a family without considering the relevant religious beliefs of the parties.

expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). "In other words, '[a law] is content-based when the content of the speech determines whether the [law] applies." Congregation Rabbinical College of Tartikov, Inc. v. Vill. of Pomona, 138 F.Supp.3d 352, 426 (S.D.N.Y. 2015) (quoting Sugarman v. Vill. of Chester, 192 F.Supp.2d 282, 292 (S.D.N.Y. 2002)).

As discussed above, 18 N.Y.C.R.R. §421.3(d) applies to all authorized agencies and, therefore, its applicability is not based on the content of an agency's speech. Congregation Rabbinical College of Tartikov, 138 F.Supp.3d at 426. Additionally, the regulation was promulgated to ensure that "discrimination on the basis of sexual orientation, gender identity or expression in essential social services," does not occur, N.Y.S. Register, Nov. 6, 2013, p. 3, when determining if an adoption is in a child's best interests.[6] Therefore, it is content-neutral.

A content-neutral law does not violate the free speech guarantee of the First Amendment if it "(1) 'advances important government interests unrelated to the suppression of speech' and (2) 'does not burden substantially more speech than necessary to further those interests.'" Time Warner Cable, Inc. v. FCC, 729 F.3d 137, 160 (2d Cir. 2013) (stating the factors set forth in United States v. O'Brien, 391 U.S. 367, 377 (1968)).

The state interest of expanding the number of people who may adopt children has been judicially determined to be an important government interest, which also advances the important state interest of providing permanent families in children's best interest. In re Jacob, 86 N.Y.2d at

[6] Just like the Philadelphia Department of Human Services in Fulton v. City of Philadelphia, OCFS "did not seek to create a forum for private speech nor did [it] seek to promote speech at all" when it authorized a religious organization to provide family services. 320 F.Supp.3d 661, 695-696 (E.D.PA. 2018). Instead, it authorized New Hope to provide services to New York State residents, including the completion of adoption studies. Id. (authorizing plaintiff to provide certification services and home visits for prospective foster parents).

658, 661. Toward that end, 18 N.Y.C.R.R. §421.3(d) goes no further than ensuring that the most people entitled to adopt in New York are considered and afforded an equal opportunity as prospective adoptive parents by state authorized adoption agencies. It neither compels, nor prohibits, New Hope from (1) expressing its beliefs, religious or otherwise, or (2) associating with others for the purpose of expressing such beliefs. Therefore, plaintiff is not likely to succeed on its second cause of action.

Third, the complaint fails to allege an equal protection claim. The Equal Protection Clause provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV. Its command is essentially a direction that all persons similarly situated should be treated alike. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 439 (1985). An equal protection claim cannot be maintained unless a plaintiff shows that it is not being treated the same as similarly situated individuals. New York State Club Assoc. v. City of New York, 487 US 1, 17-18 (1988); Tigner v. State of Texas, 310 U.S. 141, 147 (1940) (the Equal Protection Clause "does not require things which are different in fact or opinion to be treated in law as though they were the same.").

Based on the allegations in the complaint, themselves, 18 N.Y.C.R.R. §421.3(d) applies to all agencies authorized by OCFS to provide adoption services. Therefore, New Hope has failed to allege any facts sufficient to state an equal protection claim. As a result, the plaintiff is not likely to succeed on its third cause of action.

Finally, the complaint fails to allege an unconstitutional conditions claim. The ""unconstitutional conditions' doctrine distinguishes between 'conditions that define the limits of the government spending program-those that specify the activities Congress wants to subsidize,' which are generally permissible, and 'conditions that seek to leverage funding to regulate speech

outside the contours of the program itself,' which are not." Alliance for Open Soc'y Int'l v. United States Agency for Int'l Dev., 2018 U.S. App. LEXIS 35833, **42-43 (2d Cir. Dec. 20, 2018). The application of the doctrine "varies depending on the underlying substantive right at issue." EklecCo NewCo LLC v. Town of Clarkstown, 2018 U.S. Dist. LEXIS 101591, *20 (S.D.N.Y. June 18, 2018). In the First Amendment context, the unconstitutional conditions doctrine precludes the government from "'deny[ing] a benefit to a person on a basis that infringes his constitutionally protected...freedom of speech' even if he has no entitlement to that benefit." Bd. Of County Commissioners v. Umbehr, 518 U.S. 668, 674 (1996).

Plaintiff's fourth cause of action alleges that the defendant "has violated the unconstitutional conditions doctrine by conditioning New Hope's perpetual authorization to provide adoption services on its willingness to relinquish its First Amendment rights." Dkt. No. 1 at 295. This argument necessarily fails because, as discussed above, §421.3(d) does not violate any of New Hope's First Amendment rights. Additionally, as discussed above, this allegation conflates New Hope's perpetual authority as a corporate structure with its status as an "authorized agency" subject to the ongoing approval of OCFS. N.Y. Soc. Serv. Law 371(10)(a).

Since New Hope has not pleaded any cognizable claim, it has not met its burden of establishing that it is likely to succeed on the merits of its claim or, alternatively, raised any serious questions as to the likely success of their claims. Therefore, New Hope's motion for preliminary injunctive relief should be denied.

C. Plaintiff Has Failed to Make the Requisite Showing Regarding the Balancing of Equities and Public Interest

Since New Hope fails to establish that it is likely to succeed on the merits of its claim or suffer irreparable harm in the absence of a preliminary injunction, the court need not determine in whose favor the equities tip, Upstate Jobs Party, et al. v. Kosinski, 18-CV-459 at Dkt. No. 19,

p. 22, or whether the public interest would be disserved if plaintiff's motion were granted. Id. at p. 23. However, *arguendo*, even if these considerations were applicable, they would weigh in defendant's favor, requiring the denial of plaintiff's motion.

CONCLUSION

For the reasons discussed above, and those contained in the declaration of Carol McCarthy, incorporated herein, plaintiff's motion for preliminary injunctive relief should be denied in its entirety.

Dated: Albany, New York
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