

Summary Statement of Dumont v. Gordon Settlement Agreement

The Michigan Department of Health and Human Services (MDHHS) contracts with agencies for foster care case management and adoption services, for which a significant portion of funding comes from the federal Title IV-E program. As a condition of receiving these federal funds, the United States Department of Health and Human Services requires that states' Title IV-E-funded programs prohibit discrimination on the basis of sexual orientation or gender identity. 45 CFR 75.300(c). In compliance with this federal requirement, MDHHS contracts mandate that, except for an agency's sole discretion to decide whether to accept a referral from MDHHS, all agencies must comply with MDHHS's non-discrimination statement when providing state-contracted services. This exception is grounded in the Michigan Legislature's finding in MCL 722.124e(h) that an agency does not receive public funding with respect to a particular child or a particular individual referred by MDHHS unless the agency affirmatively accepts the referral. Otherwise, the contracts prohibit discrimination "against any individual or group because of race, sex, religion, age, national origin, color, height, weight, marital status, *gender identity or expression*, *sexual orientation*, political beliefs, or disability" in the provision of services under contract with MDHHS.

On September 20, 2017, two same-sex couples (Plaintiffs) filed a complaint challenging MDHHS's contracts with taxpayer-funded, state-contracted foster care and adoption agencies that refuse to provide contracted services involving same-sex couples. As alleged in the complaint, Plaintiffs approached St. Vincent Catholic Charities (SVCC) and Bethany Christian Services (Bethany) directly, rather than through a referral from MDHHS, for the purpose of adopting through the State's foster care system, i.e., for children the agency had accepted through referrals from MDHHS. The process of becoming a licensed foster care provider or prospective adoptive parent typically begins with an agency processing an application for licensure as a foster care provider and, if qualified, determining whether placement with the licensed provider and prospective adoptive parent is in the best interest of any child accepted by the agency through an MDHHS referral.

Plaintiffs claimed that, because of their sexual orientation, SVCC and Bethany refused to work with them when providing state-contracted services for children accepted by the agencies, in violation of the federally-mandated non-discrimination provisions in the agencies' contracts with MDHHS. According to MDHHS, on the dates that SVCC and Bethany turned away Plaintiffs, each agency was providing foster care case management services or adoption services for one or more children for whom the agency had accepted an MDHHS referral. Plaintiffs were not seeking direct-placement or private adoption services, and they did not approach the agencies through an MDHHS referral that the agencies could accept or reject under existing state law. Consequently, each agency was contractually prohibited from discriminating against Plaintiffs as potential qualified foster care or adoptive families for any child for whom the agencies were providing services under contract with MDHHS.

MDHHS is represented in this lawsuit by the Michigan Department of Attorney General, led by Attorney General Dana Nessel, who took office on January 1, 2019. After reviewing the facts of this case, MDHHS's contracts with foster care and adoption agencies, and applicable law, the Department of Attorney General determined that MDHHS may be subject to liability on Plaintiffs' claims. To avoid this liability, the Department of Attorney General strongly

recommended resolving the case on terms that are consistent with the law and existing agency contracts and that serve the health, safety, and well-being of children in need of state-contracted foster care case management and adoption services.

Plaintiffs and MDHHS, through counsel, entered into negotiations and, as explained below, agreed to settle the case on terms that satisfy the recommended criteria.

2015 PA 53 added two new sections to the Child Care Organizations Act. Under MCL 722.124e(2), an agency shall not be required to provide “any services” that conflict with its sincerely held religious beliefs. And, MDHHS is prohibited from taking adverse action against an agency that declines to provide “any services” that conflict with its sincerely held religious beliefs. MCL 722.124e(3). For purposes of Section 124e, the term “services” is defined as “includ[ing] any service that a child placing agency provides” but expressly excludes “foster care case management services and adoption services provided under contract with the Department.” MCL 722.124e(7)(b).

Contracted agencies provide state-contracted foster care case management services and adoption services for a particular child or individual upon accepting an MDHHS referral of the child or individual. According to MCL 722.124e(1)(h), agencies do not receive public funding relative to the referred child or individual prior to accepting the referral. And, an agency is not engaged in state action prior to accepting a referral or when performing private-adoption or direct-placement services. MCL 722.124e(1)(i). Under, MCL 722.124f(1) and (2), agencies have sole discretion to decide whether to accept an MDHHS referral to provide foster care case management or adoption services, and the state cannot take adverse action against an agency that rejects a referral based on its sincerely held religious beliefs. Upon accepting a referral, however, the law does not provide an agency with discretion to refuse to provide the accepted child or individual with state-contracted foster care case management or adoption services that conflict with its sincerely held religious beliefs. On the other hand, the terms of the agency’s contract with the State expressly prohibit discrimination in the provision of these contracted services.

When an agency accepts a referral for a child or an individual needing foster care case management or adoption services under contract with MDHHS, MCL 722.124f no longer applies to the agency’s provision of these services to the accepted child or individual. Likewise, because MCL 722.124e(7)(b) exempts foster care case management and adoption services provided under contract with MDHHS from the definition of “services” as used in Section 14e, an agency that accepts a particular child or individual through a referral from MDHHS cannot invoke the statute to refuse to provide contracted services that conflict with the agency’s sincerely held religious beliefs. And, the statute does not prohibit MDHHS from taking adverse action against an agency that refuses to provide state-contracted services for accepted referrals based on its sincerely held religious beliefs. Rather, the statute prohibits MDHHS from taking adverse action against private agencies when they are engaged in “private action” and refuse to provide other non-state-contracted services that conflict with their sincerely held religious beliefs, such as private-adoption or direct-placement services.

The same analysis applies to 2015 Public Acts 54 and 54. Like PA 53, related amendments to the Probate Code, 2015 PA 54, MCL 710.23g, and the Social Welfare Act, 2015 PA 55, MCL 400.5a, prohibit MDHHS from taking adverse action against an agency that refuses to provide “services” that conflict with the agency’s sincerely held religious beliefs. The Probate

Code, MCL 710.23g, also provides that an agency shall not be required to provide adoption services that conflict with its sincerely held religious beliefs. However, each amended statute expressly incorporates the language in MCL 722.124e and 722.124f, i.e., “[i]n accordance with section 14e and 14f of 1973 PA 116, MCL 722.124e and MCL 722.124f.” Thus, these statutes clearly exclude foster care case management and adoption services under contract with MDHHS.

Under the terms of the settlement agreement, MDHHS agrees to maintain federally required non-discrimination provisions in its foster care and adoption agency contracts. And, MDHHS agrees to enforce the non-discrimination provisions, up to and including termination, when a state-contracted agency discriminates against same-sex couples or LGBTQ individuals that may otherwise be qualified foster care or adoptive parents for any child accepted by the agency for services under contract with MDHHS. In essence, MDHHS must take action to enforce its existing contracts where an agency has accepted a referral and later violates the non-discrimination provisions by refusing to work with LGBTQ individuals interested in fostering or adopting any of the children it has accepted. The agreement also specifies that MDHHS is not required to take adverse action against an agency on the basis that the agency has decided to not accept a referral from MDHHS consistent with MCL 722.124f. In return, Plaintiffs agree to dismiss their claims with prejudice and pay their own attorney fees and costs, which eliminates liability for MDHHS on Plaintiffs’ claims.

In summary, resolving this lawsuit on the terms in the settlement agreement allows MDHHS to avoid liability on Plaintiffs’ claims and remain compliant with federal and state law. In addition, the terms of the settlement agreement do not conflict with existing state law, are consistent with federal law and existing agency contracts, and serve the health, safety, and well-being of the State’s most vulnerable children in need of state-contracted foster care case management and adoption services.

As explained above, the Department’s contracts with foster care and adoption agencies prohibit discrimination against any individual or group because of race, religion, age, national origin, color, height, weight, marital status, sex, sexual orientation, gender identity or expression, political beliefs or disability.

Examples of prohibited discriminatory conduct include:

- turning away or referring to another contracted agency an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the agency for contracted services;
- refusing to provide orientation or training to an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the agency for contracted services;
- refusing to perform a home study or process a foster care licensing application or an adoption application for an otherwise potentially qualified LGBTQ individual or same-sex couple that may be a suitable foster or adoptive family for any child accepted by the agency for contracted services; and

- refusing to place a child accepted by the agency for contracted services with an otherwise qualified LGBTQ individual or same-sex couple suitable as a foster or adoptive family for the child.

If you are aware of a violation or suspected violation of these nondiscrimination provisions, a complaint may be made via the Online Complaint Form accessible on the Department's website.