SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

SAVE OUR CONSUMER DIRECTED HOME CARE PROGRAM, INC, Petitioner, -v- NEW YORK STATE DEPARTMENT OF HEALTH, and JAMES V. MCDONALD in his capacity as Commissioner of Health, Respondents.	Index No. **VERIFIED PETITION AND COMPLAINT**

Save Our Consumer Directed Home Care Program, Inc. ("Petitioner" or "the Coalition"), by and through its attorneys, Littler Mendelson, P.C., for its Verified Petition pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR"), and a Complaint for declaratory judgment pursuant to CPLR §3001, respectfully states and alleges as follows:

PRELIMINARY STATEMENT

1. Petitioner brings this proceeding pursuant to CPLR Sections 3001 and 7803(3) ("Article 78"), seeking injunctive and other relief as a result of amendments to Section 365-f of the Social Services Law ("SSL") enacted on April 20, 2024, and the actions of the New York State Department of Health ("the DOH" or "Respondent Department of Health") and Commissioner of Health James V. McDonald ("Respondent Commissioner," collectively referred to with the DOH as "Respondents") in implementing their Request for Proposals #20524 ("the RFP") on June 17, 2024, as amended on July 19, 2024 (Amendment #1), August 2, 2024 (Amendment #2) and August 7, 2024 (Amendment #3).[1]

[1] A true and correct copy of the RFP is attached as Exhibit A to the contemporaneously filed Attorney Affirmation of Paul R. Piccigallo, dated August 12, 2024 ("Piccigallo Aff."). Respondents, after issuing the RFP on June 17, 2024, twice extended their deadline to issue substantive amendments to the RFP. Respondents issued their substantive amendments to the RFP via Amendment #3, issued on August 7, 2024, of which a true and correct copy thereof is

2. Enacted as part of the State budget effective April 20, 2024, the amendments to Section 365-f of the SSL ("Section 365-f) have the effect of causing irreparable harm to all individuals and entities who participate in the Consumer Directed Personal Assistance Program ("the CDPA Program" or "the Program"), a statewide Medicaid program that provides an at-home care alternative for chronically ill and/or mentally or physically disabled Medicaid beneficiaries (known as "Consumers").

3. The amendments to Section 365-f will, upon information and belief, eliminate more than 600 New York businesses that are providing Fiscal Intermediary ("FI") services to 246,000 Consumers enrolled in the Program and their caregivers (known as "Personal Assistants") by replacing them with a single Statewide Fiscal Intermediary ("SFI") selected at the sole discretion of Respondents without the standard oversight that state procurements and contracts traditionally receive from the Office of the State Comptroller ("the Comptroller"). This sweeping change to an eight billion dollar ($8,000,000,000.00) per year program was quietly adopted in the final days of the State budget process without public dialogue, discussion, or debate, let alone input from stakeholders and participants in the Program. It will have the effect of putting hundreds of New York state companies out of business, costing thousands of jobs, and significantly disrupting services and/or fully depriving Consumers of services within their homes, forcing them to be institutionalized. Indeed, as a result of the changes to Section 365-f, the FI services that the Coalition members have been and currently are providing to Medicaid beneficiaries will be unlawful in less than eight months (on April 1, 2025).

4. Approximately two months after the enactment of the State budget, on June 17, 2024, Respondents issued the RFP, seeking to implement the amendments of Section 365-f. Three

attached as Exhibit B to the Piccigallo Aff. On the same day, Respondents issued "Questions and Answers" with respect to the RFP, a true and correct copy of which is attached hereto as Exhibit C to the Piccigallo Aff.

weeks later, on August 7, 2024, Respondents formally adopted their RFP and the "Bidder Qualifications" set forth therein, making only minor amendments to the RFP. Inexplicably, the RFP set forth additional anti-competitive, unreasonable restrictions and specifications creating an almost insurmountable bar for an entity to merely qualify as the SFI, significantly exceeding and expanding on the requirements set forth in the amended statute.

5. For example, the RFP includes specifications requiring the bidder to have been performing FI services on a statewide basis in another state as of April 1, 2024, to pledge to provide the DOH with a draft agreement for a $100,000,000 line of credit within ten days of being notified of contract approval, to comply with the terms of collective bargaining agreements and to certify current and future compliance with New York's prevailing wage laws set forth in Section 220 of the New York Labor Law, which applies to work performed by "Workers, Laborers and Mechanics employed on a public project."

6. The "qualifications" set forth in the RFP do not support the efficiency or efficacy of the CDPA Program and only serve to restrict competition in a way that precludes Petitioner's members from continuing to operate and provide FI support for the thousands of Consumers and Personal Assistants ("PAs") whom they have devotedly served for years. These changes appear to be the result of a swift, ill-conceived effort by Respondents and the State to increase efficiencies and reduce alleged bureaucracy in the Program. But rather than address any such issues by less severe and harmful alternatives, such as those that have been proposed by legislators and industry stakeholders, Respondents have chosen to simply consolidate the entire industry of CDPA Program providers into a single entity, without regard for the detrimental effects their actions will have on the public, including depriving hundreds of existing businesses of their livelihoods,

costing thousands of jobs, and leaving thousands of vulnerable New Yorkers at risk of institutionalization.

7. The devastating effects that the implementation of the RFP will have on Consumers cannot be overstated. Crucially, many Consumers rely on the care they receive to live independently and with dignity as participating members of their communities, rather than in institutions, where they are isolated from their communities and loved ones. As a result of the consolidation of approximately 600 currently operating FIs to a single SFI, Consumers will be required to abruptly transition their care to a new provider of Fiscal Intermediary services, and a new Personal Assistant.

8. Respondents in Amendment #3 to the RFP, set forth "Initial Transition Activities" that must be completed by the SFI as part of the consolidation of approximately 600 currently operating FIs to a single SFI. *See* Piccigallo Aff., Ex. B, pp. 2-3. This so-called "transition plan" consists of 8 exceedingly broad directives the SFI must complete prior to the implementation of the SFI contract.[2] Any failures in the transition process, required to be completed in less than nine months, will result in interruptions of care that would put Consumers at risk of institutionalization. These interruptions will include delays or difficulties in the start-up of the SFI: contracting with at least one subcontracting entity per rate setting region subject to the DOH's review and approval[3];

[2] Concerningly, Respondents' Questions and Answers to the RFP, issued August 7, 2024, indicate that Respondents will not even begin to implement a transition plan until the SFI award is issued. *See* Ex. C to Piccigallo Aff., Q&A No. 1106 ("Q. If the contract with the statewide FI begins October 1, 2024, when will consumers and PA's be transitioned to the statewide FI from current FIs?" "A. Upon selection of a vendor, the Department will work with the contracted statewide fiscal intermediary, managed care plans, Local Departments of Social Services, and other stakeholders to develop and implement a transition plan and timeline to ensure all consumers and personal assistants are transitioned seamlessly to the new fiscal intermediary including, but not limited to, the transfer of personal assistant documentation."). Industry stakeholders submitted **96 questions** to Respondents expressing concern with respect to potential disruptions of care and ancillary concerns during the transition period (*see* Q&A nos. 1106 through 1202), yet Respondents provided the same boilerplate response above to each question.

[3] The RFP requires that the awarded SFI subcontract with "at least one entity per [DOH] rate setting region," currently defined into four different regions of "NYC Area", "Mid-Hudson/Northern Metro", "Northeast/Western" and "Rest of State". *See* Ex. A to Piccigallo Aff., pp. 5, 32.

notifying Consumers about their new SFI provider and any subcontracting entities; transitioning Consumers to the new SFI provider and with any subcontracting entities (including by assessing and ensuring the active Medicaid enrollment status of each Consumer and making arrangements with their insurance plans); ensuring that hundreds of thousands of PAs enroll with the new SFI, which may offer less competitive wages and benefits than their current FIs; onboarding PAs to the SFI including by conducting I-9 verifications and Medicaid program participation exclusion list checks and by enrolling them in new benefits plans; obtaining the resources to provide access to services in a wide variety of languages and/or that are specialized based on Consumers' impairments, and securing adequate staffing.

9. Taken together, the amendments to Section 365-f and Respondents' implementation of the RFP will have a disastrous impact on the CDPA Program and cause irreparable harm to all existing FIs, including their businesses, employees, and hundreds of thousands of PAs and Consumers whom they serve, by eliminating all competition and shutting down all existing FIs, and taking a one-size-fits-all approach to provide personal assistance to the most vulnerable New Yorkers. Moreover, Respondents' implementation of the RFP will unconstitutionally and illegally deprive Petitioner's members the ability to provide FI services in violation of state and federal laws, and in some cases, their Consumers' ability to receive sufficient and adequate Medicaid services through the CDPA Program. For the foregoing reasons and those discussed in detail below, Petitioner respectfully requests that the Court (a) enjoin Respondents from taking further action on or further implementation of the RFP, including but not limited to, enjoining Respondents from selecting an SFI; and (b) issue an order declaring the April 20, 2024, amendments to Section 365-f arbitrary and capricious, invalid, unconstitutional, and/or contrary to law.

PARTIES

10. Petitioner Save Our Consumer Directed Home Care, Inc. is a not-for-profit association of Fiscal Intermediaries ("FIs") currently participating in the CDPA Program. The Coalition is also comprised of other supporting entities and participants in the Program, including a Consumer currently participating in the Program and receiving personal assistance services.

11. The Coalition has standing to sue on behalf of itself and/or its members. The Coalition is largely comprised of FIs that do not qualify to be the single SFI under the April 20, 2024, amendments to Section 365-f and the eligibility criteria set forth in the RFP. Members of the Coalition and its members, as well as all other FIs providing services under the CDPA Program, will suffer irreparable harm to their businesses and will be directly harmed by the implementation of the April 20, 2024, amendments to Section 365-f and the RFP. Indeed, as an example, Attending Home Care Services LLC, an FI currently operating in New York, will be subject to a complete loss of FI-related business if implementation of the RFP goes forward (*See, e.g.*, the contemporaneously-filed and accompanying Affidavit of Petitioner's member Attending Home Care Services LLC, sworn to on August 8, 2024).

12. The Coalition's members currently provide FI services to more than 16,500 Consumers and 19,500 PAs and employ at least 1,000 administrative staff supporting the CDPA Program. Moreover, the Coalition's members provide services to Consumers and PAs who speak various languages (including Spanish, French, Russian, Yiddish, Hebrew, Cantonese, Mandarin, Arabic and Nepalese) and accommodate individuals with a wide variety of disabilities, cultures, and religious practices. The Coalition's members perform crucial FI services for both unionized and non-unionized PAs. In addition, Petitioner's members anticipate a job loss of at least 1,000 employees and the cessation of the provision of wages and benefits to approximately 19,500 PAs.

13. Respondent Department of Health ("DOH") is an agency of New York State charged with the powers and duties set forth in Section 365-f. The DOH is a "body" within the meaning of Article 78 of the CPLR. The DOH receives federal funds from the United States Department of Health and Human Services ("HHS"), including through the Centers for Medicare and Medicaid Services ("CMS"). The DOH is a non-federal entity within the meaning of Part 75 of Subchapter A of Subtitle A of Title 45 of the Code of Federal Regulations ("Part 75"). 45 C.F.R. § 75. The DOH is a state entity that is covered by Title II of the ADA. The DOH's principal office is located at Corning Tower, Empire State Plaza, Albany, New York 12237.

14. Respondent James V. McDonald is the New York Commissioner of Health, and as such is charged with the responsibility of administering the CDPA Program and authorizing entities to perform FI services pursuant to Section 365-f. He is an "officer" within the meaning of Article 78 of the CPLR. He is a party to this matter in his official capacity and not in his personal capacity. His principal office is located at Corning Tower, Empire State Plaza, Albany, New York 12237.

JURISDICTION AND VENUE

15. The Court has jurisdiction over this proceeding pursuant to Article 78, under CPLR § 7804(b). The Court has jurisdiction over the claims for declaratory relief pursuant to CPLR § 3001.

16. Pursuant to CPLR § 506(b), this proceeding is brought in Albany County where Respondents' principal offices are located.

STATEMENT OF FACTS

17. New York's CDPA Program was premised on the concept that individuals with disabilities and the chronically ill should have the same civil rights, options, and control over choices in their own lives as do individuals without disabilities. The Program, which since its

inception has substantially improved the lives of hundreds of thousands of vulnerable New Yorkers through the use of a network of hundreds of New York Fiscal Intermediaries, was made possible through Medicaid, a joint system established in Title XIX of the Social Security Act ("the Medicaid Act") that is funded by state and federal monies. Indeed, Medicaid plays an important role in states' efforts to achieve compliance with the Supreme Court's holding that the unjustified institutional isolation of people with disabilities is a form of unlawful discrimination under the Americans with Disabilities Act ("ADA"). *Olmstead v. LC*, 527 U.S. 581 (1999). The CDPA Program allows for the provision of services that help individuals transition from institutional to home and community-based settings where they are empowered to exercise more freedom, choice, and control over their lives and maintain meaningful involvement with their communities.

18. While a state's participation in the Medicaid program is voluntary, in order to receive federal funds, it must comply with federal statutory and regulatory requirements, including those designed to promote the best interests of Medicaid beneficiaries and safeguard against fraud, waste, and abuse. This includes prohibitions on anti-competitive practices in procurement processes and any arbitrary actions by a state in its implementation of a Medicaid program—such as the CDPA Program.

19. New York has chosen to participate in the Medicaid Program and has its own State Plan in effect, which it initially submitted to CMS for approval in 1987. Since then and as recent as June 2024, Respondents have submitted numerous proposed amendments to New York's State Plan, waiver requests, and ideas for innovative demonstration projects to CMS, all seeking its approval of the implementation of new programs and initiatives as well as changes to existing ones. *See* New York State Department of Health, *State Plan Under Title XIX of the Social Security*

Act Medical Assistance Program (last updated March 25, 2025), available at State Plan (hcrapools.org) (last accessed August 11, 2024).

20. Pursuant to Section 365-f, which governs the Program, to qualify for enrollment in the Program, an individual must, *inter alia*, be:

> (1) a Medicaid recipient,
>
> (2) eligible for certain long term and home care and services and/or personal care services,
>
> (3) with the provision of such services, "capable of safely remaining in the community in accordance with the standards set forth in *Olmstead*," and
>
> (4) in need of assistance with daily activities, personal assistance, or home care, nursing, or other services enumerated in the SSL, pursuant to a determination after an assessment of the person's appropriateness for the Program conducted in accordance with the requirements set forth in the law.

SSL § 365-f(2).

21. Under the CDPA Program, the recipient of personal assistance under the Program—the Consumer—must be, or have a legal guardian or designated representative who is, able and willing to make informed choices regarding the management of the services they receive.

22. These choices include selecting, directing, and supervising their own care within their own home. Importantly, the Consumer can hire individual(s) with whom they are familiar and comfortable, such as their child, sibling, or friend, as their PA to provide personal care, home health, and/or nursing services, under the Program.

23. The CDPA Program allows Consumers to exercise control over the care they receive by engaging in functions typically performed by a traditional home care provider, such as setting their PA's schedules, training their PA about the manner and methods in which to perform the services that the Consumer requires, and directing and supervising their work.

24. As stated above, Consumers who are not able to perform such PA oversight and supervision themselves and who cannot "self-direct" but still wish to receive personalized care from an individual who they know and trust, can designate a representative, such as a family member, friend, or guardian, to perform these responsibilities on their behalf.

25. Because the Program is funded by Medicaid, PAs are able to provide individualized care to their loved ones in exchange for compensation and benefits through their meaningful employment. To that end, FIs play an important, necessary, and crucial role in administering wages and benefits to PAs, processing and documenting their time records and duty sheets, coordinating Medicaid claims and reimbursement, maintaining copies of service authorizations and reauthorizations from Managed Care Organizations ("MCOs"), and ensuring compliance with federal and state requirements governing the Program.

26. In accordance with the regulations that have governed the Program for years, over 600 FIs operating in New York have been and are currently responsible for financial management; maintenance of documents, and administrative oversight, including processing all income tax and other required wage withholdings; ensuring the health status of each PA is assessed prior to service and annually thereafter, conducting Medicaid program participation exclusion list checks with the offices of the Medicaid Inspector General and the Inspector General; maintaining personnel records for PAs, and acting as the employer of record for PAs for workers' compensation and disability insurance purposes. FIs are also mandatory reporters to local departments of social service and/or MCOs if there are changes in the Consumer's health status or ability to participate in the Program, suspected abuse or neglect, unsanitary living conditions, fraud, waste, or abuse related of Medicaid funds, and/or unsafe situations for the Consumer and/or the PA.

27. Consumers have the freedom to choose a provider of FI services from among the hundreds of FIs that have been granted authorization by Respondents.

28. Approximately six years ago, legislators began proposing changes to the CDPA Program, including more regulatory standards and oversight due to the overwhelming popularity of the Program.

29. Importantly, one such proposal was enacted through the State's fiscal year 2019-2020 state budget and resulted in the DOH issuing a Request for Offers #20039 ("the 2019 RFO") wherein which FIs were required to submit offers to be awarded contracts to continue providing FI services in New York. The 2019 RFO explicitly acknowledged that any awarded contracts would be subject to the Comptroller's review and that Section 163 of New York's State Finance Law ("SFL") applied to the procurement process. At the conclusion of the 2019 RFO process, the DOH awarded contracts to 68 FIs.

30. In response to numerous protests to the 2019 RFO, legal challenges, and concerns raised by Consumers, FIs, and other stakeholders, numerous additional legislative proposals were submitted and the RFO was paused for over a year. Then, the State's fiscal year 2022-2023 budget included language to provide an opportunity for qualified FIs that previously submitted an offer and were not previously awarded a contract under the 2019 RFO to submit an attestation with supporting information and, after review, be awarded a contract if they served, at any time during the period of January 1, 2020, through March 31, 2020, at least 200 Consumers in New York City or 50 Consumers in the rest of the state. While additional awards were made based on the new criteria, and numerous bills were proposed throughout the years, legislators had not been able to find a common ground.

31. Effective April 20, 2024, Section 365-f was amended to repeal the 2019 RFO and provide for the consolidation of FI services being provided by over 600 fiscal intermediaries into a single statewide entity, resulting in the elimination of competition within the industry serving the CDPA Program. Most notably, to be eligible to be the SFI, an entity must have been providing FI services in a state *other than New York* on a statewide basis as of April 1, 2024. SSL § 365-f(4-a)(ii-b). Respondents, in Amendment #3 to the RFP issued on August 7, 2024, clarified that "[f]or the purposes of minimum qualification, 'statewide basis in at least one other state' means that the entity is currently engaged in a contract with the single State agency established or designed to administer or supervise the administration of the State's Medicaid program in a state other than New York, to be a provider of fiscal intermediary services throughout the entire geographic area of the subject state." *See* Ex. B to Piccigallo Aff., p. 2. This requirement (the "out-of-state requirement") for an entity to have significant experience from outside of New York state, irrespective of how that other State's caregiving standards and regulations compared to New York, to serve Consumers within New York state was not supported by or articulated with any rationale or other basis (nor were many of the other requirements set forth).

32. Despite an annual budget of approximately eight billion dollars ($8,000,000,000.00) allocated solely to the CDPA Program, the amendments to Section 365-f suspended the competitive bidding requirements and typical review and oversight procedures conducted by the Comptroller, found in Sections 112 and 163 of the SFL and Section 142 of the Economic Development Law ("the EDL"). SSL § 365-f(4-a)(ii-b).

33. Despite unlawfully restricting oversight, the amendments to Section 365-f do not contain clear criteria or objective guidelines for selecting the SFI. Rather, the DOH is granted unfettered and unchecked discretion, contrary to the law and regular service procurement practices

as set forth above, and is only required to post criteria for the selection of the SFI, the single entity to perform FI services throughout the entirety of the state. The criteria specified in the statute is limited to the following sentence:

> the criteria for selection of the statewide fiscal intermediary, which shall include at a minimum that the eligible contractor is capable of performing statewide fiscal intermediary services with demonstrated cultural and language competencies specific to the population of consumers and those of the available workforce, has experience serving individuals with disabilities, and as of April first, two thousand twenty-four is providing services as a fiscal intermediary on a statewide basis with at least one other state.

SSL § 365-f(4-a)(b)(i)(b).

34. Section 365-f obligates Respondent Commissioner to award a contract to the single entity that meets the criteria for selection and offers the best value for providing the services required under Section 365-f and the needs of Consumers. SSL § 365-f(4-a)(b)(iii).

35. Respondents were thus directed to implement a vague, ambiguous, and sweeping law without the Comptroller's supervision, or the protections of the public treasury afforded by competitive bidding and as required by law. Ultimately, Respondents were provided with unguided, largely unfettered and unsupervised discretion to eliminate hundreds of New York businesses (all of the in-state FIs currently operating) and thousands of New York jobs in favor of a single entity, doing business outside New York, without any regard for the effects that it could have on existing FIs and their employees, let alone Consumers and PAs themselves.

36. On June 17, 2024, Respondents issued the RFP setting forth the minimum qualifications it would use to evaluate and select a single entity to perform FI services. *See* Ex. A to Piccigallo Aff. Drawing from the mere 76 words of direction in Section 365-f(4-a)(b)(i)(b) of the SSL, Respondents set forth 35 pages of novel bidding requirements in the RFP. Thereafter, Respondents issued Amendment #3 to the RFP, incorporating minor amendments to the RFP.

Respondents adopted standards and terms for the selection of the SFI in the RFP that have categorically no basis in any provision in Section 365-f, or otherwise in state or federal laws or regulations.

37. Despite that interested industry stakeholders and/or individuals expressed confusion and concern regarding the legislature's intent with respect to the amendments Section 365-f and the resulting specific criteria set forth by the DOH in the RFP, Respondents have provided no clarity on how they set forth their bidding qualifications. *See, e.g.*, Ex. C to Piccigallo Aff., Q&A No. 33 ("Q. The statute New York Consolidated Laws, Social Services Law, SOS § 365-f requires the selection of a single Statewide Fiscal Intermediary. However, the legislative intent and specific implementation details remain broad and unclear. Could the Department clarify the specific criteria[?]" "A. The specific components of the Department's evaluation will not be shared with the bidding community. Bidders should submit their Technical Proposal in accordance with Section 6.2 of the RFP.").

38. Notably, the terms adopted as part of the RFP have the primary effect of stifling competition and limiting the pool of qualified bidders to meet requirements that are highly particularized yet irrelevant to the provision of FI services in New York to New York Consumers. These include mandatory terms and conditions which were not set forth or contemplated in the statute and are wholly unrelated to the effective operation of the CDPA Program, such as:

(i) requiring certification that every bidder "will have met and will continue to meet the requirements of Section 220(3-a)(a)(iii) of the Labor Law that sets forth the certified payrolls and obligations related to such payrolls" (Ex. A to Piccigallo Aff. at 21);

(ii) requiring that the winning bidder's physical locations satisfy the 2010 ADA Standards for Accessible Design despite that services under the Program are performed within Consumers' homes and not at the offices of FIs (*Id.* at 8);

(iii) requiring compliance with collective bargaining agreements (*Id.* at 7);

(iv) restricting ownership and controlling interests by prohibiting conflicts with Licensed Home Care Service Agencies ("LHCSAs)" and MCOs (*Id.* at 8);

(v) setting a five-year term that locks Consumers, PAs, and the entire industry into a single entity for an unjustified period of time (*Id.* at 4);

(vi) requiring, as a material condition of the contract, that the contractor provide the DOH with a revolving line of credit, in amount of at least $100,000,000.00 (*Id.* at 14); and

(vii) establishing and then limiting the permissible duties of subcontractors to effectively prohibit contracting of fiscal intermediary services, including by prohibiting the setting of wage rates for PAs (*Id.* at 15).

39. On June 10, 2024, pursuant to the New York Freedom of Information Law ("the FOIL"), the Coalition submitted a request to the DOH for information about Respondents' adoption of the amendments to Section 365-f and their development of the RFP, including "all records and communications relating to the consideration, negotiation, adoption, and implementation of Part HH of Chapter 57 of the Laws of 2024 amending the Consumer Directed Personal Assistance Program (CDPAP)," ("Petitioner's June 2024 FOIL Request"). To date, the DOH has not provided responsive records in unmistakable defiance of the statutory deadlines established by the FOIL. *See* Ex. D to Piccigallo Aff (Petitioner's June 2024 FOIL Request).

40. In sum, the criteria set forth in Section 365-f and the RFP, and Amendment #3 thereto, are so arbitrary and capricious that, upon information and belief, only a handful of FIs currently operating in New York could even meet the out-of-state requirement alone; and the implementation of the SFI puts hundreds of thousands of CDPA Program stakeholders at risk of irreparable harm.

RESPONDENTS' ACTIONS ARE IMPERMISSIBLE AND CONTRARY TO LAW

Section 365-f and the RFP Violate Federal Procurement Laws and Regulations

41. Pursuant to Section 1915(j) of the Medicaid Act and HHS regulations, when a state allows for the procurement of financial management services from private entities for its self-

directing personal assistance services program which is backed by federal funds, the procurement method must meet the requirements set forth in 45 C.F.R. §§ 75.326 through 75.340. *See* 42 C.F.R. § 441.484.

42. If the state itself is conducting the procurement, it "must follow the same policies and procedures it uses for procurements from its non-Federal funds." 45 C.F.R. § 75.326. Similarly, if a non-federal entity is conducting the procurement, it "must use its own documented procurement procedures which reflect applicable State, local, and tribal laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in Part 75." 45 C.F.R. § 75.327.

43. Because the CDPA Program provides for self-directing personal assistance services to Medicaid beneficiaries under a federal award from CMS, any method used by Respondents to procure fiscal intermediary services must comply with: (1) their own documented procurement procedures which reflect New York's applicable state, local, and tribal laws and regulations, *and* (2) the applicable federal laws and standards set forth in Part 75.

44. By implementing the RFP, Respondents impermissibly deviated from their own documented procurement procedures that reflect New York's applicable state, local, and tribal laws and regulations.

45. In New York, "[t]he objective of state procurement is to facilitate each state agency's mission while protecting the interests of the state and its taxpayers and promoting fairness in contracting with the business community." SFL § 163. To advance this objective, New York

State agencies must procure services "in accordance with Article 11 of the New York State Finance Law, current statutes, regulations, executive orders, and other actions with the force of law."[4]

46. Article 11 of the SFL defines key procurement terms and concepts (§ 160), establishes a State Procurement Council with important responsibilities (§ 161), sets forth obligatory procurement solicitation and evaluation methods and standards as well as the manner in which such obligations may be waived (§ 163), and specifies which commodities and services are exempt from such standards (§ 164).

47. The state's procurement laws and regulations obligate agencies to, *inter alia*:

- conduct formal competitive procurements to the maximum extent possible;
- promote and afford first priority to businesses certified pursuant to Article 15-A of the Executive Law and Article 3 of the Veterans' Services Law (Minority- and Women-Owned Business Enterprises ("MWBEs") and Service-Disabled Veteran-Owned Business Enterprises ("SDVOBs"));
- provide opportunities to New York state's small business enterprises; contract with responsive and responsible offerors;
- establish clearly articulated procedures;
- clearly specify the requirements or work to be performed when soliciting bids;
- document processes for proposals and the determination of the method of procurement;
- provide for a reasonable process that ensures a competitive field;
- offer fair and equal opportunities for bidders to submit responsive offers;
- implement a balanced and fair method of award;
- delineate criteria (prior to the submissions of proposals) for evaluating proposals and awarding contracts;

[4] New York State Procurement Council, *New York State Procurement Guidelines* (November 2023), available at https://ogs.ny.gov/system/files/documents/2023/12/nys_procurement_guidelines.pdf) (last accessed August 11, 2024).

- allow for regular and critical review and evaluation of the efficiency, integrity and effectiveness of the procurement process; mandate testing by the Commissioner for reasonableness to ensure that the results of the procurement withstand public scrutiny and that the quality and the price of the contract are practical;

- ensure that procurements are conducted in a manner consistent with the best interests of the state, and minimize the use of single source procurements[5] such that they are implored "only when a formal competitive process is not feasible".

See SFL § 163; Article 15-A of the Executive Law; Article 3 of the Veterans' Services Law; *New York State Procurement Guidelines*.

48. To assure that state agencies comply with these obligations, the Comptroller is entitled to review their procurement procedures and contracts. SFL § 163(12). Indeed, for more than a century, the Comptroller has conducted independent, pre-review of state and state agency contracts, adding transparency to the process, ensuring fairness for bidders in State contracting, and protecting the interests of the State and its taxpayers. *See* Office of the New York State Comptroller, *Comptroller's Oversight of State Contracts* (last updated July 2024), available at https://www.osc.ny.gov/state-agencies/contracts/oversight (last accessed August 11, 2024). The Comptroller's "contract oversight extends to most State agency contracts, generally those where the contract value exceeds $50,000." *Id.*

49. The Comptroller's safeguarding of bidders from unfair treatment is of such importance that "any State agency seeking to waive competitive bidding and receive an exemption from its statutory requirement to advertise a procurement opportunity in the New York State Contract Reporter must first receive approval from the Comptroller's Office." *Id.*

[5] A single source procurement is one in which although two or more offerors can supply the required services, the commissioner or state agency, upon written findings setting forth the material and substantial reasons, therefore, may award a contract to one offeror over another, subject to the Comptroller's review and approval. *See* SFL §§ 163(1)(h), 163(10)(b).

50. In addition, the New York State Procurement Guidelines were created by the State Procurement Council "to assist State agencies in conducting procurements efficiently and effectively by providing [them] with a source of basic, systematic guidance about State procurement laws, rules, regulations, policies, and practices." *New York State Procurement Guidelines* at 3.

51. Upon information and belief, against the background of the aforementioned state laws, regulations, and guidelines that generally apply to all state agency procurements, Respondents have developed and implemented their own procurement procedures.

52. Upon information and belief, Respondents' typical procurement procedures provide for procurements that are competitive and subject to the review and approval of the Comptroller and promote and afford first priority to MWBE and/or SDVOBs. *See Respondent's 2019 RFO for FIs*, Ex. E to Piccigallo Aff (RFO issued December 18, 2019).

53. Upon information and belief, Respondents have a policy and/or practice of following New York state procurement laws, regulations, and guidelines, including Sections 112 and 163 of the SFL, Section 142 of the EDL, and the New York State Procurement Guidelines, to conduct procurements that offer fair and equal opportunities for bidders to submit responsive offers, and clearly set forth the minimum specifications that a bidder needs to perform the services requested under the contract.

54. Moreover, Respondents, upon information and belief, use single-source procurements only when a formal competitive process is not feasible. *See* Ex. F to Piccigallo Aff. (List of Single Source Procurements from New York State Department of Health website). When conducting single source procurements, Respondents first seek the Comptroller's review and

approval, and then publicize the material and substantial reasons as to why they have awarded the contract to one offeror over another. *Id.*

55. Here, in violation of the 45 C.F.R. § 75.327, Respondents impermissibly deviated from their own procurement procedures which reflect applicable State laws and regulations. The amendments to Section 365-f purport to exempt from application statutory provisions that have long governed state agencies' procurement processes, including Sections 163 and 112 of the SFL and Section 142 of the EDL, without any justifications for doing so. SSL § 365-f(4-a)(b).

56. Respondents' procurement through the RFP restricts competition; fails to ensure fair and equal opportunities for bidders; establishes criteria beyond the minimum requirements necessary for the performance of the services under the contract; neglects to ensure efficiency, integrity, and effectiveness; and inexplicably favors an out-of-state vendor of services over one that is in state and/or MWBE- and/or SDVOB- certified state vendors.

57. Although the purported rationale for the amendments to Section 365-f, as stated by Governor Kathy Hochul, is to curb fraud, waste, and abuse in the CDPA Program, the implementation of the RFP seems to be aligned with different goals as it avoids the Comptroller's wealth of experience combatting fraud, waste, and abuse and the Comptroller's independent review and oversight, which has been a strong deterrent to fraud, waste, and abuse in state agency contracting and has resulted in hundreds of millions of dollars in savings for taxpayers each year. *See Comptroller's Oversight of State Contracts*.

58. Notably, the Comptroller has publicly decried the Respondent's actions as "troubling." More specifically, according to the Comptroller, "[t]he Enacted State Budget for Fiscal Year 2024-25 includes a number of troubling provisions setting aside this critical oversight as well as normal competitive procurement requirements;" and "[t]he contract for the statewide FI

bypasses Office of the State Comptroller pre-audit review and competitive bidding." *See* Ex. G to Piccigallo Aff. at 19, 9 (Enacted Budget Report, May 2024).

59. The Comptroller further reported: "$367.6 million is exempt from Office of the State Comptroller oversight and normal competitive procurement requirements; an additional $1.5 billion is exempt from normal competitive procurement requirements; and another $1.9 billion may allow the funds to be distributed at the discretion of the Executive/DOB without following the normal competitive procurement requirements. These proposed changes reduce transparency, competition, and State Comptroller oversight over a significant amount of taxpayer supported State spending. Examples of these problematic provisions include: The contract for the statewide Fiscal Intermediary (FI) for the Consumer Directed Personal Assistance Program (CDPAP) bypasses the Office of the State Comptroller pre-audit review and competitive bidding." *Id.* at 19.

60. Moreover, Respondents, in the Questions and Answers to the RFP issued on August 7, 2024, acknowledged and confirmed their transparent attempt to circumvent Comptroller review:

> Q#1289: What is the justification or rationale for awarding a contract of this magnitude without the oversight of the New York State Comptroller and outside the state's usual contracting process?
>
> A#1289. This question is not relevant to the development of a proposal under the RFP.
>
> …
>
> Q#27. Will the New York State Comptroller review any proposed Department award to assure that the Department complied with the law and terms of the RFP?
>
> A#27. No. The resulting contract will not be subject to the Office of State Comptroller's approval.

See, Ex. C to Piccigallo Aff. (Questions and Answer Responses #1289, 27)

61. Apparently, the Comptroller agrees that the amendments to Section 365-f and the implementation of the RFP violate standard procurement laws, regulations, guidelines, procedures

and general procurement norms, and such anti-competitive, nontransparent practices must be stopped before New York taxpayers, Medicaid recipients, and businesses are irreparably harmed. The Comptroller's statements as set forth above show a likelihood of success on the law and the merits.

The RFP Does Not Comply with Federal Regulations Governing Procurements by Non-Federal Entities

62. Even if Respondents could demonstrate that they complied with their own procurement procedures and state laws and regulations (which they cannot), they failed to comply with independent federal regulations which apply to procurements by non-federal entities that use federal funds for their consumer directed personal assistant programs, like New York's own CDPA Program. Similar to the provisions of the SFL, the applicable federal law and the standards set forth at §§ 75.327 through 75.335, include "full and open competition" requirements to protect the integrity of the procurement process. The federal procurement regulations seek to ensure that HHS grant "programs function as effectively and efficiently as possible," and award recipients are held to "a high level of accountability to prevent waste, fraud, abuse." Department of Health and Human Services, *Health and Human Services Grants Regulation*, 81 F.R. 89,393, 89,394. (Dec. 12, 2016).

63. Specifically, a non-federal entity must select procurement instruments that are "appropriate for the particular procurement and for promoting the best interest of the program or project involved," and conduct procurements "in a manner providing full and open competition." 45 C.F.R. § 75.327(l), 75.328. Procurements cannot restrict competition by, *inter alia*, "[p]lacing unreasonable requirements on firms in order for them to qualify to do business," "requiring unnecessary experience and excessive bonding," and/or engaging in "[a]ny arbitrary action in procurement process." Moreover, the non-federal entity "must conduct procurements in a manner

that prohibits the use of statutorily or administratively imposed state, local, or tribal geographical preferences in the evaluation of proposals." *Id.* at § 75.328(b).

64. If a non-federal entity chooses to conduct a procurement "by competitive proposals," the request for proposals must identify *all* factors to be used in evaluating proposals and their relative importance, and the description of the technical requirements for the service being procured cannot "contain features which unduly restrict competition."[6] *Id.* at §§ 75.328(c)(2),75.329(d)(1), 75.329(d)(2). Moreover, a request for proposals must be structured in such a way that it only "set[s] forth th[e] minimum essential characteristics and standards to which [an entity] must conform if it is to satisfy its intended use," and that it will solicit services "from an adequate number of qualified sources." *Id.* at §§75.328(c)(1), 75.328(c)(2). If a non-federal entity uses a prequalified list of firms in acquiring services, the list must include "enough qualified sources to ensure maximum open and free competition." *Id.* at § 75.328(d).

65. The RFP at issue here blatantly fails to comply with the federal regulations governing procurements by non-federal entities using federal funds. Most importantly, Respondents' RFP was not issued with the goal of providing full and open competition. To the contrary, the RFP places unreasonable requirements on entities in order for them to qualify, including but not limited to, the requirement for them to rid themselves of any purported "conflicts of interest[,]" such as having a common or controlling ownership in a LHCSA. This requirement, not mandated by Section 365-f, is unreasonable and arbitrary, as it forecloses the most meritorious and experienced homecare providers in New York from qualifying unless they disconnect from

[6] Like New York laws limiting single source procurements to very few circumstances, the federal regulations prohibit non-federal entities from conducting a procurement "by noncompetitive proposals" unless: (1) the item is available only from a single source; (2) a public emergency for the requirement does not allow for a delay resulting from competitive solicitation; (3) the HHS awarding agency or pass-through entity expressly authorizes noncompetitive proposals in response to a written request from the non-federal entity; or (4) after a solicitation of a number of sources, competition is determined inadequate. 45 C.F.R. § 75.329(f).

the traditional model of agency homecare they already provide, which could potentially leave thousands of Consumers and/or LHCSA patients at risk.

66. The RFP also requires unnecessary and unjustified experience and excessive bonding, in further violation of federal regulations. With respect to unjustified experience, for the SFI, Respondents are seeking an entity that has been providing FI services *outside* of New York, on a statewide basis, which is not at all relevant to whether an entity is capable of providing FI services within New York state. Indeed, given New York's renowned cultural and linguistic differences, it is dubious that an entity operating on a statewide basis outside of New York could truly serve Respondents' requirement for "demonstrated cultural and language competencies specific to the population of consumers and those of the available workforce." After all, many Consumers have found it beneficial and comforting to choose a provider of FI services that best fits their own respective cultural and linguistic preferences, without regard to whether that entity is also providing extensive FI services in languages or cultures other than their own.[7]

67. Respondents further demand unnecessary experience for the subcontractors with whom the SFI will subcontract, namely, that they must have "been established as a Fiscal Intermediary prior to January 1, 2012, and ha[ve] been continuously providing services for CDPAP individuals."

[7] These serious concerns are not lost on industry stakeholders. Indeed, in the Questions and Answers to the RFP dated August 7, 2024, the following question was poised, "Can the Department provide examples or case studies where an SFI operating solely outside of New York State successfully demonstrated cultural and language competencies equivalent to those required in New York?" Respondents answered simply, "No." *See* Ex. C to Piccigallo Aff., Q&A No. 317; *see also* Q&A No. 196 ("Q. Given the critical role of fiscal intermediaries in facilitating consumers' roles as employers, how will the Department ensure that an out-of-state SFI has the requisite knowledge and capability to uphold New York State's high standards for consumer support and compliance, particularly in light of legal and regulatory adherence? "A. See answer to Question #195 [stating only, "See section 4.1 of the RFP. It is incumbent on the Bidder to explain to the Department how it plans to meet its obligations under the contract."]); *see also* Q&A No. 291 ("Q. How does the Department intend to ensure cultural competence across the extensive, highly regionalized and diverse populations of New York?" "Q. This is a minimum qualification of a bidder under this RFP. The Department cannot speak to this until there is an awardee. Bidders should follow the instructions included throughout Section 6 [of the RFP] and any applicable attachments when responding.").

68. With respect to excessive bonding, the RFP includes, "as a material condition of the Contract," that the contractor provide the DOH with a revolving line of credit, "in amount of at least one hundred million U.S. Dollars ($100,000,000.00)," for which the contractor must provide a draft written agreement within ten days of being selected as the SFI. This provision and the whimsical choice of $100,000,000 as a figure acts as an insurmountable barrier for most, if not all, FIs currently in operation. It wholly deters all entities, including small businesses and those with limited records of performance who would not be able to obtain a line of credit in the amount of $100,000,000, from even submitting a response to the RFP.[8]

69. Worse, the RFP includes geographic preferences—which the federal regulations keenly prohibit irrespective of whether a non-federal entity is attempting to follow a state's statute, law or administratively imposed geographical preferences. The RFP not only gives preference to out-of-state businesses but outright excludes from consideration all current FIs who have best-in-class performance in providing FI services to New York Consumers, merely because these FI do not have experience performing FI services in another state on a statewide basis. At a minimum, the RFP sets aside the contract award for an out-of-state business, which (i) is a clear violation of federal regulations prohibiting geographic preferences, and (ii) is punitive against current FIs whose New York services are not affected or have no tangible relationship to services provided outside of New York.

70. Moreover, the RFP does not identify all requirements that potential contractors must fulfill as well as all other factors to be used in evaluating bids or proposals because it provides that Respondents, in their sole discretion, can reject applications and determine which proposal(s)

[8] Again, Respondents' Questions and Answers to the RFP dated August 7, 2024, further emphasize how this excessive and disqualifying bonding requirement was seemingly pulled from thin air. *See* Ex. C. to Piccigallo Aff., Q&A No. 1308 ("Q. Why the $100 million line of credit? And what authority does NYSDOH have to impose a line of credit? How did you pick that number?" "A. This question is not relevant to the development of a proposal under this RFP.").

best satisfy its requirements on a subjective rather than an objective basis. Further, the RFP includes descriptions of technical requirements for the service being procured that contain features which unduly restrict competition.

71. As if the above were not enough, Respondents further violate the federal prohibition on having a prequalified list unless such list includes "enough qualified sources to ensure maximum open and free competition." Respondents' statements within the RFP indicate that prior to solicitation, they had already identified entities that were qualified and prepared a list from which they expected to select a contractor. Specifically, Respondents noted that they "conducted a comprehensive search and determined that the Contract does not offer sufficient opportunities to set specific goals for participation by SDVOBs as subcontractors, service providers, and suppliers to the awarded Statewide FI," and that "[f]or purposes of this RFP, DOH hereby establishes an overall goal of 0% for M/WBE participation, based on the current availability of qualified MBEs and WBEs and outreach efforts to certified M/WBE firms." Not surprisingly, there are no MWBEs or SDVOBs that meet the RFP's stringent requirements, but apparently, prior to issuing the RFP, Respondents already knew this based on their searches, reviews, and determinations.[9]

72. Lest there be any doubt that Respondents' prequalified list does not include "enough qualified sources to ensure maximum open and free competition," one need only look to

[9] Respondents' Questions and Answers to the RFP dated August 7, 2024 further demonstrate the nonsensical nature of Respondents' bidding qualifications and the impact of same to, in effect, exclude MWBEs or SDVOBS. *See, e.g.*, Ex. C to Piccigallo Aff, Q&A No. 622 ("Q. New York policy and executive orders require commitment to ensuring diversity in its procurements. Yet, Section 5.5 states, "DOH hereby establishes an overall goal of 0% for M/WBE participation." Further, DOH justifies this with saying that their determination is "based on the current availability of qualified MBEs and WBEs and outreach efforts to certified M/WBE firms." In our experience, M/WBE are crucial to the success of these programs and play important roles in all aspects of the program—even administrative tasks, such as mailing, etc. How can the Department justify saying that none of the hundreds of M/WBE firms available are unable to perform any duties under this contract, when there are so many that meet the requirements?" "A. The RFP is not subject to State Finance Law Section 163.") *see also* Q&A No. 1354 ("Q. The MWBE Requirement for this opportunity has been identified as 0%. Why has the Department determined that this contract is not subject to the terms of MWBE policy for contracting and subcontracting?" "A. This question is not relevant to the development of a proposal under the RFP.").

the hundreds of meritorious entities currently performing FI services in New York that have been automatically excluded because they are not operating on a statewide basis in another state, cannot secure a 100-million-dollar revolving line of credit, and/or have a common or controlling interest in a LHCSA. Indeed, the specifications of the RFP are so meticulously tailored that the RFP would be more properly categorized as a single or sole source procurement, whereby an agency has determined that there is only one bidder that can supply the services it seeks. Here, it is almost as if Respondents had already contemplated the single entity to which they sought to award the contract and worked backwards to establish a disingenuous set of "requirements" to narrow any selection to said contemplated single entity, and drafted the RFP accordingly. Respondents actions appear plainly anti-competitive.

73. Respondents' procurement through the RFP is in violation of federal procurement regulations and procedures, which require, *inter alia*, the promotion of competition and minimum bidding specifications to ensure application by the maximum number of qualified bidders. As a result of the clear violations of federal regulations and the irreparable harm that would befall the 600 FIs presently operating in New York and the hundreds of thousands of Consumers and PAs whom they serve, the RFP must be enjoined.

The RFP is Arbitrary and Capricious

74. Section 365-f sets forth the basis by which Respondents can administer the CDPA Program as well as the basis for which Respondents can enter into a contract with an entity to provide services as an SFI.

75. Specifically, Respondent Commissioner is authorized to enter into a contract with an eligible contractor, provided that the eligible contractor is capable of performing statewide FI services with demonstrated cultural and language competencies specific to the population of Consumers and those of the available workforce, has experience serving individuals with

disabilities, and as April, 1, 2024, has been providing services as an FI on a statewide basis with at least one other state. SSL § 365-f(4-a)(b)(i)(b).

76. Given the limited statutory guidance and legislative direction provided in Section 365-f, Respondents essentially have unguided, unfettered and unsupervised discretion in conducting the procurement and selecting an entity to whom they will award the SFI contract.

77. However, an agency, such as the DOH, cannot rely on its enabling statute "as a basis for drafting a code embodying its own assessment of what public policy ought to be [because] it is the province of the people's elected representatives, rather than appointed administrators, to resolve difficult social problems by making choices among competing ends." *Nestle Waters N. Am., Inc. v. City of N.Y.*, 121 A.D.3d 124, 127 (1st Dep't 2014); *accord Pell v Bd. of Educ.*, 34 N.Y.2d 222, 231 (1974).

78. Specifically, a court must strike down an agency action under Article 78 if "a determination . . . was made in violation of lawful procedure . . . [w]as arbitrary and capricious or an abuse of discretion." N.Y. C.P.L.R. § 7803(3).

79. Most of the bidding requirements and criteria implemented by Respondents in the RFP are not required or contemplated by Section 365-f and are wholly unrelated to the effective and efficient operation of the CDPA Program. Moreover, Respondents have failed to, and ostensibly cannot, provide any rationale for establishing the peculiar bidding specifications set forth in the RFP.

80. For example, the RFP places unreasonable requirements on entities in order for them to qualify, including requiring them to: rid themselves of any purported "conflicts of interest," such as having a common or controlling ownership in a LHCSA and/or MCO; certify ADA compliance on all buildings despite the fact that Consumers and PAs do not perform services

within such buildings (and instead typically perform services in the Consumer's home); commit to a five-year term for a contract with legal terms that are yet to be disclosed by Respondents; certify compliance with New York State prevailing wage laws despite that such laws have not traditionally applied to this industry, and agree to comply with collective bargaining agreements, which is not at all relevant to whether an entity is capable of performing statewide FI services with demonstrated cultural and language competencies specific to the population of Consumers and PAs.[10]

81. Additionally, as discussed above, the RFP includes excessive bonding as a mandatory contract term, namely, that the contractor furnish an irrevocable revolving credit letter of credit or line of credit, for the third-party benefit of the DOH, in the amount of $100,000,000.

82. The RFP is also capricious by nature as a result of the significant discretion afforded to Respondent Department of Health in administering the procurement. As noted *supra*, the RFP does not identify all requirements that potential contractors must fulfill, as well as all other factors to be used in evaluating bids or proposals, because it provides that Respondents, in their sole discretion, can reject applications and determine which proposal(s) best satisfies its requirements on a subjective rather than an objective basis.

[10] Respondents have set forth no basis explaining why having a common or controlling ownership in a LHCSA presents a "conflict of interest." Indeed, the arbitrariness of this requirement is highlighted by Respondents responses to industry stakeholders. *See* Ex. C to Piccigallo Aff., Q&A No. 154 ("Q. This language was not included in the law. What was the Department's reasoning for adding it to the RFP?" "A. The Department included this language to provide an example of an actual or perceived conflict that could arise in this context."); Q&A No. 155 ("Q. Why does the Department now consider it a conflict for LHCSAs to provide FI services after decades of successful service provision? Should this standard then apply to all health service agencies that offer multiple services under one roof?" "A. See answers to Questions No. 153 [referring to RFP Section 6.2.C and Attachment 4] and #154. This question is not relevant to the development of a proposal under this RFP.").

Industry stakeholders also noted that the legislature previously considered adopting a similar "conflict of interests" provision in prior legislation, but declined to do so. *See* Q&A No. 1283 ("Q. Under 4.5 d [of the RFP], what legal authority do you have to include this subsection? Especially when the legislature specifically rejected the same proposal in the 2024 legislative section? "A. This question is not relevant to the development of a proposal under this RFP.").

83. Respondents also impermissibly deviate from their standard procurement procedures and New York laws and regulations that are generally applicable to procurements by state agencies. They have decided to eliminate Comptroller review and oversight and forego their purported dedication to giving preference to MWBEs, SDVOBs, and New York State small business enterprises.

84. Finally, Respondents' implementation of the RFP and its requirements that the SFI bidder have been providing FI services in another state on a statewide basis as of April 1, 2024, and that the subcontractors have been providing FI services since April 1, 2012, are arbitrary and capricious. Specifically, despite that these requirements were included in the amendments to Section 365-f, they violate lawful procedures, including Part 75's prohibition against non-federal entities conducting procurements that: include geographical preferences, even if statutorily mandated; restrict competition; and/or require excessive experience.

85. These decisions do not appear to be based upon any rational basis, and in many instances, the purposes of the RFP appear contrary to the statute and the goals of the Program to ensure that Consumers are afforded freedom of choice in providers and the ability to obtain efficient and adequate home care services while remaining in the most integrated settings. Together, these arbitrary and capricious provisions act as a barrier for all FIs currently serving Consumers in New York and do not withstand Article 78 scrutiny.

Section 365-f and the RFP Violate the New York State Constitution

Section 365-f and the RFP Violate State Constitutional Separation of Powers

86. The New York State Constitution provides that "[t]he legislative power of this State shall be vested in the Senate and the Assembly." N.Y. Const. art. III, § 1; *see also, Boreali v. Axelrod*, 71 N.Y.2d 1 (1987). In accordance with the New York State Constitution, the Court of Appeals in *Boreali* applied separation of powers principles and enjoined the New York City Board

of Health from enforcing a ban on large sodas, finding the agency acted in excess of its statutory authority. *Id.* at 9, 13. Following *Boreali*, New York courts consider four factors to determine whether an agency impermissibly exercises legislative rather than regulatory authority:

(1) whether the agency acted within its legislatively delegated policy goals;

(2) whether the agency was merely filling in the details of broad legislation describing the overall policies to be implemented, as opposed to "[writing] on a clean slate" without the benefit of legislative guidance;

(3) whether the legislature had repeatedly tried but failed to adopt legislation in this area; and

(4) whether the agency relied on special expertise in developing the regulation.

87. Applying the foregoing factors, Respondents plainly overstepped into the legislative realm and established wholly new standards to implement the CDPA Program legislation, including in areas where the legislature previously tried but failed to adopt similar laws. Specifically, Respondents promulgated stringent bidder requirements, including, but not limited to, prohibiting bidders from having a common ownership or controlling interest in a LHCSA and/or MCO in New York, limiting the duties of subcontractors, and requiring: a 100-million-dollar line of credit; ADA building certification; compliance with collective bargaining agreements; at least one subcontractor per rate setting region rather than a minimum number of subcontractors per region that directly correlates to the number of Consumers serviced therein; certifications of compliance with New York's prevailing wage laws, and a commitment to a 5-year contract term. These actions were largely taken without legislative direction. Rather, Respondents "wrote on a clean slate, creating [their] own comprehensive set of rules without benefit of legislative guidance." *Boreali*, 71 N.Y.2d at 13.

88. In addition, Respondents' actions are not based upon any special expertise they may have in this area and exceed the authority granted to Respondents through the legislature. Indeed,

there is no suggestion or indication any special expertise was involved in setting the restrictive and nonsensical terms of the RFP. To the contrary, the qualifications set forth by Respondents are not "necessary to carry out the objectives of the program" or "to ensure adequate access to services." *See* SSL § 365-f(5)(b).

Section 365-f and the RFP Violate the State's Equal Protection Clause

89. The Equal Protection Clause of the New York State Constitution mandates that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof." N.Y. Const. art. I § 11.

90. As described above, the amendments to Section 365-f and the RFP disfavor hundreds of FIs that have been serving New York Consumers on the basis that they are operating solely in New York and/or operating in any other state(s) in less than a statewide capacity, in favor of FIs with an out-of-state presence on a statewide basis. Indeed, the implementation of the RFP will result in a total loss of business for FIs operating solely in New York as well as for those operating in New York and in at least one other state at any capacity other than statewide.

91. Requiring an entity that is bidding for a contract—which calls for services that will be performed solely in the state of New York— to have experience on a statewide basis in a state other than New York has no rational basis and serves no legitimate governmental purpose. Respondents' imposition of this illogical condition deprives Petitioner's members of the equal protection of the law.

92. Likewise, Respondents deprive LHCSAs and MCOs—entities that have experience accommodating New York residents in need of home and community-based services—from equal protection of the law by favoring entities that do not have a common or controlling interest in a LHCSA and/or MCO, without providing any rationale for the exclusion of such entities.

93. The amendments to Section 365-f and the RFP treat similarly situated entities differently based upon factors entirely irrelevant to any legitimate governmental purpose.

Section 365-f and the RFP Violate the United States Constitution

Section 365-f and the RFP Violate the Commerce Clause

94. The U.S. Constitution authorizes Congress to "regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. I, § 8, cl. 3. The Supreme Court has explained that Congress may regulate "the channels of interstate commerce," "persons or things in interstate commerce," and "those activities that substantially affect interstate commerce." *See Nat'l Fed'n of Indep, Bus. v. Sebelius*, 567 U.S. 519, 536 (2012).

95. The amendments to Section 365-f and the RFP mandate that entities be engaged in interstate commerce on a statewide level in a state outside of New York. Perplexingly, the legislature and the DOH have, without justification or any reasonable basis, disfavored hundreds of FIs operating solely in New York, and serving New York Consumers, in favor of FIs with a substantial out-of-state presence. Because Section 365-f disfavors in-state businesses by mandating experience in providing FI services on a statewide basis in another state, Section 365-f and Respondents' implementation of the RFP are violative of the commerce clause.

Section 365-f and the RFP Violate the Contracts Clause

96. The Contracts Clause of the U.S. Constitution prohibits states from passing any law "impairing the obligation of contracts." U.S. Const. art. I, § 10, cl. 1. Indeed, as the Supreme Court has acknowledged:

> The power of changing the relative situation of debtor and creditor, of interfering with contracts, a power which comes home to every man, touches the interest of all, and controls the conduct of every individual in those things which he supposes to be proper for his own exclusive management, had been used to such an excess by the state legislatures, as to break in upon the ordinary intercourse of society, and destroy all confidence between man and man. This mischief had become so great, so alarming, as not only to impair

> commercial intercourse and threaten the existence of credit, but to sap the morals of the people and destroy the sanctity of private faith. To guard against the continuance of the evil was an object of deep interest with all the truly wise, as well as the virtuous, of this great community, and was one of the important benefits expected from a reform of the government.

Ogden v. Saunders, 25 U.S. 213, 354-355 (1827).

97. As of April 1, 2025, "[e]xcept for the statewide fiscal intermediary and its subcontractors . . . no entity shall provide, directly or through contract, fiscal intermediary services." SSL § 365-f(4-a-1)(a). Section 365-f and the RFP will cause concrete, irreparable and substantial harm to all FI entities currently operating in New York by requiring them to cease operations and nullify thousands of existing contracts that are contingent upon Petitioner's members' ability to provide services under the CDPA Program. These contracts include agreements with MCOs for the provision of Medicaid services and reimbursements, employment agreements, insurance agreements, vendor agreements, and collective bargaining agreements by causing businesses to cease operations. By significantly limiting the pool of eligible bidders and requiring that all FIs other than the handful which meet the stringent, arbitrary requirements set forth in Section 365-f and the RFP shut down their operations in less than nine months, Respondents are interfering with these contractual agreements without a legitimate governmental purpose, causing the kind of public distrust the Supreme Court sought to guard against.

Section 365-f and the RFP Violate the Equal Protection Clause

98. The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution mandates that no state shall deny any person within its jurisdiction the equal protection of the laws. U.S. Const. amend. XIV, § 1.

99. As described above, the amendments to Section 365-f and the RFP disfavor hundreds of FIs that have been serving New York Consumers, on the basis that they are operating

solely in New York and/or operating in any other state(s) in less than a statewide capacity, in favor of FIs with an out-of-state presence on a statewide basis. Indeed, the implementation of the RFP will result in a total loss of business for FIs operating solely in New York as well as for those operating in New York and in at least one other state at any capacity other than statewide.

100. Requiring an entity that is bidding for a contract—which calls for services that will be performed solely in the state of New York— to have experience on a statewide basis in a state other than New York has no rational basis and serves no legitimate governmental purpose. Respondents' imposition of this illogical condition deprives Petitioner's members of the equal protection of the law.

101. Likewise, Respondents deprive LHCSAs and MCOs—entities that have experience accommodating New York residents in need of home and community-based services—from equal protection of the law by favoring entities that do not have a common or controlling interest in a LHCSA and/or MCO, without providing any rationale for the exclusion of such entities.

102. The amendments to Section 365-f and the RFP treat similarly situated entities differently based upon factors entirely irrelevant to any legitimate governmental purpose.

Section 365-f and the RFP are an Impermissible Bill of Attainder

103. The U.S. Constitution prohibits the enactment of any bills of attainder, which are legislative acts that single out individuals or groups for punishment without trial. U.S. Const. art. I, § 10, cl. 1. Legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial, are bills of attainder prohibited by the Constitution. *United States v. Lovett*, 328 U.S. 303, 304.

104. As described above, Section 365-f and the RFP would consolidate an entire industry under the control of a single entity selected at the discretion of and based upon the arbitrary and

capricious requirements established by Respondents. This is a punitive measure on Petitioner and threatens to cost thousands of New Yorkers their jobs.

Section 365-f and the RFP Violate and Are Preempted by Federal Medicaid Laws and Regulations

105. A state participating in the Medicaid program is required to submit to CMS a "plan for medical assistance" that complies with all of the provisions of Section 1902 of the Medicaid Act. 42 U.S.C. § 1396a. Specifically, a state plan must ensure that:

> any individual eligible for medical assistance . . . 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).

106. Moreover, a state plan must "provide such safeguards as may be necessary to assure that eligibility for care and services under the plan will be determined, and such care and services will be provided, in a manner consistent with simplicity of administration and the best interests of the recipients." 42 U.S.C. § 1396(a)(19).

107. If a state seeks to deviate from any requirement imposed on it by Section 1902 Medicaid Act, it must apply for and obtain a waiver specific to the required provision that it seeks to waive. Specifically, in order to limit the number of providers rendering covered services to Medicaid beneficiaries, a state must submit a Section 1915 waiver application to CMS, seeking permission to waive Section 1902(a)(23)(A) of the Medicaid Act, which otherwise provides beneficiaries with the right to free choice of providers.

108. A waiver of the freedom of choice requirement is granted to a state "only if its applicable state standards are consistent with access, quality and efficient and economic provision of covered care and services and the restrictions it imposes . . . do not discriminate among classes

of providers on grounds unrelated to their demonstrated effectiveness and efficiency in providing those services." 42 C.F.R. § 431.55(f)(2)(ii).

109. As part of the waiver process, federal laws require a state to provide sufficient and adequate notice to the public about the proposed change and to give the public an opportunity to comment on the proposed changes. Unless a state obtains a Section 1915 waiver from CMS, it cannot restrict Medicaid beneficiaries' freedom of choice of providers. *See* 42 C.F.R. §§ 430.25; 431.51.

110. New York State participates in the Medicaid program and receives federal funds from CMS to implement its home and community-based programs. *See* SSL § 365-f ("Subject to the availability of federal financial participation, the provisions of this section . . . shall also apply to such services when offered under the home and community-based attendant services and supports state plan option (Community First Choice) pursuant to 42 U.S.C. § 1396n(k)."). New York's State Plan does not provide for a Section 1915(b) or (c) waiver that permits Respondents to restrict Consumers' freedom of choice of a provider for FI services. Indeed, it requires the State to provide assurances that it will ensure Medicaid beneficiaries' freedom of choice of providers. *See State Plan*, § 4.10. New York has an obligation to amend its State plan if there is a "material change[ ] in State law . . . or in the State's operation of the Medicaid program." 42 C.F.R. § 430.12(c).

111. Section 365-f vests Respondent Commissioner with the authority to, "subject to the approval of the director of the budget, file for such federal waivers as may be needed for the implementation of the" CDPA Program. SSL § 365-f(5)(a).

112. As of the date of this filing, according to publicly available information and upon information and belief, Respondents have not filed a waiver application or amendment to their

State Plan that specifically requests approval from CMS to significantly limit the choice of Consumers, who are Medicaid beneficiaries, to a single provider of FI services, which should have been requested as well as approved *before* Respondents issued the RFP. Moreover, Respondents implemented the RFP without providing notice to stakeholders about the drastic proposed changes or offering them an opportunity to comment. This action violates Consumers' rights under the freedom of choice provisions of the Medicaid Act, which preempts the amendment to Section 365-f and the implementing RFP.

113. The RFP violates and is preempted by Section 1902(a)(23) of the Medicaid Act, 42 U.S.C. § 1396a(a)(23) and related regulations, because it restricts Medicaid participants' freedom of choice of providers. Further, the RFP violates and is preempted by Section 1902(a)(19) of the Medicaid Act, 42 U.S.C. § 1396a(a)(19), because it is not "consistent with simplicity of administration and the best interests of the recipients."

Section 365-f and the RFP Violate the ADA under Olmstead

114. The Supreme Court has held that states have obligations under Title II of the ADA to ensure that persons with physical or mental disabilities or impairments are not unjustifiably isolated in institutions and are provided services in the most integrated setting appropriate to their needs. *See Olmstead*, 527 U.S. 581. The Supreme Court recognized that:

> institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life" and "severely diminishes the everyday life activities of [such] individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment…

Id. at 600-601.

115. By requiring the transition of the entire population of 246,000 Consumers from over 600 FIs to a single SFI by April 1, 2025, with a proposed contract start date of October 1,

2024, the amendments to Section 365-f and the RFP threaten institutionalizations due to lapses in care.

116. Indeed, one of the Coalition's members, Carmen Colon, is a Consumer currently receiving care through CDPA Program. Ms. Colon resides in Brooklyn, New York, and has had a PA assigned through the Program since 2017. Ms. Colon suffers from high blood pressure, cholesterol, diabetes, and early memory loss. The PAs assigned to Ms. Colon are individuals who Ms. Colon knows and trusts, including her daughter-in-law and her close friend, who otherwise would not have been able to receive compensation for their caretaking services. Through a reliable and consistent FI, they have been receiving wages, benefits, and other administrative services since 2017.

117. Ms. Colon, along with thousands of other Consumers and PAs serviced by the Coalition's members, have received no notice or instructions with respect to the how Respondents' consolidation of over 600 FIs to a single SFI will affect her quality of care. However, it is certain that due to the arbitrary, restrictive and nonsensical bidding qualifications set forth in the RFP, the FI currently providing services to Ms. Colon (and hundreds of others) will *not* qualify to continue as an SFI, thus resulting in a likely disruption or lapse of service during any transitionary takeover by the SFI.

118. Upon information and belief, Ms. Colon's PAs do not meet the qualifications to become personal care aides and/or home health aides such that they could continue providing home care services to Ms. Colon through employment by a LHCSA that may have a common interest with her FI provider. Therefore, Ms. Colon is at risk of institutionalization.

119. In sum, Section 365-f and the RFP will have devastating impacts on the lives of the most vulnerable New Yorkers and the caregivers who serve them, including by forcing many Consumers into institutions where they will be isolated from their loved ones and communities.

Respondents Have Failed to Respond to Petitioner's June 2024 FOIL Request

120. The FOIL expresses the State's strong commitment to open government and public accountability and imposes a broad standard of disclosure upon the State and its agencies. N.Y. Pub. Off. Law § 84. The FOIL presumes that the public has a vested right to know certain information, and that secrecy is antithetical to our government. Thus, under the FOIL, all government records are presumptively open for public inspection and copying. The FOIL establishes timeframes and requirements applicable to responding to requests.

121. The FOIL allows for fees, and "the counsel fee provision was added in recognition that persons seeking to force an agency to respond to a proper FOIL request must engage in costly litigation, and the statute was recently amended in order to create a clear deterrent to . . . denials of access and thereby encourage every unit of government to make a good faith effort to comply with the requirements of FOIL." *Legal Aid Soc. V. New York State Dep't of Corr. & Cmty. Supervision*, 105 A.D.3d 1120, 1122 (3rd Dep't 2013).

122. On June 10, 2024, Petitioner, through counsel, submitted a request to the DOH, pursuant to the FOIL, seeking records relating to the April 20, 2024 amendments to Section 365-f, and/or Respondents' development and implementation of the RFP. To date, the DOH has not responded to Petitioner's June 2024 FOIL Request in the timeframes set forth by the FOIL, thereby depriving Petitioner of any opportunity to review relevant records prior to instituting this action.

AS AND FOR A FIRST CAUSE OF ACTION

Failure to Comply with the DOH's Procurement Procedures that Reflect the State's Applicable Laws and Regulations in Violation of Federal HHS Regulations

123. Petitioner repeats and re-alleges each and every allegation contained in the preceding paragraphs as if fully set forth herein.

124. Pursuant to 29 C.F.R. § 441.484, states may choose to provide financial management services to a participant who receives self-directed personal assistance services by using private entities. When a non-federal entity conducts such a procurement for FI services, it "must use its own documented procurement procedures which reflect applicable State, local, and tribal laws and regulations." 45 C.F.R. § 75.327.

125. By implementing the RFP, Respondents impermissibly deviated from their own procurement procedures that reflect New York's applicable laws and regulations, including by neglecting to ensure fair and adequate competition, restricting the Comptroller's oversight and review, and imposing strict bidder requirements that do not promote the best interest of the Program.

126. By reason of the foregoing, Respondents' actions are in violation of federal regulations. Respondents should be enjoined from taking further action on the RFP, and the Court should issue an order declaring the amendments to Section 365-f invalid.

AS AND FOR A SECOND CAUSE OF ACTION

Failure to Comply with Federal Procurement Standards in Violation of HHS Regulations

127. Petitioner repeats and re-alleges each and every allegation contained in the preceding paragraphs as if fully set forth herein.

128. Pursuant to 29 C.F.R. § 441.484, states may choose to provide financial management services to a participant who receives self-directed personal assistance services by using private entities. When a non-federal entity conducts such a procurement for FI services, the

procurement method must meet the federal requirements set forth in 45 C.F.R. §§ 75.327 through 75.340. Specifically:

> All procurement transactions must be conducted in a manner providing full and open competition consistent with the standards of this section . . . Some of the situations considered to be restrictive of competition include but are not limited to: . . . (1) Placing unreasonable requirements on firms in order for them to qualify to do business; (2) Requiring unnecessary experience and excessive bonding; . . . and (7) Any arbitrary action in the procurement process.

45 C.F.R. § 75.328.

129. Respondents' implementation of the RFP violates federal procurement laws by restricting competition, imposing geographical preferences, setting unreasonable requirements on entities in order for them to qualify to do business, requiring unnecessary experience and bonding, failing to ensure that the solicitation includes enough qualified sources to maximize free and open competition, neglecting to identify all factors that be used in evaluating proposals, and including descriptions of technical requirements which unduly restrict competition and are beyond the minimum essential standards to satisfy the intended purpose of the contract.

130. By reason of the foregoing, Respondents' actions are in violation of federal regulations. Respondents should be enjoined from taking further action on the RFP, and the Court should issue an order declaring the amendments to Section 365-f invalid.

AS AND FOR A THIRD CAUSE OF ACTION
Arbitrary and Capricious Implementation of the RFP in Violation of CPLR § 7803(3)

131. Petitioner repeats and re-alleges each and every allegation contained in the preceding paragraphs as if fully set forth herein.

132. Governmental actions can be challenged if they are "in violation of lawful procedure, [were] affected by an error of law, or [were] arbitrary and capricious or an abuse of discretion." CPLR § 7803(3).

133. Respondents' decision to select only one entity to provide SFI services under the RFP—without providing proper justification for this consolidation of FI services—is in violation of lawful procedure and is arbitrary and capricious. The bidding requirements and criteria set forth in the RFP include arbitrary and capricious terms such as:

a. requiring bidders to certify ADA compliance on all buildings;

b. requiring bidders to certify compliance with New York State prevailing wage laws;

c. requiring compliance with collective bargaining agreements;

d. prohibiting bidders from sharing common ownership and/or a controlling interest with LHCSAs and MCOs;

e. establishing a 5-year term for the SFI contract;

f. requiring a $100,000,000 line of credit; and

g. limiting the duties of subcontractors.

134. These terms are arbitrary and capricious as they are not required or suggested by Section 365-f, the statute governing the Program, and they are in violation of federal and state lawful procedures.

135. Respondents acted without legislative guidance or direction in adopting the terms of the RFP and have not offered any rational basis for these terms. Rather, Respondents' actions were inconsistent with the purposes of the CDPA Program and were arbitrary and capricious actions.

136. By reason of the foregoing, Respondents' actions are arbitrary and capricious. Respondents should be enjoined from taking further action on the RFP, and the Court should issue an order declaring the amendments to Section 365-f invalid.

AS AND FOR A FOURTH CAUSE OF ACTION
Violation of the Separation of Powers Doctrine under the New York State Constitution

137. Petitioner repeats and re-alleges each and every allegation contained in the preceding paragraphs as if fully set forth herein.

138. The New York State Constitution vests legislative authority in the Senate and the Assembly and prohibits executive agencies from exercising sweeping power to create whatever rules they deem necessary. N.Y. Const. art. III, § 1; *see also Boreali*, 71 N.Y.2d at 9, 13.

139. The amendments to Section 365-f provide Respondents with near absolute discretion. Respondents' implementation of the RFP and inclusion of additional restrictive specifications for bidders seem to reflect Respondents' own policy goals, rather than those of the legislature.

140. Respondents were not merely filling details in setting the bidding terms within the RFP but rather setting forth entirely new criteria that were not approved by the legislature—such as requiring compliance with collective bargaining agreements and prohibiting common and/or controlling ownership(s) in LHCSA(s) and/or MCO(s). Respondents adopted these terms after a history of failed legislative overhauls to the CDPA Program, and without basing the RFP terms on their actual expertise and/or in a manner that promotes the best interests of the participants of the Program.

141. By reason of the foregoing, Respondents' actions are in violation of the State Constitution. Respondents should be enjoined from taking further action on the RFP, and the Court should issue an order declaring the amendments to Section 365-f invalid.

AS AND FOR A FIFTH CAUSE OF ACTION
Failure to Provide Equal Protection in Violation of the New York State Constitution

142. Petitioner repeats and re-alleges each and every allegation contained in the preceding paragraphs as if fully set forth herein.

143. The Equal Protection Clause of the New York State Constitution mandates that "[n]o person shall be denied the equal protection of the laws of this state or any subdivision thereof." N.Y. Const. art. I § 11.

144. By imposing specific qualifications for bidders which single out groups based upon arbitrary and capricious criteria, Respondents deprive Petitioner's members of equal protection under the law.

145. By reason of the foregoing, Respondents' actions are in violation of the State Constitution. Respondents should be enjoined from taking further action on the RFP, and the Court should issue an order declaring the amendments to Section 365-f invalid.

AS AND FOR A SIXTH CAUSE OF ACTION
Unduly Burdening Commerce in Violation of the U.S. Constitution

146. Petitioner repeats and re-alleges each and every allegation contained in the preceding paragraphs as if fully set forth herein.

147. The Commerce Clause of the U.S. Constitution vests the authority to regulate Commerce "among the several States" in Congress and forbids state economic actions which impair such commerce. U.S. Const. art. I, § 8, cl. 3.

148. Respondents place an undue burden on Petitioner's members' ability to bid and participate in New York's economy by requiring that bidders have prior out-of-state experience on a statewide basis. This requirement has no apparent basis in law or reason and appears only to be included to unduly restrict the number of eligible bidders for the RFP.

149. By reason of the foregoing, Respondents' actions are in violation of the U.S. Constitution. Respondents should be enjoined from taking further action on the RFP, and the Court should issue an order declaring the amendments to Section 365-f invalid.

AS AND FOR A SEVENTH CAUSE OF ACTION
Impairment of Contracts in Violation of the U.S. Constitution

150. Petitioner repeats and re-alleges each and every allegation contained in the preceding paragraphs as if fully set forth herein.

151. The Contracts Clause of the U.S. Constitution prohibits states from passing any law "impairing the obligation of contracts." U.S. Const. art. I, § 10.

152. Respondents' actions to unduly restrict Petitioner's members' ability to bid and continue performing FI services impairs existing contracts on an industry-wide basis, and will result in the loss of entire businesses, as well contracts with MCOs, vendors, unions, insurance companies, and employees currently working in the CDPA Program.

153. By reason of the foregoing, Respondents' actions are in violation of the U.S. Constitution. Respondents should be enjoined from taking further action on the RFP, and the Court should issue an order declaring the amendments to Section 365-f invalid.

AS AND FOR AN EIGHTH CAUSE OF ACTION
Failure to Provide Equal Protection in Violation of the U.S. Constitution

154. Petitioner repeats and re-alleges each and every allegation contained in the preceding paragraphs as if fully set forth herein.

155. The Equal Protection Clause of the Fourteenth Amendment of the Constitution protects individuals and groups from laws which deprive them of equal protection. U.S. Const. amend. XIV, § 1.

156. By imposing qualifications for bidders which single out groups based upon arbitrary and capricious criteria, Respondents deprive Petitioner's members of equal protection under the law.

157. By reason of the foregoing, Respondents' actions are in violation of the U.S. Constitution. Respondents should be enjoined from taking further action on the RFP, and the Court should issue an order declaring the amendments to Section 365-f invalid.

AS AND FOR A NINTH CAUSE OF ACTION
Impermissible Bill of Attainder in Violation of the U.S. Constitution

158. Petitioner repeats and re-alleges each and every allegation contained in the preceding paragraphs as if fully set forth herein.

159. The Constitution prohibits bills of attainder and the adoption of laws which single out individuals or groups for punishment without trial. U.S. Const. art. I, § 10, cl. 1.

160. The amendments to Section 365-f impermissibly single out groups of entities, including but not limited to, those which did not perform FI services in at least one other state on a statewide basis prior to April 1, 2024, and those that have common and/or controlling interests in LHCSA(s) or MCO(s). Respondents therefore impose a punishment on entities that are located exclusively within New York state and/or share a common interest or controlling owner with a LHCSA and/or MCO. These restrictions do not reasonably serve a stated legitimate governmental or CDPA Program objective, and only operate to subject specific groups to punishment by destroying their businesses.

161. By reason of the foregoing, Respondents' actions are an impermissible bill of attainder, in violation of the U.S. Constitution. Respondents should be enjoined from taking further action on the RFP, and the Court should issue an order declaring the amendments to Section 365-f invalid.

AS AND FOR A TENTH CAUSE OF ACTION
Infringement on Consumers' Rights to Freedom of Choice of Providers in Violation of the Medicaid Act and Federal Regulations

162. Petitioner repeats and re-alleges each and every allegation contained in the preceding paragraphs as if fully set forth herein.

163. The DOH receives federal funds from CMS, which Respondents use to implement the CDPA Program.

164. Section 1902(a)(23) of the Medicaid Act provides that Medicaid beneficiaries may obtain services from any qualified Medicaid provider who undertakes to provide the services to them.

165. Section 1915(b) of the Medicaid Act authorizes a waiver of the Section 1902(a)(23) freedom of choice of providers requirement in certain specified circumstances.

166. In accordance with 42 C.F.R. § 431.55(f)(2)(ii), a state can obtain a waiver of the freedom of choice requirement "only if its applicable state standards are consistent with access, quality and efficient and economic provision of covered care and services and the restrictions it imposes . . . do not discriminate among classes of providers on grounds unrelated to their demonstrated effectiveness and efficiency in providing those services."

167. Pursuant to 42 C.F.R. §§ 430.25 and 431.51, unless a state obtains such a waiver from CMS pursuant to Section 1915(b) of the Medicaid Act, the state cannot restrict Medicaid beneficiaries' freedom of choice of providers.

168. Respondents' decision to select a single provider of FI services to Medicaid beneficiaries throughout the entire state without obtaining a proper waiver from CMS violates Consumers' rights under the freedom of choice provisions of the Medicaid Act (42 U.S.C. §§ 1396(a)(19); 1396a(a)(23)), as well as federal regulations, including 42 C.F.R. §§ 430.25; 431.51; 431.55(f)(2)(ii).

169. Respondents' transition to a single SFI is a material change in the State's operation of the Medicaid program. Their failure to amend the State plan by notifying CMS and/or seeking CMS's approval of a waiver, violate 42 C.F.R. § 430.12(c), which obligates New York to amend its State plan if there is a "material change[ ] in State law . . . or in the State's operation of the Medicaid program."

170. Respondents' actions also violate 42 U.S.C. § 1396a(a)(19), as their implementation of the RFP is not "consistent with simplicity of administration and the best interests of the recipients."

171. By reason of the foregoing, Respondents should be enjoined from taking further action on the RFP, and the Court should issue an order declaring the amendments to Section 365-f invalid.

172. Moreover, the Court should enter a declaratory judgment stating that Section 365-f and the RFP are preempted by federal Medicaid laws and regulations.

AS AND FOR AN ELEVENTH CAUSE OF ACTION
Unjustified Segregation of ***Individuals with Disabilities in Violation of Olmstead, the ADA, the Rehabilitation Act, and the Affordable Care Act***

173. Petitioner repeats and re-alleges each and every allegation contained in the preceding paragraphs as if fully set forth herein.

174. Pursuant to Section 504 of the Rehabilitation Act of 1973, Section 1557 of the Affordable Care Act, Title II of the ADA, and the Supreme Court's decision in *Olmstead*, covered entities are obligated to ensure that individuals with disabilities receive services in the most integrated setting appropriate to their needs.

175. As a recipient of federal funds from CMS, Respondent Department of Health is a covered entity and is required to comply with Section 504 of the Rehabilitation Act and Section

1557 of the Affordable Care Act. As a state entity, the DOH is required to comply with Title II of the ADA.

176. Consumers who receive services from Petitioner's members are living in the most integrated settings, their homes. Petitioner's members' FI services have provided their Consumers with the opportunity to interact with non-disabled persons to the fullest extent possible.

177. The amendments to Section 365-f and the RFP have mandated that Petitioner's members and each of the hundreds of other entities providing FI services pursuant to the CDPA Program in New York completely cease their operations by April 1, 2025.

178. Contrary to the requirements of the ADA, *Olmstead*, the Rehabilitation Act, and the Affordable Care Act, Respondents' actions will result in the unjustified segregation of individuals with disabilities. Moreover, in violation of the aforementioned laws, Respondents fail to ensure that individuals with disabilities receive adequate services to enable them to remain at home, in their most integrated setting.

179. By reason of the foregoing, Respondents should be enjoined from taking further action on the RFP, and the Court should issue an order declaring the amendments to Section 365-f invalid.

AS AND FOR A TWELFTH CAUSE OF ACTION
Failure to Furnish Requested Records in Violation of the FOIL

180. Petitioner repeats and re-alleges each and every allegation contained in the preceding paragraphs as if fully set forth herein.

181. Petitioner has a legal right under the FOIL to access the public records requested in each of Petitioner's FOIL Requests. The FOIL recognizes the public's right to access and review government documents. Agency records are presumed to be public and subject to disclosure under

FOIL. Article 78 is the appropriate method of review of final agency determinations concerning FOIL Requests.

182. Respondents have not produced any of the records sought by Petitioner and have failed to properly invoke any purported exemptions to disclosure under the FOIL.

183. Respondents have not produced any of the records sought by Petitioner and have failed to respond within the timeframe mandated by the FOIL. Respondents did not meet their burden to provide specific and particularized justification for withheld and redacted records requested under the FOIL.

184. On June 10, 2024, Petitioner, through its counsel, submitted a request to the DOH pursuant to the FOIL, seeking records relating to the implementation of the CDPA Program and RFP. To date, Petitioner has not received a response by the date certain that the agency promised to provide the records, and Respondents' actions leave Petitioner with no other remedy at law. Petitioner has not made a prior application for the relief requested herein.

185. By reason of the foregoing, Respondents should be ordered to produce records in response to Petitioner's June 2024 FOIL Request. Further, as the DOH has no reasonable basis for its failure to respond to Petitioner's June 2024 FOIL Request, Petitioner is entitled to attorney's fees under Section 89(4)(c) of the New York Public Officers Law.

REQUEST FOR RELIEF

WHEREFORE, Petitioner respectfully requests that this Court enter judgment, pursuant to Civil Practice Law and Rules Sections 3001 and 7806, on its behalf:

a. Ordering Respondents be permanently enjoined and prevented from taking further action to implement the RFP;

b. Declaring the April 20, 2024, amendments to Section 365-f unconstitutional, arbitrary and capricious, contrary to lawful procedure, and invalid;

c. Declaring that the April 20, 2024, amendments to Section 365-f and the implementation of the RFP are preempted by the Medicaid Act, the U.S. Code, Part 75, and related federal regulations;

d. Ordering and Directing Respondents to comply with their duty under the FOIL to provide Petitioner with the requested records and documents responsive to Petitioner's June 2024 FOIL Request that are not subject to any exemption and to specifically identify and describe any documents allegedly exempt from disclosure; and

e. Awarding Petitioner reasonable attorney's fees pursuant to Section 89(4)(c) of the New York Public Officers Law;

f. Awarding Petitioner reasonable attorney's fees and costs pursuant to the New York Equal Access to Justice Act; and

g. Granting Petitioner such other and further relief as the Court deems necessary, equitable, just, and proper.

Dated: August 12, 2024
New York, New York

LITTLER MENDELSON P.C.

By: */s/ Paul R. Piccigallo*

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Attorneys for Petitioner

VERIFICATION

I, Mordy Schwab, being duly sworn, depose and state that I am the Treasurer of Petitioner, Save Our Consumer Directed Home Care Program, Inc. I have read the foregoing Verified Petition and Complaint, and know the contents of same to be true to the best of my knowledge, except as matters stated to be alleged on information and belief, and as to those matters, I believe them to be true. I am authorized by Petitioner to execute this petition on its behalf.

Mordy Schwab

Sworn to me before this 12 day
of August, 2024

Notary Public

LANDAU SHLOMO
NOTARY PUBLIC, STATE OF NEW YORK
NO. 01LA6445567
QUALIFIED IN KINGS COUNTY
MY COMMISSION EXPIRES DECEMBER 27, 2026