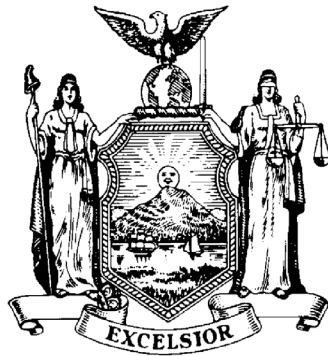


State of New York  
Offices of the Inspector General



Investigation of Alleged Irregularities Involving  
Care Coordination Organizations  
in the State's Health Home Program  
at the New York State  
Office for People With Developmental Disabilities  
and the Department of Health

September 2021

Robyn Adair  
Acting Inspector General

## EXECUTIVE SUMMARY

On September 10, 2020, the Offices of the New York State Inspector General received a 67-page memorandum written by Theodore Kastner, M.D., commissioner of the New York State Office for People With Developmental Disabilities (OPWDD), alleging irregularities in New York State's transition to a managed care system for individuals with intellectual and developmental disabilities (I/DD). Specifically, Kastner alleged that beginning in 2016, Michael Mascari, then a part-time adviser to then OPWDD acting Commissioner Kerry Delaney, may have manipulated the procurement and financing of Care Coordination Organizations (CCOs) in collaboration with Delaney, Paul Francis, then deputy secretary for health and human services in the Executive Chamber, and providers of services to individuals with I/DD. Additionally, Kastner alleged that Mascari manipulated the rate setting process so as to maximize CCO profitability; and Mascari, Francis and Delaney misrepresented CCO start-up costs as administrative fees in claims to the Centers for Medicare & Medicaid Services (CMS). Lastly, Kastner alleged that Mascari, the chairman of Partners Health Plan, Inc. (PHP), rewarded Delaney for her complicity by offering her future employment with PHP as its chief executive officer, and Delaney accepted his offer.

The Inspector General conducted an investigation of Kastner's allegations by reviewing thousands of pages of records and interviewing witnesses involved with New York State's transition to managed care for individuals with I/DD including Kastner, Delaney, Francis, Mascari, OPWDD's former general counsel, the former director of the New York State Department of Health (DOH) Division of Long-Term Care, the OPWDD deputy commissioner for enterprise solutions, and a DOH chief health care fiscal analyst, among others.

As set forth below, the Inspector General's investigation found that while certain policy and programmatic decisions made the State's transition to managed care for individuals with I/DD susceptible to Kastner's criticism, the substantive decisions were consistent with the State's long-standing managed care policy goals prior to Mascari's hiring and were subject to approval by Delaney, outside state and federal agencies, and/or the Executive Chamber. Notably, the investigation found that Kastner's allegations were often based on his mistaken assumptions and suppositions, a misunderstanding of the mechanism used to select CCO/Health Homes (HH) applicants, and/or reflected material differences of opinion on policy decisions made by the State regarding the transition of individuals with I/DD to managed care.

The investigation was unable to substantiate allegations made by Kastner including whether the redesignation of start-up costs as administrative costs was done upon the advice of and in consultation with CMS due to the absence of records, overly general guidance from CMS, and the lack of recollection by a witness of the many collaborative conversations she engaged in with CMS.

Mascari's chairmanship at PHP and PHP's affiliation with the CCO applicant Care Design NY, LLC (Care Design) while serving as Delaney's advisor may have presented an appearance of a conflict of interest, however, there is no definitive evidence that it improperly influenced the process or ultimately, the designations of CCOs. Further, Delaney should have sought guidance from the agency's ethics officer or the New York State Joint Commission on Public Ethics (JCOPE) upon engaging in discussions related to employment with PHP in order to ensure that she was in compliance with New York State Public Officers Law.

At the heart of this investigation was the question of whether Mascari was considered a State employee—and therefore subject to New York State's Code of Ethics found in the Public Officers Law—or whether he was considered a consultant and therefore not subject to such requirements. This discrepancy creates an apparent loophole where contractors or consultants doing business with the State may be able to circumvent measures designed to ensure public accountability. This investigation may serve as an opportunity to reexamine the regulation of contractors or consultants to determine if these entities should be subjected to enhanced ethics requirements.

## BACKGROUND

From 2012 to 2018, New York State, with approvals from CMS, established Health Homes for Medicaid-eligible adults, children, and individuals with I/DD. Health Homes are defined as groups of healthcare and service providers working together to ensure care and services are provided to individuals in a managed care structure. To encourage the nationwide establishment of Health Homes, the federal government offered to contribute 90 percent of program costs for two years following the approval of a state's plan.<sup>1</sup> This 90 percent funding was the fiscal impetus for New York State to develop a CCO/HH program for individuals with

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<sup>1</sup> The federal government's share of most Medicaid expenditures is known as the Federal Medical Assistance Percentage (FMAP).

I/DD. At the conclusion of the two-year period, the State and local share would increase to 50 percent of program costs.

To effectuate its Health Home plan, New York State submitted state plan amendments to the federal government with the goal of serving adults, children, and individuals with I/DD using the Health Home structure. The United States Department of Health and Human Services approved New York's Health Home Program in 2012 for the adult population, in spring 2013 for children, and in fall 2013 for individuals with I/DD.

In response to the State's policy decision to move towards managed care for individuals with I/DD, Delaney formed a Transformation Panel in February 2015 to "offer guidance on OPWDD's transition . . . and to shape clear and actionable recommendations to guide the agency's path forward." The panel was comprised of stakeholders within the I/DD-regulated community, including self-advocates, parents of children with I/DD, providers, and experts in the field. Several panel members eventually served on an OPWDD Advisory Committee created to support the rollout of the CCO/HH program. As part of this effort, Mascari was hired by the Research Foundation for Mental Hygiene, Inc. (RFMH)<sup>2</sup> in 2016 to advise Delaney on the advancement of the Transformation Panel's recommendations, consult with the Advisory Committee, and more generally, advise Delaney in preparing for the State's transition to managed care for individuals with I/DD.

In New York State's Health Home Program, a care coordinator creates enrollees' care plans, helps them access services, and coordinates treatment with all their caregivers. Health Homes collaborate between a number of organizations, which may include hospitals, community providers, health plans, and others. Health Homes receive a per-member, per-month payment for services. CCOs, designated by New York State in June 2018, are specialized Health Homes that work with individuals with I/DD and their families to coordinate health and I/DD services efficiently.

Kastner was hired as Delaney's successor and OPWDD's acting commissioner in January 2019, and was appointed commissioner in June 2019. He has a long history of working with individuals with I/DD. Prior to his OPWDD employment, Kastner served as director of the Rose

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<sup>2</sup> The Research Foundation for Mental Hygiene, Inc., is a private, not-for-profit corporation that assists and enhances the research and training objectives of the New York State Office of Mental Health (OMH), OPWDD, and New York State Office of Addiction Services and Supports (OASAS).

F. Kennedy Children's Evaluation and Rehabilitation Center at Montefiore Medical Center, which assists individuals with or at risk for developmental disabilities. Kastner also had associations with Mascari and PHP. In 2013, PHP sought Kastner's assistance in its efforts to start a managed care plan. In early 2019, Mascari, PHP's board chairman, approached Kastner about becoming the next OPWDD commissioner. That outreach led, in part, to Kastner's hiring by OPWDD in January 2019.

In October 2017, OPWDD/DOH issued a request for applications for the designation of CCO in the CCO/HH program. Kastner, then the director of the Rose F. Kennedy Center, was involved in Montefiore Medical Center's submission of an application for this designation. In November 2017, Kastner raised concerns with OPWDD regarding his belief that the application process provided an unfair advantage to certain CCOs, which had been designated by OPWDD as "emerging CCOs" prior to the issuance of the request for applications. Ultimately, Montefiore Medical Center was not awarded a CCO/HH designation by OPWDD.

## ALLEGATIONS

In his extensive September 2020 memorandum, Kastner raised a number of complaints regarding the State's transition to managed care for individuals with I/DD. The core of his allegations is tied to the hiring of Mascari as an advisor to Delaney through a contract with RFMH. In general, Kastner alleged that Mascari, the chairman of PHP and one of its founding members, orchestrated the State's transition to managed care for individuals with I/DD in a way that would financially benefit PHP and its affiliated entity, Care Design. Kastner further alleged that Delaney accepted all guidance provided by Mascari and in turn was rewarded for her complicity with a job at PHP. Lastly, Kastner alleged that Delaney, Francis, and providers of services to individuals with I/DD worked in "collaboration" to achieve these ends.

### **Mascari's Role as Delaney's Advisor**

When Mascari was hired by RFMH in 2016, his title was Project Administrator - Senior Advisor Level IV. The primary responsibilities listed in RFMH's position announcement for Mascari's role stated that the Project Administrator would be "responsible for providing advice to OPWDD Senior Executive Staff." Specifically, the announcement said that the Project Administrator would review "high level" elements of the Transformation Panel's recommendations; review and provide advice on a rate rationalization initiative; and assist OPWDD in assessing managed care readiness. According to several witnesses interviewed in

this investigation, Mascari was retained as a paid, part-time advisor based on his significant expertise in provider services and managed care for individuals with I/DD as well as his relationships with major providers and stakeholders in the field.<sup>3</sup>

The evidence reviewed by the Inspector General shows that Mascari's actions conformed to the role outlined above. Mascari provided advice and counsel to Delaney, and also served as a conduit between the State and stakeholders in the State's transition to a managed care model. The investigation found no evidence that Mascari was a final decision maker on any matter. While Kastner suggests that Mascari asserted himself beyond the role of advisor in decisions that were made, Francis testified to the Inspector General that Mascari's role was solely to advise Delaney and he was not to be seen as a decision maker. Likewise, Delaney testified that Mascari, in fact, solely advised and provided recommendations but did not make any final decisions.

The investigation found Mascari's employment status upon his hiring was unclear. On one hand, Mascari was hired by RFMH as if he was a part-time consultant. He was retained for a fixed period—eighteen months, which was extended to two years—and he did not receive benefits provided to State employees, such as sick leave, health insurance, and authorization to participate in the State's retirement system. In fact, the Position Announcement stated that RFMH "is not an agency or instrumentality of the State of New York" and its employees "are not state employees, do not participate in any state retirement system, and do not receive state fringe benefits." If a consultant, Mascari would not be subject to the New York State Public Officers Law Code of Ethics section 74 and the conflict-of-interest provisions contained therein.<sup>4</sup>

On the other hand, Mascari's hiring by RFMH appeared to make him an employee of that organization. Primarily, Mascari received from RFMH IRS W-2 and I-9 Forms, which are used to report employee compensation, rather than an IRS Form 1099-MISC, which is used to report compensation to independent contractors/nonemployees. Additionally, Mascari completed an RFMH Employee Appointment Form; received an employee manual; and RFMH's director of human resources stated, in response to a question from the Inspector General about Mascari's

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<sup>3</sup> RFMH paid Mascari \$9,887.50 in 2016, \$20,457.50 in 2017, and \$7,805 in 2018 for his services.

<sup>4</sup> See, New York State Ethics Commission Advisory Opinion No. 93-7 (March 8, 1993).

employment status, that RFMH deemed Mascari to be an “employee” of the entity.<sup>5</sup> As an employee of RFMH, which is considered a “closely affiliated entity,” Mascari would be deemed a public officer bound by the State’s Code of Ethics and subject to the jurisdiction of JCOPE.<sup>6</sup>

RFMH and OPWDD should have taken more care in assessing Mascari’s employment status. In either case, Mascari’s hiring and onboarding should have been more systematic, with more analysis and consideration given by RFMH and OPWDD to address any appearance of conflict. Additionally, Mascari should have been formally advised and provided guidance on possible conflicts of interest between his advisory role at OPWDD and his private interests.

If Mascari was a consultant, RFMH or OPWDD should have drafted an ethics opinion or recusal statement to mitigate against any potential appearance of a conflict created by Mascari’s relationship with PHP and to provide Mascari guidance in diminishing any such conflict or appearance of the same. However, neither RFMH nor OPWDD engaged in this analysis and Mascari did not independently seek an ethics consultation with the agency. Both agencies also neglected to recommend to Mascari that should any potential conflicts arise during his employment, he should consult with OPWDD’s ethics officer.

If Mascari was an employee of RFMH and therefore subject to the Code of Ethics found in Public Officers Law, it would have been prudent for RFMH or OPWDD to have sought an advisory opinion from JCOPE regarding possible conflicts of interest or the appearance of the same with respect to Mascari’s associations with PHP. However, neither OPWDD or RFMH sought such an opinion, nor did Mascari.

In fact, the investigation found OPWDD and RFMH took little effective action to mitigate Mascari’s potential conflicts. Mascari testified to the Inspector General that upon his hiring in 2016, he was contacted by the then OPWDD general counsel regarding potential conflicts of interest. The general counsel stated that he spoke with Mascari about the appearance of a conflict of interest posed by Mascari’s association with PHP and some of his proposed work involving managed care policy development. Mascari testified to the Inspector General that he

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<sup>5</sup> Although Mascari did not recall receiving the RFMH employee manual or training related to conflicts of interest, on October 12, 2016, he signed an acknowledgment stating that he received a copy of the RFMH handbook, which contains prohibitions on actual and apparent conflicts of interest. Additionally, Mascari testified that PHP counsel Harold Iselin also advised him about potential conflicts.

<sup>6</sup> See, New York State Joint Commission on Public Ethics Advisory Opinion No. 17-01 (May 23, 2017).

was cognizant of a potential conflict with respect to his role at PHP and recused himself from those matters when appropriate.

According to the then OPWDD general counsel, around or upon the hiring of Mascari, he recommended that Mascari resign his PHP chairman position in order to avoid any appearance of a conflict. Mascari testified repeatedly that neither the general counsel, Delaney, nor others asked him to resign from PHP. Ultimately, the investigation was unable to determine if Mascari was advised to resign from PHP. OPWDD was unable to provide any formal documentation reflecting steps taken to mitigate Mascari's potential conflicts. Regardless, when Mascari did not resign from PHP, the general counsel or the ethics officer should have provided an ethics consultation in order to establish additional approaches to mitigate appearance issues. The approach proposed by the general counsel was not the exclusive remedy available and the Inspector General found that other analyses should have been conducted to mitigate Mascari's appearance of a conflict.

### **Selection of CCOs and Eligibility Criteria**

Kastner claimed that Mascari violated procurement rules to award designations to preselected CCOs, labeled these same CCOs as "emerging CCOs" and thereby provided them a competitive advantage, created eligibility criteria that prevented fair competition between the emerging CCOs and other applicants, controlled the membership of the CCO Advisory Committee thereby ensuring the emerging CCOs were exclusively represented, and blocked an applicant from participating in the process. Specific allegations raised by Kastner are separately discussed in the below subsections.

#### **Allegation that Mascari Violated Procurement Rules**

With respect to Kastner's assertion that Mascari violated procurement rules, the Inspector General found this allegation to be unfounded, in that DOH/OPWDD was not required to conduct a formal competitive procurement under New York State Finance Law.

Pursuant to New York State Social Services Law section 365-1(8)(b), DOH is authorized to contract with entities to implement the Health Home program "without a competitive bid or request for proposals process" provided DOH posts on its website for at least 30 days the services sought, criteria for selection, and the manner and period in which interested entities should apply. The commissioner of DOH, after reviewing any submissions from interested entities, may then select those entities that "in his or her discretion, are best suited to serve the



purpose of this section.” The investigation found that DOH/OPWDD took the steps required under Social Services Law.

Although not required by law, OPWDD opted to use a request for applications (RFAs) to determine which organizations would be awarded CCO designations as part of their voluntary participation in this managed care program. An RFA is a solicitation often used by entities seeking applicants for grant funding and includes an outline of a program and how and when applications will be evaluated.

#### Allegation that Mascari Unfairly Promoted “Emerging CCOs”

Kastner alleged that Mascari’s identification of certain CCOs as “emerging CCOs” and the timing and publication of their designation gave those entities an unfair competitive advantage. The Inspector General found that OPWDD took several steps prior to the release of the RFA that were beneficial to six emerging CCOs but were otherwise not legally prohibited. Notably, some of the principals of the “emerging CCOs” were already known to OPWDD as they had long worked with New York State’s I/DD community and the development of the State’s Developmental Disability Individual Support and Care Coordination Organization (DISCO) program, a precursor to the HH/CCO program.

The Inspector General found nothing precluded OPWDD from structuring this process in such a manner. Despite having no requirement to issue an RFA, OPWDD chose to use this mechanism, which in effect, only served to establish the standards to be met. According to the timeline of events, the presumptive entities that would be awarded CCO designations had been determined soon after OPWDD publicly announced the program and well before the RFA was issued.

#### Allegation that Mascari Created Unfair CCO Applicant Eligibility Criteria

Kastner alleged that Mascari created CCO eligibility criteria that prevented fair competition between the emerging CCOs and other applicants. Kastner advised that in November 2017, while he was employed at Rose F. Kennedy Center/Montefiore Medical Center, he criticized program criteria establishing minimum patient enrollment in an email to OPWDD and asked that any review of non-emerging CCO applications be given special consideration. Ultimately, however, the patient thresholds remained. Kastner disagreed with this policy decision, noting that he ran a Medicaid Service Coordination provider agency at Montefiore

Medical Center that was able to operate at a much lower threshold, and he believed the criteria to be arbitrary and designed to steer CCO designations to entities favored by Mascari.

The investigation found that OPWDD set eligibility criteria based on Mascari's recommendations, which included governance, Medicaid Service Coordination affiliation, and enrollee threshold requirements, among other requirements.

One critical factor in the selection of CCOs was the requirement that a CCO serve a minimum of 10,000 individuals. Those serving at least 5,000 individuals would also be considered if they met certain financial benchmarks. Given this criterion, Medicaid Service Coordination provider agencies were encouraged to partner with emerging CCOs in their region prior to the public release of the RFA. Subsequently, when non-emerging CCOs began attempting to partner with the remaining regional Medicaid Service Coordination provider agencies, the available I/DD patient population had dwindled, and 80 percent of Medicaid Service Coordination providers had already entered into contracts with emerging CCOs. Consequently, the non-emerging CCOs were each unable to achieve a minimum of 5,000 I/DD patients. This made it challenging for any non-emerging CCO to become a viable candidate.

The Inspector General found that the criteria benefitted larger providers. However, the Inspector General found no evidence that this policy decision was untoward or prohibited under the RFA. In fact, many witnesses testified that the criteria were established to ensure a financially viable long-term program with adequate coverage throughout the State.

#### Allegation Mascari Improperly Controlled Advisory Committee Membership

With respect to Kastner's claim that Mascari controlled the membership of OPWDD's CCO Advisory Committee and thereby ensured that the emerging CCOs were exclusively represented, the investigation found that the committee members were chosen by Mascari, Delaney, and OPWDD staff based on their expertise in managed care for individuals with I/DD.

According to Delaney, the members of the Advisory Committee, which included care providers and OPWDD staff, were identified by OPWDD staff and Mascari. The majority of these providers would ultimately become members of the emerging CCOs, which were subsequently all selected as the final designated CCOs in this program. The investigation found that Mascari did, in fact, consult with many of the care providers on the Advisory Committee for feedback regarding criteria for ensuring the operational and fiscal viability of the CCOs and he

provided extensive advice and feedback to Delaney and others on this topic. However, the investigation also found that Mascari was hired precisely for this purpose—to consult with the Advisory Committee on these issues—and the stakeholders comprising the committee were chosen because they had characteristics essential for entities that would ultimately become the CCOs.

#### Allegation that Mascari Blocked a CCO/HH Program Applicant

As for Kastner’s claim that Mascari blocked an applicant, Young Adult Institute, from participating in the process; the Inspector General found that Young Adult Institute, which was a member of OPWDD’s Advisory Committee, ultimately became a provider under the CCO Care Design. Given this finding, the Inspector General took no further action to investigate the claim as it was rendered moot.

#### **The Utilization of BIP Funding**

Kastner asserted that designated CCOs improperly re-purposed unused Balance Incentive Program (BIP) funds for purposes of funding the CCOs. Kastner testified that his claim that OPWDD’s repurposing of BIP funds may have been impermissible was based on his prior professional experience at Montefiore Medical Center, which had been asked to return its unused BIP funding.

The Inspector General found no evidence to suggest that the use of BIP funds to support the CCO/HH program was improper. In fact, the program’s goals were aligned with CCO/HH goals regarding the importance of community-based settings and the necessity for a conflict-free case management system.

For context, BIP, authorized by the 2010 Affordable Care Act, aims to improve access to community-based long-term services and supports for multiple populations and programs. New York State’s BIP application was approved by CMS in March 2013, and the State was awarded \$598.7 million. The investigation found that three of the emerging CCOs had unused BIP funding from a prior attempt by New York State to create managed care for individuals with I/DD. The entities created under this prior program were known as Developmental Disability Individual Support and Care Coordination Organizations or DISCOs. On July 27, 2017, Delaney authorized the emerging CCOs to utilize their unused BIP funds from the DISCO program.

Witnesses testified and records confirm that BIP monies directed to the DISCO program were subsequently used to support the implementation of the CCO/HH program, and no witness provided any evidence that this repurposing was improper. The BIP project director testified that all subsequent reallocation of BIP funds obtained under the DISCO program was not done in a vacuum and required the review and approval of DOH and CMS. Of note, upon request, DOH advised it was unable to provide documentation verifying this approval.

### **Alleged Rate Manipulation and Misrepresentation of Start-Up Costs**

Kastner claimed that reimbursement rates for services provided by CCOs were inflated by Mascari to benefit the CCOs because the rates were exponentially higher than in programs Kastner ran in the private sector. Kastner also asserted that the inflated rates that were ultimately approved were even higher than those originally projected in stakeholder analyses. In addition, Kastner alleged that Delaney, Francis, and Mascari, misrepresented CCO start-up costs as administrative fees in claims to CMS.

The Inspector General determined that although the overall rates were higher than initially projected, the investigation found no evidence of conspiracy or collusion among Delaney, Francis, and Mascari to benefit certain CCOs. However, the Inspector General found that DOH/OPWDD redesignated certain start-up costs as administrative costs in the final State Plan Amendment, and DOH/OPWDD provided no records to the Inspector General about CMS's level of awareness on this issue.

Reimbursement rates are fixed, periodic payments for a defined package of benefits, and may include such expenses as operating and administrative fees and start-up costs. The Inspector General found no evidence that the rates were inflated specifically by Mascari or for the benefit of the CCOs, however the rates were significantly higher than their projected costs. In fact, program costs were \$200 million more annually than under the previous Medicaid Service Coordination program. In addition, the evidence reviewed by the Inspector General revealed that the then DOH director of long-term care was apparently responsible for the decision to redesignate certain costs, which had formerly been designated as "start-up" costs, as "administrative" costs after CMS advised that it would not reimburse the State for "start-up" costs.

The former director of the DOH Division of Long-Term Care, whose responsibilities included working on CCO rate-setting methodologies and communicating with CMS to obtain

approvals for rates, state plan amendments, and methodologies, testified that the process used by OPWDD to determine the rates for individuals with I/DD health homes was the same process used by DOH to determine rates for adult and children health homes. Although DOH typically determines these rates, OPWDD took the lead in this process due to its familiarity with services for individuals with I/DD. The former director testified, “You can include start-up costs in your rate but you can’t pull down federal share for that.”

OPWDD’s deputy commissioner for enterprise solutions testified that using DOH’s process, he determined the rates for individuals with I/DD health homes. The deputy commissioner for enterprise solutions noted that neither he nor OPWDD had set such rates before for managed care for individuals with I/DD. The deputy commissioner testified that although OPWDD had not received projected budgets from most of the CCOs, the fee methodology was done in an objective manner and vetted through a review of historical cost data and industry experience, and he validated some of his assumptions through DOH.

A DOH chief health care fiscal analyst and the counterpart to OPWDD’s deputy commissioner for enterprise solutions also testified that the rate setting process was appropriate. He said that although the rates seemed high, in his opinion, the State’s analysis was “meticulous” and “well thought out.” He testified that there was a “stark contrast” in the rates set by OPWDD for individuals with I/DD to those set by DOH for adult and children health homes, but he was uncertain if this was inappropriate. The chief health care fiscal analyst noted that although OPWDD took the lead in setting these rates, DOH oversaw and approved the rates.

After numerous discussions between Mascari and the CCOs, start-up costs were estimated to be \$25 million annually for the two-year period of 90/10 federal reimbursement. The rates, which included the start-up funds, were then included in a December 2017 draft State Plan Amendment that was submitted to CMS by DOH. According to the former director of DOH’s Division of Long-Term Care, a state may include start-up costs in its rate but CMS may “decline to include start-up dollars.” CMS responded to this draft plan, “***Note that the health home state plan cannot include start-up costs.*** However, states can build some administrative costs into their overall rates.” (Bold and italicized original). In response, DOH advised CMS that it “deleted this paragraph” from the State Plan Amendment. In subsequent correspondence between OPWDD and DOH discussing its ongoing response to CMS, it was noted, “We will

need to include the \$20 add on [per-member, per-month start-up costs] as part of administrative costs and presumably seek a state plan to reduce the rate after the first 24 months.”

The OPWDD deputy commissioner for enterprise solutions testified to the Inspector General that this is what occurred. Costs originally designated as start-up were then referred to as administrative costs despite CMS’s original direction to the contrary. It is unclear if subsequent deliberative discussions between the State and CMS held during this time period clarified that such inclusions in the State Plan Amendment were permissible. Likewise, the Inspector General could not discern what constituted start-up and administrative costs because CMS guidance on these types of costs was vague and did not define the terms. Notably, the Inspector General requested records from DOH and OPWDD including all draft State Plan amendments sent to CMS and comments received from CMS. To date, these agencies have not provided any records to the Inspector General reflecting approval by CMS of the redesignation.

Francis testified that the reimbursement rates were contemplated, appropriate, and transparent to all involved parties. According to Francis, the CCOs “were not overcompensated” using the rate methodology and the “fact that they would generate more revenue than they would need for their direct care management activities, which they would use to provide the start-up infrastructure was . . . completely transparent.” As for start-up expenses, Francis testified that after he conducted limited research on the matter, he did not “see anything that prohibits . . . health home funding to be used for start-up expenses.” Francis also testified that the rates calculated by OPWDD were subsequently reviewed and approved by DOH, Division of the Budget (DOB), himself, and CMS.

The State Plan Amendment was formally submitted to CMS on January 22, 2018, and CMS approved it shortly thereafter. After the two-year period of 90/10 federal reimbursement ended, these administrative costs were eliminated by the State.

#### **Possible Conflicts Regarding Mascari and the Awarding of a CCO Designation to CCO Care Design NY, LLC**

Kastner alleged that Mascari, the chairman of PHP, worked with PHP, New York Integrated Network for Persons With Intellectual and Developmental Disabilities (NYIN), and UCP (United Cerebral Palsy), to create the CCO known as Care Design and then recommended that Care Design be designated an “emerging CCO” and subsequently, be awarded a CCO designation. The Inspector General did not find an actual conflict with respect to Mascari’s prior

employment with AHRC Nassau, an entity affiliated with PHP; his then board chairmanship at PHP, which is affiliated with Care Design; and his then advisory role at OPWDD. However, while these circumstances created an appearance of a conflict, they did not disqualify Mascari from performing his advisory role and the State benefitted from his more than 40 years of experience in the management of care and treatment of New York's I/DD population.

The Inspector General discovered relationships between the service providers Kastner referred to in his allegation including the operations and boards of Care Design, PHP, and two other entities, Partnerships for Healthcare Solutions, Inc. (Partnerships) and PHSI, Inc., to be intertwined. Additionally, the investigation found that Mascari served as the chairman of PHP while he served as an advisor to OPWDD from 2016 to 2018, and was the compensated executive director of AHRC Nassau, a founding member of PHP, just prior to his tenure as an advisor to OPWDD.

By way of background, Mascari was an OPWDD employee from 1976 to 1988, and held the title of facility deputy director/associate commissioner for four years. He was also a founding member of PHP, a not-for-profit organization governed by a board of directors. PHP was created in 2012 by another not-for-profit, ARHC Nassau, along with a number of other not-for-profits serving individuals with I/DD.<sup>7</sup> Mascari held the position of unpaid chairman of PHP since its inception. Per PHP's bylaws, its board members are uncompensated. In January 2016, PHP became New York State's only managed care organization to contract with Medicare and DOH/Medicaid to provide benefits to individuals with I/DD and their families through the Fully Integrated Duals Advantage for I/DD demonstration period. Mascari also served as AHRC Nassau's executive director, a compensated position, from at least 2006 through January 2016. In 2015, Mascari received compensation from AHRC Nassau and related organizations totaling approximately \$446,000.

PHP's sole corporate member is Partnerships. As such, the board of Partnerships, the parent organization, possesses substantial control over the subsidiary organization, PHP. Partnerships has one corporate member, PHSI, another New York not-for-profit corporation. Mascari was a founding member of PHSI in 2012 and served as a director of the organization.

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<sup>7</sup> PHP was initially comprised of five downstate chapters of the New York State Association for Habilitation and Residential Care (AHRC), namely AHRC Nassau, AHRC New York City, The Arc Rockland, AHRC Suffolk, and The Arc Westchester. In 2016, ADAPT Community Network (formerly known as United Cerebral Palsy of New York City) joined PHP.

Care Design, incorporated in April 2017, was formed by NYIN and Partnerships (which controls PHP) for the purpose of operating a CCO for individuals with I/DD.<sup>8</sup> By September 2017, Care Design expanded to include four other member organizations that provide services to individuals with I/DD. Each member organization is comprised of a number of network agencies.

The investigation found that from June 2016 through June 2018, Mascari served as an advisor to Delaney under an RFMH contract. During this period, Mascari maintained his position as PHP's board chairman but was not directly affiliated with Care Design, an entity that was created in 2017 while Mascari was still working at OPWDD. Although Mascari received regular updates on the activities of Care Design, Mascari testified that he did not attend board meetings of Care Design while working with OPWDD, did not serve as a board member of this newly formed organization, and had no level of involvement with Care Design.

Similarly, in his role as OPWDD advisor, Mascari did not review any applications submitted by organizations seeking approval to be designated as a CCO. OPWDD and DOH established a review committee comprised of four DOH and three OPWDD staffers, who separately evaluated and ranked each CCO application submitted. The committee then independently communicated the results to Delaney for her review.

The investigation found that Mascari made recommendations to Delaney about certain organizations before any applications were submitted by entities seeking to participate in the CCO program. Mascari recommended that certain organizations should be designated as "emerging CCOs," with Care Design included among this group. According to Mascari, his recommendations were based on certain criteria including the organization's fiscal viability, ability to meet a 5,000-to-10,000 treatment threshold requirement, and its geographical location within the state. Ultimately, Delaney made the final decision as to which organizations were designated as "emerging CCOs" and she determined that Care Design should receive such designation.

The Inspector General found that given Mascari's prior association with Nassau AHRC, his then association with PHP, and the overlapping boards of the aforementioned entities, it would have been prudent for him to obtain a consultation from the OPWDD ethics officer and/or

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<sup>8</sup> Care Design's Articles of Incorporation are signed by the president of NYIN and the chair of Partnerships for Healthcare Solutions, Inc.



JCOPE to discuss any concerns associated with the appearance of a conflict of interest and to memorialize any guidance or mitigation efforts.

### **Former OPWDD Acting Commissioner Delaney's Post-State Employment with PHP**

Kastner alleged that Mascari rewarded Delaney for her complicity in the State's transition to managed care for individuals with I/DD by appointing her CEO of PHP upon her separation from State service on January 1, 2019. The Inspector General did not find that Delaney's post-employment resulted from any "complicity" or malfeasance based on her involvement in the State's transition to managed care.

New York State Public Officers Law section 73(5) prohibits State employees from accepting or receiving gifts, including offers of employment, when it could reasonably be inferred or expected the gift would influence the employee in the performance of his/her official duties or was intended as a reward for his/her official action. The accepting and receiving of future employment also raise the appearance that the State employee's interests in this activity may be in conflict with the proper discharge of his/her official duties under Public Officers Law sections 74(2) and 74(3)(a)(b)(d)(e)(f) and (h).

Additionally, an advisory opinion issued by the former New York State Ethics Commission is on point in the instant matter. The opinion reads, "[A] situation in which a State employee is making a decision, the outcome of which may impact his or her future employer, contains an unacceptably high level of risk to government integrity and its decision-making process. Therefore, when an entity (or individual) has a specific proceeding, application or other matter pending before a State employee, the solicitation of employment by the employee or any post-government employment-related communications with that entity (or individual) is prohibited."<sup>9</sup>

The investigation found that in as early as February 2018, Mascari and Delaney, using State email systems, began to discuss Delaney's future employment with PHP. On February 7, 2018, Mascari emailed Delaney, then the OPWDD acting commissioner, a list of benefits for PHP employees. Additionally, on April 2, 2018, the two discussed via email Delaney's résumé

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<sup>9</sup> New York State Ethics Commission Advisory Opinion No. 06-01 (January 23, 2006). Note, although PHP had ongoing grants from both OPWDD and DOH, PHP had no pending matter before DOH or OPWDD at that time. However, given the complex nature of the associations between Partnerships, PHP, and Care Design (which had a pending matter before the State), including their interwoven operations, boards, and aspects of control of board decisions, reference to a pending matter might be interpreted with respect to PHP.

and the location of her upcoming interview with PHP. And on May 4, 2018, Delaney received by email a draft employment contract from Mascari for the position of CEO at PHP. At this same time, Mascari continued to serve as a consultant to Delaney, advising her on the managed care transformation, to include matters that would ultimately impact efforts by the PHP-affiliated entity Care Design to be considered by OPWDD in the program.

Under Public Officers Law, Mascari's solicitation in his email concerning PHP employee benefits should have prompted Delaney to seek a consultation from the OPWDD ethics officer and discuss whether recusal from further work on the CCO/HH program in light of PHP's participation was appropriate. Although Mascari claimed he took steps to avoid potential conflicts, his conversations with Delaney about future employment as the CEO of PHP showed a lack of understanding of Public Officers Law and should not have been conducted during State time and using State resources. His actions further underscore the importance of a consultation from either the agency ethics officer and/or JCOPE. Additionally, under an abundance of caution, Delaney should have considered refraining from further contact with Mascari or PHP until 30 days after all matters related to Care Design were closed or she had no further involvement in the CCO designation process due to her recusal or reassignment.<sup>10</sup>

Delaney testified that she verbally notified both the then OPWDD general counsel and Francis on or around February 15, 2018, that PHP had offered her a job. Francis testified that Delaney verbally advised him that Mascari had offered her a job at PHP, but he was uncertain of the date.

The investigation found that Delaney took no additional steps to address this issue until April 4, 2018, when she requested an informal advisory opinion from JCOPE. However, Delaney only sought an opinion regarding potential post-employment conflicts of interest and did not seek an opinion regarding any current conflicts she might have with respect to the PHP job offer. On April 17, 2018, JCOPE issued its informal opinion to Delaney. This opinion was limited to post-employment restrictions and considerations if Delaney were to accept employment generally in the managed care field. The JCOPE advisory opinion does not address the potential conflict of interest inherent in her relationship with Mascari; his ongoing association with PHP; the imminent designation of PHP-affiliate Care Design as a CCO in a program she oversaw; and her offer of employment with PHP. As the acting commissioner of

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<sup>10</sup> New York State Ethics Commission Advisory Opinion No. 06-01; see also N.Y. Pub. Off. L. sections 73(5); 74.

OPWDD, it was incumbent upon Delaney to make these associations with Mascari, her consultant advisor, known to JCOPE.

Notably, Delaney's request to JCOPE for an informal advisory opinion, which did not describe her current dealings with PHP, stated that she had recused herself from matters relating to "the potential employer."<sup>11</sup> This statement appears to be in conflict with the findings of the Inspector General's investigation. Delaney continued to engage with Mascari throughout a six-month period in spring and summer 2018 regarding OPWDD's CCO/HH program. In fact, just eight days after Delaney's letter to JCOPE, she participated in a meeting where she set the agenda to focus on CCO/Health Homes and managed care policy development. Moreover, Delaney approved the final designation letters sent to the selected CCOs on June 29, 2018, which included Care Design, an entity affiliated with PHP.

It was not until August 22, 2018, that Delaney provided Francis a written "draft" recusal memorandum. In this memorandum, Delaney advised she would not participate in matters involving the review and designation of CCOs. However, this recusal came more than three weeks after the final formal designation of CCOs had occurred on June 29, 2018, and more than six months after she had been approached by Mascari regarding the job offer. Further, Delaney's recusal memorandum noted that she would continue her oversight of the implementation of CCO/HHs, which included the CCO Care Design.

## **Conclusion**

The Inspector General found that in spite of Mascari's seeming appearance of a conflict of interest related to his dual role as the PHP board chairman and advisor to OPWDD for managed care policy development, Mascari would not have been disqualified solely for these activities. There is no definitive evidence to suggest that his affiliation with PHP improperly affected the process or designation of CCOs. However, OPWDD should have exercised prudence by encouraging Mascari to seek a consultation with the agency ethics officer and/or JCOPE to discuss approaches to mitigate the appearance of such conflict.

The investigation found that OPWDD and DOH reviewed and scored the applications submitted by organizations who sought CCO designations, including Care Design. Mascari did not take part in the application review and scoring. Further, Mascari provided recommendations

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<sup>11</sup> The April 4, 2018 letter was written by an attorney at the law firm Greenberg Traurig, LLP. This firm also represents PHP.

and advised Delaney about developing a managed care model that aimed to be financially viable and ensure statewide coverage. Both Mascari and Delaney testified that Mascari was not the final decision maker on any matters directly or indirectly affecting PHP. The investigation did not uncover evidence to support the allegation that either Mascari or Delaney structured managed care policies for their own personal benefit.

At the heart of this investigation was the question of whether Mascari was considered a State employee—and therefore subject to New York State’s Code of Ethics found in the Public Officers Law—or whether he was considered a consultant and therefore not subject to such requirements. This discrepancy creates an apparent loophole where contractors or consultants doing business with the State may be able to circumvent measures designed to ensure public accountability. This investigation may serve as an opportunity to reexamine the regulation of contractors or consultants to determine if these entities should be subjected to enhanced ethics requirements.

Of note, JCOPE’s jurisdiction over Delaney expired on January 1, 2020, as she left State service on January 1, 2019.