

**TO:** Kathy Febraio, President/CEO  
NYS Association of Health Care  
Providers

**FROM:** Roger Bearden, Senior Counsel  
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**DATE:** December 23, 2024

**RE:** New York State Department of Health December 6, 2024 Memorandum to  
Consumer Directed Personal Assistance Fiscal Intermediaries

You have asked for a legal review of a Memorandum from the New York State Department of Health to Consumer Directed Personal Assistance (“CDPAP”) Fiscal Intermediaries (the “Memorandum”).<sup>1</sup> In our opinion, the Memorandum raises serious legal concerns that should be considered by a Fiscal Intermediary (“FI”). We caution that our review should not be relied upon by any FI without consulting with their own independent legal counsel and the analysis contained herein does not create an attorney-client relationship between this firm and any specific FI. Our analysis, however, identifies multiple potential legal deficiencies with the Memorandum which we believe ought to be considered by any FI in discussion with their legal counsel.

### **Background**

The State Fiscal Year 2024-25 Enacted Budget amended Social Services Law Section 365-f(4-a) to require the Commissioner of Health to contract with a single statewide fiscal intermediary (SFI) to provide fiscal intermediary services to CDPAP consumers. DOH issued a Request for Proposals (RFP) #20524 New York State Fiscal Intermediary Services on June 17, 2024. On September 30, 2024, the Governor announced Public Partnerships LLC (PPL) as the SFI vendor. Under the enacted law, all existing Fiscal Intermediaries other than the SFI must cease operations effective April 1, 2025. See Social Services Law § 365-f(4-a-1).

CDPAP is authorized under Social Services Law § 365-f, which contains specific provisions governing FIs that are ceasing operation. See Social Services Law § 365-f(4-d) (“Fiscal intermediaries ceasing operation”). As described in Section 365-f(4-d), there are different requirements depending upon the reason why the fiscal intermediary is ceasing provisions, with specific subsections governing:

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<sup>1</sup> [https://health.ny.gov/health\\_care/medicaid/redesign/mrt90/mltc\\_policy/2024/24-04\\_memo.htm](https://health.ny.gov/health_care/medicaid/redesign/mrt90/mltc_policy/2024/24-04_memo.htm) [last visited December 20, 2024]

- (a) “Where a fiscal intermediary is ceasing operation or will no longer serve the consumer's area”;
- (b) “Where a consumer is electing to transfer his or her services to a new fiscal intermediary or a personal care or home health care provider by the consumer's independent choice”; and
- (c) “Where a fiscal intermediary is suspending or ceasing operation pursuant to an order under subdivision four-b of this section, or has failed to submit an offer for a contract, or has been denied a contract under this section”.

For fiscal intermediaries “ceasing operation or will no longer serve the consumer’s area,” Section 365-f(4-d) requires that the fiscal intermediary shall:

- (i) deliver written notice forty-five calendar days in advance to the affected consumers, consumer representatives, personal assistants, the department, and any local social services districts or managed care plans with which the fiscal intermediary contracts. Within five business days of receipt of the notice, the local social services district or managed care plan shall acknowledge the notice and provide the affected consumers with a list of other fiscal intermediaries operating in the same county or managed care plan network as appropriate;
- (ii) not take any action that would prevent a personal assistant from moving to a new fiscal intermediary of the consumer's choice, nor require the consumer or the personal assistant to switch to a personal care or home health care program not under this section; and
- (iii) upon request and consent, promptly transfer all records relating to the individual's health and care authorizations, and personnel documents to the fiscal intermediary or personal care or home health care provider chosen by the consumer and assume all liability for omissions or errors in such records.

However, “[w]here a consumer is electing to transfer his or her services to a new fiscal intermediary or a personal care or home health care provider by the consumer's independent choice, the fiscal intermediary being discontinued shall comply with subparagraphs (ii) and (iii) of paragraph (a) of this subdivision.” In other words, notice to the affected consumers, consumer representatives, personal assistants, the department, and any local social services districts or managed care plans with which the fiscal intermediary is not required where a consumer is electing to transfer his or her services to a new fiscal intermediary or a personal care or home health care provider by the consumer's independent choice.

Where “a fiscal intermediary is suspending or ceasing operation pursuant to an order under subdivision four-b of this section, or has failed to submit an offer for a contract, or has been denied a contract under this section, all the provisions of this subdivision shall apply except subparagraph (i) of paragraph (a) of this subdivision, notice of which to all parties shall be provided by the department as appropriate.” Under this provision, the notice to the affected consumers, consumer representatives, personal assistants, the

department, and any local social services districts or managed care plans with which the fiscal intermediary contracts must be made by the department of health, not the fiscal intermediary.

## **New York State Department of Health December 6, 2024 Memorandum**

On December 6, 2024, the Department of Health issued a Memorandum entitled Consumer Directed Personal Assistance Program (CDPAP) Fiscal Intermediary Transition Policy for Current Fiscal Intermediaries and contemporaneously posted the Memorandum and related documents on its website.<sup>2</sup> The Memorandum has no identified author.

The Memorandum states that: “The purpose of this policy is to provide transition guidance for current fiscal intermediaries that were not selected as the Statewide Fiscal Intermediary (SFI) pursuant to Request for Proposals (RFP) #20524: New York State Fiscal Intermediary Services.”

In a “Background” Section, the Memorandum states that: “[t]he State Fiscal Year 2024-25 Enacted Budget amended Social Services Law Section 365-f(4- a) to require the Commissioner of Health to contract with a single statewide fiscal intermediary (SFI) to provide fiscal intermediary services to CDPAP consumers and that “Public Partnerships LLC (PPL) was selected as the SFI vendor”.

The Memorandum then contains an “Introduction” that restates that: “[t]he purpose of this policy is to facilitate the transition of services from entities currently providing fiscal intermediary services (“Current FIs”) that will be required to cease providing fiscal intermediary services as of 11:59pm on March 31, 2025.” The Introduction goes on to state: “[t]his policy is effective immediately and provides guidance to Current FIs for required consumer transitions.” It further directs that: “[c]urrent FIs that are subcontracted with the SFI as facilitators and who have received conditional approval from the Department should follow the guidance for subcontracted FIs.”

The Memorandum contains separate sections for “Current FIs Without Department Approved Facilitator Subcontracts” and “Current FIs With Department Approved Facilitator Subcontracts.” The Memorandum states that current FIs that: “are subcontracted” with the SFI as facilitators and who have received conditional approval from the Department should follow the guidance for subcontracted FIs.”

With respect to “Current FIs Without Department Approved Facilitator Subcontracts,” the Memorandum describes “Transition Notifications and Procedures, stating:

Current FIs that were not awarded a contract as the SFI must cease providing fiscal intermediary services as of March 31, 2025. Current FI’s

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<sup>2</sup> [https://health.ny.gov/health\\_care/medicaid/redesign/mrt90/mltc\\_policy/2024/24-04\\_memo.htm](https://health.ny.gov/health_care/medicaid/redesign/mrt90/mltc_policy/2024/24-04_memo.htm) [last visited December 20, 2024]

must provide written notice at least **forty-five (45) calendar days** before discontinuing fiscal intermediary services to the affected CDPAP consumers (or the CDPAP Consumers' designated representatives), the CDPAP Consumers' personal assistants (PAs), the Local District of Social Services (LDSS) and Managed Care Plans with which the Current FI contacts, and the Department.

(emphasis in original).

Further, the Memorandum states:

Current FIs must use the following templates, located on the Department's CDPAS web page, to provide such written notices:

- FI Discontinue Services Template FI to Consumer
- FI Discontinue Services Template FI to LDD or Managed Care Plan
- FI Discontinue Services Template FI to PAs

The Memorandum provides links to the required Templates.

Further, the Memorandum describes: "Data Transfer and Procedures", stating:

No later than January 15, 2025, Current FIs must transfer data related to the CDPAP consumers they serve and their PAs to the Managed Care Plans for managed care enrollees and the Department for fee-for-service members. Data transfer to the Department will be through HCS. Data must include:

- Full names of CDPAP Consumer
- Consumer CIN
- Designated Representative and contact information (if applicable)
- Consumer contact information (phone number, email address)
- Consumer preferred language
- PA(s) for each Consumer
- PA contact information (phone number, email address)
- PA wage information

A CDPAP Fiscal Intermediary Data Transfer Template is provided. The Memorandum also states that: "[o]nce a consumer and their PA(s) have registered with the SFI, the SFI, with the consent of the consumer and their PA(s), may request records from the Current FI such as PA health assessment records (including immunization records)."

For “[c]urrent FIs With Department Approved Facilitator Subcontracts”, the Memorandum provides different “Transition Policies and Procedures”, stating that: “[c]urrent FIs that have subcontracted with PPL as facilitators must provide written notice of the transition of FI services to the affected CDPAP consumers (or the CDPAP Consumers’ designated representatives), the CDPAP Consumers’ personal assistants (PAs), Managed Care Plans and/or LDSS with which the Current FI contacts, and the Department.” Templates are provided for the required notices, with a schedule for such transmission, beginning on January 6, 2025, and continuing on January 20, 2025, February 3, 2025, and February 10, 2025, depending on county.

With respect to Data Transfer and Procedures, the Memorandum states that: “[F]acilitators must follow the processes outlined in their contracts with PPL to transfer data for consumers and personal assistants.”

## **Legal Considerations with Respect to the Memorandum**

The Memorandum raises a number of legal considerations that any current FI should take into consideration. These include compliance with the CDPAP authorizing statute, federal health privacy law, employee privacy law, and other federal constitutional concerns, as more thoroughly reviewed below. It is worth noting that although the Memorandum describes itself as “guidance,” the language of the Memorandum is mandatory with the word “must” used thirteen times. With the exception of a citation to the law establishing the Single Fiscal Intermediary, the Memorandum does not contain a single legal citation to support its mandatory language.

### **I. New York State Social Services Law § 365-f**

An initial consideration with respect to the Memorandum is its conformity with the CDPAP enabling statute, Social Services Law § 365-f. As reviewed above, § 365-f contains specific provisions governing Fiscal Intermediaries ceasing operations, with a distinction between “(a) Where a fiscal intermediary is ceasing operation or will no longer serve the consumer’s area” and “(c) Where a fiscal intermediary is suspending or ceasing operation pursuant to an order under subdivision four-b of this section, or has failed to submit an offer for a contract, or has been denied a contract under this section”. It would appear that all Fiscal Intermediaries ceasing operation as a result of the selection of the SFI would be described in subsection (c), as entities ceasing operation either by failing to submit an offer for a contract or having been denied a contract under this section. Therefore, the responsibility for providing consumer and PA notices would lie with the Department of Health.

We believe that the same conclusion would apply to those who may have obtained a subcontract to provide facilitation services. The notice provisions refer to entities “denied a contract under this section,” which we understand to refer the contract to provide statewide fiscal intermediary services. Notably, § 365-f (4-a)(ii-a) which describes the responsibilities of subcontractors under the statute, does not describe any responsibilities with respect to notice or data transfer that would distinguish

subcontractors from other current FIs who will be ceasing operations due to failure to submit an offer for a contract or to be awarded a contract. Therefore, for facilitators, the notice responsibility falls to the Department, not the FI.

## **II. Health Privacy**

The Health Information Portability and Accountability Act (“HIPAA”) requires covered entities to safeguard the privacy of Protected Health Information (“PHI”). PHI is defined as:

Individually identifiable health information is information that is a subset of health information, including demographic information collected from an individual, and:

- (1) Is created or received by a health care provider, health plan, employer, or health care clearinghouse; and
- (2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and
  - (i) That identifies the individual; or
  - (ii) With respect to which there is a reasonable basis to believe the information can be used to identify the individual.

### **45 CFR § 160.103**

A covered entity may use or disclose PHI to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of the law. See 45 CFR 164.512(a)(1). Under this provision, each covered entity must be limited to disclosing or using only the PHI necessary to meet the requirements of the law that compels the use or disclosure. Common permitted uses and disclosures include carrying out treatment, payment, or health care operations. See 45 CFR § 164.506.

HIPAA contains specific provisions for which an authorization is required. As may be relevant to the Memorandum, 45 CFR § 164.508(3) requires an authorization for “marketing,” defined as: “to make a communication about a product or service that encourages recipients of the communication to purchase or use the product or service”. 45 CFR § 164.501.

The Memorandum directs the transfer of the following information:

- Full names of CDPAP Consumer
- Consumer CIN
- Designated Representative and contact information (if applicable)
- Consumer contact information (phone number, email address)
- Consumer preferred language

- PA(s) for each Consumer

The information requested appears to meet the legal definition of PHI, in that it: “(1) Is created or received by a health care provider, ..”; and “(2) Relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual;” and “identifies the individual”. Therefore, a covered entity (which would include all current FIs) may disclose such information to the extent that such use or disclosure is required by law and the use or disclosure complies with and is limited to the relevant requirements of the law.

The Memorandum does not identify the legal basis for its direction that current FIs transfer the data nor the purpose for which the data will be used. We understand, however, that the data is being collected for transmission to the newly-awarded SFI in order to contact Consumers. We believe that the transfer of PHI for this purpose would likely run afoul of federal requirements, which require a specific authorization for the use of PHI for marketing. It also does not conform to the requirements of state law which, in the event of a current FI ceasing operations, directs that the FI: “upon request and consent, promptly transfer all records relating to the individual's health and care authorizations, and personnel documents to the fiscal intermediary or personal care or home health care provider chosen by the consumer.” Social Services Law § 365-f(4-d)(iii). Although the Memorandum directs transfer of information to DOH for apparent retransmission to the SFI, the same requirements of request and Consumer consent would likely apply.

With respect to “[c]urrent FIs With Department Approved Facilitator Subcontracts,” the Memorandum states: “Facilitators must follow the processes outlined in their contracts with PPL to transfer data for consumers and personal assistants.” DOH has not issued a model subcontract and, therefore, an analysis of such privately-negotiated subcontracts is not possible. However, current FIs with such contracts should consult with counsel regarding their obligations under health privacy laws with respect to PHI they hold as current FIs. We would also question whether an FI with a Facilitator Subcontract could transfer PHI to PPL without the Consumer's consent.

Since the Memorandum neither identifies the legal basis for its request nor the purpose for which the requested information will be used, a comprehensive analysis of the Department's legal position cannot be undertaken at this time. We understand that additional clarification regarding DOH's legal basis for the request and its conformity with health privacy laws is being sought. In the event that DOH issues a revised Memorandum and identifies the specific legal basis for its request, additional analysis may be required.

### **III. Other Concerns**

In addition to the concerns under the Social Services law and HIPAA, we believe that the Memorandum raises additional legal concerns that a current FI may wish to consider in consultation with their counsel, as discussed briefly below.

- *Compelled speech.* The First Amendment prohibits government from compelling private entities to speak on its behalf. The Templates included with the Memorandum contain representations about the selected SFI and its capacity to deliver services. A current FI may or may not have the knowledge upon which to make these statements, but the First Amendment generally prohibits a governmental entity from directing a private entity to make such statements on its behalf.
- *Commercial speech.* The information directed to be transmitted, including current consumer and personal assistant contact information, constitutes valuable commercial information which the Memorandum directs to be transmitted to the benefit of another commercial entity (the newly-awarded SFI). Both the First Amendment and the Takings Clause of the Constitution provide protection against such direction.
- *Employee privacy.* Federal and state law restrict the sharing of employee information without specific authorization. The Memorandum's direction to share personal assistant information may run afoul of these requirements.
- *Employee notification.* Federal and state laws governing worker notification strictly regulate the content and timing of required employee notifications. In the event that ceasing operations for a particular FI would dictate such notifications, the Template notice to the Personal Assistant may raise compliance issues under these laws.

There may be additional legal concerns based upon the specifics of any current FI's situation that should be reviewed with counsel.