



August 13, 2018

DELIVERED ELECTRONICALLY

The Honorable Seema Verma, Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-2413-P, P.O. Box 8016
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RE: CMS-2413-P: Medicaid Program; Reassignment of Medicaid Provider Claims

Dear Ms. Verma:

The American Civil Liberties Union (“ACLU”) submits these comments to express our strong opposition to the recent notice of proposed rulemaking (NPRM), CMS-2413-P, because it would harm women, particularly women of color, and people with disabilities.

According to the Centers for Medicare and Medicaid Services (CMS), the proposed rule would prohibit independent, non-agency home care workers from making deductions from their pay to cover the benefits they choose, including healthcare, training, and voluntary union dues. This rule is misguided and should not be adopted.

The ACLU supports the rights of employees to organize unions and bargain collectively. Collective bargaining provides critical and necessary protections for workers who exercise basic civil rights, in particular, the rights of speech, association, and petition. Unions also give working people a voice; they play a critical role in negotiating better wages, improving working conditions, and expanding workplace protections and benefits such as increased wages, health insurance benefits, free provider trainings and transportation, and paid leave. The ability to choose a union and facilitate participation in a union through the automatic deduction of dues is especially critical for home care workers – 90 percent of whom are women and most of whom are women of color – who are among the poorest working people in our country. They have had to confront a legacy of systemic discrimination and still must tackle the problem of subpar workplace benefits and protections. Home care workers of all kinds should be able to make essential deductions from their paychecks that are common to employment, just as other working people can. CMS should not erect barriers for a segment of workers who need more, not fewer, supports and protections.

The NPRM would also harm people with disabilities because home care workers are critical providers of home and community based services and supports (HCBS) – including bathing, toileting, dressing and preparing meals, as well as other duties such as helping individuals go to doctors’ appointments– that allow people with disabilities to maintain their independence and avoid institutionalization.¹ Institutionalization violates the liberty interests of people with disabilities by taking away the autonomy and freedom we all enjoy in the community. Despite the indispensable services that home care workers provide, the low wages and lack of benefits associated with these jobs results in in high turnover rates and worker shortages.² High turnover means people with disabilities will go without vital services necessary to retain their independence. This proposed rule will certainly make matters worse, not better.

The proposed change would have a negative impact on access to and the quality of Medicaid-funded HCBS, and in particular the consumer-directed model for providing those services. The vast majority of people prefer HCBS over institutional care.³ Most states have adopted consumer-directed model of service delivery because it allows for consumer control and independence, while also being cost-effective for the state. Consumer direction grew out of the disability rights movement as advocates fought for the right of people with disabilities to live independently and participate fully in mainstream society. Consumer-directed service delivery models have been a driving force in state efforts to redirect and rebalance resources and funding away from institutional models of care and into community-based services.⁴

Consumer-directed services allow persons with disabilities to hire, fire, and train their own home care workers, including family members, neighbors, friends, and others in their communities. This greatly increases the pool of available working people. Under this model, the state administers the Medicaid benefit and conducts employer functions, like payroll and deductions, for the direct care workers. These types of employer functions would be extremely burdensome for individual consumers to perform on their own, potentially restricting the ability of consumers to direct their own care. The system as it operates now affords consumers who would like the ability to select their own caregiver and make day-to-day management decisions the freedom to do so. The proposed rule puts this system at risk in an industry that is already struggling to meet consumer demand. The rule could undo decades of work rebalancing long term services and supports in this country away from institutional care and into our homes and communities.⁵ Over the last two decades, consumer-directed services have significantly expanded and this rule

¹ S. Dale & R. Brown, *Reducing Nursing Home Use through Consumer-Directed Personal Care Services*, 44:8 Medical Care 760-767 (2006).

² Institute of Medicine, *Retooling for an Aging America* (2008), pp. 200-01; PHI, “Caring in America - A Comprehensive Analysis of America’s Fastest Growing Jobs: Home Health and Personal Care Aides” (Dec. 2011); Amy Hewitt, et al., “A synthesis of direct service workforce demographics and challenges across intellectual/developmental disabilities, aging, physical disabilities and behavioral health,” National Direct Service Workforce Resource Center at CMS (Nov. 2008).

³ AAPD, Factsheet: *Support Americans with Disabilities in their Homes and Communities*, available at <https://www.aapd.com/wp-content/uploads/2016/03/aapd-hcbs-medicaid-fact-sheet.pdf>.

⁴ Center for Healthcare Strategies, Inc., *Profiles of Innovation: Roadmap for Rebalancing Long-Term Supports and Services* (Nov. 2010), available at http://www.chcs.org/media/Rebalancing_Roadmap_112210.pdf.

⁵ Jennifer Ryan and Barbara Coulter Edwards, *Rebalancing Medicaid Long-Term Services And Supports. Shifting away from primarily financing institutional care, Medicaid is supporting more flexible community-based long-term services and support*, Health Affairs Policy Brief (Sept. 17, 2015), available at https://www.healthaffairs.org/doi/10.1377/hpb20150917.439553/full/healthpolicybrief_144.pdf.

threatens to roll back the considerable progress that has been made by restricting the collective bargaining rights of the men and women who support people with disabilities.

Finally, we want to register our concern about the process underlying this NPRM. CMS provides no justification for a 30-day comment period, which is far shorter than the standard 60-day period that is meant to provide a meaningful opportunity for all stakeholders to comment. Furthermore, while CMS claims that the rule is economically significant, the agency also states that it does not have sufficient data to either support such a claim or conduct the analysis required if such a statement is true. This is thin ground on which to base a proposal for a policy change that CMS believes may have a major impact on state HCBS programs, home care workers, and the consumers who rely on these services.

For all these reasons, we believe that CMS should not move forward with rulemaking. Please contact Vania Leveille at vleveille@aclu.org if you have any questions.

Sincerely,



Faiz Shakir
National Political Director



Vania Leveille
Senior Legislative Counsel