Prinzivalli v Farley
2016 NY Slip Op 32691(U)
May 3, 2016
Supreme Court, New York County
Docket Number: 114372/09
Judge: Joan A. Madden

[* 1]

FA 5/9/16 E

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden **PART** II

Justice

Index Number : 114372/2009
PRINZIVALLI JOANN
vs
FARLEY, THOMAS
Sequence Number : 008
COUNSEL FEES, EXPENSES

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision and Order.

RECEIVED
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NYS SUPREME COURT - CIVIL
GENERAL CLERK'S OFFICE

FILED
MAY 09 2016
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: May 5, 2016

_____, J.S.C.
HON. JOAN A. MADDEN

1. **CHECK ONE:** ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. **CHECK IF APPROPRIATE:** ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 11

JOANN PRINZIVALLI, PATRICIA HARRINGTON, MARCO WYLIE, and NAZ SEENAUTH,

Petitioners,

- against -

THOMAS FARLEY in his capacity as HEALTH COMMISSIONER OF THE CITY OF NEW YORK, NYC BUREAU OF VITAL STATISTICS, NEW YORK CITY OFFICE OF VITAL RECORDS, NEW YORK CITY BOARD OF HEALTH, NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, and THE CITY OF NEW YORK,

Respondents.

Index No.: 114372/09

DECISION/ORDER

MADDEN, JOAN, J.:

In this Article 78 proceeding/declaratory judgment action, commenced in 2009, petitioners challenge, as arbitrary, capricious, and discriminatory, respondents' regulation requiring proof of "convertive surgery" before issuing a new birth certificate to transgender applicants, and respondents' denial of petitioners' applications for birth certificates amending their names and sex designations. In December 2014, the regulation was amended, and petitioners subsequently received corrected birth certificates. Petitioners now move for an order granting them attorney's fees, pursuant to the New York City Human Rights Law (NYCHRL) (Administrative Code of the City of New York [Administrative Code] § 8-502 [g] [formerly 502(f)]).

Respondents oppose the motion.

Background

The court presumes the parties' familiarity with the underlying facts and procedural history of the case, which has been ongoing for about six years. In brief, in 2009, petitioner Joann Prinzivalli initially commenced this Article 78 proceeding, which was converted to a declaratory judgment action, and subsequently, by stipulation of the parties, was reconverted and consolidated with later proceedings commenced by petitioners Patricia Harrington, Marco Wylie, and Naz Seenauth.

Petitioners challenge the validity of section 207.05 (a) (5) of the New York City Health Code (Health Code) (24 RCNY 207.05 [a] [5]) (the regulation), which, since 1971, required, in order to have the gender changed on a birth certificate, proof of "convertive surgery," interpreted by respondents to mean genital surgery, the absence of which was the primary basis for denying petitioners' applications. Petitioners contend that respondents' reasons for retaining the "convertive surgery" requirement, and for interpreting that requirement to mean genital surgery, did not have a rational basis; and the regulation and its implementation discriminated against petitioners and other transgender and disabled persons, in violation of the NYCHRL Administrative Code § 8-107 (4) (a). This section, to the extent relevant, provides that is an unlawful discriminatory practice

for any provider of public accommodation to withhold or deny the accommodations or privileges it provides on the basis of an applicant's sexual orientation or disability.

Following motion practice, the court, finding that the proceeding was, essentially, a hybrid declaratory judgment/Article 78 proceeding raising more complex issues than commonly arise in summary proceedings, permitted and directed discovery with respect to whether respondents' convertive surgery requirement was rational and whether discrimination played any part in addressing requests of transgender or disabled individuals for birth certificates.

Document discovery, and discovery disputes, continued into August 2014. Just prior to the commencement of respondents' depositions in September 2014, and approximately five years after the commencement of litigation, petitioners learned that respondent New York City Department of Health and Mental Hygiene (DOH) intended to amend the regulation to remove the convertive surgery requirement; and depositions were postponed. On or about October 7, 2014, DOH proposed a resolution to amend section 207.05 of the Health Code to remove the name change and the convertive surgery requirements for transgender birth certificate applicants. *See* DOH Press Release # 039-14, dated October 7, 2014, Ex. EE to Affirmation of Christina Hoggan in Opposition to Petitioners' Motion (Hoggan Aff.); *see also* Notice of Public

Hearing, available at www1.nyc.gov/assets/doh/downloads/pdf/notice/2014/boh-noi-207.05. At the same time, New York City Council Member Corey Johnson introduced a bill to require the DOH to issue birth certificates to transgender applicants without requiring proof of convertive surgery. *See* Committee Report, Ex. Y to Hoggan Aff. Public hearings on the proposed changes were held in November 2014, at which three of the petitioners, and Michael Silverman, executive director of the Transgender Legal Defense and Education Fund, petitioners' co-counsel in this case, among others, testified or submitted comments. The bill was passed by the City Council on December 8, 2014, and, on December 9, 2014, DOH adopted the proposed rule change, which became effective January 12, 2015. Amended birth certificates have now been issued to all petitioners.

Discussion

Petitioners move for costs and attorney's fees under Administrative Code § 8-502 (g), which provides that "[i]n any civil action commenced pursuant to this section, the court, in its discretion, may award the prevailing party costs and reasonable attorney's fees... prevailing includes a plaintiff whose commencement of litigation has acted as a catalyst to effect policy change..." Petitioners contend that they are entitled to fees as prevailing parties in this litigation.

Respondents argue, at the outset, that petitioners cannot

seek legal fees under the NYCHRL because the statute does not apply to petitioners' claims that respondents discriminated against them based on gender and disability in the issuance or amendment of birth certificates. Respondents contend, that the issuance or amendment of birth certificates, which does not appear in the statutory definition, "is clearly not a public accommodation." *See* Respondents' Memorandum of Law in Opposition to Petitioners' Motion (Rp. Memo), at 6, 7. Respondents further argue that petitioners are not entitled to legal fees as they are not prevailing parties in this litigation.

Public Accommodation

Administrative Code § 8-107(4)(a), to the extent relevant, provides:

> [i]t shall be an unlawful discriminatory practice for any person, being the owner, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation, because of the actual or perceived race, creed, color, national origin, age, gender, disability, marital status, partnership status, sexual orientation or alienage or citizenship status of any person, directly or indirectly, to refuse, withhold from or deny to such person any of the accommodations, advantages, facilities or privileges thereof...

In support of their argument, respondents point to relevant parts of the following definition of public accommodation as defined in Administrative Code § 8-102 (9),

> "[t]he term 'place or provider of public accommodation' shall include providers,

> whether licensed or unlicensed, of goods, services, facilities, accommodations, advantages or privileges of any kind, and places, whether licensed or unlicensed, where goods, services, facilities, accommodations, advantages or privileges of any kind are extended, offered, sold, or otherwise made available. Such term shall not include any club which proves that it is in its nature distinctly private..."

Respondents argue that this definition does not include the issuance or amendment of birth certificates and that the pre-1991 statutory definition of public accommodation supports their interpretation of the law. Before 1991, Administrative Code § 8-102 (9) included an extensive list of examples of public accommodations, as well as the more general definition of "establishments dealing with goods or services of any kind," and expressly excluded libraries, educational institutions, and clubs which prove they are "distinctly private." *See* Rp. Memo at 7-8. Respondents' apparent argument is that this list in the pre-1991 Administrative Code, reflects an intent to limit the definition to the types of public accommodations enumerated in the examples and that therefore, public accommodations do not include the issuance or amendment of birth certificates.(*id.* at 7). However, contrary to respondents' argument, the absence of a specific mention in the statutory definition of the provision of services by government agencies, such as DOH's issuance of birth certificates, in either the present, or the pre-1991 definition of public accommodation, does not, by itself, exclude it from the

statute's purview.

Moreover, to the extent the list of examples in the pre-1991 definition has any relevance, the list is, "illustrative, not specific," and not exclusive. See *Cahill v Rosa*, 89 NY2d 14, 21 (1996) (finding, under a similarly worded definition in the New York State Human Rights Law (NYSHRL) (*see* Executive Law § 292 [9]), that a private dentist office, not listed in statute, was a public accommodation); *see also Matter of U.S. Power Squadrons v State Human Rights Appeal Bd.*, 59 NY2d 401, 409-410 (1983)(private boating organization, not listed in the state statute, is a public accommodation); *New York Road Runners Club v State Div. of Human Rights*, 55 NY2d 122 (1982)(New York Marathon is a public accommodation); *D'Amico v Commodities Exch. Inc.*, 235 AD2d 313, 314 (1st Dept 1997) (trading floor of commodities exchange, not included in statutory list, is a place of public accommodation); *Walston & Co. v New York City Commn. on Human Rights*, 41 AD2d 238 (2d Dept 1973) (investment stock trading company, not listed in statute, is a public accommodation as an "establishment dealing in services to the public"); *DiMiceli & Sons Funeral Home v New York City Commn. on Human Rights*, NYLJ, Jan. 14, 1987, at 12, col 3 (Sup Ct, NY County).

Most importantly, courts have found that government agencies are providers of public accommodations under the NYCHRL. *See Boureima v New York City Human Resources Admin.*, 128 AD3d 532,

533 (1st Dept 2015) (NYC Human Resources Administration [HRA] is a provider of public accommodation under NYCHRL); *Doe v City of New York*, 42 Misc 3d 502 (Sup Ct, NY County 2013) (plaintiff stated a claim for discrimination in public accommodation against HRA's HIV/AIDS Services Administration for treatment when seeking a benefits card).[1] Respondents' attempt to distinguish *Doe* by arguing that no government benefits are associated with a birth certificate (Rp. Memo at 21-22), misconstrues both the facts and the law. In *Doe*, the court found that plaintiff had a claim, not because she was being denied benefits, which she was not, but because she alleged disparate and discriminatory treatment in the process of seeking to change her gender on the benefits card. 42 Misc 3d at 505-506.

Moreover, with respect to the NYCHRL, Administrative Code § 8-130 provides that

> The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws,

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[1] *Matter of Birney v New York City Dept. of Health & Mental Hygiene* (34 Misc 3d 1243[A], 2012 WL 975082, 2012 NY Misc LEXIS 1267 [Sup Ct, NY County 2012]), involving a challenge to the kind of proof of convertive surgery required by DOH, and in which the court declined to address the NYCHRL issues and remanded the matter to DOH to reconsider petitioner's application, is not to the contrary. *New York County Bd. of Ancient Hibernians v Dinkins* (814 F Supp 358, 366 [SD NY 1993]), on which respondents rely, found that the St. Patrick's Day parade was not a public accommodation because it was "quintessential" protected free speech, and also is not instructive here.

> including those laws with provisions comparably-worded to provisions of this title, have been so construed.[2]

In construing this section, courts have held, that Administrative Code § 8-102 (9), like all provisions of the NYCHRL, must be construed "broadly in favor of discrimination plaintiffs, to the extent that such a construction is reasonably possible." *Albunio v City of New York*, 16 NY3d 472, 477-478 (2011); *see Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881, 885 (2013). Applying this construction, the nature and purpose of birth certificates are properly considered. As respondents have

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[2]This section clearly provides that a court in interpreting NYCHRL is not limited by the interpretation of similar New York State Human Rights Law (NYSHRL) nor its federal counterparts. Specifically, in construing this section, the First Department has held that "interpretations of state or federal provisions worded similarly to City HRL provisions may be used as aids in interpretation only to the extent that the counterpart provisions are viewed 'as a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise.'" *In Williams v New York City Hous. Auth.*, 61 AD3d 62, 66-67(1st Dept 2009),(citation omitted). With respect to the issue of public accommodation, a recent amendment to the definition of public accommodation in the NYSHRL is instructive, and, if viewed as a "floor", supports the conclusion that a governmental agency is subject to the NYCHRL. The amendment, effective November 22, 2015, adds that a public accommodation "shall include, regardless of whether the owner or operator of such place is a state or local government entity or a private individual or entity, . . . all places included in the meaning of such terms as . . . establishments dealing with goods or services of any kind . . . ." Executive Law § 292 (9), as amended by L 2015, ch 89, § 1. Moreover, the New York City Commission on Human Rights (CHR), the administrative agency charged with enforcing the NYCHRL, informs visitors to its website that "government agencies" are public accommodations. *See* CHR website, www.nyc.gov/html/cchr/html/coverage/public-accommodations.shtml.

recognized, a birth certificate "is a vital document relied upon by individuals to obtain, 'among other things, marriage certificates, drivers' licenses, passports, social security cards, and government benefits.'" *Matter of Birney*, 2012 WL 975082, at *8, 2012 NY Misc LEXIS 1267, at **21-22, citing respondents' memo of law. DOH also appears to have recognized this in proposing the amended regulation. *See* Notice of Adoption of Amendment, Ex. DD to Hoggan Aff., at 2. In testimony about the proposed regulation, Gretchen Van Wye, Assistant Commissioner, of the DOH's Bureau of Vital Statistics, noted that "documents that accurately reflect a person's gender identity can be critical to accessing healthcare, employment, and other important services." Testimony of Gretchen Van Wye before the New York City Council Committee on Health, November 10, 2014 (Van Wye Testimony), Ex. W to Hoggan Aff, at 2.

Based on the above legal precedent and considering the significance of a birth certificate, and construing Administrative Code §§ 8-102 (9) and 8-107(4)(a) broadly and in favor of petitioners, I conclude that DOH is a provider of public accommodation under the NYCHRL, and that a public accommodation includes the issuance or amendment of birth certificates.

Prevailing Party

Administrative Code § 8-502 (g)[3] provides that

> [i]n any civil action commenced pursuant to this section, the court, in its discretion, may award the prevailing party reasonable attorney's fees, expert fees and other costs. For the purposes of this subdivision, the term "prevailing" includes a plaintiff whose commencement of litigation has acted as a catalyst to effect policy change on the part of the defendant, regardless of whether that change has been implemented voluntarily, as a result of a settlement or as a result of a judgment in such plaintiff's favor.

Respondents argue that petitioners are not prevailing parties, and therefore they are not entitled to legal fees under the NYCHRL as their litigation was not a catalyst to changing 24 RCNY 207.05 (a) (5). *See* Rp. Memo at 9.

Administrative Code § 8-502 (g), which like numerous federal statutes, in its express authorization that a court, in its discretion, may award reasonable attorney's fees and costs to a prevailing party, "is consistent with the [NYC]HRL's purpose of making prevailing parties as whole as possible and deterring others from engaging in reprehensible discriminatory conduct." *Albunio v City of New York*, 35 Misc 3d 1238(A),(Sup Ct, NY County), affd 101 AD3d 656 (1st Dept 2012), affd as mod on other

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[3]This section, previously Administrative Code § 8-502(f), was amended by the Local Civil Rights Restoration Act of 2005 (Local Law No. 85 of City of New York [2005]) (Restoration Act).

grounds, 23 NY3d 65 (2014), citing *McIntyre v Manhattan Ford, Lincoln-Mercury*, 176 Misc 2d 325, 327 (Sup Ct, NY County 1997), *affd in part & mod in part*, 256 AD2d 269 (1st Dept 1998). As the Court of Appeals recognized, in addressing a claim under federal law, "attorney's fees are an integral part of the remedy necessary to achieve compliance with civil rights laws . . . [and] [i]n keeping with this remedial objective, . . . [statutory provisions for attorney's fees should be] liberally construed." *Matter of Giaquinto v Commissioner of New York State Dept. of Health*, 11 NY3d 179, 186 n 5 (2008) (internal quotation marks and citations omitted) (claim under 42 USC §§ 1983 and 1988); *see Matter of Thomasel v Perales*, 78 NY2d 561, 567 (1991)(finding that petitioner was entitled to attorney's fees pursuant to 42 USC § 1988); *Matter of Johnson v Blum*, 58 NY2d 454, 458-459 (1983)(prevailing party should generally be awarded attorney's fees in proceedings brought to vindicate civil rights); *see also Thomas v City of New York*, 2016 WL 319982, *2, 2016 US Dist LEXIS 8960, *4 (SD NY 2016) (awards of attorney's fees "'encourage the bringing of meritorious civil rights claims which might otherwise be abandoned'" for financial reasons [citation omitted]).

Courts that have considered generally the issue of whether a plaintiff is a prevailing party have found that "plaintiffs may be considered prevailing parties for attorney's fees purposes if they succeed on any significant issue in litigation which

achieves some of the benefit the parties sought in bringing suit." *Hensley v Eckerhart*, 461 US 424, 433 (1983) (internal quotation marks and citation omitted); "[t]o qualify as a prevailing party, a civil rights plaintiff 'must obtain at least some relief on the merits of his [or her] claim...' [which] means that a plaintiff prevails when 'actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *United States v City of New York*, 2013 WL 5542459, *3, 2013 US Dist LEXIS 125461, *11-13 (ED NY 2013) (citations omitted); "[a]t a minimum, the plaintiff 'must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant.'" *Baird v Boies, Schiller & Flexner, LLP*, 219 F Supp 2d 510, 517-518 (SD NY 2002), quoting *Texas State Teachers Assn. v Garland Independent Sch. Dist.*, 489 US 782, 792 (1989).

As discussed above, Administrative Code § 8-130 mandates that Administrative Code § 8-502 (g) be liberally construed in favor of petitioners, to accomplish "its uniquely broad and remedial purposes." *Albunio v City of New York*, 23 NY3d at 75; *Bennett v Health Mgt. Sys., Inc.*, 92 AD3d 29, 34 (1st Dept 2011); *Williams*, 61 AD3d at 66-67.[4] Consistent with this precedent, one

[4]Effective March 28, 2016, section 8-130 was further amended, by Local Law 35 of 2016, to add: "c. Cases that have correctly understood and analyzed the liberal construction

federal court which has considered the catalyst theory in applying NYCHRL, found that in construing Administrative Code § 8-502(f),[5] "in favor of [plaintiff] to the extent possible," that "it was the threat and instigation of litigation that prompted [defendant's] otherwise inexplicable policy reversal." Hugee v Kimso Apartments, LLC, 852 F. Supp2d 281, 296-297 (ED NY 2012). Specifically, the court found that defendant for a year prior to litigation had ignored repeated requests by plaintiff, who was disabled, for modification of her apartment unit to accommodate her disability; that plaintiff filed her lawsuit before defendant showed any willingness to make the modifications; that a letter plaintiff sent approximately one month prior to the commencement of litigation put the defendant on notice that further legal action would be taken in the absence of a commitment to make the modifications; and that although two days elapsed between service of the complaint on the Secretary of State and a response by defendant to plaintiff's requests, defendant's failure to respond

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requirement of subdivision a of this section and that have developed legal doctrines accordingly that reflect the broad and remedial purposes of this title include *Albunio v City of New York*, 16 NY3d 472 (2011), *Bennett v Health Management Systems, Inc.*, 92 AD3d 29 (1st Dept 2011), and the majority opinion in *Williams v New York City Housing Authority*, 61 AD3d 62 (1st Dept 2009)." This provision was added "to provide additional guidance for the development of an independent body of jurisprudence for the New York city human rights law that is maximally protective of civil rights in all circumstances." L.L. 35/2016, § 1.

[5]As noted above, now Administrative Code § 8-502 (g).

to plaintiff for a year prior to the commencement of litigation, "raises a reasonable, if not inescapable inference that it was the threat and instigation of litigation that prompted [defendant's] otherwise inexplicable policy reversal."[6] Id.

In any ordinary sense of the word, petitioners have prevailed in this matter. They sued to get the DOH regulation changed, to obtain new birth certificates, and to be treated fairly in the application process, and they have "achieved 'the central relief sought.'" *Graham Court Owners Corp. v Taylor*, 24 NY3d 742, 752 (2015) (tenant obtaining dismissal of holdover proceeding was prevailing party) (citation omitted). Notwithstanding the change in DOH's policy regarding the amendment of birth certificates with respect to transgender applicants, as respondents voluntarily amended the regulation, prior to a judicial determination, the court, to determine whether petitioners are entitled to attorney's fees, must consider whether petitioners' commencement of litigation "acted as a catalyst to effect policy change" by respondents (Administrative Code § 8-502 [g]).

Respondents argue that petitioners were not a catalyst for amending 24 RCNY 207.05(a)(5). According to respondents, legislative history shows that "it was a change in both federal

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[6]The court noted that defendant offered no proof as to when it first learned of the commencement of litigation.

and state policy which served as the catalyst to the amendment, not the instant proceeding." Rp. Memo at 9. As respondents' counsel asserted at oral argument, "[t]his litigation did not affect the federal government changing and it did not affect the State. And that's what we're relying on." Transcript of Oral Argument, dated August 27, 2015 (Tr.), at 27.

Neither the legislative history, nor the chronology of the amendment process, however, indicate that a change in federal or state law was the reason for amending the regulation. In her testimony in support of the amendment, Assistant Commissioner Van Wye stated that the amendment was proposed in recognition that "not all applicants with incongruent gender assignment wish to undergo surgery, and the surgery requirement may present an unnecessary burden." Van Wye Testimony, Ex. W to Hoggan Aff., at 2. The Statement of Basis and Purpose of the amendment recognizes that certain federal and state policies have already been similarly changed, and that "[t]his trend reflects an understanding . . . that not all transgendered persons want surgery in order to express their gender identity." *See* Notice of Adoption of Amendment, Ex. DD to Hoggan Aff., at 2. It does not however, demonstrate that the changes in federal and state laws, some of which occurred years before, were the reason DOH went ahead with amending the regulation.

In 2009, when this litigation was commenced, section 207.05

(a)(5) of the Health Code had been in effect since 1971. In 2006, having acquired sufficient information that genital surgery was not the only test of a transgendered person's sex, DOH proposed an amendment similar to the one proposed in 2014, permitting proof other than proof of genital surgery to demonstrate the gender of an applicant seeking a corrected birth certificate. The Statement of Basis and Purpose of the proposed 2006 amendment noted that "New York City had been a leader in the early 1970s in this area, but it has not amended this section of the Health Code since enacted . . . ." Notice of Intention to Amend Article 207 of the New York City Health Code, Ex. D to Affidavit of Steven Schwartz, dated July 15, 2011 (Schwartz 2011 Aff.), Ex. D to Hoggan Aff.

The 2006 proposed regulation was subsequently withdrawn due to concerns raised by certain New York City agencies, including the Department of Correction (DOC) and the New York City Police Department (NYPD), and because DOH "had not fully considered the implications . . . [the amendment] could have on institutions relating to housing and other accommodations;" and in part because of concerns about pending federal regulations regarding identification documents, such as the Real ID Act of 2005. *See* Schwartz 2011 Aff., ¶¶ 17-18. Although Schwartz stated, in 2011, that the effect of the legislation was still unclear (*id.*, ¶ 21), the Real ID Act of 2005 was signed in 2005, and regulations were

finalized in 2008. *Id.* at 8 n 3.

Following withdrawal of the 2006 amendment, Schwartz asserted, DOH "has, from time to time, reconsidered the issues" raised regarding the amendment, but, as of 2011, "has not yet determined that it is appropriate to propose additional amendments." *Id.*, ¶ 20.[7] Despite the claim that respondents periodically revisited the issue of amending the regulation, respondents fail to submit an affidavit or other evidence showing that, after 2006 and prior to this litigation, they reconsidered their policy. According to Lorna Thorpe, Deputy Commissioner of the DOH's Division of Epidemiology, meetings were held with DOC and the NYPD in 2006, and lawyers were consulted, but DOH could not "determine with any certainty what impact the proposed amendment would have on institutions which housed by sex." Affidavit of Lorna Thorpe, dated November 15, 2012, Ex. C to Hoggan Aff., ¶¶ 12-13. Respondents do not present any evidence, however, that they further investigated or addressed

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[7]In fact, in 2011, in litigation challenging the extent of proof required to show convertive surgery, respondents continued to argue not only that requiring proof of genital surgery was rational and reasonable ("because birth certificates categorize based on a person's genitalia, . . . [they will be changed only if] the applicant establishes he or she has the genitalia that corresponds to the requested designation on the birth certificate"); but also that requiring that such proof include detailed medical records about the specific surgery performed and pre- and post-operative psychiatric evaluations, was rational and reasonable. *Matter of Birney*, 2012 WL 975082, at *8; 2012 NY Misc LEXIS 1267, at **9-10.

the concerns raised in opposition to the 2006 amendment by the DOC and the NYPD and other agencies, and it is unclear whether any such concerns were raised or addressed in response to the 2014 proposed amendment.

Notably, the federal government stopped requiring surgery to change the gender on a passport in 2010, as respondents admittedly were aware (*see* Tr. at 24, 290), and the record before this court lacks any evidence that the change in the federal government's policy prompted any review of the regulation. Similarly, the record lacks evidence that further changes in federal policy in 2013 caused respondents to consider amending the regulation. While respondents argue that they wanted to wait to make a change to "stay in line" with the state policy, they do not submit an affidavit or other evidence, and the legislative history does not indicate, that waiting for the state to change its policy was necessary, or that the amendment was intended to conform with state policy, and they do not claim that they previously were intent on conforming the DOH regulation to the state regulation.

To the extent that respondents also argue that they did not act out of a concern for a negative ruling in this litigation, and contend that petitioners could not have prevailed on their efforts to get respondents to change the regulation, that argument is unavailing. Respondents contend that, even if the

court found that the regulation was irrational and discriminatory, it could not direct respondents to promulgate new regulations, and petitioners would have accomplished nothing more than a reversion to the pre-1971 regulations. Rp. Memo at 15-16. While this issue has become moot, contrary to respondents' claim that petitioners' success in this litigation would be fruitless, or even harmful to the people they were seeking to benefit (*id.* at 16 n 9), a ruling that the regulation was irrational would require implementation of rules and procedures which could withstand scrutiny as to their rationality and reasonableness. Further, while the court did not reach the merits of petitioners's claims, respondents, by their actions, have implicitly acknowledged them. Clearly, as a result of the change in the regulation, there has been a material alteration in the legal relationship of the parties, as respondents are "now legally incapable of acting as [they] did before" this litigation. *Perez v Westchester County Dept. of Corr.*, 587 F3d 143, 150 (2d Cir 2009).

In view of the circumstances surrounding this case, including respondents' years-long delay, commencing in 2006, in considering amending the regulation, notwithstanding their awareness of federal policy changes as far back as 2010, and their continued resistance to the relief sought by petitioners; and even assuming that other factors, such as a change in the

mayoral administration and a change in the state's policy, may have come in to play with respect to deciding to change the regulation in 2014, there is "a reasonable, if not inescapable inference" that petitioners' commencement of this litigation was a catalyst in getting the regulation changed. See *Hugee*, 852 F Supp 2d at 296. In reaching this conclusion, I note that Administrative Code § 8-502 (g) requires that a plaintiff's commencement of litigation, be "a" catalyst to affect change in policy, not that it be the only driving force behind the change. Thus, even if changes in federal or state policy or in the city administration were factors affecting the change, these factors would not preclude a finding that the commencement of this litigation was "a" catalyst for change. Construing the NYCHRL attorney's fee provision "as favorably to [petitioners] as possible" (Id), I conclude that petitioners were prevailing parties under Administrative Code § 8-502 (g).

Reasonable Fees

As prevailing parties, therefore, petitioners are entitled to recover costs and reasonable attorney's fees. "[A] reasonable attorney's fee is commonly understood to be a fee which represents the reasonable value of the services rendered." *Sass v MTA Bus Co.*, 6 F Supp 3d 238, 260 (ED NY 2014). In civil rights cases, a reasonable fee is one "that is sufficient to induce a capable attorney to undertake the representation of a

meritorious civil rights case." *Perdue v Kenny A.*, 559 US 542, 552 (2010); *see Finch v New York State Off. of Children & Family Servs.*, 861 F Supp 2d 145, 153-54 (SD NY 2012).

Courts have considerable discretion in determining what constitutes a reasonable attorney's fee in any given case (*see Finch*, 861 F Supp 2d at 150; *Lancer Indem. Co. v JKH Realty Group, LLC*, 127 AD3d 1035, 1035-1036 [2d Dept 2015]), and commonly employ the "lodestar" method to calculate a "presumptively reasonable fee." *Millea v Metro-North R.R.*, 658 F3d 154, 166 (2d Cir 2011); *Matakov v Kel-TechConstruction, Inc.*, 84 AD3d 677 (1st Dept 2011)(finding that "the court properly applied the lodestar method to calculate Plaintiff's class action fees"). "Under the lodestar method, the court determines the reasonable hourly rate and multiplies it by the reasonable number of hours expended . . . ." *Flemming v Barnwell Nursing Home and Health Facilities, Inc.*, 56 AD3d 162, 165 (3d Dept 2008), *affd on other grounds* 15 NY3d 375 (2010). In the calculation, a court must determine "a reasonable hourly charge for each category of service rendered...which should be based on the customary fee charged for similar services by lawyers in the community with like experience and comparable reputation to those by whom the prevailing party was represented." *Matter of Rahmey v Blum*, 95 AD2d 294, 302 (2d Dept 1983)(citation omitted); see *Matakov v Kel-Tech Constr. Inc.*, supra at 678 (1st Dept 2011). Moreover,

"[i]t is appropriate to distinguish between legal work in the strict sense, and investigation, clerical work, compilation of facts and statistics and other work which can often be accomplished by non-lawyers but which a lawyer may do because he [or she] has no other help available."

Matter of Rahmey, supra at 301 (citation omitted).

The party seeking fees "bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates." *Hensley*, 461 US at 437; *see Shabazz*, 2015 WL 7779267, at *2, 2015 US Dist LEXIS 161728, at *4; *Finch*, 861 F Supp 2d at 150. The requesting party has the burden of submitting competent evidence that its fees were consistent with customary fees in the community and of the training, background, and experience of the attorneys performing the work. Matakov v Kel-Tech Construction Inc., supra at 678 (citation omitted).

Here, as shown in billing records submitted on this motion, petitioners' counsel, Kaye Scholer, LLP (Kaye Scholer), is requesting fees for five attorneys, for work on this case from December 2012 to May 2015, at hourly rates between $300 and $550. Kaye Scholer also seeks fees for two "non-std attorneys," at $315 and $525 per hour. While petitioners' counsel submits three brief profiles from the firm's website, these profiles are not competent evidence. Absent competent evidence of the background, training and experience of the attorneys who worked on this

matter, petitioners have failed to provide sufficient proof for the court to determine what a reasonable hourly rate would be for each attorney.

Moreover, notwithstanding Moilanen's affirmation to the contrary (Moilanen Affirmation in Support of Petitioners' Motion, ¶ 5), Kaye Scholer has "failed to establish through competent evidence that its fees were consistent with 'customary fee[s] charged for similar services by lawyers in the community with like experience and of comparable reputation,' or were reasonable." *Matakov*, 84 AD3d at 678.

Nor do the cases on which petitioners' counsel relies support the requested rates. At the outset, I note petitioners rely on fee awards in federal court, which awards may provide guidance in determining a reasonable hourly rate. *Albunio v City of New York*, 23 NY3d at 73. With respect to recent fee awards in civil rights and discrimination cases in the Southern District, courts have variously found that "the range of appropriate fees for experienced civil rights litigators is between $350 and $450 per hour" (*Shabazz*, 2015 US Dist LEXIS 161728, at *7, and cases cited therein) and "a reasonable hourly rate for a civil rights attorney can range from $250 to $650." *Coakley v Webb*, 2016 WL 1047079, *3, 2016 US Dist LEXIS 30780, *9 (SD NY 2016). Courts award the high end of that range only to the most skilled and experienced attorneys in the field (*see e.g. Rozell*, 576 F Supp

2d 527 [awarding $600 per hour to senior partners, with more than 30 years experience, in "one of the outstanding firms representing plaintiffs in employment cases"]); and even in those cases, fee requests are often reduced. *See e.g. Coakley*, 2016 US Dist LEXIS 30780, at *9-10 (despite finding attorney's more than 40 years of civil rights experience supported a rate at the top of the range, court reduced hourly rate to $575 per hour due to time and nature of case). Awards for associates generally fall within the $200 to $350 per hour range, depending on relevant experience. *See Andrews v City of New York*, 118 F Supp 3d 630, 640 (SD NY 2015) (and cases cited therein)(setting rate of $250 for attorneys who were seven and four years out of law school; $200 for first year associate); *see also Gonzalez v Scalinatella, Inc.*, 112 F Supp 3d 5, 28 (SD NY 2015) (noting "'courts in this district have found that $300 is an appropriate hourly rate for a senior associate with at least eight years' experience,'" but granting requested $350 rate to attorney with ten years' experience).

Kaye Scholer's request for paralegal and other support staff fees are not supported with any background information or evidence of prevailing market rates. Petitioners request fees for seven paralegals, at hourly rates ranging from $135 to $240, while recent cases indicate that reasonable paralegal hourly rates range from $75 to $125. *See e.g. Coakley*, 2016 US Dist

LEXIS 30780, at *25 n 12 ($125); *Andrews*, 119 F Supp 3d at 643 ($100); *Gonzalez*, 112 F Supp 3d at 5 (SD NY 2015) ($100 and $105); *Shabazz*, 2015 US Dist LEXIS 161728, at *10 ($75). Similarly, petitioners' counsel offers no explanation for the various hourly rates requested for litigation support staff ($150 to $295), library staff ($145 to $190), and other clerks ($110 to $200), or why they differ from the paralegal rates. *See Andrews*, 118 F Supp 3d at 643 (research director and reference library compensated at paralegal rate of $100 per hour).

Therefore, while petitioners are entitled to recover costs and reasonable attorney's fees, the court finds that the issue of the amount of fees and expenses petitioners may recover from respondents should be resolved at a hearing, addressing whether the fees claimed by petitioners are reasonable, based on the requested rates, the hours expended, and the kind of work performed. In this connection, Kaye Scholer shall produce copies of its time and billing records, together with a summary and breakdown of the categories of legal services provided, and the hours attributable to each category of services and counsel shall arrange for the requisition of the court files so they are available at the hearing for the Referee's inspection and evaluation of the work performed.

Conclusion

In view of the above, it is

ORDERED that petitioners' motion for attorney's fees and costs is granted; and it is further

ORDERED that the amount of reasonable attorney's fees and costs that petitioners may recover against respondents is referred to a Special Referee to hear and report with recommendations, in accordance with this decision; and it is further

ORDERED that the issue of the amount of reasonable attorneys' fees and costs is referred to a Special Referee to hear and report with recommendations; and it is further

ORDERED that the powers of the Special Referee shall not be limited further than as set forth in the CPLR; and it is further

ORDERED that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date on calendar of the Special Referee Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the References link under Courthouse procedures), shall assign this matter to a Special Referee to hear and report as specified above; and it is further

ORDERED that when the parties appear at the hearing before the Special Referee, as indicated above, counsel for petitioners shall provide copies of its specific billing and time records, together with a summary and breakdown of the categories of legal

services provided, and the hours attributed to each category of services, and counsel shall arrange for the requisition of the Court files so that they are available at the hearing for the Referee's inspection and evaluation of written work performed; and it is further

ORDERED that the Referee's report and recommendations shall include specific findings identifying counsel's hourly rate and a breakdown of the nature and category of the legal services performed, and the hours attributed to each category; and it is further

ORDERED that counsel for petitioners shall, within 15 days of this decision and order submit to the Special Referee Clerk by fax (212-401-9186) or email an Information Sheet (which can be accessed at the References link of the Court website) containing all the information called for therein and that, as soon as practical thereafter, the Special Referee Clerk shall advise counsel of the date fixed for the appearance on the matter upon the calendar of the Special Referee Part; and it is further

ORDERED that the parties shall appear at the hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed on the date fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee Part in accordance with the rules of that Part; and it is further

ORDERED that the hearing shall be conducted in the same manner as a trial before a Justice without a jury (CPLR 4320(a))(the proceeding will be recorded by a court reporter, the rules of evidence apply, etc) and, except as otherwise directed by the assigned Special Referee for good cause shown, the trial of the issues specified above shall proceed from day to day until completed; and it is further

ORDERED that the motion to confirm or reject the Report of the Special Referee shall be made within the time specified in CPLR 4403 and Section 202.44 of the Uniform Rules for the Trial Courts.

Dated: May 3, 2016

J.S.C.

HON. JOAN A. STAUDT

FILED
MAY 09 2016
COUNTY CLERK'S OFFICE
NEW YORK