SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COUNTY OF NASSAU

Present:
Hon. Thomas Feinman
Justice

AGENCIES FOR CHILDREN'S THERAPY SERVICES, INC.,

Plaintiff,

- against -

NEW YORK STATE DEPARTMENT OF HEALTH and ANDREW M. CUOMO, in his official capacity as Governor of the State of New York,

Defendants.

TRIAL/IAS PART 9
NASSAU COUNTY

INDEX NO. 15763/12

MOTION SUBMISSION
DATE: 1/10/13

MOTION SEQUENCE
NO. 1, 2

The following papers read on this motion:

Order to Show Cause.....	X
Notice of Cross-Motion and Affidavits.....	X
Memorandum of Law.....	X
Affirmation in Opposition.....	N/A
Reply Affirmation.....	X

Plaintiff, Agencies for Children's Therapy Services, Inc., moves by Order to Show Cause, pursuant to CPLR 6311, to preliminarily enjoin the application and enforcement of regulations adopted by the defendant, New York State Department of Health and published in the State Register in a Notice of Adoption on November 28, 2012. The motion is granted.

Defendants, New York State Department of Health and Andrew M. Cuomo, in his official capacity as the Governor of the State of New York, cross move, pursuant to CPLR 510(3) for an Order changing the venue of this action and to dismiss this action for lack of standing. The cross motion is denied.

Plaintiff, Agencies for Children's Therapy Services, Inc. (hereinafter referred to as "ACTS"), is a New York not-for-profit corporation whose member agencies, pursuant to "New York's Early Intervention Program for Infants and Toddlers with Disabilities and Their Families"[1], contract with and employ individuals who provide evaluations, services and service coordination for children with developmental delays due to physical or mental conditions such as Down syndrome or other chromosomal abnormalities, sensory impairments, inborn errors of metabolism, or fetal alcohol syndrome. The Early Intervention Program is designed to provide services to such developmentally disabled children at an early age – typically between birth and two years old – through the coordination and cooperation of parents, professional service providers, and municipalities.

The New York State Department of Health ("DOH") and the Governor of the State of New York promulgated regulations and an Executive Order on November 28, 2012 and January 18, 2012, respectively, to address the "conflicts of interest" by evaluators, service providers and service coordinators. (The DOH's regulations will hereinafter be referred to as the "conflict of interest regulations.") Notably, on September 5, 2010, prior to the DOH's publication of the proposed conflict of interest regulations, the Governor submitted a similar set of rules to the Legislature for its approval as part of the 2012-2013 State Budget. The Legislature did not, however, enact those rules into law.

ACTS brings this action seeking a declaratory judgment that, *inter alia*, the DOH and the Governor have exceeded the scope of their authority by issuing rules and an Executive Order that purport to make policy decisions which, it claims, are the Legislature's alone to make. Specifically, in bringing this suit, ACTS claims, *inter alia*, that the regulations and Executive Order at issue will make sweeping changes to the operation of New York's Early Intervention Law including, among other things, prohibiting a person who conducts an evaluation of a child for eligibility for Early Intervention services, and also an agency who contracts with or employs the evaluator, from providing Early Intervention services to the same child; and, forbidding a person from serving as both an evaluator and a "service coordinator" for a child (i.e., a professional who, among other things, assists eligible children and their families in accessing Early Intervention services and coordinates the provision of Early Intervention services to eligible children).

ACTS submits that the Early Intervention Law does not authorize the DOH to declare policy with respect to whether, and in what circumstances, an evaluator may also provide Early Intervention services to a child. It also claims that, as with the conflict of interest regulation, the Governor, pursuant to the doctrine of separation of powers, does not have the authority to issue an Executive Order reflecting policy choices that are left to the Legislature to make.

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[1]Codified in Title II-A of the Public Health Law §§ 2540-2559-b and referred to herein as "Early Intervention Program" or "Early Intervention Law."

Upon the instant motion, brought by Order to Show Cause, ACTS seeks a preliminary injunction preventing the implementation of the conflict of interest regulations that in effect prohibits the evaluators for children under New York's Early Intervention Law from also acting as service providers for the children that they evaluate, *supra*. Notably, plaintiff's claim that the Governor lacked the authority to issue Executive Order No. 38 is not the subject of ACTS' preliminary injunction motion.

Defendants oppose the plaintiff's motion and cross move, in turn, for an Order changing the venue of this action, or alternatively, dismissing the action for lack of standing.

Addressing first the issue of lack of standing, this Court notes the following: plaintiff is a not-for-profit corporation with member agencies who contract with and employ individuals to provide evaluations, services and service coordination for children pursuant to the Early Intervention Program (Complaint, ¶¶2, 15).

It is true that the plaintiff does not have standing to maintain this action in *its own right* because it has failed to demonstrate that *it* has suffered any injury in fact as a result of defendants' actions (*Matter of Dental Socy. v Carey*, 61 NY2d 330, 334 [1984]). However, in bringing this declaratory judgment action, the plaintiff has consistently identified itself as a membership organization. It claims that its "members" will sustain injury if the conflict of interest regulations and the Executive Order are not set aside.

The law governing organizational standing is clear. In order to have standing to sue on behalf of its members, some or all of the members of the organization must have such standing; the interests which the organization seeks to protect must be germane to its purpose; the organization must be an appropriate representative of the group; and, participation of the individual members in the relief sought or claims asserted must not be required (*Id*).

Here, ACTS' complaint satisfies these criteria for standing. Specifically, ACTS' members have standing because they are directly injured by the regulations in the form of lost opportunities for business and the inability to service children as both evaluators and service providers. For the purposes of establishing standing, "[i]t is enough to allege the adverse effect of the decision sought to be reviewed on the individuals represented by the organization; the complaint need not specify individual injured parties" (*Id.* at 334). Indeed, this Court notes that no where on this record do the defendants dispute that the regulations are applicable to the entities that employ or contract with qualified personnel including members of ACTS.

Next, ACTS' Certificate of Incorporation states that ACTS was

> "formed for the following purpose or purposes: For mutual advancement of the interests of its members engaged in the business of providing evaluation and therapy services...; to

promote and represent the common business interests of and improve business conditions among, persons engaged in such business..." (Sanders' Reply Aff., Ex. A)

Accordingly, it is plain that advancing its members' interests as providers of Early Intervention services and evaluations is clearly germane to ACTS' purposes.

Finally, the participation of ACTS' members is not required in this declaratory judgment action which seeks simply to determine the validity of the conflict of interest regulations (*Matter of Aeneas McDonald Police Benevolent Assn. v City of Geneva*, 92 NY2d 326, 331 [1998]; *Mulgrew v Board of Educ. of the City School Dist. of the City of New York*, 75 AD3d 412 [1st Dept. 2010]).

In light of the foregoing, this Court finds that the plaintiff can proceed to advance its clam as a representative of its members.

Defendants' argument that this action is not proper in Nassau and should be changed to Albany is equally meritless.

Defendants assert two bases for their application to change the venue of this action. First, citing to CPLR 6311, defendants argue that the venue for a motion for a preliminary injunction seeking to prevent a governmental entity from performing a statutory duty "maybe granted only by the supreme court at a term in the department in which the officer or board is located or in which the duty is required to be performed." Second, defendants contend that since this is an Article 78 proceeding masquerading as a declaratory judgment action, ACTS' Nassau County "residence" is irrelevant and is not a basis for venue for the Article 78 proceeding (Defendants' Memo of Law, pp. 4-8).

Dealing first with the defendants' contention that this action should have been brought as an Article 78 proceeding, this Court notes that pursuant to the State Administrative Procedure Act §205, "[u]nless an exclusive procedure or remedy is provided by law, judicial review of rules may be had upon petition presented under article seventy-eight of the civil practice law and rules, *or in an action for a declaratory judgment* where applicable and proper" (Emphasis Added). This (declaratory judgment) action challenges the validity of the conflict of interest regulations and the DOH's authority to issue said regulations.

The Court of Appeals has made clear that where, as here, the plaintiffs seek both a review of a quasi-legislative act and a declaration that a promulgated regulation is invalid, an action for a declaratory judgment is more appropriate than an Article 78 proceeding (*Boreali v. Axelrod*, 71 NY2d 1 [1987]; *Erie County v Whalen*, 57 AD2d 281 [3rd Dept. 1977] *aff'd* 44 NY2d 817 [1978]). Accordingly, there is no basis herein for converting this action (seeking, *inter alia*, review of a legislative action) into an Article 78 proceeding.

Defendants argue that plaintiff's claims assert that the DOH "proceeded or is about to proceed without or in excess of jurisdiction" in issuing the conflict of interest regulation which, they submit, is a ground for commencing an Article 78 proceeding. This argument is unavailing. The statutory ground of proceeding "without or in excess of jurisdiction" is a codification of the writ of prohibition, which, in turn, is limited to challenges to official action in a "judicial or quasi-judicial capacity," as distinguished from legislative, executive or ministerial action (*Town of Huntington v. New York State Division of Human Rights*, 82 NY2d 783 [1993]; *B.T. Productions, Inc. v. Barr*, 44 NY2d 226 [1978]). Here, ACTS is not challenging any judicial or quasi-judicial action; rather, ACTS seeks a declaratory judgment determining the validity of the conflict of interest regulations. A declaratory judgment action is appropriate to determine the validity of a statute, ordinance, or other enactment of a legislative nature (*Hudson Valley Oil Heat Council, Inc. v. Town of Warwick*, 7 AD3d 572 [2nd Dept. 2004]; *see also Jones v. Town of Carroll*, 32 AD3d 1216 [4th Dept. 2006]).

As to defendants' application to change the venue of this action to Albany County, it is noted that pursuant to CPLR 6311(1):

> "A preliminary injunction to restrain a *public officer, board or municipal corporation* of the state *from performing a statutory duty* may be granted only by the supreme court at a term in the department in which the officer or board is located or in which the duty is required to be performed" (Emphasis Added).

Here, the plaintiff seeks to enjoin the New York State Department of Health, not a "public officer, board or municipal corporation" (State Administrative Procedure Act §102[1]). Moreover, ACTS is not seeking to enjoin the DOH from "performing a statutory duty;" rather, it is seeking to preliminarily enjoin the DOH from enforcing its own conflict of interest regulations. Accordingly, this Court finds no basis in CPLR 6311 to change the venue of this action to Albany County (*see also* CPLR 503[a] [c]).

Finally, defendants' claim that the convenience of the parties and putative party witnesses compel a change of venue to Albany County, is also unavailing (CPLR 510[3]; *D'Argenio v. Monroe Radiological Assocs.*, 124 AD2d 541 [2nd Dept. 1986]). Here, the defendants have failed to satisfy their burden to demonstrate that the convenience of the *non-party* witnesses warrants a transfer of venue (CPLR 510[3]; *McAdoo v. Levinson*, 143 AD2d 819 [2nd Dept. 1988]). Accordingly, this Court finds that it is no more convenient to decide this action in Albany County than it is in Nassau County, where ACTS has otherwise properly established venue (*see e.g, Brevetti v. Roth*, 114 AD2d 877 [2nd Dept. 1985]; *Margolis v. United Parcel Service, Inc.*, 57 AD3d 371 [1st Dept. 2008]). Therefore, defendants' application to transfer venue is herewith denied.

Turning to the plaintiff's motion for a preliminary injunction, this Court begins by noting that although the procedural device is designed to maintain the status quo pending determination

of an action (*City of Long Beach v. Sterling Am. Capital, LLC*, 40 AD3d 902, 903 [2nd Dept. 2007]; *Ingenuit, Ltd. v. Harriff*, 33 AD3d 589 [2nd Dept. 2006]), it is a drastic remedy which is used sparingly, and only when required in urgent situations or grave necessity and then upon the clearest evidence (*Wm. Rosen Monuments, Inc. v. Phil Madonick Monuments, Inc.*, 62 AD2d 1053 [2nd Dept. 1978]). Ultimately, the decision whether to grant or deny such relief rests in the sound discretion of this Court (*Ruiz v. Meloney*, 26 AD3d 485, 486 [2nd Dept. 2006]).

In order to obtain a preliminary injunction the movant must demonstrate (1) a likelihood of success on the merits; (2) irreparable injury absent the granting of the requested relief; and (3) a balancing of the equities in the movant's favor (*Aetna Ins. Co. v. Capasso*, 75 NY2d 860, 862 [1990]; *Wiener v. Life Style Futon Inc.*, 48 AD3d 458 [2nd Dept. 2008]).

It must be reiterated that the ACTS' application for a preliminary injunction is aimed at preventing the implementation of the conflict of interest regulations issued by the DOH. ACTS' claim that the Governor lacked the authority to issue Executive Order No. 38 is not the subject of this motion.

Here, ACTS has demonstrated it's likelihood of success on the merits – i.e., that the DOH did not have the authority to promulgate regulations prohibiting parents from choosing a service provider that also evaluated their child. The DOH is a New York State executive agency which administers the Early Intervention Program. As an arm of the executive branch of government, an administrative agency may not, in the exercise of rule-making authority, engage in broad-based public policy determinations (*Boreali v. Axelrod*, supra at 9). In *Boreali*, the Court of Appeals identified four "coalescing circumstances" indicating that the agency, in enacting the regulations, had usurped the role of the legislature in making public policy assessments. Similarly, in this case, ACTS has established that all of the *Boreali* factors weigh in favor of finding that the DOH, just as the State's Public Health Commission in *Boreali*, acted outside its proper role and that the regulations are therefore unlawful:

> 1. The [agency] constructed a regulatory scheme laden with exceptions based solely upon economic and social concerns;
>
> 2. The [agency] did not merely fill in the details of broad legislation describing the overall policies to be implemented, but instead, writing on a clean slate, created its own comprehensive set of rules without benefit of legislative guidance;
>
> 3. The [agency] acted in an area in which the legislature had repeatedly tried—and failed—to reach agreement in the face of substantial public debate and vigorous lobbying by a variety of interested factions; and
>
> 4. The [agency] had no special expertise or technical competence.
>
> *Id.* at 12–14.

As to the first factor, here, according to the DOH, its conflict of interests regulations will "ensure that the relationship between evaluator and provider does not encourage the inappropriate provision of services, fostering the objectivity of evaluations and decreasing costs for taxpayers" (Sanders Aff., Ex. A [Early Intervention Final Regulations] at 10). Thus, not only is it plain that the DOH is balancing policy matters that have nothing to do with health or costs, but, as in the case of *Boreali*, there is no distinction herein that "[t]o the extent that the agency has built a regulatory scheme on its own conclusions about the appropriate balance of trade-offs between health and cost...it [is] 'acting solely on [its] own ideas of sound public policy' and [is] therefore operating outside of its proper sphere of authority" (*Boreali v. Axelrod*, supra at 12 [citations omitted]; *see also Under 21, Catholic Home Bur. For Dependent Children v. City of New York*, 65 NY2d 344, 359 [1985]).

Moreover, pursuant to a plain and simple reading of the Early Intervention Law – Public Health Law §2544[5] – the evaluation of a child from including a reference to any specific provider of Early Intervention services is expressly prohibited. Thus, clearly, the Legislature not only considered the conflict of interest in connection with the provision of Early Intervention services, but it also addressed and resolved the issue within the statute itself. Therefore, absent any statutory authority, this Court cannot permit the DOH to expand upon or modify the Legislature's policy. Indeed, there is no provision of the Early Intervention statute that delegates any authority to the DOH to further regulate purported conflicts of interest between evaluators and service providers. Accordingly, in light of the detailed legislative scheme outlined in the Early Intervention statute, to wit, Public Health Law §§2540-2559, there is no basis for the DOH to usurp the right to regulate the choice of a provider under the generalized concern for avoiding a "conflict of interest."

With respect to the second *Boreali* factor, since, as stated above, the legislature has made clear how service providers are chosen and how conflicts of interest are best avoided, leaving no provision for the DOH to have any regulatory role in this area, this Court finds that the DOH's conflict of interest regulations do not fill any statutory gap; rather, the DOH has "creat[ed] its own comprehensive set of rules without benefit of legislative guidance," allowing it the discretion to determine whether an evaluator may also act as a service provider (*Boreali v. Axelrod*, supra at 13). The conflict of interest regulations give the DOH the power to decide how to make the policy tradeoffs in determining under what circumstances an evaluator may also be a service provider for a child. This is clearly outside the function of the DOH (*Under 21, Catholic Home Bur. For Dependent Children v. City of New York*, supra at 356).

As to the third factor, the facts here are undisputed that as part of his 2012-13 State Budget, the Governor submitted a proposed conflict of interest rule to the Legislature for its approval, which the Legislature ultimately chose to reject. Refusal by the Legislature, the arm of the government charged with the task of enacting laws, to adopt the Governor's proposed rule is enough evidence that this choice, in fact, belongs to the legislature, not to an executive agency

(*Boreali v. Axelrod*, supra at 13; *see also Ellicott Group, LLC v State of N.Y. Exec. Dept. Off. of Gen. Servs.*, 85 AD3d 48, 54 [4th Dept. 2011]).

Finally, based upon the papers presented for this Court's consideration, and despite the fact that the Early Intervention Law is a public health statute, there is no evidence that the DOH used any special expertise in the field of health in creating the regulations at issue here. With the exception of a single statistic about the incidence of agency evaluators and service providers serving the same child in New York City (a consideration having nothing to do with health), the DOH does not cite to any evidence in support of its regulations.

Thus, having shown the existence of all four *Boreali* factors, this Court finds that the DOH lacked the authority to promulgate regulations prohibiting parents from choosing a service provider that also evaluated their child. The DOH's actions violate the separation of powers doctrine and establish ACTS' likelihood of success on the merits of its claim for a declaratory judgment that the conflict of interest regulations are invalid.

In fact, by demonstrating the DOH also failed to comply with the procedures mandated by the statute in promulgating the regulations (*see e.g.*, PHL §§ 2553[4], 2559-b) and that the regulations are based upon speculation and erroneous assumptions and are therefore arbitrary and capricious, ACTS has advanced additional basis of it's success on the merits of its claim for a preliminary injunction. For example, there is no record evidence here of instances where a conflict of interest tainted the process of evaluations, service coordination and services. Nor is there any evidence of any benefit beyond an undefined level of savings to the program (*Id*; *see also, Matter of Aronsky v. Bd. of Educ.*, 75 NY2d 997, 1000-01 [1990]). "Absent a predicate in the proof to be found in the record, an unsupported determination must be set aside as without any rational basis and wholly arbitrary" (*Metro. Taxicab Bd. Of Trade v. New York City Taxi & Limousine Commission*, 2009 WL 8411814 [Sup. Ct. New York 2009]).

ACTS has also established an irreparable harm in the absence of a preliminary injunction. There is support for ACTS' claim that by expressly preventing an approved agency from evaluating a child for eligibility for Early Intervention services and also providing Early Intervention services to the same child, the DOH's conflict of interest regulations will cause a substantial disruption in the Early Intervention Program, by causing a likely shortage in the availability of willing evaluators and impinging on the rights of parents. Indeed, the affidavits from several of ACTS' Board members, each of which is a principal in an approved agency providing Early Intervention evaluations and services, demonstrate that, in the absence of the conflict of interest regulation, each of these ACTS' member agencies anticipate providing Early Intervention services in 2013 to a similar percentage of children whom it will evaluate in 2013 – approximately 35% to 60% of the children whom they also evaluated in 2012. Lost business opportunities are irreparable (*see e.g., Gundermann & Gundermann Ins. v. Brassill*, 46 AD3d 615, 617 [2nd Dept. 2007]). In any event, damages are unavailable in this suit involving an unlawful administrative regulation (State Administrative Procedure Act § 205). Notably, the DOH does not take issue with ACTS' argument that the lost business opportunities that ACTS'

members will suffer are not compensable with damages and are thus irreparable (*McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co., Inc.*, 114 AD2d 165, 174 [2nd Dept. 1986] *app. den.* 67 NY2d 606 [1986]).

The DOH's argument that ACTS has failed to show that "*it* will be harmed" because "ACTS does not engage in any activity that is subject to the...regulation[s]" (Defendants' Memo of Law, p. 13) is meritless. As stated above, under the law of associational standing, *supra*, injury to ACTS' member agencies by the conflict of interest regulation may be asserted by ACTS.

Finally, the test for determining whether the balance of equities weighs in favor of granting preliminary injunctive relief is whether "the irreparable injury to be sustained is more burdensome to the plaintiff than the harm caused to the defendant through the imposition of the injunction" (*Klein, Wagner & Morris v. Lawrence A. Klein, P.C.*, 186 AD2d 631, 633 [2nd Dept. 1992]). Here, the harm to ACTS has been established, *supra*; however, there is no evidence or suggestion of any demonstrable harm to the DOH from maintaining the status quo until this Court decides the merits of this case. Further, inasmuch as this Court is required to "weigh the interests of the general public as well as the interests of the parties to the litigation" in determining this motion for a preliminary injunction (*De Pina v. Educational Testing Serv.*, 31 AD2d 744, 745 [2nd Dept. 1969]), there is evidence on this record that the regulations will harm the parents of the children who need Early Intervention services in that the regulations will have the effect of a causing a shortage of evaluators because of the disincentive they create to qualified individuals working as evaluators (Sanders Aff., ¶10). Moreover, the regulations will interfere with the right of parents to choose their evaluator to act as their child's service provider (*Id*).

Given that the harm to the DOH from a provisional injunction is minimal, this Court finds that the balance of equities favors maintaining the status quo until this Court decides the merits of this case. Accordingly, this Court is persuaded that the injury to be sustained by plaintiff is more burdensome to plaintiff than the harm which would be caused to defendants through the imposition of the injunction (*McLaughlin, Piven, Vogel, Inc. v. W.J. Nolan & Co., Inc.*, supra at 174).

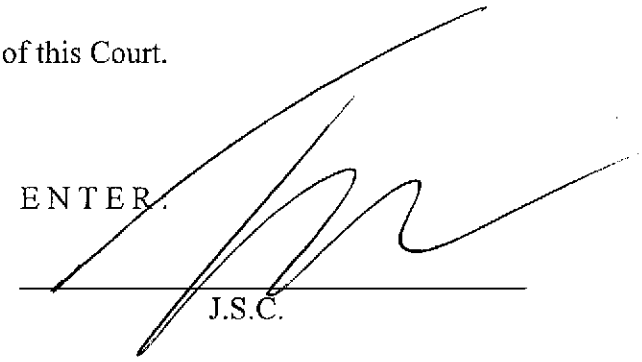
For these reasons, plaintiff's motion for a preliminary injunction enjoining the application and enforcement of the conflict of interest regulations promulgated by the New York State Department of Health and published in the New York State Register on November 28, 2012, is granted pending final disposition of this action.

The parties' remaining contentions have been considered and do not warrant discussion.

The parties are hereby directed to appear for a Preliminary Conference which shall be held at the Preliminary Conference part located at the Nassau County Supreme Court on the 27th day of March, 2013, at 9:30 A.M. This directive, with respect to the date of the

Conference, is subject to the right of the Clerk to fix an alternate date should scheduling require. The attorneys for the plaintiff shall serve a copy of this order on the Preliminary Conference Clerk and the attorneys for the defendants.

This shall constitute the decision and order of this Court.



Dated: February 4, 2013

cc: Jones Day
Eric T. Schneiderman, Attorney General of the State of New York