JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW

September 23, 2021

DELIVERED ELECTRONICALLY

Chiquita Brooks-LaSure, Administrator
Centers for Medicare & Medicaid Services
Department of Health and Human Services
Attention: CMS-2444-P, P.O. Box 8016
Baltimore, MD 21244-8016

RE: CMS-2444-P: Medicaid Program; Reassignment of Medicaid Provider Claims

Dear Ms. Brooks-LaSure:

Justice in Aging appreciates the opportunity to comment on the Notice of Proposed Rulemaking (NPRM) amending regulations governing reassignment of Medicaid provider claims published in the Federal Register on August 3, 2021.

Justice in Aging is a national, legal nonprofit that uses the power of law to fight senior poverty. We work in several critical areas: health care and long-term services and supports, economic security, housing, and elder justice. We focus our work on the needs of older adults of color, older women, LGBTQ seniors, and older adults with limited English proficiency.

We strongly support the proposed amendments because they will ensure that home care workers can continue to make deductions for health, training, and other standard workplace benefits, which is key to enabling the self-directed model for delivery of HCBS. As an organization that works to ensure that older adults and people with disabilities have access to a full range of services that allow them to live as independently as possible in their homes and communities, we recognize the key role of home care workforce plays in making that a reality. There is a close connection between addressing workforce challenges, such as low wages and lack of benefits, and ensuring full access to these services. Justice in Aging opposed CMS's 2018 reassignment proposal, finalized in 2019, to bar deductions from home care worker payments for standard employment benefits such as health care, training, and union dues.[1] We knew the inability to make these payments would reduce access to crucial benefits and negatively affect job quality, which in turn would increase worker turnover and

[1] Medicaid Program; Reassignment of Medicaid Provider Claims, 84 Fed. Reg. 19,718 (May 6, 2019).

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shortages and, ultimately, reduce access to and quality of care. We believe the district court made the right decision when it vacated the 2019 rule in *California v. Azar*,[2] and are pleased that CMS acted quickly to amend the current regulatory language in response to the court's decision.

Strengthening the HCBS System

As the NPRM notes, the majority of spending for long-term services and supports now goes to HCBS, rather than institutional services. This shift reflects the growing preference of older adults and people with disabilities to age at home, as well as the impact of the Supreme Court's *Olmstead* v. *L.C.* decision[3] and other policy changes supporting full integration of people with disabilities into the community. Home care workers provide a significant portion of HCBS, including assistance with bathing and toileting, meal preparation and feeding, as well as some health-related tasks. It is intimate care that is essential and demanding work which allows people to live with dignity and independence in their homes and communities.

Within the array of HCBS services, self-directed programs allow consumers a higher level of autonomy and independence. As a result, self-directed programs have become increasingly popular, and continue to grow. The number of self-directed home care providers is now estimated to be at least 1.2 million, and the demand for their services will likely only increase.[4] Both agency-employed workers and the self-directed workforce face the challenges of low wages, few benefits, and little support on the job - resulting in workforce instability, and threatening the quality and availability of these services. In addition, self-directed workers have historically lacked a common employer and the ability to form unions to bargain for improvements in pay, working conditions, and benefits. In response to these challenges, home care workers began to organize unions and eventually won the right to collectively bargain in a number of states. As a result, these workers have won significant improvements, including wage increases, health and retirement benefits, and expanded training opportunities. Home care unions have also worked side by side with organizations such Justice in Aging to increase funding and expand HCBS at the state and federal levels.

We believe the improvements in workforce standards have been supported by the ability of states and workers to direct a portion of service payments to pay for the costs of benefits such as health care and training. Workforce improvements help consumers by ensuring workers are available and well-prepared to deliver the hands-on services they need. Workers can receive the training, supports, and compensation they need to continue providing these critical services. The ability for workers to join together in a union, and have input into the HCBS system is particularly important in self-directed

[2] 501 F. Supp. 3d 830 (N.D. Cal. 2020)
[3] 527 U.S. 581 (1999)
[4] PHI, September 2021. Direct Care Workers in the United States: Key Facts, p.8. Available at: https://phinational.org/resource/direct-care-workers-in-the-united-states-key-facts-2/

models of HCBS where workers and their voices are otherwise disaggregated, unlike a more standard work environment. Finally, we also note that this is a matter of racial equity as well as program stability--the economic gains home care workers have won constitute a key step in addressing the past marginalization of this workforce, which is largely made up of women of color.[5,6]

We want to ensure that the improvements these workers have been able to make are sustained and expanded into the future. The ability of these workers to contribute to their benefits from the payments they receive is integral to achieving that goal.

Voluntary Consent Requirement

CMS proposes to defer to states to ensure that consent for deductions is obtained, but raises the possibility of being more prescriptive concerning the form of consent, and specifically of requiring written consent. We support deferring to states given the fact that states typically implement deductions according to state law or policy, provisions in a collective bargaining agreement, or other regulations. Given the wide variation in state law, and the fact that states generally maintain the authority to administer their individual and unique Medicaid programs, we believe that the original proposal to defer to the states to determine how to obtain the consent of workers for deductions. Additionally, as CMS notes in a footnote in the NPRM some deductions, such as union dues, already require the affirmative consent from workers. If CMS became too prescriptive on this matter, it could become unduly burdensome on state programs and workers within those programs.

We thank you for the opportunity to comment on this matter, and look forward to working with CMS on HCBS access, equity, and workforce issues in the future.

Sincerely,

Claire M. Ramsey
Senior Staff Attorney

[5] PHI., Workforce Data Center, National Data, Race and Ethnicity. Available at: https://phinational.org/policy-research/workforce-data-center/#tab=National+Data&natvar=Race+and+Ethnicity

[6] PHI., Workforce Data Center, National Data, Gender. Available at: https://phinational.org/policy-research/workforce-data-center/#tab=National+Data&natvar=Gender