

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

CARING PROFESSIONALS, INC. and CONSUMER)
DIRECTED PERSONAL ASSISTANCE) Index No.: 601181/2025
ASSOCIATION OF NEW YORK STATE,)

Plaintiffs,

v.

)
)
AFFIRMATION OF
BRYAN O'MALLEY

NEW YORK STATE DEPARTMENT OF HEALTH,)
JAMES V. MCDONALD, in his official capacity as)
Commissioner of the New York State Department of)
Health, and, MICHAEL LEWANDOWSKI, in his)
official capacity as a representative of the New York)
State Department of Health's Office of Health)
Insurance Programs, and PUBLIC PARTNERSHIPS)
LLC,

Defendants.

Bryan O'Malley affirms under penalty of perjury the following:

1. I am the Executive Director of Plaintiff Consumer Directed Personal Assistance Association of New York State ("CDPAANYS") with principal offices at 119 Washington Avenue, Suite 3A, Albany, NY 12210.
2. CDPAANYS is a not-for-profit corporation organized under the NY Not-for-Profit Corporations Law in 2000 to support the interests of Fiscal Intermediaries and Consumers in the Consumer Directed Personal Assistance Program ("CDPAP").
3. CDPAANYS supports FIs and recipients in New York, offering supportive services, including, but not limited to: advocacy, systems change, and the promotion of consumer control and self determination.
4. Every provider member of CDPAANYS is a Fiscal Intermediary in CDPAP.
5. Under the NY Social Services Law, Fiscal Intermediaries can be for-profit and not-for-profit corporations.
6. Both for-profit and not-for profit corporations are members of CDPAANYS.

7. Every provider member of CDPAANYS must be committed to the principle of self-direction.

8. CDPAP is a program, enacted under New York Social Services Law §365-f, in which New York State Medicaid beneficiaries who are chronically ill and/or physically disabled, and otherwise eligible to receive home care service, self-direct their own home care. CDPAP provides these individuals with greater flexibility and freedom of choice in obtaining these services.

9. By permitting individuals with disabilities to direct their own care, CDPAP empowers individuals to control their own lives, by enabling the individuals to choose when they will receive care, how they will receive care, and from whom.

10. All of this is done in the individual's own home or in the community, and not in an institution.

11. Approximately 280,000 Medicaid beneficiaries are currently enrolled in New York's CDPAP and are served by approximately 440,000 PAs working for over 600 different FIs.

12. Fiscal Intermediaries provide support services to Consumers and interface with the New York State Medicaid Program.

13. Fiscal Intermediaries are required by law to provide a significant number of services on behalf of the Consumers and function as providers in the Medicaid Program. See NY Social Services Law § 365-f; 18 NYCRR § 505.28.

14. In April 2024, the State Fiscal Year 2024-25 Enacted Budget amended Social Services Law Section 365-f(4-a) to eliminate the current network of FIs and replace it with a single statewide FI.

15. In June 2024, the Department of Health ("DOH") issued Request for Proposals #20524: New York State Fiscal Intermediary Services (the "RFP").

16. On September 30, 2024, the Governor of New York awarded the five year, \$9 billion (per year) contract to Public Partnerships LLC ("PPL") as the SFI.

17. After awarding the SFI contract to PPL, DOH did nothing to prepare for the transition of 280,000 Consumers and 440,000 Personal Assistants to the SFI.

18. The initial RFP, issued on June 17, 2024 contained no provisions regarding the transition from the existing 600 FIs to the SFI.

19. Belatedly, on August 7, 2024, DOH published its Third Amendment to the RFP with a section entitled "Initial Transition."

20. Under the Amended RFP, the awarded SFI's transition tasks included "Contacting every managed care plan and Local Department of Social Services to determine the consumers that need to be transitioned and the fiscal intermediaries they currently work with;" "Contacting each consumer to educate them about the transition;" and "Assisting consumers with educating their personal assistants about the transition".

21. The Third Amendment did not address the legal authority under which the SFI would obtain Consumer and Personal Assistant information to make these contacts.

22. This failure to address the legal authority is important because FIs are covered entities under the Health Insurance Portability and Accountability Act ("HIPAA") and therefore must comply with the HIPAA Privacy Rule set forth in 45 CFR Part 160 and Part 164, Subparts A and E (referred to herein as "HIPAA Privacy Rule").

23. In their capacities as covered entities under HIPAA, FIs are restricted from using and disclosing protected health information ("PHI"), as that term is defined in 45 CFR § 160.103, other than as permitted or required by the HIPAA Privacy Rule. (45 CFR § 164.512 [a] [1]).

24. Further, each covered entity is limited to disclosing or using only the PHI necessary to meet the requirements of the law that compels the use or disclosure (45 CFR § 164.506).

25. When a request for PHI is made, a covered entity is obligated to assure that the disclosure is the minimum "reasonably necessary to accomplish the purpose" of the disclosure (45 CFR § 164.514 [d] [3] [ii] [A]).

26. To accomplish this objective, a covered entity must "verify the identity of a person requesting [PHI] and the authority of any such person to have access to [PHI]" (45 CFR § 164.514 [h] [i]).

27. HIPAA contains specific provisions regarding marketing, requiring that "a covered entity must obtain an authorization for any use or disclosure of [PHI] for marketing" (45 CFR § 164.508 [a] [3] [i]).

28. "Marketing" is in turn 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).

29. In addition to their obligations under HIPAA, FIs must comply with the provisions of New York General Business Law § 399-ddd, which provides in relevant part that: "4. Any person, firm, partnership, association or corporation having possession of the social security account number of any individual shall . . . provide safeguards necessary or appropriate to preclude unauthorized access to the social security account number and to protect the confidentiality of such number."

30. Further, the CDPAP authorizing statute, Social Services Law § 365-f, permits transfer of records only "upon request and consent" of the Consumer. Social Services Law § 365-f(d)(iii).

31. Having failed to plan for the transition and without citing any legal authority, on December 6, 2024, DOH Defendants issued a memorandum to current FIs in New York State 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 “Memorandum”).

32. The language of the Memorandum appears to mirror language in Social Services Law § 365-f. However, the Memorandum deviates in an important way from the statutory language.

33. Specifically, Social Services Law § 365-f (4-d) states:

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[.]

34. But importantly, the law does not require current FIs to provide such notifications when a FI has failed to submit an offer for a contract or has been denied a contract, as is directed under the Memorandum. Rather, the law requires DOH to make such announcements.

Specifically, § 365-f (4-d)(c) states:

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.

35. The Memorandum also directs FIs to transfer confidential, proprietary information.

36. The directed data transfer policy is as follows:

Data Transfer and Procedures

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 [Health Commerce System]. 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

37. In a template accompanying the Memorandum, DOH directs FIs to follow when transferring data, and also directs the transfer of Social Security Numbers, dates of birth, and physical addresses of Consumers and PAs.

38. Yet, 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.

39. This provision of law requires that health and personnel records may be transferred in accordance only upon request and consent of the Consumer.

40. A large number of member FIs concluded that the DOH directive regarding data transfer and notices to Consumers and PAs is both unlawful and beyond the authority of DOH.

41. As a result of these concerns, on December 13, 2024, CDPAANYS wrote to DOH outlining the many legal deficiencies with the December 6, 2024 directive.

42. On December 23, 2024, instead of responding to the CDPAANYS letter, DOH issued an “Update: Notification to Current Fiscal Intermediaries Regarding Data Transfers,” (the “Update”).

43. Indeed, the Update claims that “HIPAA allows the sharing of protected health information between ‘covered entities’ for purposes of healthcare operations without individual consent” and that current FIs, the DOH, and MMC [programs] are covered under this rule making disclosure appropriate. Id.

44. The Update failed to provide the information necessary for an FI to determine, among other things, the legal basis for the requested PHI, the purpose for which the PHI is sought, and that the requested PHI is the minimum necessary to accomplish the requested disclosure. Further, the Update failed to disclose that the information requested was to be shared with PPL to engage in prohibited marketing practices.

45. PPL has contacted Consumers for the purposes of marketing its services as an FI.

46. Upon information and belief, PPL received Consumer and Personal Assistant information from MMCPs (to whom FIs have transferred data), DOH (which received information from current FIs), or both.

47. Since receiving this information, PPL has contacted Consumers for the purpose of encouraging those Consumers to enroll with PPL.

48. These types of communications fall squarely within the definition of prohibited marketing communications under HIPAA. See 45 CFR §§164.501, 164.508(a)(3).

49. Upon information and belief, PPL has also shared Personal Assistant information with 1199 SEIU, which has also sent text messages to Personal Assistants to encourage them to work for PPL and to affiliate with the union.

50. The data that member FIs of CDPAANYS hold regarding their lists of PAs and Consumers is immensely valuable; indeed it is confidential and proprietary and, in many case, has taken years to compile.

51. DOH's Memorandum and Update are unlawfully demanding that the member FIs of CDPAANYS disclose private Consumer information in violation of HIPAA.

52. DOH has made it abundantly clear that they have no intentions of pausing the unlawful collection and dissemination of personal Consumer and PA data which disclose, among other things, home addresses, telephone numbers, and social security numbers.

53. Furthermore, DOH intends to force compliance with the January 15, 2025 disclosure deadline or punish current FIs with "penalties and other sanctions, including exclusion from the Medicaid program" if it does not comply with the DOH directives regarding data transfer and notices.

54. CDPAANYS therefore seeks a permanent injunction enjoining the enforcement of all deadlines and provisions of the Memorandum, Update, and all attachments and templates attached thereto, regarding the directed data transfer and notice to Consumers and PAs, including DOH Defendants' threat of taking adverse actions against non-complying FIs including expulsion from the Medicaid Program, as a result of non-compliance with the Memorandum.

55. Alternatively, and in the event that this Court is unable to provide the relief above, CDPAANYS seeks a permanent injunction enjoining the enforcement of all the deadlines and provisions of the Memorandum, the Update, and all attachments and templates attached thereto, and all threatened consequences, pending resolution of this litigation and until Defendants develop adequate safeguards to protect Consumer and PA data in accordance with HIPAA and other state and federal laws.

I affirm this 21st day of January, 2025, under the penalties of perjury under the laws of New York, which may include a fine or imprisonment, that the foregoing is true, and I understand that this document may be filed in an action or proceeding in a court of law.



1/21/2025

Bryan O'Malley
Executive Director, CDPAANYS