

Grudge Match Between Sexual Orientation and Religious Freedom



By Paul Engel

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- How does same-sex marriage impact your marriage? But morphing acceptance into extortion.
- Can government force private agencies they work with to promote a government message?
- Does the recent orders from the District Court in the case New Hope v. Poole show a restoration of religious liberty in America?

I hear this question all the time: “How does homosexual marriage impact your marriage?” This platitude has a small grain of truth, but it only works if you ignore the rest of reality. It’s not that recognizing other marriages changes your own, but how allowance morphs into coercion and then grows into extortion.

For almost a dozen years there’s been a feud between the State of New York’s Office of Children and Family Services (OCFS) and New Hope Family Services (New Hope). New Hope was granted a perpetual corporate authorization as an adoption agency by OCFS. However, between January 2011 and November 2013, OCFS created policies and rules that would require that New Hope place children with couples that would violate their religious beliefs. The suit New Hope filed in December of 2018 has been through ups and downs. With the latest court orders, it

appears New Hope is currently enjoying the protection of their religious liberty. Will it be challenged again?

Until 2010, New York law only allowed adoption by a married heterosexual couple. In January 2011, OCFS sent adoption agencies a letter to bring their policies in line with New York's Domestic Relations Law. This was followed up in July with another letter stating that "discrimination based on sexual orientation in the adoption study assessment process" was prohibited. In November 2013 OCFS promulgated a rule which prohibited "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." This rule would require that New Hope place adoptive children with couples other than a traditional heterosexual married couple, which violated their religious beliefs. When an unmarried or same-sex couple contacted New Hope seeking to adopt a child, the couple were informed that New Hope could not provide them with adoption services and offered to provide them with referrals to other agencies. In 2018, OCFS conducted a comprehensive review of New Hope, and an OCFS employee advised them that its referral policy was in violation of OCFS policies. New Hope declined to change its referral policy. OCFS informed New Hope that if it failed to bring its policies into compliance with regulations, they would lose approval for their adoption program. New Hope filed suit.

Compelled Speech

In reading the order of U.S. District Judge Mae D'Agonsino, it appears New Hope based their suit on a violation of the First Amendment.

At the heart of the First Amendment' is the principle 'that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence... Consistent with this principle, freedom of speech

means that the 'government may not prohibit the expression of an idea,' even one that society finds 'offensive or disagreeable. ... For much the same reason, [the] government also cannot tell people that there are things 'they must say.

[New Hope Family Services, Inc. v. Sheila J. Poole, Acting Commissioner for the OCFS](#)

I've talked until I'm blue in the face about how actors under state law cannot violate the First Amendment. After all, the first five words point out that it applies to U.S. law.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

[U.S. Constitution, Amendent I](#)

This was a violation of freedom of speech, which is protected in New York by Article I §8 of the New York State Constitution:

Every citizen may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press

[New York Constitution, Article I §8](#)

OCFS claims that the placing of children with adoptive families is government speech not private, and therefore does not trigger First Amendment protections. Is a state regulation, requiring adoption agencies place children with couples in violation of the beliefs of those adoption agencies, a violation of free speech?

Thus, when [the] government 'direct[ly] regulat[es] ... speech' by mandating that persons explicitly agree with government

policy on a particular matter, it 'plainly violate[s] the First Amendment.

[**New Hope Family Services, Inc. v. Sheila J. Poole, Acting Commissioner for the OCFS**](#)

This opinion had already been confirmed by the Second Circuit Court of Appeals.

When it examined the government speech issue earlier in this litigation, the Second Circuit concluded that nothing in the pleadings suggested that there was expressive conduct or other speech engaged in by New Hope in the course of providing adoption services that constituted government speech.

[**New Hope Family Services, Inc. v. Sheila J. Poole, Acting Commissioner for the OCFS**](#)

OCFS now claims it has evidence sufficient to change the opinion of the Second Circuit, but the judge does not agree.

Accordingly, the Court holds that none of New Hope's expressive conduct or other speech constitutes government speech.

[**New Hope Family Services, Inc. v. Sheila J. Poole, Acting Commissioner for the OCFS**](#)

However, OCFS does bring up an interesting point.

OCFS also continues to argue that Section 421.3(d) does not compel or prohibit any speech.

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Let's set aside the position of OCFS that regulations regarding the placement of adopted children is government speech. What about the question of compelling agreement with government policy? Is regulation of the placement of children

a form of speech?

Freedom of Speech or Religion?

Looking at the definition of “speech” at the time of the ratification of the First Amendment we find:

1. *The faculty of uttering articulate sounds or words, as in human beings; the faculty of expressing thoughts by words or articulate sounds. speech was given to man by his Creator for the noblest purposes.*
2. *Language; words as expressing ideas. The acts of God to human ears cannot without process of speech be told.*

SPEECH – Webster’s 1828 Dictionary

After some thought, I can see an argument for compelled speech. After all, those who work for, and by definition represent New Hope, are expressing thoughts by their words. By working with same-sex and unmarried adoptive couples, they must express ideas that are contrary to their beliefs. If we are to follow Occam’s Razor, there is a much simpler answer.

The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind;

New York Constitution, Article I §3

Those who own, run, and are employed by New Hope, have a religious profession that a married heterosexual couple is the only proper home for adopting a child. According to the New York Constitution, they cannot be discriminated against because of that religious profession.

Discrimination

I’ve certainly heard it often enough: Why should religious people be allowed to discriminate against same-sex marriage? It seems those who ask that question never seem to consider

the other side. Why should same-sex couples be allowed to discriminate against those who disagree with them? It's not like New Hope refused to interact with a couple with whom they could not, with a clear conscience, place a child. They expressed their position and offered the couple other agencies who would be able to place a child with them. If New Hope were the only adoption agencies in the state I might consider this discrimination against a same-sex couple, but that is not the case here. There are plenty of adoption agencies that will place children with same-sex or unmarried couples. Why should those couples force New Hope to be one of them? It appears that while prejudice and discrimination are two sided, most people only consider their point of view.

Conclusion

Which leaves us, for now, with Judge D'Agostino's order.

After careful review of the record, the parties' arguments, and the applicable law—in particular the Second Circuit's prior decision in this matter—the Court hereby

ORDERS that OCFS' motion for summary judgment (Dkt. No. 74) is **DENIED**; and the Court further

ORDERS that New Hope's motion for summary judgment (Dkt. No. 75) is **GRANTED**; and the Court further

ORDERS that OCFS is **ENJOINED** from enforcing 18 N.Y.C.R.R. § 421.3(d) insofar as it would compel New Hope to process applications from, or place children for adoption with, same-sex couples or unmarried cohabitating couples, and insofar as it would prevent New Hope from referring such couples to other agencies;

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The court finds for New Hope and OCFS is enjoined from

enforcing the regulation requiring New Hope to place children with same-sex or unmarried couples.

I guess I've gotten used to seeing courts come to the right decision in their own way, even if it seems twisted and convoluted. The question for me is, will this new-found respect for the rights of individuals and organizations to determine who they will do business with permeate throughout the federal judicial system? After all, the facts of this case are little different than the Masterpiece Cake Shop or the Arlene's Flowers cases, or even the upcoming case 303 Creative case recently heard by the Supreme Court. They all involve the state compelling people to act contrary to their conscience and religious beliefs. I guess we'll just have to wait and see if the protection of rights, on both sides of the same-sex divide, will be a priority.

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E-Mail Paul Engel: paul@constitutionstudy.com