UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DEBORAH CARR, BRENDA MOORE, MARY ELLEN WILSON, MARY SHAW, and CAROL KATZ, on behalf of themselves and those similarly situated, Plaintiffs, v. XAVIER BECERRA, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, Defendant.	Civil Action No. 3:22-cv-988 (MPS) CLASS ACTION REQUESTED September 19, 2022

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR A PRELIMINARY INJUNCTION

Defendant offers five arguments opposing Plaintiffs' motion for a preliminary injunction: (1) this Court lacks jurisdiction because enjoining Defendant from requiring states to reduce Medicaid benefits to Plaintiffs would not offer them any redress, (2) Defendant had good cause to dispense with the otherwise applicable notice and comment process before issuing its now 18-month-old "interim" final rule ("IFR"), (3) Defendant's newfound ambiguity in the statute requires this Court to defer to Defendant's determination that maintenance of "such benefits" reasonably means maintenance of lesser benefits, (4) Plaintiffs (who now face current and imminent loss of critical medical coverage) cannot show the required irreparable harm because they did not file their motion until months after the IFR was issued, and (5) assuming this Court rejects those arguments, any injunctive relief would have to be limited to the Named Plaintiffs. Plaintiffs discuss each of these meritless arguments below.

Plaintiffs' Harms are Redressable by Defendant

Defendant argues that, "Plaintiffs lack standing because their alleged injuries are not redressable by Defendant." Def.'s Mem. in Opp'n to Pls.' Mem. Prelim Inj. at 1 (Docket # 45) (hereinafter, "Def.'s Mem."). Defendant's reason: "the federal government has no authority to reinstate the eligibility of a Medicaid beneficiary or to transition a Medicaid beneficiary from one group to another. Only the states can do that . . . ." *Id.* at 12. If this Court enjoins the IFR, he also claims states have the option to reject millions in additional Medicaid funding rather than maintain coverage. *Id.* at 27-28. Both arguments are meritless.

Defendant has a statutory duty to ensure state compliance with federal Medicaid standards, s*ee Cmty Health Care Ass'n of N.Y. v. Shah*, 770 F.3d 129, 135 (2d Cir. 2014), and has *ordered* state agencies to reduce Medicaid coverage under the IFR. *See* Pls.' Mem. in Supp. of Mot. for TRO and Prelim. Inj. at 11-12 (Docket # 3-1) (hereinafter, "Pls.' Mem. Prelim. Inj."). In other words, states reduced Medicaid coverage to comply with Defendant's instructions under its IFR. There is no basis to presume that if the IFR is enjoined and Defendant is ordered to instruct the states accordingly, states, which would be in jeopardy of losing significant funding, would then violate coverage maintenance requirements.[1]

To establish redressability, or standing, a plaintiff need only show "'a non-speculative likelihood that the injury can be remedied by the requested relief.'" *Hu v. City of New York*, 927 F.3d 81, 89 (2d Cir. 2019) (citation omitted). Plaintiffs have done that. Defendant's accepted offer to moot a ruling on Plaintiffs' motion for a temporary restraining order, Def.'s Notice,

[1] To the contrary, *see, e.g.*, Ex. 1 at 169:17-169:25, Second Decl of Toubman in Supp. of Pls.' Mem. Prelim. Inj. (statement by attorney for Connecticut Medicaid agency that it "has consistently been told [what] they have to do by CMS and therefore they had no other choice," and it is up to "the federal court to actually decide whether or not the reg[ulation] is inconsistent with the statute."

(Docket # 20), makes Plaintiffs' point: Defendant told the State of Connecticut it would not enforce the IFR against Plaintiffs Moore and Carr and the state immediately agreed to keep them on full Medicaid pending the resolution of the preliminary injunction motion. As for the speculation that states *might* forgo millions in supplemental Medicaid funding to avoid compliance,[2] Defendant's argument directly contradicts his own IFR: Even under his original interpretation, "CMS is *not aware* of any states or territories not currently claiming this temporary FMAP [Federal Medical Assistance Percentage] increase, *or of any state or territory that intends to cease claiming it*." 85 Fed. Reg. 71148 (emphasis added).

Plaintiffs Have Shown a Likelihood of Success on the Merits

Defendant does not dispute that Plaintiffs would establish a likelihood of success on the merits if they established a likelihood *either*: (1) that the IFR was unlawful because the public had no opportunity for prior notice and comment, or (2) that the language of the Families First Coronavirus Response Act ("Act") barred Defendant from reducing the level of Medicaid benefits to Plaintiffs. As discussed below, Defendant's actions were unlawful on both grounds.

There Was No Good Cause for Dispensing with Administrative Procedure Act ("APA") Notice and Comment Requirements

Defendant argues that, "CMS had good cause to issue the Rule without advanced notice and comment in order to ensure that states would continue to receive necessary Medicaid funding amidst the ongoing pandemic." Def's. Mem. at 2." [I]t is entirely possible," Defendant

[2] Defendant offers no predicate for its speculation. But there is ample evidence to the contrary. An analysis conducted by Kaiser Family Foundation estimated that states will receive *twice* as much additional Medicaid funding under the Act ($100.4 billion as the estimated costs ($47.2 billion) of maintaining Medicaid coverage from FY 2020 – FY 2022. Elizabeth Williams, *Fiscal and Enrollment Implications of Medicaid Continuous Coverage Requirement During and After the PHE Ends*, KFF, May 10, 2022, https://www.kff.org/medicaid/issue-brief/fiscal-and-enrollment-implications-of-medicaid-continuous-coverage-requirement-during-and-after-the-phe-ends/.

adds, "that states would have rejected the additional FMAP funding rather than continuing to shoulder this burden." *Id.* at 25. This argument strains credulity.

"The good cause exception 'should be narrowly construed and only reluctantly countenanced.'" *N.R.D.C. v. Nat. Highway Traffic Safety Admin*., 894 F. 3d 95, 114 (2d Cir. 2018) (citation omitted). Indeed, the good cause exception "is generally confined to *emergency* situations in which a rule would respond to an immediate threat to safety, such as to air travel, or when immediate implementation of a rule might directly impact public safety." *Id*. (emphasis added) "[T]the use of notice and comment must actually harm the public interest." *Id*.

The portion of Defendant's IFR challenged here does not remotely "meet these exacting standards." *Id*. The IFR identified no emergency harm to the public interest from offering prior notice and comment. The argument that CMS needed to issue the IFR immediately "to ensure that states would continue to receive necessary Medicaid funding," Def's. Mem. at 1, makes no sense. As Plaintiffs pointed out, Defendant ascribes no *probability* to his claim that it was "entirely possible," *id.* at 25, that states would voluntarily forgo additional Medicaid funding rather than maintain coverage. As noted above, his claim also contradicts his own stated expectation in the IFR that no states would forgo the additional funding. 85 Fed. Reg. at 71148.

"Such Benefits" in Section 6008 is Not Ambiguous

Defendant acknowledges, as he must, that under *Chevron*, an agency's interpretation of a statute is entitled to no deference if the statute is unambiguous and that to ascertain the absence of ambiguity, a court will employ the "'traditional tools of statutory construction.'" Def's Mem. at 16 (citation omitted); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc*., 467 U.S. 837, 843 n.9 (1984). Defendant also acknowledges that the interpretation of Section 6008 contained in his IFR marked a

reversal of the position he had consistently taken in the months leading up to the IFR's issuance. Def's. Mem. at 5. That prior interpretation said it would be "inconsistent" with the statute to allow even any *reduction* in Medicaid benefits. *See* Pls.' Mem. Prelim. Inj. at 8 (quoting May 5, 2022 CMS guidance to states). But, Defendant argues, the ambiguity he newly found in the IFR rested on the ambiguous nature of the statute's use of the undefined term "benefits." Def's. Mem. at 17.

The essence of the claimed ambiguity is this: "the first usage of 'benefits' [in Section 6008] broadly means the medical assistance that a beneficiary receives under the Medicaid program as a whole, and not a specific level of assistance . . . ." *Id.* "If Congress intended the word 'benefits' in § 6008(b)(3) to refer to a specific *level* of benefits," he argues, "Congress knew how to use language that would unambiguously do so." *Id.* (emphasis in original). The problems with this argument are fourfold.

First, Defendant's explanation is impermissibly *post hoc*. An agency may only rely on the rationale advanced in its rulings to defend its position. *Kakar v. U.S. Citizenship and Immigration Servs.*, 29 F.4d 129, 132 (2d Cir. 2022). The stated purpose of the statute is *maintenance* of eligibility during the public health emergency — if a person was receiving Medicaid benefits at the start of the federal government's declared COVID emergency, the *only* reasonable interpretation of "such benefits" is that the state must maintain the individual's same benefits. The IFR offers no definition for "such benefits." Defendant's contrary interpretation offered is *post hoc* and impermissible.

Second, the ordinary tools of statutory construction demonstrate that "such benefits" referenced in section 6008(b)(3) unambiguously meant the *same* "benefits" contained in the sections immediately preceding reference to "benefits." Tellingly,

Defendant offers no response to the Second Circuit's holding, cited in Plaintiffs' brief, that "such" means "the same." Pls.' Mem. Prelim Inj. at 31 (Docket #3-1) (*citing Am. Standard Inc. v. Crane Co*., 510 F.2d 1043, 1059 (2d Cir. 1974)). "[T]he *Chevron* Court explained that deference is not due unless a 'court, employing traditional tools of statutory construction,' is left with an unresolved ambiguity." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (*quoting* 467 U.S. at 843 n.9). Using the tools deployed by the Second Circuit, there is no ambiguity to resolve.

Third, this much Defendant admits is unambiguous: "Consistent with the language in § 6008(b)(3), the Rule *guarantees* that states cannot terminate beneficiaries' Medicaid coverage." Def's. Mem. at 22 (emphasis added). But, since the statute does not expressly refer to a "specific level of benefits," Defendant's argument suggests that no level of benefit reduction, short of outright termination, would violate the Act. At best, by Defendant's own characterization, the statute is only "somewhat ambiguous." 85 Fed. Reg. 71160. But even where there is "some ambiguity," an agency's interpretation may still be wrong under *Chevron* step one. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448-49 (1987) (finding that while there was "some ambiguity" in the term "well-founded fear," under the Act's "plain language . . . to show a 'well-founded fear of persecution,' an alien need not prove that it is more likely than not that he or she will be persecuted in his or her home country."). An agency is only permitted the "degree of discretion the ambiguity allows." *Smiley v. Citibank (South Dakota), NA,* 517 U.S. 735, 741 (1996).

Defendant does maintain that the new IFR was designed "to ensure that beneficiaries do not experience a *substantial* reduction in covered benefits." Def.'s Mem. at 9 (emphasis added). But, under his interpretation of Section 6008(b)(3), a person like

Plaintiff Carr, no longer entitled to home health care and thus facing institutionalization, would not be considered to have suffered a "substantial" reduction in benefits. That cannot be correct. Similarly, in the case of formerly pregnant or formally under 21-year-old non-citizens subject to the five-year bar, it is patently untrue to state that they will see no "substantial" reduction in benefits. By Defendant's own admission, these individuals are now limited to only coverage available for "for the treatment of an emergency medical condition," Def.'s Mem. at 8, *i.e.*, for preventing imminent death or organ damage, *see* 42 C.F.R. § 440.255. Indeed, with respect to the "not validly enrolled" exception created in the IFR, 42 CFR § 433.400(b) and (c)(2), states must cut individuals off of *all* Medicaid-covered services even if they are ineligible for any other alternative coverage. Having admitted that "states cannot terminate beneficiaries' Medicaid coverage," Def.'s Mem. at 22, Defendant cannot direct states to do just that.

Finally, even assuming a broader ambiguity in the statute, Defendant's claim that the agency's interpretation was reasonable because it somehow furthers the Medicaid Act's requirement of protecting the "best interests of the recipients," Def.'s Mem. at 22-23, is unsustainable. It is not in any Medicaid enrollee's "best interest[]" to be involuntarily cut off of health benefits, or to have them be involuntarily reduced. The new IFR tried to explain it this way: "CMS is giving states less flexibility to reduce beneficiaries' coverage under this blended approach than might be available to states under the enrollment interpretation . . . ." 85 Fed. Reg. 71163. Defendant's assertion that it considered an interpretation that would have given states wider latitude, but ultimately adopted a "blended approach" with beneficiaries in mind, is a straw man — implying that the harm to their interests could have been *worse* does not help his argument.

Irreparable Harm is Established

Defendant offers a twofold argument why Plaintiffs have failed to satisfy the irreparable harm prong of the preliminary injunction test: "Plaintiffs have not established imminent irreparable harm that would be remedied by an injunction, since the states in which Plaintiffs reside *may* decide to reject the increased funding if the IFR is enjoined," Def.'s Mem. at 2; "Delay in seeking enforcement of those rights … tends to indicate at least a reduced need for such drastic, speedy action," *Id.* at 26 (citation omitted). These arguments are wholly meritless.

First, Defendant's assertion that Plaintiffs' harm rests on speculation, *see id.* at 27, ignores currently imminent and irreparable harm to Plaintiffs from their loss of Medicaid benefits absent injunctive relief. What is speculative, as discussed, is *Defendant's* assertion that states would turn down Medicaid funding rather than maintain Plaintiffs' Medicaid coverage. In fact, his IFR declared that no states were expected to forego the funding. 85 Fed. Reg. 71148.

Second, Defendant's claim that Plaintiffs' "delay" in seeking enforcement suggests the harm is not irreparable, Def.'s Mem. at 26, misapprehends the entire concept of when irreparable harm ensues. It is not when the IFR was issued, but when irreparable harm was imminent. *See Faiveley Transp. Malmo AB v. Wabtec Corp*., 559 F. 3d 110, 118 (2d. Cir. 2009) (plaintiff seeking preliminary injunctive relief must show that harm is “actual and imminent”). While Plaintiffs theoretically could have challenged the IFR at an earlier date, they could not have sought preliminary injunctive relief until their harm was imminent. As set forth in their papers, Plaintiffs Carr and Moore were only threatened with imminent harm in August or September of 2022. They filed their action and motion for a preliminary injunction on August 3rd. New Plaintiff Carol Katz received a July 14, 2022 notice that she was being terminated on August 1st.

The Injunction Should Not Be Limited to Named Plaintiffs

Defendant claims that relief in this APA action should be limited to just the Named Plaintiffs or just the specific regulatory exception to the continuous enrollment provisions in Section 6008 affecting them. Def.'s Mem. at 28-29. But this argument conflates standing to initiate review under the APA with standing to assert the rights of the public:

> [T]he fact of economic injury is what gives a person standing to seek judicial review under the statute*, but once review is properly invoked, that person may argue the public interest in support of his claim that the agency has failed to comply with its statutory mandate* . . . . [W]e have used the phrase "private attorney general" to describe the function performed by persons upon whom Congress has conferred the right to seek judicial review of agency action.

Sierra Club v. Morton, 405 U.S. 727, 737-38 (1972) (emphasis added).[3] "This public interest concept is particularly applicable to cases brought under . . . the Administrative Procedure Act . . ." *Sierra Club v. Adams*, 578 F.2d 389, 392 (D.C. Cir. 1978). In *Adams*, once plaintiffs "established standing to challenge the adequacy of the FEIS [an environmental impact statement] on at least one ground, they were entitled to raise *other inadequacies* in the FEIS based upon the 'public interest' . . . . " *Id.* (emphasis added). Thus, as the Supreme Court added*:*

> Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Art. III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants . . . . But so long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights *and interests of others*, and, indeed*, may invoke the general public interest in support of their claim.*

Warth v Seldin, 422 U.S. 490, 501 (1975) (citation omitted) (emphasis added).

[3] Defendant cites *Lewis v. Casey*, 518 U.S. 343 (1988), and *Blum v. Yeretsky*, 437 U.S. 991 (1982), for the general proposition that a party aggrieved by one provision of a challenged rule cannot challenge other provisions. Def's. Mem. at 15. But neither of these are APA cases. Under the APA, as noted above, once standing to seek review is established, the appellant represents the public interest. But even assuming *Lewis* limited the applicability of *Morton*, a plaintiff with standing would still have the authority to invoke a "procedural injury" that would be "redressed by vacutur." *WildEarth Guardians v. Jewell*, 738 F.3d 298, 308 (D.C. Cir. 2013). The absence of notice and comment plainly falls into that category.

Limiting relief to just those harmed by Section 433.400(c)(2)(i)(B), as suggested by Defendant, also misapprehends the nature of Plaintiffs' argument: that *any* new exceptions to the continuous enrollment requirements in the Act are *ultra vires*, and CMS had no statutory authority to invent new exceptions beyond the two set forth by Congress itself. Which particular exception created in the IFR harms a given individual is beside the point. As important, lack of compliance with APA notice and comment requirements invalidates the entire provision (Section 433.400) related to maintenance of coverage. Once Plaintiffs establish standing, they stand in the shoes of the public and can challenge *any* defect that affects the lawfulness of the IFR. *See Sierra Club*, 578 F.2d at 392. That certainly applies to challenges under the procedural provisions of the APA. *See N.R.D.C.*, 894 F.3d at 104, 113-116 (NRDC had standing to challenge absence of notice and comment; court vacated entire rule finding no good cause for circumventing the notice and comment obligation). But it also applies to substantive challenges under the APA especially where, as here, there is a statutory prohibition on any additional regulatory exceptions.

Finally, nationwide preliminary injunctions are entirely appropriate in APA cases challenging rulemakings. *See New York v. DHS*, 969 F.3d 42, 88 (2d 2020) (finding that district courts have power to enter nationwide preliminary injunctions in APA cases, particularly "in certain circumstances – for example, where only a single case challenges the action or where multiple courts have spoken unanimously on the issue."). Granting Plaintiffs' motion for class certification, moreover, will fully address any concerns with granting nationwide relief, because the defined class applies to *all* individuals cut off of any type of Medicaid during the public health emergency under the IFR. Courts have granted class-wide preliminary injunctive relief in the Medicaid area, even prior to class certification. *See, e.g., Olson v. Wing*, 281 F. Supp. 2d 476 (E.D.N.Y. 2003), *aff'd by summary order*, 66 Fed. Appx. 275 (2d Cir. 2003).

DATED: September 19, 2022

Respectfully Submitted,

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PLAINTIFFS' COUNSEL

Certificate of Service

I hereby certify that on September 19, 2022, a copy of the foregoing document was filed electronically and served by overnight delivery to anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by overnight delivery to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/Sheldon V. Toubman
Sheldon V. Toubman

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DEBORAH CARR, BRENDA MOORE, MARY ELLEN WILSON, MARY SHAW, and CAROL KATZ, on behalf of themselves and those similarly situated,

Plaintiffs,

v.

XAVIER BECERRA, SECRETARY, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant.

Civil Action No. 3:22-cv-988 (MPS)

September 19, 2022

SECOND DECLARATION OF SHELDON V. TOUBMAN IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

I, SHELDON V. TOUBMAN, declare as follows:

1. I am one of the attorneys representing Named Plaintiffs and the putative class in the above-captioned action and I am submitting this Declaration in support of Plaintiffs' Motion For a Temporary Restraining Order and a Preliminary Injunction (Docket No. 3).

2. I am over the age of eighteen, have personal knowledge of the matters in this declaration, and am competent to testify about them.

3. As stated in my August 26, 2022 Declaration in Support of Plaintiffs' Motion for Class Certification (Docket No. 44-5), I requested and was expected to receive shortly from the Connecticut Department of Social Services ("DSS") a transcript of the June 22, 2022 administrative hearing before the DSS hearings office in Named Plaintiff Deborah Carr's appeal of the termination of full benefit Medicaid coverage (under "HUSKY D").

4. Attached as Exhibit 1 are true and correct copies of pages 1-4 and 169 of the transcript of that hearing, received on September 13, 2022.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

DATED: September 19, 2022

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Certificate of Service

I hereby certify that on September 19, 2022, a copy of the foregoing document was filed electronically and served by overnight delivery to anyone unable to accept electronic filing. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system or by overnight delivery to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/Sheldon V. Toubman
Sheldon V. Toubman

EXHIBIT 1

JUNE 22, 2022 HEARING TRANSCRIPT
Pages 1-4, 169

STATE OF CONNECTICUT

DEPARTMENT OF SOCIAL SERVICES

OFFICE OF LEGAL COUNSEL, REGULATIONS AND

ADMINISTRATIVE HEARINGS

In RE:	:	
	:	
DEBORAH CARR,	:	Case No. 100641958
	:	RN 190840
Appellant.	:	
	:	June 22, 2022

Venue: 66 Orange Steet, Apt 301
New Haven, Connecticut

ADMINISTRATIVE HEARING

(Transcription from Electronic Recording)

Held Before:

SYBIL HARDY, Hearing Officer

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For the Appellant:

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BY: SHELDON TOUBMAN, ESQ.

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DEPARTMENT OF SOCIAL SERVICES
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BY: MELANIE DILLON, ESQ.

Also Present:

DEBORAH CARR, Appellant

DONALD DEMMITT, Care Partner

MARJORI KAPSIS, DSS, Public Assistance Consultant

(Proceedings commenced.)

HEARING OFFICER HARDY: The hearing record for Deborah Carr is now open. Although this is an informal hearing all those present who are going to testify must take an oath. Everyone please raise their right hand. If you could raise your right hand?

(Whereupon, the parties were duly sworn by Hearing Officer Hardy.)

HEARING OFFICER: Thank you. And for the record everyone present must state his or her name, address and in what capacity he or she is at this hearing.

My name is Sybil Hardy, I am the Hearing Officer with the Department of Social Services, Office of Legal Counsel, Regulations and Administrative hearings assigned to preside at this hearing. So if we could start with Ms. Carr please, if you could state your full name and address for the record.

MS. CARR: My name is Deborah Carr. The address is 66 Orange Street, Apartment

301, New Haven, Connecticut 06510.

HEARING OFFICER: Okay. And your witness?

MR. DEMMITT: My name is Donald Demmitt, 66 Orange Street, Apartment 301, New Haven, Connecticut. I am her care partner as I like to call it.

HEARING OFFICER: Okay.

MS. KAPSIS: I'm Marjori Kapsis. I work at the Department of Social Services. I'm a Public Assistance Consultant.

HEARING OFFICER: Okay.

MS. DILLON: I'm Melanie Dillon, I am attorney in the Office of Legal Counsel at the Department of Social Services.

MR. TOUBMAN: I am Sheldon Toubman, that's spelled T-o-u-b-m-a-n. I'm an attorney at Disability Rights Connecticut. Do you want the address?

HEARING OFFICER: Yes.

MR. TOUBMAN: 846 Wethersfield Avenue, Hartford, Connecticut. I think it's 06114, and I'm representing Ms. Carr today.

HEARING OFFICER: Thank you.

Okay, Ms. Carr, the Office of Legal

must be kept on until the end of the public health emergency.

HEARING OFFICER: Thank you.

MR. TOUBMAN: Thank you.

HEARING OFFICER: Does the Department care to respond?

MS. DILLON: Sure.

The Department's only response to that would be that it's --the Hearing Officer doesn't have the authority in this case to decide whether or not a federal regulation is consistent with a federal statute and she's really limited to whether or not the termination of Husky D was correct based on the federal regulation.

That's what the Department relied on, that is what the Department has consistently been told that they have to do by CMS and therefore they had no other choice.

And it would be up to either CMS to withdraw this federal regulation or for it to go to federal court for the court -- the federal court to actually decide whether or not the reg is inconsistent with the statute.