

Ending the Skimming of Union Dues from Federal Child Care Funds

BY CHASE MARTIN



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Background

The federal government helps eligible low-income families pay for child care through the Temporary Assistance for Needy Families program and Child Care and Development Fund. Federal funds are distributed to states in the form of block grants. Individual states administer and co-fund their programs and directly reimburse home-based family child care providers for the cost of serving eligible families. Many providers are related to the children for whom they provide care.

The National Labor Relations Act does not generally cover such independent, family child care providers. However, at the urging of unions like the Service Employees International Union and the American Federation of State, County, and Municipal Employees, several states have recognized family child care providers as government employees for the limited purpose of allowing them to be unionized under state public sector labor laws.¹ Until the U.S. Supreme Court's 2014 *Harris v. Quinn* decision ruled it unconstitutional, unions and states had the power to compel providers who declined union membership to nonetheless pay union agency fees as a condition of

employment.² The Supreme Court's 2018 *Janus v. AFSCME* decision expanded this holding to all union-represented government employees and required unions to obtain employees' affirmative consent before deducting any dues or fees from their wages.³

As of June 2018, nine states still forced independent child care providers to financially support a union by automatically deducting union dues from the TANF and CCDF benefit payments they receive on behalf of their low-income clients. There are approximately 10 states that forced home health care providers, who are similarly situated as child care providers, to pay union dues by automatically deducting fees from their Medicaid payments on behalf of low-income and disabled Americans.⁴ With the loss of agency fees and presumptive enrollment resulting from Supreme Court rulings, labor unions began an aggressive campaign to enroll more dues-paying members. In some cases, unions like SEIU have reportedly resorted to forging signatures on membership forms.⁵

1 For more information, see: "End Dues Skimming: Protect Home Health Care Providers" (State Policy Network), <https://perma.cc/6HQP-MWQ5>; Maxford Nelson, "Unions are Siphoning Medicaid Funds by Bullying Caregivers," (Washington Examiner, May 10, 2017), <https://perma.cc/7ZJX-KX96>.

2 573 U.S. ___ (2014).

3 585 U.S. ___ (2018).

4 Matthew Glans, "Research and Commentary: It's Time to End the Skimming of Union Dues," (The Heartland Institute, June 26, 2018), <https://perma.cc/7H77-T7FP>.

5 Sean Higgins, "Fraud Alleged in Minnesota Homecare Provider Union" (Washington Examiner, March 4, 2017) <https://perma.cc/6WAB-K33W>; Caleb Jon Vandenbos, "Victim of Union Forgery Files Lawsuit"

The amount of union deductions skimmed by state governments from family child care providers' payments amounts to tens of millions of dollars each year.⁶ The practice redirects to unions funds intended to help prevent child care costs from standing in the way of low-income families maintaining steady jobs and earning a paycheck, making them less likely to need to rely on additional government support.

The Trump administration has options at its disposal to end these dues-skimming schemes and protect program beneficiaries. It could prohibit states from continuing to skim union dues from federal child care benefits or, at minimum, ensure that all providers paying union dues do so with informed, affirmative consent. To achieve this, it could deploy the rulemaking procedure detailed in the Administrative Procedure Act or have the Department of Health and Human Services' Administration of Children and Families issue agency guidance to states.

Rulemaking Proposals

Federal agencies have broad authority to propose and implement regulations related to their statutory mandate and responsibilities. The APA establishes the process agencies must follow when proposing and implementing regulations, or rulemaking, which it defines as the process of "formulating, amending, or repealing a rule."⁷

Federal regulations governing the CCDF are found in Title 45 of the Code of Federal

Regulations. Specifically, 45 C.F.R. § 98.56 establishes "restrictions on the use of funds." Restrictions include prohibitions on the expenditure of CCDF funds for the construction of child care facilities, duplicative services already provided by public schools, and for grants or contracts for religious worship or instruction. Adding to that list a subsection with the following language would prohibit the deduction of union dues from CCDF benefits:

(f) Third-party payments. No funds may be paid, directly or indirectly, to, or deducted from providers' payments for, any membership organization, labor union, or political fund. No fiscal agent or other intermediary that contracts with or makes payments to providers may deduct funds from providers' payments for any membership organization, labor union, or political fund.

To prohibit dues skimming of TANF child care benefits, ACF could amend 45 C.F.R. § 263.11, which establishes proper and improper state expenditures of TANF funds. This regulation expressly permits state expenditures of TANF funds "that are reasonably calculated to accomplish the purposes of TANF," which are listed in § 260.20 as follows:

(a) Provide assistance to needy families so that children may be cared for in their own homes or in the homes of relatives;

(b) End the dependence of needy parents on government benefits by promoting job preparation, work, and marriage;

(c) Prevent and reduce the incidence of out-of-wedlock pregnancies and establish annual numerical goals for preventing and reducing the incidence of these pregnancies; and

(Freedom Foundation, Oct. 1, 2018), <https://perma.cc/M2RH-VK9M>.

⁶ Ibid.

⁷ 5 U.S.C. §§551-559; 5 U.S.C. § 551(5).

(d) Encourage the formation and maintenance of two-parent families.

45 C.F.R. § 263.11(b) considers funds expended “in violation” of these purposes to be “a misuse of funds.” Additionally, the regulation considers improper expenditures outlined in §§404 and 408 of the Social Security Act, §115(a)(1) of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, and 45 C.F.R. Part 75 to be misuses of funds. None of these laws or regulations permits or acknowledges deducting union dues from TANF benefits.

The ACF could make a strong argument that under the current rules union dues skimming is not “reasonably calculated to accomplish the purpose of TANF.” Nevertheless, a rulemaking proposal would still be the most effective way to explicitly prohibit labor union dues skimming of TANF child care benefits.

ACF could successfully end union dues skimming of TANF child care benefits by proposing rulemaking that adds the following subsection to 45 C.F.R. § 263.11:

(c) The payment of funds to any membership organization, labor union, or political fund will be considered a misuse of funds, regardless of whether the payment is made directly, indirectly, or via payroll deduction.

In the event that a state misuses TANF funds, 45 C.F.R. § 263.10 requires the HHS secretary to reduce the offending state’s grant amount in the fiscal year following the misuse by an amount equal to the amount misused. Further, if a state fails to show that its misuse was unintentional, HHS may withhold an additional 5 percent of the state’s total grant award.

Potential Legal Challenges to Rulemaking

The rulemaking required to end union dues skimming from CCDF and TANF funds may face legal challenges from unions or states. The most likely challenge would be one based on whether the rule is beyond the scope of the regulatory authority Congress has delegated to ACF in relevant statutes. At 5 U.S.C. § 706(2), the APA states:

The reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be –

. . .

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right[.]

However, a court would likely find that rules prohibiting union dues skimming are not “in excess of statutory jurisdiction” or “short of statutory right.” Congress has granted the HHS secretary broad authority to propose informal comment and notice rulemaking regarding the CCDF in the Child Care and Development Block Grant Act and the Social Security Act.⁸ The CCDBG Act specifically states: “Amounts received by a State under this section shall only be used to provide child care assistance.”⁹ By proposing rulemaking to ban union dues skimming of CCDF funds, ACF would fulfill Congress’ mandate to ensure CCDF funds are used only to provide child care assistance, not to subsidize unions that provide no child care services to eligible families.

Opponents may argue that any regulatory restriction on the use of CCDF funds must

⁸ 42 U.S.C. § 9858; 42 U.S.C. § 618.

⁹ 42 U.S.C. § 618(b)(1).

be expressly required by statute. However, administrations have enacted several restrictions on the use of CCDF funds that are not specifically required by statute, such as prohibiting the use of funds for facilities construction or improvement, educational opportunities for children in grade school, or meeting state share requirements for other federal grants.¹⁰ Eliminating dues skimming by rule would be simply another regulation to enforce CCDF's statutory mandate.

Likewise, the ACF, through the HHS secretary, derives authority to enact rulemaking that prevents dues skimming of TANF child care benefits from the Social Security Act. The act explicitly states that the secretary "shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter."¹¹

Agency Guidance to Minimize or Eliminate Dues Skimming

Federal agencies routinely issue guidance memoranda to states regarding agencies' interpretation of federal rules or laws. Agency guidance is not legally binding on states but is considered persuasive when disputes over the underlying subject matter give rise to litigation. Federal courts show great deference to agencies' own interpretations of authorizing statutes and rulemaking.¹² The HHS secretary could issue guidance clarifying that union dues skimming

from TANF and CCDF funds violates federal law and that states continuing the practice will be subject to penalties.

Specifically, such guidance could clarify that dues skimming is a misuse of TANF grant funds under existing regulations because it is not "reasonably calculated to accomplish the purposes of TANF" as required by 45 C.F.R. § 263.11 and explained by 45 C.F.R. § 260.20. Guidance should further note that 42 U.S.C. § 604 prohibits the use of TANF funds in a manner inconsistent with the purposes of TANF and that the agency finds dues skimming to be inconsistent with statute as well as regulation. The secretary could further warn that states continuing to misuse TANF funds by skimming union dues from child care providers' payments will be subject to withholding penalties as authorized in statute.

To immediately halt dues skimming of CCDF funds, the secretary could issue additional guidance clarifying that paying a portion of CCDF funds to unions is impermissible, citing the controlling statute's plain language: "Amounts received by a State under this section shall only be used to provide child care assistance."¹³ As discussed above, current rulemaking explicitly prohibits several specific types of expenditures using CCDF funds, but all are reasonably related to the grant's purpose of providing child care. The secretary's guidance could point out that payment of union dues was omitted from current regulations' list of prohibited expenditures because it is completely unrelated to the grant's purpose and previously unforeseeable by federal regulators.

¹⁰ 45 C.F.R. § 98.56.

¹¹ 42 U.S.C. § 1302.

¹² See *Chevron U.S.A., Inc. v Natural Resources Defense Council, Inc.*, 468 U.S. 1227 (1984) and *Auer v Robbins*, 519 U.S. 452 (1997).

¹³ 42 U.S.C. 618(b)(1).

Opt-in Requirement to Ensure Clear Consent

As an alternative to producing rulemaking proposals and issuing agency guidance, ACF can take action to regulate union dues collection from CCDF and TANF funds with the goal of expressly prohibiting all union dues skimming. *Janus v. AFSCME* held, in part, that forced payment of dues to a public sector labor union is a violation of workers' First Amendment rights. The court held that any waiver of that right "must be freely given and shown by 'clear and compelling' evidence. . . . Unless employees clearly and affirmatively consent before any money is taken from them, this standard cannot be met."¹⁴ The Trump administration can therefore now take measures to ensure states only deduct dues from providers who have given appropriate, voluntary consent for the deductions. One way to do this is to require unions to annually obtain clear and compelling waivers, meeting a uniform standard, from providers before deducting union dues from their state payments.

In anticipation of the *Janus* decision, New Jersey enacted a law limiting the period during which a public worker may withdraw from a union to just one 10-day window per year.¹⁵ As referenced above, multiple home care providers in Minnesota reported that the SEIU forged their signatures for the purpose of authorizing dues deductions from their checks.¹⁶ A lawsuit

¹⁴ *Janus v. AFSCME*, 585 U.S. ____ (2018) at 48 (quoting *Curtis Publishing Co. v. Butts*, 388 U. S. 130, 145 (1967)).

¹⁵ Colleen O'Dea, "Conservative Group Sues Over NJ Limit on When People Can Quit Labor Unions" (NJSpotlight.com, Oct. 4, 2018), <https://perma.cc/X72R-R9KT>.

¹⁶ Sean Higgins, "Fraud alleged in Minnesota Homecare Provider Union" (Washington Examiner, March 4, 2017), <https://perma.cc/6WAB-K33W>.

brought by public employees in Washington claims government unions there have pressured and misled them into continuing their membership.¹⁷

Unions' refusal to abide by Supreme Court rulings like *Harris* and *Janus* give the federal government a compelling interest in stepping in to protect Americans' civil rights. ACF can protect family child care providers by issuing guidance requiring states to obtain providers' annual consent, supported by clear and compelling evidence, to union dues deductions. ACF could argue that clear consent is only possible in writing when the provider is identified by verifiable, unique information after indicating that he or she has read and understood the rights he or she is waiving. ACF can enforce a clear consent requirement among the states with the administrative penalty powers granted the department by statute.

For instance, ACF could send a letter or guidance memo to each state's health and welfare agency explaining what compliance with the Supreme Court's ruling requires and what will happen if they fail to comply. Appropriate language for such a letter could read as follows:

Dear Secretary/Commissioner _____:

The U.S. Supreme Court, in *Janus v. AFSCME*, recently ruled that withholding union dues or fees from public employees' pay without their consent is a violation of their First Amendment rights under the U.S. Constitution. The Court further held that consent to union dues deductions must be established by "clear and compelling evidence." In an effort to ensure that

¹⁷ Gregg Re, "Workers Say Unions Defying *Janus* Ruling, Threaten New Court Action" (Fox News, Sept. 11, 2018), <https://perma.cc/LZ6U-KZ72>.

federal funds allocated to states through the Temporary Assistance for Needy Families and Child Care and Development Fund programs are not misused in violation of the Constitution, ACF directs states to refrain from deducting union dues or fees from TANF and CCDF provider payments unless the provider has first waived his or her First Amendment right to refrain from financially supporting a union.

To comply with the Supreme Court's requirement that dues may only be withheld upon a showing of clear and affirmative consent, waivers must be designed and distributed by the state and contain the following language:

“I, [payee name], am aware that, as a public employee, I have a First Amendment right, as recognized by the U.S. Supreme Court, to refrain from joining and paying dues or fees to a labor union. I further realize that union membership and payment of union dues are completely voluntary and that I may not be discriminated against for my refusal to join or financially support a union. I hereby waive my First Amendment right to refrain from union membership and dues payment and authorize [legal employer/state agency] to deduct [union name] dues from my payment check in the amounts specified in accordance with [union name] bylaws. I understand that I may revoke this authorization at any time by providing written notice to [legal employer/state agency] or [union].”

The waiver must contain the payee's full legal name, full Social Security or tax ID number, date of birth, signature, and date signed to be valid. When a union provides

the state with a provider's dues deduction authorization, the state should confirm the authorization by sending a letter to the provider describing the deduction and the provider's purported authorization, and requiring the provider to respond to the state confirming the deduction before dues may be withheld. Waivers will be valid for one year from the date of authorization and must be resent to payees for approval on an annual basis. Jurisdictions that deduct union dues from federal TANF or CCDF benefits without obtaining a waiver will be found to have misused funds and will be subject to applicable penalties.

Substantial precedent supports these requirements: SEIU and AFSCME membership enrollment and political action committee contribution cards generally require a full name, signature, the last four digits of an enrollee's Social Security number or employee number, and more.¹⁸ However, union membership forms frequently do not inform employees of their rights in clear and neutral terms. Requiring enrollment waivers be designed and distributed by the state with ACF-prescribed language would help ensure providers receive proper notification of their rights.

Requiring a full Social Security number, instead of a partial number, would provide assurance that the provider filled out the card and help discourage forgery. Unions routinely collect full Social Security numbers from members enrolling in union-provided health benefits.¹⁹ Applying the same requirement to union

18 For example, see: AFSCME Local 3299, University of California, <https://perma.cc/2XX8-C2LU>; SEIU Healthcare Florida Local 1991, <https://perma.cc/WVEY3-397G>; AFSCME PEOPLE, <https://perma.cc/L36K-6HXA>.

19 For example, see: UFCW Local 152 Enrollment Card, <https://perma.cc/EY62-X2FS>.

dues deduction authorization forms is neither unreasonable nor unprecedented.

The annual re-enrollment requirement described above is essential to ensure clear, continued consent. With unions across the nation implementing policies to prohibit members from revoking their consent except in brief escape periods each year, “clear consent” is increasingly elusive, and it falls upon state governments to offer workers that opportunity.

Lastly, union dues deduction authorization cards collected by unions should be provided to and maintained by the state agency responsible for provider payment and union dues withholding. States should not withhold union dues from providers simply because the union informs the state a provider has authorized deductions. The double-authentication procedure described in the draft memorandum above provides critical assurance that providers themselves have consented to union dues withholding. Federal agencies such as the Department of Homeland Security, the Department of Commerce, and the Federal Financial Institutions Examination Council have repeatedly endorsed or required, and have prescribed standards for, similar multifactor authentication measures to verify the identity of individuals in employment or consumer settings.²⁰ As the entity deducting

20 “Homeland Security Presidential Directive 12: Policy for a Common Identification Standard for Federal Employees and Contractors” (U.S. Department of Homeland Security, Aug. 27, 2004), <https://perma.cc/T6KB-KAWZ>; Paul A. Grassi, Michael E. Garcia and James L. Fenton, “NIST Special Publication 800-63-3: Digital Identity Guidelines” (National Institute of Standards and Technology, June 2017), <https://perma.cc/E7Q3-PSP2>; “Authentication in an Internet Banking Environment” (Federal Financial Institutions Examination Council, October 2005), <https://perma.cc/BD9J-BQK3>.

the dues, the state should not abdicate its responsibility to ensure all union dues deductions are properly authorized.

An ACF guidance memo, whether entirely prohibiting or merely regulating union dues skimming, would provide evidence of state rule violations in any civil action ACF took to enforce the substance of the memos. Under the Trump administration, the Department of Justice has limited the purpose that guidance memos can serve as evidence against a defendant in civil or criminal actions the DOJ brings. However, this change in policy does not affect agencies that bring their own civil enforcement actions using staff counsel.²¹

Such a memo would be well within precedent. Under the Obama administration in 2014, citing constitutional authority, DOJ issued guidance to federal, state and local law enforcement agencies prohibiting their officers from profiling suspects on the basis of gender, national origin, religion, sexual orientation or gender identity.²² The memorandum expanded on a George W. Bush-era memo prohibiting racial profiling and requiring agencies to implement training and data-collection activities related to the new guidance. Similarly, the Bush Department of Education in 2003 issued guidance to states warning them that they may be subject to financial penalties under federal law if they prohibit students in public schools from exercising

21 Brian Knight, “Regulation by Guidance and Due Process: A Response by the Department of Justice” (Mercatus Center at George Mason University, Feb. 8, 2018), <https://perma.cc/78SB-C7YF>.

22 “Guidance for Federal Law Enforcement Agencies Regarding the Use of Race, Ethnicity, Gender, National Origin, Religion, Sexual Orientation, or Gender Identity” (U.S. Department of Justice, December 2014), <https://perma.cc/GCY8-CNFD>.

students' constitutional right to prayer in school. The memo laid out a detailed First Amendment analysis and prescribed steps states must take to ensure schools comply with federal law.²³

HHS guidance designed to enforce the Supreme Court's clearly articulated constitutional standards related to union dues deductions would rest on a firm legal and policymaking foundation. However, regulatory proposals to end union dues skimming of child-care benefits would have more teeth and a stronger legal posture than would agency action based on guidance alone. Rulemaking is also more durable than executive orders and agency guidance as repealing a regulation requires navigating the same APA process as initial adoption.

Conclusion

The practice by some states of skimming union dues from federal funds appropriated to provide child care to needy families may be successfully ended or reformed by the Trump administration.

Agency guidance, supported by administrative penalties and agency action, will help to protect program beneficiaries and dissuade states from continuing the practice of dues skimming. Though guidance memos lack strict legal enforceability, state agencies often comply with them when issued by federal agencies that provide their funding. Requiring providers to opt in to union deductions on an annual basis is a fair and reasonable way to establish their consent to waive their First Amendment rights, which a recent Supreme Court decision requires.

23 "Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools" (U.S. Department of Education, Feb. 7, 2003), <https://perma.cc/7DQH-J8MD>.

Enforcement of guidance to this effect would almost certainly be challenged in court, and the outcome of litigation would be uncertain. A rulemaking proposal to prohibit union dues skimming of TANF and CCDF child care funds would be the strongest, most permanent and least assailable course of action for the administration to follow, short of pursuing an act of Congress.

Author



Chase Martin is a policy consultant who has worked in state government, numerous campaigns, and ballot initiatives.

Chase has organized and led grassroots coalitions to create and influence public policy relating to healthcare, energy, and telecommunications.

Chase served as the Senior Legal and Policy Advisor to the Commissioner for the Maine Department of Health and Human Services (DHHS). In this role, he served as legal counsel to the Commissioner on policy and management decisions for reforming various state and federal entitlement programs, as well as Executive branch appellate issues before the Maine Supreme Court. Chase also interacted and served as liaison with the U.S. Department of Health and Human Services Centers for Medicare and Medicaid and the U.S.D.A. Food and Nutrition Service while working at the Maine DHHS.

Chase is a graduate of the University of Maine School of Law in Portland, Maine and the University of Southern Maine. He is currently a member of the State Bar of Maine and lives in Washington, DC.

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