STATE OF NEW YORK

8376

IN SENATE

February 17, 2022

Introduced by Sen. MANNION -- read twice and ordered printed, and when printed to be committed to the Committee on Health

AN ACT to amend the social services law, in relation to the registration process for fiscal intermediaries; and to repeal certain provisions of such law relating thereto

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Paragraphs (b), (b-1), (b-2), (b-3) and (c) of subdivision 4-a of section 365-f of the social services law are REPEALED.

§ 2. Paragraph (a) of subdivision 4-a of section 365-f of the social services law, as added by section 1 of part E of chapter 57 of the laws of 2017, subparagraphs (i) and (ii) as amended by section 3 of part G of chapter 57 of the laws of 2019, is amended to read as follows:

(a) For the purposes of this section:

(i) "Fiscal intermediary" means an entity that provides fiscal intermediary services and has a contract for providing such services with the department of health and is [~~selected through the procurement process described in paragraph (b) of this~~] registered by the department pursuant subdivision four-b of this section. Eligible [~~applicants for contracts shall be~~] entities shall demonstrate to the department that they are capable of appropriately providing fiscal intermediary services, performing the responsibilities of a fiscal intermediary, and complying with this section, including but not limited to entities that:

(A) are a service center for independent living under section one thousand one hundred twenty-one of the education law; or

(B) have been established as fiscal intermediaries prior to [~~January~~] April first, two thousand [~~twelve and have been continuously providing such services for eligible individuals under this section~~] twenty-two.

(ii) Fiscal intermediary services shall include the following services, performed on behalf of the consumer to facilitate his or her role as the employer:

(A) wage and benefit processing for consumer directed personal assistants;

(B) processing all income tax and other required wage withholdings;

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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(C) complying with workers' compensation, disability and unemployment requirements;

(D) maintaining personnel records for each consumer directed personal assistant, including time records and other documentation needed for wages and benefit processing and a copy of the medical documentation required pursuant to regulations established by the commissioner;

(E) ensuring that the health status of each consumer directed personal assistant is assessed prior to service delivery pursuant to regulations issued by the commissioner;

(F) maintaining records of service authorizations or reauthorizations;

(G) monitoring the consumer's or, if applicable, the designated representative's continuing ability to fulfill the consumer's responsibilities under the program and promptly notifying the authorizing entity of any circumstance that may affect the consumer's or, if applicable, the designated representative's ability to fulfill such responsibilities;

(H) complying with **reporting requirements and** regulations established by the commissioner specifying the responsibilities of fiscal intermediaries providing services under this title;

(I) entering into a department approved memorandum of understanding with the consumer that describes the parties' responsibilities under this program; [~~and~~]

(J) **reporting quality monitoring and oversight data required pursuant to this section; and**

(K) other related responsibilities which may include, as determined by the commissioner, assisting consumers to perform the consumers' responsibilities under this section and department regulations in a manner that does not infringe upon the consumer's responsibilities and self-direction.

(iii) Fiscal intermediaries are not responsible for, and fiscal intermediary services shall not include, fulfillment of the responsibilities of the consumer or, if applicable, the consumer's designated representative as established by the commissioner. A fiscal intermediary's responsibilities shall not include, and a fiscal intermediary shall not engage in: managing the plan of care including recruiting and hiring a sufficient number of individuals who meet the definition of consumer directed personal assistant, as such term is defined by the commissioner, to provide authorized services that are included on the consumer's plan of care; training, supervising and scheduling each consumer directed personal assistant; terminating the consumer directed personal assistant's employment; or assuring that each consumer directed personal assistant competently and safely performs the personal care services, home health aide services and skilled nursing tasks that are included on the consumer's plan of care. A fiscal intermediary shall exercise reasonable care in properly carrying out its responsibilities under the program.

§ 3. Subdivision 4-b of section 365-f of the social services law is REPEALED and a new subdivision 4-b is added to read as follows:

4-b. Fiscal intermediary registration. (a) All fiscal intermediaries shall be registered with the department prior to providing fiscal intermediary services. The department shall not deny registration to an existing fiscal intermediary in good standing with the department on the effective date of this section.

(i) A registration or registration renewal shall be valid for five years from the date of issue. An application for the renewal of any registration issued under this section shall be filed with the depart-

ment not more than six months nor less than four months prior to the expiration thereof.

(ii) The fee for initial registration shall be based on the estimated number of consumers within the applicant's service area, as determined by the department in regulations, but in no event shall the fee exceed five thousand dollars.

(iii) The fee for registration renewal shall be based on the number of consumers within the applicant's service area as determined by the department at the date of renewal, but in no event shall the fee exceed two thousand dollars. Fiscal intermediaries that fail to apply for registration renewal within the timeframe set forth in subparagraph (i) of this paragraph shall be subject to a penalty of five hundred dollars each month or part thereof that the fiscal intermediary is in default. A fiscal intermediary that failed to apply for registration renewal in the prior year by the deadline of the current year shall not be permitted to register for the upcoming registration period unless such fiscal intermediary submits any unpaid late fees.

(iv) For existing fiscal intermediaries in good standing with the department on the effective date of this section, the department shall develop a streamlined registration process that ensures continuation of fiscal intermediary services and requires attestation that such fiscal intermediaries can achieve compliance with the requirements of this section. Upon issuance of registration by the department, such fiscal intermediaries shall be subject to all requirements set forth in this section.

(b) The application for initial registration shall be submitted on a form prescribed by the department, which shall include an attestation that the entity is able to provide fiscal intermediary services, including but not limited to:

(i) the applicant's ability to appropriately serve individuals participating in the program;

(ii) demonstrated compliance with all applicable federal and state laws and regulations, including but not limited to those relating to wages and labor; and

(iii) provide additional informational data to the department as required in paragraph (i) of this subdivision.

(c) The application for registration renewal shall be submitted on a form prescribed by the department and include such information as descriptions of any material changes in the circumstances or factors listed in paragraph (b) of this subdivision, including:

(i) changes in ownership or service area;

(ii) number of consumers in the service area; and

(iii) any incidents related to noncompliance with applicable state and federal laws and regulations.

(d) If the commissioner determines that the fiscal intermediary has failed to comply with the provisions of this section or regulations promulgated hereunder, the department shall provide written notice to the fiscal intermediary and may impose a penalty of not less than five hundred dollars and not exceeding one thousand dollars per violation of non-compliance. Such written notice shall include:

(i) a description of the conduct and the issues related thereto that have been identified as failure of compliance;

(ii) the timeframe of the conduct that fails compliance;

(iii) required corrective actions and a timeframe for implementation of such corrective actions to bring the fiscal intermediary into compliance; and

(iv) the assigned penalty associated with non-compliance.

(e) Notwithstanding the foregoing, upon a determination that the public health or safety would be imminently endangered by the continued operation or actions of a fiscal intermediary, the commissioner may terminate such fiscal intermediary's registration or suspend or limit such fiscal intermediary's rights and privileges under the registration immediately upon written notice.

(f) All orders or determinations under this subdivision shall be subject to review as provided in article seventy-eight of the civil practice law and rules.

(g) In order to be issued registration or registration renewal as a fiscal intermediary, an entity shall:

(i) be willing and able to serve any consumer in the entity's selected service area;

(ii) have and maintain an effective organizational structure with qualified administrative staff to deliver all the services and ensure fiscal intermediary personnel have the appropriate training and knowledge to fulfill their duties;

(iii) maintain an organizational chart with professional and managerial lines of authority and submit such chart to the department upon request. Where the fiscal intermediary is also a licensed home care services agency (LHCSA), maintain adequate firewalls between the LHCSA and fiscal intermediary lines of business to ensure the avoidance of actual or perceived conflicts of interest;

(iv) document and maintain written fiscal intermediary policies and procedures, including policies for administrative staff;

(v) ensure appropriate cultural and linguistic competencies are available to serve its consumers and personal assistants that assist consumers;

(vi) maintain a local presence, commensurate with selected service areas to ensure effective and timely delivery of the services required pursuant to this subdivision; and

(vii) establish, maintain, and periodically review a disaster preparedness and emergency plans and procedures related to the provision of required services.

(h) Fiscal intermediaries shall submit, in a form determined by the department, information regarding fiscal monitoring and oversight measures undertaken by the fiscal intermediary, including:

(i) fiscal procedures adopted by the fiscal intermediary that comply with generally accepted accounting principles and Medicaid rules and regulations, including internal control procedures;

(ii) financial records that facilitate fiscal monitoring and audits;

(iii) fiscal oversight practices;

(iv) corporate compliance policies and procedures in accordance with the federal deficit reduction act and the false claims act to prevent, detect and report fraud, waste and abuse by board members, employees and consumers, and develop strategies to prevent and detect such fraud; and

(v) information regarding the fiscal intermediary's compliance with office of Medicaid inspector general compliance program required duties.

(i) (i) In addition to the annual direct care and administrative cost reports required by paragraph (k) of this subdivision, the fiscal intermediary shall submit, in a form and frequency determined by the department, a report listing quality measures and other data to assist in the evaluation of the effectiveness and quality of services provided by the fiscal intermediary. Such report shall include:

(A) the number of timely processed payroll cycles and the total number of processed payroll cycles;

(B) the number of accurate paychecks processed and the total number of paychecks processed each cycle;

(C) the number of days to onboard a personal assistant;

(D) information regarding complaints tracked by the fiscal intermediary, including the dates of complaint submission and resolution, the nature of the complaints, how complaints were resolved, and any applicable corrective measures or actions taken to ensure similar complaints can be avoided;

(E) the total number of referrals made each month by a local department of social service or managed care organization;

(F) the number of times consumer services are suspended for hospital admission;

(G) information related to social determinants of health, cultural or racial disparities or related information; and

(H) any other information deemed appropriate by the department.

(ii) In addition to the information and data identified in this paragraph, the fiscal intermediary shall cooperate with other efforts undertaken by the department to assess fiscal intermediary services, including consumer satisfaction surveys.

(j) (i) Fiscal intermediaries shall demonstrate compliance with all state privacy, confidentiality, and security policies and standards, as well as with all applicable state and federal requirements. In the event registration is not renewed or revoked by the department, fiscal intermediaries shall retain all programmatic records, supporting documents, statistical records, and other records related to the delivery of fiscal intermediary services for a minimum of six years from the expiration of such registration.

(ii) Fiscal intermediaries shall implement and maintain plans, procedures, policies, internal controls, and appropriate administrative, technical, and physical safeguards, consistent with applicable laws and rules to ensure the security, confidentiality, integrity, and availability of personal identifiable information and protected health information created, collected, used, transferred, and/or disclosed by the fiscal intermediary. At a minimum, such plans, procedures, policies, internal controls, and appropriate administrative, technical, and physical safeguards shall ensure:

(A) the secure and confidential storage of hard copy and electronically stored information;

(B) protected information is only used by or disclosed to those authorized to receive or view it;

(C) protected information is protected against any reasonably anticipated threats or hazards to the confidentiality, integrity, and availability of such information;

(D) protected information is protected against any reasonably anticipated uses or disclosures of such information that are not permitted or required by law; and

(E) protected information is securely destroyed or disposed of in an appropriate and reasonable manner and in accordance with retention schedules.

(iii) Fiscal intermediaries shall maintain and provide to the department upon request their data privacy and security plans and procedures, as well as a plan for ensuring compliance with the federal health insurance portability and accountability act of nineteen hundred ninety-six and its implementing regulations. Fiscal intermediaries shall notify the

department of any breach of privacy or confidentiality upon discovery of the breach.

(k) (i) The commissioner shall require a fiscal intermediary to report annually on the direct care and administrative costs of personal assistance services as accounted for by the fiscal intermediary. The department shall specify the format of such reports, determine the type and amount of information to be submitted, and require the submission of supporting documentation, provided, however, that the department shall provide no less than ninety calendar days' notice before such reports are due.

(ii) If the department determines that the cost report submitted by a provider is inaccurate or incomplete, the department shall notify the provider in writing and advise the provider of the correction or additional information that the provider must submit. The provider shall submit the corrected or additional information within thirty calendar days from the date the provider receives the notice.

(iii) The department shall grant a provider an additional thirty calendar days to submit the original, corrected or additional cost report when the provider, prior to the date the report is due, submits a written request to the department for an extension and establishes to the department's satisfaction that the provider cannot submit the report by the date due for reasons beyond the provider's control.

(iv) All reports shall be certified by the owner, administrator, chief executive officer, or public official responsible for the operation of the provider. The cost report form shall include a certification form, which shall specify who shall certify the report.

(l) The department shall provide a minimum of ninety calendar days' notice to fiscal intermediaries prior to collecting any reports or information required pursuant to paragraphs (h), (i), (j) and (k) of this subdivision, provided however that the effective date of initial registration issued by the department shall serve as notice to the fiscal intermediary that the department will be collecting an initial report and/or information pursuant to this subdivision.

§ 4. Subdivision 4-c of section 365-f of the social services law is REPEALED and subdivision 4-d is renumbered subdivision 4-c.

§ 5. Subdivision 4-c of section 365-f of the social services law, as added by section 7 of part G of chapter 57 of the laws of 2019, paragraph (d) as added and paragraphs (e) and (f) as relettered by section 3 of part LL of chapter 57 of the laws of 2021, and such section as renumbered by section four of this act, is amended to read as follows:

4-c. Fiscal intermediaries ceasing operation. (a) Where a fiscal intermediary is ceasing operation or will no longer serve the consumer's area, the fiscal intermediary shall:

(i) deliver written notice forty-five calendar days in advance to the affected consumers, consumer representatives, personal assistants, the department, and any local social services districts or managed care plans with which the fiscal intermediary [~~contracts~~] registers. Within five business days of receipt of the notice, the local social services district or managed care plan shall acknowledge the notice and provide the affected consumers with a list of other fiscal intermediaries operating in the same county or managed care plan network as appropriate;

(ii) not take any action that would prevent a personal assistant from moving to a new fiscal intermediary of the consumer's choice, nor require the consumer or the personal assistant to switch to a personal care or home health care program not under this section; and

(iii) upon request and consent, promptly transfer all records relating to the individual's health and care authorizations, and personnel documents to the fiscal intermediary or personal care or home health care provider chosen by the consumer and assume all liability for omissions or errors in such records.

(b) Where a consumer is electing to transfer his or her services to a new fiscal intermediary or a personal care or home health care provider by the consumer's independent choice, the fiscal intermediary being discontinued shall comply with subparagraphs (ii) and (iii) of paragraph (a) of this subdivision.

(c) Where a fiscal intermediary is suspending or ceasing operation pursuant to an order under subdivision four-b of this section[~~, or has failed to submit an offer for a contract,~~] or has been denied a [~~contract~~] **registration** under this section, all the provisions of this subdivision shall apply except subparagraph (i) of paragraph (a) of this subdivision, notice of which to all parties shall be provided by the department as appropriate.

(d) where a fiscal intermediary is acquired by, merges with, sells assets to, or engages in a transaction of a similar nature with a fiscal intermediary that was [~~awarded a contract~~] **registered** pursuant to subdivision four-a of this section, all the provisions of this subdivision shall apply. In providing notice under subparagraph (i) of paragraph (a) of this subdivision, the fiscal intermediary may inform the notice recipient of the applicable transaction and, if applicable, the ability of the consumer to remain with the awarded fiscal intermediary in accordance with any guidance issued by the commissioner.

(e) The local social services district or managed care plan, as appropriate, shall supervise the transition of services and transfer of records and maintain provision of services by the personal assistant(s) chosen by the individual.

(f) Any transfer under this subdivision shall not diminish any of an individual's rights relating to continuity of care, utilization review or fair hearing appeals and aid continuing.

§ 6. Subparagraph (ii) of paragraph (c) of subdivision 9 of section 365-f of the social services law, as added by section 24 of part C of chapter 60 of the laws of 2014, is amended to read as follows:

(ii) The commissioner may require that applications submitted pursuant to this subdivision be submitted in response to and in accordance with [~~a request for applications or a request for proposals issued by the commissioner~~] **registration requirements established pursuant to this section**.

§ 7. The commissioner of health shall take the necessary steps to repeal subdivision (k) of section 505.28 of title 18 of the New York codes, rules, and regulations.

§ 8. This act shall take effect six months after it shall have become a law. Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date.