

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.

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF DEFENDANT'S
MOTION TO DISMISS THE COMPLAINT PURSUANT TO FRCP 12(B)(6)**

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Date: February 8, 2019

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PRELIMINARY STATEMENT

Defendants New York State Office of Children and Family Services (“OCFS”) and OCFS Acting Commissioner Sheila Poole have clearly articulated not only legitimate, but significant, state interests supporting the promulgation of 18 N.Y.C.R.R. §421.3(d) (“§421.3(d)”). First, the defendants have demonstrated a significant interest in placing as many children in permanent homes. Second, the defendants have demonstrated a significant interest in approving adoptive families diverse as to (1) cultural, ethnic and racial background, 18 N.Y.C.R.R. §421.18(d); (2) age, *id.*; (3) religion, *id.* at §421.18(c); and (4) other characteristics, OCFS Informational Letter 11-OCFS-INF-05 (July 11, 2011), is imperative in finding a permanent family that is in the each child’s best interest. Third, the defendants have demonstrated a significant interest in “prohibiting discrimination on the basis of sexual orientation, gender identity or expression in essential social services,” N.Y.S. Register, Nov. 6, 2013, p. 3. Section 421.3(d) was promulgated to advance these significant state interests.

This regulation functions to ensure that state-authorized agencies providing adoption services in this State evaluate the “capacity of the prospective adoptive parents to meet the needs of children freed for adoption” as “the primary consideration when making approval or rejection decisions of an adoptive applicant.” OCFS Information Letter 11-OCFS-INF-05 (July 11, 2011). It is because New Hope refuses to make this its primary consideration and, instead, uses marital status or sexual orientation of prospective adoptive parents, as the only factor to refuse services to prospective adoptive parents that New Hope’s policy violates §421.3(d).

This case is of purely a legal nature. The defendants have cited to the governing legal authority and the rule-making record of §421.3(d), which supports the state interests identified by the defendants. Interestingly, New Hope did not comment on §421.3(d) when it was proposed. N.Y.S. Register, Nov. 6, 2013. It was promulgated without objection notwithstanding

that it would become applicable to all state-authorized providers of adoption agencies in this State – including New Hope. However, New Hope now claims that discovery is necessary to determine the regulation’s purpose. The court need only review the complaint against the backdrop of the relevant law, legal history and rule-making record to dispose of plaintiff’s claims.

This memorandum of law is submitted on behalf of the defendants in further support of their motion to dismiss the complaint pursuant to FRCP 12(b)(6).

ARGUMENT

A. New Hope Conflates its Corporate Authority with its Authority to Provide Adoption Services

Preliminarily, it is important to note that New Hope has a fundamental misunderstanding of its legal relationship with OCFS, the manner in which it has been granted the ability to provide adoption services, and the legal framework in which it must operate. No matter how many times New Hope states in its memorandum of law that it has been granted a “license” by OCFS to provide adoption services, OCFS does not grant such licenses. Instead, agencies 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 children”¹ and “submit and consent to the approval, visitation, inspection and supervision” of OCFS to be authorized by OCFS to provide adoption services. N.Y. Soc. Serv. Law §371(10)(a). Notwithstanding OCFS’s clear description of the method by which New Hope is permitted to perform adoption services, with citations to all relevant legal authority, New Hope continues to mischaracterize its authority.

¹ OCFS must also approve the agency’s certificate of incorporation before the agency may be authorized by OCFS to provide adoption services. N.Y. Soc. Serv. §460-a.

Specifically, in an effort to distract the court from the fact that New Hope may only perform adoption services consistent with the law as New York has determined it, New Hope continues to conflate issues relating to its corporate authority with issues relating to its approval to provide adoption services. As discussed in defendants' moving memorandum, while OCFS has granted New Hope perpetual *corporate authority*, it has not granted New Hope perpetual approval to provide adoption services. As defined in Social Services Law §371(10)(a), New Hope must have "approval" to operate its program *in addition* to its corporate authority to be an "authorized agency." Moreover, OCFS is authorized to issue regulations pursuant to Social Services Law §372(b)(3) and to enforce such regulations pursuant to Social Services Law §34. New Hope's argument that the only vehicle by which its authorization to provide adoption services may be revoked is pursuant to Social Services Law §385 completely mischaracterizes both its own limited authority, and the purpose of §385, which is inapplicable here. Such an argument would mean that New Hope could violate OCFS regulations without any repercussions so long as the conduct did not violate §385. Such an interpretation would essentially render all relevant regulations meaningless.

B. §421.3(d) is Neutral and Generally Applicable and Therefore Does Not Violate the First Amendment

While New Hope alleges that the defendants are "attacking claims that New Hope has not brought, and ignoring the facts that New Hope is alleged," Dkt. No. 36 at p. 2, it is actually New Hope that is attempting to distract the court from the very straight-forward question that applies here: Is §421.3(d) a neutral and generally applicable regulation? As discussed in defendants' moving memorandum, (1) the language of the regulation itself, (2) the rulemaking history of §421.3(d) and (3) the law upon which the regulation is based are relevant in determining whether §421.3(d) is neutral and generally applicable. Church of Lukumi Babalu Aye, Inc. v. Hialeah,

508 U.S. 520, 540 (1993). Therefore, contrary to New Hope’s characterization, the rulemaking documents that articulate the purpose of the regulation, see e.g. N.Y.S. Register, Nov. 6, 2013, p. 3², and Court of Appeals case law, In re Jacob, 86 N.Y.2d 641, 662 (1995), are the only factors relevant to whether §421.3(d) is constitutional under the First Amendment. Therefore, discovery is not necessary.

Also irrelevant is New Hope’s baseless, conclusory allegation that defendants are using §421.3(d) “to carry out a statewide purge of faith-based adoption agencies, removing not just New Hope, but Catholic, Jewish, Muslim, and Mormon...agencies from its list of approved agencies.” Id. at p. 6. This argument misconstrues even New Hope’s own complaint. All that paragraph 202 of the complaint – the paragraph relied upon by New Hope -- states is that “several voluntary faith-based authorized agencies that were listed on OCFS’ website in January of 2018 as authorized to made adoption placements, including several Catholic providers, a Jewish provider, and a Muslim provider, have been removed by OCFS from that posted list of authorized agencies as of the date of this Complaint.” Dkt. No. 1 at 202. Removal from a website, for reasons not even alleged by New Hope, hardly supports a claim that OCFS is attacking religion through its promulgation of §421.3(d). New Hope does not, and cannot, allege that the removal of some agencies from the OCFS website has anything to do with §421.3(d).

C. New Hope is Required to Comply with All Relevant Statutes and Regulations

In light of the intentional misdirection of New Hope in its memorandum of law, it is necessary to focus the court on the very straight-forward issue before it, and the relevant

² While New Hope seems perplexed by the State’s articulation of its significant interest in “[p]rohibit[ing] discrimination on the basis of sexual orientation, gender identity or expression in essential social services,” this purpose of the regulation is explicitly stated in the rulemaking record supporting the promulgation of the regulation. N.Y.S. Register, Nov. 6, 2013, p. 3

provision of the law. Social Services Law §372-e(2) provides that OCFS “shall promulgate regulations setting forth standards and procedures to be followed by authorized agencies in evaluating persons who have applied to such agencies for the adoption of a child.” N.Y. Soc. Serv. Law §372-e(2). As an “authorized agency,” New Hope must comply with the standards established by OCFS when it receives an application from prospective adoptive families.

Part 421 of Title 18 of the New York State Code of Rules and Regulations set forth the standards of practice for adoption services. 18 N.Y.C.R.R. §421.1, et seq. Included in those standards are directives governing an authorized agency’s first contact with prospective adoptive parents, 18 N.Y.C.R.R. §421.11, which require authorized agencies to, *inter alia*, offer an adoption application form to, and provide orientation sessions for, such prospective adoptive parents. *Id.* at §§421.11(b), (c), (f). Applications must elicit the information required by 18 N.Y.C.R.R. §421.12(a), and authorized agencies must develop a record for each adoptive applicant that includes the items set forth in 18 N.Y.C.R.R. §421.12(b).

Authorized agencies must then conduct an adoption study for each applicant³ pursuant to 18 N.Y.C.R.R. §421.15, that inquires into the criteria set forth in 18 N.Y.C.R.R. §421.16. Upon the completion of an adoption study, an authorized agency must approve or reject an applicant, unless the process is discontinued on mutual consent. *Id.* at §421.15(e), (f), (g). Applications from prospective adoptive parents at least eighteen years old who cooperate with the required adoption study may only be disapproved if the applicant is physically or emotionally incapable of caring for a child, or if the approval of an applicant would not be in the interests of children

³ “Authorized agencies may refer an adoption applicant to another agency prior to the initiation of the adoption study when: (1) the applicant has expressed interest in a specific photo-listed child determined to be in the care of that agency; and (2) the applicant has indicated willingness to be so referred.” 18 N.Y.C.R.R. §421.13(d). However, New Hope’s policy requires the referral of unmarried and same sex couples despite such couples’ interest or willingness.

awaiting adoption. 18 N.Y.C.R.R. §421.15(g).

Section 421.3(d) – the only regulation at issue here – states, in relevant part, that “[a]uthorized agencies providing adoption services shall...prohibit discrimination and harassment against applicants for adoption services on the basis of...sexual orientation...[or] marital status...” 18 N.Y.C.R.R. §421.3(d). This regulation, promulgated in November 2013, is consistent with New York State policy that 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,” and that the marital status or sexual orientation of the applicants is not a legitimate basis upon which to deny an application for adoption since such characteristics are irrelevant to this primary consideration.⁴ OCFS Informational Letter 11-OCFS-INF-05 (Jan. 11, 2011) (emphasis added). However, by rejecting unmarried or same sex couples as prospective adoptive parents without consideration of any factors relating to the ability of such couples to parent and meet the needs of children, **New Hope’s policy necessarily makes a couple’s marital status or sexual orientation the primary consideration.** It is for this reason – and not some imagined effort to “purge” faith-based organizations from the field of adoption services -- that OCFS requires New Hope to revise its policy or lose its ability to provide adoption services.⁵

⁴ In other words, the promulgation of §421.3(d) simply makes explicit that that nothing about a prospective adoptive family’s marital status or the sexual orientation of a prospective adoptive couple can be deemed contrary to the interests of children awaiting adoption and support a rejection of an applicant for adoption under 18 N.Y.C.R.R. §421.15(g).

⁵ It is important to note that there are no allegations in the complaint that OCFS has directed New Hope that it must cease operation if it refuses to change its policy. This is because OCFS has not so directed. Dkt. No. 1-7. Instead, OCFS has informed New Hope that New Hope must discontinue only its adoption program if it does not bring its policy into conformity with §421.3(d). *Id.* As described in great detail in the complaint, New Hope provides many other important services that are unaffected by OCFS’s directive.

Notwithstanding the fact that, as a voluntary agency authorized by OCFS to provide adoption services, New Hope is required to comply with these, and all, OCFS regulations governing adoption services, New Hope alleges that it should be able to determine, on its own, what constitutes a suitable parent for a child. New York State permits faith-based groups to provide adoption services in an effort to provide as many service options as possible to families surrendering children for adoption, and those seeking to adopt. However, that authorization does not exempt faith-based providers from New York's neutral and generally applicable laws that require that adoption providers approve the applications of all prospective adoptive parents unless such applicants are physically or emotionally incapable of caring for a child, or if the approval of an applicant would not be in the interests of children awaiting adoption. 18 N.Y.C.R.R. §421.15(g). Yet, that is what New Hope is asking this court to find.

New Hope's reliance on the case of Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC, 565 U.S. 171 (2012) is entirely misplaced. In that case, the Supreme Court recognized a ministerial exemption in employment discrimination cases, and this Circuit has applied Hosanna-Tabor only in such cases. See e.g. Penn v. N.Y. Methodist Hosp., 884 F.3d 416 (2d Cir. 2017) (employment action brought by chaplain of hospital); Fratello v. Archdiocese of N.Y., 863 F.3d 190 (2d Cir. 2017) (employment action brought by principal of a Catholic school). See also Stabler v. Congregation Emanu-El of N.Y., 2017 U.S. Dist. LEXIS 118964 (S.D.N.Y. July 28, 2017) (employment action by librarian of a Jewish synagogue). Not only is this case not an employment discrimination case, it also does not involve a fact pattern to which a ministerial exemption can apply. Specifically, this case does not involve "government interference with an internal church decision that affects the faith and mission of the church itself." Hosanna-Tabor, 565 U.S. at 190. Instead, §421.3(d) involves the provision of adoption

services – an “outward physical act.” Id. Contrary to New Hope’s argument, it is precisely this type of non-religious act to which the standard of Employment Division, Department of Oregon v. Smith, 494 U.S. 872 (1990) applies. Hosanna-Tabor, 565 U.S. at 190 (distinguishing Smith).

Additionally, there is no way to more narrowly tailor §421.3(d). Permitting agencies to refuse to consider applications of prospective adoptive families on grounds unrelated to a family’s ability to parent is contrary to the state’s interest in providing permanent homes for children because it necessarily diminishes the number and types of prospective adoptive parents available. New Hope argues that the alleged effect of the enforcement of §421.3(d) to agencies like itself that refuse to comply with the regulation is a decrease in the number of adoption providers, and therefore §421.3(d) is not narrowly tailored because the reduction of providers necessarily means less children will be adopted. The reality is actually the opposite: it is better to have **more** agencies that make determinations about the ability of prospective adoptive parents to meet the needs of children based on factors directly relevant to that ability than to have **fewer** agencies that make those determinations only on factors completely unrelated to that ability (i.e. marital status or sexual orientation). It is certainly more important, and in advancement the state’s interest in having the greatest pool of prospective adoptive parents, to have more potential adoptive families approved than to have more agencies.

D. The Complaint Fails to State an Expressive Association Claim

New Hope’s reliance on Boy Scouts of America v. Dale, 530 U.S. 640 (2000), in support of its expressive association claim is misplaced. In Dale, the court held that forced inclusion of homosexuals as members of the Boy Scouts of America violated the Boy Scouts of America’s right to expressive association in light of the organization’s mission “to instill values in young people.” Id. at 649. Although faith-based, New Hope is a provider of pregnancy, foster and

adoption services. It is not a membership organization, and it does not exist to engage in expressive conduct. Notwithstanding, a “regulation that serves purposes unrelated to the content of 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). See also Christian Legal Soc’y of the Univ. of Cal. v. Martinez, 561 U.S. 661, 695 (2010). This is precisely what New Hope alleges: §421.3(d) incidentally impacts some providers of adoption services, like itself, but not others. Since the regulation serves the purpose of ensuring that discrimination based on marital status or sexual orientation is not used by state-authorized adoption providers to decrease and limit the number and types of adoptive families available to adopt, its incidental effect on New Hope’s ability to expressively associate does not violate the First Amendment.

However, it is important to note that nothing about §421.3(d) limits who New Hope may hire as an employee and be express its viewpoints. Nothing about the regulation limits what message it may convey, or what views it wishes to express. Its only function is to ensure that providers of adoption services – like New Hope – not exclude qualified prospective adoptive parents from its services.

E. New Hope Has Conceded That it Does Not Allege a Class Of One Equal Protection Claim

In its opposition, New Hope has conceded that it is not alleging a class of one equal protection claim. Dkt. No. 36 at p. 28. Instead, it alleges that §421.3(d)’s

prohibition on discrimination, which nominally covers several protected classes, taken together with OCFS’s enforcement of the of that prohibition, is arbitrary because OCFS permits New Hope, all other approved agencies, and all parents involved in the adoption process to “discriminate” on the basis of protected characteristics in multiple contexts, but categorically bans consideration of sexual orientation even for best interest analysis concerning a particular child.

Id. Not surprisingly, New Hope does not cite to any case to support such a convoluted theory of an equal protection violation. Id. Additionally, what New Hope characterizes as “discrimination” in the adoption process refers to the consideration of factors that New York State has determined to be relevant to the best interests of a child. New Hope’s argument that §421.3(d) unconstitutionally limits the characteristics upon which adoption providers can “discriminate” is disturbing. What OCFS requires is that adoption agencies only consider factors that relate to an applicant’s ability to parent and meet the needs of children awaiting adoption. As discussed above, New Hope seeks to consider the marital status and sexual orientation of applicants as a primary consideration, instead of the best interests of children. There is no constitutional right to do so.

F. §421.3(d) Does Not Affect Consideration of the Religion of Birthparents and Children

Finally, it is important to re-emphasize that nothing about §421.3(d) changes the requirement that the religious wishes of a birthparent should be honored when practicable and consistent with the best interests of the child, N.Y. Soc. Serv. §313(7), and that children surrendered for adoption should, when practicable, be placed with a family “of the same religious faith as the child.” 18 N.Y.C.R.R. §421.18(d). In other words, “[p]assing on the faith to the next generation,” – a concern allegedly important to New Hope, Dkt. No. 36 at p. 10 -- remains an interest of the biological parent and child that is unaffected by §421.3(d). In ignoring this important aspect of New York adoption law, New Hope attempts to advance its own religious beliefs over the children in this state in need of forever families, and asks this court to deem such a constitutional right. As demonstrated by New Hope’s own memorandum of law, there is no precedent for such a convoluted result. The religious faith of the child, and the

religious wishes of a birth parent, not an adoption agency, are interests important to children awaiting adoption.

CONCLUSION

For the reasons discussed above, and those in defendants' moving memorandum incorporated herein, defendants' motion to dismiss the complaint pursuant to FRCP 12(b)(6) should be granted in its entirety.

Dated: Albany, New York
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