STATE OF NEW HAMPSHIRE
SUPERIOR COURT

GRAFTON, SS. Docket No. 215-2019-CV-00454

Littleton Hospital Association

v.

State of New Hampshire Department of Health and Human Services

ORDER ON PENDING MOTIONS

On October 21, 2019, the plaintiff, Littleton Hospital Association, filed a complaint against the defendant, the State of New Hampshire Department of Health and Human Services ("DHHS"), seeking declaratory judgment, injunctive relief, a writ of mandamus, and equitable relief. (Index #1.) Presently before the court are the defendant's motion to dismiss, (Index #7), to which the plaintiff objects, (Index #15), and the plaintiff's motion for preliminary injunction, (Index #2), to which the defendant objects. (Index #9.) The court held a hearing on the parties' motions and objections on December 4, 2019, at which it heard offers of proof and oral argument from the parties. For the reasons that follow, the defendant's motion to dismiss is GRANTED, and the plaintiff's motion for preliminary injunction is DENIED.

In short, this case arises from a recent license application that the intervenor, ConvenientMD, submitted to DHHS for a non-emergency walk-in care center to be located at 551 Meadow Street in Littleton, approximately three miles from Littleton Regional Healthcare ("LRH"). (Compl. ¶ 20.) Because LRH is classified as a critical access hospital ("CAH") by the Centers for Medicare and Medicaid Services, (*id.* ¶ 1), ConvenientMD was required to set forth in its application "a written determination by the

commissioner of health and human services [the "Commissioner"], after inquiry to the critical access hospital, that the proposed new facility will not have a material adverse impact on the essential health care services provided in the service area of the critical access hospital." RSA 151:4, III(a)(7); (*see also* Compl. ¶¶ 9, 33).

On April 22, 2019, LRH submitted to DHHS an objection to ConvenientMD's application, which demonstrated that ConvenientMD's proposed walk-in care center would have a material adverse impact on the essential health services provided in LRH's service area, including emergency services, behavioral health services, primary care services, and obstetric services. (Compl. ¶ 25.) Nevertheless, on July 23, 2019, the Commissioner issued a written determination that ConvenientMD's proposed walk-in care center will not result in a material adverse impact to the essential health services in LRH's service area ("impact determination"). (Id. ¶ 33.) The plaintiff filed this action thereafter, seeking the aforementioned relief, all arising from the Commissioner's impact determination. (*See id.* ¶¶ 47–81.)

On or about October 21, 2019, the date the complaint in this matter was filed, LRH learned that ConvenientMD had refiled its license application to correct deficiencies in its original application. (*See* Pl.'s Mot. for TRO at 4.) Again, LRH submitted an objection to DHHS, and on December 3, 2019, the Commissioner issued a new written determination that ConvenientMD's proposed walk-in care center will not result in a material adverse impact to the essential health services in LRH's service area. On December 4, 2019, DHHS issued a license for ConvenientMD's new walk-in care center in Littleton. It is undisputed that the Commissioner made his impact determination and that DHHS issued the license pursuant to RSA 151:4. LRH has not requested a rehearing of DHHS's issuance of the license, and it has not appealed to the New Hampshire Supreme Court.

The defendant now moves to dismiss the plaintiff's claims on the grounds that this court lacks subject matter jurisdiction to review the actions of DHHS and the Commissioner in licensure proceedings brought under RSA 151:4. (*See* Def.'s Mot. Dismiss at 1–2.) When ruling on a motion to dismiss, the court must determine whether the plaintiffs' allegations stated in the complaint "are reasonably susceptible of a construction that would permit recovery." *Lamprey v. Britton Constr., Inc.*, 163 N.H. 252, 256 (2012). In doing so, the court must "assume the plaintiff's allegations to be true and construe all reasonable inferences in the light most favorable to [the plaintiff]." *Id.* The court "need not assume the truth of statements in the petitioner's pleadings, however, that are merely conclusions of law" not supported by "predicate facts." *General Insulation Co. v. Eckman Constr.*, 159 N.H. 601, 611–12 (2010). The court should test these facts against the applicable law and deny the motion to dismiss "[i]f the facts as alleged would constitute a basis for legal relief." *Starr v. Governor*, 148 N.H. 72, 73 (2002). Dismissal is appropriate if the facts as alleged in the complaint "do not constitute a basis for legal relief." *Lamprey*, 163 N.H. at 256.

Ordinarily, "[w]henever a statute provides a procedure for appeal or review of an administrative agency's decision, that procedure is exclusive and must be followed." *Frost v. Comm'r, N.H. Banking Dep't*, 163 N.H. 365, 373 (2012). "Thus, before an agency decision may be reviewed [by the court], administrative remedies typically must be exhausted." *Id.* However, the New Hampshire Supreme Court has "recognized that the exhaustion of administrative remedies doctrine is flexible, and that exhaustion is not required under certain circumstances." *Id.* (quoting *Konefal v. Hollis/Brookline Coop. Sch. Dist.*, 143 N.H. 256, 258 (1998)). For example, "[a] party is not required to exhaust administrative remedies where the issue on appeal is a question of law rather than a question of the exercise of

administrative discretion." *Pheasant Lane Realty Trust v. City of Nashua*, 143 N.H. 140, 141–42 (1998) (quoting *Bedford Residents Grp. V. Town of Bedford*, 130 N.H. 632, 639 (1988)); *see also Frost*, 163 N.H. at 373; *Blue Jay Realty Trust v. Franklin*, 132 N.H. 502, 510 (1989) ("This is especially true where, as here, the question is one peculiarly suited to judicial rather than administrative treatment and no other adequate remedy is available to the plaintiff. Under these circumstances the rule of exhaustion of administrative remedies is inapplicable.") (quoting *Olson v. Litchfield*, 112 N.H. 261, 262 (1972)).

In *Thompson v. N.H. Bd. of Med.*, 143 N.H. 107, 110 (1998), the Court held that although parties cannot ordinarily "circumvent the statutory appeal process under the guise of a petition for injunctive relief," the superior court may "intervene prior to entry of final judgment in exceptional circumstances where, as here, a party raises a due process violation that fundamentally impedes the fairness of an underlying proceeding resulting in immediate and irreparable harm to that party." In order for the superior court to grant injunctive relief under *Thompson*, however, the party seeking relief must demonstrate that: "(1) a potential due process violation or prejudice has occurred; (2) an important collateral issue completely separate from the merits of the action can be resolved; and (3) failure to review would result in serious and immediate harm." *Id.* at 109–10.

In this case, ConvenientMD applied for a license under RSA 151:4, which governs the licensure of residential care and health facilities. The statute contains a procedure for review or appeal when DHHS grants a license, providing in relevant part:

> Any person shall have the right, within 30 days after the filing of any application, to object in writing prior to action by the department on any license on the grounds that the application does not meet the applicable requirements of this chapter or any rule adopted under this chapter. If the license is granted by the department over a timely objection, the person who objected shall have a right to request a rehearing by the commissioner of the

> department of health and human services under RSA 541:3 within 30 days and to appeal under RSA 541 based on the grounds stated in the objection.

RSA 151:4, VII. RSA chapter 541 permits appeals only to the New Hampshire Supreme Court: "Within thirty days after the application for a rehearing is denied, or, if the application is granted, then within thirty days after the decision on such rehearing, the applicant may appeal by petition to the supreme court." RSA 541:6.

Under this statutory framework, any person has the right to file an objection, within thirty days and only on specific grounds, to any license application submitted under RSA 151:4. RSA 151:4, VII. Thereafter, if a license is granted, a person who submitted such an objection may request a rehearing by the Commissioner within 30 days of the license being issued. *Id.* If a rehearing is denied, then the objecting party may appeal directly to the Supreme Court. RSA 151:4, VII and 541:6. This framework does not contemplate an appeal to, or review by, the superior court. Rather, it requires an objecting party to first request a rehearing by the Commissioner and to thereafter appeal directly to the Supreme Court. As such, this court concludes that the power of judicial review vests exclusively in the New Hampshire Supreme Court.

The plaintiff argues that this court should retain jurisdiction under the exceptions outlined in *Thompson* and *Frost*. (*See* Pl.'s Obj. Def.'s Mot. Dismiss at 2, 5.) The court is not persuaded by the plaintiff's argument. In order to grant injunctive relief under *Thompson*, the court would have to find that "failure to review would result in serious and immediate harm." 143 N.H. at 410. In this case, however, the plaintiff has not demonstrated a likelihood of serious and immediate harm should this court decline to grant injunctive relief. While the court recognizes that ConvenientMD's new walk-in care center might have significant impacts on LRH's finances and the services it provides, nothing in the court's record

suggests that any harm will be immediate.

Likewise, the court is not persuaded that it should apply *Frost* to retain jurisdiction over this case. Even assuming, *arguendo*, that the plaintiff's complaint raises only pure questions of law, RSA 151:4, VII and 541:6 do not contemplate an appeal to the superior court as do other statutes that govern administrative review and appeals. *See, e.g.*, RSA 677:4 ("Any person aggrieved by any order or decision of the zoning board of adjustment or any decision of the local legislative body may apply, by petition, to the superior court within 30 days after the date upon which the board voted to deny the motion for rehearing . . . ."). If the legislature had intended the superior court to have jurisdiction over appeals brought under RSA 151:4, it plainly could have granted jurisdiction; however, it did not. Accordingly, the court interprets RSA 151:4, VII as granting exclusive jurisdiction to the New Hampshire Supreme Court. *See Woodview Dev. Corp. v. Town of Pelham*, 152 N.H. 114, 116 (2005) ("When a statute's language is plain and unambiguous, [the court] need not look beyond it for further indication of legislative intent, and [the court] will not consider what the legislature might have said or add language that the legislature did not see fit to include.").

For the foregoing reasons, the court rules that it does not have subject matter jurisdiction over the claims asserted in this case. The defendant's motion to dismiss for lack of subject matter jurisdiction is GRANTED. Because the court concludes it does not have jurisdiction, the plaintiff's motion for preliminary injunction is DENIED.

SO ORDERED, this 10th day of December 2019.

Lawrence A. MacLeod, Jr.
Presiding Justice