

# JUSTICE IN AGING

FIGHTING SENIOR POVERTY THROUGH LAW



Disability Rights Education & Defense Fund

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. 8016  
Baltimore, MD 21244-8016

Re: CMS-2413-P: Medicaid Program Reassignment of Medicaid Provider Claims

Dear Administrator Verma,

Justice in Aging, Disability Rights California, and Disability Rights Education and Defense Fund (DREDF) submit the following comments opposing proposed rule #CMS-2413-P, which would prevent states from paying in-home care providers' health care insurance payments and union dues.

Justice in Aging is a national nonprofit that uses the power of the law to fight senior poverty by securing affordable health care and economic security for older adults with limited resources. Disability Rights California is a non-profit law firm working to advance dignity, equality, independence, and freedom for all Californians with disabilities. DREDF is a leading national civil rights law and policy center directed by individuals with disabilities and parents who have children with disabilities.

In California, more than 400,000 providers provide care for more than 500,000 In-Home Supportive Services (IHSS) recipients. California's program allows for recipient self-direction while ensuring payroll is handled through the State. The proposed rule will needlessly disrupt California's ability to administer all payroll functions for the In-Home Supportive Services program, including preventing the State from deducting health care premiums and union dues. Rescinding this rule is not required by law as asserted in the proposed rulemaking, will harm consumers and providers by disrupting home care payments, and is based on a weak quantitative understanding of the harmful effects of the change.

### WASHINGTON

1444 Eye Street, NW, Suite 1100  
Washington, DC 20005  
202-289-6976

### LOS ANGELES

3660 Wilshire Boulevard, Suite 718  
Los Angeles, CA 90010  
213-639-0930

### OAKLAND

1330 Broadway, Suite 525  
Oakland, CA 94612  
510-663-1055



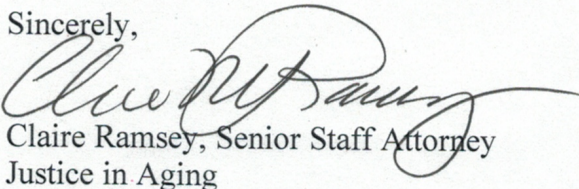
During the 2014 rulemaking process promulgating the regulation at issue, CMS explicitly considered and rejected the proposition that the rule consisted of a new exception to section 1902(a)(32) of the Social Security Act. This finding was correct. The Congressional concern originally addressed by section 1902(a)(32) was the practice of “factoring” – that is, the sale of Medicaid accounts receivable from, for example, a physician, to a third party who would then collect payment for the service provided, often submitting inflated claims. In fact, since the mid-1990s, CMS has been aware of, and permitted the practice of allowing states to make payroll deductions for consumer-directed programs. The 2014 rule simply reinforced what was already law, that independent provider pay deductions are not reassignments and fall outside the scope of the statute.

While it is clear that the anti-reassignment provision was never intended to apply to home care worker payment deductions, it is equally clear that the proposed change will have a negative impact on access to and quality of Medicaid-funded home and community-based services, and in particular on the consumer-directed model for providing those services. In California, that means significant negative impacts on the In-Home Supportive Services program. California has determined that the best way to administer the In-Home Supportive Services program is to provide consumers with broad discretion in hiring, supervising, and firing providers while retaining authority over payroll. In administering the IHSS program in this manner, the State accomplishes two goals that directly serve consumers—people with disabilities and seniors have the autonomy to direct and work with their chosen home care workers and the administrative burden of ensuring accurate payroll deductions are minimized. Administrative burdens, whether on the provider or the consumer, can make it significantly more difficult to hire and retain good care workers. In short, disruption of the California’s authority to deduct customary employee benefits harms consumers and providers without offering any countervailing benefits.

Finally, we want to note our concern about the process underlying this notice of proposed rulemaking. CMS claims that the rule is economically significant, but 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. CMS should refrain from rescinding a rule that will have a significant economic impact without first understanding what that impact is. Furthermore, 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 meaningful opportunity for all stakeholders to comment. This is inadequate grounds 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.

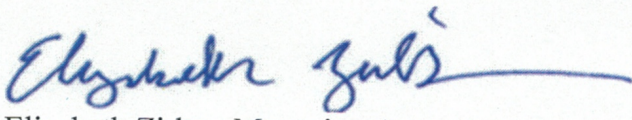
For all these reasons, we respectfully request CMS withdraw this proposed rule change.

Sincerely,



Claire Ramsey, Senior Staff Attorney  
Justice in Aging





Elizabeth Zirker, Managing Attorney  
Disability Rights California

/s/

Silvia Yee, Senior Staff Attorney  
Disability Rights and Education Defense Fund