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Clinton, NY
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At a term of the Supreme Court of the State of New York, held in and for the County of Clinton, at the Clinton County Government Center in the City of Plattsburgh, on the 13th day of August, 2004.

P R E S E N T: **HONORABLE PATRICK R. McGILL**
Acting Justice, Supreme Court

STATE OF NEW YORK
SUPREME COURT COUNTY OF CLINTON

In the Matter of the Application of

DORSETT-FELICELLI, INC.,
d/b/a Pyramids,

Petitioner,

-against-

DECISION AND ORDER
Index No. 04-0547
RJI #09-1-2004-0289

COUNTY OF CLINTON, COUNTY OF CLINTON DEPARTMENT OF HEALTH, PAULA CALKINS LACOMBE, in her official capacity as Director of the County of Clinton Department of Public Health, and KATHERINE O'CONNOR, in her official capacity as Early Intervention Official and PreSchool Related Service Coordinator,

Respondents,

For Judgment Pursuant to Article 78 of the Civil Practice Laws and Rules

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APPEARANCES: MEREDITH H. SAVITT, Esq., Attorney for the Petitioner
CHRISTOPHER R. LYONS, Esq., Attorney for the Respondents

McGILL, A.J.:

Pending before the Court is the notice of petition filed

on May 28, 2004 by Dorsett-Felicelli, Inc., d/b/a Pyramids (hereinafter "Pyramids") seeking a judgment for the following relief: (1) an order directing the respondents to give Pyramids the right of first refusal on early intervention and preschool services and prohibiting the respondents from retaliating against Pyramids in this regard; (2) an order directing the respondents to provide all future referrals to Pyramids in the same ratio as existed in 2002 between Pyramids and other providers of the same services; (3)an order directing the respondents to refer children with multiple service needs to an appropriate agency in compliance with the New York State regulations on the matter; (4) an order removing respondent Katherine O'Connor from her position or otherwise ensuring that said respondent have no authority over pertinent referrals; (5) holding a trial on any relevant issue of fact; and (6) awarding attorney's fees, costs and disbursements.

The Court has reviewed and considered the following: the notice of petition and verified petition, as well as the affidavit of Melissa Dorsett-Felicelli, sworn to on May 25, 2004, plus attached exhibits, the affidavit of Alan Perlman, sworn to on May 4, 2004, plus attached exhibits, the affidavit of Deborah Lajti, notarized April 2004, and the affidavit of John Deon, sworn to on April 29, 2004, as well as the

petitioner's memorandum of law in support of the petition. The Court has also considered the respondents' attorney's affidavit in opposition, sworn to July 30, 2004, plus attachments, the affidavit in opposition of respondent Paula Calkins Lacombe, sworn to July 30, 2004, plus attached exhibits, and the affidavits of registered nurse Darlene Pavone and public health nurses Pamela LeFebvre, Lynn Staley, Darwyna Facteau and Valerie A. Butler, plus attachments thereto and the respondents' memorandum of law. The Court has also considered and reviewed the reply affidavit of Melissa Dorsett-Felicelli, sworn to August 9, 2004, plus attachments, and the petitioner's reply memorandum of law.

Since the petitioner lacks standing to bring this Article 78 proceeding, the petition is dismissed.

The relevant facts of this case may be summarized as follows: the petitioner is a licensed provider of multiple early intervention and preschool services to children who have developmental delays and disabilities. Since 1994 Pyramids and the County have entered into contracts by which Pyramids provides these services to children referred to it by the County Department of Public Health (hereinafter "DPH"). The contract has been renewed each year and may not be terminated except for cause or on 30-days' notice. Pyramids receives more referrals from DPH than any other provider in the County.

However, nothing in the contract guarantees to Pyramids a certain number or a certain percentage of the referrals. The contract for 2003-2004 provided for a payment of $70.00 to Pyramids for each session.

According to the petitioner, during the fall of 2003, it made several complaints to the County regarding its use of independent contractors. The petitioner felt the use of such independent contractors was unfair since they did not have to pay taxes and other expenses that Pyramids had to pay and thus the independent contractors could charge less for their services. The County took no action on these complaints.

In January 2004, three employees at Pyramids tendered letters of resignation and each gave the required one month notice which would have put their final days at Pyramids toward the end of February 2004. However, on February 3, 2004, Pyramids unilaterally shortened the notice to two weeks so that each employee's last day was now February 13, 2004.

These three employees had already applied to the New York State Department of Health for licensing to set up a company called North Country Kids which would provide similar services to those already provided by Pyramids. Apparently the employment contracts between Pyramids and these employees did not include a non-competition provision. Once the North Country Kids received approval at the State level, the next

step in the process was acceptance by the County Legislature of the provider agreement with North Country Kids. The respondents assert that it received notification from the State Department of Health that North Country Kids had been approved on January 8, 2004 and then began its standard procedure when working with a new service provider. Pyramids alleges, and the respondents do not dispute, that if the three employees left Pyramids before the County Legislature approved the provider agreement, their cases would remain with Pyramids.

Instead, the County Legislature met on February 11, 2004 and approved the provider agreement with North Country Kids. The following day respondents informed Pyramids that effective the following week 57 sessions per week were being reassigned to North Country Kids. And even though Pyramids had signed the latest renewal of its contract with the County on January 20, 2004, the required signatures from the County were not affixed to it until February 13, 2004.

The petitioner assumes, because of the timing of these events, respondent Katherine O'Connor must have been working with North Country Kids prior to the date the County approved the provider agreement since she had the contract ready on that date. Pyramids alleges in its petition the motivation of O'Connor was to deprive it of its caseload.

Pyramids concludes that since the County had not taken such action in the past with any service provider, on this occasion, the motivation must have been to retaliate against Pyramids for its complaints regarding independent contractors.

According to the respondents, the families of the 24 children affected by the departure of these three employees were contacted by a public health nurse, informed about the situation and given the option to continue with a new therapist at Pyramids or transfer their child to North Country Kids. All the transfers to North Country Kids came at the request of the children's parents since all wished their child to continue receiving services from a counselor with whom the child was familiar and comfortable. Respondent O'Connor approved these requests in strict compliance with the relevant regulations according to the respondents.

Pyramids now brings this Article 78 proceeding seeking the relief noted above. Pyramids alleges in its petition the respondents have colluded with North Country Kids to take business away from Pyramids in retaliation for it making complaints about the use of independent contractors.

Public Health Law (hereinafter "PHL") §2540 mandates the early intervention program for infants in the state and PHL 2559-b authorizes the State Health Commissioner to adopt regulations to implement the programs. Education Law §4410(3)

authorizes the preschool program. The statutes and the implementing regulations make it clear the family of the child being offered services plays an important role in making decisions affecting the child[1]. Neither the statutes nor the regulations mention competition between appropriately licensed service providers; the entire import of both is providing appropriate services to children who need them.

Consequently, the Court must consider whether the petitioner has standing in this situation. The Court of Appeals has established a two-prong test for same: whether "the administrative action will in fact have a harmful effect on the petitioner and that the interest asserted is arguably within the zone of interest to be protected by the statute" (*Mtr of Dairylea Coop. v Walkley*, 38 NY2d 6, 9 [1975]). While the petitioner may suffer a harmful effect (loss of business), the interest asserted by the petitioner is not protection of the children affected by the transfer to North Country Kids but rather protection of its bottom line.

The petitioner asserts it seeks to ensure the children in need of multiple services receive those services at one

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[1] See, for example, 10 NYCRR 69-4.9(g)(1)("State early intervention service agencies and early intervention officials shall make reasonable efforts to ensure that early intervention services delivered to eligible infants and toddlers are family-centered, including parents in all aspects of their child's services and in decisions concerning the provision of the services."

provider, as is recommended by 8 NYCRR 200.16(e)(2)[2]. However, that regulation includes only a recommendation that the child be seen at one agency. Other portions of that regulation require parental involvement and approval of the IEP and, even if the language of the regulation mandated the use of one provider for multiple services, the petitioner has not presented any authority for its apparent position that one portion of a regulation may trump another.

In its reply, the petitioner again asserts this case is not about competitive advantage but the County using "systematic efforts" to reduce the number of referrals to the petitioner. While the number of referrals may be lower than before the petitioner had a competitor, the petitioner has not presented any evidence of a "suspicious pattern" of conduct toward Pyramids on the part of the County. Contrary to the petitioner's assertions, it is entirely logical for DPH nurses to contact the parents of the children affected prior to the last day of the former Pyramids's employees. Again it is entirely logical that the transfers to North Country Kids become effective the date North Country Kids became an

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[2] "If the individualized education plan (IEP) includes two or more related services, where possible, the board shall select from the list maintained by the municipality pursuant to section 4410(9) of the Education Law, such related service providers that are employed by a single agency for the provision of such services.

officially approved service provider.

The petitioner has simply failed to make the "critical showing" that its injury falls within the "zone of interest" of either PHL 2540 or Education Law §4410(3).

Since the petitioner lacks standing to bring this action, the matter must be **DISMISSED.**

IT IS ALL SO ORDERED.

E N T E R:

PATRICK R. McGILL
Supreme Court Acting Justice

Dated: Plattsburgh, New York
October 31, 2004