Agencies for Children's Therapy Servs., Inc. v New York State Dept. of Health
2014 NY Slip Op 33692(U)
April 8, 2014
Supreme Court, Nassau County
Docket Number: 15763/12
Judge: Thomas Feinman
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[* 1]

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

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MOTION SUBMISSION
DATE: 2/20/14

MOTION SEQUENCE
NOS. 3, 4

The following papers read on this motion:

Notice of Motions and Affidavits..................	X
Memorandums of Law in Support of Motion.	X
Affirmations in Opposition...........................	X
Reply Affirmations.......................................	X

RELIEF REQUESTED

The plaintiff moves pursuant to CPLR §§3001 and 3212(b) for a declaratory judgment that the regulations promulgated by the defendant, New York State Department of Health, addressing "conflicts-of-interest" and "limits on executive compensation and administrative expenses" in New York's Early Intervention Program are invalid and may not be enforced; and that Executive Order No. 38 issued by defendant, Governor Andrew M. Cuomo on January 18, 2012, is invalid and may not be enforced. The plaintiff submits a Memorandum of Law in support of the motion. The defendants submit opposition. The plaintiff submits a reply affirmation.

The defendants move separately pursuant to CPLR §3212 for summary judgment seeking dismissal of this proceeding and a declaration that the regulations of the New York State Department of Health at issue are valid. The defendants submit a Memorandum of Law in support of the motion. The plaintiff submits opposition and provides that the defendants' opposition to plaintiff's motion for summary judgment is an identical copy of defendants' instant separate motion for summary judgment. The plaintiff submits a Memorandum of Law in opposition to the defendants' motion for summary judgment. The defendants submit a reply Memorandum of Law in further support of their motion for summary judgment.

BACKGROUND

The plaintiff, Agencies for Children's Therapy Services, Inc., (hereinafter referred to as "ACTS"), by way of Amended Complaint, provides that it is a New York not-for-profit corporation with its principal office located at 255 Executive Drive, Plainview, New York. ACTS is comprised of more than twenty-five member agencies that provide Early Intervention, Pre-K, Special Education, and School Age Special Education services to more than 25,000 children throughout the state with agencies primarily located in New York City, Long Island, Westchester and the Hudson Valley region. The defendant, the Department of Health, (hereinafter referred to as the "DOH"), administers the Early Intervention Program. ACTS' member agencies contract with and employ individuals who provide evaluations, services, and service coordination for children pursuant to New York's Early Intervention Program for Infants and Toddlers with Disabilities and Their Families, (hereinafter referred to as "Early Intervention Program" and "Early Intervention Law"), pursuant to Title 11-A of the Public Health Law, §§2540-2559-b.

The plaintiff seeks a declaratory judgment that, *inter alia*, the DOH and the defendant, Andrew M. Cuomo, in his official capacity as Governor of the State of New York, (hereinafter referred to as the "Governor"), have exceeded the scope of their authority by issuing rules, and on Executive Order, that purport to make policy decisions which are the Legislator's alone to make.

The plaintiff challenges two sets of regulations promulgated by the DOH. The first regulation promulgated by the DOH is its "conflict-of-interest" regulation which the DOH claims amended 10 NYCRR Part 69.4. The second regulation promulgated by the DOH is its newly-promulgated regulation imposing caps on executive compensation and administrative expenses, referred to as the "anti-excess" regulation by the DOH which claims it is enacted as 10 NYCRR Part 1002; referred to by ACTS as the "use-of-funds" regulation. The DOH provides that the "anti-excess"/"use-of-funds" regulation does not direct how proper funds are to be expended, but rather it directs how provider funds may not be expended by setting forth ceiling (caps) on executive compensation and administrative expenses.

This Court, by way of order dated February 4, 2013, granted ACTS' application for a preliminary injunction enjoining the application and enforcement of the conflicts-of-interest regulations promulgated by the DOH and published in the New York State Register on November 28, 2012, pending final disposition of this action. ACTS provides that the use-of-funds regulation was not at issue on its prior motion for a preliminary injunction as it had not been finalized until May 30, 2013 and did not go into effect until July 1, 2013, approximately five months after the Court issued the preliminary injunction order.

ACTS submits the affidavit of Steven Sanders, Executive Director of ACTS, who avers that he is a former member of the New York State Assembly from 1978 through 2005 and was a second lead sponsor of the Assembly bill that became the Early Intervention Program for Infants and Toddlers With Disabilities and Their Family, codified as Title II-A of the Public Health Law, §§2540 to 2559-b.

Mr. Sanders provides that ACTS is comprised of more than thirty member agencies that provide early intervention to more than 25,000 children throughout the State of New York, provides a list of such member agencies, and submits that the ACTS' member agencies, through contracts with independent therapists, provide a full spectrum of Early Intervention services to children and families as part of New York's Early Intervention Program. ACTS provides that ACTS' members are for-profit providers of Early Intervention Services. The Early Intervention Program is designed to provide services to 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.

Mr. Sanders sets forth that the Early Intervention Law prescribes how Early Intervention services are to be provided and provides examples and references thereto: New York Public Health Law, (PHL) §2544 provides detailed instructions for how children for the Early Intervention Program, (EIP) should be screened and evaluated; PHL §2544(2)(a) provides parents with the unfettered right to select an evaluator from a list of approved evaluators whereby (5) the evaluation shall not include a reference to any specific provider of Early Intervention services in the event that a child is deemed eligible for such services; [PHL §2544(2)(a) provides that "[t]he parent may select an elevator from the list of approved elevators . . ."]; PHL §2545 provides that should a child be deemed eligible for Early Intervention services, an "early intervention official" shall convene a meeting with, among others, the child's parents, the evaluator, and an initial "service coordinator" who is charged with coordinating the provision of Early Intervention services to the child. Mr. Sanders provides that this meeting culminates in the preparation of a written Individual Family Service Plan, "IFSP", whereby a child's parents play a significant role in working with either the initial service coordinator in connection with preparing the IFSP or with an ongoing service coordinator charged with implementing the IFSP to determine who will be the service provider or providers for the child. (PHL §2545(2)). Early Intervention Law provides for reimbursement by the State and municipalities, together with third party insurers, for the provision of Early Intervention services by private, for-profit agencies, such as the member agencies of ACTS. (PHL §§2552, 2557).

Mr. Sanders submits that the two regulations, the "conflicts-of-interest regulation," and the "use-of-funds" are invalid and will cause major disruption in the EIP and harm ACTS' member agencies. Mr. Sanders details how the conflict-of-interest regulation prohibits a professional who conducts an evaluation of a child eligible for Early Intervention services, and also an agency who contracts with or employs the evaluator, from providing Early Intervention services to the same child; forbids a person from serving as both an evaluator and a "service coordinator" for a child; will prevent an ACTS' member agency from working with a therapist to provide Early Intervention services to children when that therapist was the professional who evaluated the child; will prevent an ACTS member agency from working with any therapist to provide Early Intervention services to a child when the evaluator of the child was done through

that member agency; will limit the scope of professional therapists with whom ACTS' member agencies may work, and will impact parents' rights under the Early Intervention Law as parents have an unfettered right to choose an evaluator for their child from an approved list, and may work with the service coordinator to choose the service provider for the child. (PHL §2544 (2)(a)). The prohibition, explains Mr. Sanders, will cause agencies and therapists who currently provide a full range of Early Intervention services to avoid providing evaluations of children for eligibility in the Early Intervention Program to ensure that they are not conflicted out of providing Early Intervention services, and reduce the overall number of professionals able to conduct evaluations.

Ms. Sanders offers the following legislative history. On or about January 17, 2012, the Governor introduced a Budget Bill in the Assembly and the Senate which included two bills, the Assembly bill (A. 9056) and the Senate bill (S. 6256). The Governor's Budget Bill included the proposed legislation pertaining to conflicts of interest between evaluators, service coordinators, and service providers in the EIP, intended as an amendment to PHL §2550(2)(b), which was rejected by the Legislature. The Legislature passed the 2012-2013 Budget Bill on March 30, 2012, the Governor signed the 2012-2013 Budget into Law by April 9, 2012, and such enacted Budget Bill did not include the proposed conflicts of interest provision. Thereafter, the DOH promulgated the conflicts-of- interest rules which, Mr. Sanders submits, was without authority, and was arbitrary and capricious. In accordance with PHL §2553(2), a committee comprised of twenty-six members appointed by the Governor, the Early Intervention Coordinating Council, (EICC), is charged with among other things, administering the Early Intervention Law, and assisting and advising the Commissioner of the DOH in the development of coordinated standards and procedures. Mr. Sanders provides that the DOH sought the EICC's input of the conflict of interest regulation only a few days after it already published the regulation, whereby the EICC, by way of two resolutions, essentially requested the DOC to withdraw the regulation and/or provide the EICC's recommended alternative approval.

With respect to the "use-of-funds" regulation, Mr. Sanders provides that the prohibitions contained thereto were also a part of the same January 17, 2012 bill set forth in the Governor's proposed conflict-of-interest rule, proposing limits on compensation and expenses applicable to all providers of services reimbursed by state funds, which was rejected by the Legislature. Mr. Sanders provides a sample of the briefing box that accompanied the Governor's proposed 2012-2013 Budget acknowledging that the proposal was intended to effectuate policy "reforms" to protect against "excessive compensation, administrative costs and profit." The enacted 2012-2013 Budget did not include, as the Legislature rejected, the Governor's proposal to give the DOH, and other agencies, the authority and direction to impose compensation and administrative caps on providers of Early Intervention and other services. Thereafter, the Governor issued Executive Order No. 38, directing each agency to promulgate regulations to address the extent and nature of executive compensation and administrative costs, directing each agency to promulgate regulations that Mr. Sanders submits are identical to the provisions rejected in the Governor's budget proposal. Mr. Sanders has demonstrated that two bills submitted to the Assembly, which would have imposed the same executive compensation and administrative costs caps that the Governor proposed, were rejected by the Legislature.

The DOH submits that with respect to the conflicts-of-interest regulation, the DOH had the authority to regulate in this area and followed the procedures for promulgating the conflicts-of-interest regulation. The DOH has authority to "[r]egulate the financial assistance granted by the state in connection with all public health agencies" and to "receive and expend funds made available for public health purposes pursuant to law." (PHL §§201(1)(o) and 201(1)(p)). The DOH has been designated as the lead agency responsible for the administration of the Early Intervention system, (PHL §2541(12)), "responsible for the general administration and supervision" of the program, (PHL §2550(1)), authorized to "adopt regulations necessary to carry out the provisions of [the statute]." (PHL §2259-b). The DOH contends that it promulgated the amendments to the conflicts-of-interest regulation pursuant to these express grants of authority. The DOH provides that PHL §2544(5) is not the sole means of preventing conflicts-of-interest, but rather represents one - not the only - safeguard against conflicts-of-interest in the evaluation process. Furthermore, the DOH states it is not limited to the collection and analysis of data as the DOH is required to "enhance [its] ongoing provision of the EIP administration." (PHL §2557(4)).

The DOH profers the affidavit of Bradley J. Hutton who avers that he is the Director of the Department's Center for Community Health and oversees many Divisions and Bureaus within the Center, including the Bureau of Early Intervention. Mr. Hutton previously served as the Director of the Bureau of Early Intervention from August of 2006 to July of 2011. Mr. Hutton is a voting member on the EICC and the designee of the Commissioner of Health ("Commissioner"), and has been a voting member since 2012. Mr. Hutton provides that New York's EIP identifies young children, (from birth through three years of age), who may have a disability or developmental delay, who can benefit from services to minimize their disability or delay. Mr. Hutton provides that the EIP is an entitlement program where services are provided without consideration of parents' income or insurance program, where services are given entirely free of charge to parents regardless of their income. Costs are bourne at public expense whereby the Department receives approximately $22 million dollars in grant funding. Once a child is referred to the Early Intervention Official, (EIO), the parent is authorized to select an evaluator who has already been approved by the Department to conduct evaluations, who is solely responsible for deciding whether a child is eligible for the EIP. (PHL §2544). Mr. Hutton provides that while it is significant that the PHL expressly authorizes the parent to select the evaluator who evaluates their child pursuant to PHL §2544(2)(a), it also allows the parent to select the ongoing service coordinator responsible for implementing the Individualized Family Service Plan, (IFSP), pursuant to PHL §2594(2)(j), but does not authorize the parent to select the actual provider of services. Rather, it is the Department, the lead agency, not the IFSP team, to determine the appropriate provider of any particular early intervention service. Mr. Hutton submits that the aforementioned guidance for evaluations is consistent with the PHL. Additionally, as the Legislature has provided the Department with authority over a provider's participation by authorizing the Department to establish standards for evaluators and to approve and periodically re-approve evaluations, and perform audits, as well as collect data on the number of evaluators, Mr. Hutton provides that the Department promulgated the conflicts-of-interest regulations consistent with its authority. Mr. Hutton states that the Department promulgated the conflicts-of-interest regulation to ensure that the service providers for a child were selected based on the best interest of the child and not on the best financial interests of the evaluator or the evaluator's agency. Mr. Hutton adds that the Department has special expertise in the early intervention field that it utilized in promulgating the special interest regulations.

The DOH refers to Mr. Hutton's affidavit to point out that over 90% of the evaluators in New York City, and over 44% of evaluators throughout the rest of the State of New York, provided services to the same children they previously evaluated. The DOH also refers to the affidavits provided by ACTS' member agencies, such as Mid Island Therapy, Wee Grow Up, and Trudy Font-Padron, and remarks that the numbers portrayed are disproportionate as to the actual number of children eligible for EIP services, and mentions that one of the providers seeks to derive substantial revenues from DOH and continue a "sky's the limit" approach, as evidenced by such provider's attempt in a separate litigation attempt to prevent an audit of the provider's company. Mr. Hutton explains that the DOH determined that it would be more likely that an evaluator would advance their own financial self-interest by steering children towards themselves, and the conflict-of-interest regulation is a prophylactic regulation to protect evaluations and the IFSP process from evaluators' conflicts-of-interest before they could manifest themselves.

As to the use-of-funds/anti-excess regulation, the DOH maintains that it was properly promulgated and lawful. The DOH refers to the affidavit of Robert Lociero, Deputy Director of the Division of Administration of the DOH. Mr. Lociero avers that the DOH's interest in promulgating the regulations regarding limits on executive compensation and administration expenses was to direct more state dollars to patient care and less to executive compensation, and administrative expenses. The DOH submits that the use-of-funds/anti-excess regulation is one instance of governmental oversight of state funds. The DOH refers to the affidavit of J. Mark Noordsy, Senior Attorney in the Division of Legal Affairs of the DOH. Mr. Noordsy identifies thirteen agencies, including the Division of Criminal Justice Services, Agriculture and Market, and Office of Children and Family Services, that promulgated almost identical regulations regarding limits on executive compensation.

DISCUSSION

The conflicts-of-interest regulation essentially prohibits a professional who conducts an evaluation of a child for eligibility for Early Intervention Services, and the agency who contracts with or employees the evaluator, from providing Early Intervention services to the same child. In other words, the professional cannot service in the capacity as an "evaluator" and a "service coordinator" for the same child. The use-of-funds/anti-excess regulation essentially limits the compensation of for-profit agency members and caps their administrative expenses.

At issue is whether the DOH, in promulgating the conflicts-of-issue and use-of-funds/anti-excess regulations, strayed from the administrative field into the legislative field by crossing the line from administrative rule making into legislative policy-making. The Court of Appeals has identified, in *Boreali v. Axelrod*, 71 NY2d 1, the following four "coalescing circumstances" indicating that the agency, in enacting regulations, had usurped the role of the legislature in making public policy assessments:

"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."

As already provided in this Court's prior order, 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*; *Under 21, Catholic Home Bur. For Dependent Children v. City of New York*, 65 NY2d 344).

Additionally, this Court has previously reasoned that 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."

Likewise, as to the first *Boreali* factor, here, the DOH, in implementing Executive Order No. 38 by promulgating the use-of-funds/anti-excess regulation, has "built a regulatory scheme on its own conclusions about the appropriate balance of trade-offs" where the agency was not authorized to do so. The statutory provisions cited by the DOH, *to wit*, Social Services Law §363-2(a); PHL §§201(1)(o), (p) and 206(3) and (6); Not-For-Profit Corporation Law §508, either apply to non-profits whereas ACTS' member agencies are for-profit, or apply to medicaid. The two PHL provisions referred to, allow the DPH to regulate the financial assistance, however,

they do not empower the DOH to direct how providers of Early Intervention services may allocate the money that they earn by providing Early Intervention services to infants and toddlers at levels of reimbursement fixed by the DOH, or in essence dictate what for-profit providers do with their earnings. Neither is the DOH's authority to "enter into contracts" an authority to set executive compensation and administrative expense caps for Early Intervention providers. Additionally, the DOH's scope of authority to "collect data" or "reimburse approved costs" invoke authority to obtain and spend money, but not to dictate how the organization uses that money in paying its expenses and compensating its executives after a private company has been duly paid. None of the statutes invoked by the DOH grant it the authority to determine how much a for-profit entity may pay its executives and how much it may expend administrative expenses. Rather, in an effort to address a problem the DOH may perceive as a future problem with costs, the DOH, in promulgating the use-of-funds/anti–excess regulation, by limiting compensation and setting caps under its authority to oversee and regulate financial assistance, has built a regulatory scheme on its own conclusions about what the appropriate balance trade off should be concerning Early Intervention services and costs. The DOH is balancing policy matters concerning economic factors and policy without addressing health related concerns or services to children with developmental delays through the coordination and cooperation of parents, and professional service providers.

As already provided by this Court's prior order, 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). As will be described in more detail with respect to the third *Boreali* factor, not only did the DOH act without the benefit of legislative guidance in promulgating the conflicts-of-interest regulation, but rather implemented a regulation rejected by the Legislature. 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 second *Boreali* factor with respect to the use-of-funds/anti-excess regulation, likewise, the DOH did not merely fill in the details of broad legislation, but rather, wrote on a clean slate, created its own comprehensive rules without the benefit of legislative guidance. As a matter of fact, the DOH wrote on a clean slate its own comprehensive rules in the face of legislative rejectment of such proposed litigation, which will be more fully discussed in this Court's analysis of the third *Boreali* factor. The DOH created its own comprehensive rules in promulgating the use-of-funds/anti-excess regulation after the Governor's proposed legislative guidance granting the DOH commissioner, "the authority subject to approval by the director of the budget, to promulgate regulations or to address by other means the extent and nature of a provider's administrative costs and executive compensation" was rejected by the Legislature. Here, the DOH did not merely implement a policy declared by the Legislature, or fill in the details of broad litigation, but rather, on the contrary, promulgated a set of rules based in a proposal that was rejected by the Legislature.

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).

Likewise, as to the third *Boreali* factor concerning the use-of-funds/anti-excess regulation, it is undisputed that the DOH "acted in an area which the Legislature had repeatedly tried - and failed to reach an agreement," (*Boreali, supra)*, as Executive Order No. 3, and the use-of-funds/anti-excess regulation were issued and promulgated after the Legislature rejected the proposed budgetary legislation that included an identical proposal to cap executive compensation and administrative expenses through provisions virtually identical to the terms of the Executive Order. ACTS has demonstrated that the use-of-funds/anti-excess regulation is nearly a verbatim copy of the proposal that the Legislature rejected, not just once but several times.

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. Rather, the DOH submits the conflict-of-interest regulation is a prophylactic regulations to protect evaluations from potential conflicts-of-interest before they manifest themselves. Likewise, the use-of-funds/anti-excess regulation was a prophylactic approach to costs without the benefit of any evidence of expertise or technical competence. The DOH's rationale that compensation and expense caps will "ensure that taxpayers' dollars are used properly, efficiently, and effectively to improve the lives of New Yorkers" is unsubstantiated. The DOH does not refer to any evidence of taxpayers' dollars being used more efficiently for executive compensation or administrative expense. In any event, the rationale for either the conflicts-of-interest or use-of-funds/anti-excess regulation has not taken into consideration as to how the prohibitions will impact the EIP "established to provide coordinated and comprehensive early termination services to infants and toddlers with disabilities and their families recognizing the essential role of families in planning and implementing services for their infants and toddlers . . .", a program the Legislature determined "will provide a variety of services that will enhance the capacity of families to meet the developmental needs of their families and toddlers with disabilities." (L. 1992, c428 §1). The DOH's rationale hasn't demonstrated how the regulations enhance the EIP, or that they do not impair the EIP. The Legislature had found that the provision of early intervention services established will "[r]educe the educational costs to our society, including our state's schools, by minimizing the need for special education and related services after infants and toddlers with disabilities reach school age." (*Id.*)

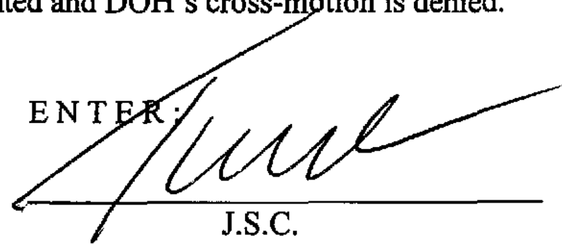
DOH's reliance on the Suffolk County Supreme Court's decision in *Concerned Home Care Providers, Inc. v. New York State Department of Health and Andrew Cuomo, as Governor of the State of New York*, 969 NYS2d 743, is misplaced. The Court in *Concerned Home Care Providers, Inc.*, did not involve the legislative history as in the case *sub judice*. At bar, the Legislature was not merely "inactive" with respect to the Governor's policy proposal here, but

rather rejected the proposal, and already addressed the potential conflicts of issue and costs issue in the PHL. Moreover, the legislation in *Concerned Home Care Providers, Inc.*, proposed a detailed set of amendments to the not-for-profit corporation law, and did not impose any executive compensation and expense caps to for-profit corporations. As already provided, ACTS' agency members are for-profit providers of Early Intervention services.

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

CONCLUSION

Upon the foregoing, ACTS' motion is granted and DOH's cross-motion is denied.



J.S.C.

Dated: April 8, 2014

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

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NASSAU COUNTY
COUNTY CLERK'S OFFICE