A Medicaid Advocate’s Guide to Deference

National Health Law Program
January 2008

Prepared by: Sarah Somers

Funded with a grant from the Nathan Cummings Foundation

© 2008 National Health Law Program
Prepared by Sarah Somers
National Health Law Program
211 N. Columbia Street
Chapel Hill, NC 27514

January 2008

Main Office
National Health Law Program
2639 S. La Cienega Blvd.
Los Angeles, CA 90034
nhelp@healthlaw.org
www.healthlaw.org

Preparation of this manual was made possible through the generous support of
the Nathan Cummings Foundation

Special thanks to Julie Wahlstrand, Stanford Law School '08, for her invaluable
and diligent research
About this Guide

Advocates who work with the Medicaid and Medicare programs must, of course, familiarize themselves with the federal statutes and regulations, as well as any state statutes and regulations. In addition, written guidance from the Centers for Medicare & Medicaid Services (CMS) that has not been promulgated through formal rulemaking, referred to in this Guide as “sub-regulatory guidance” can be helpful when trying to understand the issues. In addition, sub-regulatory guidance may be used in federal and state courts to support or oppose a client’s argument. On these occasions, the court will need to determine the extent to which it must or whether it should follow the interpretation set forth in the guidance.

It should be noted that deference has historically been a popular topic with the Supreme Court, so the standards may change over time. Moreover, while courts are controlled by Supreme Court precedent, deference standards differ somewhat from circuit to circuit. The purpose of this Guide is to summarize and explain these standards. Part I of this Guide discusses the deference issue with selected case examples. Part II is a chart of cases organized by the type of sub-regulatory guidance at issue in the case and the level of deference given to each. Part III is a circuit-by-circuit docket summaries of Medicaid and Medicare deference cases since 1990. Pre-1990 cases and cases that are not directly on point but may be helpful to advocates are included.

---

1 CMS is a part of the U.S. Department of Health and Human Services. In 2001, the name of the Health Care Financing Administration (HCFA) was changed to the Centers for Medicare and Medicaid Services (CMS). Court decisions and guidance that pre-date 2001 refer to the agency as HCFA. For the sake of clarity, this fact sheet refers to the agency as CMS.

Part I

Deference to Guidance from the Secretary of Health and Human Services: Discussion

Over the years, the Supreme Court has made several attempts to clarify the standards for according deference to federal agency interpretations of federal statutes. The most important case is *Chevron U.S.A. v. Natural Resources Defense Council*, in which the Court articulated a two-step inquiry for judicial review of administrative interpretations of federal statutes. Under the *Chevron* analysis, a court must first determine whether Congress has spoken to the specific issue. If so, the congressional statement must prevail over any contrary administrative interpretation. However, if Congress has not spoken to the issue or if its statements are ambiguous, the court must defer to (meaning follow) the administrative interpretation as long as it is “reasonable.” The administrative interpretation therefore has the force of law.

In recent years, the Court has narrowed *Chevron’s* application. In *Christensen v. Harris County*, the Court refused to apply *Chevron* to an agency opinion letter, finding that “[i]nterpretations 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.” *Christensen* held these types of agency interpretations are “entitled to respect,” but only to the extent they have the power to persuade. This type of deference is sometimes called “Skidmore deference” based on the 1944 decision in *Skidmore v. Swift & Co.*, which said the weight to be accorded to an administrative interpretation in a particular case “will depend upon the thoroughness evident in its consideration, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.”

---


4 *Id.* at 844-45.


6 *Id.* at 587.

7 *Id.* (quoting *Skidmore v. Swift*, 323 U.S. 134, 140 (1944)).

8 323 U.S. 134 (1944).

9 *Id.* at 140.
Most recently, in *U.S. v. Mead Corporation*,\(^\text{10}\) the Court discussed the circumstances for applying *Chevron* or *Skidmore* deference. At issue in *Mead* was a “tariff ruling letter” authorized by regulation but not subjected to formal rulemaking. Tariff ruling letters also are formally binding only upon the particular entity to whom they are issued. The United States Customs Service argued that the letter at issue was entitled to *Chevron* deference. Rejecting this position, the eight-member majority attempted to clarify when *Chevron* deference is appropriate:

We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. Delegation of such authority may be shown in a variety of ways, as by an agency’s power to engage in adjudication or notice-and-comment rulemaking, or by some other indication of a comparable congressional intent.\(^\text{11}\)

In other words, *Chevron* deference is limited to agency interpretations where “it appears that Congress delegated authority to the agency to make rules carrying the force of law, and that the agency interpretation was promulgated in the exercise of that authority.”\(^\text{12}\)

Applying this standard, the Court found no evidence of congressional intent for the agency’s tariff ruling letter to carry *Chevron’s* “force of law.”\(^\text{13}\)

The Court then looked to see whether the tariff ruling was entitled to “some deference” under the “practical criteria” of *Skidmore*.\(^\text{14}\) In so doing, the majority rejected the position articulated by Justice Scalia in dissent that would have broadened the occasions for *Chevron* deference while eliminating other lesser forms of deference.\(^\text{15}\)

According to the majority:

*Chevron* did nothing to eliminate *Skidmore’s* holding that an agency’s interpretation may merit some deference whatever its form, given the specialized experience and broader investigations and information available to the agency,

\(^\text{10}\) 533 U.S. 218 (2001).

\(^\text{11}\) *Id.* at 226-27.

\(^\text{12}\) *Id.*

\(^\text{13}\) *Id.* at 231-36.

\(^\text{14}\) *Id.* at 235.

\(^\text{15}\) *Id.* at 237-39.
and given the value of uniformity in its administrative and judicial understandings of what a natural law requires.\textsuperscript{16}

The level of deference that courts apply may, but do not always, differ depending on the form in which the agency statement comes. In addition to issuing regulations, CMS provides guidance through the \textit{State Medicaid Manual}, a voluminous statement of Medicaid policy and guidance that is periodically updated by the Agency. In addition, CMS periodically issues letters to state Medicaid directors (sometimes known as “Dear State Medicaid Director” letters) or other memoranda or transmittals that contain statements of policy and interpretation.

States submit Medicaid plans that must be approved by CMS before they can take effect.\textsuperscript{17} 42 U.S.C. § 1396a(a). States can also apply for “waivers” of certain Medicaid requirements in order to offer home and community based services to people at risk of institutionalization. 42 U.S.C. § 1396n(c). And, states may be given approval to create demonstration or pilot projects to advance the purposes of the Medicaid Act. 42 U.S.C. § 1315. CMS must also approve these waiver applications. Both state plans and waiver applications are pre-printed and many aspects of the programs are designated simply by checking a box. For example, the pre-printed state plan allows states to check boxes indicating which (if any) of Medicaid’s optional categories of services they will choose to cover. The approval process is intended to ensure that the state plans and waiver programs comply with federal law. On occasion, however, advocates and beneficiaries have complained that, despite CMS approval, plans and waiver programs contain provisions that in fact do violate the federal law. In these circumstances, advocates may argue that courts should not defer to the suggestion implicit in plan approval that CMS has actually determined that the plans or waivers comply with Medicaid law.

Numerous cases, pre-dating \textit{Mead}, accord deference to the federal Medicaid agency’s sub-regulatory interpretive statements. Because courts have generally not treated \textit{Mead} as marking a major change in doctrine, these cases are likely to still be

\textsuperscript{16} \textit{Id.} at 234. For an interesting post-\textit{Mead} case, see \textit{Barnhart v. Walton}, 535 U.S. 212 (2002), which accorded \textit{Chevron} deference to a Social Security regulation promulgated in response to the very case that was before the Court: “In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the agency has given the question over a long period of time all indicate that \textit{Chevron} provides the appropriate legal lens through which to review the legality of the Agency interpretation here at issue.” \textit{Id.} at 222.

\textsuperscript{17} For more information on the state plan process, see NHeLP, “State Medicaid Plans,” April 25, 2006, at www.healthlaw.org.
considered good law. The level of deference varies from case to case. While some of these cases cite *Chevron* and *Skidmore*, others simply describe the level of deference without citation to the Supreme Court. Perhaps not surprisingly, *Mead* has not imposed significantly more uniformity in this area. The Supreme Court itself recently cited *Mead*, but offered little other discussion, to give “respectful consideration” to consistent agency interpretation contained in a Regional State Medicaid Letter and proposed regulation.

In most cases, courts have given *Chevron* deference to Medicaid and Medicare regulations. There are a few exceptions as courts may sometimes determine that a

---

18 For court of appeals cases, see *K&A Radiologic Tech. Servs. Inc. v. Comm’r of the Dep’t of Health of State of New York*, 189 F.3d 273, 282-83 (2d Cir. 1999) (State Medicaid Manual) (not specifying the level of deference but following the agency position); *Bray v. Dowling*, 25 F.3d 135, 143 (2d Cir. 1994) (agency memorandum) (stating that “[c]onsistent interpretations by the agencies entrusted with the administration of the Social Security Act are due deferential treatment in the courts.”) (citations omitted); *Liegl v. Webb*, 802 F.2d 623, 625-26 (2d Cir. 1986) (discussing the Medical Assistance Manual, which pre-dated the State Medicaid Manual); *Wisconsin Dep’t of Health and Social Services v. Bowen*, 797 F.2d 391, 398 (7th Cir. 1986), cert. dismissed, 485 U.S. 1017 (1988) (Medicaid Action Transmittal) (finding that Secretary’s interpretation is warranted deference if reasonable and permitted by the statute, without citing *Chevron* or *Skidmore*); *Smith v. Miller*, 665 F.2d 172, 179 (7th Cir. 1981) (Medical Assistance Manual) (affording judgment of the agency considerable weight); *Philadelphia Welfare Rights Org. v. Shapp*, 602 F.2d 1114, 1122 (3d Cir. 1979), cert. denied, 444 U.S. 1026 (1980) (Medical Assistance Manual); *Stanton v. Bond*, 504 F.2d 1246, 1249 (7th Cir. 1974), cert. denied, 420 U.S. 984 (1975).


regulatory interpretation exceeds the agency’s authority or when a statute is not ambiguous. Generally, however, the interpretations found in the various types of sub-regulatory guidance discussed above receive less deferential treatment. In the case of the State Medicaid Manual, courts have not accorded Chevron deference, but usually give the provisions some weight. For example, in Indiana Family and Social Services Admin. v. Thompson, the Seventh Circuit accorded Skidmore level deference to its provisions. Specifically, that court decided that less formal interpretations in agency manuals should receive “more flexible respect” depending on the agency’s care, consistency, formality, relative expertness and the position’s overall persuasiveness. In Strand v. Rasmussen, the Iowa Supreme Court decided that “substantial deference” is due to the agency interpretations contained in the State Medicaid Manual. The Ninth and Fifth Circuits have given it “respectful consideration.” In contrast, in Ramey v. Reinertson, the Tenth Circuit stated that the court must give deference to interpretations in the State Medicaid Manual but only to the extent they do not conflict with the purpose of the Medicaid Act.

The results in cases involving Dear State Medicaid Director letters and other memoranda from CMS have been more mixed. The Third and Eleventh Circuits, in Elizabeth Blackwell Health Ctr v. Knoll and Toal v. Shalala, have given them Chevron deference. Others have deferred, but not necessarily cited Chevron or indicated the level of deference given. For example, in Rabin v. Wilson-Coker, the Second Circuit held that Dear State Medicaid Director letters are entitled to “some significant measure of deference.” In Johnson v. Guhl, a New Jersey district court held that transmittal

---


22 286 F.3d 476 (7th Cir. 2002).

23 648 N.W.2d 95 (Iowa 2002).

24 S.D. ex rel. Dickson v. Hood, 391 F.3d 581 (5th Cir. 2004); Katie A. v. Los Angeles County, 481 F.3d 1150 (9th Cir. 2007).

25 See, 268 F.3d 955 (10th Cir. 2001).

26 Elizabeth Blackwell Health Center, 61 F.3d 170 (3d Cir. 1995); Toal, 8 F.3d 1565 (11th Cir. 1993).

27 362 F.3d 190, 197 (2d Cir. 2004).

letters are entitled to “some deference” as long as they are consistent with the plain language and purpose of the statute and with prior administrative views. In *Grey Bear v. N.D. Dep’t of Human Services*, the North Dakota Supreme Court has said that a letter to state Medicaid directors will normally receive deference, especially where that interpretation does not contradict statutory language.\(^{29}\) In contrast, the Sixth Circuit refused to give any deference to an opinion letter from CMS in *Spectrum Health Continuing Care Group v. Anna Marie Bowling Irrecoverable Trust*.\(^{30}\) Citing *Mead*, the court made the broad statement that because a letter is not subject to rule making authority and notice and comment, it should not be given any deference. Significantly, however the court also held that the statement in that particular letter is inconsistent with the statutory scheme, thus, despite the broad statements in the opinion, the end result is not a departure from previous holdings.

Courts may be more reluctant to defer to letters that are issued in response to specific inquiries. In *Estate of F.K. v. Div. of Med. Assist. & Health Services*,\(^{31}\) the court gave *Skidmore* deference to several letter from CMS based on indications that the agency and director gave thorough consideration to the underlying issue, but refused to defer to a letter responding to a specific inquiry that does not evidence “independent analysis.” Indeed, courts may also give less deference if it appears that a policy statement in a letter may represent the view of only one employee. See, e.g., *A.B. v. Division of Medical Assistance and Health Services*, 865 A.2d 791 (N.J. Super. A.D. 2005) (finding that a CMS letter was entitled to “little if any deference because of its guarded wording and because it responded to an inquiry which assumed the conclusion that a retail market existed.”); *Harris v. Olszewski*, 442 F.3d 456, 471 (6th Cir. 2006) (refusing to defer to a “tentative view” of a single Medicaid program representative at CMS) (discussed infra) *S.D. v. Hood*, 391 F.3d 581 (5th Cir. 2004) (refusing to defer to an opinion expressed in an employee e-mail because the individual had no authority to bind the agency).

In cases in which beneficiaries are challenging aspects of a state’s Medicaid plan or waiver program, the defendants will often argue that the plan has been approved by CMS and that, accordingly, the decision to approve the plan should be given deference. Several courts have given significant deference to plan approval.

For example, in *Visiting Nurses’ Ass’n v. Bullen*, a case pre-dating *Mead*, the First Circuit held that a plan approval constituted the “implicit interpretation” of a Medicaid requirement and was therefore to be accorded *Chevron* deference.\(^{32}\) Another pre-*Mead*

\(^{29}\) 2002 N.D. 139 (2002).

\(^{30}\) 410 F.3d 304 (6th Cir. 2005).


\(^{32}\) 93 F.3d 997 (1st Cir. 1996).
case, *Perry v. Dowling* reached the same conclusion. In contrast, post-*Meade*, the First Circuit gave only *Skidmore* deference to waiver approval. In *Bryson v. Shumway*, plaintiffs sued defendant state Medicaid officials alleging that the limitation on the number of participants in their home and community based waiver program violated the Medicaid statute. The defendants argued that the fact that CMS had approved its home and community based waiver application indicated that the state had not violated the Medicaid Act and that the court should defer to this approval. While noting that the waiver approval process may not be entitled to *Chevron* deference, the court held that *Skidmore* deference was appropriate. Finding that the approval of the waiver program was both consistent with the statutory language and with longstanding agency interpretation, the court ruled against the plaintiffs. Other post-*Meade* cases have accorded state plan approvals *Chevron* deference, while others have applied unspecified standards. There does not appear to be consensus on this issue— even within individual circuits.

These decisions are not necessary inconsistent, however, because the individual facts can greatly influence the outcome. Moreover, while courts may not cite *Chevron* or *Skidmore*, they may in practice be applying that standard. For example, in *Rosen v. Goetz*, the Sixth Circuit gave “substantial” deference to the fact that CMS has approved an aspect of Tennessee’s state plan. However, it is not clear that this is actually less deferential than the treatment in *Harris v. Olszewski*, in which the court explicitly afforded *Chevron* deference to a state plan approval.

---

33 95 F.3d 231 (2d Cir. 1996).

34 308 F.3d 79 (1st Cir. 2002).

35 See, e.g., *West Virginia v. Thompson*, 475 F.3d 204 (4th Cir. 2007); *Harris v. Olszewski*, 442 F.3d 456 (6th Cir. 2006); *S.D. ex rel. Dickson v. Hood*, 391 F.3d 581 (5th Cir. 2004).

36 See, e.g., *Ind. Ass’n of Homes for Aging Inc. v. Ind. Office of Medicaid Policy and Planning*, 60 F.3d 262 (7th Cir. 1995) (giving letter a “presumption of regularity” though still subject to review); *Royal Geropsychiatric Servs., Inc. v. Tompkins*, 159 F.3d 238 (6th Cir. 1998) (giving a combination of approval of state plan and position argued at litigation “some” deference).


38 410 F.3d at 927.

39 442 F.3d at 466.
Despite the tendency of judges to defer to state plan approvals, there is some encouraging news for advocates challenging aspects of approved state plans. In some cases, if a state was not able to show that CMS specifically approved a particular aspect of a state plan, the court would not treat the approval as relevant to the challenged policy. For example, in *Neb. Pharm. Ass’n, Inc. v. Neb. Dep’t of Social Services*, Nebraska’s Medicaid agency required pharmacists to collect co-payments from Medicaid recipients and imposed specific requirements on how the co-payments would be calculated. The Medicaid agency head argued that the court should accept the state’s position because CMS had approved its Medicaid plan. The court refused, because the specific practice at issue was not described in the state plan.40

The cases described in this memo are just a few examples; a complete listing of cases follows in Part III.

---

Part II

This Part lists the types of agency guidance at issue in each case then, for each type of guidance, groups cases by the type of deference given to them by the court.

Federal Regulations

Chevron:

*Rolland v. Romney* 318 F.3d 42 (1st Cir. 2003)
*Bryson v. Shumway*, 308 F.3d 79 (1st Cir. 2002)
*Bellevue Hospital Center v. Leavitt*, 443 F.3d 163 (2d Cir. 2006)
*Pediatric Specialty Care, Inc. v. Ark. Dep’t of Human Servs.*, 444 F.3d 991 (8th Cir. 2006)
*Baptist Health v. Thompson*, 458 F.3d 768 (8th Cir. 2006)
*Providence Yakima Medical Center v. Leavitt*, No. 03-3095, 2007 WL 991494 (D. Wash. March 29, 2007)
*Resident Councils of Washington v. Leavitt*, 500 F.3d 1025 (9th Cir. 2007)
*Cnty. Hosp. v. Sullivan*, 986 F.2d 357 (10th Cir. 1993)
*U.S. v. Baxter Intern., Inc.*, 345 F.3d 866 (11th Cir. 2003)
*Tallahassee Mem’l Reg’l Med. Ctr. v. Cook*, 109 F.3d 693 (11th Cir. 1997) (applied Chevron analysis, but did not defer because inconsistent with statute)

None:

*Jewish Hosp., Inc. v. Secr’y of Health and Human Servs.*, 19 F.3d 270 (6th Cir. 1994) (statute not ambiguous)
*Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412 (D.C. Cir. 1994) (regulation exceeded Secretary’s authority)
*Whitecliff, Inc. v. Shalala*, 20 F.3d 488 (D.C. Cir. 1994) (no deference because interpretation unreasonable)

Other:

*Peura by & through Herman v. Mala*, 977 F.2d 484 (9th Cir. 1992) (Deference of unspecified degree given – found regulation was not arbitrary or capricious or in excess of statutory authority)
Transitional Hosps. Corp. of La., Inc. v. Shalala, 222 F.3d 1019 (D.C. Cir. 2000) (court remanded for more information)

Presbyterian Med. Ctr. of Univ. of Pa. Health Sys. v. Shalala, 170 F.3d 1146 (D.C. Cir. 1999) (“substantial” deference given to unpublished rule that was later published as a notice in the Federal Register)

Kidney Ctr. of Hollywood v. Shalala, 133 F.3d 78 (D.C. Cir. 1998) (court remanded for more information)

Rules not promulgated with notice and comment:

Capitano v. Secretary of Health & Human Servs., 732 F.2d 1066 (2d Cir. 1994) (no deference)

Approval of State Plan

Chevron:

Visiting Nurse Ass’n of North Shore, Inc. v. Bullen, 93 F.3d 997 (1st Cir. 1996)
Stowell v. Secretary of Health & Human Servs., 3 F.3d 539 (1st Cir. 1993)
Perry v. Dowling, 95 F.3d 231 (2d Cir. 1996)
Erie County Geriatric Ctr. v. Sullivan, 952 F.2d 71 (3d Cir. 1991) (applied Chevron analysis, but rejected Secretary’s position as arbitrary and capricious)
West Virginia v. Thompson, 475 F.3d 204 (4th Cir. 2007)
S.D. ex rel. Dickson v. Hood, 391 F.3d 581 (5th Cir. 2004)
Harris v. Olszewski, 442 F.3d 456 (6th Cir. 2006)
Emerson v. Steffen, 959 F.2d 119 (8th Cir. 1992)
Folden v. Wash. State Dep’t of Social & Health Servs., 981 F.2d 1054 (9th Cir. 1992)

Other:

Rosen v. Goetz, 410 F.3d 919 (6th Cir. 2005) (“significant”)
Ind. Ass’n of Homes for Aging Inc. v. Ind. Office of Medicaid Policy and Planning, 60 F.3d 262 (7th Cir. 1995) (a “presumption of regularity” though still subject to review)
Neb. Pharm. Ass’n, Inc. v. Neb. Dep’t of Social Services, 863 F. Supp. 1037 (D. Neb. 1994) (none given because the specific action at issue was not described in the state plan)
Indep. Acceptance Co. v. Cal., 204 F.3d 1247 (9th Cir. 2000) (“highly deferential”)
Kan. Health Care Ass’n v. Kan. Dep’t of Social and Rehab. Servs., 903 F. Supp. 1449 (D. Kan. 1995) (none because it was not clear that the specific action at issue was described in the state plan)
Pharm. Research and Mfrs. of Am. v. Medows, 184 F.Supp.2d 1186 (N.D. Fla. 2001)
Mead – “at least some deference”
Skidmore:

*Bryson v. Shumway*, 308 F.3d 79 (1st Cir. 2002)

Other:

*Lamore v. Ives*, 977 F.2d 713 (1st Cir. 1992) (“legislative effect”)
*Royal Geropsychiatric Servs., Inc. v. Tompkins*, 159 F.3d 238 (6th Cir. 1998) (giving a combination of approval of state plan and position argued at litigation “some” deference)

See also:

*New York City Health & Hospitals Corp. v. Perales*, 954 F.2d 854 (2d Cir. 1992) (refusing to defer to federal approval of state regulation)

*N.C. Dep’t of Human Res., Div. of Med. Assist. v. U.S. Dep’t of Health & Human Servs.*, 999 F.2d 767 (4th Cir. 1993) (giving “considerable” deference to Secretary’s determination that notice of amendment to state plan was required)
*Texas v. U.S. Dep’t of Health & Human Servs.*, 61 F.3d 438 (5th Cir. 1995) (Disapproval of state plan amendment, *Chevron*)

Approval of Waiver or Demonstration Program:

*Pharm. Research and Mfrs. of Am. v. Thompson*, 251 F.3d 219 (D.C. Cir. 2001) (*Chevron*)

Approval of Modification of Consent Decree:

CMS Letters

**Chevron:**

*Detsel by Detsel v. Sullivan, 895 F.2d 58 (2d Cir. 1990)* (Applied *Chevron*, but did not defer, finding interpretation not reasonable)

*Skubel v. Sullivan, 925 F. Supp. 930 (D. Conn. 1996)* (Applied *Chevron*, but no deference, because the agency offered no informed and reasoned rationale for its position)


*Elizabeth Blackwell Health Ctr v. Knoll, 61 F.3d 170 (3d Cir. 1995)* (Chevron)

*Children’s Hosp. & Health Ctr. v. Belshe, 188 F.3d 1090 (9th Cir. 1999)* (considered Chevron, but found statute unambiguous)

*State of Ga., Dep’t of Med. Assistance, By and Through Toal v. Shalala, 8 F.3d 1565 (11th Cir. 1993)* (Chevron)

**Skidmore:**

*Cleary ex. rel. Cleary v. Waldman, 167 F.3d 801 (3d Cir. 1999)* (Skidmore, because not promulgated with notice and comment)


*Caremark, Inc. v. Goetz, 480 F.3d 779 (6th Cir. 2007)* (Skidmore; deference given only the extent it has the power to persuade)

*Battle Creek Health System v. Leavitt, 498 F.3d 401 (6th Cir. 2007)* (deference given only to the extent it has the power to persuade)

*St. Mary's Hosp. of Rochester, Minn. v. Leavitt, 416 F.3d 906 (8th Cir. 2005)* (Skidmore)

*Resident Councils of Washington v. Leavitt, 500 F.3d 1025 (9th Cir. 2007)* (Skidmore)

None:

*Westmiller by Hubbard v. Sullivan, 729 F. Supp. 260 (W.D. N.Y. 1990)* (none, because not made contemporaneously with statute and not consistent with previous positions)

*Matarazzo v. Rowe, 623 A.2d 470 (Conn. 1993)* (none, because not made contemporaneously with statute and not consistent with previous positions)


*Spectrum Health Continuing Care Group v. Anna Marie Bowling Irrecoverable Trust, 410 F.3d 304 (6th Cir. 2005)* (none)

*Utah Women's Clinic, Inc. v. Graham, 892 F. Supp. 1379 (D. Utah 1995)* (none, inconsistent with statute)
Ariz. v. Thompson, 281 F.3d 248 (D.C. Cir. 2002) (none, because court decided the agency did not exercise its own discretion but really just deferred to Congress)

Other:

Harris v. Olszewski, 442 F.3d 456 (6th Cir. 2006) (unclear – most likely bolstering decision to afford Chevron deference to state plan approval).
Chambers v. Ohio Dep’t of Human Servs., 145 F.3d 793 (6th Cir. 1998) (“some presumption of correctness”)
N.D. ex rel. Olson v. Ctrs. for Medicare and Medicaid Servs., 403 F.3d 537 (8th Cir. 2005) (did not reach deference issue, finding statute unambiguous)
Grey Bear v. N.D. Dep’t of Human Services, 2002 N.D. 139 (2002) (deferred to reasonable interpretation that did not contradict statute)

Letter specifically to party:

S.D. ex rel. Dickson v. Hood, 391 F.3d 581 (5th Cir. 2004) (none)
Harris v. Olszewski, 442 F.3d 456 (6th Cir. 2006) (none)

Q&A/Instructions from Secretary:

Glendale Adventist Med. Ctr. v. Thompson, 11 Fed.Appx. 760 (9th Cir. 2001)
(Chevron, mixed with APA standard)

See also:

HCMF Corp. v. Allen, 238 F.3d 273 (4th Cir. 2001) (finding that letter from CMS does not confer a right enforceable through Section 1983)

State Medicaid Manual

Chevron:

No cases

Skidmore:

Cleary ex. rel. Cleary v. Waldman, 167 F.3d 801 (3d Cir. 1999)
S.D. ex rel. Dickson v. Hood, 391 F.3d 581 (5th Cir. 2004) (“respectful consideration,” citing Mead)

Ind. Family & Social Servs. Admin. v. Thompson, 286 F.3d 476 (7th Cir. 2002) (“more flexible respect” citing Mead)

Poindexter v. State ex rel. Dep’t of Human Servs., 372 Ill. App. 3d 1021 (2007) (unspecified, but deferred because consistent with statute and longstanding agency position)

Katie A. v. Los Angeles County, 481 F.3d 1150 (9th Cir. 2007) (“respectful consideration”)

Ramey v. Reinertson, 268 F.3d 955 (10th Cir. 2001) (followed only to the extent consistent with the purposes of the Medicaid Act, treated as interpretive rule)


Other:


Rosen v. Goetz, 410 F.3d 919 (6th Cir. 2005) (significant, considered in combination with state plan approval and amicus brief from feds)

State Operations Manual


Position taken in litigation (including amicus briefs)

Skandalis v. Rowe, 14 F.3d 173 (2d Cir. 1994) (Chevron)

Pennsylvania Med. Soc’y v. Snider, 29 F.3d 886 (3d Cir. 1994) (Court considers Chevron, but rejects because statute not ambiguous)

Rehab. Ass’n v. Kozlowski, 42 F.3d 1444 (4th Cir. 1994) (none, because inconsistent with statute)

Harris v. Olszewski, 442 F.3d 456 (6th Cir. 2006) (considering it along with state plan approval, not specifying particular level of deference)

Rosen v. Goetz, 410 F.3d 919 (6th Cir. 2005) (“significant” considered in combination with state plan approval and State Medicaid Manual)

Cherry by Cherry v. Magnant, 832 F.Supp. 1271 (S.D. Ind. 1993) (Chevron given to amicus brief)

Georgetown Univ. Hosp. v. Sullivan, 934 F.2d 1280 (D.C. Cir. 1991) (none, although court independently agreed with agency’s position)
Combinations


*Community Health Center v. Wilson-Coker*, 311 F.3d 132 (2d Cir. 2002)

*Deerbrook Pavilion, LLC v. Shalala*, 235 F.3d 1100 (8th Cir. 2000) (unspecified level given to regulation, commentary on regulation, agency memorandum)

*Via Christi Regional Medical Center, Inc. v. Leavitt, ___ F.3d ___, No. 06-3402 (10th Cir. Dec. 7, 2007)* (noting in *dicta* that agency memoranda and instruction manuals are given deference only to their “degree of persuasiveness”)

*McCreary v. Offner*, 172 F.3d 76 (D.C. Cir. 1999) (*Chevron* given to agency transmittal and State Medicaid Manual)

Secretary’s response to comment published in the Federal Register

*Lewis v. Grinker*, 965 F.2d 1206 (2d Cir. 1992) (none)

Medicare Provider Reimbursement Manual

*Chevron:*


*Nat’l Med. Centers., Inc. v. Shalala*, 43 F.3d 691 (D.C. Cir. 1995) (even greater deference than *Chevron*)

*Skidmore:*

*Visiting Nurse Ass’n Gregoria Auffant v. Thompson*, 447 F.3d 68 (1st Cir. 2006)


*Cmty. Hosp. of the Monterey Peninsula v. Thompson*, 323 F.3d 782 (9th Cir. 2003)

*Cmty. Hosp. of the Monterey Peninsula v. Thompson*, 323 F.3d 782 (9th Cir. 2003)


*Other:*


*Community Care, L.L.C. v. Leavitt*, 477 F. Supp. 2d 751 (E.D. La. 2007) (considered “persuasive at best”)

16
St. Francis Health Care Center v. Shalala, 205 F.3d 937 (6th Cir. 2000) (applied APA standard and deferred to interpretation as not arbitrary and capricious)

Paragon Health Network, Inc. v. Thompson, 251 F.3d 1141 (7th Cir. 2001) (found it a “useful guide”)


St. Luke’s Methodist Hosp. v. Thompson, 182 F.Supp.2d 765 (N.D. Iowa 2001) (only to the extent it has the power to persuade)


Univ. Health Servs., Inc. v. Health & Human Servs., 120 F.3d 1145 (11th Cir. 1997) (unspecified level, but followed)


Medicare 1986 Reimbursement Manual

Yale-New Haven Hospital v. Leavitt, 470 F.3d 71 (2d Cir. 2006) (none)

Medicare Carriers Manual

Ambulatory Anesthesia of N.H., PA v. Leavitt, No. 04-0725, 2007 WL 655599(D. N.J. Feb. 27, 2007) (unspecified level given, but deferred to Secretary’s interpretation)

Wood v. Thompson, 246 F.3d 1026 (7th Cir. 2001) (unspecified level given, but deferred to Secretary’s interpretation)

Loyola Univ. of Chi. v. Bowen, 905 F.2d 1061 (7th Cir. 1990) (none, because inconsistent with statute)

Tsoutsouris v. Shalala, 977 F. Supp. 899 (N.D. Ind. 1997) (Chevron)

Downtown Med. Ctr./Comprehensive Health Care Clinic v. Bowen, 944 F.2d 756 (10th Cir. 1991) (Chevron)

Medicare Intermediary Manual

Battle Creek Health System v. Leavitt, 498 F.3d 401 (6th Cir. 2007) (Deference given only to the extent it has the power to persuade)

Chaves County Home Health Serv., Inc. v. Sullivan, 931 F.2d 914 (D.C. Cir. 1991) (Chevron)

Peer Review Organization Manual

Pub. Citizen, Inc. v. U.S. Dep’t of Health and Human Servs., 332 F.3d 654 (D.C. Cir. 2003) (Skidmore, but statute not ambiguous, so no deference)
Part III

This part lists and summarizes federal and state Medicaid and Medicare cases on the issue of deference to written statements from the Centers for Medicare & Medicaid Services. The list is organized by Circuit. It is intended to be a complete list of cases decided after 1990. It also includes selected non-Medicaid/Medicare cases and cases predating 1990.

First Circuit

Court of Appeals Cases

Visiting Nurse Ass’n Gregoria Auffant, In. v. Thompson, 447 F.3d 68 (1st Cir. 2006)

Parties:  Plaintiffs, health care provider agency; Defendant, Secretary of U.S. Department of Health & Human Services.

Issue:  Whether the plaintiff was entitled to reimbursement of contributions to deferred salary plan for employees. The court considered whether interpretive rules in the federal Provider Reimbursement Manual (PRM) defining “necessary and proper costs” were applicable to plaintiffs’ claims for reimbursement and whether Secretary’s decision to deny reimbursement warranted deference.


Deference given to guidance:  Skidmore.

Held:  For Secretary.

*note: this case has been questioned and arguably superseded on other grounds.

Rolland v. Romney 318 F.3d 42 (1st Cir. 2003)

Parties:  Plaintiffs:  Class of Medicaid beneficiaries with developmental disabilities living in nursing homes; Defendant, Massachusetts Governor and other state officials.

Issue:  Whether state was violating statute imposing requirements and standards on nursing home care. The specific requirement at issue was contained in a regulation, not the statute. The Defendants argued that the requirement in the regulation was unenforceable.

Guidance at issue:  federal regulation.
Deference given to guidance: *Chevron*.

**Held:** For Medicaid beneficiary plaintiffs.

**Bryson v. Shumway, 308 F.3d 79 (1st Cir. 2002)**

**Parties:** Plaintiffs, Medicaid beneficiaries with acquired brain disorders; Defendant, New Hampshire’s state Medicaid agency director.

**Issue:** Whether the state was required to accommodate at least 200 individuals in its Medicaid HCB waiver program. The state argued that it could serve fewer than 200, based on a regulation providing that the type of waiver in question “could not exceed” 200 participants and on the fact that CMS had approved its waiver plan which anticipated serving fewer than 200 individuals.

**Guidance at issue:** Regulation and CMS approval of HCB waiver plan.

**Deference given to guidance:** Regulation given *Chevron* deference. Plan approval given *Skidmore* deference.

**Held:** For state Medicaid director.

**Warder v. Shalala, 149 F.3d 73 (1st Cir. 1998)**

**Parties:** Plaintiffs, Medicare beneficiaries and medical equipment suppliers; Defendant, Secretary of HHS.

**Issue:** Whether a “Seating System” used to manage musculoskeletal problems qualified as durable medical equipment (DME) or as braces under the Medicare reimbursement scheme. CMS had ruled, in an administrative ruling, that it was DME.

**Guidance at issue:** A CMS’s Agency Ruling (HCFAR 96-1), which court characterized as an interpretive rule.

**Deference given to guidance:** Court did not decide what level of deference was due but held that the ruling was an appropriate construction of the statute.

**Held:** For Secretary.

**Visiting Nurse Ass’n of North Shore, Inc. v. Bullen, 93 F.3d 997 (1st Cir. 1996)**
Parties: Plaintiffs, health care providers; Defendants, Massachusetts state health officials.

Issue: Plaintiffs claimed that defendants were violating the Medicaid requirements governing reimbursement rates for health care providers.

Guidance at issue: Approval of state plan that included description of rate-setting methodology.

Deference given guidance: *Chevron*, as an “implicit interpretation” of the Medicaid Act

Held: For state health officials.

**Stowell v. Secretary of Health & Human Servs., 3 F.3d 539 (1st Cir. 1993)**

Parties: Plaintiffs, class of Medicaid and AFDC beneficiaries; Defendants, Secretary of U.S. Department of Health & Human Servs.

Issue: Whether Maine violated Medicaid provision governing levels of payment and standards of need for AFDC recipients.

Guidance at issue: Secretary’s approval of Maine’s state Medicaid plan which includes payment levels below those required by the Medicaid statute.

Deference given guidance: *Chevron*, but court states that the question of deference is really just a test of the persuasiveness, given the totality of the circumstances.

Held: For Secretary.

**Lamore v. Ives, 977 F.2d 713 (1st Cir. 1992)**

Parties: Plaintiffs, Medicaid beneficiaries who are veterans or veterans survivors; Defendant, Maine state health officials. The defendants also filed a third-party complaint against the federal Secretary of the Department of Health and Human Services.

Issue: Whether Veteran’s Administration Aid and Attendance benefits should be treated as income for the purpose of determining the amount beneficiaries should contribute to the cost of care.

Guidance at issue: Secretary’s interpretation of statute. It is not explicit from the case what form that interpretation takes, but it seems most likely the Secretary’s approval of Maine’s state plan.
Deference given guidance: Interpretation given “legislative” effect.

Held: For state officials, complaint against Secretary dismissed.
State Cases


Parties:  Petitioners, pharmacies and a pharmacy trade association.

Issue:  Whether state Medicaid agency practice of reducing reimbursement to providers for pharmaceuticals and durable medical equipment provided to dually eligible Medicaid/Medicare beneficiaries violated Medicaid Act.

Guidance at issue:  Letter from CMS

Deference given:  None, because it is inconsistent with a duly promulgated federal regulation.

Held:  For petitioners.

Notable Pre-1990 Cases

Comm. of Mass. v. Sec’y of Health & Human Servs., 816 F.2d 796 (1st Cir. 1987)

St. Luke’s Hosp. v. Sec’y of Health & Human Servs., 810 F.2d 325 (1st Cir. 1987)

Mayburg v. Sec’y of Health & Human Servs., 740 F.2d 100 (1st Cir. 1984)

Hoodkroft Convalescent Center v. N.H. Dep’t of Human Servs., 701 F. Supp. 17 (D. N.H. 1988)
Second Circuit

Court of Appeals Cases

Bellevue Hospital Center v. Leavitt, 443 F.3d 163 (2d Cir. 2006)

**Parties:** Plaintiff, health care provider; Defendant, Secretary of Health & Human Services.

**Issue:** Challenge to agency’s determination of geographic areas upon which Medicare rate determinations were based.

**Agency action at issue:** Federal regulation containing this determination.

**Deference given:** *Chevron*, noting that Congress acquiesced in the decision.

**Held:** For Secretary.

Yale-New Haven Hospital v. Leavitt, 470 F.3d 71 (2d Cir. 2006)

**Parties:** Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

**Issue:** Whether Secretary’s decision denying Medicare reimbursement for allegedly experimental services violated Medicare law.

**Guidance at issue:** Medicare 1986 Reimbursement Manual.

**Deference given:** None, because the Secretary acted arbitrarily and capriciously in promulgating the manual (appeared to be applying APA standard, rather than *Chevron*-type analysis).

Rabin v. Wilson-Coker, 362 F.3d 190 (2d Cir. 2004)

**Parties:** Plaintiffs, class of Medicaid beneficiaries; Defendant, state Medicaid director.

**Issue:** Whether Medicaid beneficiaries who become ineligible because the state lowers income eligibility limits are entitled to Transitional Medical Assistance.

**Guidance at issue:** Letters from CMS.

**Deference given:** “Some significant measure of deference.”
**Held:** For Medicaid beneficiary class.

*Community Health Center v. Wilson-Coker,* 311 F.3d 132 (2d Cir. 2002)

**Parties:** Plaintiff, health care provider; Defendant, state health official.

**Issue:** Extent of state’s authority to define reasonable costs for Medicaid reimbursement, specifically, whether setting a “productivity screen” is allowed by the Medicaid statute.

**Agency action at issue:** Combination of approval of state plan, Rural Health Clinic and FHQC Manual, and amicus brief from federal government.

**Deference given:** “Considerable deference, through *Chevron* or otherwise,” (includes discussion of deference).

**Held:** For state health official.

*NOTE: see also unpublished district court decision, granting *Chevron* deference to state plan approval, with lengthy analysis.*


**Parties:** Plaintiff, health care provider; Defendant, state health officials.

**Issue:** Whether plaintiffs were entitled to reimbursement for services to Qualified Medicare Beneficiaries.

**Guidance at issue:** State Medicaid Manual.

**Deference given:** Unspecified, but followed guidance.

**Held:** For state health officials.

*Perry v. Dowling,* 95 F.3d 231 (2d Cir. 1996)

**Parties:** Plaintiff, Medicaid beneficiary; Defendant, state health officials.

**Issue:** Validity of state Medicaid rule requiring Medicaid beneficiaries to cooperate with establishing paternity at recertification of continuing eligibility.

**Guidance at issue:** approval of state Medicaid plan.
Deference given: *Chevron.*

Held: For state health officials.

*Lewis v. Grinker, 965 F.2d 1206 (2d Cir. 1992)*

Parties: Plaintiffs, undocumented immigrant pregnant Medicaid applicants; Defendant, state Medicaid official.

Issue: Whether undocumented immigrant pregnant women were eligible to receive Medicaid-covered prenatal care.

Agency action at issue: Secretary’s response to comment published in the Federal Register during the pending litigation.

Deference given: None.

Held: For Medicaid applicants.

*New York City Health & Hospitals Corp. v. Perales, 954 F.2d 854 (2d Cir. 1992)*

Parties: Plaintiff, health care provider; Defendants, Massachusetts state health official, Secretary of Health and Human Services.

Issue: Challenge to a state regulation which limited the state’s responsibility for Medicare Part B cost-sharing coverage for dual eligibles.

Agency action at issue: Approval of state regulation by Secretary.

Deference given: Minimal, because the regulation was inconsistent with statute.

Held: For health care provider.

*Det sel by Det sel v. Sullivan, 895 F.2d 58 (2d Cir. 1990)*

Parties: Plaintiff, Medicaid beneficiary; Defendant, Secretary of Health & Human Services.

Issue: Whether coverage of medically necessary private duty nursing services can be denied for child when in school.
Agency action at issue: Letter from CMS interpreting Medicaid regulation.

Deference given: Applied *Chevron*, but did not defer, finding interpretation not reasonable.
Held: For Medicaid beneficiary.

*New York by Perales v. Sullivan, 894 F.2d 20 (2d Cir. 1990)*

Parties: Plaintiff, state health official; Defendant, Secretary of Health & Human Servs.

Issue: Secretary’s decision to exclude costs of medical malpractice insurance from Medicaid reimbursement.

Agency action at issue: Secretary’s disapproval of state plan amendment.
Deference given: *Chevron*.
Held: For Secretary.

*Skandalis v. Rowe, 14 F.3d 173 (2d Cir. 1994)*

Parties: Plaintiff, state health officials; Defendant, Secretary of Health & Human Services.

Issue: Whether Connecticut could receive reimbursement for coverage of home and community based services for individuals with incomes greater than 300 % of the federal poverty level.

Agency action at issue: *Amicus* brief from federal government.
Deference given: *Chevron* - in part because the position taken during litigation was consistent with previous interpretations.
Held: For state health officials.

*Capitano v. Secretary of Health & Human Servs., 732 F.2d 1066 (2d Cir. 1994)*

Parties: Plaintiff, one of the widows of social security recipient; Defendant, Secretary of Health & Human Services.

Issue: which of deceased’s two widows was entitled to surviving spouse Social Security benefits.
Agency action at issue: Rule that was not promulgated pursuant to notice and comment rulemaking.

Deference given: none, because interpretation “violates spirit of statute,” *Chevron* inapplicable because “we do not have a legislative regulation.”
District Court Cases


Parties: Plaintiffs, Medicare beneficiaries; Defendant, Secretary of Health and Human Services.

Issue: Whether policy requiring three day stay in hospital before providing Medicare coverage of services in a skilled nursing facility services complied with Medicare Act.


Deference given: Skidmore, but declines to decide “definitively” whether Chevron or Skidmore deference is more appropriate because it agrees with the Secretary’s interpretation.

Held: For Secretary.


Parties: Plaintiffs, Medicaid recipients; Defendant, Secretary of Health & Human Services.

Issue: State refusal to cover home health services in settings other than the home.

Agency action at issue: Letters from CMS interpreting Medicaid regulation.

Deference given: Chevron analysis, but no deference, because the agency offered no informed and reasoned rationale for its position.

Held: For Medicaid beneficiaries.


Parties: Plaintiff, state agency; Defendant, Secretary of Health and Human Services.

Issue: Validity of Secretary’s decision to deny requested reimbursement rate to state for expenditures made to operate its claims processing data system.


Deference given: Chevron.
**Held:** For Secretary.


**Parties:** Plaintiffs, Medicaid applicants; Defendant, Secretary of Health & Human Services.

**Issue:** Validity of Secretary’s position regarding counting of resources when determining Medicaid eligibility.

**Agency action at issue:** Transmittal from the Secretary, issued 15 years after Medicaid statute enacted and inconsistent with position taken for preceding 14 years.

**Deference given:** None, because not contemporaneous with passage of statute and inconsistent with previous agency positions.

**Held:** For Medicaid applicants
State Court Cases

Matarazzo v. Rowe, 623 A.2d 470 (Conn. 1993)

Parties: Plaintiff, Medicaid applicant; Defendant, state Medicaid official.

Issue: Whether the state’s method of counting resources and failure to allow a “spend down” using medical bills violated Medicaid act.

Agency action at issue: CMS “Action Transmittal” memo.

Deference given: Minimal, because the position was not taken contemporaneously with the enactment of the statute and contradicts agency’s previous position.

Held: For state Medicaid official.

Notable Pre 1990 Cases

State of New York v. Bowen, 811 F.2d 776 (2d Cir. 1987)


Other cases

Bray v. Dowling, 25 F.3d 135 (2d Cir. 1994) (class of AFDC beneficiaries, holding that “[c]onsistent interpretations by the agencies entrusted with the administration of the Social Security Act are due deferential treatment in the courts.”)
Third Circuit

Court of Appeals Cases

*Cleary ex. rel. Cleary v. Waldman, 167 F.3d 801 (3d Cir. 1999)*

**Parties:** Plaintiff, Medicaid applicant and spouse; Defendant, state health official.

**Issue:** Proper methodology for counting income when determining Medicaid eligibility of institutionalized person with spouse in community.

**Agency action at issue:** Letters from CMS and Secretary, State Medicaid Manual.

**Deference given:** *Skidmore*, because the guidance is an interpretive rule, rather than one promulgated with notice and comment.

**Held:** For state health official.

*Elizabeth Blackwell Health Ctr v. Knoll, 61 F.3d 170 (3d Cir. 1995)*

**Parties:** Plaintiff, health care providers; Defendants, State officials.

**Issue:** Whether state law restricting Medicaid funding for abortions was valid.

**Agency action at issue:** Letters from Secretary.

**Deference given:** *Chevron*, as a reasonable interpretation.

**Held:** For health care providers.


**Parties:** Plaintiffs, health care provider association; Defendants, state Medicaid official and Secretary of Health and Human Services.

**Issue:** Whether services for Qualified Medicare Beneficiaries who have premiums and other costs paid for through Medicaid should be reimbursed using Medicare rates or the lower Medicaid rates.

**Guidance at issue:** Secretary’s litigation position.
Deference given: None, because it leads to an illogical result and conflicts with previous policy memoranda from the Secretary.

Held: For health care providers.

*Erie County Geriatric Ctr. v. Sullivan*, 952 F.2d 71 (3d Cir. 1991)

Parties: Plaintiff, health care provider; Defendants, Secretary of Health & Human Services and state Medicaid director.

Issue: Whether reimbursement rates for skilled nursing facilities and intermediate care facilities established by state Medicaid agency and approved by Secretary violated Medicaid Act.

Guidance at issue: Secretary’s approval of state plan.

Deference given: Employed *Chevron* analysis, but did not defer, because Secretary did not carry out his duty of ensuring that the reimbursement rates be reasonable and adequate.

Held: For health care provider.
District Court Cases


**Parties:** Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

**Issue:** Validity of Secretary’s decision to deny reimbursement for Medicare services.

**Guidance at issue:** Medicare Carriers Manual (MCM).

**Deference given:** Unspecified level given.

**Held:** For Secretary.


**Parties:** Plaintiffs, Medicaid applicant; Defendant, state health officials.

**Issue:** Whether county spouse annuity trusts are a countable resource for the purpose of determining Medicaid eligibility.

**Agency action at issue:** Letter from CMS, State Medicaid Manual.

**Deference given:** “Some” deference (citation to *Skidmore*).

**Held:** For state health officials.


**Parties:** Plaintiffs, pharmacy operators; Defendant, state Medicaid official.

**Issue:** Whether reimbursement rates adopted by state Medicaid agency violated the Medicaid Act.

**Guidance at issue:** Secretary’s approval of state plan.

**Deference given:** None, because the state’s actions in establishing the rates violated federal regulations.
Held: For pharmacy operators.

State Court Cases

_A.B. v. Division of Medical Assist. & Health Servs., 865 A.2d 701 (N.J. Super A.D. 2005)_

Parties: Plaintiff, Medicaid applicant; Defendant, state Medicaid agency.

Issue: Validity of state determination of ineligibility based on an annuity that did not designate the state as the remainder beneficiary.

Guidance at issue: Letters from CMS, including one written in response to plaintiff’s counsel.

Deference given: General letter was not given deference because it was not addressing a similar situation. Letter to plaintiff’s attorney was given deference because it “cogently explains the agency’s consistent position.” Cited _Skidmore_.

Held: For Medicaid applicant.


Parties: Plaintiff, estate of deceased Medicaid beneficiary; Defendant, State Medicaid Agency.

Issue: Validity of state regulation establishing caps on a community spouse resource allowance.

Guidance at issue: CMS transmittal issued as part of State Medicaid Manual.

Deference given: _Skidmore_, because less formal than a regulation.

Held: For plaintiff.
Fourth Circuit

Court of Appeals Cases

West Virginia v. Thompson, 475 F.3d 204 (4th Cir. 2007)

Parties: Plaintiff, state; Defendant, Secretary of Health and Human Services.

Issue: Whether Secretary’s decision denying state plan amendment that would have exempted up to $50,000 from estate recovery from deceased Medicaid beneficiaries violated the Medicaid Act.

Guidance at issue: disapproval of state plan amendment.

Deference given: Chevron. Court also notes in dicta that State Medicaid Manual, by its terms, is not binding but only interpretive.

Held: For Secretary.


Parties: Plaintiff, state; Defendant, Secretary of Health & Human Services.

Issue: Whether WV must comply with the HHS rule that WV collect Medicaid expenditures from deceased Medicaid recipients.

Action at issue: Threat to withhold federal reimbursement.

Deference given: Unspecified.

Held: For Secretary, but only because she did not order the withholding of 100% of funds. That would have prompted a 10th Amendment issue.

Rehab. Ass’n v. Kozlowski, 42 F.3d 1444 (4th Cir. 1994)

Parties: Plaintiff, health care provider; Defendants, state health official and Secretary of Health and Human Services.

Issue: Whether services for Qualified Medicare Beneficiaries who have certain costs paid for through Medicaid should be reimbursed with a method treating them essentially as Medicare beneficiaries or Medicaid beneficiaries.
**Action at issue**: Secretary’s arguments in litigation (and, probably, the fact that the Secretary approved the state plan including the rates).

**Deference given**: None, because the plain language of the statute contradicts the Secretary and state officials’ interpretation.

**Held**: For health care providers.


**Parties**: Plaintiff, state Medicaid agency; Defendant, Secretary of Health & Human Services.

**Issue**: Whether N.C. was required to give notice to feds before making a change to its state Medicaid plan.

**Agency action at issue**: Determination that notice was required.

**Deference given**: “Considerable” deference given and will not be set aside unless abuse of discretion or otherwise contrary to law.

**Held**: for Secretary.

**Notable Pre-1990 Case**

*Deel v. Lukhard*, 830 F.2d 1283 (4th Cir. 1987) (refusing to give deference to repeated approvals of state AFDC plan)

**Other cases**:

*HCMF Corp. v. Allen*, 238 F.3d 273 (4th Cir. 2001) (finding that letter from CMS is not enforceable through Section 1983)
Fifth Circuit

Court of Appeals Cases

S.D. ex rel. Dickson v. Hood, 391 F.3d 581 (5th Cir. 2004)

Parties: Plaintiff, Medicaid recipient; Defendant, state Medicaid official

Issue: Whether Medicaid’s Early and Periodic Screening, Diagnosis and Treatment requirements required state to cover incontinence supplies for Medicaid beneficiary under 21.

Action at issue: (1) Inclusion of “medical supplies” as part of home health care services; (2) approval of state Medicaid plan providing for coverage of incontinence supplies; (3) email from CMS employee; (4) federal “State Medicaid Manual.”

Deference given: (1) & (2) Chevron, (3) none, (4) “respectful consideration.”

Held: For Medicaid beneficiary.

Texas v. U.S. Dep’t of Health & Human Servs., 61 F.3d 438 (5th Cir. 1995)

Parties: Plaintiff, state; Defendant, Department of Health and Human Services.

Issue: Federal agency’s determination that state could not expand Medicaid program to cover inpatient residential chemical dependency treatment for children under age 21.

Action at issue: Disapproval of state plan amendment.

Deference given: Chevron.

Held: For federal agency.
**District Court Cases**


**Parties:** Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

**Issue:** validity of payment methodology used to determine Medicare reimbursement.

**Guidance at issue:** Medicare Provider Reimbursement Manual (PRM).

**Deference given:** considered “persuasive at best,” Fifth Circuit precedent already established that PRM gets this level of deference rather than *Chevron* (note: confusing analysis of level of deference suggests that PRM might sometimes get *Chevron* deference).

**Held:** for Secretary.


**Parties:** Plaintiff, Medicaid beneficiary; Defendant, state Medicaid official.

**Issue:** Whether state Medicaid agency’s decision to reduce the number of hours of private duty nursing for which coverage was authorized violated the Medicaid Act and due process clause of the U.S. Constitution.

**Guidance at issue:** letters from CMS.

**Deference given:** none, because the statute and regulations are not ambiguous and the letters are not promulgated with notice and comment rulemaking procedures.

**Held:** For Medicaid beneficiary.


**Parties:** Plaintiffs, health care providers (nursing homes); Defendant, state Medicaid official.

**Issue:** whether state failed to give proper notice to public before amending state Medicaid plan rendered plan amendment invalid.

**Action at issue:** Secretary’s approval of state plan.
Deference given: unspecified, but court holds that mere approval of a state plan does not insulate state from any challenge of invalidity.

Held: for health care providers.

Pre-1990 Cases

Sixth Circuit

Court of Appeals Cases

_Battle Creek Health System v. Leavitt_, 498 F.3d 401 (6th Cir. 2007)

**Parties:** Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

**Issue:** Whether Secretary’s decision denying reimbursement for bad debts owed health care provider was valid.

**Guidance at issue:** Medicare Intermediary manual and memoranda from CMS.

**Deference given:** Only to the extent the guidance has the power to persuade, because informal and not subject to notice and comment.

**Held:** For Secretary.

_Caremark, Inc. v. Goetz_, 480 F.3d 779 (6th Cir. 2007)

**Parties:** Plaintiff, pharmaceutical services management company; Defendant, state health officials.

**Issue:** Whether certain pharmacy benefit plan limitations were enforceable with respect to third party liability claims for Medicaid reimbursement asserted by Tennessee's managed healthcare program.

**Guidance at issue:** Fact sheet from CMS.

**Deference given:** “Entitled to respect” and “some deference.”

**Held:** For Defendant state officials.

_Harris v. Olszewski_, 442 F.3d 456 (6th Cir. 2006)

**Parties:** Plaintiffs, health care providers; Defendant, state Medicaid official.

**Issue:** Whether Michigan’s single source contract for purchase of “medical devices” violates Medicaid’s freedom of choice provision.

**Action at issue:** (1) Approval of the related state plan amendment (which contained a certification from the state Medicaid agency that the single-source contract for
incontinence supplies complied with statutory and regulatory requirements for the single source contract); (2) letter from CMS.

**Deference given:**  *Chevron* (considering them in combination).

**Held:**  For state Medicaid official.

*Spectrum Health Continuing Care Group v. Anna Marie Bowling Irrecoverable Trust, 410 F.3d 304 (6th Cir. 2005).*

**Parties:**  Plaintiff, health care provider; Defendant, Medicaid beneficiary’s trust.

**Issue:**  Whether the provider was entitled to enforce its lien against the settlement proceeds of a patient's tort claims.

**Action at issue:**  Letter from CMS.

**Deference given:**  None, because the letter was not promulgated with rulemaking authority, the Medicaid statute does not indicate that Congress intended deference to agency letters, the letter is not publicly available, and it is inconsistent with clear statutory and regulatory language.

**Held:**  For beneficiary trust.

*Rosen v. Goetz, 410 F.3d 919 (6th Cir. 2005)*

**Parties:**  Plaintiff, Medicaid beneficiaries; Defendant, state Medicaid official.

**Issue:**  Whether procedures for terminating, reducing, or suspending Medicaid coverage were contrary to Medicaid regulations.

**Action at issue:**  Combination CMS approval of procedures for disenrollment, State Medicaid Manual, and *amicus* brief filed by federal government (considered as a whole by court).

**Deference given:**  Unspecified, but significant.

**Held:**  For state Medicaid officials.

*Royal Geropsychiatric Servs., Inc. v. Tompkins, 159 F.3d 238 (6th Cir. 1998)*
Parties: Plaintiff, health care provider; Defendants, state Medicaid director and Secretary of Health and Human Services.

Issue: Challenge to federal policy that reduced reimbursement to physicians and psychologists who provided non-hospital treatment of qualified Medicare beneficiaries (QMBs).

Action at issue: Unclear, could be a combination of approval of state plan and position argued at litigation. Court does not base its conclusion on the form of the Secretary’s interpretation.

Deference given: “Some” deference, even though the Secretary’s position not always consistent, but immaterial because the court found the defendant Secretary’s position more plausible.

Held: For state Medicaid director and Secretary.

Chambers v. Ohio Dep’t of Human Servs., 145 F.3d 793 (6th Cir. 1998)

Parties: Plaintiff, Medicaid applicant; Defendant, State Medicaid agency.

Issue: Whether a resource-first approach (as opposed to an income-first approach) in determining a nursing home resident's eligibility for Medicaid benefits was permissible.

Action at issue: Letters from CMS.

Deference given: “Some presumption of correctness.”

Held: For state Medicaid agency.

Jewish Hosp., Inc. v. Sec’y of Health and Human Servs., 19 F.3d 270 (6th Cir. 1994)

Parties: Plaintiff, health care provider; Defendant, Secretary of Health & Human Services.

Issue: Whether Secretary correctly interpreted statutory phrase “disproportionate share adjustment.”

Action at issue: Federal regulation.

Deference given: none. Statute was not ambiguous, thus Chevron analysis not warranted. Also, interpretation contrary to statute.
**Held:** For health care provider.

*Am. Acad. of Ophthalmology, Inc. v. Sullivan, 998 F.2d 377 (6th Cir. 1993)*

**Parties:** Plaintiffs, health care providers; Defendant, Secretary of Health & Human Services.

**Issue:** Whether a demonstration project involving payment of single negotiated fee for outpatient surgery and related services violated the Medicare Act and their equal protection rights.

**Action at issue:** Approval of demonstration project.

**Deference given:** *Chevron.*

**Held:** For Secretary.
District Court Decisions


**Parties:** Plaintiffs, Medicaid beneficiaries; Defendant, state Medicaid officials.

**Issue:** Whether modification of consent decree was warranted.

**Action at issue:** CMS approval of the modifications at issue.

**Deferral given:** “Substantial,” although the court cautions that CMS “did not explicitly interpret the federal regulations at issue in its approval document.”

**Held:** For state Medicaid agency official.

**Notable Pre-1990 Case**

Seventh Circuit

Courts of Appeals Cases

*Ind. Family & Social Servs. Admin. v. Thompson, 286 F.3d 476 (7th Cir. 2002)*

**Parties:** Plaintiff, state Medicaid agency; Defendant, Secretary of Health & Human Services.

**Issue:** Whether Secretary’s denial of claim for enhanced federal Medicaid reimbursement for a new information management system was correct.

**Guidance at issue:** State Medicaid Manual.

**Deference given:** “More flexible respect,” citing *Mead.*

**Held:** For Secretary.

*Wood v. Thompson, 246 F.3d 1026 (7th Cir. 2001)*

**Parties:** Plaintiff, Medicare beneficiary; Defendant, Secretary of Health & Human Services.

**Issue:** Whether denial of coverage of dental services performed in preparation for heart valve surgery was correct.

**Guidance at issue:** Medicare Part B Carriers Manual.

**Deference given:** Given, but degree not specified.

**Held:** For Secretary.

*Paragon Health Network, Inc. v. Thompson, 251 F.3d 1141 (7th Cir. 2001)*

**Parties:** Plaintiff, provider; Defendant, Secretary of Health & Human Services.

**Issue:** Whether denial of exemption from routine cost limits was correct.

**Action at issue:** Denial of exemption, guidance in Provider Reimbursement Manual.

**Deference given:** *Chevron* for denial; found manual to be “useful guide.”

**Held:** For Secretary.
**Ind. Ass'n of Homes for Aging Inc. v. Ind. Office of Medicaid Policy and Planning, 60 F.3d 262 (7th Cir. 1995)**

**Parties:** Plaintiff, state provider association; Defendant, state Medicaid agency.

**Issue:** Whether the state’s reimbursement plan for nursing homes complied with federal law.

**Action at issue:** Approval of state plan by Secretary of Health & Human Services, letter in response to provider inquiries that feds considered reimbursement scheme consistent with federal law.

**Deference given:** Gave the plan a “presumption of regularity” though still subject to review. Concluded federal agency’s interpretation of controlling weight unless plainly erroneous or inconsistent with the regulation.

**Held:** For state Medicaid agency.

**Loyola Univ. of Chi. v. Bowen, 905 F.2d 1061 (7th Cir. 1990)**

**Parties:** Plaintiff, health care provider; Defendant, Secretary of Health & Human Services.

**Issue:** Whether denial of Medicare reimbursement for educational activities was correct.

**Guidance at issue:** CMS Medicare Carriers Manual.

**Deference given:** None, because inconsistent with statute.

**Held:** For health care provider
**District Court Cases**


**Parties:** Plaintiff, health care provider; Defendant, Secretary of Health & Human Services.

**Issue:** Whether decision denying Medicare reimbursement was correct.

**Guidance at issue:** Medicare Provider Reimbursement Manual.

**Deference given:** Unspecified, but based on a determination that the interpretation was reasonable and consistent with longstanding interpretation of the phrase.

**Held:** For Secretary.

*Tsoutsouris v. Shalala, 977 F. Supp. 899 (N.D. Ind. 1997)*

**Parties:** Plaintiff, health care provider; Defendant, Secretary of Health & Human Services.

**Issue:** Whether denial of claim for waiver of overpayment was correct.

**Guidance at issue:** Medicare Part B Carriers manual.

**Deference given:** *Chevron.*

**Held:** for Secretary.


**Parties:** Plaintiffs, provider association; Defendant, state Medicaid agency.

**Issue:** Whether state Medicaid regulation requiring copayment from Medicaid recipients conflicted with federal statute placing moratorium on reductions in payment limits or dispensing fees for pharmacies providing outpatient drugs to Medicaid recipients.

**Action at issue:** Position stated in federal government’s *amicus* brief.

**Deference given:** None, because the interpretation was “neither reasonable or permissible.”
Held: For provider association.

*Cherry by Cherry v. Magnant*, 832 F.Supp. 1271 (S.D. Ind. 1993)

**Parties:** Plaintiffs, Medicaid applicant nursing home residents; Defendant, state Medicaid official.

**Issue:** Correctness of state Medicaid agency determination that plaintiffs were ineligible for Medicaid based on resources of spouses living in the community.

**Action at issue:** Position stated in federal government’s amicus brief.

**Deference given:** *Chevron.*

**Held:** For state Medicaid official.
State Court Cases

Poindexter v State ex rel. Dep’t of Human Servs., 372 Ill. App. 3d 1021 (2007)

Parties: Plaintiffs, spouses of institutionalized Medicaid beneficiaries; Defendant, state.

Issue: Whether federal Medicaid law preempted state spousal support provision allowing state to seek income support for institutionalized spouse from community spouses.


Deference given: Unspecified level given because the interpretation is consistent with the plain language and purposes of the statute and consistent with prior administrative views.

Held: For state.

Notable Pre-1990 Cases

Woodstock/Kenosha Health Ctr. v. Bowen, 810 F.2d 123 (7th Cir. 1987)


Wisconsin Dep’t of Health and Social Services v. Bowen, 797 F.2d 391, 398 (7th Cir. 1986)

Other cases

Ill. Health Care Ass'n v. Bradley, 983 F.2d 1460 (7th Cir. 1993)

Eighth Circuit

Court of Appeals Cases

*Pediatric Specialty Care, Inc. v. Ark. Dep’t of Human Servs.*, 444 F.3d 991 (8th Cir. 2006)

**Parties:** Plaintiffs, Medicaid beneficiaries and providers; Defendant, state Medicaid agency.

**Issue:** Whether coverage of services for children and youth was consistent with the Medicaid Act.

**Action at issue:** Federal regulations.

**Deference given:** *Chevron.*

**Held:** For Medicaid beneficiaries.

*Baptist Health v. Thompson*, 458 F.3d 768 (8th Cir. 2006)

**Parties:** Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

**Issue:** Validity of decision denying Medicare reimbursement for education-related costs.

**Guidance at issue:** Federal regulation.

**Deference given:** *Chevron.*

**Held:** For Secretary.

*St. Mary's Hosp. of Rochester, Minn. v. Leavitt*, 416 F.3d 906 (8th Cir. 2005)

**Parties:** Plaintiff, health care provider; Defendant, Secretary of Health and Human Service.

**Issue:** Whether the Secretary's denial of hospitals' claim for reimbursements for indirect medical expenses (IME) incurred as teaching hospitals was a reasonably interpretation the Medicare statute.

**Guidance at issue:** Letter from CMS official to plaintiff.
Deference given: *Skidmore* – given consideration according to its power to persuade.

Held: For Secretary.

*N.D. ex rel. Olson v. Ctrs. for Medicare and Medicaid Servs.*, 403 F.3d 537 (8th Cir. 2005)

**Parties:** Plaintiffs, states; Defendant, federal agency.

**Issue:** Whether states were entitled to full reimbursement for Medicaid services provided to Native Americans.

**Guidance at issue:** Letter from CMS.

**Deference given:** Considered *Chevron*, but Deference issue not reached because statute is not ambiguous.

**Held:** For federal agency.

*Deerbrook Pavilion, LLC v. Shalala*, 235 F.3d 1100 (8th Cir. 2000)

**Parties:** Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

**Issue:** Whether agency had the power to impose civil money penalties on defendant, which was successor in interest for actions that took place while another company owned facility.

**Guidance at issue:** Regulation, commentary on regulation, agency memorandum.

**Deference given:** Unspecified, but given.

**Held:** For Secretary.

*Univ. of Iowa Hosps. and Clinics v. Shalala*, 180 F.3d 943 (8th Cir. 1999)

**Parties:** Plaintiffs, health care provider; Defendant, Secretary of Health and Human Services.

**Issue:** Whether Secretary’s determination of the hospital's Medicare reimbursement for some of the costs of graduate medical education (GME) was correct. Specifically, the hospital argued that all of its teaching physician office space is part of its GME, while the Secretary based reimbursement for the office costs on the per-resident amount.
Guidance at issue: Interpretation of two general Medicare record-keeping regulations in an informally distributed booklet entitled Questions and Answers Pertaining to Graduate Medical Education.

Deference given: None, because the court decided that the interpretation was a retrospective rule.

Held: In part for Secretary, in part remanded.


Parties: Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

Issue: Legality of the Secretary’s decision to deny reimbursement of Medicare bad debt expenses of indigent patients based on provider’s failure to independently verify indigency.

Guidance at issue: Provider Reimbursement Manual and Secretary’s interpretation of it.

Deference given: Chevron deference given to PRM, treated as a binding rule; but Secretary’s interpretation thereof given no deference because it was inconsistent with the PRM.

Held: For health care provider.

Portland Residence, Inc. v. Steffen, 34 F.3d 669 (8th Cir. 1994)

Parties: Plaintiff, health care provider; Defendant, state Medicaid official.

Issue: Whether Medicaid reimbursement scheme violated Medicaid.

Guidance at issue: Approval of state Medicaid plan, preamble to regulations rejecting commenter’s suggestion that regulations should require states to take the steps urged by Plaintiffs.

Deference given: Court’s holding did not rest on deference, but court found the federal support for its conclusion persuasive.

Held: For state Medicaid official.
Emerson v. Steffen, 959 F.2d 119 (8th Cir. 1992)

**Parties:** Plaintiff, Medicaid applicant; Defendants, state Medicaid official and Secretary of Health and Human Services.

**Issue:** Whether state policy regarding counting of court-ordered child support as available income for the purpose of determining Medicaid eligibility violated Medicaid law.

**Guidance at issue:** Approval of state plan.

**Deference given:** Chevron, with Court specifically noting that an interpretation need not be contained in a regulation in order to receive Chevron deference.

**Held:** For state Medicaid official.
**District Court Cases**


**Parties:** Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

**Issue:** Validity of federal regulation concerning the right to be reclassified to different Metropolitan Statistical Areas ("MSA") for the purpose of receiving increased Medicare reimbursement.

**Guidance at issue:** Federal regulation.

**Deference given:** None, because the statute was not ambiguous.


**Parties:** Plaintiff, United States; Defendant, health care provider.

**Issue:** Whether defendant submitted false claims for reimbursement for payments for teaching professionals.

**Guidance at issue:** Letter from CMS setting forth guidelines regarding reimbursement.

**Deference given:** “Substantial deference.”

**Held:** For Secretary.


**Parties:** Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

**Issue:** Validity of denial of the hospital's request for Medicare reimbursement for hospital-based skilled nursing facility's atypical services.

**Guidance at issue:** Provider Reimbursement Manual.

**Deference given:** Only entitled to the extent it has the power to persuade; none given because interpretation was unreasonable and not contemporaneous with regulation or statute.
Held: For health care provider.


**Parties:** Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

**Issue:** Validity of Secretary’s decision imposing liability for Medicare overpayments for lab services.

**Guidance at issue:** Medicare newsletter memorandum.

**Deference given:** Unspecified, but given.

Held: For Secretary.


**Parties:** Plaintiff, state pharmacy association; Defendant, state Medicaid agency.

**Issue:** Whether state’s copayment program requiring pharmacists to collect copayments from Medicaid recipients and method of calculating copayments violated Medicaid law.

**Action at issue:** Approval of state Medicaid plan

**Deference given:** None, because the specific state practice was not included in the state plan.

Held: For state pharmacy association.


**Parties:** Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

**Issue:** Challenge to new regulation dealing with classification of hospital for purpose of reimbursement rates.

**Guidance at issue:** Federal regulation.
Deference given: *Chevron.*

Held: For Secretary.
State Court Cases

Grey Bear v. N.D. Dep’t of Human Services, 2002 N.D. 139 (2002)

Parties: Plaintiff, Medicaid beneficiary; Defendant, state agency.

Issue: Whether state agency was entitled to the entire proceeds of a medical malpractice damage award to plaintiff Medicaid beneficiary.

Guidance at issue: Letter from CMS.

Deference given: Deferred to “reasonable interpretation” that does not contradict statute.

Held: For state Medicaid agency in relevant part.

Pre-1990 Cases

Olsen v. Norman, 830 F.2d 811 (8th Cir. 1987)

Springdale Mem’l Hosp. Ass’n, Inc. v. Bowen, 818 F.2d 1377 (8th Cir. 1987)

Other Case

Lankford v. Sherman, 451 F.3d 496 (8th Cir. 2006) (holding that Missouri’s regulation defining coverage of durable medical equipment, appliances and supplies conflicted with federal Medicaid statute, regulations and sub-regulatory guidance)
Ninth Circuit

Court of Appeals Cases

**AHCCCS v. McLellan, 508 F.3d 1243, 2007 WL 4225827 (9th Cir. 2007)**

**Parties:** Plaintiff, state Medicaid agency; Defendant, federal officials in Department of Health and Human Services.

**Issue:** Whether denial of reimbursement for costs of providing Medicaid services to Native Americans violated Medicaid Act.

**Guidance at issue:** Memoranda from federal agency, decision of Secretary denying reimbursement.

**Deference given:** Memoranda – none; Secretary’s decision – *Chevron*.

**Held:** For Secretary.

**Katie A. v. Los Angeles County, 481 F.3d 1150 (9th Cir. 2007)**

**Parties:** Plaintiffs, class of Medicaid beneficiaries under age 21 needing mental health services; Defendants, county and state human services/health officials.

**Issue:** Whether Defendants violated Medicaid’s Early and Periodic Screening, Diagnosis and Treatment requirements in delivery of mental health services.

**Guidance at issue:** State Medicaid Manual.

**Deference given:** Court notes, in dicta, that it is entitled to “respectful consideration.”

**Resident Councils of Washington v. Leavitt, 500 F.3d 1025 (9th Cir. 2007)**

**Parties:** Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

**Issue:** Whether regulations authorizing states to allow the use of paid feeding assistants to feed nursing home residents who do not have complicated feeding problems violated the Medicaid statute.

**Guidance at issue:** regulations; informal letters from agency administrators.
**Deference given:** Regulations, *Chevron*, even though a change in agency position; letters, *Skidmore*.

**Held:** For Secretary.

*Cmty. Hosp. of the Monterey Peninsula v. Thompson*, 323 F.3d 782 (9th Cir. 2003)

**Parties:** Plaintiffs, health care providers; Defendant, Secretary of Health and Human Services.

**Issue:** Validity of the Secretary’s policy requiring Medicare providers to show evidence of billing Medi-Cal for co-insurance and deductibles before they could be reimbursed for bad debts related to services provided to beneficiaries eligible for both Medicare and Medi-Cal.

**Guidance at issue:** Provision of Provider Reimbursement Manual (PRM).

**Deference given:** *Skidmore*, but ultimately deferred to contrary policy that was a consistently held agency interpretation.

**Held:** For Secretary.


**Parties:** Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

**Issue:** Validity of Secretary’s ruling that the hospital was required to purchase a separate malpractice insurance policy to cover its interns and residents, and not simply obtain separate coverage under its preexisting blanket policies, to obtain reimbursements for certain education related expenses.

**Guidance at issue:** Two agency documents containing interpretation of Medicare regulation.

**Deference given:** *Chevron*.

**Held:** For Secretary.

*Indep. Acceptance Co. v. Cal.*, 204 F.3d 1247 (9th Cir. 2000)

**Parties:** Plaintiffs, health care provider; Defendants, state, state Medicaid agency and Secretary of Health and Human Services.
**Issue:** Challenge to the Secretary of HHS’s acceptance of a California state plan to amend the method of reimbursement under the Medicaid Act.

**Guidance at issue:** Secretary’s approval of state Medicaid plan.

**Deference given:** “Highly deferential.”

**Held:** For Secretary and state.

*Children’s Hosp. & Health Ctr. v. Belshe, 188 F.3d 1090 (9th Cir. 1999)*

**Parties:** Plaintiff, health care provider; Defendant, state Medicaid agency director.

**Issue:** Whether California Medicaid agency’s method of reimbursing out of state hospitals complied with Medicaid.

**Guidance at issue:** Letter from HCFA informing a State Medicaid director that HCFA’s prior approval of state Medicaid agency’s method for reimbursing out-of-state hospitals who treat California’s Medicaid patients would remain valid even after the repeal of the Boren Amendment.

**Deference given:** None, because statute was unambiguous.

**Held:** For health care providers.

*Folden v. Wash. State Dep’t of Social & Health Servs., 981 F.2d 1054 (9th Cir. 1992)*

**Parties:** Plaintiff, health care provider; Defendant, state Medicaid agency.

**Issue:** Whether Medicaid reimbursement rates were fair and adequate and in compliance with Medicaid requirements.

**Guidance at issue:** Not explicit, but seems to be the approval of state Medicaid plan.

**Deference given:** *Chevron.*

**Held:** For state Medicaid agency and Secretary.

*Peura by & through Herman v. Mala, 977 F.2d 484 (9th Cir. 1992)*

**Parties:** Plaintiff, Medicaid applicant; Defendant, state Medicaid agency official; third party defendant, Secretary of Health and Human Services.
**Issue:** Whether decision regarding available income violated Medicaid Act.

**Guidance at issue:** Regulation defining “available income.”

**Deference given:** Deference of unspecified degree given – found regulation was not arbitrary or capricious or in excess of statutory authority.

**Held:** For state Medicaid agency.
District Court Cases

*Providence Yakima Medical Center v. Leavitt*, No. 03-3095, 2007 WL 991494 (D. Wash. March 29, 2007)

**Parties:** Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

**Issue:** Validity of Medicare regulation governing reimbursement for certain General Medical Education expenses.

**Guidance at issue:** federal regulation.

**Deference given:** *Chevron*, because the agency’s interpretation was reasonable.

Notable Pre-1990 Cases

*Vierra v. Rubin*, 915 F.2d 1372 (9th Cir. 1990)

*Citizens Action League v. Kizer*, 887 F.2d 1003 (9th Cir. 1989)

*State of Cal., Dep’t of Health Servs. v. U.S. Dep’t of Health & Human Servs.*, 853 F.2d 634 (9th Cir. 1988)
Tenth Circuit

Court of Appeals Cases

Via Christi Regional Medical Center, Inc. v. Leavitt, 509 F.3d 1259, No. 06-3402 (10th Cir. Dec. 7, 2007)

Parties: Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

Issue: Validity of decision denying Medicare reimbursement for losses associated with merger of hospitals.

Guidance at issue: CMS instruction manuals and agency letters.

Deference given: Noted in *dicta* that such documents are given deference only to their “degree of persuasiveness.”

Held: For Secretary.

Ramey v. Reinertson, 268 F.3d 955 (10th Cir. 2001)

Parties: Plaintiffs, Medicaid applicants; Defendant, state Medicaid official.

Issue: Whether state’s determination that certain special needs trusts were countable as income for eligibility purposes was in compliance with Medicaid law.


Deference given: Deferred only to the extent it did not conflict with the purposes of the Medicaid Act because it was an interpretive rule not promulgated with notice and comment.

Held: For Medicaid applicants.

Cmty. Hosp. v. Sullivan, 986 F.2d 357 (10th Cir. 1993)

Parties: Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

Issue: Validity of Secretary’s decision refusing to designate hospital as sole community hospital under Medicare reimbursement system.
**Guidance at issue:** Federal regulation.

**Deference given:** *Chevron*, because consistent with Congressional intent.

**Held:** For Secretary.

*N.M. Dep’t of Human Servs. v. Dep’t of Health and Human Servs. Health Care Fin. Admin.,* 4 F.3d 882 (10th Cir. 1993)

**Parties:** Plaintiff, state Medicaid agency; Defendant, Secretary of Health and Human Services.

**Issue:** Whether Secretary’s disapproval of Medicaid plan amendment that would have required calculation of financial eligibility based on state community property law was valid.

**Guidance at issue:** Secretary’s disapproval of plan amendment.

**Deference given:** Explicitly refused to afford *Chevron* deference because this part of the statute did not explicitly delegate authority to the Secretary; instead, used the “implicit delegation standard,” which provides that the agency’s interpretation generally controls if it is reasonable and consistently applied and consistent with the statute.

**Held:** For state Medicaid agency.

*Downtown Med. Ctr./Comprehensive Health Care Clinic v. Bowen,* 944 F.2d 756 (10th Cir. 1991)

**Parties:** Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

**Issue:** Validity of denial of reimbursement for psychological and physical therapy services provided by nonphysicians not employed by provider.

**Guidance at issue:** Medicare Carriers Manual.

**Deference given:** *Chevron*, because reasonable and not inconsistent with statute and regulations.

**Held:** For Secretary.
District Court Cases


**Parties:** Plaintiff, health care providers; Defendant, state Medicaid agency.

**Issue:** Whether reimbursement rates established by state Medicaid agency violated Medicaid Act.

**Guidance at issue:** CMS approval of state Medicaid plan.

**Deference given:** None, because it was not clear whether CMS approved the particular aspect of the plan at issue in the case.

**Held:** For health care providers.


**Parties:** Plaintiffs, health care providers and Medicaid eligible women; Defendant, state Medicaid official.

**Issue:** Whether state statute prohibiting funding for abortions in any case conflicted with federal law allowing funding for abortions in case of rape or incest.

**Guidance at issue:** CMS letter interpreting federal statute as defining “medically necessary” abortions as those in cases of rape or incest.

**Deference given:** None, because it conflicted with clear language of statute and is not clearly the position of the agency (rather than the opinion of a single employee).

**Held:** For plaintiffs.


**Parties:** Plaintiff, health care provider association; Defendants, state Medicaid official and Secretary of Health and Human Services.

**Issue:** Whether federal regulation governing Medicaid copayments, and state’s reliance thereon, violated Medicaid statute.

**Guidance at issue:** Federal regulation.
Deference given: *Chevron*.

**Held:** For state and federal officials.


**Parties:** Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

**Issue:** Validity of Secretary’s disallowance of reimbursement for portion of provider’s owner’s compensation.

**Guidance at issue:** Medicare Provider Reimbursement Manual (PRM).

**Deference given:** Unclear, but the court followed the interpretation.

**Held:** For health care provider.


**Parties:** Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

**Issue:** Validity of decision adjusting Medicare reimbursement rates.

**Guidance at issue:** Medicare Provider Reimbursement Manual (PRM).

**Deference given:** Unspecified, but court held that interpretation in PRM should be accepted unless found to be unreasonable or inconsistent with statutory authority.
Notable Pre-1990 Case


Additional case:

*Hill v. Ibarra*, 954 F.2d 1516 (10th Cir. 1992) (AFDC case – deferred to HHS memorandum)
Eleventh Circuit

Court of Appeals Cases

U.S. v. Baxter Intern., Inc., 345 F.3d 866 (11th Cir. 2003)

Parties: Plaintiffs, recipients of silicone breast implants; Defendants, manufacturers of silicon breast implants; Plaintiff-intervenor, United States

Issue: For U.S., whether U.S. was entitled to recover costs of Medicare-covered medical care and treatment related to breast implants for claimants who would be compensated through a settlement program

Guidance at issue: Medicare regulations and proposed regulations

Deference given: Chevron, finding interpretation reasonable and consistent with longstanding interpretation

Held: For United States

Tallahassee Mem’l Reg’l Med. Ctr. v. Cook, 109 F.3d 693 (11th Cir. 1997)

Parties: Plaintiff, health care provider; Defendant, state Medicaid officials

Issue: Whether state Medicaid agency’s failure to reimburse providers for out-patient psychiatric services to adolescents in inpatient settings under certain circumstances violated the Medicaid Act

Guidance at issue: Federal regulation

Deference given: Chevron applied, but no deference given because regulation conflicts with statute

Held: For health care provider

Univ. Health Servs., Inc. v. Health & Human Servs., 120 F.3d 1145 (11th Cir. 1997)

Parties: Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

Issue: Validity of Secretary’s decision disallowing portion of hospital’s claim for reimbursement of bad debts related to Medicaid patients.

Deference given: Unspecified, but court followed interpretation finding it “plausible and consistent” with regulation.

Held: For Secretary.

State of Ga., Dep’t of Med. Assistance, By and Through Toal v. Shalala, 8 F.3d 1565 (11th Cir. 1993)

Parties: Plaintiff, state Medicaid officials; Defendant, Secretary of Health and Human Services.

Issue: Whether Secretary’s disapproval of state eligibility determination methodology as violating Medicaid statute was correct.

Guidance at issue: Federal agency transmittal.

Deference given: Chevron

Held: For Secretary
District Court Cases


**Parties:** Plaintiff, health care provider; Defendant, federal agency.

**Issue:** Whether plaintiff, successor in interest, was liable for Civil Monetary Penalty (CMP) imposed on previous owner for violation of Medicare requirements.

**Guidance at issue:** CMS State Operations Manual.

**Deference given:** *Chevron*.

**Held:** Partly for plaintiff, partly for defendant.

*Pharm. Research and Mfrs. of Am. v. Medows*, 184 F.Supp.2d 1186 (N.D. Fla. 2001)

**Parties:** Plaintiff, pharmaceutical company organization; Defendant, state Medicaid officials.

**Issue:** Whether Florida statute requiring drug manufacturers to agree to an additional discount beyond that required by federal law before their drugs can be placed on a preferred drug list was preempted by Medicaid statute.

**Guidance at issue:** Federal approval of state Medicaid plan amendment including the discount requirement.

**Deference given:** “At least some deference” citing *Mead*.

**Held:** For state Medicaid officials.

**Notable Pre-1990 Case**

D.C. Circuit

Court of Appeals Cases


**Parties:** Plaintiff, pharmaceutical drug manufacturers’ organization; Defendant, Secretary of Health and Human Services.

**Issue:** Validity of a Michigan plan requiring manufacturer rebates for certain state Medicaid and non-Medicaid drug purchases in order to stay on automatic coverage lists.

**Guidance at issue:** Approval of state Medicaid plan including the rebate agreement.

**Deference given:** _Chevron_.

**Held:** For Secretary.


**Parties:** Plaintiff, consumer advocacy group; Defendant, Department of Health and Human Services.

**Issue:** Validity of disclosure requirements governing Peer Review Organizations (PRO) in reviewing complaints filed by Medicare beneficiaries.

**Guidance at issue:** Peer Review Organization Manual (PRO Manual).

**Deference given:** Only _Skidmore_ deference would be required, but court did not defer because the statute was unambiguous.

**Held:** For plaintiffs – requirements were held to be invalid.

_Ariz. v. Thompson_, 281 F.3d 248 (D.C. Cir. 2002)

**Parties:** Plaintiffs, six states; Defendant, Secretary of Health and Human Services.

**Issue:** Validity of agency directive barring states from using TANF grants to pay for the common costs of administering the TANF, Medicaid, and Food Stamp programs.
Guidance at issue: Agency action transmittal.

Deference given: None, because deference to an agency's statutory interpretation, under *Chevron*, is only appropriate when the agency has exercised its own judgment, not when it believes that interpretation is compelled by Congress. Here, however, the agency did not purport to exercise discretion.

Held: For states.

*Pharm. Research and Mfrs. of Am. v. Thompson*, 251 F.3d 219 (D.C. Cir. 2001)

Parties: Plaintiff, pharmaceutical drug manufacturers’ organization; Defendant, Secretary of Health and Human Services.

Issue: Validity of state Medicaid demonstration project requiring pharmaceutical manufacturers to rebate a portion of the price of drugs purchased by individuals who were not otherwise covered by the Medicaid program.

Deference given: *Chevron* analysis, but no deference, because the Secretary’s action was inconsistent with the Congressional purpose behind the statute.

Held: For plaintiff.

*Transitional Hosps. Corp. of La., Inc. v. Shalala*, 222 F.3d 1019 (D.C. Cir. 2000)

Parties: Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

Issue: Validity of Medicare reimbursement regulations.

Deference given: None – court began *Chevron* analysis but that the Chevron framework did not apply here because “the Secretary did not believe that she had the discretion to do what the plaintiffs request.”

Held: Remanded for further consideration by Secretary.

*McCreary v. Offner*, 172 F.3d 76 (D.C. Cir. 1999)

Parties: Plaintiffs, Medicare providers; Defendant, D.C. health officials.

Issue: Validity of District rule limiting cost sharing to Medicaid rates, rather than Medicare rates, for some dually eligible beneficiaries.

Deference given: Chevron.

Held: For District.


Parties: Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

Issue: Validity of interpretive rule that required requested increase for Medicare reimbursement of graduate medical education (GME) costs to be supported by contemporaneous documentation.

Guidance at issue: Interpretive rule, first in the form of as HCFA instruction to fiscal intermediaries, then as published notice in Federal Register.

Deference given: “Substantial.”

Held: for Secretary.


Parties: Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

Issue: Validity of regulation capping Medicare reimbursement for bad debts.

Guidance at issue: Federal regulation.

Deference given: Court began with Chevron, then abandoned it, remanding for Secretary to either provide more adequate explanation for regulation capping reimbursement for bad debts or withdraw the regulation.

Held: Remand for further development.

**Parties:** Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

**Issue:** Validity of Secretary’s decision which reclassified hospital's labor costs associated with administration of intravenous therapy to a routine care cost center from an ancillary cost center.

**Guidance at issue:** Medicare Provider Reimbursement Manual (PRM).

**Deference given:** A “still more deferential standard than *Chevron*” because the Secretary is interpreting her own regulations; the court will accept the Secretary’s interpretation if not “plainly erroneous.”

**Held:** For Secretary.

*Health Ins. Ass'n of Am., Inc. v. Shalala, 23 F.3d 412 (D.C. Cir. 1994)*

**Parties:** Plaintiff, health care provider association; Defendant, Secretary of Health and Human Services.

**Issue:** Validity of new Medicare regulations implementing Medicare as secondary payer statute.

**Guidance at issue:** Federal regulation.

**Deference given:** None, because regulations went beyond Secretary’s authority.

**Held:** For health care provider association.

*Whitecliff, Inc. v. Shalala, 20 F.3d 488 (D.C. Cir. 1994)*

**Parties:** Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

**Issue:** Validity of Medicare regulations governing reimbursement for depreciation.

**Guidance at issue:** Regulation.

**Deference given:** None, because interpretation in regulation was unreasonable.

**Held:** For health care provider.

Parties: Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

Issue: Validity of reimbursement decision based upon “amount in controversy,” upon which interest is awarded to hospital entitled to reimbursement for inpatient services under Medicare prospective payment system.

Guidance at issue: Position taken in litigation.

Deference given: None, though court ultimately agreed with the position. The court did not use the Secretary’s definition out of deference to the agency’s interpretation because the agency’s had never issued in a ruling, regulation, or policy statement explaining the interpretation. Thus, the court held that Chevron deference was inappropriate.

Held: For Secretary.

Chaves County Home Health Serv., Inc. v. Sullivan, 931 F.2d 914 (D.C. Cir. 1991)

Parties: Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

Issue: Challenge to procedures adopted by agency for the recoupment of Medicare overpayments in which agency uses a sample auditing procedure to calculate amounts of overpayment.


Deference given: Chevron, because manual consistent with longstanding interpretation.

Held: For Secretary.
District Court Cases


**Parties:** Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

**Issue:** Validity of decision seeking refund of overpayment of Medicare reimbursement (specifically, the amount of repayment).

**Guidance at issue:** Agency guidelines on statistical sampling, used to calculate overpayments.

**Deference given:** Not *Chevron*, based in part on lack of formality and in part on the terms of the guidelines themselves indicating that the guidelines offered one possible method.

**Held:** For Secretary.


**Parties:** Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

**Issue:** Validity of Secretary’s denial of reimbursement for certain costs plaintiffs incurred in rendering “atypical” nursing services to patients in their “hospital-based” skilled nursing facilities.

**Guidance at issue:** Medicare Provider Reimbursement Manual (PRM).

**Deference given:** None, and court also held that there was no need for it to address the issue of the level of deference due to the PRM interpretation, because it violated the APA since it constituted a change in the Secretary's definitive interpretation made without following the required notice-and-comment procedures.

**Held:** For health care provider.

Parties: Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

Issue: Validity of Secretary’s denial of its request for reimbursement of Medicare bad debts.


Deference given: Skidmore.

Held: For Secretary.


Parties: Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

Issue: Validity of a rule prohibiting reclassification from rural to urban area since the standardized amount for determining Medicare reimbursement was equal in each area.

Guidance at issue: Federal regulation.

Deference given: Chevron.

Held: For Secretary.


Parties: Plaintiffs, class of Medicaid beneficiaries under age 21; Defendant, District of Columbia.

Issue: Whether defendant’s operation of its Medicaid program violated Medicaid’s Early and Periodic Screening, Diagnosis and Treatment program.


Deference given: Unspecified, but followed the standards.

Held: For Medicaid beneficiaries.

Additional case
United Seniors Ass’n, Inc. v. Shalala, 182 F.3d 965 (D.C. Cir. 1999) (rejecting constitutional challenge to statute because regulation eliminated any constitutional injury, deferring to Secretary’s interpretation in regulation)
Supreme Court


**Parties:** Plaintiff, Medicaid beneficiary; Defendant, state Medicaid official.

**Issue:** Whether Arkansas Medicaid statute allowing liens against third party tort awards to Medicaid recipients violated Medicaid, because it allowed liens against portions of awards designated for purposes other than medical costs.

**Guidance at issue:** Two decisions by the Departmental Appeals Board of HHS (Board) rejecting appeals by the States of California and Washington from denial of reimbursement for costs those States paid on behalf of Medicaid recipients who had settled tort claims.

**Deference given:** None, because the decisions addressed a different issue.

**Held:** For Medicaid beneficiary.


**Parties:** Plaintiff, spouse of Medicaid beneficiary; Defendant, state Medicaid agency.

**Issue:** Whether Wisconsin’s method of determining the amount of income reserved for a spouse of a nursing home resident living in the community violated the Medicaid Act.

**Guidance at issue:** Letters from CMS, proposed federal regulation.

**Deference given:** “Respectful consideration,” citing _Mead._

**Held:** For state Medicaid agency.

_Your Home Visiting Nurse Servs., Inc. v. Shalala, 525 U.S. 449 (1999)_

**Parties:** Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

**Issue:** Whether the Medicare Provider Reimbursement Board has jurisdiction to reopen a fiscal intermediary’s denial of reimbursement.
Guidance at issue: Medicare Provider Reimbursement Manual (PRM), although it is not clear that the court relies solely on the PRM. Rather, it seems that the court is also considering the position taken in the litigation.

Deference given: Chevron, without explanation.

Held: For Secretary (no jurisdiction).


Parties: Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

Issue: Validity of regulation prescribing methodology for auditing reimbursement rates.

Guidance at issue: Federal regulation.

Deference given: Chevron.

Held: For Secretary.


Parties: Plaintiff, health care provider; Defendant, Secretary of Health and Human Services.

Issue: Whether the Medicare regulations require reimbursement according to generally accepted accounting principles (GAAP), and whether the reimbursement guideline the Secretary relied upon is invalid because she did not follow the notice and comment provisions of the Administrative Procedures Act.


Deference given: Guidance entitled to deference as a reasonable interpretation, Chevron not cited.

Held: For Secretary.

Pre-Chevron cases

Lukhard v. Reed, 481 U.S. 368 (1987) (plurality) (noting that authoritative expression of agency's view in memoranda and letters "is entitled to deference")