

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.

STATEMENT PURSUANT TO RULE 56.1(a)

Pursuant to Rule 56.1(a) of the Local Rules of this Court, Defendant Sheila J. Poole contends that as to the following material facts, no genuine issue exists:

Authorized Adoption Agencies and OCFS Oversight

1. OCFS regulates and oversees authorized agencies. Declaration of Carol McCarthy (“McCarthy Decl.”), ¶¶ 8-9.
2. Only authorized agencies with approved adoption programs are permitted to provide adoption services in New York State. *Id.*, ¶ 9.
3. Authorized agencies include both local departments of social services and not-for-profit agencies (voluntary authorized agencies). *Id.*
4. In many cases, the local departments of social services contract with voluntary authorized agencies to provide adoption services on the government’s behalf. *Id.*
5. Prospective adoptive parents served by voluntary authorized agencies may seek a child in the custody and guardianship of a local department of social services and may be eligible

for government-funded adoption subsidy, even if the voluntary authorized agency itself does not receive government funding. *Id.*

6. As voluntary authorized agencies provide the same adoption services as the local departments of social services, the laws, regulations, and policies that govern authorized agencies with respect to adoption services do not distinguish between them. *Id.*

7. OCFS' government website contains a comprehensive list of all voluntary authorized agencies with adoption programs and represents to the public that all listed providers are approved by OCFS. *Id.*

8. An authorized agency must meet three distinct requirements: (1) it must be organized under the laws of the state and have the corporate authority to place out children; (2) it must have its actual place of business in New York; and (3) it must be "approved, visited, inspected and supervised by the office of children and family services or . . . submit and consent to the approval, visitation, inspection and supervision of such office as to any and all acts in relation to the welfare of children" *Id.*, ¶ 11 (quoting N.Y. Soc. Serv. Law § 371(10)).

9. In order to meet the first requirement, an agency must file a Certificate of Incorporation or Certificate of Amendment with the New York State Department of State. *Id.*, ¶ 12.

10. The Certificate of Incorporation establishes the authorized agency as a corporate entity. *Id.*

11. If an agency intends to have an adoption program, it must also obtain an approval from OCFS, to be filed in conjunction with its Certificate of Incorporation. *Id.*

12. To obtain the OCFS approval, an agency must submit an application packet and business plan to the appropriate OCFS regional office. *Id.*

13. Upon receipt, OCFS conducts a site visit, which includes a full review of the proposed adoption program and fiscal review, and determines whether to issue the approval. *Id.*

14. It is the act of filing of the Certificate of Incorporation and approval that gives the authorized agency the legal authority to operate an adoption program in New York. *Id.*

15. Corporate authority can be ended by: (1) the corporation itself filing a Certificate of Amendment to remove that authority; (2) the corporation filing a Certificate of Dissolution to end the corporate entity; (3) expiration of the corporate authority, if the authority was limited in duration; or (4) by court order. *Id.*, ¶ 13.

16. In New York State, nearly all authorized agencies have corporate authority for a limited duration and must seek reauthorization prior to expiration. *Id.*, ¶ 14. OCFS must provide its approval for each reauthorization. *Id.*

17. In order to assess if it will approve the reauthorization, OCFS conducts a comprehensive review of the authorized agency, which includes an agency visit, completion of an adoption services assessment, and drafting of an Adoption Agency Program Review Report. *Id.*, ¶ 15.

18. As part of this assessment, OCFS interviews staff members and reviews the authorized agency's application for authorization/reauthorization, business plan, financial information, policies and procedures, forms, and correspondence. *Id.*

19. OCFS utilizes this review process to determine if the authorized agency is in compliance with state laws, regulations, and policies. *Id.*

20. Only a small number of authorized agencies have corporate authority in perpetuity, and therefore do not need to re-file with the Department of State. *Id.*, ¶ 16.

21. To meet the third requirement, the authorized agency must be approved, visited, inspected, and supervised by OCFS, or must submit and consent to such oversight. *Id.*, ¶ 17.

22. In addition to the approval an adoption agency receives at the time of corporate authorization/reauthorization, the authorized agency remains subject to ongoing approval and supervision. *Id.*

23. Such oversight includes determining whether an agency is complying with state law, regulations, and policies, and such compliance may be a condition for ongoing approval. *Id.*

24. This requirement is distinct from the requirement for corporate authority and applies to all authorized agencies, including those with perpetual corporate authority. *Id.*

25. OCFS may review the adoption program and withhold its approval for failure to meet OCFS standards, regardless of if or when the agency's corporate authority is up for renewal. *Id.*

26. Declining to approve an adoption program does not constitute a revocation or invalidation of the authorized agency's certificate of incorporation; it merely ends the specific program for which approval is required. *Id.*

27. Prior to 2017, it was OCFS's practice to utilize its corporate reauthorization approval process to satisfy its general oversight obligations; the adoption programs at authorized

agencies were only reviewed when the agency sought approval for corporate reauthorization, unless special circumstances warranted additional monitoring or intervention. *Id.*, ¶ 18

28. As a result of this practice, authorized agencies with perpetual corporate authority, including New Hope, did not have their adoption programs visited and reviewed on a regular basis. *Id.*, ¶ 19.

29. In 2017, OCFS discovered and corrected this oversight by visiting and reviewing every authorized agency with perpetual authority. *Id.*

30. OCFS revised its practice to require an on-site visit for every adoption program every year; these annual visits consist of a substantially similar review to the one done at the time of corporate reauthorization. *Id.*

31. If the authorized agency is seeking corporate reauthorization that year, the reauthorization visit replaces the agency visit. *Id.*

32. During OCFS's program reviews, it assesses the quality of the adoption program and makes determinations regarding the agency's compliance with applicable laws, regulations, or policies. *Id.*, ¶ 20.

33. OCFS routinely works with authorized agencies to ensure compliance so as to maintain the greatest number of resources available to families who wish to surrender or adopt a child. *Id.*

34. Only if an agency is unwilling or unable to comply with all laws, regulations and policies will OCFS seek to disapprove an adoption program or deny a request for corporate recertification. *Id.*, ¶ 22.

35. OCFS has informed various agencies, both secular and faith-based, that they must close a program if the program does not comply with OCFS regulations. *Id.*, ¶ 23.

Promulgation of 18 N.Y.C.R.R. § 421.3(d)

36. OCFS is authorized by State law to promulgate regulations that establish standards and criteria for adoption practices, including standards for evaluating prospective adoptive parents. *Id.*, ¶ 24.

37. In 2006, a lawsuit entitled *Rodriguez v. Johnson* (“*Rodriguez* litigation”) was commenced in the United States District Court for the Southern District of New York against employees of OCFS challenging plaintiff’s treatment, as a juvenile transgender female, while in court-ordered OCFS custody. Declaration of Jara Traina (“*Traina Decl.*”), ¶ 4 & Exh. A.

38. On November 13, 2006, a Stipulation and Order of Settlement was endorsed by the court in the *Rodriguez* litigation. *Id.*, ¶ 5 & Exh. B.

39. As a condition of the settlement of the *Rodriguez* litigation, OCFS entered into a Memorandum of Understanding (“MOU”) with counsel for the plaintiff in the *Rodriguez* litigation, Lambda Legal Defense and Education Fund (“Lambda”) and Sylvia Rivera Law Project (“SRLP”). *Id.*, ¶ 6 & Exh. C.

40. The MOU required that OCFS, Lambda and SRLP engage in six “Informational Meetings” to discuss the care provided to Transgender Youth in court-ordered OCFS custody. *Id.*, ¶ 7 & Exh. C at p. 2.

41. OCFS assembled a work group to address the issues raised in the *Rodriguez* litigation and MOU (“work group”), in accordance with the MOU. *Id.*, ¶ 8.

42. The work group included employees of OCFS. *Id.*

43. As a result of its work on improving the services to, and treatment of, transgender youth living in OCFS facilities pursuant to a court-order, the work group concluded a policy was necessary to prohibit discrimination against, and harassment of, all LGBTQ youth. *Id.*, ¶ 9.

44. In 2010, Lambda recommended OCFS expand the protections against discrimination on the basis of sexual orientation, gender identity or gender expression to other programs and services regulated by OCFS. *Id.*, ¶ 12 & Exhs. E, F.

45. The work group then considered expanding its scope to include other program areas in furtherance of OCFS's commitment to protect individuals from discrimination based on sexual orientation, gender identity or gender expression. *Id.*, ¶ 13.

46. OCFS determined that it had an obligation to protect not only the children in its custody, but also the children and families it serves through programs and services it regulates, approves, funds, or otherwise oversees. *Id.*

47. To this end, the work group considered how to protect LGBTQ people from discrimination in other programs or services regulated by OCFS including: (1) Child Protective Services; (2) Juvenile Detention Facilities; (3) Runaway and Homeless Youth Approved Programs; (4) Child Care Agencies; (5) Foster Services; and (6) Adoption Services. *Id.*

48. The work group worked collaboratively with stakeholders to draft OCFS regulations to prohibit the discrimination and/or harassment of anyone involved in services regulated by OCFS on the basis of sexual orientation, gender identity or gender expression. *Id.*, ¶ 14.

49. The work group assembled a package of proposed regulations and amendments, which proceeded through rulemaking and were promulgated in November 2013. *Id.*, ¶ 15.

50. Included in the package was 18 N.Y.C.R.R. 421.3(d) (“421.3(d”). *Id.*

51. OCFS promulgated 18 NYCRR §421.3(d) to prohibit discrimination in adoption services on the basis of race, creed, color, national origin, age, sex, sexual orientation, gender identity or expression, marital status, religion or disability. McCarthy Decl., ¶ 25.

52. Section 421.3(d) is critically important to the State's adoption policies and practices and was promulgated to further OCFS's mission to promote the safety and well-being of families and children. *Id.*, ¶ 26.

53. The State has a strong interest in preventing discrimination in the provision of adoption services. *Id.*, ¶ 27

54. Prohibiting discrimination serves the best interests of vulnerable children by ensuring the state has a broad and diverse pool of potential adoptive parents and, critical to meeting this objective, are policies that prohibit disqualification of any potential adoptive parents due to their sexual orientation, marital status, or any other characteristic that is wholly unrelated to parenting ability. *Id.*

55. 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 and to determine whether they can appropriately meet the needs of a child including the child's safety, health, permanency, well-being and mental, emotional and physical development. *Id.*

56. Section 421.3(d) also seeks to prevent the irreparable trauma and social harm caused by discrimination against lesbian, gay, bisexual, transgender, queer, or questioning

(LGBTQ) people—a group that has been historically excluded from family formation under the law. *Id.*, ¶ 28.

57. The State has a strong interest in preventing and remedying the stigmatization caused by the systemic exclusion of LGBTQ people from public and civic life based solely on their sexual orientation. *Id.*

58. Section 421.3(d) prevents these harms to LGBTQ individuals by prohibiting authorized agencies from implementing 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. *Id.*

59. The State has a strong interest in ensuring government services are provided on an equal basis to all residents. *Id.*, ¶ 30.

60. Since OCFS authorizes and regulates adoption programs operating in New York, allowing agencies with religious objections to refuse to serve all people equally would undermine the State's ability to provide government services on a nondiscriminatory basis and without favoring particular religious beliefs. *Id.*

61. All authorized agencies are prohibited from engaging in discriminatory practices or harassment against applicants for adoption services based on sexual orientation or marital status. *Id.*, ¶ 31.

62. OCFS does not offer or provide exemptions to 18 NYCRR §421.3 to any agency or class of agencies on either a mandatory or discretionary basis. *Id.*

63. The reference to “archaic regulatory language” in the OCFS rulemaking file referred to 18 N.Y.C.R.R. § 421.16(h), which required certain considerations of homosexuality, but not heterosexuality, in an adoption study. Traina Decl., Exh. G, pp. 22-23, 39.

64. The reference to “archaic regulatory language” in the OCFA rulemaking file did not refer to 421.3(d). *Id.*

Adoption Services

65. Authorized agencies receive and respond to inquiries from, conduct orientation sessions for, and offer OCFS-approved applications to prospective adoptive parents. McCarthy Decl., ¶ 34.

66. After an authorized agency receives an adoption application, it must complete an adoption study. *Id.*

67. As part of the adoption study, the authorized agency must explore the following characteristics of the prospective adoptive parent or 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.*

68. Authorized agencies are prohibited from denying an application for adoption services due to the applicant’s membership in any of the protected classes enumerated in 18 NYCRR §421.3. *Id.*, ¶ 35.

69. Section 421.3 prohibits discrimination with respect to placement decisions. *Id.*, ¶ 37.

70. OCFS policy, adopted in response to the federal Multiethnic Placement Act of 1994, also prohibits consideration of race, color, or national origin in placement decisions, or decisions as to whether an applicant may become a foster or adoptive parent. *Id.*, ¶ 37.

71. In rare circumstances, race, color, or national origin may be considered as part of an individualized assessment in order to make a placement decision that is in the child's best interests. *Id.*, ¶ 38.

72. OCFS policy and regulation provide that race, color, or national origin may be considered *only* where it can be demonstrated to be related to the specific needs of an individual child. *Id.*

73. The authorized agency may *not* make generalizations about the child's needs based on the child's membership in a particular race, color, or national origin, nor may the agency routinely consider these factors during the individualized assessment. *Id.*

74. Section 421.3 prohibits discrimination with respect to placement decisions based on the religion of the prospective adoptive parent. *Id.*, ¶ 39.

75. New York law and regulations provide that, *where practicable*, the child shall be placed in the custody of a person of the same religious persuasion as the child. *Id.*; N.Y. Soc. Serv. Law § 373; 18 NYCRR § 421.18(c).

76. Nonetheless, as with all adoptive placements, the authorized agency must make placement decisions based on the best interests of the particular child. McCarthy Decl., ¶ 39 &

Exh. B.

77. Authorized agencies may not categorically exclude prospective adoptive parents based on the agency's beliefs regarding the applicants' religion. *Id.*

78. Consideration of the foregoing factors is expressly limited to determining the best interests of the individual child during the placement decision. *Id.*, ¶ 40.

79. State regulation and policy, in accordance with federal law, do not permit consideration of these factors when conducting the adoption study to assess the suitability of a prospective adoptive parent. *Id.*

80. Factors that authorized agencies must consider in making placement decisions are enumerated in New York Social Services Law and OCFS regulations. *Id.*

2018 Comprehensive Review of New Hope

81. OCFS conducted a comprehensive review of New Hope Family Services in 2018 as part of its effort to review authorized agencies with perpetual authority. McCarthy Decl., ¶ 41.

82. OCFS's review of New Hope in 2018 was its first review subsequent to promulgation of 18 NYCRR §421.3(d). *Id.*, ¶ 42.

83. This review was the first time OCFS learned of New Hope's practices with respect to unmarried and same-sex couples. *Id.*

84. On or about September 6, 2018, OCFS conducted a site visit of New Hope. Colligan Decl., ¶ 4.

85. During the visit, New Hope provided OCFS with a copy of its written policies to review as part of the assessment. *Id.*

86. While reading those policies, OCFS learned that New Hope maintained a policy of refusing to provide adoption services to same-sex and unmarried couples. *Id.*

87. On or about October 10, 2018, Suzanne Colligan contacted New Hope to advise that New Hope's policy was in violation of OCFS policy and to discuss how New Hope could come into compliance. *Id.*, ¶ 6.

88. New Hope advised that it did not intend to comply with the regulation and that it was "unwilling to compromise [its] beliefs." *Id.*

89. At no time did OCFS employee, Suzanne Colligan, indicate to New Hope that "Some Christian ministries have compromised their beliefs in order to remain open." *Id.*, ¶ 7.

90. Suzanne Colligan is not aware of any faith-based adoption agencies who have changed their policies against providing adoption services to same-sex or unmarried couples in order to comply with OCFS non-discrimination regulation. *Id.*

91. In 2003, Suzanne Colligan discovered that Broome County Department of Social Services ("DSS") maintained a policy of refusing foster care applications from unmarried couples. *Id.*, ¶ 8 & Exh. A.

92. She notified Broome County DSS that its policy was in violation of OCFS policy and regulations and directed them to amend it. *Id.*

93. Broome County DSS subsequently updated its practices in accordance with OCFS' directive and no further action was necessary. *Id.*

94. OCFS has historically worked collaboratively with New Hope to address issues. McCarthy Decl., ¶ 43.

95. New Hope refuses to comply with § 421.3(d). *Id.*

Recuse and Refer Policy

96. A recuse and refer policy, like the one used by New Hope, sends the message to LGBTQ individuals that they are second class citizens. *Id.*, ¶ 47.

97. A recuse and refer policy disrespects and further marginalizes a historically disadvantaged population. *Id.*

98. Under a recuse-and-refer policy, families turned away from one agency would need to seek out an agency willing to serve them and, without a universally applicable non-discrimination requirement, it is possible that there would be no adoption providers willing to serve them. *Id.*, ¶ 48.

99. Although each local department of social services operates an adoption program, these programs only place children in the foster care system. *Id.*, ¶ 49.

100. A prospective adoptive parent seeking to adopt outside of the foster care system could not do so through the local department of social services. *Id.*

101. New Hope almost exclusively facilitates domestic adoptions of newborns, infants and young toddlers. *Id.*, ¶ 50; Compl., ECF No. 1, ¶ 76.

102. New Hope is not a licensed foster care agency and is not authorized to place foster children for adoption in New York. McCarthy Dec., ¶ 50.

103. Typically, agencies that facilitate domestic adoptions of newborns, infants and young toddlers outside of foster care have a greater number of prospective adoptive parents than children in need of placement, resulting in waiting lists. *Id.*, ¶ 51.

104. Under recuse-and-refer, same-sex and unmarried couples turned away from agencies like New Hope would be segregated and funneled to the smaller subset of agencies willing to work with them, making waiting lists at those agencies longer and the likelihood of placement slimmer. *Id.*

105. A recuse-and-refer policy diminishes the number of children available to same-sex and unmarried couples by reducing the number of agencies willing to serve them. *Id.*, ¶ 52.

106. Prospective adoptive parents who are categorically rejected by an authorized agency lose the ability to adopt the children in that agency's custody and guardianship. *Id.*

107. Thus, the likelihood that a prospective adoptive parent will receive a child for an adoptive placement depends on the number of children in the custody and guardianship of the authorized agencies willing to work with them, not the number of children available for adoption statewide. *Id.*

108. Same sex couples adopt at rates disproportionately higher than other individuals. *Id.*, ¶ 53.

109. New Hope's method of turning away unmarried and same sex couples through its recusal and referral policy prevents such couples from appealing such a decision by New Hope to OCFS. *Id.*, ¶ 54.

110. Couples who go through the application process at an agency and are not approved can appeal that denial to OCFS. *Id.*

111. By preventing unmarried and same sex couples from participating in the application process, New Hope's recusal and referral policy effectively leaves such couples with no avenue by which to challenge New Hope's action. *Id.*

Agencies Removed from OCFS Website

112. In 2018 and 2019, OCFS did not disapprove any adoption program in New York State. *Id.*, ¶ 44.

113. In 2018 and 2019, approximately twelve authorized agencies with perpetual authority, including both faith-based and secular agencies, were removed from OCFS's website because they voluntarily no longer operated an adoption program. *Id.*

114. None of these authorized agencies were asked to or pressured by OCFS to close due to their religious beliefs or non-compliance with §421.3(d). *Id.*

115. In addition, approximately five agencies were removed from OCFS's website for a lack of corporate authority. *Id.*, ¶ 45.

116. Two others were removed because they closed in response to losing Hague accreditation, and two others were removed because they changed names. *Id.*

August 2018 OCFS Statement

117. In August 2018, OCFS was asked by the Buffalo News for a response to Catholic Charities Buffalo's voluntary closure. Declaration of Monica Mahaffey ("Mahaffey Decl."), ¶ 3.

118. In response to the request, OCFS Assistant Commissioner for Communications made the following statement: "Discrimination of any kind is illegal and in this case OCFS will vigorously enforce the laws designed to protect the rights of children and same sex couples. In

New York State, we welcome all families who are ready to provide loving and nurturing homes to foster or adoptive children. There is no place for providers that choose not to follow the law."

Id.

119. This statement of Assistant Commissioner Mahaffey simply meant that an adoption or foster care agency cannot refuse to provide services based on sexual orientation or marital status under New York State law. *Id.*, ¶ 4.

120. The statement applies to all providers equally and was not intended to target faith-based providers, or to suggest that religious beliefs are not welcome in New York State. *Id.*

New York Domestic Relations Law § 110

121. Section 421.3(d) was promulgated pursuant to Executive Law §§ 503 and 532-e and Social Services Law §§ 20(3)(d), 462(1), 372-b(3), 372-e(2), 378(5), 409 and 409-a. Traina Decl., Exh. G, pp. 1, 16, 37, 38, 39, 60, 69.

122. Section 421.3(d) was not promulgated pursuant to New York Domestic Relations Law ("DRL") § 110. *Id.*

123. The rulemaking record for, inter alia, § 421.3(d) does not include any assertion that 421.3(d) was implemented pursuant to DRL 110. *Id.*

124. DRL § 110 defines who may legally adopt in New York. 2010 legislative history of DRL § 110, Declaration of Adrienne J. Kerwin ("Kerwin Decl."), Exh. A; N.Y. Dom. Rel. Law § 110.

125. DRL § 110 does not permit or prohibit discrimination against those who apply for adoption services. 2010 legislative history of DRL ¶ 110, Kerwin Decl., Exh. A; N.Y. Dom. Rel. Law § 110.

Dated: Albany, New York
October 8, 2021

LETITIA JAMES
Attorney General of the State of New York
Attorney for Defendant Sheila J. Poole
The Capitol
Albany, New York 12224

By: s/ Adrienne J. Kerwin
Adrienne J. Kerwin
Assistant Attorney General, of Counsel
Bar Roll No. 105154
Telephone: (518) 776-2608
Fax: (518) 915-7738 (Not for service of papers)
Email: Adrienne.Kerwin@ag.ny.gov