IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

GREG STEWART and STILLMAN STEWART; LISA BLAKEY and JANET RODRIGUEZ; and TODD VESELY and JOEL BUSCH,

Plaintiffs,

v.

DAVE HEINEMAN, in his official capacity as Governor of Nebraska; KERRY WINTERER, in his official capacity as Chief Executive Officer of the Nebraska Department of Health and Human Services; and THOMAS PRISTOW, in his official capacity as Director of the Nebraska Division of Children and Family Services,

Defendants.

CASE CI 13-3157

AMENDED ORDER

This matter came on for hearing on September 4, 2015 on the Defendants' motion to amend or alter the judgment entered by the court on August 5, 2015. Plaintiffs were represented by attorneys Amy Miller, Tina Barton, and Garrard Beeney. Defendants were represented by Assistant Attorney General Jessica Forch. The court received Exhibits 61, 62, and 63, the parties' written briefs, solely for the purpose of creating a record of the parties' arguments on the motion. The motion was argued and submitted.

Defendants filed the present motion in response to the court's Order entered on August 5, 2015, denying Defendants' motion for summary judgment and granting summary judgment in favor of Plaintiffs. Defendants argue that the court erroneously granted summary judgment to Plaintiffs based on several alleged errors of law. Specifically, Defendants argue that the court

erred in finding (1) that Administrative Memorandum #1-95 (hereinafter "Memo #1-95") is the policy of the Department of Health and Human Services ("DHHS"); (2) that DHHS must rescind Memo #1-95 when it is not DHHS' current policy and DHHS does not follow or apply it; (3) that Plaintiffs satisfied their burden to prove Memo #1-95 is unconstitutional in all its applications; and (4) that Defendants committed Equal Protection and Due Process constitutional violations. Additionally, Defendants assert that the remedy granted by the court erroneously ordered Defendants to perform an affirmative action in violation of the sovereign immunity doctrine by requiring Defendants to perform foster care license evaluations in a certain manner. Defendants argue that the court's remedy, as worded, is overly broad and improperly supplants the "best interest of the child" standard for foster placement.

The errors of law raised by Defendants in support of their motion were considered and addressed by the court in the Order granting summary judgment for Plaintiff. The court reaches the same ultimate conclusion on those issues, but the court amends its Order to clarify that the court's findings are made in the context of a facial constitutional challenge. With respect to the court's remedy, the court understands and appreciates Defendants' concerns and recognizes that the court's Order may be read more broadly than the court intended. Therefore, the court also amends the August 5, 2015 Order to clarify the relief granted. The following constitutes the court's amended order on the parties' cross-motions for summary judgment.

BACKGROUND

In Nebraska, the Department of Health and Human Services (hereinafter "DHHS") is the

legal guardian of all children committed to it and is charged with placing those children in suitable homes. NEB. REV. STAT. § 43-905(1) (Supp. 2013). To fulfill its statutory duties, DHHS evaluates and licenses foster homes and places children with adoptive families. Individuals and families are required to obtain a foster home license before they may be considered as an adoptive placement for a state ward.

A. Memo #1-95

In January 1995, DHHS issued Administrative Memorandum #1-95 (hereinafter "Memo #1-95") which directed that no foster home license be issued to "persons who identify themselves as homosexuals" or "unrelated, unmarried adults residing together." In an addendum to Memo #1-95 DHHS clarified that the policy would not affect foster placements made prior to the issuance of the memorandum or placements with a child's relative. Staff were directed not to specifically ask about an individual's sexual orientation or make inquiries into the applicant's marital status in addition to those already included in the licensing application and home study.

In the summer of 2012, former Director of the Division of Children and Family Services (hereinafter "CFS") Thomas Pristow verbally instructed Service Area Administrators and the Deputy Director of CFS that Memo #1-95 would no longer be followed by DHHS. Ex. 6, 33:18-25. At that time, Mr. Pristow informed Service Area Administrators that DHHS may place children with individuals who live with a same-sex partner and/or identify as homosexual, provided that such placements are personally approved by him (hereinafter the "Pristow Procedure"). Ex. 6, 34:24-35:10.

Memo #1-95 was removed from the DHHS website in February 2015. Ex. 27. However, Memo #1-95 was never formally rescinded or replaced and does not appear on the DHHS website page for rescinded or replaced memos. Ex. 28. No other writing currently addresses DHHS's

policy with reference to the issue of foster care licenses to, or the placement of state wards with, gay and lesbian individuals and couples or "unrelated, unmarried adults residing together".

B. Current Practice

The Pristow Procedure requires different levels of approval for foster care placements with persons who identify themselves as homosexual and heterosexual. The placement of a state ward with a married opposite-sex couple or a single individual who does not identify as homosexual requires two tiers of review. For that placement a Caseworker must first make the recommendation and the Supervisor gives the final approval. Ex. 6, 14:12-15:4.

The placement of a state ward with unrelated, unmarried individuals who reside together and who are not a same-sex couple requires four tiers of review. A four tier review is also utilized where a recommendation is made to place a state ward with a convicted felon. Ex. 6, 51:15-52:4. For these placements a Caseworker must first make the recommendation and then the Supervisor must approve it. If the placement is approved by the Supervisor it is submitted to the Administrator for approval or rejection. If the placement is approved by the Administrator it is submitted to the Service Area Administrator for final approval. Ex. 6, 14:12-15:8; 16:8-20.

The placement of a state ward with a gay or lesbian individual or couple requires five tiers of review. These placements must first be recommended by a caseworker and then approved by the Supervisor, Administrator, and Service Area Administrator. If the placement is approved at each of these tiers it is then submitted to the Director of CFS for final approval. Ex. 6, 13:23-14:8; 16:8-17:7.

C. Plaintiffs

Plaintiffs Greg Stewart and Stillman Stewart are residents of Lincoln, Nebraska who have been in a committed same-sex relationship for over thirty years. They were married in 2008 in

California. Their marriage was not recognized by the State of Nebraska at the time this action was filed. They are parents to five children all of whom they adopted out of the foster care system in California, where they previously resided. Greg and Stillman Stewart contacted DHHS in October 2012 to inquire about obtaining a foster home license. DHHS informed them that, as a same-sex couple, they are prohibited from obtaining a foster care license pursuant to DHHS policy.

Plaintiffs Lisa Blakey and Janet Rodriguez are residents of Lincoln, Nebraska. They have been in a committed same-sex relationship for over eight years. They wish to become foster parents and allege they are categorically barred from obtaining a foster home license both because they are lesbian women and because they are unmarried, unrelated persons who reside together.

Plaintiffs Todd Vesely and Joel Busch are residents of Lincoln, Nebraska. They have been in a committed same-sex relationship for over nine years. The couple began the process of applying to become foster parents in July of 2008. They completed training, underwent a home study, and passed required background checks. In June of 2010, the couple received a letter from Todd Reckling, then Director of DHHS's Division of CFS, informing them that as unrelated adults residing together they were categorically barred from obtaining a foster home license pursuant to DHHS policy.

The Plaintiffs collectively filed the instant action alleging that Memo #1-95 violates their rights to equal protection and due process. Plaintiffs seek a declaration that Memo #1-95 is void and unenforceable and an order enjoining Defendants from categorically excluding gay and lesbian individuals and couples from consideration as foster or adoptive parents. In addition, Plaintiffs seek an order directing Defendants to evaluate applications of gay and lesbian individuals and couples seeking to become foster or adoptive parents in the same manner as the

applications of heterosexual individual and couples. The parties now submit cross-motions for summary judgment.

STANDARD OF REVIEW

On a motion for summary judgment, the question is not how a factual issue is to be decided, but whether any real issue of material fact exists. *Fries v. Hurst,* 279 Neb. 887, 897, 782 N.W.2d 596, 604 (2010). Summary Judgment is proper "only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts." *Agri Affiliates, Inc. v. Bones,* 265 Neb. 798, 803, 660 N.W.2d 168, 174 (2003). "The party moving for summary judgment has the burden to show that no genuine issue of material fact exists and must produce sufficient evidence to demonstrate that the moving party is entitled to judgment as a matter of law." *Kline v. Farmers Insurance Exchange*, 277 Neb. 874, 766 N.W.2d 118 (2009). The evidence is to be viewed in the light most favorable to the nonmoving party, and the nonmoving party is afforded the benefit of all favorable inferences. *A.W. v. Lancaster County School District 0001,* 280 Neb. 205, 784 N.W.2d 907 (2010).

DISCUSSION

Plaintiffs present a facial constitutional challenge in which they assert Memo #1-95 and DHHS's current policies and practices deprive them of equal protection and due process. Defendants argue that it is unnecessary to strike Memo #1-95 as unconstitutional since Memo #1-95 is no longer the policy of DHHS. Defendants claim that DHHS no longer prohibits otherwise qualified gay and lesbian individuals and couples from obtaining foster care licenses. Defendants also state that DHHS no longer prohibits "unrelated, unmarried adults residing together" from obtaining foster care licenses. Defendants state that they apply the "best interest

of the child" standard in all foster and adoptive child placements and do not discriminate on the basis of sexual orientation.

MEMO #1-95

Plaintiffs argue that, under the current policies of DHHS, persons who identify as homosexual are treated differently than heterosexual persons throughout the foster care licensing and child placement processes. By its plain language, Memo #1-95 directs that gay and lesbian individuals and couples not be granted foster care licenses or child placements. Memo #1-95 also directs that "unrelated, unmarried adults residing together" are not to be granted foster care licenses or child placements. Defendants do not dispute that Memo #1-95 treats applicants for foster care licenses and persons seeking to adopt state wards differently on the basis of sexual orientation.

Defendants assert that a declaratory judgment is not warranted in this instance because Memo #1-95 does not reflect the current policy or practice of DHHS. Defendants state that DHHS allows qualified gay and lesbian individuals and couples to obtain foster care licenses and follows a strict "best interest of the child" standard in making placements. *See, e.g.*, NEB. REV. STAT. § 71-1902(1) (Cum. Supp. 2014); 390 NAC 6-001; 390 NAC 6-002; 390 NAC 7-000; 390 NAC 7-001.02A. Despite the direct contradiction between what Defendants assert is the current practice of DHHS and the policy outlined in Memo #1-95, Defendants have declined to formally rescind or replace Memo #1-95.

Plaintiffs have produced undisputed evidence that confusion about whether Memo #1-95 is still the official policy of DHHS persisted throughout the department at the time this lawsuit was filed. For example, Service Area Administrator Kathleen Stolz explained the contradictory positions held by DHHS with relation to Memo #1-95 in her deposition:

Q. Does Administrative memo No. 1-95 reflect current HHS policy?

A. Yes.
Q. How so?

A. It is currently an administrative memo that is still active; therefore, it's still policy.

Q. What do you mean by "active"?

A. It has not been rescinded.

Q. And is this policy applied by its literal terms?

A. No.

Ex. 16, 38:9-22. Emails between several employees of DHHS and outside contractors demonstrate that many people within the department were confused about the status of Memo #1-95 even after Director Pristow states that he directed Service Area Administrators to stop enforcing the policy. Ex. 29 (Email from Cynthia Bremer to Marylyn Christenson, Nov. 27, 2012, "I would just make her aware that the memo [#1-95] which clarifies the policy has not been rescinded so she is aware it is basically against policy at this point."); Ex. 30 (Email from Marylyn Christenson to KaCee Zimmerman, Nov. 21, 2012, "Perhaps no one has clearly explained to me how we can license a [same-sex couple's] home when this memo is still in effect."); Ex. 32 (Email from Marylyn Christensen to Kathleen Stolz, Nov. 4, 2012, "Oh. I assumed it was still in force since it's on the website."); Ex. 33 (Email from Bob Furr to Marylyn Christenson, June 29, 2012, "While I may agree that the 1-95 policy memo needs to be changed I and any contractor needs to follow that memo until that policy is changed."); Ex. 34 (Email from Julie Pham to Nathan Busch, June 4, 2013 "Is [Memo #1-95] still the current policy or has it been rescinded?"); Ex. 36 (Email from Nathan Busch to Tony Green and others, November 6, 2012, "This memo [#1-95] is still

active and has not been rescinded. An exception to the memo must be granted by Director Pristow."); Ex. 36 (Email from Kathleen Stolz to Nathan Busch, December 7, 2012, "Okay Nathan, be patient with me as I try to get clarity on this Admin memo [#1-95] on behalf of my staff."); Ex. 38 (Email from Lindy Bryceson to Pepper Meyer, September 17, 2012, "Can we have a brief time on Thursday to agree on whether or not unmarried unrelated adult exceptions are to come to the central office. We are doing this differently across the state. We should only need a few minutes. The current policy memo is not clear on this issue."); Ex. 42 (Email from Jessyca Vandercoy of Lutheran Family Services to Thomas Pristow, September 4, 2012, "I am writing to request clarification . . . The memo from the 90's seems to be in affect [sic], restricting agencies and the State, to approve/license homes of same-sex couples . . . I understand this is not policy but has been a barrier to many families becoming foster parents, as the memo seems to be in full affect.").

The current policy of DHHS as set forth in the deposition of Pristow allows gay individuals, gay couples, and "unrelated, unmarried adults residing together" to obtain foster care licenses and to adopt state wards. Thus, DHHS' current policy reflects its interpretation and application of the "best interests of the child" standard in its regulations. This current stated policy of DHHS is wholly inconsistent with Memo #1-95. Memo #1-95 has not been formally rescinded or replaced with the current policy. DHHS cannot have two conflicting policies that reflect wholly incompatible interpretations of the same regulations. *Cf. Melanie M. v. Winterer*, 290 Neb. 764, 775, 862 N.W.2d 76, 86 (2015) (Courts "accord deference to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent."); *Utelcom, Inc. v. Egr*, 264 Neb. 1004, 1011, 653 N.W.2d 846, 852 (2002) ("When an agency offers an interpretation of a disputed regulation during litigation that is inconsistent with its prior statements and actions

regarding the regulation, the interpretation is not entitled to deference."). It simply defies common sense for a governmental agency to adopt a new policy, and not rescind or replace a prior Administrative Memorandum that is wholly inconsistent with the current policy.

Additionally, while not raised by the parties, the court has concerns that Memo #1-95 is more properly considered a "rule" as defined by the Administrative Procedures Act ("APA") as opposed to a policy or Administrative Memorandum. Pursuant to the APA, a rule is defined as

> any rule, regulation, or standard issued by an agency, including the amendment or repeal thereof whether with or without prior hearing and designed to implement, interpret, or make specific the law enforced or administered by it or governing its organization or procedure. Rule or regulation shall not include (a) rules and regulations concerning the internal management of the agency *not affecting private rights, private interests, or procedures available to the public* . . . .

NEB. REV. STAT. § 84-901 (Reissue 2014) (emphasis added). Memo #1-95 clearly affects private rights and interests as it categorically bars gay and lesbian individuals and couples and "unrelated, unmarried adults residing together" from obtaining foster care licenses. However, the provisions of Memo #1-95 have not been formally adopted into any regulation as required by the APA. The court may take judicial notice of DHHS regulations, and there is no regulation similar to Memo #1-95. *See* NEB. REV. STAT. § 84-906.05 ("Every court of this state may take judicial notice of any rule or regulation that is signed by the Governor and filed with the Secretary of State pursuant to section 84-906."). If Memo #1-95 is a "rule" under the APA, then it is invalid because it was never formally adopted pursuant to APA procedures. *See McAllister v. Nebraska Dep't of Corr. Servs.*, 253 Neb. 910, 573 N.W.2d 143 (1998) (finding employee disciplinary rule was a regulation within the meaning of the APA and was therefore invalid as it was not filed with the Secretary of State).

Based on the foregoing, it is the determination of the court that Memo #1-95 is invalid and

should be rescinded, and ordered stricken or replaced with the current policy, for the reason that it is not consistent with the current policy of DHHS. The court further finds that Memo #1-95 should be stricken in its entirety as neither the portion pertaining to gay and lesbian individuals and couples nor the portion pertaining to "unrelated, unmarried adults residing together" would have been adopted without the other. The overall intent of Memo #1-95 was to identify particular types of people that DHHS deemed unfit to be issued foster care licenses, and the provision barring "unrelated, unmarried adults residing together" further served DHHS' purpose in preventing gay and lesbian couples from receiving foster care licenses as, at the time Memo #1-95 was issued, gay and lesbian couples could not be married in Nebraska.[1] *See State ex rel. Douglas v. Thone*, 204 Neb. 836, 851–52, 286 N.W.2d 249, 257 (1979) ("When the invalid portions of a statute are so interwoven with the rest of the act so that the act may not be operative with the void portions eliminated or where it is obvious from an inspection of the act that the invalid portion formed the inducement for the passage of the act, the entire act fails.").

Additionally, pursuant to the holding of the United States Supreme Court in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), the court holds that Memo #1-95 is stricken as, on its face, it violates the Equal Protection and Due Process Clauses. *Obergefell* recognized that gay and lesbian individuals have a fundamental right to marry under the Equal Protection and Due Process Clauses. Memo #1-95 burdens that fundamental right.

CURRENT REVIEW PRACTICES

Defendants assert that the current practice of DHHS is to review all foster care placements

1 The court also notes that, at the hearing on the cross-motions for summary judgment, counsel for Defendants did not specifically object to the court striking the language "unrelated, unmarried adults residing together" from Memo #1-95, but instead maintained that it was not necessary based on Defendants' argument that Memo #1-95 was not applied.

using only the "best interest of the child" standard. At the same time, Defendants admit that placements with gay and lesbian individuals and gay and lesbian couples are subject to five levels of review where placements with heterosexual individuals and heterosexual couples are subject to no more than four levels of review. Placements with gay and lesbian individuals and gay and lesbian couples are reviewed by the Director but placements with heterosexual individuals and heterosexual couples are not.

Defendants have not argued, nor have they identified, any legitimate government interest to justify treating gay and lesbian individuals and gay and lesbian couples differently than heterosexual individuals and heterosexual couples in this review process. In fact, Defendants assert that they do not treat gay and lesbian individuals, gay and lesbian couples, or unrelated, unmarried adults residing together any differently than heterosexual married couples. Defendants assert that the extra level of review for placements with gay and lesbian individuals and gay and lesbian couples was implemented to prevent bias against those persons. The Defendants, however, have failed to satisfactorily explain how the extra level of scrutiny can prevent bias when only approved placements are sent to the Director for review. It is not logical that a procedure could prevent bias when it does not deal with placements that were rejected, or not recommended, during one of the previous four stages of review. If the Defendants wanted to prevent bias against gay and lesbian couples, Defendants would review denials of placements rather than approvals of placements.

Defendants state that they always follow the "best interest of the child" standard when making decisions relating to the placement of foster children in out-of-home care. Defendants acknowledge that no child welfare interest is advanced by treating gay and lesbian persons differently from heterosexual persons in decisions regarding licensing or placement in foster or

adoptive homes. Ex. 6, 10:11-13:16, 19:24-20:3; Ex. 8, 63:4-8; Ex. 9, 68:19-69:7; Ex. 10, 80:15-25; Ex. 11, 170:24-171:10; Ex. 12, 75:25-76:5; Ex. 13, 97:22-98:3; Ex. 14, 52:7-12; Ex. 15, 79:4-8. Defendants' acknowledgement further belies any rational basis for subjecting approved placements with gay and lesbian individuals and couples to an extra level of review. *See Snyder v. IBP, Inc.*, 229 Neb. 224, 227, 426 N.W.2d 261, 264 (1988) (a "classification must rest upon real differences of situations and circumstances surrounding the members of the class relative to the subject of the legislation which render appropriate its enactment").

The court recognizes that, as a state agency, DHHS has the power to adopt any review process it chooses that is consistent with the law. However, pursuant to the United States Supreme Court holding in *Obergefell v. Hodges*, the current practice of subjecting gay and lesbian individuals and couples to additional levels of review than heterosexual individuals and heterosexual married couples is in violation of the Equal Protection Clause and the Due Process Clause. Therefore, consistent with the holding of *Obergefell v. Hodges*, this court must order Defendants to refrain from adopting or applying policies, procedures, or review processes that treat gay and lesbian individuals and couples differently from similarly situated heterosexual individuals and couples when evaluating foster care or adoption applicants under the "best interests of the child" standard set forth in DHHS' regulations.

CONCLUSION

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Plaintiffs' motion for summary judgment is granted and sustained. Defendants' motion for summary judgment is denied and overruled. The court specifically grants the relief here enumerated:

1. Memo #1-95 is ordered rescinded, and is ordered stricken or replaced with the current policy; and consistent with the stated policy of DHHS, Defendants and those acting in concert with

them are enjoined from enforcing Memo #1-95 and/or applying a categorical bar to gay and lesbian individuals and gay and lesbian couples seeking to be licensed as foster care parents or to adopt a state ward.

2. Defendants and those acting in concert with them are ordered to refrain from adopting or applying policies, procedures, or review processes that treat gay and lesbian individuals and couples differently from similarly situated heterosexual individuals and couples when evaluating foster care or adoption applicants under the "best interests of the child" standard set forth in DHHS' regulations.

Costs of this action are taxed to Defendants.

A copy of this order is sent to counsel for Plaintiffs and to counsel for Defendants.

Dated this 15th day of September, 2015.

BY THE COURT:

Hon. John A. Colborn
District Judge