

HOME CARE CLIENT ALERT



State Executive Budget Proposes Repealing Existing FI Law and Replacing it with a Law that Would Authorize Fewer FIs to Operate

January 16, 2019

Last night, the New York State Executive Budget was released and it proposes repealing and replacing the existing Social Services Law Section 365-f, the law that establishes consumer directed and fiscal intermediary services. The overwhelming majority of the changes proposed would become effective April 1, 2019. This alert summarizes the State Executive Budget proposal (the "Proposal").

Eligibility of Providers to Serve as Fiscal Intermediaries

The Proposal would limit provision of fiscal intermediary services to:

1. entities that have contracts with the DOH to provide fiscal intermediary services. (The Proposal outlines a competitive bid process to obtain a contract with the DOH), or
2. entities that are authorized by the Commissioner and which have a history of providing FI services that: (i) are a service for independent living or (ii) have experience providing fiscal intermediary services for persons with disabilities, as demonstrated by having a continuous history of arrangements with DSSs beginning no later than January 1, 2012. The Proposal states that applications to operate a fiscal intermediary may be filed with the Commissioner, together with such other forms and information as may be required by the Commissioner.

However, the Proposal states that "any agency or individuals providing services under a patient managed home care program authorized under ...former section 365-f may continue to provide such services." This language seems to suggest that currently authorized fiscal intermediaries may continue to provide fiscal intermediary services, and would not be subject to the above limitations on fiscal intermediaries. It is not clear what "authorized" means, however, since only a limited number of fiscal intermediaries have been officially authorized by the New York Department of Health. Hundreds of fiscal intermediary applications remain pending with the State. In the coming weeks, as the Executive and the Legislature negotiate about the Budget, and as lobbying efforts take off, the true limitations and parameters of the Proposal will become more clear.

Consumer Eligibility

The Proposal states that the following individuals would qualify to participate in CDPAP: (a) Individuals who are eligible for long term care and services provided by a CHHA, LTHHC, or an AIDS home care program, or a person who is eligible for personal care services pursuant to Social Services Law; (b) Individuals eligible for medical assistance; (c) Individuals who are deemed in need of home care services or private duty nursing and who are able and willing, or who have a designated representative, to make informed decisions as to the type and quality of services; and (d) Individuals who meets criteria which may be established by the Commissioner of Health.

The Proposal requires that all eligible individuals receiving home care must receive notice of the availability of CDPAP and, no less frequently than annually thereafter, will have the opportunity to apply for participation in CDPAP.



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New Definition of Personal Assistant

The Proposal defines a personal assistant as an adult who provides services “under the eligible individual’s instruction, supervision and direction or under the instruction, supervision and direction of the eligible individual’s designated representative, provided that a person legally responsible for an eligible individual’s care and support, an eligible individual’s spouse or a designated representative, may not be the personal assistant...however a personal assistant may include any other adult relative of the eligible individual, provided, however that the program determines that the services provided by such relative are consistent with an individual’s plan of care and that the aggregate cost of such services does not exceed the aggregate cost of equivalent services provided by a non-relative personal assistant.” The Proposal would thus limit when/if relatives can serve as personal assistants.

Obligations of Fiscal Intermediaries

The obligations of fiscal intermediaries under the Proposal would remain largely the same as they are under the current fiscal intermediary law:

1. Wage and benefit processing for personal assistants;
2. Processing all income tax and other required wage withholdings
3. Complying with workers’ compensation, disability and UI requirements
4. Maintaining personnel records for each personal assistant, including timesheets and other documentation needed for wage processing
5. Maintaining a copy of the medical documentation required by the Commissioner
6. Ensuring the health status of each personal assistant is assessed prior to service delivery
7. Maintaining records of service authorizations
8. Monitoring the consumer’s ability to fulfill his/her role and promptly notifying the authorizing authority if there is any circumstance that may affect the consumer’s or a designated representative’s ability to fulfill his/her duties
9. Complying with regulations established by the Commissioner regulations regarding fiscal intermediaries’ responsibilities; and
10. Entering into a Department-approved memorandum of understanding with the consumer that describes the parties’ responsibilities under CDPAP

Also like the current law, the Proposal states that fiscal intermediaries are not responsible for and will not:

1. Manage the plan of care
2. Recruit and hire personal assistants
3. Train, supervise, schedule, or terminate the personal assistants
4. Assure that a personal assistant is performing his/her services or complying with the consumer’s plan of care.



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Our Home Care Practice attorneys provide counsel to multiple home care agencies with respect to corporate, transactional, regulatory, reimbursement, compliance, wage and hour, wage parity enforcement, and litigation matters. With a broad understanding of the New York regulatory landscape, we help clients anticipate and respond to the increasingly complex rules governing the industry.

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Just like the current Section 365-f, the Proposal also states that fiscal intermediaries would not be “liable for fulfillment of responsibilities agreed to be undertaken by” the consumers. However, providers would continue to be liable for failure to “exercise reasonable care in properly carrying out its responsibilities under this program, which shall include monitoring such individual’s ability to fulfill those responsibilities documented in his or her records, and that failure of an individual to carry out his/her agreed-to responsibilities may be considered in determining the individual’s ability to continue in CDPAP.

Revocation of Authorization to Operate a Fiscal Intermediary

The Proposal states that a fiscal intermediary’s authorization may be revoked, suspended, limited or annulled upon 30 days’ written notice to the fiscal intermediary if the Commissioner finds that the fiscal intermediary has failed to comply with the law or regulations. In addition, the Commissioner may immediately revoke, suspend, limit or annul an authorization to operate a fiscal intermediary if the Commissioner determines that the public health or safety would be imminently endangered by the continued operation of a fiscal intermediary.

Availability of CDPAP is Contingent on Funding

Like the current law, the Proposal states that CDPAP and fiscal intermediary services will only be available if the Commissioner of Health determines that there is adequate federal financial participation to fund the program and/or entities. There are some indications that the reimbursement rate for FI services may be changed. More information on that will be forthcoming.

If you have any questions about this topic, please contact any member of our Home Care Group.