2021 WL 3666264 (N.Y.Sup.) (Trial Order)
Supreme Court of New York.
New York County

Yu Pride ALLIANCE, Molly Meisels, Doniel Weireich, Amitai Miller and Anonymous,
v.
YESHIVA UNIVERSITY, Vice Provost Chaim Nissel and President Ari Berman.

No. 154010/2021.
August 18, 2021.

***1** Part 8
Mot. Date
Mot. Seq. No. 2, 3 and 6

Decision/Order as to Seqs. 2&3 Interim Order as to Seq. 6

Present: Hon. Lynn R. Kotler, J.S.C.

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

Notice of Motion/Petition/O.S.C. -- Affidavits -- Exhibits	ECFS DOC No(s). _____
Notice of Cross-Motion/Answering Affidavits -- Exhibits	ECFS DOC No(s). _____
Replying Affidavits	ECFS DOC No(s). _____

The year is 2021. Defendant is a school that refuses to formally recognize an LGBTQ organization. But the defendant is not just any school. Defendant is Yeshiva University, an educational institution with a proud and rich Jewish heritage and a self-described mission to combine "the spirit of Torah" with strong secular studies. Plaintiffs are the student organization wishing to obtain formal recognition, namely YU Pride Alliance, and both named former students and an anonymous current student. The remaining defendants are Vice Provost Chaim Nissel and President Ari Berman of Yeshiva.

There are three motions pending before the court. In motion sequence 2, plaintiffs seek an order restraining the defendants from continuing their refusal to officially recognize the YU Pride Alliance as a student organization because of the members sexual orientation or gender and/or YU Pride Alliance's status, mission, and/or activities on behalf of LGBTQ students. Plaintiffs further seek an order granting YU Pride Alliance "the full and equal accommodations, advantages, facilities, and privileges of Yeshiva University, because of the actual or perceived sexual orientation or gender of the YU Pride Alliance's members, and/or the YU Pride Alliance's status, mission and/or activities on behalf of LGBTQ students." Defendants oppose that motion.

In motion sequence 3, defendants move for leave to file certain documents in their opposition to plaintiffs' motion for a preliminary injunction under seal, or alternatively leave to submit said documents in unredacted form to the court for *in camera* review. There is no opposition to that motion.

Finally, in motion sequence 6, defendants move to dismiss this action. They argue that plaintiff's claims are untenable under the New York City Human Rights Law, N.Y.C. Admin Code § 8-101, *et seq.*, (the "NYCHRL") because Yeshiva falls within an exception to its application. Defendants further argue that if the NYCHRL applies to them, such application is unconstitutional. Finally, defendants separately move for dismissal of the claims against Nissel on the grounds that he is not a decision-maker, but rather, a messenger. Plaintiffs oppose that motion.

For the reasons that follow, the motion for a preliminary injunction is denied, the motion for leave to file under seal is denied without prejudice to renewal, and the motion to dismiss is converted to one for summary judgment pursuant to CPLR § 3212.

Background

Yeshiva enrolls more than 3,000 undergraduate students at Yeshiva College, Stern College for Women, the Sy Syms School of Business, the Katz School of Science and Health, and the S. Daniel Abraham Program in Israel. Yeshiva describes itself as a "deeply religious" university, to wit, all students are required to engage in religious studies, its campuses are sex-segregated, synagogues are located throughout both the men's and women's campuses so that students my pray and participate in other religious services, students must observe Orthodox Jewish laws and undergraduate dorms are governed by Torah values. Indeed, plaintiffs concede Yeshiva's deeply religious character in their pleadings.

***2** Relevant to this court's inquiry, plaintiffs allege that Yeshiva "is registered as an educational corporation, rather than a religious one" and is therefore eligible to receive certain New York State funding as a result.

Meanwhile, plaintiffs allege that Yeshiva has formally recognized 116 undergraduate student clubs as of the Fall 2020 semester. These clubs range from special-interest groups "as diverse as poetry and private equity, video games and the outdoors, and College Democrats and College Republicans, as well as across broad categories such as "Art," "Business," "Health and Wellness," "Sports and Fitness," and "Politics and Activism." Yeshiva further recognizes several cultural and affinity groups for students such as the Sephardic Club, YU Europeans, and the International Club.

To form a club at Yeshiva, students must submit an application in accordance with the procedures of Yeshiva's campuses where the students wish to have the club. This process delegates approval of student clubs to Yeshiva's student governments at each campus, but Yeshiva retains ultimate authority to override the decision of the student governments and accept or reject a club.

Plaintiffs further allege that Yeshiva has denied formal recognition to undergraduate LGBTQ organizations for more than a decade: "[o]ne of the first public iterations of an LGBTQ club at [Yeshiva], the "Tolerance Club," officially formed in 2009." In 2009, the Tolerance Club held an event called "Being Gay in the Modern Orthodox World", where students complained about "the school's atmosphere of silence surrounding issues of LGBTQ identity". Shortly after that event, plaintiffs allege that the Tolerance Club disbanded due to "significant pressure it faced from the [Yeshiva] administration".

In Spring 2019, Yeshiva refused to recognize a gay/straight alliance aptly called The Gay-Straight Alliance. This organization was proposed by several of the plaintiffs to school officials including defendant Nissel. On or about February 3, 2019, several Yeshiva students submitted a formal application to the Student Council presidents for club approval of a

gay/straight alliance. In the application, the stated purpose of the club was "to provide a safe space for students to meet, support each other, and talk about issues related to the intersection of sexual orientation and Jewish identity."

On February 5, 2019, plaintiff Miller and other students met with defendant Nissel to discuss the gay/straight alliance's application. During this meeting, Nissel allegedly told the students that such a group would be allowed to form "as long as it was not called "Gay Straight Alliance" and did not include the terms "LGBT," "queer," or "gay" in the title".

On February 13, 2019, the students proposed to defendant Nissel that the gay/straight alliance be called "Ahava" (the Hebrew word for "love"). In response, defendant Nissel sent a description of the "Jewish Activism Club," which mentioned LGBTQ inclusion along with numerous other topics in its mission statement, and indicated that the two overlapped and therefore there was no need for a gay/straight alliance. Thereafter, plaintiff Miller held further fruitless meetings with Yeshiva administrators in an effort to obtain recognition of the gay/straight alliance.

***3** In April 2019, plaintiff Meisels invited New York State Assembly Member Deborah Glick to speak on campus about her experience as an LGBTQ legislator. Yeshiva's Office for Student Life ("OSL") approved the event. Plaintiffs further allege:

> However, during the planning process for the event, members of the YU administration variously informed Plaintiff Meisels that (1) they did not want her to host the event and provide a space for LGBTQ students to complain to Assembly Member Glick about their experience on campus; and (2) if the event did take place, it could not focus on LGBTQ issues. After Plaintiff Meisels negotiated with the OSL, the OSL allowed the event to move forward under the title, "Overcoming Adversity: Minority Representation in NY Politics." The event was held on May 2, 2019.

In September 2019, plaintiff YU Pride Alliance was formed. The unofficial club was announced at a march held on September 15, 2019 in which plaintiff Meisels along with several other Yeshiva students, alumni and other supporters participated. The march, titled the "We, Too, Are YU" march, ended at one of Yeshiva's campuses.

Plaintiffs further allege, upon information and belief, that in response to YU Pride Alliance's formation and attempt to seek formal recognition by Yeshiva, Yeshiva convened a panel tasked with "fostering initiatives to address matters of inclusion, including LGBTQ-related issues." Plaintiffs complaint that this panel "required the members of the YU Pride Alliance to justify the need for an LGBTQ student club to a degree never required of another student group seeking approval." At a December 3, 2019 meeting between members of YU Pride Alliance including plaintiffs Meisels and Weinreich, and Yeshiva's Senior Vice President Josh Joseph, the latter urged the former to abandon their efforts to form an LGBTQ club because he and defendant Berman believed that some Yeshiva administration officials' views and the YU Pride Alliance members' views were likely to be "irreconcilable."

On January 30, 2020, YU Pride Alliance submitted a formal application to the Yeshiva Student Union, the student governing body charged with approving or denying applications in the first instance. YU Pride Alliance's mission statement is as follows:

> The Yeshiva University Alliance is a group of undergraduate YU students hoping to provide a supportive space on campus for all students, of all sexual orientations and gender identities, to feel respected, visible, and represented. Conversation is at the heart of our community, in order to foster awareness and sensitivity to the unique experiences of being a LGBTQ+ person in YU and the Orthodox community, and to advocate for their unconditional inclusion and acceptance. Our space will promote open dialogue for all, regardless of religious views and political affiliations. We ask students to be cognizant and respectful of the beliefs, experiences, and

> backgrounds of everyone in attendance at our functions. At our events, please do not express assumptions about or hostility towards any person or organization.

On or about February 9, 2020, the Student Council Presidents abstained from voting on YU Pride Alliance's application, leaving the matter to Yeshiva administration to decide. This decision was set forth in an email to the Yeshiva student body which allegedly read in part as follows:

> ***4** The decision about a club focusing on LBGTQ+ matters at Yeshiva University is too complex and nuanced to be voted on by Student Council Presidents. We are not administrators, we are not rabbis, and we are not subject matter experts.

Plaintiffs claim, upon information and believe, that the student governing body had never before abstained from voting on a club application. Meanwhile, by on or around February 9, 2020, plaintiffs claim that all other new club applicants for the Spring 2020 semester received a decision regarding approval or denial of the club, except for the YU Pride Alliance.

On or about February 9, 2020, plaintiff Weinreich filed a discrimination complaint with YU about the YU Alliance's Spring 2020 club's application for official status. On or about February 27, 2020, plaintiff Weinreich learned that Yeshiva had determined that no action was required in response to his discrimination complaint since no official determination regarding YU Pride Alliance's status had been rendered.

According to plaintiffs, Yeshiva never made a decision as to whether it would formally recognize the YU Pride Alliance during the Spring 2020 semester. Plaintiffs assert that the lack of recognition prohibits them from participating in club fairs, fundraise to support its events, and the use of university facilities, including virtual facilities provided by Yeshiva during the ongoing COVID-19 pandemic.

In September 2020, plaintiffs again applied for official club status for the Fall 2020 semester. In a statement emailed to the Yeshiva student body, Yeshiva officials stated that as policy that Yeshiva would not recognize LGBTQ clubs on campus. The statement, which has been provided to the court, explained:

> The message of Torah on this issue is nuanced, both accepting each individual with love and affirming its timeless prescriptions. While students will of course socialize in gatherings they see fit, forming a new club as requested under the auspices of YU will cloud this nuanced message.

The statement further promised that Yeshiva would "create a space for students, faculty and Roshei Yeshiva to" "continue to explore ways of bringing about greater awareness and acceptance", update its "diversity, inclusion and sensitivity training to be focused on [Yeshiva's] diverse student groups, including sexual orientation and gender identity" and Yeshiva's "distinguished Counseling Center will continue to address all of [its] students' needs" and "enhance its services by ensuring that there is a clinician on staff with specific LGBTQ+ experience." The statement was signed by Dr. Yael Muskat, Rabbi Yaakov Neuburger, Dr. Rona Novick, and Dr. David Pelcovitz.

On September 29, 2020, members of the YU Pride Alliance attended a YU Inclusion Panel with defendant Nissel, Rosh Yeshiva Yaakov Neuburger, Dean Rona Novick, Counseling Center Director Yael Muskat, and Professor David Pelcovitz. Plaintiffs claim in that meeting that Rosh Yeshiva Neuburger stated

making an LGBTQ club formal would "cloud" the issues being considered and sacrifice real accomplishment. He then said that a conversation about holding events could be held in the future, but that YU would not commit to having any substantive discussion about what event guidelines could look like without having actual proposed events in hand.

***5** Plaintiffs claim that Yeshiva's refusal to formally recognize YU Pride Alliance as a club is unlawful discrimination based on sex, sexual orientation, and gender identity and expression in violation of both Yeshiva policy and the NYCHRL. Specifically, plaintiffs assert that Yeshiva is a provider of public accommodation and the NYCHRL prohibits such providers from denying "full and equal enjoyment" of those "accommodations, advantages, services, facilities, or privileges" due to gender and sexual orientation (Admin Code § 8-107[4], [20]). Plaintiffs assert four causes of action: three claims for violation of Admin Code § 8-107(4) and one for violation of Admin Code § 8-107(20). Plaintiffs seek declaratory and injunctive relief as well as money damages including punitive damages, attorneys fees and costs.

Discussion

The court will first consider the motion for a preliminary injunction. A preliminary injunction is a drastic remedy and should not be granted unless plaintiff can demonstrate "a clear right" to such relief (*City of New York v. 330 Continental, LLC*, 60 AD3d 226 [1st Dept 2009]). On a motion for preliminary injunctive relief, plaintiff must demonstrate a likelihood of success on the merits, irreparable injury absent the granting of the preliminary injunction, and a balancing of the equities in its favor (see *Aetna Ins. Co. v. Capasso*, 75 NY2d 860 [1990]; see also *1234 Broadway LLC v. West Side SRO Law Project*, 86 AD3d 18 [1st Dept 2011]). Here, plaintiffs have not met their heavy burden.

Plaintiffs have sued Yeshiva as a "place or provider of public accommodation" pursuant to Admin Code § 8-107(4) and (20). This statute provides in relevant part as follows:

4. Public accommodations.

a. It shall be an unlawful discriminatory practice for any person who is the owner, franchisor, franchisee, lessor, lessee, proprietor, manager, superintendent, agent or employee of any place or provider of public accommodation:

1. Because of any person's actual or perceived race, creed, color, national origin, age, gender, disability, marital status, partnership status, sexual orientation, uniformed service or immigration or citizenship status, directly or indirectly:

(a) To refuse, withhold from or deny to such person the full and equal enjoyment, on equal terms and conditions, of any of the accommodations, advantages, services, facilities or privileges of the place or provider of public accommodation; ...

...

20. Relationship or association. The provisions of this section set forth as unlawful discriminatory practices shall be construed to prohibit such discrimination against a person because of the actual or perceived race, creed, color,

> national origin, disability, age, sexual orientation, uniformed service or immigration or citizenship status of a person with whom such person has a known relationship or association.

Meanwhile, Admin Code § 8-102, which sets forth the definitions of terms used under the NY-CHRL, defines place or providers of public accommodation as follows:

> The term "place or provider of public accommodation" includes 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 does not include any club which proves that it is in its nature distinctly private. A club is not in its nature distinctly private if it has more than 400 members, provides regular meal service and regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of non-members for the furtherance of trade or business. **For the purposes of this definition, a corporation incorporated under the benevolent orders law or described in the benevolent orders law but formed under any other law of this state, or a religious corporation incorporated under the education law or the religious corporation law is deemed to be in its nature distinctly private.** No club that sponsors or conducts any amateur athletic contest or sparring exhibition and advertises or bills such contest or exhibition as a New York state championship contest or uses the words "New York state" in its announcements is a private exhibition within the meaning of this definition.
>
> ***6** (Emphasis added.)

Based upon this statutory framework, the court finds that plaintiffs have failed to demonstrate a likelihood of success on the merits for the reasons that follows. The NYCHRL expressly excludes "a religious corporation incorporated under the education law" as a place or provider of public accommodation. Yeshiva asserts both in opposition to the motion for a preliminary injunction as well as in support of its motion to dismiss that it is a religious corporation incorporated under the education law. If that is the case, then plaintiffs do not have a claim under the NYCHRL against Yeshiva for failure to officially recognize YU Pride Alliance.

The court notes that plaintiffs do separately allege that Yeshiva has violated its own polices, which would be subject to a CPLR Article 78-style analysis of whether the determination to withhold formal recognition of YU Pride Alliance was irrational, arbitrary or capricious. This argument presents its own issues, however, notably with timeliness and the four-month statute of limitations applicable to such challenges, which the court does not pass on at this juncture.

On reply, plaintiffs argue that Yeshiva cannot be classified as a religious corporation because it is a research university with a $500 million endowment and 3,000 undergraduates who receive training for "an array of secular employment and business opportunities." The court disagrees. Plaintiffs urge the court to narrowly construe the public accommodation exception under Admin Code § 8-102 as only applying to "distinctly private" small clubs and religious corporations. This reading of the Administrative Code is contrary to the plain language of the statute. While exceptions to the NYCHRL should be narrowly construed (NYCHRL § 8-130[b]) and the NYCHRL should be construed broadly in favor of plaintiffs (*Bennett v. v. Health Mgmt. Sys., Inc.*, 92 AD3d 29, 34 [1st Dept 2011]), plaintiff's interpretation would have this court entirely reject the exception and/or ascribe a meaning to the term "distinctly" contrary to how that term is normally used. Indeed, this court views the Legislature's use of the term "distinctly" as employed to differentiate between places or providers of public

accommodation and places or providers of private accommodation such as religious corporations incorporated under the education law or the religious corporation law.

Plaintiffs further cite a 102-year old case (*McKaine v. Drake Bus. Sch.*, 107 Misc. 241 [1st Dep't 1919]) applying Civil Rights Law § 40 which is inapplicable since this statute has no bearing on the clear, unambiguous language of the specific statute upon which this lawsuit is based. Otherwise, plaintiffs point to Yeshiva's IRS filings and Undergraduate Bill of Student Rights, which falls woefully short of its burden of showing that Yeshiva is outside the carve-out of the NYCHRL's application to places of public accommodation.

The court further finds that the injunctive relief plaintiffs seek would not maintain the status quo, another factor militating in favor of denial of their motion. Plaintiffs allege that Yeshiva's refusal to formally recognize an LGBTQ organization has been ongoing for over a decade. The relief plaintiffs seek would change that status quo. In fact, the relief plaintiffs seek via preliminary injunction is part of the ultimate relief they seek in this action. This factor also weighs against plaintiffs.

***7** Accordingly, the motion for a preliminary injunction must be denied. In light of this result, the court declines to consider the parties' arguments as to whether Yeshiva should be exempted as a religious corporation based upon its religious character as moot to the application for a preliminary injunction.

Defendants' motion for leave to file its unredacted memorandum of law in opposition to plaintiff's motion for a preliminary injunction under seal is denied as moot, since the motion has been decided in Yeshiva's favor without the need for an unredacted version of its memo. This denial is without prejudice to seeking leave to file the same subject matter under seal or for *in camera* review. Such an application should be brought via order to show cause so that it can be promptly considered by the court in tandem with any relevant applications pending in this action.

Finally, defendants move to dismiss the complaint. Plaintiffs point out that defendants' motion is based upon many facts and proof which goes beyond the scope of an ordinary motion to dismiss. The court agrees. This case is ripe for summary adjudication. Accordingly, the court converts the motion to dismiss to one for summary judgment on notice to the parties (CPLR § 3211[c]).

The court will grant the parties an opportunity to file surreplies to motion sequence 6 as follows: plaintiffs to file and serve a surreply on or before September 17, 2021; defendant to file and serve a surreply on or before October 15, 2021.

The parties are directed to appear for oral argument on October 19, 2021 at 12pm via Microsoft Teams. Invitations to the Teams meeting will be sent to counsel of record on NYSCEF. Any person or party who wishes to participate/observe the oral argument may request a meeting invitation by sending an email to Steven Carney, Part 8 Clerk, at SCARNEY@nycourts.gov.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that motion sequence 2 is denied; and it is further

ORDERED that motion sequence 3 is denied as moot without prejudice to renewal; and it is further

ORDERED that motion sequence 6 is converted to a motion for summary judgment pursuant to CPLR § 3211(c). Plaintiffs to file and serve a surreply on or before September 17, 2021; defendant to file and serve a surreply on or before October 15, 2021.

The parties are directed to appear for oral argument on motion sequence 6 on October 19, 2021 at 12pm via Microsoft Teams. Invitations to the Teams meeting will be sent to counsel of record on NYSCEF. Any person or party who wishes to participate/observe the oral argument may request a meeting invitation by sending an email to Steven Carney, Part 8 Clerk, at SCARNEY@nycourts.gov.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 8/18/21

New York, New York

So Ordered:

<<signature>>

Hon. Lynn R. Kotler, J.S.C.