MACKINAC CENTER
FOR PUBLIC POLICY

Mackinac Center for Public Policy comment in opposition:
Medicaid Program: Reassignment of Medicaid Provider Claims
CMS-2444-P, Document ID: CMS-2021-0130-0001

Medicaid Payments Should Go to Caregivers, Not to Union Politics

Stephen Delie, Director of Labor Policy, Mackinac Center for Public Policy

The Mackinac Center for Public Policy opposes the Department of Health and Human Services' ("the Department's") Notice of Proposed Rulemaking regarding the diversion of payments for Medicaid services to third parties alleged to benefit practitioners, CMS-2444-P, issued July 28, 2021.

The Mackinac Center for Public Policy is a nonprofit research and educational institute that advances the principles of free markets and limited government. Through our research and educational programs, we challenge government overreach and advocate for free market approaches to public policy that free people to realize their potential and their dreams.

We strongly oppose the Department's proposed rule, which directly contradicts the relevant enabling statute. More than that, it would permit the continuation of a scheme by which payments to home health care providers are diverted to support favored special interests and their political activity. Such diversions do not benefit individual providers or those in their care, but rather empower public-sector unions to enact in inherently political activity. The current rule, by contrast, protects caregivers by ensuring they receive the full amount of payments meant to support their loved ones, and it should not be altered.

BACKGROUND

1. Legal Background

The Social Security Act, 42 U.S.C. §1396a(a)(32) ("Section 32") governs payments from Medicaid plans to third parties, stating:

> A State plan for medical assistance must—
>
> …
> (32) provide that no payment under the plan for any care or service provided to an individual shall be made to anyone other than such individual or the person or institution providing such care or service, under an assignment or power of attorney or otherwise; except that—

The statute then describes exemptions, none of which would permit the Department's proposed rule. These exemptions are clearly enumerated in the statute, and no further authority is provided for either the Secretary, or the Department, to create additional exemptions. Despite this, in 2014, the Department attempted to create such an exemption by promulgating 42 C.F.R. §447.10(g)(4). That regulation added the following exemption:

> (g) ***
>
> > (4) In the case of a class of practitioners for which the Medicaid program is the primary source of service revenue, payment may be made to a third party on behalf of the individual practitioner for benefits such as health insurance, skills training and other benefits customary for employees.[1]

This exemption was eventually repealed in 2019. In repealing the exemption, the Department noted that "section 1092(a)(32) of the Act does not specifically provide for additional exceptions to the direct payment requirement."[2] The Department continued, stating

> More recently, we have become concerned that § 447.10(g)(4) is neither explicitly nor implicitly authorized by the statute, which identifies the only permissible exceptions to the rule that only a provider may receive Medicaid payments. Unlike section 1902(a)(6) of the Act, that requires a State agency to make such reports, in such form and containing such information, as the Secretary may from time to time may (sic) require, section 1902(a)(32) of the Act provides for a number of exceptions to the direct payment requirement that we believe constitutes an exclusive list of exceptions and does not authorize the agency to create new exceptions. The regulatory provision at §447.10(g)(4) granted permissions that Congress has not expressly authorized, and, in our interpretation, has foreclosed.[3]

This repeal was later challenged in court and eventually vacated by the U.S. District Court for the Northern District of California in California v. Azar, 501 F. Supp. 3d 830 (N.D. Cal. 2020). In response, HHS appealed to the 9th U.S. Circuit Court of Appeals in California v Becerra, No. 21-15091 (9th Cir.), which remains pending before that court.

With the matter remanded to it, the Department has since issued the current notice of proposed rulemaking ("NPRM"), which is strikingly similar to the 2014 rule the Department previously repealed. The text of the relevant portion of the NPRM reads:

> (i) Payment prohibition. The payment prohibition in section 1902(a)(32) of the Act and paragraph (d) of this section does not apply to payments to a third party on behalf of an individual practitioner for benefits such as health insurance, skills training, and other benefits customary for employees, in the case of a class of practitioners for which the Medicaid program is the primary source of revenue, if the practitioner voluntarily consents to such payments to third parties on the practitioner's behalf.[4]

---

1 https://perma.cc/HZG9-8JR6.

2 https://perma.cc/97VM-XZ62.

3 *Id.*

4 https://perma.cc/52GX-KUQS.

The only meaningful addition to the 2014 rule is the requirement that the "practitioner voluntary consents" to payments to third parties.

2. Factual Background

In 2011, the Mackinac Center was the first organization to discover the redirection of Medicaid payments to labor organizations, commonly called a "dues skim." In Michigan, the Service Employees International Union's local affiliate recognized it could obtain dues from home health care providers and worked with the state to unionize them. First, the SEIU lobbied the state to create an agency known as the "Michigan Quality Community Care Council" that would serve as the putative employer of home health care providers in Michigan.[5] The SEIU then bargained with that "employer" to unionize these workers. This all happened even though fewer than 20% of the affected home health care providers voted for the union.[6] Many were not even aware that a unionization election had occurred.

As a result, a portion of the federal money meant to pay these home health care providers to care for others — often their seriously ill or disabled family members — was redirected to the SEIU.[7] By 2012, the SEIU had successfully redirected over $34 million in this way in Michigan alone.[8]

After the Mackinac Center discovered this arrangement, and brought it to the public's attention, the Michigan Legislature exempted home health care providers from Michigan's public sector bargaining law.[9] There were also lawsuits throughout the states, ultimately resulting in the United States Supreme Court's ruling in *Harris v. Quinn*, which forbade states from requiring home health care providers in right-to-work states to pay agency fees to keep their jobs.[10]

In Michigan, after reforms were passed (and later reaffirmed in a ballot proposal),[11] home health care providers overwhelming demonstrated they did not wish to be unionized. In less than a year, SEIU Healthcare Michigan's membership fell from 55,265 to 10,918.[12] That number has only continued to fall, with 2020 membership listed as only 7,181.[13] In other words, when given the choice about whether to become a member of a union, only 13% of providers decided it was worthwhile.

---

5 https://perma.cc/LJ79-EZK7.

6 https://perma.cc/L9SY-KB2T.

7 https://perma.cc/D6CA-M3JA.

8 *Id.*

9 2012 MI PA 1018.

10 https://perma.cc/PF69-6WBY.

11 https://perma.cc/9KTL-BJ96.

12 Available through LM-2 reports for SEIU Healthcare Michigan. The fall in membership can be seen by comparing the 2012 and 2013 LM2 reports, available at file number 543-857. https://olmsapps.dol.gov/query/getOrgQry.do.

13 Available through LM-2 reports for SEIU Healthcare Michigan for the year 2020. https://olmsapps.dol.gov/query/getOrgQry.do.

COMMENTS ON THE DEPARTMENTS PROPOSED RULE

The changes proposed by CMS appear to be both contrary to law and of questionable benefit to providers, particularly those who serve as home health care providers for sick and disabled family members. We address each issue in turn.

1. Legality of the Proposed Rule

a. The Department Lacks the Authority to Adopt the Proposed Rule

As highlighted above, the Department's proposed rule is very similar to the 2014 rule that added §447.10(g)(4). As it later recognized, the Department lacked the authority to add that rule.[14] The authority to introduce the current rule is equally suspect.

"When Congress specifically enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of contrary legislative intent." *NRDC v. EPA*, 489 F. 3d 1250, 1259-1260 (D.C. Cir. 2007). In 2019, the Department acknowledged that it had "not seen any evidence of such intent in the text, structure, purpose, and legislative history," instead concluding that its review confirmed a legislative intent that the exceptions listed in section 1902(a)(32) be exclusive.[15] While it is true that the Department retains broad discretion to modify or alter its previous rules, it also has a burden to "provide a more detailed justification than what would suffice for a new policy created on a blank slate." *Fox v. Fox Television Stations, Inc.*, 556 U.S. 502, 514-15 (2009). The Department has not done so here.

b. The Department's Addition of a Voluntariness Requirement is an Illusory One

The NPRM adds a requirement that providers voluntarily consent to having their Medicaid payments diverted. This does not alleviate the issues with either the 2014 rule, or the rule currently being considered. Since the time the Department enacted the original version (2014), the United States Supreme Court has issued two key opinions that have provided greater protections to home health care providers. Despite this, however, unions have used aggressive tactics to coerce unaware or unwilling providers into becoming union members. These efforts are only amplified by anti-worker legislation supported by unions in states with pro-labor governments. As we stated in our comment on the 2019 rule, "[t]he Mackinac Center maintains that [dues skim] is inherently unethical and must be reformed."[16]

Without question, the Supreme Court has taken steps to affirm worker rights since the Department issued the 2014 version of the proposed rule. In 2014, the Court decided *Harris v. Quinn*, 134 S. Ct. 2618 (2014), which held that independent in-home caregivers in Illinois could not be forced to pay agency fees as a condition of employment. That decision was later expanded upon in the landmark *Janus v. Am. Fedn' of State, Cnty., and Mun. Emps., Council 31*, 138 S. Ct. 2448 (2018), in which the Court ruled that

---

14 Supra note 1.

15 https://perma.cc/97VM-XZ62.

16 Available at: https://perma.cc/28E7-VLG3. See page 4.

public sector employees could not be required to financially support a union in order to keep their jobs.

Janus examined whether public employees had a First Amendment right to refuse to financially support a public sector union. The Court answered affirmatively, noting that all actions of a public sector union, even traditional representational activities, were "inherently political." *Id.* at 2480 (citation and internal quotations omitted). Since payments to these unions necessarily, therefore, supported an act of political speech, such payments could not be compelled under the First Amendment. *Id.* at 2486. Instead, the Court ruled, public sector workers must first waive their First Amendment rights before any dues or fees could be withdrawn from their paychecks. *Id.*

The Court continued by elaborating on precisely what was required. It held that a worker's First Amendment "waiver cannot be presumed. Rather, to be effective, the waiver must be freely given and shown by 'clear and compelling evidence." *Id.* To satisfy that standard, "employees [must] clearly and affirmatively consent before any money is taken from them. …" *Id.*

Other Supreme Court precedent highlights the standards that should be applied when evaluating whether a waiver is the result of clear and affirmative consent, as required by *Janus*. First, a waiver must be a "knowing, intelligent act … done with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748 (1970). "An effective waiver must … be one of a 'known privilege or right." *Curtis Pub Co v. Butts*, 388 U.S. 130, 143 (1967) (citation omitted). It must also be done with "a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." *Moran v. Burbine*, 475 U.S. 412, 421 (1986). Therefore, for any truly voluntary waiver to occur, employees must know both what their rights are, and the consequences of waiving those rights.

Presumably a nod to *Janus*, the Department's proposed rule contains an addition to the 2014 version, requiring that a provider "voluntary consents" to diversion of Medicaid payments to a third-party. That addition would nonetheless fail to carry out the requirements of highlighted above if it carried no further protections. Post-*Janus* litigation reveals precisely how illusory the protection offered by this language can be when interpreted by courts.

As an example, the case *Troesch v. Chicago Teachers Union*, No. 20-1786, is currently pending before the Supreme Court, on appeal from the 7th U.S. Circuit. In that case, public sector employees signed union membership agreements before Janus was decided, and they argued that post-*Janus*, such agreements were insufficient evidence of a valid waiver. The employees have argued that, since they were not aware of their *Janus* rights and were not residents of a right-to-work state, they had no ability to voluntarily waive their First Amendment right to not support a union. Despite this, the 7th Circuit affirmed these pre-existing agreements as demonstrating voluntariness.

Similar cases have been decided in multiple federal circuits, each of which affirmed a similar view of what a voluntary waiver entails.[17] Each of these cases has ignored Supreme Court precedent that a

17 See, e.g., *Id., Diamond v. P.A. State Educ. Ass'n*, 972 F. 3d 262 (3d Cir., 2020) (petition for cert. denied); *Loescher v. Minnesota Teamsters Pub. Law Enf't*, 2020 WL 5525220 (8th Cir., 2020); *Belgau v. Inslee*, 975 F. 3d 940 (9th Cir., 2020) (petition for cert. denied).

meaningful waiver requires an employee know their rights and the consequences of waiving them.[18] In light of these cases' incorrect interpretations of what constitutes a voluntary waiver, significantly more clarity is needed than what is offered by the Department's proposed rule.

This is particularly true in light of union-supported laws designed to limit the ability of outside organizations to communicate with public-sector and home health care employees regarding their rights.[19] In Washington, a union-supported ballot intuitive, approved by voters, prevents anyone from obtaining the contact information for home health care providers, with an exception for a union which serves as their exclusive representative.[20] And Washington is not the only state to adopt such a law. Indeed, at least 10 states have some law restricting access to the contact information of public-sector employees or care providers.[21] This is in addition to other laws giving unions preferential access to newly hired employees, in order to convince them to join a union.[22] Unions have no incentive to inform these employees of the full extent of their First Amendment rights to either join, or refuse to join, a union.

c. If the Department Chooses to Adopt the Proposed Rule, It Should Also Adopt Procedural Protections for Providers' First Amendment Rights.

Without significant clarification to the meaning of "voluntary" as used in the Department's notice, providers are at risk of being forced to pay dues to a labor organization they often don't know they are even members of. Worse still, since these dues would pay public sector labor organizations, they would be funding inherently political activity, often without meaningful knowledge or consent on the part of the provider.

Therefore, to the extent the Department chooses to move forward with this rule, despite the well-grounded opposition thereto, it should at the very least clarify that "voluntary" payments to third-parties be truly voluntary. This would require that providers be fully informed about their rights

---

18 *Supra* Notes 24-25. See also, *Patterson v. Illinois*, 487 U.S. 285, 292 (1988) (holding that a First Amendment waiver is only valid if the individual knows of their rights and freely and intentional chooses to abandon them).

19 These laws, and their effects on the workers' rights, are discussed extensively in the Goldwater Institute and Cato Institute's joint *amicus curiae* brief in *Troesch v. Chicago Teachers Union*. This comment will highlight a number of these laws, but wishes to draw the Department's attention to this additional resource, available at: https://perma.cc/DC6S-N7CM.

20 See *Boardman v. Inslee*, 978 F.3d 1092, 1123–24 (9th Cir. 2020) (Bress, J., dissenting) (citing Wash. Rev. Code §§ 42.56.640(2), 42.56.645(1)(d), 43.17.410(1)), *petition for cert. filed*, No. 20-1334 (Mar. 24, 2021).

21 See, e.g., Cal. Gov't Code §§ 3558, 6254.3; Haw. Rev. Stat. § 89-16.6(a), (d); 5 Ill. Comp. Stat. 140/7.5(oo), (pp), 315/6(c), (c-5); 26 Me. Rev. Stat. Ann. § 975(2); Md. Code, State Pers. & Pens. §§ 3-208, 3-2A-08; Md. Code, Educ. § 6-407; Md. Code, General Provisions §§ 4-311(b)(3), 4331; N.J. Stat. Ann. 34:13A-5.13(c), (d); N.Y. E.O. 183 (June 27, 2018); N.Y. Civ. Serv. Law §§ 208(4)(a), 209-a(1)(h); 3 Vt. Stat. Ann. §§ 909(c), 910, 1022(c), 1023; 16 Vt. Stat. Ann. §§ 1984(c), 1985; 21 Vt. Stat. Ann. §§ 1646, 1738(c), 1739; 33 Vt. Stat. Ann. § 3619; see also Or. Rev. Stat. §§ 192.355(3), 192.363, 192.365, 243.804(4)(a).

22 See, e.g., Cal. Gov't Code § 3556; 5 Ill. Comp. Stat. 315/6(c-10)(1)(C) (enacted December 2019); 26 Me. Rev. Stat. Ann. § 975(1)(c); Md. Code Ann., State Pers. & Pens. § 3-307(b)(3), (5); Md. Code, Educ. §§ 6-407.1, 6-509.1(a)(1); Mass. Gen. Laws Ann. ch. 150E, § 5A(b)(iii); N.J. Stat. Ann. 34:13A-5.13(b)(3); N.Y. Civ. Serv. Law § 208(b), (c); Or. Rev. Stat. § 243.804(1)(b)(B); Wash. Rev. Code § 41.56.037.

before agreeing to divert funds, including their rights to not be forced to financially support a union to continue to receive Medicaid payments or otherwise keep their jobs. Absent such information, a provider's consent cannot be said to be "knowing" as required by *Janus*.

Some states, such as Alaska, Texas, Indiana, and Michigan, have already identified the need for employees' First Amendment rights to be further protected.[23] If the Department were to adopt the proposed rule, we would recommend it follow these examples and require specific waiver language designed to protect caregiver rights. Such language should be made part of a Department-issued waiver form and contain language that is substantially similar to the following:

> "The Department of Health and Human Services wishes to make you aware that you have a First Amendment right, as recognized by the United States Supreme Court, to either join, or refrain from joining and paying dues to a union or labor organization. Your membership and payment of dues are voluntary and you may not be discriminated against or terminated for your refusal to join or financially support a union. By signing this form, you are agreeing to authorize dues from any payments to you by the Department in the amounts specified in accordance with your union's bylaws. You may revoke this authorization at any time."[24]

In addition, the Department should ensure that it verifies any payments to third parties are, in fact, authorized by each provider. Evidence of voluntariness should have to be provided directly to the Department by the individual provider, rather than any third party, including a union. And the Department should confirm with the individual provider that any payment to a third party is consistent with their wishes before diverting any payments. This is especially important given a number of cases in which labor organizations forged dues authorizations, and it helps to avoid that problem going forward.[25]

While these additions do not alleviate the fact that the proposed rule is not authorized by the Social Security Act, it at least ensures that providers would be given a free and truly voluntary choice about where their Medicaid payments should be directed.

2. Policy Considerations

The factual background that developed when the Department's previous rule was in effect demonstrates that, far from benefitting caregivers, the Department's proposed rule would, in fact, hurt them. Even worse, it would authorize a system that would drain federal funds from the pockets of those who need it most. Given that it was common for most caregivers to not even be aware of their unionized status before the 2014 rule

---

23 Texas Attorney General Opinion No. KP-0310; 2019 Op. Alaska Att'y Gen. (August 27)(Opinion); Indiana Attorney General Opinion 2020-5 (June 17, 2020); https://perma.cc/9UCK-NUBM.

24 This language is a variant of the language proposed by Chase Martin in his piece "Ending the Skimming of Union Dues from Federal Child Care Funds." https://perma.cc/8LBS-WBY6. In discussing similar diversionary payments, Mr. Martin proposes language to protect child care providers, as well as providing the justification for taking protective action. Much of this publication is equally applicable to home health care providers and is therefore useful in evaluating the Department's proposed rule.

25 See, e.g., *Quezambra v. United Domestic Workers of America, AFSCME Local 3930*, 445 F. Supp. 3d 695 (C.D. Cal., 2020) (under appeal); https://perma.cc/Z7X2-HVPH.

was adopted, it is wildly inappropriate to return to a system in which payments of Medicaid funds can be directed to third parties without significant additional protections.[26]

The practical consequences of permitting dues skimming cannot be understated. The providers from whom payments would be diverted are often the family members of those with serious illnesses or disabilities, who would be otherwise unable to care for themselves. These family members sacrifice their time and energy, compensated primarily through Medicaid payments. Despite this, unions have previously used the Department's 2014 rule to divert payments while providing little, if any, tangible benefits. Home health care providers are not employed by an outside agency, but rather their patients, and work from either their own homes, or the homes of their ill and disabled relatives. The manage their own working conditions and hours, based on the needs of their patient. Unions play no representational role in these areas, the traditional core of collective bargaining.

Likewise, it is unnecessary to permit diversion of Medicaid payments for purposes of training. It would be difficult, if not impossible, to track whether each labor organization paid directly through Medicaid actually provides training. It would be similarly difficult to quantify the value of that training, or to track whether home health care providers participate in it. There has also been little, if any, evidence presented that demonstrates how diverting payments has benefitted providers in the past beyond broad and unsubstantiated assertions in the proposed rule. To the extent the proposed rule is aimed at providing better resources for providers, a far better proposition would be to continue without the proposed rule and allow providers to chose whether they wish to pay for additional training. Such trainings could be offered by any third parties, including unions, and priced at the level selected by those organizations. It would then be up to the providers, who regularly make decisions about what is best for their patient, to decide whether a particular training provides enough value to justify the cost.

History teaches us that allowing diversion of Medicaid payments to unions does not benefit providers. In our state there was an 87% reduction in SEIU Healthcare Michigan's membership following reforms that did not require providers to maintain membership to keep their jobs.[27] If the alleged benefits of unionization of home health care workers, as would be permitted by the Department's proposed rule, are significant, such a membership drop would be unexpected. The Department should not implement a rule that is contrary to the free choice of a vast majority of providers.

Caregivers should not find their Medicaid payments reduced to pay for membership dues in a labor organization. This is doubly true for those who are most vulnerable, carrying for family and loved ones in a home health care capacity. The consequences of the Departments' proposed rules are serious and would hurt families, as demonstrated by a recent film "The Big Skim," in which providers tell how they were affected by the Department's previous rule.[28] If nothing else, these stories should give the Department pause about the wisdom of proceeding with this proposed rule.

---

26 As previously stated, only 20% of the affected caregivers in Michigan voted in the unionization election. https://perma.cc/L9SY-KB2T. In California, that number was only 27%. https://perma.cc/D6CA-M3JA. For Washington and Oregon, the percent participating was 31% and 42% respectively. https://perma.cc/VE6U-JF97. In some states, such as Illinois and Iowa, no election was even held. Id.

27 Supra, notes 11 and 12.

28 https://perma.cc/7X2J-RX7K.

CONCLUSION

The Mackinac Center strongly opposes the Department's effort to permit the diversion of Medicaid funds to third parties. Such a change would harm caregivers, provide no meaningful benefit to their patients, and directly lead to the federal funding of the inherently political activity of public-sector unions. Funds paid to caregivers should be used to support their efforts to care for the sick and disabled, not for favored political causes. This is doubly true while the litigation against the Department's 2019 rule is ongoing. The Department should not adopt the proposed rule and should continue to defend its prior rule, which recognized it lacked authority to modify the Social Security Act through rulemaking. But, to the extent the Department intends to adopt the rule, it should also include specialized procedural protections to adequately protect providers' First Amendment Rights under *Janus* and *Harris*.