STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

Corning Council for Assistance and Information for the Disabled, Inc. d/b/a/ AIM Independent Living Center; Rockland Independent Living Center, Inc. d/b/a/ Bridges; Aliah Home Care, Inc.; Blossom Home Care Agency Corp; Caring Professionals, Inc.; Committed Home Care Inc.; Horizon Home Care Services, Inc.; Lifecare Advantage LLC; and New Solution Home Care Inc.

Plaintiffs/Petitioners,

DECISION AND ORDER
Index No. 908147-24

-against-

JAMES V. McDONALD, M.D., in his capacity as the Commissioner of the New York State Department of Health, and the NEW YORK STATE DEPARTMENT OF HEALTH,

Defendant/Respondent,

(Supreme Court, Albany County, Article 78 Term)

APPEARANCES: Hermes A. Fernandez, Esq.
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HON. AMY E. JOYCE, Acting Justice:

Petitioners commenced this hybrid CPLR article 78 proceeding/declaratory judgement action to challenge Chapter 57 of the Laws of 2024 (hereinafter Part HH), which made a significant change to the State's consumer directed personal assistance program (hereinafter CDPAP) and the actions taken by respondent Department of Health's (hereinafter DOH) to implement this change.

CDPAP "is intended to permit chronically ill and/or physically disabled individuals receiving home care services under the medial assistance program greater flexibility and freedom of choice in obtaining such services" (SSL 365-f [1]). "Eligible individuals" apply to participate in the program at least once a year (SSL 365-f [2]) and may be permitted to participate if they meet certain criteria and it is determined, after an assessment, that the individual needs home care services, private duty nursing, or supervision with activities of daily living (SSL 365-f [2] [a-d]. These services are provided by a "personal assistant" in accordance with the wishes of the "eligible individual's" or his or her designated representative (SSL 365-f[3]. Participating "eligible individuals" must hire, recruit and supervise their own "personal assistants". (id). The CDPAP statute includes provisions applicable to entities that provide "fiscal intermediary services" (Social Services Law §365-f [4-a]). Specifically, the "fiscal intermediary services" are performed on behalf of the consumer to help him or her perform the functions as a personal assistant's employer, including the following:

> (A) Wage and benefit processing for consumer directed personal assistants;
> (B) Processing all income tax and other required wage witholdings;
> (C) Complying with workers' compensation, disability and unemployment requirements;
> (D) Maintaining personnel records for each consumer directed personal assistant, including time records and other documentation needed for wages and benefit processing and a copy of the medical documentation required pursuant to regulations established by the [Health] commissioner;
> (E) Ensuring that the health status of each consumer directed personal assistant is assessed prior to service delivery pursuant to regulations issued by the commissioner;
> (F) Maintaining records of service authorizations or reauthorizations;
>
> (G) monitoring the consumer's or, if applicable, the designated representative's continuing ability to fulfill the consumer's responsibilities under the program and promptly notifying the authorizing entity of any circumstance that may affect the consumer's or, if applicable, the designated representative's ability to fulfill such responsibilities;

(H) complying with regulations established by the commissioner specifying the responsibilities of fiscal intermediaries providing services under this title;

(I) entering into a department approved memorandum of understanding with the consumer that describes the parties' responsibilities under this program; and

(J) other related responsibilities which may include, as determined by the commissioner, assisting consumers to perform the consumers' responsibilities under this section and department regulations in a manner that does not infringe upon the consumer's responsibilities and self-direction.

(Social Services Law § 365-f; 18 NYCRR § 505.28).

Part HH was enacted as part of New York States 2024 Budget. In relevant part, Part HH amended Social Service Law 365-f to change the definition of "fiscal intermediary" to "Statewide fiscal intermediary". Consequently, while there are currently many entities with contracts to provide fiscal intermediaries, once this change is implemented there will be just one. Part HH included specific selection criteria, including "at a minimum that the eligible contractor is capable of performing statewide fiscal intermediary services with demonstrated cultural and language competencies specific to the population of consumers and those of the available workforce, has experience serving individuals with disabilities, and as of April 1, 2024, is providing services as a fiscal intermediary on a statewide basis with at least one other state" (part HH Section 2(B). Part HH also provides that the statewide FI will be required to enter into a subcontract with "an entity that is a service center for independent living under [Education Law § 1121) and to subcontract with qualified entities to provide FI services. To be qualified to subcontract as an FI, the entity must have been providing FI services since at least (Part HH, Section 1 [ii-b]).

On July 17, 2024, DOH issued its Request for Proposals 20524 (hereinafter RFP) for eligible entities to bid for the contract for Statewide Fiscal Intermediary Services. The RFP

provides that only entities with certain, "minimum qualifications" may submit a bid. Insofar as it is relevant to this proceeding, an entity may bid if, as of April 1, 2024, it is providing services as a statewide fiscal intermediary in another state. The RFP was amended on August 7, 2024 to clarify that "for the purposes of this minimum qualification, 'statewide basis in at least one other state" means that the entity is currently engaged in a contract with the single State agency established or designated to administer or supervise the administration of the State's Medicaid program in a state other than New York, to be a provider of fiscal intermediary services throughout the entire geographic area of the subject state". The RFP further provides that each bidder must agree to subcontract with at least one subcontractor "that has a proven record of delivering services to individuals with disabilities and the senior population and has been providing fiscal intermediary services since January 1, 2012, or earlier". In addition, the RFP provides that bidders must "[e]nsure the avoidance of actual or perceived conflicts of interest while operating as the Statewide FI. Actual or perceived conflicts include . . . entit[ies] . . . owned or controlled by a Licensed Home Care Services Agency (LHCSA) or a Managed Care Organization (MCO) in New York State that owns or holds the controlling interest in a LHCSA or MCO in New York State".

Petitioners Corning Council for Assistance and Information for the Disabled, Inc. d/b/a AIM Independent Living Center (hereinafter AIM), Rockland Independent Living Center, Inc., d/b/a BRIDGES (hereinafter BRIDGES), Aliah Home Care (hereinafter Aliah), Blossom Home Care Agency Corp. (hereinafter Blossom). Caring Professionals Inc. (hereinafter Caring Professionals), Committed Home Care Inc. (hereinafter CHC), Horizon Home Care Services, Inc. (hereinafter Horizon), Lifecare Advantage, LLC (Lifecare), and New Solution Home Care

Inc. all operate as FIs under the CDPAP. Each entity submits an affidavit detailing their extensive experience providing FI services in the State of New York. None of the petitioners are qualified to submit a bid to serve as the statewide FI because none has the requisite out of state experience[1]. In addition, because petitioners Aliah, Blossom, Caring Professionals, and Lifecare are all affiliated with a LHCSA, these entities also cannot seek to subcontract with the statewide FI that is selected. Petitioners Blossom, CHC, Horizon, Lifecare, and New Solution have not been operating since 2012, thus, these entities also cannot seek to subcontract.

Petitioners commenced this combined CPLR article 78 proceeding/declaratory judgment action to challenge Part HH of chapter 57 of the Laws of 2024 and the issuance of the Request for Proposals seeking a single statewide vendor of FI services pursuant to Part HH. More specifically, petitioners allege that Part HH violates the due process and equal protection clauses of the United States Constitution because it excludes NY FIs who have statewide experience in New York State but permits proposals by Fis who have statewide experience in other states (1st and 2nd COA). Petitioners also allege that Part HH is an unconstitutional bill of attainder in violation of Article 1, Section 10 of the United States Constitution (3rd COA) .

Petitioners also challenge respondent's RFP. Specifically, petitioners allege that respondent's determination to exclude proposals from entities owned or controlled by a LHCSA in New York State or that own or hold the controlling interest in in a LHCSA in New York State violates the equal protection clause and is arbitrary and capricious and contrary to law (4th COA, 8th COA). Petitioners also allege that determination to require entities to have demonstrated

[1] AIM does have a contract to provide FI services in Pennsylvania pursuant to a contract with the U.S. Department of Veterans Affairs.

experience providing statewide FI services in other states under a contract with that State's Medicaid program (5th COA). Petitioners also allege that respondent's determination to issue the RFP was arbitrary and capricious because the requirement that bidders have experience providing FI services under a contract with another state's Medicaid program excludes entities that would qualify pursuant to Part HH, and permits entities with no experience in New York State to bid are contrary to Part HH, irrational and unsubstantiated (6th COA). Further, petitioners claim that the determination to issue the RFP was arbitrary and capricious because the provision allowing the statewide FI to offer subcontracts to Independent Living Centers and set the terms of such subcontracts is contrary to the express language of Part HH (7th COA). Finally, petitioners allege that the determination to issue the RFP was arbitrary and capricious because it provides that the statewide FI may not subcontract with providers who began providing services after January 1, 2012.

Now, by Order to Show Cause dated August 20, 2024 (McDonough, J), petitioners move for a preliminary injunction, a permanent injunction, and an order declaring that Part HH is unconstitutional on its face and as applied. Petitioners further seek attorneys' fees and costs. Respondents oppose the requested relief. Oral argument was held on September 20, 2024.

"A preliminary injunction may be granted under CPLR article 63 when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of equities tipping in the moving party's favor" (Doe v Axelrod, 73 NY2d 748, 750 [1998]). A preliminary injunction is a "drastic remedy" that "prevent[s] the litigants from taking actions that they [would] otherwise [be] legally entitled to take in advance of an adjudication on the merits" (Rural Community

Coalition, Inc. v Village of Bloomingburg, 118 AD3d 1092, 1094-1095). Accordingly, the relief "should be issued cautiously" (id at 1095).

Petitioners argue that they are likely to succeed on the merits of their challenge to Part HH because the amended statute denies them due process and equal protection of the laws and is an unconstitutional bill of attainder. Petitioners also contend that they are likely to succeed on the merits of their challenge to the RFP because its terms deny them equal protection of the laws and are arbitrary and capricious and contrary to law.

"A violation of equal protection is deemed to occur when a state agency treats persons similarly situated differently under the law" (Matter of United Jewish Community of Blooming Grove, Inc. v. Washingtonville Cent. Sch. Dist., 207 AD3d 9, 15-16 [2022] [internal quotation marks and citations omitted]) Here, the parties agree that Part HH does not create a suspect classification or impair a fundamental right, thus petitioners/plaintffs have "the tremendous burden of demonstrating that no facts can reasonably be conceived to show the existence of a rational basis in support of some legitimate state interest in drawing the distinction" (id). The rational basis review is "highly deferential" (Grand S. Point, LLC v. Bassett, 2024 NY Slip Op 03364 *17-19, __ AD3d __, __ [2024]). 024 N.Y. App. Div. LEXIS 3422, *17-19) and "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." (Heller v Doe, 509 U.S. 312, 319-321 [1993] [internal quotation marks and citation omitted]).

Petitioners allege that Part HH denies them equal protection because there is no rational reason to favor entities with experience in other states over entities with experience in New York State. In response to petitioners' motion for a preliminary injunction, respondents submit an

affirmation by its Medicaid Director. He explains that there are currently more than 600 FIs operating in New York State. These entities do not contract directly with the DOH. The Medicaid Director further explains that the high administrative costs associated with having so many entities providing FI services has made CDPAP program "prohibitively expensive". Moreover, because these entities did not contract with DOH, there was no ability to control the number of entities providing FI services nor to anticipate costs associated with the CDPAP program. The Medicaid Director explains that Part HH is expected to save the Medicaid program approximately $200 million in 2024. Additionally, he explains, the change to a single statewide provider will improve oversight, allow more comprehensive auditing, and reduce fraud, waste and abuse.

Petitioners may be correct in their view that Part HH is unwise, but it would be improper for this Court to assess the wisdom of a legislative enactment (Dalton v Pataki, 11 AD.3d 62, 68 [2004]). Contrary to petitioner's claim, Part HH does not favor providers with experience out of State over providers with experience in New York State. Rather, it seeks providers who have experience serving as a statewide FI in another State. The Medicaid Director's explanation that by requiring this experience, the selected provider will not have to create a new model, thus minimizing service disruption provides a rational basis for this legislative determination. Accordingly, petitioners have not demonstrated a likelihood of success on it claim that Part HH violates the equal protection clause of the United States Constitution.

Petitioners also contend that Part HH violates the Due Process Clause of the United States Constitution because there is no rational basis to exclude New York experience. "To establish a claim for violation of substantive due process, a party must establish a cognizable

vested property interest and that the governmental action was wholly without legal justification" (Matter of Raynor v Landmark Chrysler, 18 NY3d 48, 59 [2011] [internal quotation marks, citations and ellipses omitted]). If "no fundamental right is infringed legislation is valid if it is rationally related to legitimate government interests" (People v Superintendent, Adirondack Corr. Facility, 36 NY3d 187, 199 [2020]). Petitioners do not allege that a property interest is implicated by Part HH. Further, the statute does not exclude New York experience, it requires a provider to have experience as a single statewide FI. The justification for this is, as set forth above, to minimize service disruption as this State moves to the single statewide FI provider model. Accordingly, petitioners have not demonstrated a likelihood of success on the merits of its claim that Part HH violates the Due Process clause of the United States Constitution.

The Court finds that petitioners have not demonstrated that they will be likely to succeed on the claim that Part HH is an unconstitutional Bill of Attainder. "[T]he Bill of Attainder Clause prohibits any law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial. That is, the Supreme Court has identified three elements of an unconstitutional bill of attainder: (1) "specification of the affected persons," (2) "punishment," and (3) "lack of a judicial trial." (ACORN v United States, 618 F.3d 125, 135-136 [2d Cir 2010] [internal quotation marks and citations omitted]). To determine whether legislation inflicts punishment, "three factors guide our consideration: (1) whether the challenged statute falls within the historical meaning of legislative punishment (historical test of punishment); (2) whether the statute, viewed in terms of the type and severity of burdens imposed, reasonably can be said to further nonpunitive legislative purposes (functional test of punishment); and (3) whether the legislative record evinces a [legislative] intent to punish"

(motivational test of punishment). All three factors need not be satisfied to prove that a law constitutes punishment; rather, the factors are the evidence that is weighed together in resolving a bill of attainder claim." (id. at 136 [internal quotation marks and citations omitted]).

Here, no entity was specified in the legislation (compare Consolidated Edison Co. of N.Y. v Pataki, 292 F3d 338 [2d Cir. 2002]). Review of petitioners' submissions confirm that there was significant legislative debate and concern about whether moving to a single statewide FI would lead to a disruption of services to consumers but no specific complaints about petitioner or other provider of FI services. While there may have been some concern with fraud in the CDPAP program in general, petitioners do not identify any specific legislative intent to punish petitioners or any entities that provide FI services (compare, id). Finally, there is a nonpunitive purpose to Part HH, specifically, to reduce administrative costs, minimize service disruption, and reduce fraud and waste.

Turning to petitioners' challenge to the RFP, Part HH directs respondent DOH to issue an RFP that describes the services to be provided by statewide fiscal intermediary with the "minimum" criteria (see Part HH Section 2 [b] [i] [A], [B]). Petitioners allege that respondent's determination to preclude LHCSAs from being able to submit proposals and permitting only entities contracting with another State's Medicaid agency to provide FI services to submit proposals violates the Equal Protection Clause of the United States Constitution. The submissions do not demonstrate that petitioners are likely to be successful on the merits of these claims. Neither of these criteria conflict with the minimum criteria proscribed by Part HH. Moreover, as set forth above, respondent has demonstrated a rational basis for requiring experience with another State's Medicaid agency, that is, to allow an efficient transition.

Petitioners' submissions fail to demonstrate that excluding entities affiliated with LHCSAs from providing FI services is irrational. Respondent's Medicaid Director explains that DOH determined this exclusion was necessary because LHCSAs provide care and FIs process payments for such care. At the very least, this could be a conflict of interest. Under the CDPAP structure, if a consumer hires a personal assistant through a LHCSA, the FI should be assisting the consumer. If the FI and LHCSA are affiliated, the conflict seems evident. Even if, as petitioners contend, LHCSAs have always served as FIs, there is a rational basis for respondent's determination to minimize actual and perceived conflicts of interest going forward.

Finally, petitioners have not demonstrated that they will be successful on their claim that the specification in the RFP were arbitrary and capricious and contrary to law. State agencies, "when composing bid specifications, may establish requirements--as long as they are rationally based--that set forth criteria for experience and qualifications that must be met for an entity to be an eligible bidder and . . . may disqualify a bidder for failure to comply with these requirements" (E.W. Tompkins Co. v. State Univ. of N.Y., 61 A.D.3d 1248, 1250 [internal quotation marks and citations omitted]). Here, petitioners' submissions do not demonstrate how the RFP is inconsistent with Part HH. Finally, petitioners are not likely to succeed on their claims challenging the RFP because respondent's interest in reducing administrative costs, minimizing fraud and waste, ensuring an efficient transition, and limiting any disruption in services provided to consumers provide a rational basis for the challenged specifications.

Having determined that petitioners have not demonstrated a likelihood of success on the merits of their claims, the Court will not address the remaining elements of petitioners' motion. Accordingly, based on the foregoing, it is

ORDERED that the application for a preliminary injunction is denied; and it is further

ORDERED that counsel for the parties shall confer and attempt to agree on a proposed, final briefing schedule to be provided to this Court within twenty (20) days of the date of this Decision and Order.

This shall constitute the Decision, Order and Judgment of the Court. This Decision, Order and Judgment will be forwarded to the Albany County Clerk by the Court. A copy of the Decision, Order and Judgment is being forwarded to all counsel of record. The signing of this Decision, Order and Judgment and delivery of the same to the County Clerk shall not constitute entry or filing under CPLR 2220. Counsel for respondent is not relieved from the applicable provisions of that rule with respect to filing, entry and notice of entry of the Decision, Order and Judgment. As this is an E-FILED case, there are no original papers considered for the Court to transmit to the County Clerk.

ENTER.

Dated: Albany, New York
September 30, 2024

Hon. Amy E. Joyce
Acting Justice of the Supreme Court

09/30/2024

Papers Considered:

NYSEF Doc. # 1-33; 35-42; 47-48