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Via Email

Kathy Marks, General Counsel
New York State Department of Health
Corning Tower, Empire State Plaza
Albany, New York 12237

Dear Ms. Marks:

This firm represents the Consumer Directed Personal Assistance Association of New York (“CDPAANYS”), which supports Fiscal Intermediaries and consumers in the Consumer Directed Personal Assistance Program (“CDPAP”). Fiscal Intermediaries recently received an unsigned memorandum from the New York State Department of Health (“DOH” or “the Department”), entitled “New York State Department of Health Memo Consumer Directed Personal Assistance Program (CDPAP) Statewide Fiscal Intermediary Transition Policy for Current Fiscal Intermediaries” with a Date of Issuance of December 6, 2024.¹ Since there are multiple legal deficiencies with the Memo, and the Memo does not have an author to whom we can address our concerns, we are writing your office with a request that you review the Memo and, upon conducting that review, direct the Department to withdraw it.

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.

The Memo 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.” The Memo divides its guidance into two sections: “Current FIs Without Department Approved Facilitator Subcontracts” and “Current FIs With Department Approved Facilitator Subcontracts.” The Memo does not provide any

¹ A copy of this Memo can be found at:
https://health.ny.gov/health_care/medicaid/redesign/mrt90/2024/docs/current_fi_transition_policy.pdf.

information about the “Department Approval” process by which Subcontracts will be approved and the Department has not otherwise published any information about how it reviews and approves subcontracts. Further, to the best of our knowledge, no current FI has executed an approved subcontract with PPL. Nevertheless, we address both current FIs with and without Department approved facilitator subcontracts in the sections below.

Current FIs Without Department Approved Facilitator Subcontracts

For the described “Current FIs Without Department Approved Facilitator Subcontracts”, the Memo directs that: “Current FI’s 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.” The Memo then provides templates for accomplishing these directed notices.

No legal authority is cited in the Memo to support DOH’s directed notice. The language of the Memo appears to mirror language in Social Services Law § 365-f (the CDPAP enabling statute). However, the Memo deviates in an important way from the statutory language. Specifically, Social Services Law § 365-f (4-d) (“Fiscal intermediaries ceasing operation”) states:

- (a) Where a fiscal intermediary is ceasing operation or will no longer serve the consumer’s area, 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;

However, the law does not require current Fiscal Intermediaries to provide such notifications when a fiscal intermediary has failed to submit an offer for a contract or has been denied a contract, as is the case here. Rather, it directs the Department to make such notifications. Specifically, § 365-f (4-d)(c) states:

(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, 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.

Accordingly, under the applicable statutory language, DOH should be making any notifications, not current FIs, and the Memo should be withdrawn.

Further, the Memo's "Data Transfer and Procedures" do not cite any legal authority to support the instruction that: "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." (emphasis added) This is particularly concerning since the Memo specifies that the information to be transferred includes both protected health information, as defined by the Health Insurance Portability and Accountability Act, and private personnel information. ("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"). Fiscal Intermediaries cannot disclose consumer health or employee information without specific legal authority to do so. As noted, the Memo provides no legal basis for its direction. Further, Social Services Law § 365-f(4-d), governing fiscal intermediaries ceasing operation, states:

(a) Where a fiscal intermediary is ceasing operation or will no longer serve the consumer's area, the fiscal intermediary shall:....

(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.

This provision of law is consistent with our understanding that health and personnel records may be transferred in accordance with federal and state law only upon request and consent. For this reason as well, the Memo should be withdrawn.

Current FIs With Department Approved Facilitator Subcontracts

For the so-called “Current FIs With Department Approved Facilitator Subcontracts,” the Memo states that “Current 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.” In place of the 45-day notice requirement, the Memo states “Notice should be provided beginning, but no sooner than, January 6, 2025, and align with the following schedule by county.” A table is provided with “Notice Dates” of January 6, 2025, January 20, 2025, February 3, 2025, and February 10, 2025 and templates are provided for the required notice.

There is no legal basis for the differential treatment of so-called Current FIs With Department Approved Facilitator Subcontracts from those Without Department Approved Facilitator Subcontracts. As noted, Social Services Law § 365-f governs the required notifications of existing FIs who cease operations due to failing to submit an offer for a contract or having been denied a contract. Current FIs, whether they have or do not have subcontracts, meet this statutory definition. Accordingly, DOH has the obligation to notify consumers of this transition.

The Department’s direction with respect to “Data Transfer and Procedures” states that “Facilitators must follow the processes outlined in their contracts with PPL to transfer data for consumers and personal assistants.” As noted, the transfer of consumer and personal assistant data raises serious privacy concerns under federal and state law. DOH has not provided a model contract for such subcontracts to assure that any exchange of private information complies with these legal requirements. Further, the Department does not have legal authority to direct facilitators to comply with the terms of these privately-negotiated subcontracts.

Contents of Required Notices

Our concerns regarding the Memo extend beyond the inappropriate delegation of DOH’s notice obligations to Fiscal Intermediaries, but also include the content of the templates provided.

The Memo provides links to three templates for use by the “Current FIs Without Department Approved Facilitator Subcontracts”. The “FI Discontinue Services Template FI to Consumer” states that: “This letter is to inform you that effective <Month, Day, Year>, <name of FI> will no longer provide Fiscal Intermediary (FI) services under the Consumer Directed Personal Assistance Program (CDPAP).” Stated this way, it implies that the FI has determined that it wishes to cease operations, as opposed to being

forced to close operations. The template then (incorrectly) informs the consumer that “No later than March 28, 2025, all individuals and personal assistants in the CDPAP will need to register with the new Statewide Fiscal Intermediary, Public Partnerships LLC (PPL).” Under Social Services Law § 365-f, current Fiscal Intermediaries may continue operating until March 31, 2025.

The template then requires the FI to state to each Consumer that: “Your plan of care, hours of service, and your right to choose your personal assistant(s) is not affected by our change in providing fiscal intermediary services.” The current FI has no basis to make this statement and the Department has no legal right to require current FIs to make it.

The template then contains a lengthy description of PPL’s business. Thus, the template requires the current FI to state:

There are many ways that you and your personal assistant(s) will be able to register with PPL.

- Option 1: Call PPL’s support center at 1-833-247-5346 or TTY: 1-833-204-9042. A team member will help you complete the process.
- Option 2: Change through PPL@Home by going to PPL’s website at pplfirst.com/cdpap. PPL will also send you a link.
- Option 3: Work with an approved CDPAP facilitator who can guide you through the process. A list of approved CDPAP facilitators will be listed on PPL’s website.

Astonishingly, the required template then directs Fiscal Intermediaries to state: “No matter which way you choose to register with PPL, they will be here to help.”

The Department’s direction that existing Fiscal Intermediaries make these affirmative statements about PPL raises serious First Amendment compelled speech concerns as the Department is requiring existing Fiscal Intermediaries to attest to the efficacy of a competitor, and not merely any competitor, but one who is forcing them to involuntarily close their business. Further, we are not aware of any current Fiscal Intermediary who has the knowledge upon which they can make such representations. DOH may make such representations about PPL in its own communications if it chooses. It cannot compel current FIs to do so.

We also note that the proposed Consumer template is only in English and that neither the Memo nor the template address communication with Consumers whose primary language is not English and/or who may be visually impaired or blind, as required under federal and state law. Current FIs cannot be compelled to provide consumer notifications in violation of federal and state language and disability access laws.

The FI Discontinue Services Template FI to LDSS or Managed Care Plan and the FI Discontinue Services Template FI to PAs are similarly problematic. The LDSS or Managed Care Plan template includes a requirement that “The full list of CDPAP consumers and their PAs, including contact information is attached.” As noted above, this direction raises serious protected health information and employee privacy concerns.

The template to PAs raises the same concerns as the template for Consumers, requiring current FIs to describe PPL’s business and indicate that “they will be here to help.” Further, the template states: “As long as you register with PPL no later than March 28, 2025, this change will not affect your ability to continue to provide Personal Assistant services, as directed by the CDPAP consumer you now serve.” We are aware of no current FI who has a basis to make this statement. To the contrary, we are aware of a multitude of problems that have arisen in other states with nonpayment of PA wages with transitions of this nature. Again, if DOH wishes to make these statements itself, it may do so, but it cannot require current FIs to make such statements on its behalf.

The templates provided for the “Current FIs With Department Approved Facilitator Subcontracts,” suffer from all of the same infirmities as those provided to those without such approvals and raise a few additional ones. The FI Transition to Facilitator Template FI to Consumer is identical with the addition of the following sentence: “We are pleased to partner with PPL as a CDPAP facilitator and are able to continue supporting you and your personal assistant(s) in that capacity.” It is particularly outrageous for DOH to direct current FIs who are losing their current FI business and replacing it with a “Facilitation” role to state that they are “pleased” with the outcome. As with the rest of the Memo, DOH has no legal authority to demand current FIs proclaim their joy in being deprived of their current business.

Additional Consumer and Personal Assistant Privacy Concerns

In addition to the above Memo’s multiple directives in apparent violation of federal and state law, we understand that DOH has provided direction to Medicaid Managed Care Plans (MMCPs) to transfer Consumer and Personal Assistant data to DOH, which has then been retransmitted to PPL. DOH’s sharing of such information with PPL and PPL’s subsequent use of such information to contact Consumers and Personal Assistants raises serious concerns under federal and state privacy law. Under these same laws, current FIs have an obligation to safeguard information and understand how and whether requested information they may share could be redisclosed to other parties. In the event that the information requested above is to be shared with PPL, current Fiscal Intermediaries have a legal obligation to understand how the information

December 13, 2024
Page 7

will be used prior to sharing any such information. Of note, the Department's published New York Medicaid Program Notice Of Privacy Practices does not inform Medicaid beneficiaries that it will take and retransmit Personal Health Information for marketing purposes, as has apparently already occurred.² This apparently egregious violation of the health privacy rights of Consumers and the employee privacy rights of PAs separately merits your separate review and investigation, in addition to the withdrawal of the legally-groundless Memo.

Thank you for your time and consideration.

Very truly yours,

BOND, SCHOENECK & KING, PLLC



Roger A. Bearden

² See https://www.health.ny.gov/health_care/medicaid/program/hipaa/notpriveng.htm.