

Comments of SEIU Healthcare IL on Proposed Amendments to Rules for the Department of Human Services' Home Services Program

Executive Summary

Re: Department of Human Services, Notices of Proposed Amendments, Ill. Reg. Vol. 40, Issue 34 (Aug. 19, 2016), at pp. 11079-11114

SEIU Healthcare Illinois/Indiana submitted comments on the proposed amendments to rules guiding the Department of Human Services' Home Services Program on behalf of the 90,000 workers we represent. Our Union represents the 28,000 Individual Providers (IPs), also known as Personal Assistants, who provide home care services to over 30,000 people with disabilities in the Home Services Program (HSP). Our home care members are committed to supporting their consumers' right to live independently in their own homes and communities.

DHS should suspend this rulemaking until it has fulfilled its statutory duty to bargain in good faith with the IPs' designated union representative as required under the Illinois Public Labor Relations Act, and, equally important, has cooperatively engaged with HSP stakeholders, including HSP consumers and their representatives. If DHS proceeds to implement the proposed rules without fulfilling its statutory duty, the rules will be subject to legal challenge and will likely be overturned. The current proposed rulemaking, therefore, will create needless chaos for HSP consumers and providers and expense for Illinois taxpayers.

Furthermore the proposed rules fail to bring the HSP into compliance with federal Fair Labor Standards Act protections for home care workers and are fundamentally contrary to the purposes of both the HSP and the FLSA. The purpose of HSP is to provide "services to individuals with severe disabilities so they can remain in their homes and be as independent as possible."¹ A modest amount of overtime by Independent Providers is an important part of the services that allow HSP consumers to remain living in their communities. In 2015, there

were over 8,600 HSP consumers who employed IPs that worked more than 40 hours in at least one week. The average number of weekly overtime hours worked by these IPs when they did work overtime was 11 hours per week.² The proposed rules are deeply flawed and would disrupt this arrangement significantly:

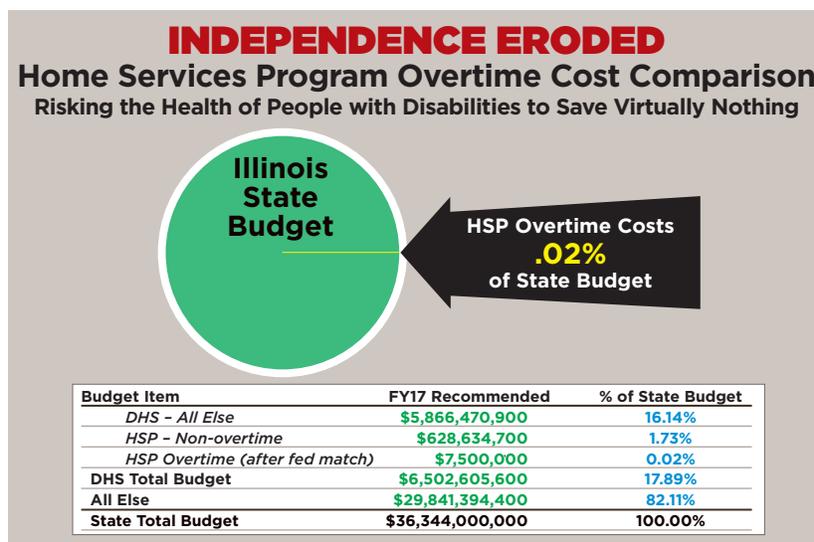
- **The proposed 40 hours per week cap is far too low and the exceptions process is extremely problematic.** The strict 40 hour per week cap and the overly narrow exceptions would create a serious risk of institutionalization for many HSP consumers. The US Department of Justice Civil Rights Division and Department of Health and Human Services provided specific guidance to states to avoid violating creating such a risk, which the State has not followed.³ The 40 hour cap will illegally and inappropriately impair consumers' right to choose their home care worker and would disrupt stable care-giving relationships that are essential to the success of the program.
- **Proposed rules to administer the overtime policy are arbitrary and unclear.** The process for documenting and approving overtime needs to be less burdensome, and customers and IPs should know beforehand if overtime is appropriate, as opposed to an IP having to "work at their own risk." Proposed rules for documenting and seeking approval of overtime would not provide stability or predictability for workers and consumers. Participants will not know when to expect notification of a decision, which could allow more "unjustified" overtime claims to pile up in the meantime, resulting in the defunding and barring of a provider. The "three-strikes-you're-out" penalties proposed for noncompliance are

unnecessarily punitive.

- **The proposed rules would throw the workforce into disarray.** The hours cap would require consumers to recruit and hire almost 9,000 more workers, which is unworkable and poses serious challenges for consumer choice and self-direction.⁴ The home care industry is experiencing a growing nationwide workforce shortage.⁵ Nationally, the number of home care workers more than doubled over the past decade and growth in demand is expected to continue, yet median annual income is only \$13,300.⁶ Other provisions in the proposed rule, such as the threat of legal or administrative actions against IPs who do not comply with the rule, will likely increase turnover as well. Taken together, the policies proposed would erode the quality of IP jobs, in turn harming the quality of services provided.
- **The proposed rules would violate multiple laws.** In addition to the Illinois Public Labor Relations Act, implementation of this policy would result in violations of the Americans with Disabilities Act, the Fair Labor Standards Act, and other laws and

policies. The changes would place thousands of consumers at serious risk of institutionalization in violation of their rights under Title II of the Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973.⁷ The proposed restrictions will result in violations of the federal Fair Labor Standards Act and other laws that require the State to pay overtime for all hours for which it knows, or reasonably should know, IPs work over 40 in a week.⁸ The proposed rules also fail to comply with consumers' constitutional and Medicaid due process rights.⁹

Overall, the policy would harm people with disabilities, their home care providers, and the Home Services Program as a whole. The proposed rules should be withdrawn. The Department should rethink entirely its approach to regulating overtime and embark on a thoughtful stakeholder engagement process to ensure that all of those who are impacted by the overtime issue have an adequate opportunity to make their voices heard and engage in dialogue.



¹ DHS Home Services Program description. <http://www.dhs.state.il.us/page.aspx?item=29738>.

² Based on monthly hours data provided by DHS.

³ "Dear Colleague" letter dated December 15, 2014 from the U.S. Department of Justice's Civil Rights Division and the Department of Health and Human Services Office for Civil Rights. https://www.ada.gov/olmstead/documents/doj_hhs_letter.pdf.

⁴ Based on monthly hours data provided by DHS.

⁵ "Wages for Home Care Aides Lag as Demand Grows." Span, Paula. New York Times, September 23, 2016. <http://www.nytimes.com/2016/09/27/health/home-care-aides-wages.html>.

⁶ "US Home Care Workers: Key Facts" PHI, August 2016. <http://phinational.org/home-care-workers-key-facts>.

⁷ 42 U.S.C. § 12132. 29 U.S.C. § 794.

⁸ 29 U.S.C. §§ 207, 215. 820 ILCS 105/4a. Ill. Pub. Act 99-0758. See, e.g., Reich v. Dep't of Conservation & Nat. Resour., Ala., 28 F.3d 1076 (11th Cir. 1994).

⁹ See, e.g., Goldberg v. Kelly, 397 U.S. 254 (1970); 42 U.S.C. § 1396a(a)(3); 42 C.F.R. §§ 431.200-431.246.