Office of the New York State Attorney General

Letitia James Attorney General

January 24, 2025

Via NYSCEF
The Honorable Jerome C. Murphy, J.S.C.
Nassau County Supreme Court
100 Supreme Court Drive
Mineola, New York 11501

RE: *Caring Professionals, Inc., et al. v. NYS Dep't of Health, et al.*, Index No. 601181- 2025

Dear Justice Murphy:

This Office represents Defendants New York State Department of Health ("DOH"), James V. McDonald, and Michael Lewandowski (collectively, the "State Defendants") in the above-referenced matter. I write to respectfully submit the State Defendants' position with respect to Plaintiffs' motion for a temporary restraining order ("TRO"). State Defendants adopt the arguments asserted in the letter submitted by Co-Defendant Public Partnerships LLC ("PPL")[1] (see NYSCEF Doc. No. 45) and respectfully submit the following additional arguments.

As an initial matter, CPLR 6313(a) provides: "No [TRO] may be granted in an action . . . against a public officer, board or municipal corporation of the state to restrain the performance of statutory duties." The purpose of the directives challenged by Plaintiffs is to implement recent amendments to Social Services Law ("SSL") § 365-f. These are precisely the type of State functions that cannot be the subject of a TRO.

Plaintiffs fail to show irreparable harm:

State Defendants' understanding is that Plaintiffs' TRO motion seeks only to enjoin the imposition of sanctions on Plaintiffs for their non-compliance with DOH's directives set forth in the memorandum dated December 7, 2025 (Pls.' Ex. I). *See* Letter from Plaintiffs to Court (NYSCEF Doc. No. 46) at 1; Proposed OSC at 2; Pls.' Mem. (NYSCEF Doc. No. 38) at 4. However, because Plaintiffs fail to identify any imminent threat of sanctions, their motion fails on this basis alone. *See Fam.-Friendly Media, Inc. v. Recorder Television Network*, 74 A.D.3d 738, 739 (2d Dep't 2010) ("The movant must show that the irreparable harm is "imminent, not remote or speculative.").

[1] State Defendants do not adopt PPL's assertion that FIs were required to transfer data to PPL. *See* NYSCEF Doc. No. 45 at 1). This appears to be merely a good-faith error, not a "stunning admission" as Plaintiffs wrongly characterize it (NYSCEF Doc. No. 46 at 2). It is undisputed that FIs were required to transfer data only to DOH and Managed Care Plans, not to PPL. *See* Pls.' Ex. I at 3.

Plaintiffs' TRO motion is premised entirely on assertions by DOH, issued in a memorandum dated December 23, 2024, that: (1) FIs are "required to comply with all Medicaid statutes, regulations, and guidance as a condition of participation in the program"; and (2) failure to comply with Medicaid statutes, regulations, and guidance "can carry penalties and other sanctions, including exclusion from the Medicaid program." *See* Pls.' Ex. M (NYSCEF Doc. No. 34) at 2. Nowhere do Plaintiffs allege that DOH has taken any steps to implement sanctions against them. And nowhere do Plaintiffs demonstrate any "threat" of sanctions. The statements by DOH are general and uncontroversial. Any fear that Plaintiffs may have that the licensed home care services segment of their businesses would be dis-enrolled from the Medicaid program is merely the "remote and speculative" harm that falls far short of satisfying the essential element of irreparable harm, which is necessary to justify the drastic remedy of a TRO. The lack of imminent harm is further demonstrated by Plaintiffs' delay in seeking relief. The directives have been in place since December 7, 2024, *see* Pls.' Ex. I, and the memo with the purported "threats" that non-compliance with Medicaid rules may have consequences was issued December 23, 2024, *see* Pls.' Ex. M. Yet Plaintiffs waited until January 22, 2025 to file their Order to Show Cause.

These failures alone warrant denial of Plaintiffs' TRO motion.

Plaintiffs fail to show likelihood of success on the merits:

Plaintiffs also cannot show a likelihood of success on the merits. Their first cause of action, alleging HIPAA violations, will have to be dismissed because "there is no private right of action under the HIPAA law." *Mathie v. Womack*, No. 14-cv-6577, 2015 WL 419802, at *2 (E.D.N.Y. Jan. 29, 2015); *see also Ames v. Grp. Health Inc*., 553 F. Supp. 2d 187, 192 (E.D.N.Y. 2008) (holding private plaintiffs "cannot bring a HIPAA enforcement action due to improper disclosures of medical information"). "Rather, HIPAA enforcement actions are in the exclusive purview of the Department of Health and Human Services." *Id*. *see also Ames*, 553 F. Supp. 2d at 192 ("In fact, HIPAA limits enforcement of the statute to the Secretary of Health and Human Services." (citing 42 U.S.C. §§ 1320d–5, d–6)). Full briefing on Plaintiffs' motion for a preliminary injunction ("PI") will further demonstrate that even if Plaintiffs could assert a private right of action, it would fail because the directives by DOH are permitted under HIPAA. For example, SSL § 363-c provides: "Notwithstanding any laws or regulations to the contrary, . . . providers and other recipients of medical assistance program funds shall make available to the commissioner . . . in a prompt fashion all fiscal and statistical records and reports, . . . and all underlying . . . records, which may be requested by the commissioner . . . . any personally identifying information obtained pursuant to this subdivision shall remain confidential and shall be used solely for the purposes of this subdivision." SSL § 363-c(4). In addition, DOH is a health oversight agency and under HIPAA, protected health information may be disclosed to a health oversight agency for oversight of the health care system, *see* 45 C.F.R. § 164.512(d)), as well as for health care operations such as care coordination, *see* 45 C.F.R. § 164.506(c) (4), the circumstance presented here.

Plaintiffs' second cause of action, brought pursuant to N.Y. Business Law ("GBL") § 399-ddd, also will have to be dismissed because that statute provides for exclusive enforcement by the New York State Attorney General. *See* GBL § 399-ddd(7) ("Whenever there shall be a violation of this section, application may be made by the attorney general in the name of the people of the state of New York to a court or justice having jurisdiction by a special proceeding to issue an injunction

. . . ."). In addition, full briefing on Plaintiffs' PI motion will demonstrate that, even if Plaintiffs could assert a private right of action, it would fail because GBL § 399-ddd has not been violated.

Plaintiffs also cannot succeed on their third cause of action, alleging compelled speech in violation of the First Amendment. The data transfer and notice requirements at issue comport with the First Amendment because they require only the provision of "purely factual and uncontroversial information" that is "reasonably related" to a state interest and that is not "unduly burdensome." *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *see Milavetz, Gallop & Milavetz*, *P.A. v. United States*, 559 U.S. 229, 249 (2010). This analytical framework should apply here because of the importance of ensuring continuity of home care services, and a more deferential approach is appropriate because factual disclosures are not viewpoints.

Nor can Plaintiffs succeed on their fourth cause of action, for purported violations of N.Y. SSL § 365-f, because that statute does not provide for a private cause of action by FIs, which do not fall within the groups that the statute is intended to protect. Moreover, Plaintiffs demonstrate no violation. Plaintiffs' fifth cause of action is merely an alternative request for relief, not a separate cause of action. In any event, Plaintiffs have no basis or standing to demand unspecified "safeguards" of their choosing. There are numerous protections in place for the at-issue data.

Plaintiffs' takings claim, their sixth cause of action, also will fail. Plaintiffs do not have a property right in continued participation in the Medicaid program, *see, e.g., Rye Psychiatric Hosp. Ctr., Inc. v. State,* 177 A.D.2d 834, 835 (3d Dep't 1991) ("It is fundamental that a Medicaid provider has no property interest in or contract right to reimbursement at any specific rate or, for that matter, to continued participation in the Medicaid program at all."), much less in the administrative information for CDPAP consumers and personal assistants.

Finally, Plaintiffs' seventh cause of action is equally baseless. DOH has not "threatened" any Plaintiff. DOH merely made the uncontroversial assertions that FIs must comply with Medicaid statutes, regulations, and guidance, and that non-compliance "*can* carry penalties and other sanctions." *See* Pls.' Ex. M at 2 (emphasis added).

For all of the foregoing reasons, and for the reasons asserted in the letter submitted by Co-Defendant PPL (NYSCEF Doc. No. 45), State Defendants respectfully request that the Court deny Plaintiffs' motion for a temporary restraining order. State Defendants look forward to working with the Court and with Plaintiffs to set a briefing schedule for Plaintiffs' motion for a preliminary injunction.

Thank you for your attention to these matters.

Respectfully submitted,

s/ *Helena Lynch*

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