N.Y. Court Case Charges That Plan To Close Hospitals Is Unconstitutional

On Jan. 3, a Bronx, New York Supreme Court judge issued a temporary restraining order (TRO) barring the implementation of a plan to shut down Westchester Square Medical Center, one of 57 hospitals in New York State that are being closed or downsized by recommendation of the "Commission on Health Care Facilities in the 21st Century." The recommendations of the Commission, which is chaired by longtime associate of synarchist banker Felix Rohatyn, Stephen Berger, became law when the state legislature failed to overturn them on Jan. 1. While the TRO only applies to the Westchester Square facility, the basis for the suit, that the legislature engaged in an unconstitutional delegation of power in handing power over to the Commission, could halt the entire plan to further demolish health care in New York State, if upheld. The following excerpts from the plantiffs' filing paint a vivid picture of the cowardly and unconstitutional relinquishing of power and responsiblity by the legislature, and the vigor with which the Berger Commission pursued the opportunity to cut back on health infrastructure and services vital to New York's citizens.—Patricia Salisbury

Mary McKinney and Mechler Hall Community Services, Inc., Plantiffs,
against
The Commissioner of the New York State Department of Health, the New York State Department of Health, and the State of New York, Defendants.

Nature of the Action

1. Plantiffs . . . bring this declaratory judgment action seeking an order declaring the Commission on Health Care Facilities in the 21st Century, Enabling Legislation ("Enabling Legislation") invalid and enjoining its implementation. . . . Such relief is warranted because the Enabling Legislation constitutes an unconstitutional delegation of legislative lawmaking authority by the New York State Legislature (the "Legislature") to the Executive Department in violation of the separation of powers and Article III, Section 1 of the Constitution of the State of New York. Article III Section 1 provides that "[t]he legislative power of this state be vested in the senate and assembly.". . .

2. More specifically, in violation of separation of powers, the Enabling Legislation empowered the unelected members of the New York State Commission on Health Care Facilities in the 21st Century, chaired by Stephen Berger (the "Berger Commission"), with broad and unfettered authority to dramatically reshape the distribution of health care throughout New York State. The Enabling Legislation authorized the Berger Commission to adopt its own standards in lieu of those enumerated by the Legislature and mandates that the Berger Commission's "recommendations" shall be implemented by the Commissioner of Health "notwithstanding any contrary provision" of law. . . .

4. The "recommendations" issued by the Berger Commission to close or downsize 57 hospitals across the State will also require the expenditure of substantial New York State revenues in order to implement the Berger Commission's recommendations to be implemented by the Commissioner of Health. . . .

Factual Background

. . . 13. On April 13, 2005, the State of New York enacted the Enabling Legislation, which provided for the creation of the Berger Commission. . . . This broad delegation vested the Berger Commission with the power to direct hundreds of millions of dollars of State expenditures and dramatically reshape the distribution of health care facilities throughout the State, without requiring any review, much less accountability, by the Legislature.

14. . . .The Enabling Legislation authorized the Berger Commission to arrive at these recommenations by assessing the need for and availability of health care resources within a given region, the "economic impact" of closing and downsizing facilities "on the state, regional and local economics," as well as the financial status of facilities, including the amount of capital debt carried by each. (Enabling Legis. §5) However, the Legislature provided no meaningful guidelines as to how the Berger Commission was to weigh these competing, disparate interests. . . .

15. The Enabling Legislation provided that the Berger Commission would be comprised of eighteen statewide members and thirty-six regional members. . . . Significantly, none of the statewide or regional members were approved by vote of the Legislature. . . .

21. The enabling Legislation contains a number of provisions that empowered the Berger Commission with extraordinarily broad policy making authority without providing for any meaningful limitations on that authority. . . .

24. The Berger Commission used this amorphous framework within its larger, undefined decision-making process to obscure the bases for its recommendations. . . . The Berger Commission offered no insight as to what standards or criteria guided these additional deliberation [sic], stating only that "[a]dditional measures [outside of the analytic framework] will be considered during later phase deliberations.". . . The "additional measures" considered by the Berger Commission are not articulated with any meaningful specificity anywhere in the public literature or public meetings.

25. Meaningful assessment of the Framework and the Berger Commission's decision-making methodology is further precluded by the lack of transparency in the Berger Commission's deliberations. For example, the Berger Commission claimed that it was not subject to the Open Meetings Law and conducted most of its business in executive sessions beyond the secrutiny of the public. . . . Further, while the Enabling Legislation calls for "formal public hearings" (§8), these hearings were held before Regional Advisory Committees rather than the Berger Commission, and they were not recorded in any manner. . . .

26. The Enabling Legislation requires the Commissioner of Health to implement the Commission's recommendations in a manner that effectively repeals existing legislation. . . . Article 28 of the New York Public Health Law specifically contains statutes governing "the system of general hospitals and nursing homes". . . . Through Section 9(a), however, the Enabling Legislation puported to allow the "recommendations" of an unelected governmental entity to entirely disregard and supersede these and any other pre-existing statutes and rules passed by the democratically elected Legislature. . . .

29. . . .The Enabling Legislation now authorizes the Commissioner of Health to disregard the procedural safeguards of Section 2806(6), which provides detailed procedures that the Commissioner of Health must follow whenever the commissioner considers modifying or revoking a hospital operating certificate to restrict the number of beds to those "actually needed.". . . These statutory sefeguards require the Commissioner of Health to take the community and public comment into account when determining whether a hospital's services are "actually needed.". . .

31. In the course of implementing the Berger Commission's recommendations, the State will cause an unconstitutional disbursement of state funds through both the Federal-State Health Reform partnership ("F-SHRP") and the Health Care Efficiency and Affordability Law of New Yorkers ("HEAL NY"). Under each of these programs, the Berger Commission, not the Legislature, will require the State to expend hundreds of millions of dollars to close and downsize hospitals and nursing homes throughout New York. Indeed, the Enabling Legislation required that the Berger Commission's recommendations set forth the investments necessary to carry out each recommendation (§8), and in its Final Report, the Berger Commission estimates that its recommendations will cost $1.2 billion. These expenditures of State funds give Plaintiffs standing to bring this suit as citizen taxpayers. . . .

40. In its Final Report, the Berger Commission recommended the closure, downsizing, reconfiguration, or conversion of 57 hospitals, one-quarter of all hospitals in the state. It recommended the outright closure of nine hospitals, five of which serve the people of New York City. Once implemented, the Berger Commission's recommendations will reduce statewide inpatient capacity by more than 4,000 beds, representing 7 percent of the State's total capacity. . . . In 2004, the nine hospitals selected for closure alone had over 47,000 discharges and over 156,000 emergency room visits. . . . The Final Report estimates that the cost of implementing the Berger Commission's recommendations total $1.2 billion. . . .

41. New York Westchester Square Medical Center ("WSMC") is one of the facilities that the Berger Commission selected for closure in its Final Report. . . . WSMC is reportedly the lowest cost hospital in the Bronx, with a Medicaid discharge rate of $4,460. . . . WSMC has historically been financially sound, generating a small surplus each year, despite reportedly serving over 23,000 emergency room patients. As the Berger Commission's own Regional Advisory Committee for New York City reported, WSMC's "primary service area includes part of Northeast Bronx and Pelham/Throggs Neck neighborhoods which are '*stressed*' and '*serious shortage areas*' for primary care." (emphasis added) The Regional Advisory Committee noted that "there are strong bonds between patients and the physicians who practice" at WSMC and that "closure could *significantly disrupt access.*" (emphasis added) For these reasons, the Regional Advisory Committee recommended that WSMC survive. . . .

42. Plaintiff Mary McKinney resides . . . in the Soundview neighborhood of the Bronx. She is 64 years old and has lived in the Soundview neighborhood since 1981.

43. Ms. McKinney suffers from severe asthma, erratic blood pressure, and severe arthritis that prevents her walking more than a few blocks at a time. She is currently in remission for colon cancer.

44. Ms. McKinney relies on WSMC for treatment of all of these conditions. . . . Because any one of her asthma attacks can suddenly and without warning become a life-threatening crisis, ready access to WSMC's emergency facilities is crucial to Ms. McKinney. . . .

46. Closure of WSMC will impose significant burdens on Ms. McKinney's access to needed health care. . . .

47. . . . For Ms. Mckinney, an individual with serious medical conditions which require constant care, the closure of WSMC will cause her to suffer an injury-in-fact because it will impose ongoing, significant disruptions of her access to needed health care. . . .