UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

MELISSA BUCK; CHAD BUCK; and SHAMBER FLORE; ST. VINCENT CATHOLIC CHARITIES,

Plaintiffs,

v.

ROBERT GORDON, in his official capacity as the Director of the Michigan Department of Health and Human Services; HERMAN MCCALL, in his official capacity as the Executive Director of the Michigan Children's Services Agency; DANA NESSEL, in her official capacity as Michigan Attorney General; ALEX AZAR, in his official capacity as Secretary of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants.
_____/

No. 1:19-cv-00286

HON. ROBERT J. JONKER

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STATE DEFENDANTS' RESPONSE TO FEDERAL DEFENDANTS' MOTION TO DISMISS (DOC. 44)

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CONCISE STATEMENT OF ISSUES PRESENTED

The State Defendants take no position on whether the Federal Defendants should be dismissed. However, the State Defendants oppose the Federal Defendants' Motion to Dismiss to the extent it misinterprets Michigan law, relies on erroneous assumptions, and grossly minimizes the importance of compliance with federal regulations to the Michigan Department of Health and Human Services (MDHHS) and the families it serves.

CONTROLLING OR MOST APPROPRIATE AUTHORITY

Authority:

Ashcroft v. Iqbal,
556 U.S. 662 (2009).

Reg'l Rail Reorganization Act Cases,
419 U.S. 102 (1974).

45 C.F.R. § 75.300

45 C.F.R. § 75.102(a),(b)

Mich. Comp. Laws § 722.124e(7)(b)

Mich. Comp. Laws § 722.124f

INTRODUCTION

The burden is on Plaintiffs to plead a legally cognizable claim against each Defendant. See *Ashcroft v. Iqbal*, 556 U.S. 662, 676-77, 129 S.Ct. 1937, 1948 (2009). The State Defendants take no position on whether the allegations against the Federal Defendants, as pled, survive dismissal either for failure to state a claim, or for lack of ripeness or standing.[1]

However, the State Defendants oppose the Federal Defendants' Motion to the extent it misinterprets Michigan law and relies on erroneous assumptions and assertions of fact. While the Court may be required to evaluate the Federal Defendants' Motion by accepting Plaintiffs' allegations as true, the sworn affidavits and other documents attached to the State Defendants' Response to Plaintiffs' Motion for a Preliminary Injunction (Doc. 34) refute most, if not all, of the relevant allegations.[2]

In addition, Michigan law does not allow a child placing agency (CPA) like St. Vincent Catholic Charities (SVCC) to claim a religious objection to services provided under foster care case management and adoption contracts, and the Michigan Department of Health and Human Services' (MDHHS) policy of prohibiting non-

[1]The State Defendants previously demonstrated that the Individual Plaintiffs lack standing to sue any Defendant and that no Plaintiff has standing to maintain a claim on behalf of a foster child or family. (Defs.' Br. to Transfer Mot., Doc. 30.) To the extent these arguments apply equally to the Federal Defendants' motion, the State Defendants concur.

[2] The State Defendants' Response to Plaintiffs' Motion for a Preliminary Injunction, along with the Exhibits attached thereto, is incorporated in its entirety pursuant to Fed. R. Civ. P. 10(c).

discrimination in providing such services, and investigating complaints of discrimination, was in place years before the *Dumont* settlement. Any claim that MDHHS adopted a new policy on this issue after entering into a settlement agreement in *Dumont* is patently untrue.

Moreover, the Federal Defendants grossly minimize the importance of compliance with the federal regulations to MDHHS and the children in its care. The U.S. Department of Health and Human Services' (HHS's) policy requirement prohibiting recipients of Title IV-E awards from discriminating on, among other things, sexual orientation and religion, is not optional. 45 C.F.R. § 75.300(c). This is a term and condition necessary for receipt of Title IV-E funds, which totaled more than One Hundred Seventy-One Million Dollars ($171,000,000) during the 2018 fiscal year. Thus, there ***is*** a credible threat the Federal Defendants will enforce the regulation against MDHHS – and MDHHS avoids this threat by compliance with the federal regulations, including 45 C.F.R. § 75.300(c).

The State Defendants take no position on whether Federal Defendants should be dismissed. However, the State Defendants dispute the underlying facts and allegations relied on by the Federal Defendants. This response is made largely to clarify the record and avoid any argument that, by not responding, disputed facts or inaccurate allegations are conceded in this litigation or on appeal.

BACKGROUND

Title IV-E of the Social Security Act authorizes an appropriation of federal funds to the states for the purpose of funding foster care and adoption programs. 42 U.S.C. § 670. The dollar amounts are significant. During the 2018 fiscal year,

MDHHS's foster care and adoption programs received more than $171,000,000 in Title IV-E funding.

To be eligible for these funds, a state must develop a Title IV-E plan that satisfies numerous federal requirements, including establishing and maintaining standards for foster care homes that reasonably accord with the standards of national organizations related to the protection of civil rights. 42 U.S.C. § 671(a)(10)(A). MDHHS serves as Michigan's Title IV-E agency with responsibility for administering, monitoring, and maintaining compliance with Michigan's Title IV-E State Plan. 42 U.S.C. § 671(a). (Ex. A to Defs.' PI Resp., Doc. 34-2, PageID.966, ¶ 4.)

MDHHS must comply with the terms and conditions that HHS requires in its management and administration of the funding award(s). Federal regulations require HHS to administer these awards in a manner to ensure that "[f]ederal funding is expended and associated programs are implemented in full accordance with U.S. statutory and public policy requirements: Including, but not limited to, those… prohibiting discrimination." 45 C.F.R. § 75.300(a). Specifically, "all recipients must treat as valid the marriages of same-sex couples[,]" and "no person otherwise eligible [may] be excluded from participation in, denied the benefits of, or subjected to discrimination in the administration of HHS programs and services based on non-merit factors such as … religion, gender identity or sexual orientation." 45 C.F.R. § 75.300(c), (d). Compliance with 45 C.F.R. § 75.300 is not optional. To the contrary, Section 75.300(c) unequivocally states that "Recipients

must comply with this public policy requirement in the administration of programs supported by HHS awards." 45 C.F.R. § 75.300(c) (Emphasis added.)

MDHHS must also "[e]stablish and maintain effective internal control over the Federal award that provide reasonable assurance that the [MDHHS] is managing the Federal award in compliance with Federal statutes, regulations, and the terms and conditions of the Federal award." 45 C.F.R. § 75.303(a). Evaluation and monitoring is required, and prompt action is necessary when instances of noncompliance are identified in audit findings. 45 C.F.R. § 75.303(c), (d). While exceptions may be granted, this is not the norm. Exceptions may only be considered on a "case-by-case basis" and are granted "only in unusual circumstances." 45 C.F.R. § 75.102(a), (b).

MDHHS is, and for several years now, has been, in compliance with this regulation because its policy is nondiscrimination. This is evident from the plain language of the foster care and adoption contracts entered with CPAs like SVCC. (*See, e.g.,* Ex. B to Defs.' PI Resp., Doc. 34-3, PageID.974, ¶ 13.)

Contrary to Plaintiffs' allegations, which the Federal Defendants re-iterate and rely upon in their Brief, neither the *Dumont* settlement nor Defendant Nessel's tenure as Attorney General brought about a "new policy." The State Defendants' Response to Plaintiffs' Motion for a Preliminary Injunction, which is incorporated by reference pursuant to Fed. R. Civ. P. 10(c), explains this in detail. (See, e.g., Defs.' PI Resp., Doc. 34, PageID.925.) MDHHS's policy and practice, for several years now, has been to include a nondiscrimination clause in the standard contract

entered with all CPAs, and to enforce the same. It does not grant "case-by-case" exceptions to this policy but, to the contrary, has investigated reports of noncompliance on several occasions and required corrective action to remedy this. (*See* Defs.' PI Resp., Doc. 34, PageID.924-25; Ex. A to Defs.' PI Resp., Doc. 34-2, PageID.969, ¶¶ 18-19; Ex. B to Defs.' PI Resp., Doc. 34-3, PageID.976-78, ¶¶ 18-24; Ex. C to Defs.' PI Resp., Doc. 34-4, PageID.995, ¶ 8.)

MDHHS's policy and contracts are consistent with state law. In 2015, the Michigan Legislature amended the Michigan Adoption Code (Mich. Comp. Laws §§ 710.1, *et. seq*.), Michigan's Child Care Organization Act (Mich. Comp. Laws §§ 722.111, *et seq*.), and Michigan's Social Welfare Act (Mich. Comp. Laws §§ 400.1, *et. seq*.) to allow a CPA to decline a referral of a child or individual in need of foster care case management or adoption services because of conflict with a CPA's sincerely held religious beliefs. Mich. Comp. Laws § 722.124f(1). These amendments also allow a CPA to decline to provide services in some instances – but not the services at issue in this case, i.e., recruitment, orientation, home studies, and other activities necessary to license foster care and adoptive families that SVCC claims the right to administer in a discriminatory manner. "Services," is defined for purposes of Mich. Comp. Laws § 722.124e to "include[] any service that a child placing agency provides, ***except*** foster care case management and adoption services provided under a contract with the department." Mich. Comp. Laws § 722.124e(7)(b) (Emphasis added). This definition applies to Mich. Comp. Laws §§ 722.124e(2),(3), which the Federal Defendants cite in their Brief, as well as other

statutes affected by the relevant 2015 amendments. (*See* Doc. 45, PageID.1690); *see also* Mich. Comp. Laws §§ 400.5a, 710.23g, & 722.124e(7).

Recruitment of prospective foster care and adoptive parents, home studies, orientations, and other activities necessary to license or approve a foster or adoptive home are services provided to children accepted as referrals under the Private Agency Foster Care Contract or Adoption Contract. (Ex. D to Defs.' PI Resp., Doc. 34-5, PageID.1007-09, ¶¶ 6-11.) Such services are provided to children in connection with the "paramount goal" of securing the child's placement. Mich. Comp. Laws § 722.124e(1)(a). No CPA may discriminate against a prospective foster parent or adoptive parent in the provision of such services.

ARGUMENT

I. The State Defendants take no position on whether Plaintiffs' allegations against the Federal Defendants are legally sufficient.

The burden is on Plaintiffs to plead a legally cognizable claim against each Defendant. See *Ashcroft v. Iqbal*, 556 U.S. 662, 676, 129 S.Ct. 1937, 1948 (2009) ("[A] plaintiff must plead that each Government-official defendant, through the official's own individual actions, has violated the Constitution[.]") The State Defendants take no position on whether Plaintiffs have stated a legally cognizable claim against the Federal Defendants sufficient to avoid dismissal under Fed. R. Civ. P. 12(b)(6).

II. Because of MDHHS's commitment to non-discrimination, Plaintiffs' claims against the Federal Defendants may not be ripe.

"[S]ince ripeness is peculiarly a question of timing, it is the situation now rather than the situation at the time of [this Court's] decision that must govern." *Reg'l Rail Reorganization Act Cases,* 419 U.S. 102, 140, 95 S.Ct. 335, 351 (1974). The situation now is the same as it has been for several years. MDHHS's standard contracts with SVCC include a nondiscrimination clause prohibiting discrimination on the basis of religion, sexual orientation, gender identity and other criteria, and MDHHS enforced this provision against other CPAs. (Ex. A to Defs.' PI Resp., Doc. 34-2, PageID.968-69, ¶¶ 15-19; Ex. B to Defs.' PI Resp., Doc. 34-3, PageID.976-78, ¶¶ 18-24.) MDHHS is in compliance with state law and applicable rules and policy, including 45 C.F.R. § 75.300(c).

A. It is MDHHS's compliance with federal requirements—not the Federal Defendants' purported acquiescence or agreement to any alleged new policy— that avoids federal enforcement.

Contrary to the Federal Defendants' claim, it is MDHHS's compliance with the federal regulations– and not the Federal Defendants' purported acquiescence or agreement to any purported earlier policy—that renders it unlikely a federal investigation is "certainly impending." Cf. *NRA of Am. v. Magaw*, 132 F.3d 272, 280 (6th Cir. 1997) (internal quotations and citations omitted).

The *Dumont* settlement did not announce a new policy. In fact, MDHHS incorporated the non-discrimination clause in its standard contracts and investigated non-compliance, including discrimination based on sexual orientation,

before the *Dumont* litigation was filed. (Ex. C to Defs.' PI Resp., Doc. 34-4, PageID.995, ¶¶ 7-8; Ex. A to Defs.' PI Resp., Doc. 34-2, PageID.969, ¶¶ 18, 19.)

Moreover, Michigan law does not allow a CPA to claim a religious exception to providing services under foster care case management and adoption contracts. Mich. Comp. Laws § 722.124e(7). As explained above, Michigan law allows a CPA to refuse a referral, from MDHHS, of a child or individual in need of foster care or adoption services. Mich. Comp. Laws § 722.124f. However, once a CPA accepts a referral, it cannot discriminate in services provided under contract with MDHHS. The activities from which SVCC wishes to exclude same sex couples (e.g., recruitment and training of prospective foster and adoptive parents, home studies, etc.) are services required by its foster care case management and adoption contracts and, therefore, not activities on SVCC can claim a religious exception.

B. A waiver to a CPA in South Carolina does not eviscerate the need for MDHHS's continual compliance with federal law and regulations.

MDHHS's need to comply with federal law and regulations is not ameliorated by the waiver apparently granted to the private agency in South Carolina. The Federal Defendants acknowledge that SVCC's conduct "undoubtedly implicates the Constitution," and that if MDHHS was not in compliance, the Federal Defendants could enforce its regulations against the State. (Doc. 45, PageID.1701.) MDHHS is not required – and, indeed, it would be untenable – to seek a waiver for every CPA that is unhappy with a term in the standard contract that is supported by a federal regulation. It is also likely to be unfruitful. Exceptions to the regulations are

issued "only in unusual circumstances." 45 C.F.R. § 75.102(a). Even ***if*** HHS's current secretary has a policy of granting waivers in situations like SVCC presents here (and that is far from clear),[3] such policy is not law. The policy does not override the federal regulation – which has not been rescinded – and it may, in fact, change with a change in administration or with a change of heart in the current administration. Cf. *Arizona v. U.S.*, 132 S.Ct. 2492, 2527 (2012) (Alito, J. concurring). States cannot be required to rely on the whim of the federal government when determining the terms and conditions under which they will contract with CPAs for services funded with Title IV-E funds, or to seek a waiver on behalf of every CPA that requests an exception to help the federal government avoid litigation.

SVCC's claims against the Federal Defendants may be premature or otherwise not ripe for review, but it is due to MDHHS's commitment to enforcing the nondiscrimination requirements of 45 C.F.R. § 75.300. Unless this Court enters an Order in Plaintiffs' favor requiring MDHHS to violate 45 C.F.R. § 75.300, or another term and condition for receipt of the Title IV-E funds, this will remain true.

[3] SVCC's situation is distinguishable from the subgrantee for whom an exception was granted in South Carolina. Among other things, this agency accounted for 15% of the total foster care placements in South Carolina, and it requested the right to select "among prospective foster parents on the basis of religion." There is no indication it sought to exclude persons on the basis of sexual orientation or gender identity alone.

III. MDHHS must, and does, comply with federal regulations when carrying out duties as a Title IV-E Agency.

None of the four "actions" cited by the Federal Defendants on page 22 of their Brief (PageID.1707) as the purported source of Plaintiffs' alleged threatened injuries are relevant to the question of whether SVCC has standing to assert a claim against the Federal Defendants. It is undisputed that MDHHS must now comply with 45 C.F.R. § 75.300 in carrying out its duties as the Title IV-E agency; that this regulation prohibits discrimination on the basis of, among other things, religion and sexual orientation; and that MDHHS's failure to comply could result in a significant loss of vital funding used to supporting Michigan's children and families. And, the record demonstrates that MDHHS maintains and enforces a nondiscrimination policy in its dealings with CPAs that mirrors the federal requirement.

MDHHS has never granted a "case-by-case exemption" to allow CPAs to discriminate in the provision of services under foster care case management and adoption contracts. (Ex. C to Defs.' PI Resp., Doc. 34-4, PageID.994-995, 998-1003 ¶¶ 4-8, 17, 20-29.) Defendant Nessel did not force settlement of the *Dumont* litigation, nor did she require any "reversal" in policy. (*Id.* at PageID.1003, ¶ 32.) And, as explained above, Michigan is not required to seek a waiver – even if there was some assurance it would be granted.

CONCLUSION AND RELIEF REQUESTED

The State Defendants take no position on whether the allegations as plead in the Complaint are sufficient to state a valid cause of action, or support either ripeness or standing, with respect to the claims against the Federal Defendants. However, the factual inaccuracies and mischaracterizations of Michigan law could not be left undisputed.

Respectfully submitted,

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Dated: August 9, 2019

CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of W.D. Mich. LCivR 7.2(b)(i) because, excluding the parts exempted by W.D. Mich. LCivR 7.2(b)(i), it contains 3,451 words. The word count was generated using Microsoft Word 2016.

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