

# POLICY BRIEF

## Ending the union's skim of home health care wages

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October 2017

### Key Findings

1. In 1999, the Service Employees International Union (SEIU) began a state-by-state political effort to change the classification of in-home health care and day care providers from private-sector workers to public-sector. Reclassification as a public-sector employee meant the state would technically be considered their employer, and unions could require that those workers join the union and pay dues or agency fees.
2. Under the cover of collecting union "dues" or "agency fees," SEIU has arranged for some states, like Washington, to automatically take a portion of the more than \$41 billion the government sends every year to individual Medicaid recipients and the \$11.4 billion of taxpayer dollars spent on the Child Care and Development Fund and Temporary Assistance for Needy Families programs.
3. These arrangements result in the misuse by SEIU of hundreds of millions of dollars annually in public money that is meant to provide assistance to elderly, ill or disabled individuals and low-income families. This happens in 11 states, including Washington.
4. Washington automatically extracts 3.2 percent of the earnings of home health care providers and two percent from home day care providers and sends it to SEIU.
5. The SEIU dues skim of Medicaid benefits from Washington state's home health care providers alone amounts to a staggering \$27 million for SEIU 775 each year. The dues taken from the state's day care providers generated several more million each year for SEIU 925.
6. The U.S. Supreme Court ruled in *Harris v. Quinn* that designating providers as public employees only for the purposes of unionization makes them "partial public employees" who cannot be forced to participate in a union or pay union dues or agency fees.
7. SEIU strongly opposed the Court's ruling, and has aggressively worked to prevent workers from exercising their right not to pay union dues or fees. SEIU "dues skims" are still active in 11 states, including Washington.
8. Given the union's determination to figure out ways around the *Harris v. Quinn* decision, the time is right for the Trump Administration to issue definitive rules that protect the rights of workers and end the SEIU dues skim.



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# Ending the union's skim of home health care wages

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## Introduction:

Each year executives at the country's largest government employees union, Service Employees International Union (SEIU), exploit loopholes in the law to fill their coffers with millions of dollars in taxpayer money.

Under the cover of collecting union "dues" or "agency fees," SEIU has arranged for some states, like Washington, to automatically take a portion of the more than \$41 billion the government sends every year to individual Medicaid recipients. The Medicaid money sent to low-income elderly, disabled or ill individuals is meant to enable them to pay for in-home care. Medicaid payments are sent directly to the individual in-home health care providers on behalf of their Medicaid-eligible "client," but in some states a portion of these payments are diverted to SEIU before the caregiver receives any money.

Many of the home health care providers who are forced to pay SEIU "dues" or "fees" are taking care of a family member or a close friend in their home. Often these caregivers have no idea they have been made SEIU members or are paying nearly \$1,000 per year to the union, because their state automatically deducts that money and sends it to the union before the provider ever receives payment. They receive a modest Medicaid-funded stipend each month to help cover the costs of the in-home care they provide for their friend or loved one.

SEIU employs a similar scheme to siphon off a portion of the \$11.4 billion of taxpayer dollars spent on the Child Care and Development Fund and Temporary Assistance for Needy Families programs. These programs provide federal block grant money to states to help low-income families afford day care. Individual home-based child care providers whose clients are eligible for these programs receive payment through the government grants, and as with Medicaid, a portion of their payment is first automatically taken by SEIU.

These arrangements result in the misuse by SEIU of hundreds of millions of dollars annually in public money that is meant to provide assistance to elderly, ill or disabled individuals and low-income families. This happens in several states, including Washington.

## Background

In the mid-1980s, as union membership declined, labor unions developed plans to increase their dues-paying membership by unionizing state-subsidized individual in-home health care providers.<sup>1</sup>

Home health care providers are individuals who contract with the state to provide in-home care to another person who is eligible for state-subsidized in-home care services, usually the elderly or people with disabilities. Often the person providing the care is a family member or a friend. An example would be a mother caring for her disabled adult daughter. These state-subsidized caregiving services are typically paid through the federal Medicaid entitlement program.

The biggest obstacle to the unions' plan for expanding dues-paying membership was that these home caregivers were typically classified as private-sector workers who are not employed by the state and are generally not paid directly by the state. They are care providers, often family members, as noted, who are hired by the disabled or elderly person to assist in a private home and are paid from a government entitlement received by the client. As private-sector workers who are hired and employed by individuals and contract with the state for payment, there was no way to organize caregivers and no common employer with which to collectively bargain.

The Service Employees International Union (SEIU) began a state-by-state political effort to change the classification of caregivers from private-sector workers to public-sector, arguing caregiver providers are really public-sector employees because their services are funded through state dollars via the federal Medicaid program. Reclassification as a public-sector employee meant the state would technically be considered their employer, and unions could require that those workers join the union and pay dues or agency fees.

In 1999, SEIU's first success came in California, when lawmakers passed such a bill to change the status of individual home health care workers from private employees to state employees.

## Passage of Initiative 775 in Washington

Two years later voters in Washington approved union-sponsored Initiative 775, which supporters described as a measure to establish an "authority that has the power and duty to regulate and improve the quality of long-term health-care services." Among the thirteen pages of initiative text establishing qualifications, standards and training for publicly funded individual providers of in-home health care services, was a provision allowing organized labor to unionize home care workers in the state.<sup>2</sup>

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1 "A New Model of Public-Sector Union Organization," by Derek Wilcox, Mackinac Center for Public Policy, October 23, 2012, at [www.mackinac.org/17796](http://www.mackinac.org/17796).

2 Initiative 775, Washington In-Home Care Services Initiative, Washington state, approved November 6, 2001, at [www.sos.wa.gov/elections/initiatives/text/i775.pdf](http://www.sos.wa.gov/elections/initiatives/text/i775.pdf).

However, Initiative 775 clearly specifies that individual providers are not actually employees of the state, rather they were designated public employees “solely for the purpose of collective bargaining.”<sup>3</sup> They are still legally employed by the person who hires them for caregiving services.

SEIU, the union that pioneered the strategy to gain union dues from individual home care providers by classifying them as state employees, contributed more than \$1 million to the campaign to pass the measure in Washington.<sup>4</sup> After passage of Initiative 775, SEIU Local 775 was certified to act as the monopoly union representative for all home health care providers in Washington.

Suddenly, in-home caregivers in Washington were required to pay union dues or agency fees to SEIU Local 775 for representing them, even if they did not want that representation. Even parents receiving state assistance to care for their disabled child are forced to pay union dues. The union does not even have to do the collecting; the state automatically takes the union dues and fees from caregivers’ monthly earnings and passes the funds to SEIU.

SEIU pushed for similar laws in other states, and before long a dozen other states had followed the examples of California and Washington.<sup>5</sup> By 2011, a total of 13 states reclassified different groups of state-subsidized in-home care providers as state employees. Three of those states subsequently repealed those laws.<sup>6</sup> Those newly-created “state employees” must pay union dues or fees as a condition of providing care to their elderly or disabled family members.

Of course, most of these “state employees” are not really employees of the state. Like Washington, most of the states specify that providers are considered state employees only for the purpose of collective bargaining. They receive none of the generous benefits that come with being a state employee, but they must pay union dues or fees if they want to work as a caregiver. Meanwhile, unions benefit from the millions of dollars of guaranteed revenue generated by the forced unionization scheme.

## **Lawsuit restores workers’ rights**

Some home caregivers objected to the forced unionization plan and sued to recover their independence. In 2014 a ruling by the U.S. Supreme Court threw a monkey wrench in SEIU’s dues-collecting “scheme.”

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3 Ibid.

4 “I-775: A Solution or a problem?” by Carol M. Ostrom, *The Seattle Times*, October 29, 2001, at <http://community.seattletimes.nwsourc.com/archive/?date=20011029&slug=healthinitiative29m>.

5 “Big labor trickery on display in effort to unionize home care,” by Sean Higgins, *Washington Examiner*, October 31, 2015, at [www.washingtonexaminer.com/big-labor-trickery-on-display-in-effort-to-unionize-home-care/article/2575302](http://www.washingtonexaminer.com/big-labor-trickery-on-display-in-effort-to-unionize-home-care/article/2575302).

6 “The Practical Impact of *Harris v. Quinn*: A Major Blow to Organized Labor,” by Andrew M. Grossman, Cato Institute, June 30, 2014, at [www.cato.org/blog/practical-impact-harris-v-quinn-major-blow-organized-labor](http://www.cato.org/blog/practical-impact-harris-v-quinn-major-blow-organized-labor).

The Court ruled in *Harris v. Quinn* that designating providers as public employees only for the purposes of unionization makes them “partial public employees” who cannot be forced to participate in a union or pay union dues or agency fees. The Court noted that “the customers” (which can be family and friends) who hire the caregivers control most aspects of their employment, including hiring, assigning duties, supervising, disciplining and firing, and “other than compensating” caregivers, the state’s “involvement in employment matters is minimal.”<sup>7</sup>

SEIU strongly opposed the Court’s ruling, and has aggressively worked to prevent workers from exercising their right not to pay union dues or fees.<sup>8</sup> SEIU “dues skims” are still active in 11 states, including Washington.

## The Washington experience

In 2001, Washington voters approved Initiative 775, allowing individual home health care providers to unionize by reclassifying them from private workers to “state employees.” After passage of Initiative 775, SEIU Local 775 began collecting dues from 40,000 individual home care providers in Washington.

A few years later Washington lawmakers passed legislation reclassifying the state’s home-based child care providers as public employees for the purpose of unionizing.<sup>9</sup> By 2006, SEIU Local 925 was representing close to 8,000 of them.<sup>10</sup>

The new laws allowing the unionization of in-home health and child care providers include a “union security” clause that forces all providers to pay SEIU dues or agency fees as a condition of working. This means those workers have no choice in paying SEIU.

The state automatically extracts 3.2 percent of the earnings of home health care providers and two percent from home day care providers and sends it to SEIU. The SEIU dues skim of Medicaid benefits from Washington state’s home health care providers alone amounts to a staggering \$27 million for SEIU 775 each year.<sup>11</sup> The

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7 *Harris et al. v. Quinn, Governor of Illinois, et al.*, Supreme Court of the United States, No. 11-681, Argued January 21, 2014—Decided June 30, 2014, at [www.supremecourt.gov/opinions/13pdf/11-681\\_j426.pdf](http://www.supremecourt.gov/opinions/13pdf/11-681_j426.pdf).

8 “Freedom Foundation lands one-two punch in effort to inform workers of their rights,” by Jeff Rhodes, Freedom Foundation, August 1, 2016, at [www.freedomfoundation.com/blogs/liberty-live/freedom-foundation-lands-one-two-punch-in-effort-to-inform-workers-of-their](http://www.freedomfoundation.com/blogs/liberty-live/freedom-foundation-lands-one-two-punch-in-effort-to-inform-workers-of-their).

9 “Child care providers can unionize,” by Richard Roesler, *Spokesman Review*, March 16, 2006, at [www.spokesman.com/stories/2006/mar/16/child-care-providers-can-unionize/](http://www.spokesman.com/stories/2006/mar/16/child-care-providers-can-unionize/)

10 “Supreme Court ruling on home care workers still reverberating in Washington,” by Brad Shannon, *The News Tribune*, December 12, 2014, at [www.thenewstribune.com/news/politics-government/article25903399.html](http://www.thenewstribune.com/news/politics-government/article25903399.html)

11 Form LM-2 Labor Organization Report, filed March 30, 2017, available at [http://optouttoday.com/sites/default/files/SEIU-775-2016\\_LM-2.pdf](http://optouttoday.com/sites/default/files/SEIU-775-2016_LM-2.pdf)

dues taken from the state's day care providers generated several more million each year for SEIU 925.<sup>12</sup>

Thanks to this constant influx of forcibly extracted union dues, SEIU has become one of the state's most active and potent political forces. As noted in an editorial by *The Seattle Times*:

*“The SEIU is the fastest-growing union in America and the most politically active in Washington. Its sympathies are Democrat, its acts opportunistic. In the 2004 primary, it spent big money to knock out Seattle Democrat Helen Sommers, chairwoman of the House Appropriations Committee. Sommers had blocked an SEIU contract. She survived, but barely — and the union sent an unmistakable message.”*<sup>13</sup>

However, the U.S. Supreme Court's *Harris v. Quinn* ruling has threatened the SEIU dues skim scheme.

In Washington, in-home health care and day care providers are among four employee groups considered public employees “solely for the purposes of collective bargaining.” As stated by the state Office of Financial Management:

*“Adult family home providers, child care providers, home care individual providers and language access providers are not state employees. They are only considered state employees for the purposes of collective bargaining.”*<sup>14</sup>

Based on the Court's *Harris v. Quinn* ruling, these four groups are “partial public employees” and cannot be forced to participate in a union or pay union dues or agency fees. This means those workers now have the right to decide whether they want to pay a union to represent them.

After the *Harris* ruling, SEIU 925 complied and ceased the automatic deduction of monthly dues from home-based day care providers. The union must now get the written authorization of those providers before taking their money. Day care providers in Washington no longer have to pay SEIU 925 for representation they do not want. Federal labor filings from 2015 reveal close to 3,500 day care providers have left the union since the *Harris* ruling.<sup>15</sup>

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12 “Hundreds of family child care providers exit SEIU following educational campaign,” by Maxford Nelson, Director of Labor Policy, Freedom Foundation, May 12, 2015, at [www.freedomfoundation.com/blogs/liberty-live/hundreds-of-family-child-care-providers-exit-seiu-following-educational-campaign](http://www.freedomfoundation.com/blogs/liberty-live/hundreds-of-family-child-care-providers-exit-seiu-following-educational-campaign)

13 “Child care bill a new kind of law for the private sector,” by The Seattle Times staff, March 4, 2008, at [www.seattletimes.com/opinion/child-care-bill-a-new-kind-of-law-for-the-private-sector/](http://www.seattletimes.com/opinion/child-care-bill-a-new-kind-of-law-for-the-private-sector/)

14 “Learn about the collective bargaining process,” Washington State Office of Financial Management, at [www.ofm.wa.gov/labor/agreements/about.asp](http://www.ofm.wa.gov/labor/agreements/about.asp), accessed September 8, 2016.

15 “Thousands of workers leave SEIU due to Freedom Foundation Outreach,” by Maxford Nelson, Director of Labor Policy, Freedom Foundation, October 7, 2015, at [www.freedomfoundation.com/blogs/liberty-live/thousands-of-workers-leave-seiu-due-to-freedom-foundation-outreach](http://www.freedomfoundation.com/blogs/liberty-live/thousands-of-workers-leave-seiu-due-to-freedom-foundation-outreach)



However, with \$27 million annually in forcibly extracted dues at stake, SEIU 775 executives have thrown up every obstacle they can imagine to prevent home health care workers from exercising their right to not financially support the union. The union has provided confusing information to members, filed lawsuits and even sponsored a misleading (and widely criticized) ballot initiative in 2016 to keep home care providers from being informed.<sup>16</sup>

In addition to those tactics, SEIU 775 skirted the spirit of the Supreme Court ruling with an “opt-out” system that puts the burden of stopping dues collection on in-home health care providers.<sup>17</sup> The state continues to automatically take dues on the union’s behalf until the union receives a written request from the provider to stop. Worse, SEIU 775 has made the “opt-out” system confusing and difficult, limiting the option to a small window of time of “not less than thirty (30) and not more than forty-five (45) days prior to the annual anniversary date of the authorization...”<sup>18</sup>

So home health care providers in Washington have just 15 days each year to submit the necessary written request to prevent the state from automatically diverting a portion of their paycheck to SEIU 775.

## The Solution

It is clear SEIU will not willingly give up a corrupt scheme that generates tens of millions of dollars for them each year. Given the union’s determination to figure out ways around the *Harris v. Quinn* decision, the time is right for the Trump Administration to issue definitive rules that protect the rights of workers and end the SEIU dues skim.

The Mackinac Center for Public Policy has published a thorough and comprehensive guide “*How to Stop the ‘Dues Skim’ of Federal Home Health Care and Child Care Funding*” explaining how the U.S. Department of Health and Human Services can easily end this practice immediately. With the Center’s permission, that report is reprinted in its entirety at the end of this paper.

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16 “Citizens Guide to Initiative 1501: To change the state’s Public Records Act to further the special interests of organized labor,” by Erin Shannon, Director, Center for Small Business and Labor Reform, Washington Policy Center, September 2016, at [www.washingtonpolicy.org/library/docLib/9-22-Shannon-Citizens-Guide-to-I-1501-Color.pdf](http://www.washingtonpolicy.org/library/docLib/9-22-Shannon-Citizens-Guide-to-I-1501-Color.pdf)

17 “Harris v. Quinn lives in Washington,” by Jason Mercier, Director, Center for Government Reform, Washington Policy Center, October 4, 2017 at [www.washingtonpolicy.org/publications/detail/harris-v-quinn-lives-in-washington](http://www.washingtonpolicy.org/publications/detail/harris-v-quinn-lives-in-washington).

18 “Six Ways SEIU 775 is Getting Around Harris v. Quinn,” by Maxford Nelson, Director of Labor Policy, Freedom Foundation, on May 18, 2016 at [www.freedomfoundation.com/blogs/liberty-live/six-ways-seiu-775-is-getting-around-harris-v-quinn](http://www.freedomfoundation.com/blogs/liberty-live/six-ways-seiu-775-is-getting-around-harris-v-quinn)



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### About the Author



**Erin Shannon** is the Director of the Center for Small Business and Labor Reform at Washington Policy Center and manages WPC's Olympia office. She has testified numerous times before legislative committees on small business and labor issues. Her op-eds regularly appear in newspapers around the state, including *The Seattle Times* and *The Puget Sound Business Journal*, and she has been interviewed on numerous radio and TV programs including Fox News, CNN Money, and "Stossel with John Stossel" on Fox Business. Before joining Washington Policy Center, Erin was the Public Relations Director of Washington state's largest pro-small business trade association, and was formerly a Legislative Correspondent for U.S. Congressman Randy Tate in Washington, D.C. Over the past 15 years she has appeared regularly in print, broadcast and radio media. She was a recurring guest on ABC's Bill Maher's "Politically Incorrect," until the show's cancellation in 2002, and participated in a live, on-stage version of "Politically Incorrect" in Seattle with Bill Maher. Erin has served as the spokesperson for several pro-small business initiative campaigns including repealing increases in unemployment insurance taxes; repealing the state's ergonomics rule; and ending the state's monopoly on workers' compensation. Erin holds a bachelor's degree in political science from the University of Washington.

## How to Stop the ‘Dues Skim’ of Federal Home Health Care and Child Care Funding

By Sam Adolphsen

### Introduction

United States taxpayers currently spend \$545 billion annually on the federal government’s Medicaid program.<sup>1</sup> This money is meant to aid the disabled and vulnerable and to support low-income families. However, millions of these dollars are being redirected before they ever reach the people they are meant to support.

About \$41.5 billion of Medicaid funds are sent to states through the Home and Community-Based Services “waiver” program.<sup>2</sup> This waiver allows those eligible for Medicaid — individuals suffering from a disability, illness or other affliction — to use these funds to pay for in-home care, as opposed to enrolling in an institution. These in-home services are often provided by family members or friends, or other local, independent providers. Medicaid payments are sent directly to these providers on behalf of their Medicaid-eligible “client.”

In many states, unfortunately, a portion of these payments are redirected and never reach these caregivers. This is because one of the largest

government employee unions in the country — the Service Employees International Union — has arranged for states to deduct “union dues” out of these payments and remit them directly to the SEIU. It is not clear what benefit the SEIU or its affiliates provide Medicaid patients or those who care for them in exchange for these union dues.

A similar arrangement exists concerning the \$11.4 billion of state and federal funds spent through the Child Care and Development Fund and Temporary Assistance for Needy Families programs.<sup>3</sup> These programs are meant to help low-income families afford child care. But government employee unions take a portion of the payments sent to child care providers whose clients are eligible for these programs. Most of these day care providers are independent contractors, offering services out of their own homes.

These arrangements result in the misuse of millions of dollars annually that is meant to provide assistance to disabled individuals and low-income families.

Fortunately, the loopholes that have been exploited to carry out these inappropriate diversions of federal funding can be closed. The U.S. Department of Health and Human Services can modify administrative rules so that Medicaid and other government funds are used appropriately and benefit the people who actually need them.

### ABOUT THE AUTHOR

Sam Adolphsen is the vice president at Rockwood Solutions. He previously served as chief operating officer and deputy commissioner of finance at the Maine Department of Health and Human Services. In these roles he was responsible for oversight of the states \$3.5 billion annual budget and the welfare fraud and welfare eligibility offices.

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## Overview of Medicaid Waivers

The federal Medicaid program is meant to provide services and support for the neediest people in the United States — the poor, disabled, ill and elderly. Funded by tax dollars through state funds and Federal Financial Participation matching funds, the program has grown dramatically in recent years, in cost, participation and complexity. In fact, Medicaid costs increased by about 10 percent in 2015 and another 6 percent in 2016.<sup>4</sup>

Medicaid pays for critical services for many Americans. Medicaid waivers allow disabled individuals to receive care in their own homes or community, if they so choose, and avoid enrolling in an institution — a much more costly option. Waivers are provided through the Home and Community-Based Services program. Most of the time, these in-home services are provided by family members or friends who care for patients in their homes and then are paid by Medicaid. Almost one million individuals received care through HCBS waivers in 2009.<sup>5</sup>

The HCBS waiver “waives” standard Medicaid rules that require a person to be in a certain medical setting to receive matching funds from the federal government. For a state to receive such a waiver, it must be cost neutral, ensure that the client has a choice and ensure that the in-home care is of sufficient quality. This process is authorized through the Social Security Act.<sup>6</sup>

## Overview of ‘Dues Skim’

But not all of these Medicaid funds are reaching their intended recipients. Instead, the Service Employees International Union is skimming off a portion of these funds as “union dues.” This “dues skim” redirects to the SEIU and its affiliates an estimated \$200 million annually from Medicaid funds meant to assist low-income, disabled, ill and elderly patients and their providers. An estimated 500,000 providers are affected, the majority of whom are family and friends caring for loved ones.<sup>7</sup>

This affects Medicaid recipients all across the country. There are confirmed cases in the Northeast in Vermont, Massachusetts, Connecticut and Maryland, and in the Midwest in Illinois and Minnesota, and on the West Coast in California, Oregon and Washington.<sup>8</sup>

It is not clear how these providers, most of whom are providing services to their family members in their own homes, qualify as unionized employees. They operate independently and work for themselves — they have no “employer” for the union to bargain with on their behalf. It appears that states have allowed the SEIU to unionize these providers and operate this dues skim simply because these providers receive Medicaid payments. This is problematic and suggests that anyone receiving government aid, such as SNAP payments, housing subsidies, Pell grants, WIC vouchers and more, could be subject to unionization and forced to surrender some of their benefit to a government employee union.

Many of the caregivers of Medicaid-eligible patients are unaware that they are SEIU union members. This is likely because many state governments act as a pass-through for these Medicaid payments and automatically deducts dues and remit these to the SEIU and its affiliates. Often the process for certifying the union as the exclusive bargaining representative for these caregivers is done by mail, which makes it difficult to measure how many of these independent providers actually supported becoming unionized.

## The Haynes’ Story

A prime example of the unfairness of this practice is the story from Michigan concerning Robert and Patricia Haynes. Robert is a retired Detroit police officer and he and Patricia take care of their two adult children who both have cerebral palsy. Since their children qualify for Medicaid benefits, the state sends them a modest stipend each month to help cover the costs of the in-home care they provide.<sup>9</sup>

But in 2005 the Haynes were unknowingly forced into becoming SEIU “members.” The SEIU was certified as

their bargaining representative even though only about 20 percent of election ballots were returned through the mail. Subsequently, the state automatically deducted \$30 a month from the Haynes' Medicaid stipend and sent that money to the SEIU instead.<sup>10</sup>

Robert Haynes himself highlighted the injustice of the situation: "We're not even home health care workers. We're just parents taking care of our kids. ... They are basically like six-month-olds in adult bodies. They need to be fed and they wear diapers. We could sure use that \$30 a month that's being sent to the union."<sup>11</sup>

The state of Michigan eventually put an end to this dues skim, but Mackinac Center analysts estimated that the SEIU diverted a total of \$34 million in payments designated for Medicaid recipients.<sup>12</sup>

### ***Harris v. Quinn* Case and Lingering Problems**

This issue came to the national forefront in a U.S. Supreme Court case in 2014. The Court ruled in *Harris v. Quinn* that it was unlawful for the state of Illinois to force home health care workers to financially support a labor organization like the SEIU.<sup>13</sup>

Despite this ruling, the court did not disallow Medicaid funds from being funneled to unions through other means, and similar dues skims are still active across the country.

A recent case in Minnesota involving home health care providers highlights the problems that still remain with these arrangements.

In 2014 the SEIU organized almost 30,000 home health care providers in Minnesota with only 3,543, 13 percent, voting in favor of unionization.<sup>14</sup> Because of the *Harris v. Quinn* ruling, the union could not force all home health care providers to pay dues or fees. For those that did not opt out of the union's representation, 3 percent of their Medicaid payments, which could add up to almost \$1,000 a year, were deducted and redirected to the SEIU affiliate in Minnesota.<sup>15</sup>

But some of these providers allege that they were having dues deducted from their Medicaid payments without their authorization. Patricia Johansen, from Fergus Falls, Minn., told the Washington Examiner it took her four months to realize the SEIU was taking money from the Medicaid subsidies she receives for providing in-home care for her two disabled grandchildren. When she asked the union about this, they claimed they had her signature of approval on file. After examining the signature, Johansen maintains that it is not her signature and must have been forged. It appears to be written by a right-handed person, Johansen claims, and she is left-handed.<sup>16</sup>

### **Why HHS Should End the 'Dues Skim'**

There are several reasons why it is important to stop these practices and ensure that all federal and state Medicaid funds are used to benefit their intended recipients.

#### **1) Skimming funds directly from Medicaid payments takes resources from a fixed pot of money that is meant to help the disabled**

No matter how unions, or any other association or group finds a way to redirect Medicaid funds, it is taking resources away from Medicaid's intended beneficiaries. The home health care provider is paid this stipend for one reason: to care for the disabled. To have funds be redirected to a group that does not provide federally approved Medicaid services is wasteful.

Unions who have organized home health care workers do not appear to provide benefits to the Medicaid program or to the "members" they supposedly represent. There is no "employer" to bargain with for better working conditions, since the vast majority of these individuals work for themselves out of their own homes. There is no union contract to negotiate. And most importantly, these unions do not seem to be providing direct benefits to the individuals who qualify for Medicaid subsidies as a result of their disabilities.

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## 2) Redirecting Medicaid payments for union dues contributes to the home health care worker shortage

There is a nationwide shortage of home health care workers that has reached a “crisis” level, according to many reports. In Minnesota, New York and Rhode Island, there is such a shortage of workers that many families are turning back to more costly institutions to care for their loved ones.<sup>17</sup> In most cases, low pay is cited as the reason for this shortage.

Many of the family members and friends who provide in-home health care to Medicaid-eligible individuals make significant sacrifices, including financial ones, to do so. When a portion of the modest stipend they receive is skimmed off and redirected to a union, it makes it more difficult for these providers to offer this care. If fewer of these providers can offer this care, it could lead to an increase in institutional care, which is more costly for taxpayers and less favorable for Medicaid-eligible individuals.

By ending these dues skims, home health care providers will get an instant raise in their pay, with no additional cost to state or federal budgets. This would be one piece of a larger solution to help promote adequate access to service providers for the disabled and needy going forward.

## 3) Paying union dues with Medicaid money redirects these funds from their intended purpose

Home and Community-Based Services waivers do not allow federal Medicaid payments to be used to pay for “room and board” or “educational, or supported employment services,” outside of a few narrow exceptions.<sup>18</sup> Why then should federal and state Medicaid funds be used to pay the salaries of union officials? If the federal code disallows funds meant for the disabled and needy to go to something as basic as room and board and educational services, the funds certainly shouldn’t be allowed to support a third party that does not provide direct services to Medicaid

recipients. The funding for the HCBS program is meant for the narrow purpose of providing in-home health care that ensures that an individual can avoid the more costly institutional setting and get the care they need right from the convenience of their own home or community. This narrow purpose should prohibit redirecting these funds for union purposes.

Federal law pertaining to Social Security is also clear that the secretary must not grant waivers to states unless states can assure “financial accountability for funds expended with respect to such services.”<sup>19</sup> Allowing federal funds to flow directly from Medicaid to labor organizations does not seem to meet this requirement.

## Overview of Child Care Dues Skim

These dues skim arrangements are unfortunately not contained to home health care providers. Another federally funded service meant to support low-income families has been targeted by unions as well.

In-home day care providers, who primarily take care of young children while their parents work, receive federal and state subsidies on behalf of the low-income families they serve. Just like home health care providers, they have been subject to unionization drives and have had a portion of their government payments automatically deducted as union dues. In Michigan, daycare providers were losing \$3.7 million a year in “forced dues.”<sup>20</sup>

Estimates suggest that there may be as many as 100,000 daycare providers in 12 states who are having dues skimmed off the top of their government payments. This could represent up to \$50 million in annual payments that are meant to support low-income families that are instead being sent to unions.<sup>21</sup>

## Federal Funding of Child Care

There are two primary sources of federal funding for the provision of child care. The first is the Child Care and Development Fund, which is distributed to states



via block grants and amounts to more than \$5 billion in federal funding each year.<sup>22</sup>

The second significant source of funds that is used for child care is the Temporary Assistance for Needy Families block grant. Along with directly funding child care through the TANF program, states are also allowed to transfer up to 30 percent of their TANF funds to CCDF. In 2014, states spent a total of \$2.6 billion in federal TANF funds on child care services, either directly or through transfers.<sup>23</sup>

Like Medicaid, these funds are meant for limited and specifically defined purposes. Paying union dues is not one of these. If in-home day care providers want to unionize and pay dues, they should do so with their own income, not the money meant to support low-income families' access to child care.

## **How the Trump Administration Can End the Home Health Care 'Dues Skim' Immediately**

### **1) Issue letter clarifying that deducting union dues from Medicaid payments is an inappropriate use of funds**

HHS Secretary Tom Price could issue a letter to each state that explicitly states that to qualify as a home and community-based setting eligible to receive payment under an HCBS waiver, the full Medicaid payment must be paid to the provider of services with no deductions. States that do not comply would jeopardize their HCBS waiver status in accordance with 42 CFR 441.301(c)(4).

The U.S. Code of Federal Regulations states, "Unless the Medicaid agency provides the following satisfactory assurances to [the Centers for Medicare & Medicaid Services], CMS will not grant a waiver under this subpart and may terminate a waiver already granted."<sup>24</sup>

Specifically, it says that states must provide "assurance that services are provided in home and community based settings, as specified in section 441.301(c)(4) of

the Code of Federal Regulations."<sup>25</sup> This section defines what is allowable as a home and community-based setting, such as one that "ensures an individual's rights of privacy, dignity and respect, and freedom from coercion and restraint" and one that "facilitates individual choice regarding services and supports, and who provides them."<sup>26</sup>

The secretary of HHS has the discretion to determine the acceptable definition of an allowable home and community-based setting. Section 42 CFR 441.710 states: "Home and community-based settings must have all of the following qualities, and *such other qualities as the Secretary determines to be appropriate*, based on the needs of the individual" (emphasis added).<sup>27</sup>

Using these rules, the secretary could determine that to qualify as an appropriate setting states must have the full amount of Medicaid funds transferred directly to the provider assisting the patient, with no deductions to third parties allowed. This is in line with the spirit of "cost neutrality" that must be maintained in waiver services, because it ensures funds are maximized for the client.<sup>28</sup>

This action would preclude any funds meant for home health care services going directly to any organization, association or individual who is not the service provider.

This would not prevent home health care providers from unionizing or paying union dues, if they so choose. If a provider chooses to pay dues to a union, they must do so out of their own pocket (after they have received the full Medicaid stipend). This would ensure that only the home health care providers who find value in paying union dues would have to do so.

### **2) Adopt new rules that explicitly ban the use of Medicaid funds for union dues or fees**

Since federal Medicaid funds are meant for the truly needy, they should not be transferred to unions or any other third party that does not provide services

directly to the Medicaid-eligible individual. The Federal Financial Participation element of the HCBS program, the match portion of Medicaid paid by the federal government, should be reserved for the patients and providers who care for them.

There is precedent in current rules to restrict the use of these funds. For instance, there are so-called “limits on Federal financial participation,” that describe what cannot be paid for with federal funds under the HCBS waiver.<sup>29</sup> Under these current rules, for example, HCBS funds may not be used to pay for room and board or educational services.<sup>30</sup>

New rules could be created in this section that make FFP unavailable for “any costs incurred as a result of the provider joining an association, union, or other group that does not directly assist in administering services to the client.”<sup>31</sup>

The federal government will ensure that this rule is adhered to by denying waiver requests that do not demonstrate compliance and by rejecting requests for FFP where a state is out of alignment with the rule.

## How to Stop the Child Care Provider Dues Skim

Child care is a significant area of need in the U.S., especially for low-income individuals and families. Day care providers who serve these families should not have their limited compensation diverted to pay for union dues.

To stop the dues skim of child care funds, current CCDF and TANF rules should be amended. Similar to the home health care rules, new rules would explicitly forbid any portion of these funds from being deducted or diverted before they reach their intended recipient.

## Child Care and Development Funds

To stop the seizure of CCDF funds taken from child care payments, the secretary of HHS should promulgate a rule to amend regulations and disallow the use of these funds for union dues prior to the payment having reached the provider.

This can be done by making an addition to the rules that restrict the use of CCDF funds.<sup>32</sup> These rules already prohibit the use of these funds for certain purposes, such as construction, school tuition and for any sectarian purpose.<sup>33</sup>

The secretary can add a rule to this section that names “union dues or association fees” in the list of items disallowed to receive CCDF funding. It might look something like the following:

(f) Union Dues or Association Fees. The CCDF may not be used as a funding source for union dues or association fees.

Of course, a child care provider, after they receive their payment of CCDF funds for providing services to an eligible client, may freely choose to join a union and pay dues. This new rule would simply restrict the use of those payments from being made prior to the full subsidy reaching the child care provider.

## Temporary Assistance for Needy Families

TANF funds, which are given to states in the form of a block grant, are very flexible. It is made clear in the rules guiding the use of these funds, however, that TANF funds must be used to serve one of the following purposes:

- (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
- (d) Encourage the formation and maintenance of two-parent families.<sup>34</sup>



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Any use of funds that violate this section of rules is considered to be a “misuse of funds.”<sup>35</sup>

recipient to whom it is intended and pay for the services it is intended to provide.

To ensure that TANF funds are not used to pay union dues or association fees, the secretary can insert additional language (at 45 CFR § 263.11), such as the following:

(c) States may not use TANF funds for payment of union dues or association fees.

In addition, the secretary can also amend part (b) of these rules to say, “We will consider use of funds in violation of paragraph (a) *and paragraph (c)* of this section ... to be misuse of funds” (emphasis added).<sup>36</sup>

This would restrict states or other third parties from deducting any amount from TANF payments.

## Conclusion

Across the country, millions of dollars are being taken from providers of home health care services for the disabled and from day care providers serving low-income families. These dollars are being diverted to fund union organizations. This diversion of federal funds meant for the sick, needy and children from low-income backgrounds should be explicitly barred by the federal government.

Thousands of friends and family members caring for their relatives in their homes are having their limited paycheck reduced even further, often without their knowledge. The same is true for day care providers across the country. These arrangements should be put to a stop.

The Department of Health and Human Services can stop this practice immediately by clarifying and amending existing rules. Federal rules already limit the use of these funds, so these rule changes amount to little more than just adding restrictions to the use of these funds. This rulemaking will safeguard each taxpayer dollar meant for these vulnerable populations and guarantee that it reaches the

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