STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

IN THE MATTER OF THE APPLICATION OF

The Consumer Directed Personal Assistance Association of New York State, the New York Association on Independent Living, New York State Association of Health Care Providers, Southern Tier Independence Center, AIM Independent Living Services, Rockland Independent Living Center dba BRIDGES, Center for Disability Rights, Independence Living Center of the Hudson Valley, Finger Lakes Independence Center; ARISE Child and Family Service, Inc., Independent Home Care, Inc., Long Island Center for Independent Living, Western New York Independent Living, Inc., and Consumer Directed Choices, Inc.,

Petitioners,

-against-

HOWARD A. ZUCKER, M.D., in his capacity as the Commissioner of the New York State Department of Health, and the NEW YORK STATE DEPARTMENT OF HEALTH,

Respondents.

DECISION/JUDGMENT

Index No. 904696-19
RJI: 01-19-ST0492

APPEARANCES:

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RYBA, J.,

The Consumer Directed Personal Assistance Program ("CDPAP") is a New York State program, codified in Social Services Law § 365-f, in which chronically ill and/or physically disabled

individuals receiving home care services through the New York State Medicaid Program are afforded greater flexibility and freedom of choice in obtaining such services by hiring and managing their own home care aides, referred to under the statue as Personal Assistants (see, Social Services Law § 365 [f][1]). Fiscal Intermediaries ("FI"s) contract with the New York State Department of Health to provide fiscal intermediary support services in order to facilitate the financial aspects of the relationship between CDPAP participants and their chosen Personal Assistants, and to insure compliance with the Medicaid Program and other State and Federal employment laws (see, Social Services Law § 365 [f][4-a][a][I]). The work completed by FIs include the following services:

> (A) wage and benefit processing for consumer directed personal assistants;
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> (B) processing all income tax and other required wage withholdings;
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> (C) complying with workers' compensation, disability and unemployment requirements;
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> (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 commissioner;
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> (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 (see, Social Services Law § 365 [f][4-a][a][ii]).

Prior to September 1, 2019, FIs were reimbursed for the aforementioned services through the Medicaid program at a rate that utilized the Personal Care Services methodology derived from the regulatory scheme set forth in 18 NYCRR 505.14. The methodology set forth in that regulatory scheme provided for FI reimbursement on an hourly basis, with FIs paid for each eligible hour of service delivered by a Personal Assistant to the CDPAP participant, with a reimbursement cap set at 18% of an FIs actual allowable costs. Indeed, in a letter dated July 22, 2019, the Director of Bureau of Residential Health Care Reimbursement from the Department of Health notified FI administrators that "the formula on which [reimbursement rates] have been promulgated in accordance with Title 189, Section 505.14 of the Commissioner's Administration Rules and Regulations."

However, on July 1, 2019, the Department of Health, through the New York State Office of Health Insurance Programs Division of Long Term Care, purported to alter this regulatory reimbursement methodology through issuance of "Managed Care Policy 19.01: Implementation of Fiscal Intermediary ("FI") Rate Structure Enacted in the SFY 2019-20 NYS Budget" (hereinafter "Managed Care Policy"). The Managed Care Policy, effective September 1, 2019, changed the previous FI reimbursement rates by implementing a three-tier Per Member Per Month ("PMPM") rate structure for the FI services provided to Medicaid fee-for-service (FFS) members enrolled in CDPAP. Significantly, the Managed Care Policy does not utilize the methodology derived from the regulatory scheme set forth in 18 NYCRR 505.14, and according to petitioners, results in a cap on

reimbursement for FI administrative costs at approximately 2%-4%.

Petitioners, the Consumer Directed Personal Assistance Association of New York State ("CDPAANYS"), the New York Association on Independent Living ("NYAIL"), New York State Association of Health Care Providers ("HCP"), Southern Tier Independence Center, AIM Independent Living Services, Rockland Independent Living Center d/b/a BRIDGES, Center for Disability Rights, Independence Living Center of the Hudson Valley, Finger Lakes Independence Center, ARISE Child and Family Service, Inc., Independent Home Care, Inc., Long Island Center for Independent Living, Western New York Independent Living, Inc., and Consumer Directed Choices, Inc. (hereinafter " petitioners")[1] bring this hybrid declaratory judgment action and CPLR Article 78 proceeding seeking a judgment nullifying the Managed Care Policy. Petitioners assert four causes of action seeking the following relief 1) a judgment annulling the Managed Care Policy pursuant to CPLR Article 78 due to the failure to comply with the New York State Administrative Procedure Act ("SAPA"); 2) a judgment annulling the Managed Care Policy as arbitrary and capricious and abuse of discretion pursuant to CPLR 7803 (1); 3) a judgment enjoining respondents from implementing the Managed Care Policy due to the failure to perform a duty required by law pursuant to CPLR 7803(1); and 4) a declaration that respondents have violated the New York State Constitution. In opposition, respondents Howard Zucker M.D., in his capacity as the Commissioner of the New York State Department of Health, and the New York State Department of Health (hereafter "Respondents"), filed an answer and a cross motion for summary judgment seeking dismissal of the hybrid proceeding.[2] Petitioners oppose the cross motion.

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[1] CDPAANYS, NYAIL, and HCP are associations who have FIs as members. The remaining petitioners are FIs.

[2]In a decision dated August 23, 2019, the Court: 1) denied petitioners' application for a preliminary injunction, 2) denied respondents' motion to dismiss and directed respondents to file

The New York State Constitution, as well as SAPA, mandates the procedures that must be followed for promulgation of rules and regulations. Excluded from the requirements applicable to the promulgation of rules and regulations are "interpretive statements and statements of general policy which in themselves have no legal effect but are merely explanatory" (see, SAPA § 102 [2] [b] [iv]). In contrast, a rule or regulation subject to SAPA is defined as "a fixed, general principle to be applied by an administrative agency without regard to other facts and circumstances relevant to the regulatory scheme of the statute it administers" (Matter of Roman Catholic Diocese of Albany v New York State Dept. of Health, 66 NY2d 948, 951 [1985]). SAPA sets forth in part that "prior to the adoption of a rule, an agency shall submit a notice of the proposed rule-making to the secretary of state for publication in the state register and shall afford the public an opportunity to submit comments on the proposed rule." (see, State Administrative Procedure Act § 202 [1]).

In the present case, respondents assert that the Managed Care Policy is exempt from SAPA based on certain language found in 18 NYCRR 505.28. The relevant section is as follows:

> The department will pay fiscal intermediaries that are enrolled as Medicaid providers and have contracts with social services districts for the provision of consumer directed personal assistance services **at rates that the department establishes and that the Director of the Division of Budget approves, except as provided in paragraph (2) of this subdivision** (see, 18 NYCRR 505.28[j][1][emphasis added]).

Additionally, respondents claim that SAPA has not been violated because they are not making a rule but rather applying a plain-language interpretation of 18 NYCRR 505.28[j][1] when they adopted the Managed Care Policy. Petitioners disagree and argue that the Managed Care Policy is a rule that required SAPA compliance. In support of their position, petitioners introduced copies of rate reports as far back as 2006, published by the Department of Health for Personal Care Services providers,

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an answer.

including CDPAP, which establish that the Personal Services methodology set forth in 18 NYCRR 505.14 has been utilized for FI reimbursement for over a decade. Notably, the Managed Care Policy no longer uses any rate methodology set forth in any section of NYCRR. Instead, respondents' Medicaid Director and Deputy Commissioner of the Office of Health Insurance Programs indicates that the rate methodology set forth in the Managed Care Policy was determined, in part, by relying on data submitted by managed long term care plans as required under the "Medicaid Managing Long Term Care Partial Capitation Contract. "

Upon reviewing the various arguments and the relevant statutes, the Court finds that the Managed Care Policy constitutes a rule or regulation which could not be promulgated without first complying with SAPA mandates. While respondents argue in part that the language in 18 NYCRR 505.28[j][1] allows the Department of Health to establish new reimbursement rates without first complying with SAPA, the Court disagrees. While the plain language of the regulation permits the Department of Health to establish reimbursement rates, an agency cannot grant itself the sweeping discretion to circumvent or supercede the requirements of SAPA by merely including such broad language in its own regulations. Therefore the Court must analyze if an exception to SAPA exists here. Here, there is no dispute that the Managed Care Policy is applicable to all FIs seeking to be reimbursed, notwithstanding the individual facts and circumstances of each case. Therefore, the Managed Care Policy is a fixed, general principle to be uniformly applied to govern the reimbursement rate for all FIs, rather than a mere explanatory or interpretive statement of general policy which itself has no legal effect. Therefore, no exception to SAPA applies.

In view of the Court's conclusion that the Managed Care Policy is subject to the rule-making requirements of SAPA, and as respondents have admittedly adopted the new policy without complying with those requirements, the Managed Care Policy is hereby declared to be null and void.

Accordingly, the Department of Health is directed to revert back to the previous reimbursement rate that complies with the methodology of 18 NYCRR 505.14, until such time as a new rate is introduced in compliance with SAPA. Furthermore, the Court hereby resolves that 18 NYCRR 505.28[j][1] constitutes a rule for the payment of rates and, therefore, any new rate established pursuant to 18 NYCRR 505.28[j][1] must conform to the Constitutional requirement for rule-making. The Constitution of the State of New York, Article IV, Section 8 states:

> No rule or regulation made by any state department, board, bureau, officer, authority or commission, **except such as relates to the organization or internal management** of a state department, board, bureau, authority or commission **shall be effective until it is filed in the office of the department of state**. The legislature shall provide for the speedy publication of such rules and regulations, by appropriate laws. [emphasis added]

Here, the rules governing FI reimbursement rates clearly do not just relate to the Department of Health or its internal management. Furthermore, rules and regulations for payment of rates are established through the regulatory powers granted by law to the Commissioner and not through the internal management authority of the commissioner. Therefore, it is unconstitutional for such rates to only be published in a departmental policy. Accordingly, any new rate established pursuant to the authority granted by 18 NYCRR 505.28[j][1] must be filed with the Department of State for publication as a regulation in the NYCRR by following SAPA in order to be made effective. Based on the foregoing conclusion that the Managed Care Policy is null and void due to the failure to comply with SAPA, the Court need not reach the alternative arguments for invalidation raised by petitioners.

For the foregoing reasons, it is hereby

ORDERED that respondents-defendants' cross-motion for summary judgment is denied, and

it is further

ORDERED that the petition is granted to the extent that the first, third and fourth causes of action are granted, and the rate implemented in the Managed Care Policy effective September 1, 2019 is hereby null and void; and it is it is further

ORDERED that respondents shall immediately revert to the previous rate methodology utilized prior to the adoption of the Managed Care Policy.

This constitutes the Decision & Order of the Court, the original of which is being transmitted to the Albany County Clerk for electronic filing and entry. Upon such entry, petitioners' counsel shall promptly serve notice of entry on or all other parties (see, Uniform Rules for Trial Courts [22 NYCRR] § 202.5-b [h] [1], [2]).

ENTER

Dated: October 11, 2019

HON. CHRISTINA L. RYBA
Supreme Court Justice

10/11/19
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