IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

VIOLETTE JEANNOT, YVONNE FRANCOIS, ANTONINA FRIMER, EUGENE KARASYUNOK, NELLI KOTSYUBA, PEDRO PERALTA, VITALIY ROZENBOYM, MARGARITA ROZENBOYM, CESAR RIOFRIO, MUHAMMAD O. ISLAM, TRINA-ROSE CUTUGNO, CAROL GITTENS, ELIZABETH DUNROD, ZILLA CUMMINGS, CHARLOTTE DEWITT, RASHIDA SMITH, NIKOLAY GAVRILOV, NAUM GALLER, AASHA SERVICES, INC., BANGLA CDPAP SERVICES INC., BEST HELP HOME CARE CORP., CAREAIDE DIRECT, INC., CAREFIRST CDPAP, CORP., CELESTIAL CARE INC., EASY CHOICE AGENCY, INC., ELIM HOME CARE AGENCY LLC, ENRICHED HOME CARE AGENCY INC., HEALTHY LIFE CHOICE, INC., HOME CHOICE LLC, THE DORAL INVESTORS GROUP, LLC, DBA HOUSE CALLS HOMECARE, INTERNATIONAL HOME CARE SERVICES OF NY, LLC, JUST CARE LLC, SAFE HAVEN HOME CARE, INC., SAFETY 1ST HOMECARE, INC., SILVER LINING HOMECARE AGENCY, INC., SUNDANCE HOME CARE INC., ALLCARE HOMECARE AGENCY, INC. DBA VIVID CARE Plaintiffs, v. NEW YORK STATE, NEW YORK STATE DEPARTMENT OF HEALTH, KATHY HOCHUL, in her official capacity as Governor of New York State, and JAMES V. MCDONALD, in his official capacity as Commissioner, New York State Department of Health Defendants.	)	Civil Action No.: 1:24-cv-05896

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs are Medicaid beneficiaries (hereinafter, "Consumers") residing in New York State who receive home care services through New York State's Consumer Directed Personal Assistance Program (CDPAP), as delivered by the Plaintiff agencies, known as "Fiscal Intermediaries" (hereinafter, the "Agencies" or "FIs") (Plaintiff Consumers and Plaintiff Agencies are referred to collectively as "Plaintiffs").

Plaintiffs bring this complaint for declaratory and injunctive relief against Defendants New York State, New York State Department of Health ("NYSDOH"), Kathy Hochul, in her official capacity as Governor of New York State, and James V. McDonald, in his official capacity as Commissioner of the NYSDOH, under 42 U.S.C. § 1983 on the basis that S8307-C/A8807-C, signed into law on April 20, 2024 (deemed effective April 1, 2024), and amending section 365-f of the Social Services Law (hereinafter, the "2024 CDPAP Law"), violates the federal Medicaid Statute, 42 U.S.C. §§ 1396a(a)(23), by depriving Plaintiff Consumers of their statutory right to select the agency of their choice for their CDPAP services.

In addition, Plaintiffs assert that, as implemented, the 2024 CDPAP Law will further violate the Medicaid Statute, 42 U.S.C. §§ 1396a(a)(8) (reasonable promptness of services) and (a)(10) (entitlement to services), the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12132, and the Rehabilitation Act of 1973 ("Rehabilitation Act"), 29 U.S.C. § 794(a), by, *inter alia*, preventing eligible beneficiaries from receiving access to CDPAP services, and forcing individuals eligible for home based services into institutionalized care.

In support thereof, Plaintiffs state the following:

INTRODUCTION

1. Plaintiff Consumers are elderly, physically disabled, and/or developmentally disabled Medicaid recipients who rely on personal care services, home health aide services, and/or skilled nursing services delivered through the CDPAP to remain in their homes, as opposed to receiving institutionalized care through hospitals, nursing facilities, or intermediate care facilities.

2. Plaintiff Consumers receive partial or total assistance with personal care services, home health aide services, and/or skilled nursing tasks by a consumer directed personal assistant under the instruction, supervision and direction of the consumer or the consumer's designated representative. 18 NYCRR § 505.28(b)(2). Personal care services may include the following: bathing, dressing, grooming, toileting, walking, transferring, turning and positioning, feeding, medication administration and tracking, skin care, using medical supplies and equipment, changing of dressings, making and changing beds, dusting and vacuuming, light cleaning of kitchen, bedroom, and bathroom, dishwashing, listing needed supplies, shopping, laundry, payment of bills and essential errands, and meal preparation, including modified diets. *See* 18 NYCRR § 505.28(b)(9); 18 NYCRR § 505.14(a)(5). Home health aide services may include "preparation of meals in accordance with modified diets or complex modified diets; administration of medications; provision of special skin care; use of medical equipment, supplies and devices; change of dressing to stable surface wounds; performance of simple measurements and tests to routinely monitor the consumer's medical condition; performance of a maintenance exercise program; and care of an ostomy after the ostomy has achieved its normal function." 18 NYCRR § 505.28(b)(8). Skilled nursing tasks include activities that are

within the scope of practice of a registered professional nurse or a licensed practical nurse. 18 NYCRR § 505.28(b)(11).

3. Plaintiff Consumers receive these services through CDPAP, which was designed to provide beneficiaries "greater flexibility and freedom of choice in obtaining such services." New York Social Services Law ("NY SSL") § 365-f(1). CDPAP enables its recipients to self-direct their services, meaning that the consumers recruit and hire their own caregivers (known as "personal assistants" or "PAs"), train, supervise, and schedule the personal assistants, and co-employ the personal assistants along with the agency the consumers choose.

4. Plaintiff Agencies, in turn, co-employ the personal assistants and ensure that they are hired and paid in accordance with state and federal labor laws, that appropriate records are maintained, that the consumers are able to carry out, and to continue carrying out, their self-direction role and responsibilities under the program, that appropriate contracts and memorandum of understanding are executed, and that NYSDOH regulations are complied with. *See* NY SSL § 365-f(4-a).

5. As articulated by the NYSDOH, an agency's "best practices" also include, but are not limited to, providing peer supports, including peer mentoring and counseling for consumers, conducting visits to the consumer's home, conducting face-to-face orientation for personal assistants, providing support for consumers to assist them in their role as a joint employer, including recruiting, interviewing, dealing with difficult employees, effective supervision and termination of employment, establishing a consumer advisory committee that includes personal assistants, Agency staff, Managed Care Organizations ("MCOs"), Local Departments of Social Services ("LDSS"), and consumers across the state, and establishing, maintaining, and

monitoring email and websites with information to consumers, including a means to report and/or resolve complaints and answer inquiries.[1]

6. As described through numerous declarations made by Plaintiff Consumers in support of this litigation, agencies play an essential role in ensuring that consumers receive personal care services, home health aide services, and/or skilled nursing services through the CDPAP, and that the consumers are effectively supported in carrying out their responsibilities under the program. Agency choice is a fundamental statutory right to those consumers, and it is critical that they maintain their right to select the agency that best suits their specific needs, including cultural, language, and other unique requirements of the consumers.

7. Defendant NYSDOH has likewise recognized the importance of agency choice, with its then-Medicaid Director testifying in a previous litigation: "A fundamental principle of CDPAP is that recipients must be able and willing to make informed choices regarding the management of the services they receive, or have a legal guardian or designated relative or other adult able and willing to help make informed choices. Choosing an FI is one of the informed choices CDPAP recipients must make."[2]

8. The 2024 CDPAP Law destroys all agency choice, providing that ***a single agency*** will replace the several hundred agencies currently serving CDPAP consumers and employees in New York State, and that all "managed care plans, managed long-term care plans, local social service districts, and other appropriate long-term service programs" ***must*** contract with the

[1] *See* RFO 20039, https://www.health.ny.gov/funding/rfo/inactive/20039/docs/20039.pdf, at § 4.2 (now rescinded); RFP 20524, https://www.health.ny.gov/funding/rfp/20524/20524.pdf, at § 4.2.

[2] *See Consumer Directed Pers. Assistance Ass'n of N.Y. State, Inc. et al. v. Zucker et al.*, Case No. 1:18-cv-00746-FJS-CFH, Declaration of Donna Frescatore, Filed July 5, 2018 (Dkt. 9-1).

awarded agency to provide fiscal intermediary services to consumers. NY SSL § 365-f(4-a)(a)(i); (ii-a).

9. Barring a successful challenge to the 2024 CDPAP Law, by April 1, 2025, Plaintiff Agencies will be prohibited from providing services under the CDPAP, and Plaintiff Consumers will be forced—over their objection and in violation of federal law—to obtain services through the single agency that is selected by the NYSDOH. NY SSL § 365-f(4-a-1)(a).

10. Moreover, the NYSDOH has already issued a request for proposals and plans to award the statewide contract to one agency to begin performing statewide fiscal intermediary services for CDPAP **by October 1, 2024**.[3] Following the NYSDOH's announcement of the award, it is expected that Defendant NYSDOH will begin the transition of contracts and consumers to the new statewide agency, resulting in irreparable harm to the Plaintiffs.[4] In addition, under the 2024 CDPAP Law, Plaintiff Agencies will be required to provide written notice to any remaining consumers, personal assistants, and contracted parties at least forty-five days in advance of the April 1, 2025 date, in which it will be forced under the law to cease operations. NY SSL § 365-f(4-d)(a)(i).

11. This action asks the Court to declare the 2024 CDPAP Law in violation of federal law, and to enjoin the Defendants from implementing the law.

JURISDICTION AND VENUE

12. The Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(3), as this action arises under 42 U.S.C. § 1983, Title XIX of the Social Security Act,

[3] https://www.health.ny.gov/funding/rfp/20524/.
[4] https://www.health.ny.gov/funding/rfp/20524/qanda.pdf, at Q&A 1106.

42 U.S.C. § 1396 *et seq*., the ADA, 42 U.S.C. § 12132, the Rehabilitation Act, 29 U.S.C. § 794(a), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02.

13. The Court has personal jurisdiction over all Defendants because they reside in this District or are exercising their challenged official duties in this District.

14. Venue is proper in this Court under 28 U.S.C. § 1391(b) because at least one Defendant resides in this District and all Defendants are residents of the State of New York, because Defendants are exercising their challenged official duties in this District, because a substantial part of the events or omissions giving rise to the claims occurred in this District, and/or because Plaintiffs will suffer harm in this District.

PARTIES

Plaintiff Consumers

15. Plaintiff Violette Jeannot is a resident of Brooklyn and receives CDPAP services through Plaintiff Safe Haven Home Care, Inc. ("Safe Haven") to address medical issues due to asthma, diabetes, high blood pressure, and problems with her leg and knee. Plaintiff Jeannot is a native Creole speaker and receives services from Safe Haven in her native language.

16. Plaintiff Yvonne Francois is a 73-year-old resident of Long Island and receives CDPAP services through Plaintiff Safe Haven to address medical issues related to knee and back problems, vertigo, and complications due to asthma. Plaintiff Francois was born in Haiti and receives services from Safe Haven in her native language, Creole.

17. Plaintiff Antonina Frimer is a resident of Brooklyn and receives CDPAP services through Plaintiff Enriched Home Care Agency Inc. ("Enriched"). Plaintiff Frimer speaks primarily Russian and relies on the Russian language skills of Enriched's employees to facilitate her care.

18. Plaintiff Eugene Karasyunok is a resident of Brooklyn and receives CDPAP Services through Plaintiff Vivid Care, Inc. ("Vivid Care"). Plaintiff Karasyunok speaks primarily Russian and relies on the Russian language skills of Vivid Care's employees to facilitate his care.

19. Plaintiff Nelli Kotsyuba is a resident of Brooklyn and receives CDPAP services through Plaintiff Vivid Care, Inc. Plaintiff Kotsyuba and her family members who serve as her personal assistant speak primarily Russian. Vivid Care employs fluent Russian speakers, and they facilitate the services provided to Plaintiff Kotsyuba.

20. Plaintiff Pedro Peralta is a resident of Manhattan and receives CDPAP services through Plaintiff Easy Choice Agency, Inc. ("Easy Choice") for multiple medical conditions. Plaintiff Peralta immigrated to the United States from the Dominican Republic, and the fact that Easy Choice has native Spanish speakers on staff helps to facilitate the services he receives.

21. Plaintiff Vitaliy Rozenboym is an 86-year-old resident of Brooklyn, New York and receives CDPAP services through Plaintiff Silver Lining Homecare Agency, Inc. ("Silver Lining") for multiple conditions. Plaintiff Vitaliy Rozenboym is a Holocaust survivor and selected Silver Lining as his FI because, in part, Silver Lining's Administrator's parents are also Holocaust survivors, and the Administrator lives in his community and has a similar cultural understanding given their shared backgrounds. Plaintiff Vitaliy Rozenboym also speaks Russian and Silver Lining has fluent Russian speakers on its staff, which facilitates the services provided to Plaintiff Rozenboym.

22. Plaintiff Margarita Rozenboym is an 84-year-old resident of Brooklyn, New York and, like her husband Plaintiff Vitaliy Rozenboym, receives CDPAP services through Plaintiff Silver Lining. Plaintiff Margarita Rozenboym requires home care services as a result of medical

conditions and disabilities. Plaintiff Margarita Rozenboym also speaks Russian and chose Silver Lining for similar reasons to her husband.

23. Plaintiff Cesar Riofrio is a resident of the Bronx and receives CDPAP services through Plaintiff Home Choice LLC.

24. Plaintiff Muhammad O. Islam is a resident of Brooklyn, New York and receives CDPAP services through Plaintiff Bangla CDPAP Services, Inc.

25. Plaintiff Trina-Rose Cutugno is a resident of Greenpoint, Brooklyn, and receives 84 hours per week of CDPAP services as a result of physical disability/musculo-skeletal bone disorder that leaves her prone to fractures at her joints, requiring assistance with both instrumental activities of daily living and activities of daily living.

26. Plaintiff Carol Gittens is a resident of Brooklyn and receives CDPAP services through Plaintiff Sundance Home Care, Inc. as a result of medical needs related to mental and physical decline.

27. Plaintiff Elizabeth Dunrod is a resident of Brooklyn and receives CDPAP services through Plaintiff Sundance Home Care, Inc.

28. Plaintiff Zilla Cummings is a resident of Brooklyn and receives CDPAP services through Plaintiff Sundance Home Care, Inc. as a result of medical needs related to cognitive decline.

29. Plaintiff Charlotte Dewitt is a resident of Brooklyn and receives CDPAP services through Plaintiff Carefirst CDPAP, Corp. as a result of medical needs that hinder her mobility.

30. Plaintiff Rashida Smith is a resident of Brooklyn and receives CDPAP services through Plaintiff Carefirst CDPAP, Corp. as a result of medical needs that hinder her mobility.

31. Plaintiff Nikolay Gavrilov is a resident of Queens and receives CDPAP services through Plaintiff International Home Care Services of NY, LLC ("IHCS") for multiple health conditions. Plaintiff Gavrilov speaks Russian and relies on Russian speakers at IHCS to facilitate his care.

32. Plaintiff Naum Galler is a resident of Brooklyn and receives CDPAP services through Plaintiff Just Care, LLC ("Just Care").

Plaintiff Agencies

33. Plaintiff Aasha Services Inc. d/b/a Aasha Home Care ("Aasha") is a New York corporation with its principal place of business in Queens. Aasha offers FI services to Bangladeshi immigrants and other groups in the community in their native languages.

34. Plaintiff Bangla CDPAP Services Inc. ("Bangla CDPAP") is a New York corporation with offices in New York City. Founded by an immigrant from Bangladesh in 2017, Bangla CDPAP provides CPDAP services primarily to the South Asian immigrant community in New York City. Bangla CDPAP's employees understand specific cultural and religious needs of its consumers and PAs, and the FI has developed policies and procedures to ensure respect for and adherence to certain cultural and religious norms and customs. Bangla CDPAP maintains a diverse workforce, with employees who speak the same languages as the consumers the FI serves, including English, Bengali, Urdu, Hindi, Hebrew, Arabic, Spanish, Chinese, Portuguese, and Greek.

35. Plaintiff Best Help Home Care Corp. ("Best Help") is a New York corporation and FI with its headquarters located in Brooklyn. Best Help was created to meet the needs of the local community, maintains a centrally located and accessible office, and is active in community events. Best Help employs a director of patient services to oversee compliance,

quality assurance, and other matters relating to patient care. Best Help's consumers comprise a broad array of nationalities, cultures, and religions, and likewise its staff is diverse and multilingual, speaking Creole, Spanish, and Russian, among other languages.

36. Plaintiff CareAide Direct, Inc. ("CareAide Direct") is a New York corporation with its primary place of business in New York City. CareAide Direct serves as an FI for elderly and disabled consumers in Harlem. CareAide Direct's owners and managers are involved in the Harlem community, and local community organizations and state legislators have recognized the importance of CareAide Direct's services. CareAide Direct employs a multicultural, multilingual workforce to meet the needs of its multicultural clients.

37. Plaintiff Carefirst CDPAP, Corp. ("Carefirst") is a New York Corporation. Carefirst has served as an FI since February 2017, has three locations in Nassau, Queens, and the Bronx, and works in underserved areas of Suffolk, Richmond, and Westchester counties. Carefirst's staff has expertise working with elderly individuals as well as children with severe disabilities. Its diverse and bilingual employees serve consumers who speak nine different languages. To ensure consumer safety, exercise oversight, and build relationships, Carefirst staff members visit consumers in their homes to educate them about CDPAP rules and conduct trainings for PAs and consumers.

38. Plaintiff Celestial Care Inc. ("Celestial Care") is a New York corporation. Celestial Care was founded in 2016 and is a New York State certified minority-owned business enterprise. It is an FI that primarily serves the elderly and immigrants from Caribbean countries, such as Guyana, Trinidad, Barbados, and Jamaica, as well as South Asia. Celestial Care staff speak more than seven languages, including English, Spanish, Tagalog, Hindi, Bengali, Punjabi and Urdu. Community organizations and a state legislator have

acknowledged the need in the Bronx for the services Celestial Care provides, and the role it plays in the local community.

39. Plaintiff Easy Choice Agency, Inc. is a New York corporation and FI with its principal place of business in New York, NY. Easy Choice's CEO has a master's degree in public administration and has spent her career working in social services and with individuals with disabilities. Easy Choice's staff is made up of multidisciplinary and multicultural people who speak the languages of the consumers and PAs the agency serves, including Russian, Spanish, Turkish, and Armenian. Easy Choice serves new immigrants and other consumers primarily in the Inwood section of Manhattan, but in all the other Boroughs and outside New York City as well, and maintains a centrally located office in Westchester for providing training and orientation for PAs and consumers. Training also occurs at consumers' homes, and Easy Choice staff are in regular communication with consumers and conduct home visits to ensure compliance. The state assembly member in the district where Easy Choice is located praised the skills and experience of Easy Choice's founder, and detailed the agency's valuable impact on the community, particularly for new immigrants.

40. Plaintiff Elim Home Care Agency LLC ("Elim") is a New York limited liability company. Elim is an FI serving the Boroughs of New York City and Long Island, with particular emphasis on Korean immigrant communities. Elim's founder is Korean-American and employees are fluent in Korean, so they can communicate with consumers and PAs in their native languages.

41. Plaintiff Enriched Home Care Agency Inc. is a New York corporation that has been providing FI services to the Five Boroughs and Nassau County since 2019. As an immigrant-owned FI, Enriched strives to hire employees who are aware of and sensitive to the

variation in ethnicities, languages, cultures and socio-economic statuses of its clients, many of whom are new Americans who speak Spanish, Arabic, Ukrainian, and Russian. Enriched provides staff training in cultural competency and effective communication. Enriched focuses on underserved communities with high poverty rates, including the Borough Park and Bensonhurst areas of Brooklyn. Community organizations have praised Enriched's expertise and care in providing services to the elderly and recent immigrants and the important role that the FI plays in the community.

42. Plaintiff Healthy Life Choice, Inc. ("Healthy Life Choice") is a New York Corporation serving the Brooklyn community. Healthy Life Choice is a Minority- and Woman-Owned Business Enterprise with a focus on helping minorities. Many of Healthy Life Choice's consumers are Chinese immigrants, and staff can speak multiple dialects to communicate with them.

43. Plaintiff Home Choice LLC ("Home Choice") is a New York limited liability company with its primary place of business in the Bronx. Home Choice provides FI services to consumers from varied backgrounds, cultures, and religions. Its staff members speak the languages of its consumers and PAs, including Spanish, Arabic, Hebrew, Bengali, and Chinese, to promote expeditious intake, case management and effective care. Home Choice conducts home visits, face-to-face orientation and training, and regular calls to consumers to ensure their health needs are being met.

44. Plaintiff The Doral Investors Group, LLC d/b/a House Calls Homecare ("House Calls") is a New York limited liability company with offices located in Queens, Brooklyn, Bronx, Manhattan, and Rochester. House Calls is managed by individuals who have broad administrative, operational, and clinical experience in caring for the elderly and disabled. Its

owner has more than thirty years of experience in health care administration, and its administrative directors include two registered nurses with experience in home care. House Calls provides FI services to a diverse community, with consumers who have come to New York from more than seventeen different countries, and employees who communicate in multiple languages, including Bengali, Hindi, Urdu, Mandarin, Cantonese, French, Creole, Hebrew, Yiddish, Spanish, Italian, Russian, and American Sign Language. House Calls is active in the communities it serves, develops relationships with religious and community groups, and sponsors local events.

45. Plaintiff International Home Care Services of NY, LLC ("IHCS") is a New York limited liability company with its principal place of business in Queens. IHCS's office staff is multilingual, enabling IHCS to provide FI services to Russian and other immigrant communities without the use of interpreters. IHCS's coordinators are in regular communication with consumers to check health status and ensure they are receiving the care they need.

46. Plaintiff Just Care LLC is a New York limited liability company with its primary place of business in Brooklyn. Just Care provides FI services in Bronx, Kings, Nassau, New York (Manhattan), Orange, Putnam, Queens, Richmond, Rockland, Suffolk, and Westchester Counties. Just Care is run by a Chief Executive Officer who is appointed by a board of directors, and the administrative staff receives extensive training relating to CDPAP and Medicaid. Just Care's staff includes those with backgrounds in nursing, business administration, finance and accounting. In addition, employees are from many cultures and backgrounds and their native languages include English, Russian, Ukrainian, Polish and Spanish.

47. Plaintiff Safe Haven Home Care, Inc. ("Safe Haven") is a New York corporation with its office in Brooklyn. Safe Haven is certified as a New York Minority- and Woman-Owned Business Enterprise (MWBE) and a Woman-Owned Business Enterprise (WBE). Safe Haven's founder has been a registered nurse for 34 years and spent most of that time working in home health care. She has intentionally kept Safe Haven a smaller, local FI to ensure consistent quality and foster relationships with consumers. Safe Haven's multilingual employees serve a multicultural and diverse community, with a particular focus on Creole, French, and Spanish speakers and immigrants from Haiti and the Caribbean. Community organizations and a state legislator praised Safe Haven's provision of quality and culturally competent care particularly to recent Haitian immigrants. Safe Haven's employees are in regular communication with consumers and PAs, conduct home visits, and provide consistent one-on-one guidance.

48. Plaintiff Safety 1st Homecare, Inc. ("Safety 1st") is a New York corporation with its office located on Staten Island. Safety 1st is a woman-owned FI providing services to consumers in the five Boroughs of New York City. Its clients are from a broad array of ethnic and cultural groups, mirroring the diversity in New York State. Safety 1st staff members are fluent in English, Turkish, Russian, Hebrew, Persian (Farsi), Uzbek, Bukharian, and Azeri, and many have similar religious or cultural backgrounds to the consumers and PAs they serve, making them well positioned to understand certain cultural sensitivities.

49. Plaintiff Silver Lining Homecare Agency, Inc. ("Silver Lining") is a New York corporation with its principal place of business in Brooklyn. Silver Lining serves the five Boroughs and Long Island and is well known in the community for working with Holocaust survivors and their families as well as refugees from Eastern Europe. The agency works closely with nonprofit and religious organizations in the community to educate the elderly and their

families about home care and CDPAP. Silver Lining's staff is composed of multidisciplinary and multicultural individuals who are fluent in 11 languages. Its owners are information technology professionals and healthcare entrepreneurs, with more than twenty years of experience in the health care industry. Silver Lining has a centrally located office in Brooklyn, and it conducts weekly monitoring calls with consumers as well as consistent home visits.

50. Plaintiff Sundance Home Care Inc. ("Sundance") is a New York corporation with its principal place of business in Brooklyn. Sundance has served as an FI since 2017, and its employees are in frequent personal contact with consumers and PAs. Sundance's founders and managers are naturalized U.S. citizens from the former Soviet Union, and they are able to provide services in multiple languages to immigrants from that region. Sundance also caters to immigrants from Haiti and other Eastern Caribbean countries. Sundance's employees speak Creole and Spanish, so they can communicate with consumers and PAs in their native language and provide culturally sensitive care. In addition, Sundance's Administrator is a Registered Nurse with decades of experience in geriatric care.

51. Plaintiff Allcare Homecare Agency Inc. d/b/a Vivid Care ("Vivid Care") is a New York corporation with its principal place of business in Brooklyn. Vivid Care was established in 2016 and is an FI as well as a licensed home care agency servicing New York City and Nassau County. Vivid Care's diverse employees serve a multicultural community and speak English, Russian, Spanish, Uzbek, Urdu and Creole. Because Vivid Care is centrally located in the community, consumers and their PAs often come into the office for assistance with training and requirements for participation in CDPAP. Every consumer has a dedicated case manager at Vivid Care—often someone who speaks the same language as and shares the cultural background of the consumer and PA—who is in regular contact with the consumer to facilitate

enrollment, compliance, continuity of care, and an understanding of the consumer's needs and health status.

Defendants

52. Defendant New York State is a public entity as defined by 42 U.S.C. § 12131(1).

53. Defendant Kathy Hochul is the Governor of New York and is sued in her official capacity. Governor Hochul maintains her office in Albany, NY.

54. Defendant NYSDOH is the single-state agency in New York responsible for administering New York's Medicaid program. The NYSDOH is a public entity as defined by 42 U.S.C. § 12131(1). It maintains its headquarters at Corning Tower, Empire State Plaza, Albany, NY 12237. It also maintains offices, including Local Departments of Social Services, throughout the state, including in the Eastern District of New York.

55. Defendant James V. McDonald is the Commissioner of the NYSDOH and is sued in his official capacity. Commissioner McDonald maintains his office at NYSDOH's headquarters in Albany, NY.

BACKGROUND AND FACTUAL ALLEGATIONS

The Medicaid Statute, 42 U.S.C. § 1396, *et seq.*

56. The United States covers health care expenditures for the elderly, disabled, and persons of modest income, principally through the Medicare and Medicaid programs. While the Medicare program is operated by the federal government, the Medicaid program is a federal-state partnership in which the program is operated by the State but is also regulated, overseen, and partially funded by the federal government.

57. Since 1965, the federal government and states have worked together to provide medical assistance to vulnerable populations under the Medicaid program. States need not join

the Medicaid program, but those which do, such as New York State, must comply with a long list of federal statutory and regulatory requirements, and must administer their programs in compliance with such requirements.

58. One such statutory requirement of the Medicaid program, found at 42 U.S.C. § 1396a(a)(23) and known as the "free choice of provider" provision, requires that a state must "provide that (A) any individual eligible for medical assistance (including drugs) may obtain such assistance from ***any institution, agency, community pharmacy, or person, qualified to perform the service or services required*** (including an organization which provides such services, or arranges for their availability, on a prepayment basis), who undertakes to provide him such services." 42 U.S.C. § 1396a(a)(23) (emphasis added); *see also* 42 C.F.R. § 431.51.

59. This provision ensures that a Medicaid beneficiary remains free to select the care team that he or she desires, and is not forced to receive care through any given provider.

60. Under the federal-state arrangement, states participating in Medicaid must submit their "plans for medical assistance," known as State Plans, to the federal government, specifically the United States Department of Health and Human Services ("HHS"), and receive approval from HHS for those State Plans, to receive federal funds. 42 U.S.C. § 1396-1.

61. If a state desires to amend its State Plan, or if there are material changes in State law, organization, or policy, or in the State's operation of the Medicaid program, a state must promptly submit amendment requests to HHS, and specifically to the Centers for Medicare & Medicaid Services ("CMS") within HHS, to request approval for those state plan amendments ("SPAs"). *See* 42 C.F.R. § 430.12. A SPA that is approved by CMS may be effective on the first day of the quarter in which it is submitted to CMS for approval. 42 C.F.R. § 430.20.

62. If a state seeks a waiver of its State Plan requirements, as opposed to simply an amendment of its State Plan, any such request must be submitted to CMS which, in turn, submits the request to the Administrator of HHS for approval by the Administrator. 42 C.F.R. § 430.25. A waiver of a State Plan requirement may only be granted prospectively, and not retroactively, as opposed to a SPA. *See* 42 C.F.R. § 430.25(h) ("Waivers receive a prospective effective date determined, with State input, by the Administrator [of HHS]. The effective date is specified in the letter of approval to the State.").

63. Waivers are permitted to "allow exceptions to State plan requirements and permit a State to implement innovative programs or activities on a time-limited basis, and subject to specific safeguards for the protection of beneficiaries and the program." 42 C.F.R. § 430.25(b).

64. If a state seeks a waiver of a Medicaid statutory requirement (as relevant to this lawsuit, Section (a)(23) of the Medicaid Statute), it must apply for such a waiver with CMS and must document in its waiver request (i) the cost-effectiveness of the project; (ii) the effect of the project on the accessibility and quality of services; (iii) the anticipated impact of the project on the State's Medicaid Program and; (iv) assurances that the restrictions on free choice of providers do not apply to family planning services. 42 C.F.R. § 431.55(b)(2).

65. In addition, if a state seeks to waive the free choice of provider right under Section (a)(23), such a request will only be granted by the Administrator of HHS if the state establishes that its request is "consistent with access, quality, and efficient and economic provision of covered care and services" and "if such restriction does not discriminate among classes of providers on grounds unrelated to their demonstrated effectiveness and efficiency in providing those services." 42 U.S.C. § 1396n(b)(4) (Section 1915(b) of the Social Security Act). *See also* 42 C.F.R. § 431.55(f).

66. Any request by a state to waive a Medicaid requirement must, as with a request to waive a State Plan requirement, be approved by the Administrator of HHS on a prospective basis. 42 C.F.R. § 431.55(b). Waivers under Section 1915(b), which include a waiver of the free choice of provider right, may be approved for a period of two years and may be renewed for additional periods of up to two years as determined by the Administrator, or for a five-year period if the waiver includes individuals who are dually eligible for Medicare and Medicaid services. 42 C.F.R. § 430.25(h)(2)(ii)(A)-(B).[5]

67. If a state fails to obtain necessary approval from CMS for a SPA, a waiver of a State Plan requirement, or a waiver of a Medicaid requirement, it is not eligible to receive FFP (federal financial participation) from CMS for Medicaid services rendered. *See* 42 C.F.R. 430.12(c)(2)(ii); 42 C.F.R. § 430.20.[6]

CDPAP in New York State

68. The State of New York has participated in the Medicaid program since 1966. N.Y. Soc. Serv. Law § 363.

[5] As an example, Washington State sought and obtained approval under Section 1915(b) when it implemented a change to its consumer directed program in 2021, resulting in the transition of approximately 50,000 consumers from services received through Department of Social and Health Services and Area Agency on Aging staff to a contracted vendor, the Consumer Direct Care Washington, LLC. *See* https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/WA-15.pdf. For many reasons, this change differs significantly from that being contemplated in New York, but it is provided to illustrate the procedural process by which a state must comply.

[6] Defendant NYSDOH understands its requirements under Section 1915(b), having sought and obtained such approval for other programs. *See e.g.*, Section 1915(b) waiver for Crisis Services for Individuals with Intellectual and Developmental Disabilities, at https://www.health.ny.gov/regulations/state_plans/status/non-inst/1915_b4_waiver/docs/2019/os_2020-02-26_1915b4_19-14.pdf.

69. The terms of New York's Medicaid plan, which is administered by the NYSDOH, are set forth in New York Social Services Law § 363 *et seq.*, and Title 18 of New York Code, Rules and Regulations, 18 N.Y.C.R.R. § 500 *et seq*.

70. New York Social Services Law § 365-f authorizes the program at issue in this lawsuit, CDPAP. CPDAP is governed by regulations at 18 N.Y.C.R.R. § 505.28.

71. CDPAP in New York began as a demonstration called the Patient Managed Home Care Program and was renamed CDPAP in 1995. Historically, the NYSDOH's Department of Social Services for each county ("Local Department of Social Services" or "LDSS") contracted with FIs to provide services to Medicaid beneficiaries through a fee-for-service ("FFS") delivery system.

72. In 2012, CDPAP was a service added into the Managed Long Term Care ("MLTC") benefit package. MLTC Plans are insurance companies in New York that contract with the NYSDOH, receive a per-member-per-month ("PMPM") rate per beneficiary served, and contract with FIs for the provision of CDPAP services (also referred to as "CDPAS" for Consumer Directed Personal Assistance Services") to their members.

73. CDPAP is a Medicaid program in New York State which is designed to permit chronically ill and/or physically disabled individuals (referred to as consumers) receiving home care services greater flexibility and freedom of choice in obtaining such services from consumer-selected caregivers, referred to as Personal Assistants, and in determining how, where, and when such services are performed. N.Y. Soc. Serv. Law § 365-f(1).

74. To be eligible for CDPAP, a consumer must meet the eligibility requirements which include: (a) being eligible for Medicaid; (b) being eligible for long term care and services provided by a certified home health agency, or an AIDS home care program

authorized pursuant to Article 36 of the Public Health Law; or for personal care services or private duty nursing services; and (c) needing assistance with one or more personal care services, home health aide services or skilled nursing tasks; as well as other requirements. 18 N.Y.C.R.R. § 505.28. Plaintiff Consumers are eligible to receive, and do receive, CDPAP services.

75. CDPAP enables its recipients to self-direct their services, meaning that the consumers recruit and hire their own PAs, train, supervise, and schedule the PAs, and co-employ the PAs along with the agency they choose. N.Y. Soc. Serv. Law § 365-f(3).

76. The agency the consumer chooses, known as an FI, plays a vital role in ensuring that CDPAP is appropriately administered in the best interests of the consumers, the employees, and, ultimately, the taxpayers of New York State. Importantly, while an FI is a "fiscal intermediary" and handles financial aspects of the CDPAP program, it is not simply a back-office financial service that may be easily replaced. Rather, it is a critical part of the consumer's care team and is deemed a "provider" under the program. See e.g., NY SSL § 365-f(3) ("as mutually agreed to by the eligible individual and provider" . . . "Providers shall not be liable for fulfillment of responsibilities agreed to be undertaken by the eligible individual . . . however, [this] shall not diminish the participating provider's liability for failure to exercise reasonable care in properly carrying out its responsibilities under the program") § 365-f(4-a)(c) (provider's reporting obligations); § 365-f(9) (lump sum payments to providers); 18 NYCRR § 505.28(j)(1)(vi) ("Fiscal intermediary responsibilities" include "complying with the departments regulations at 18 NYCRR § 504.3, or any successor regulation, that specify the responsibilities of providers enrolled in the medical assistance program"); 18 NYCRR §

505.28(k)(1) ("The department will pay fiscal intermediaries that are enrolled as Medicaid providers"); 18 NYCRR § 505.28(k)(4) (referring to "provider contracts" for FIs).

77. Plaintiff Agencies—the FIs—co-employ the PAs and ensure that they are hired and paid in accordance with state and federal labor laws, that appropriate records are maintained, that the consumers are able to carry out, and to continue carrying out, their self-direction role and responsibilities under the program, that appropriate contracts and memorandum of understanding are executed, and that NYSDOH regulations are complied with. See NY SSL § 365-f(4-a).

78. While those are the baseline statutory obligations of a Plaintiff Agency, in practice, they perform many additional functions. Some of those functions include the "best practices" described by NYSDOH of providing peer supports, including peer mentoring and counseling for consumers, conducting visits to the consumer's home, conducting face-to-face orientation for personal assistants, providing support for consumers to assist them in their role as a joint employer, including recruiting, interviewing, dealing with difficult employees, effective supervision and termination of employment, establishing a consumer advisory committee that includes personal assistants, Agency staff, MCOs, LDSS, and consumers across the state, and establishing, maintaining, and monitoring email and websites with information to consumers, including a means to report and/or resolves complaints and answer inquiries.[7]

79. As of December 2023, there are an estimated **246,000 Medicaid beneficiaries** in New York who receive CDPAP services.[8] Of those, approximately 11,000 receive CDPAP

[7] *See* RFO 20039, https://www.health.ny.gov/funding/rfo/inactive/20039/docs/20039.pdf, at § 4.2 (now rescinded); RFP 20524, https://www.health.ny.gov/funding/rfp/20524/20524.pdf, at § 4.2.

[8] https://www.health.ny.gov/funding/rfp/20524/20524.pdf, at p. 33, Attachment E, CDPAS Consumers by Region in December 2023.

through FFS, 38,000 receive CDPAP through Mainstream Managed Care, Health and Recovery Plans ("HARP") and HIV Special Needs Plans ("HIV SNPs"), and the vast majority, or approximately 197,000, receive services through MLTC Plans, Medicaid Advantage Plus ("MAP), and Programs of All-Inclusive Care for the Elderly ("PACE").[9]

80. These 246,000 Medicaid Beneficiaries are served by the Plaintiff Agencies in this lawsuit, as well as hundreds of other agencies that provide FI services under the CDPAP.

81. The number of agencies that have formed in New York State to provide CDPAP services is largely due to the melting pot that epitomizes the strength of New York, and particularly New York City. There are a reported 800 languages spoken by residents in New York, which has necessitated the need for many small, culturally specific agencies that serve a specific population of beneficiaries, such as the Plaintiff Agencies in this case.[10]

82. The Plaintiff Agencies have local offices and staff in the neighborhoods and communities in which their consumers live, which is critical to facilitate successful use of the CDPAP. Their local presence, as well as the cultural understanding and language capabilities of the Plaintiff Agencies, is essential to ensuring that the PAs are appropriately onboarded and understand their important role and responsibility in caring for the consumers, that the consumers likewise understand their required role under the program, and are able to continuing carrying out that role throughout their use of the program, and that the consumers are appropriately supported with sufficient knowledge and assistance in order to receive the care they are entitled to receive.

[9] *Id.*
[10] Office of General Services, Office of Language Access, at https://ogs.ny.gov/system/files/documents/2024/06/2024-ola-rights-brochure_english_web.pdf.

83. For example, Plaintiff Safe Haven was founded in 2008 by a Registered Nurse with master's degrees in nursing administration and nursing informatics. Safe Haven serves consumers in and around New York City and has remained small by design, with approximately 200 consumers receiving CDPAP services through Safe Haven. Its owner and employees uniquely cater to the Creole and Hispanic community that includes persons from Haiti or of Haitian descent, and persons of Caribbean or Hispanic descent. Because of its small size, it is able to provide personal, individualized attention to its consumers and to ensure that its consumers receive excellent care. Safe Haven's owner or another staff member visits with new consumers and PAs to provide training and ensure each understands their respective roles in the program. This is then followed by continuous interaction with the consumers and PAs throughout their use of the program. Safe Haven builds a relationship of trust and understanding with its consumers and PAs, and it empowers its consumers to direct their own care.

84. As another example, Plaintiff Vivid Care is an FI located in Brooklyn that serves a multicultural community with staff fluent in Russian, Spanish, Uzbek, Urdu, and Creole. Staff at Vivid Care work hand-in-hand with their PAs and consumers to ensure they understand their respective roles in the program and are appropriately supported in carrying out those roles and responsibilities. Every consumer has a dedicated case manager at Vivid Care, someone that typically speaks the same language and shares the same cultural background as the consumer and his or her PA. Consumers regularly communicate with their case manager to discuss their needs, abilities, family dynamics, and health status. Vivid Care's local presence also allows consumers or PAs to come into the office when assistance is needed.

85. Each Plaintiff Agency in this litigation has a similar story of excellent, localized, and culturally appropriate care that it provides for its consumers and its PAs.

The Challenged Law

86. While the 2024 CDPAP Law was enacted on April 20, 2024 (effective April 1, 2024), and is the subject of this lawsuit, it bears noting that the Plaintiff Agencies have been embroiled in a six-year battle with Defendants to preserve their very existence.

87. In sum, SSL § 365-f has been changed ***nine times*** in the past six years. First, an authorization process was established effective January 1, 2018, in which FIs were required to submit various information to the NYSDOH to receive an authorization to continue providing services under the CDPAP. SSL § 365-f (Versions effective January 1, 2018 to March 31, 2019). That process began, and some Plaintiff Agencies in fact received authorizations from NYSDOH; however, the process had not concluded before the law changed again. Effective April 1, 2019, a contracting process was established under which FIs would submit bids to the NYSDOH and NYSDOH would select and contract with FIs to provide continued services. SSL § 365-f (version effective April 1, 2019).

88. The NYSDOH issued a Request for Offers (#20039) and received 395 responses from agencies seeking contracts, yet in early 2021 it awarded only 68 contracts, and informed the remaining 327 FIs that they would be out of business once the contracting process was completed.[11] Shortly thereafter, however, the New York Legislature amended SSL § 365-f once again, calling for additional awards to be provided based on the original scoring from the RFO. SSL § 365-f (version effective April 1, 2021 to April 8, 2022).

[11] https://www.health.ny.gov/funding/rfo/inactive/20039/.

89. That process, however, was upended when the New York Legislature amended SSL § 365-f once again on April 9, 2022, eliminating the additional awards based on scores and, instead, replacing it with a process for additional awards based on size. SSL § 365-f (version effective April 9, 2022 to March 31, 2024). Under this change, the NYSDOH awarded another 108 contracts, bringing the total awarded contracts to 176 FIs that would be permitted to continue providing services under the program.[12]

90. As with the prior changes, however, the NYSDOH did not complete its process before the legislature again amended the statute, effective April 1, 2024, with the 2024 CDPAP Law that is the subject of this lawsuit.

91. The 2024 CDPAP Law repeals RFO 20039 and replaces it with a new process by which the NYSDOH will solicit proposals and choose a ***single statewide fiscal intermediary*** to serve ***all 246,000 Medicaid beneficiaries*** in New York that currently receive CDPAP services. It will also be responsible for individually working with those 246,000 Medicaid beneficiaries to onboard and hire the entire PA workforce in New York, a number that, based on information and belief, exceeds the number of Medicaid beneficiaries receiving services, as many beneficiaries receive care from more than one PA.[13]

92. The 2024 CDPAP Law requires that all "managed care plans, managed long-term care plans, local social service districts, and other appropriate long-term service programs" ***must*** contract with the awarded agency to provide fiscal intermediary services to consumers. NY SSL § 365-f(4-a)(a)(i); (ii-a).

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12 https://www.health.ny.gov/funding/rfo/inactive/20039/docs/attestation_awardees_by_county.pdf.

13 Remarkably, Defendant NYSDOH does not even know how many PAs currently provide services through CDPAP and therefore is in no position to competently plan such a transition. *See* https://www.health.ny.gov/funding/rfp/20524/qanda.pdf, at Q&A 94.

93. While the 2024 CDPAP Law will result in a single company obtaining a contract worth more than ***$9 billion***, the legislature has also exempted this contract from the typical review that is required by the Office of the New York State Comptroller. SSL § 365-f(4-a)(b) (exempting contract from NY State Finance Law § 163).[14]

94. The 2024 CDPAP Law further provides that the only fiscal intermediaries eligible to apply for the statewide award are FIs that, as of April 1, 2024, are "providing services as a fiscal intermediary on a statewide basis with at least one other state" besides New York. SSL § 365-f(4-a)(a)(ii-b).[15] Thus, Plaintiff Agencies, who do not provide FI services throughout the entire geographic area of a state outside of New York, are ineligible to apply for the statewide contract.

95. The eventual winner of the statewide FI contract is required to subcontract with: (1) an entity that is a service center for independent living that has been providing FI services since January 1, 2024; and (2) at least one entity in each of New York's four rate regions that has been providing FI services since before January 1, 2012. SSL § 365-f(4-a)(a)(ii-b). Plaintiff Agencies, however, are not service centers for independent living, nor did they begin CDPAP operations before January 1, 2012, and therefore Plaintiff Agencies will not qualify for a subcontract. Based on information and belief, very few FIs were in operation prior to January 1, 2012, as CDPAP had not yet been added to the MLTC benefit package.

[14] https://www.health.ny.gov/funding/rfp/20524/qanda.pdf, at Q&A 97 (reference to $4.5 billion New York spend); 27 (confirming no state comptroller review).

[15] This is one of many reasons why, if NYSDOH had actually submitted a 1915(b) waiver request to CMS, it would have been denied by CMS, as the 2024 CDPAP Law "discriminate[s] among classes of providers on grounds unrelated to their demonstrated effectiveness and efficiency in providing those services." 42 U.S.C. § 1396n(b)(4).

96. The 2024 CDPAP Law provides that FIs not receiving a subcontract must cease operations on or before April 1, 2025, and must provide at least forty-five days advance notice to the affected consumers. SSL § 365-f(4-a-1)(a); (4-d). In addition, FIs ceasing operations must "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 of such records." SSL § 365-f(4-d)(a)(iii). The law is silent for how this monumental endeavor for 246,000 Medicaid beneficiaries and their PAs will be successfully conducted, let alone within forty-five days.

97. In questions and answers published in connection with RFP 20524, Defendant NYSDOH acknowledged that no transition plan had yet been created, stating that it would create such a plan ***after*** it had selected a winning contractor.[16]

98. Finally, the 2024 CDPAP Law provides that it will be effective only "to the extent that, and as long as, federal financial participation is available for expenditures incurred under this section." SSL § 365-f(7). *See also* SSL § 365-f(8) (requiring continued federal match for Community First Choice services pursuant to 42 U.S.C. § 1396n(k) ("Section 1915(k)"). This is, in essence, a poison pill provision—if this Court finds that NYSDOH has not received necessary authority from HHS and, therefore, is ineligible for federal financial participation under the 2024 CDPAP Law, then the law, by its own provisions, is invalid.

[16] https://www.health.ny.gov/funding/rfp/20524/qanda.pdf, at Q&A 1106.

Medicaid Authorities for New York's CDPAP

99. Since 1990, New York State has been providing CDPAP as a fee-for-service delivery system under its State Plan authority pursuant to the Social Security Act, § 1905(a)(24), codified at 42 U.S.C. § 1396d(a)(24).

100. From 1990 until 2012, CDPAP was offered as a program and benefit through the fee-for-service delivery system via LDSSs in New York under Section 1905(a). As of 2012, based on information and belief, fewer than 15,000 consumers utilized the program.

101. CDPAP is currently offered under several Medicaid authorities, including the State Plan fee-for-service delivery system, a Section 1115 demonstration, and authority under Section 1915(k) of the Social Security Act, further detailed below.

Section 1115 Demonstration Authority

102. In 2012, CDPAP was incorporated into the State's managed care benefit package. For a State to begin offering a Medicaid service through managed care, it must obtain a waiver from CMS to do so, as managed care is an exception to traditional Medicaid services. This is known as a Section 1115 demonstration, which permits a state to request approval from HHS for an experiment, pilot, or demonstration project. 42 U.S.C. § 1315; 42 C.F.R. §§ 431.400-428.

103. In July 1997, CMS approved New York State's original Section 1115 demonstration, then called the Partnership Plan Medicaid Section 1115 Demonstration and now called the NYS Medicaid Redesign Team (MRT) Waiver, which had the primary purpose of enrolling a majority of the State's Medicaid population into managed care. There have been a number of amendments to this 1115 demonstration since its initial approval in 1997.

104. Through one such amendment to its original Section 1115 demonstration, New York State added CDPAP as a managed care service. The amendment was approved on August 31, 2012.[17] The Partnership Plan Medicaid Section 1115 demonstration was originally approved for five years with multiple extensions granted over the years. 42 C.F.R. § 431.412(c). The most recent extension of the demonstration was approved for April 1, 2022 through March 31, 2027, and last amended January 9, 2024.[18]

105. Importantly, while CDPAP has been an approved service under New York's Section 1115 demonstration since August 31, 2012, at all times, that approval has required that "[i]ndividuals who select self-direction ***must*** have the opportunity to have choice and control over how services are provided and who provides the service . . . ." *Id*. at p. 43, § 5.11 (emphasis added).

106. The 2024 CDPAP Law violates this requirement as it removes ***all*** choice and control that consumers have to select the agency that they desire to use for services under the program.

107. As established by the approved 1115 demonstration:

> "Changes related to eligibility, enrollment, benefits, ***beneficiary rights***, ***delivery systems***, cost sharing, sources of non-federal share of funding, budget neutrality, ***and other comparable program elements*** must be submitted to CMS as amendments to the demonstration. All amendment requests are subject to approval at the discretion of the Secretary in accordance with section 1115 of the Act. The state ***must not*** implement

[17] Section 1115 Demonstration Amendment Approval, August 31, 2012, at https://www.medicaid.gov/Medicaid-CHIP-Program-Information/By-Topics/Waivers/1115/downloads/ny/Federal-State-Health-Reform-Partnership/ny-f-shrp-concurrent-amendment-approval-08312012.pdf.

[18] See Extension Approval Letter, March 23, 2022, available at https://www.health.ny.gov/health_care/medicaid/redesign/mrt2/ext_request/docs/2022-03-23_cms_1115_ext_app.pdf; Approved 1115 Demonstration, available at https://www.medicaid.gov/medicaid/section-1115-demonstrations/downloads/ny-medicaid-rdsgn-team-appvl-01092024.pdf.

> changes to these elements without prior approval by CMS either through an approved amendment to the Medicaid or CHIP state plan or amendment to the demonstration. ***Amendments to the demonstration are not retroactive and no FFP of any kind, including for administrative or medical assistance expenditures, will be available*** under changes to the demonstration that have not been approved through the amendment process set forth in STC 3.7 below, except as provided in STC 3.3."

Id. at p. 16, § 3.6 (emphasis added).

108. The change imposed by the 2024 CDPAP Law, and as implemented by the Defendants, represents a major change to beneficiary rights (removing their ability to select their agency of choice) and upends the current delivery system in New York for the CDPAP by eliminating hundreds of agencies that currently provide services under the program, and by consolidating all services through one new provider.

109. "Requests to amend the demonstration must be submitted to CMS for approval no later than 120 calendar days prior to the planned date of implementation of the change and may not be implemented until approved." *Id*. at p. 16, § 3.7. Thus, with the planned contract to be awarded by October 1, 2024, Defendant NYSDOH must have submitted its request to CMS by **no later than June 3, 2024**.

110. Based on information and belief, however, Defendant NYSDOH has not even sought—let alone received—approval by CMS for an amendment to its approved 1115 demonstration.

111. In addition, during the question-and-answer process that Defendant NYSDOH purported to provide for its RFP 20524, it was asked the following question: "Will the Department be submitting one or more State Plan Amendments to address the changes to

CDPAP services in New York? If so, when?" Defendant NYSDOH, however, failed to provide any response to this question, not even including it on its published list of questions.[19]

112. Finally, any such amendment to New York's approved 1115 demonstration would also require public notice and an opportunity to comment. 42 C.F.R. 431.408(a)(3). This requirement includes "at least two public hearings, on separate dates and at separate locations" so that the public has an opportunity to voice any concerns regarding the proposed demonstration. This is especially important here given the major overhaul being contemplated by the 2024 CDPAP Law. Yet, no such notice has been provided or hearings held, in violation of CMS regulation and Plaintiffs' due process rights.

Community First Choice Option Authority

113. Under the Patient Protection and Affordable Care Act, Pub. L. 111-148, March 23, 2010 ("Affordable Care Act"), a new State Plan option called "Community First Choice Option" ("CFCO") was established, available October 1, 2011, allowing States to provide home and community-based attendant services and supports to eligible Medicaid enrollees. 42 U.S.C. § 1396n(k). Regulations governing CFCO were promulgated on May 7, 2012. Final Rule: Medicaid Program; Community First Option, 77 Fed. Reg. 26828 (May 7, 2012) (implementing 42 C.F.R. Part 441, Subpart K).

114. New York established a CFCO Program, pursuant to a 1915(k) State Plan Amendment, under which services are an entitlement, meaning that meeting New York State's

[19] *See* https://www.health.ny.gov/funding/rfp/20524/qanda.pdf.

eligibility requirements guarantees that one will receive these benefits. New York's CFCO Program was approved by CMS in October 2015.[20] CDPAP falls under the CFCO Program.

115. Under 42 U.S.C. § 1396n(k), CFCO is available to "individuals who are eligible for medical assistance under the State plan whose income does not exceed 150 percent of the poverty line (as defined in section 2110(c)(5)) or, if greater, the income level applicable for an individual who has been determined to require an institutional level of care to be eligible for nursing facility services under the State plan and with respect to whom there has been a determination that, but for the provision of such services, the individuals would require the level of care provided in a hospital, a nursing facility, an intermediate care facility . . . or an institution for mental diseases, the cost of which could be reimbursed under the State plan, but only if the individual chooses to receive such home and community-based attendant services and supports, and only if the State meets [certain] requirements." *See also* 42 C.F.R. § 441.510.

116. Pursuant to 42 U.S.C. § 1396n(k)(3), the State shall "provide consumer controlled home and community-based attendant services and supports to individuals on a statewide basis, in a manner that provides such services and supports in the most integrated setting appropriate to the individual's needs, and without regard to the individual's age, type or nature of disability, severity of disability, or the form of home and community-based attendant services and supports that the individual requires in order to lead an independent life." *See also* 42 C.F.R .§ 441.515.

117. Under 42 U.S.C. § 1396n(k)(6), "consumer controlled" is defined as "a method of selecting and providing services and supports that allow the individual, or where appropriate,

[20] CFCO Approval, SPA 13-0035, at https://www.health.ny.gov/regulations/state_plans/status/non-inst/approved/docs/app_2015-10-23_spa_13-35.pdf.

the individual's representative, maximum control of the home and community-based attendant services and supports, regardless of who acts as the employer of record." Such definition not only includes the PA services, but also the FIs' support services.

118. CFCO was an effort under the Affordable Care Act to encourage states to expand home- and community-based services offerings, with a particular emphasis on those supporting free choice and direction by beneficiaries.[21]

119. Federal regulations governing CFCO require States to ensure that services and supports in a home and community-based setting are "based on the needs of the individual as indicated in their person-centered plan." 42 C.F.R. § 441.530(a)(1). "The person-centered planning process is driven by the individual" and "[i]ncludes people chosen by the individual." 42 C.F.R. § 441.540(a). A home and community-based setting must "facilitate[] individual choice regarding services and supports, and who provides them." 42 C.F.R. § 441.530(a)(1)(v).

120. As an incentive for states to adopt CFCO, Congress provided enhanced federal matching funds, which results in states receiving an extra six percent from CMS for CFCO expenditures. *Id*. The receipt of such funds, however, is tied to the state's compliance with all CFCO requirements. *Id*. Based on information and belief, Defendant NYSDOH receives more than ***$300 million annually*** in extra federal matching funds for its CFCO program.

[21] *See* Community First Choice option Section 1915(k), at https://www.cms.gov/newsroom/fact-sheets/community-first-choice-option-section-1915k; Medicaid Program; Final Regulation, Community First Choice Option, Fed. Reg. 26828, May 7, 2012, at https://www.medicaid.gov/medicaid/home-community-based-services/downloads/cfc-final-regulation.pdf; CMS State Medicaid Director Letter, Community First Choice State Plan Option, December 30, 2016, at https://www.medicaid.gov/sites/default/files/federal-policy-guidance/downloads/smd16011.pdf.

121. Under CFCO, "States must adhere to the free choice of provider requirement at 42 CFR 431.51, unless provided through a managed care arrangement or authorized under selective contracting authority."[22]

122. Regarding managed care, under 42 U.S.C. § 1396u-2 a state may only "restrict the number of provider agreements with managed care entities under the State plan if such restriction does not substantially impair access to services." 42 U.S.C. § 1396u-2(a)(1)(A)(ii). Any such restriction must also be approved under the state's concurrent 1115 managed care demonstration. Here, for the reasons discussed above, NYSDOH has not even submitted—let alone received—any such permission from HHS. Moreover, implementation of the 2024 CDPAP Law would substantially impair access to services, as discussed further below.

123. Regarding fee-for-service, the only way that a state could restrict the free choice of provider requirement is through selective contracting authority, pursuant to a Section 1915(b) waiver application and an accompanying 1915(k) SPA.[23] As discussed above, such a request may only be approved prospectively by HHS. As the CFCO State Medicaid Director letter cautions, "[b]ecause a 1915(b) waiver must be approved on a prospective basis, we encourage a state to submit a request to operate sections 1915(b)/1915(k) concurrently at least six months in advance of the proposed CFC effective date to facilitate a smooth implementation." *Id.*

124. Federal regulations governing CFCO allow States to choose among service models. 42 C.F.R. § 441.545. One such model is the agency-provider model, under which

[22] CMS State Medicaid Director Letter, Community First Choice State Plan Option, December 30, 2016, at https://www.medicaid.gov/sites/default/files/federal-policy-guidance/downloads/smd16011.pdf, at 2.
[23] *Id.* at 8.

"individuals maintain the ability to have a significant role in the selection and dismissal of the providers of their choice, for the delivery of their specific care, and for the services and supports identified in their person-centered service plan." 42 C.F.R. § 441.545(a).

125. NYSDOH's approved SPA for CFCO provides that New York administers CFCO through an "Agency with Choice Model."[24] Under the Agency with Choice Model, "CFCO participants ***must have a free choice of fiscal intermediaries***."[25] Thus, NYSDOH is ***not*** currently approved to restrict freedom of choice under its CFCO authority and therefore the 2024 CDPAP Law violates that authority.

126. In addition, under CFCO, any SPA requires an additional step in which a state "must consult and collaborate with a state established Development and Implementation Council when developing and implementing a SPA to provide CFC services and supports."[26]

127. This is a statutory requirement found at Section 1915(k) and it provides, *inter alia*, "[i]n order for a State plan amendment to be approved under this subsection, the State shall—(A) develop and implement such amendment in collaboration with a Development and Implementation Council established by the State that includes a majority of members with disabilities, elderly individuals, and their representatives and consults and collaborates with such individuals." 42 U.S.C. § 1396n(k)(3). Based on information and belief, Defendants have also not met this requirement.

[24] SPA 13-0035, Attachment 3.1-K, p.3, at https://www.health.ny.gov/regulations/state_plans/status/non-inst/approved/docs/app_2015-10-23_spa_13-35.pdf.
[25] *Id*. (emphasis added).
[26] *Id*. at 9.

Access to Services

128. Under 42 U.S.C. § 1396a(a)(8), a state plan must: "provide that all individuals wishing to make application for medical assistance under the plan shall have opportunity to do so, and that such assistance shall be furnished with reasonable promptness to all eligible individuals."

129. CMS issued a 2001 State Medicaid Director Letter, SMDL #01-006, stating that the test for promptness is a "test of reasonableness."[27]

130. This "reasonable promptness" requirement obligates Defendants to furnish services to Medicaid beneficiaries without unreasonable delay.

131. Plaintiffs assert that transitioning ***246,000*** elderly and disabled Medicaid beneficiaries from several hundred current providers to one statewide provider will result in unreasonable delays and/or loss of services. Notably, Defendants are marching forward with an effort to close hundreds of current providers and transition all services to a new provider without ***any plan*** as to how such a transition can possibly be accomplished without significant loss of services, resulting deaths and institutionalization of home-based patients, and irreparable harm to those patients.

132. Rather, Defendant NYSDOH has claimed that the "seamless" transition plan, including the transfer of millions of medical records, hundreds of thousands of employees, and hundreds of thousands of patients, all within forty-five days, will be created after a winning agency is selected.[28]

[27] CMS State Medicaid Director Letter, January 10, 2001, at https://downloads.cms.gov/cmsgov/archived-downloads/SMDL/downloads/smd011001a.pdf, at 6.

[28] https://www.health.ny.gov/funding/rfp/20524/qanda.pdf, at Q&A 1106.

133. Lawmakers, along with an FI providing statewide services in Massachusetts and Pennsylvania, have voiced significant concern regarding the timeframe and scope of Defendant NYSDOH's potential transition of 246,000 Medicaid beneficiaries to one statewide FI.[29]

134. In addition, under 42 U.S.C. § 1396a(a)(10)(B), "medical assistance made available to any individual described in subparagraph (A) – (i) shall not be less in amount, duration, or scope than the medical assistance made available to any other such individual, and (ii) shall not be less in amount, duration, or scope than the medical assistance made available to individuals not described in subparagraph (A)." This provision ensures that all eligible beneficiaries receive the Medicaid services to which they are entitled.

135. As described above, New York State has several hundred agencies providing CDPAP services because of the diversity that exists in New York State, and particularly New York City. More than 800 languages are reportedly spoken in New York State and many agencies, including the Plaintiff Agencies, have formed to address gaps that existed in service coverage, whether due to language barriers, cultural barriers, or other reasons.

136. Defendant NYSDOH has claimed that the winning statewide agency "is responsible for understanding and being aware of the cultural and linguistic needs of the consumers and personal assistants it anticipates serving"[30] yet, unsurprisingly, has not articulated how one statewide agency can possibly serve the unique linguistic and cultural needs of 246,000 Medicaid beneficiaries that are currently served by hundreds of agencies that

[29] Questions Mount over New York state's timeline to change Medicaid program, August 21, 2024, at https://nystateofpolitics.com/state-of-politics/new-york/politics/2024/08/21/questions-mount-over-n-y--s-timeline-to-change-cdpap?oref=csny_firstread_nl.
[30] https://www.health.ny.gov/funding/rfp/20524/qanda.pdf, at Q&A 257.

have formed over time to address those specific language and cultural needs of the communities they operate in.

137. The inability of any one statewide agency to successfully communicate with, and address the cultural needs of, the current CDPAP beneficiary population will result in loss of services for many consumers because of their linguistic or cultural barriers, or their specific disabilities.

The ADA and Rehabilitation Act

138. Title II of the ADA provides that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity." 42 U.S.C. § 12132.

139. Pursuant to 28 C.F.R. 35.108(a)(1), "disability" is defined to include an actual disability, meaning a "physical or mental impairment that substantially limits one or more of the major life activities of such individual," having a record of such a disability, or being regarded as having such a disability. The ADA regulations direct that the definition of disability "shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. 28 C.F.R. § 35.108(a)(2).

140. Pursuant to regulation, "[a] public entity shall administer services, programs, and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d).

141. The ADA defines a "public entity" as "any State or local government" and "any department, agency, special purpose district, or other instrumentality of a State or States or local government." 42 U.S.C. § 12131(1)(A)-(B).

142. New York State and the NYSDOH are public entities subject to the requirements of Title II of the ADA.

143. Section 504 of the Rehabilitation Act of 1973 states that "[n]o otherwise qualified individual with a disability in the United States, as defined in section 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. 29 U.S.C. § 794(a).

144. Like regulations under the ADA, regulations under Section 504 of the Rehabilitation Act require the most integrated setting, stating "aids, benefits, and services, to be equally effective, are not required to produce the identical result or level of achievement for handicapped and nonhandicapped persons, but must afford handicapped persons equal opportunity to obtain the same result, to gain the same benefit, or to reach the same level of achievement, in the most integrated setting appropriate to the person's needs." 45 C.F.R. § 84.4(b)(2).

145. Medicaid is subject to the requirements of Section 504 of the Rehabilitation Act because it is federally funded in part. 42 U.S.C. § 1396-1.

146. Under *Olmstead v. Zimring*, 527 U.S. 581, 587, 119 S. Ct. 2176, 2181, 144 L.Ed.2d 540 (1999), the U.S. Supreme Court held that the "proscription of discrimination" requires placement of persons with disabilities in community settings rather than institutions.

147. Following the *Olmstead* decision, the U.S. Department of Justice issued the "Statement of the Department of Justice on Enforcement of the Integration Mandate of Title II of the Americans with Disabilities Act and *Olmstead v. L.C.*" ("DOJ Statement").[31]

148. In answering the question, "Do the ADA and *Olmstead* apply to persons at serious risk of institutionalization or segregation?", the DOJ Statement clarified that:

> the ADA and the *Olmstead* decision extend to persons at serious risk of institutionalization or segregation and are not limited to individuals currently in institutional or other segregated settings. Individuals need not wait until the harm of institutionalization or segregation occurs or is imminent. For example, a plaintiff could show sufficient risk of institutionalization to make out an *Olmstead* violation if a public entity's failure to provide community services or its cut to such services will likely cause a decline in health, safety, or welfare that would lead to the individual's eventual placement in an institution.[32]

149. Following the *Olmstead* decision, in October 2013, New York State issued the "Report and Recommendations of the Olmstead Cabinet."[33] The NY *Olmstead* Plan recognized CDPAP as a way to address one barrier to community integration for many people with disabilities – "their ability to access community-based assistance with health-related tasks, including medication management, medication administration, and other home health treatments." *Id.* at p.27.

150. As discussed above, Defendants' elimination of several hundred agencies providing localized and specialized care to Medicaid beneficiaries in New York will result in loss of services for certain currently eligible beneficiaries. This will also affect certain populations of beneficiaries (e.g., those with disabilities such as loss of hearing and sight) more significantly than others given their reliance on localized care from agencies equipped to handle their specific needs. The loss of critical home care services for these individuals will

[31] https://www.ada.gov/resources/olmstead-mandate-statement/.
[32] *Id.*
[33] https://www.ny.gov/sites/default/files/atoms/files/Olmstead_Final_Report_2013.pdf.

result in forced institutionalization of Medicaid beneficiaries who have chosen to remain in their homes rather than receive institutionalized care. Forced institutionalization of these individuals because of their disability violates the ADA and Rehabilitation Act.

CAUSES OF ACTION

COUNT I

VIOLATION OF THE MEDICAID STATUTE, 42 U.S.C. § 1396a(a)(23)

151. Plaintiffs incorporate and reallege the preceding paragraphs.

152. The 2024 CDPAP Law violates Plaintiff Consumers' statutory right to select the agency of their choice to administer their CDPAP services.

153. The 2024 CDPAP Law violates Plaintiff Agencies' right to be included among the agencies by which Plaintiff Consumers may select to administer their CDPAP services.

154. The 2024 CDPAP Law violates the approved State Plan.

155. The 2024 CDPAP Law violates the approved Section 1115 demonstration.

156. The 2024 CDPAP Law violates the approved 1915(k) State Plan Amendment.

157. Defendants' acts and omissions described above, while acting under color of state law, violate 42 U.S.C. § 1983 by depriving Plaintiffs of their statutory rights under 42 U.S.C. § 1396a(a)(23).

COUNT II

VIOLATION OF THE MEDICAID STATUTE, 42 U.S.C. § 1396a(a)(8)

158. Plaintiffs incorporate and reallege the preceding paragraphs.

159. As implemented, the 2024 CDPAP Law violates Plaintiff Consumers' right to reasonably prompt Medicaid services.

160. Defendants' acts and omissions described above, while acting under color of state law, violate 42 U.S.C. § 1983 by depriving Plaintiffs of their statutory rights under 42 U.S.C. § 1396a(a)(8).

COUNT III

VIOLATION OF THE MEDICAID STATUTE, 42 U.S.C. § 1396a(a)(10)

161. Plaintiffs incorporate and reallege the preceding paragraphs.

162. As implemented, the 2024 CDPAP Law violates Plaintiff Consumers' right to receive, and continue receiving, CDPAP services.

163. Defendants' acts and omissions described above, while acting under color of state law, violate 42 U.S.C. § 1983 by depriving Plaintiffs of their statutory rights under 42 U.S.C. § 1396a(a)(10).

COUNT IV

VIOLATION OF THE ADA, 42 U.S.C. § 12132

164. Plaintiffs incorporate and reallege the preceding paragraphs.

165. As implemented, the 2024 CDPAP Law violates Plaintiff Consumers' right to receive non-institutionalized home care services.

COUNT V

VIOLATION OF THE REHABILITATION ACT, 29 U.S.C. § 794

166. Plaintiffs incorporate and reallege the preceding paragraphs.

167. As implemented, the 2024 CDPAP Law violates Plaintiff Consumers' right to receive non-institutionalized home care services.

COUNT VI

VIOLATION OF DUE PROCESS

168. Plaintiffs incorporate and reallege the preceding paragraphs.

169. Defendants ignored statutory obligations to provide public notice and hearings, resulting in a violation of Plaintiffs' due process rights.

170. Defendants' acts and omissions described above, while acting under color of state law, violate 42 U.S.C. § 1983 by depriving Plaintiffs of their Constitutionally protected rights.

JURY DEMAND

171. Plaintiffs request a trial by jury on all triable issues.

REQUESTED RELIEF

Plaintiffs respectfully request that this Court:

A. Issue an order and judgment finding that the 2024 CDPAP Law violates the Medicaid Statute, the ADA, and the Rehabilitation Act.

B. Enjoin Defendants from enforcing or implementing the 2024 CDPAP Law.

C. Award costs and attorneys' fees pursuant to any applicable statute or authority; and

D. Grant such other and further relief as justice warrants.

Dated: August 22, 2024

Respectfully submitted,
Potomac Law Group, PLLC

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