

IN THE  
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS, INDIANA

PLANNED PARENTHOOD OF INDIANA,	)	
INC., <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:11-cv-0630-TWP-DKL
	)	
COMMISSIONER OF THE INDIANA STATE	)	
DEPARTMENT OF HEALTH, <i>et al.</i> ,	)	
	)	
Defendants.	)	

**DEFENDANTS’ SUPPLEMENTAL BRIEF IN OPPOSITION  
TO MOTION FOR PRELIMINARY INJUNCTION**

Pursuant to this Court’s order of June 6, 2011, [Dkt. 55], Defendants respectfully submit this memorandum addressing whether an initial decision by the Centers for Medicare and Medicaid Services (“CMS”) that it cannot approve a proposed amendment to Indiana’s Medicaid plan, is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

**INTRODUCTION**

A participating State must file a plan amendment with CMS whenever the State enacts a “[m]aterial change[] in State law, organization, or policy” respecting Medicaid. 42 C.F.R. § 430.12(c)(1). On May 13, 2011, the Indiana Family and Social Services Administration (“FSSA”), acting pursuant to 42 C.F.R. § 430.12(c)(1), submitted such a plan amendment to take account of HEA 1210’s disqualification of abortion clinics from government contracts, including Medicaid. That proposed amendment has been supplied to the Court as Attachment 2 to the parties’ Stipulations of Fact and Evidence. [Dkt. 50-2]

Under the administrative rules, CMS does not afford the State plenary briefing or a hearing upon initial review of its plan amendment; however, upon written notice that CMS cannot approve the amendment, the State may submit a request for reconsideration, which triggers a formal administrative review hearing. *See* 42 C.F.R. §§ 430.16(a)(1), 430.18(a). Only after this formal review process does the decision constitute “final agency action” under 5 U.S.C. § 704. 42 C.F.R. § 430.102(c).

On June 1, 2011, CMS Administrator Donald M. Berwick sent a letter informing FSSA that he was “unable to approve” the HEA 1210 plan amendment on the grounds that “Medicaid programs may not exclude qualified health care providers from providing services that are funded under the program because of a provider’s scope of practice.” [Dkt. 50-3] Contemporaneously, CMS disseminated an “Informational Bulletin” to Indiana and other states asserting, with no citation to authority, that “Medicaid programs may not exclude qualified health care providers . . . from providing services under the program because they separately provide abortion services . . . as part of their scope of practice.” [Dkt. 48-4]

Plaintiffs argue that this Court should defer to CMS’s interpretation of Medicaid statutes as contained in the letter and bulletin. For several reasons, however, neither the agency deference described in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984), nor *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), apply here.

## **ARGUMENT**

### **I. The CMS Letter and Bulletin Are Not Entitled to *Chevron* Deference**

#### **A. The letter is not final, authoritative agency action**

One cardinal principle of the *Chevron* doctrine is that courts defer only to *authoritative* agency directives predicated on interpretations of the statutes they administer. *See Christensen*

*v. Harris Cnty.*, 529 U.S. 576, 586-88 (2000). It follows that *Chevron* deference applies only to final agency action. See *Ass'n of Int'l Auto. Mfrs. v. Comm'r, Massachusetts Dep't of Env'tl. Prot.*, 208 F.3d 1, 6 (1st Cir. 2000) (“Given our conclusion that the [EPA’s] opinion letter is not final agency action, we hold that the opinion does not command any particular deference under *Chevron* or comparable doctrines.”); *Mid-America Care Found. v. Nat’l Labor Relations Bd.*, 148 F.3d 638, 642 (6th Cir. 1998) (“*Chevron* deference is limited in application to those situations in which an agency has *formally* adopted a particular interpretation of a statute.”).

Here, the Administrator’s letter is merely the first step of the administrative process. As the letter itself acknowledges [Dkt. 50-3], the State has the right to petition for reconsideration within sixty days of receipt of the Administrator’s letter, which it intends to do. 42 C.F.R. § 430.18(a). In addition, the letter does not impose any penalties, sanctions, or new legal obligations on the State. If CMS ultimately wishes to reduce Indiana’s Medicaid grants, that determination must come in an entirely separate decision. See 42 C.F.R. § 430.35(a).

The State has been unable to find any cases affording *Chevron* deference to a CMS determination that is still subject to further administrative review. Hence, the “authoritative agency directive” rule, and its final-action corollary, should preclude *Chevron* deference here.

**B. The bulletin is merely a general statement of policy**

Another corollary to the “authoritative agency directive” doctrine is that general policy statements are not entitled to *Chevron* deference. *Christensen*, 529 U.S. at 587 (“Interpretations such as those in opinion letters—like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference.”). That is because, when making a general policy statement, “[t]he agency retains the discretion and the authority to change its position—even abruptly—in any

specific case because a change in its policy does not affect the legal norm.” *Syncor Int’l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997).

The CMS bulletin is, at most, a mere statement of general policy. It did not arise from a formal rulemaking or adjudicatory process and bears none of the hallmarks of a deference-worthy government determination. Accordingly, it is not entitled to *Chevron* deference.

**C. CMS’s interpretation involves a non-interstitial question**

*Chevron* deference applies only when “Congress has explicitly left a gap for the agency to fill” and thus “there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.” *Chevron*, 467 U.S. at 843-44. The model for *Chevron* deference exists when Congress has either explicitly or implicitly (through ambiguity) authorized an agency to fill statutory interstices via rulemaking. In *Krzalic v. Republic Title Co.*, 314 F.3d 875, 879 (7th Cir. 2002), the Seventh Circuit observed that agency deference is based in part on “the interstitial nature of the legal question.” Cass R. Sunstein, Administrator of the White House Office of Information and Regulatory Affairs, has acknowledged this rationale for deference. See Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 231-32 (2006) (noting that the Supreme Court’s decision in *Barnhart v. Walton*, 535 U.S. 212 (2002) “suggests that ‘interstitial’ judgments will be reviewed under *Chevron*, with the clear implication that noninterstitial judgments will be reviewed more independently”).

With agency adjudications, moreover, the Seventh Circuit has suggested that *Chevron* applies only where the ruling entails the exercise of permissible policymaking discretion. See *Bob Evans Farms, Inc. v. Nat’l Labor Relations Bd.*, 163 F.3d 1012, 1017-20 (7th Cir. 1998).

This case does not fit either model. Congress has left no gap to be filled by CMS, and CMS has not engaged in permissible policymaking in fulfilling its quasi-adjudicatory function in

this case. Here what is required is not new or interstitial law or policy, but an interpretation of *existing* law. In particular, what is at stake is how the provider-qualification authority bestowed by Section 1396a(p)(1) of the Medicaid Act reconciles with the freedom-of-choice provision of Section 1396a(a)(23). Notably, while CMS has cited Section 1396a(a)(23) in its letter and interpretive bulletin, it has not even acknowledged the existence of Section 1396a(p)(1).

Furthermore, the Supreme Court has indicated that when an interpretive question implicates central aspects of a statutory scheme, *Chevron* deference is *not* appropriate because Congress likely did not intend to give the agency that degree of authority. *See Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-60 (2000) (holding that “Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion”); *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 231 (1994) (finding it unlikely that Congress intended for an agency to determine to what extent an industry should be rate-regulated, and thus not applying *Chevron* deference).

Accordingly, *Chevron* deference is inappropriate here both because Congress has legislated extensively in creating Medicaid as a model of dual-government administration, and because harmonizing Sections 1396a(a)(23) and 1396a(p)(1) is of central importance to how Medicaid functions. The question of what constitutes a permissible Medicaid provider qualification is not an interstitial matter entrusted to the federal government—and indeed, not even a matter that CMS has yet addressed in regard to HEA 1210, if ever. If anything, it is the States that have been charged by Congress with carrying out this provision of Medicaid and who are therefore in the role of interpreting and carrying out Congress’s will. Any determination by CMS as to the meaning of Section 1396a(p)—which, again, it has not even provided so far—would extend far beyond its administrative role and implicate a central aspect of the overall

Medicaid scheme: the ability of a State to determine provider qualifications. Thus, the court should not afford *Chevron* deference to CMS's initial response to Indiana's plan amendment.

**II. The Letter and the Bulletin Have Little Persuasive Value, and Indeed are Unreasonable Even Under *Chevron***

Apart from *Chevron*, an agency interpretation can have persuasive authority “depend[ing] upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.” *Skidmore*, 323 U.S. at 140; *see also United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (noting that an agency interpretation that does not carry the force of law should be evaluated based upon “the merit of its writer’s thoroughness, logic and expertness, its fit with prior interpretations, and any other sources of weight”).

Under these factors, neither the letter nor the bulletin is persuasive. The agency provided *no* reasoning to support its interpretation of Section 1396a(a)(23), and did not even acknowledge the existence of, much less analyze, Section 1396a(p)(1), which affords States the power to determine provider qualifications. And the State is not aware of any prior interpretations by CMS that provide that analysis.

What is more, even under the deferential *Chevron* standard, courts need not defer to *unreasonable* agency interpretations, which is what CMS has issued here. *See Chevron*, 467 U.S. at 845. In *Louisiana Department of Health & Hospitals v. Center for Medicare & Medicaid Services*, 346 F.3d 571, 579 (5th Cir. 2003), the court rejected CMS's disapproval of a state plan amendment as “arbitrary and capricious” where, among other things, “the Administrator’s decision was made without proper consideration of the appropriate facts” and was based on assumptions about statutory meaning that were not justified by statutory text.

In this case, CMS's conclusion that the State's plan amendment is inconsistent with Section 1396a(a)(23) is similarly arbitrary because it does not take account of the State's purposes for amending the plan and unjustifiably assumes that Section 1396a(a)(23) affords an absolute right for a recipient's preferred provider to be deemed qualified, without any regard whatever for Section 1396a(p)(1). Nor does it explain how, if the State cannot establish provider qualifications to eliminate indirect taxpayer subsidy of abortions, the State can nonetheless establish provider qualifications to address matters such as self-dealing and toxic waste dumping. *See, e.g., First Med. Health Plan, Inc. v. Vega-Ramos*, 479 F.3d 46, 53 (1st Cir. 2007); *Plaza Health Laboratories, Inc. v. Perales*, 878 F.2d 577, 582-83 (2d Cir. 1989).

Accordingly, regardless of the level of nominal deference the Court deems applicable, it should reject CMS's arbitrary disapproval of Indiana's state plan amendment and conclude that Planned Parenthood is unlikely to succeed on the merits of its claim.

### CONCLUSION

The Court should afford no deference to the CMS letter and interpretive bulletin and should deny the motion for preliminary injunction.

Respectfully submitted,

GREGORY F. ZOELLER  
Attorney General of Indiana

By: /s/ Thomas M. Fisher  
Thomas M. Fisher  
Solicitor General

Heather Hagan McVeigh  
Ashley Tatman Harwel  
Adam Clay  
Deputy Attorneys General

**CERTIFICATE OF SERVICE**

I hereby certify that on June 13, 2011, a copy of the foregoing Defendants' Supplemental Brief in Opposition to Motion for Preliminary Injunction was filed electronically. Notice of this filing will be sent to the following parties by operation of the Court's CM/ECF system:

Kenneth J. Falk  
Gavin M. Rose  
Jan P. Mensz  
ACLU of Indiana  
1031 E. Washington St.  
Indianapolis, IN 46202  
kfalk@aclu-in.org  
grose@aclu-in.org  
jmensz@aclu-in.org

Talcott Camp  
American Civil Liberties Union  
Foundation  
Reproductive Freedom Project  
125 Broad St., 18th Floor  
New York, NY 10004  
tcamp@aclu.org

Notice of this filing will be sent to the following parties by U.S. Mail:

Roger Evans  
Planned Parenthood Federation of America  
434 W. 33rd Street  
New York, NY 10001

/s/ Thomas M. Fisher  
Thomas M. Fisher  
Solicitor General

Office of the Attorney General  
302 W. Washington Street  
IGC-South, Fifth Floor  
Indianapolis, Indiana 46204  
Tel: (317) 232-6255  
Fax: (317) 232-7979  
Tom.Fisher@atg.in.gov