

Case No. 11-2158

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CENTER FOR SPECIAL NEEDS TRUST
ADMINISTRATION, INC.,
Plaintiff-Appellant,

v.

CAROL K. OLSON,
Defendant-Appellee.

On Appeal from the United States District Court
for the District of North Dakota, Southwestern Division
Case No. 1:09-cv-72

BRIEF *AMICI CURIAE* OF
NATIONAL SENIOR CITIZENS LAW CENTER, AARP, and
NATIONAL HEALTH LAW PROGRAM
IN SUPPORT OF APPELLANT AND REVERSAL

Rochelle Bobroff
Federal Rights Project
National Senior Citizens Law Center
1444 I St., NW, Suite 1100
Washington, DC 20005
(202) 683-1997
rbobroff@nsclc.org

Counsel for *Amici Curiae*

Fed. R. App. P. 26.1 CORPORATE DISCLOSURE STATEMENT

National Senior Citizens Law Center (“NSCLC”)

The Internal Revenue Service has determined that NSCLC is organized and operated exclusively for charitable or educational purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. NSCLC is also organized and operated as a non-profit corporation under the laws of the State of California. NSCLC has no parent corporation and no publicly-held corporation owns any stock in it.

AARP

AARP is a non-profit corporation organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. It does not issue stock and has no parent corporation. AARP is also organized and operated as a non-profit corporation pursuant to the provisions of Title 29 of chapter 6 of the District of Columbia Code 1951. Other legal entities related to *amicus curiae* AARP include AARP Foundation, AARP Services, Inc., Legal Counsel for the Elderly, and AARP Financial.

National Health Law Program (“NHeLP”)

The Internal Revenue Service has determined that NHeLP is organized and operated pursuant to Section 501(c) (3) of the Internal Revenue Code and is exempt from income tax. NHeLP is operated as a non-profit corporation under the laws of the State of California.

Dated: July 11, 2011

/s/ Rochelle Bobroff
Rochelle Bobroff
Federal Rights Project
National Senior Citizens Law Center
1444 I St., NW, Suite 1100
Washington, DC 20005
(202) 683-1997
Counsel for *Amici Curiae*
rbobroff@nsclc.org

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STATEMENT OF INTERESTS OF AMICI CURIAE

The **National Senior Citizens Law Center** (“NSCLC”) is a non-profit organization that advocates nationwide to promote the independence and well-being of low-income older persons and people with disabilities. For more than 35 years, NSCLC has served these populations through litigation, administrative advocacy, legislative advocacy, and assistance to attorneys in legal aid programs. NSCLC’s *Federal Rights Project* works to ensure access to the federal courts to enforce safety net and civil rights statutes. Medicaid is a critical source of health insurance for millions of older persons and people with disabilities, and NSCLC has participated as counsel in numerous lawsuits regarding Medicaid. NSCLC is profoundly concerned about the impact that the Court’s decision may have on its clients’ access to the federal courts and corresponding rights under Medicaid law.

AARP is a nonpartisan, non-profit membership organization for people 50 and over, with nearly 40 million members nationwide. AARP advocates for health and economic security for everyone and in particular for vulnerable people of all ages, including low-income persons and persons with disabilities. AARP supports access to and expansion of quality health care through publicly administered health insurance programs, including Medicaid, an essential safety net program that provides coverage for those who otherwise would be denied health care. To

further that end, Medicaid recipients' access to the federal courts to challenge the denial of Medicaid coverage is critical.

For more than 40 years, the **National Health Law Program (“NHeLP”)** has engaged in legal and policy advocacy on behalf of low income people, people with disabilities, the elderly, and children. NHeLP provides legal representation and conducts research and policy analysis on issues affecting the health status and health access of these groups. NHeLP works to help consumers and their advocates overcome barriers to health care, including a lack of affordable services or access to health care providers. NHeLP provides extensive consultation, legal analysis, and litigation support to health advocates who are navigating motions to dismiss and other procedural attacks as they seek to obtain substantive relief for their clients.

SUMMARY OF ARGUMENT

The integrity and legitimacy of our complex administrative system depend upon an open system of promulgating regulations, in which interested stakeholders, including beneficiaries, have an opportunity to comment upon interpretations of law. The decision of the district court below should be reversed, because it fails to apprehend the important distinction between a duly published regulation and a mere letter by the federal administrative agency. The error of the

district court in giving substantial deference to a 2008 letter from a regional officer at the Centers for Medicare and Medicaid Services (CMS) warrants reversal.

The assertion of the regional officer in the 2008 letter that the Medicaid provision regarding pooled trusts does not apply to people over age 65 is contrary to the statute, and therefore should be rejected. Moreover, the interpretation of the statute in the 2008 letter is contradicted by the agency's previous interpretation that there is no age limit for pooled trusts, and CMS failed to acknowledge such a stark reversal of position. In addition, the fact that multiple states are not penalizing Medicaid beneficiaries over the age of 65 who are utilizing pooled trusts shows that the regional letter does not embody CMS's national policy. Lacking finality or formal process, the letter is unpersuasive, and therefore, the decision below is without basis.

ARGUMENT

While the instant case involves a dispute between a non-profit corporation administering a trust and the North Dakota Medicaid agency, the case presents an important issue of federal law for Medicaid beneficiaries nationwide. The district court held that a mere letter from a federal agency official should be accorded substantial deference in denying Medicaid eligibility. This holding is contrary to the precedent of this Court, sister Circuits, and the Supreme Court, and warrants reversal. The notice and comment procedures for promulgating regulations protect

beneficiaries by facilitating open discussion of the correct interpretation of a complex federal statute. The federal government should not be permitted to skirt its obligations to utilize the regulatory process, especially when the government is excluding a discrete minority, in this case individuals over age 65, from the benefits provided in a statutory provision.

I. THE DISTRICT COURT ERRED BY APPLYING THE STANDARD OF DEFERENCE FOR AN AGENCY’S INTERPRETATION OF ITS OWN REGULATIONS WHEN THE AGENCY HAS NOT PROMULGATED REGULATIONS

The district court held that the North Dakota Department of Human Services (NDDHS) correctly denied Medicaid eligibility to an individual who had purchased a pooled trust, based on the individual being over the age of 65. The court acknowledged that the applicable Medicaid provision which permits the purchase of pooled trusts, 42 U.S.C. § 1396p(d)(4)(C), “makes no mention of an age requirement.” *Ctr. for Special Needs Trust Admin., Inc. v. Olson*, 1:09-CV-072, 2011 WL 1562516 (D.N.D. Apr. 25, 2011). The court did not find that the statutory provision was unclear or ambiguous regarding age. Instead, the court observed that the Centers for Medicare and Medicaid Services (CMS) had written a letter in July 2008 which asserted that permitting such a trust for people over 65 years of age would be contrary to the statute. *Id.* at *8. The court then cited cases from this Court and the Supreme Court for the principle that an agency is entitled to substantial deference when it interprets its own regulations. *Id.*

However, there are no regulations to be found in this case. CMS has not promulgated any regulations regarding whether § 1396p(d)(4)(C) is limited to individuals under age 65. Therefore, the district court's utilization of the standard of deference for an agency's interpretation of its own regulations was in error. The district court's application of an erroneous legal standard warrants reversal of the opinion below.

II. WHEN A STATUTE IS CLEAR, THE AGENCY'S INTERPRETATION NEED NOT BE CONSIDERED

The district court further erred by failing to determine whether the statutory provision at issue is ambiguous. As this Court has held, "Only when statutory language is ambiguous and its accompanying legislative history unclear do we decide whether to defer to an agency's policy for implementing a statute's requirements." *N. Dakota ex rel. Olson v. Centers for Medicare & Medicaid Services*, 403 F.3d 537, 539 (8th Cir. 2005). The Supreme Court recently relegated to a footnote the well established principle that when statutory text is not ambiguous, the court "need not consider the Government's assertion that we should defer to the [agency's] interpretation." *Janus Capital Group, Inc. v. First Derivative Traders*, 131 S. Ct. 2296, 2303 n.8 (2011).

An age requirement is not an ambiguous term. Congress included an explicit age limitation in the trust provision a few paragraphs away from the applicable provision. In 42 U.S.C. § 1396p(d)(4)(A), the statute establishes rules

for a different type of trust and limits these trusts to “individual[s] under age 65.” In the provision regarding pooled trusts at issue in the instant case, 42 U.S.C. § 1396p(d)(4)(C), there is no limitation of the trust to individuals of any particular age. The absence of an age limitation is quite clear. As a result, there is no need for consideration of agency policy.

III. EVEN IF THE STATUTE IS AMBIGUOUS, AN AGENCY LETTER IS NOT ENTITLED TO SUBSTANTIAL DEFERENCE

If this Court decides that the agency letter should be considered, the standard of review is not substantial deference. An agency letter is not entitled to deference under *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Instead, an agency letter should be given respectful consideration as to whether the agency position is persuasive under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). *United States v. Mead Corp.*, 533 U.S. 218, 230, 234 (2001). Proposed regulations are likewise entitled to respectful consideration. *Wisconsin Dept. of Health & Family Services v. Blumer*, 534 U.S. 473, 497 (2002).

In *Kai v. Ross*, 336 F.3d 650 (8th Cir. 2003), the state of Nebraska relied upon a letter written by the Health Care Financing Administration as a basis for denying Medicaid eligibility. Reversing the district court’s denial of a preliminary injunction, this Court emphasized that an agency letter is not to be treated as the equivalent of duly promulgated regulations. This Court stated:

We note first that the letter is not a regulation of the Department of Health and Human Services, nor is it part of generally published advice, for example, a practice manual distributed nationwide. It is simply a letter from the Associate Administrator of the region of the Health Care Financing Administration of which Nebraska is a part. Such an expression of opinion would not be entitled to the level of deference set out in the Supreme Court's landmark decision in *Chevron*. We should consider it respectfully, and, indeed, we have done so, but it is worth no more than its inherent persuasive value. See *Skidmore*, 323 U.S. 134, 140 (1944).

Kai v. Ross, 336 F.3d 650, 655 (8th Cir. 2003). After giving the letter respectful consideration, this Court concluded that the letter was not persuasive. *Id.* Similarly, in *St. Mary's Hosp. of Rochester, Minn. v. Leavitt*, 416 F.3d 906 (8th Cir. 2005), this Court emphasized that agency letters are not entitled to *Chevron* deference but are only entitled to respect to the extent the agency position has the power to persuade. Other circuits have reached the same conclusion. *See, e.g., Spectrum Health Continuing Care Group v. Anna Marie Bowling Irrecoverable Trust Dated June 27, 2002*, 410 F.3d 304, 318-19 (6th Cir. 2005); *Houghton ex rel. Houghton v. Reinertson*, 382 F.3d 1162, 1172 (10th Cir. 2004). Thus, the district court below clearly erred in applying substantial deference to the CMS letter.

IV. THE AGENCY LETTER RELIED UPON BY THE DISTRICT COURT IS NOT PERSUASIVE

In *Skidmore*, the Supreme Court explained that the weight to be accorded an agency interpretation is affected by “its consistency with earlier and later pronouncements.” 323 U.S. at 140. In the instant case, CMS has adopted an

inconsistent approach in applying asset penalty provisions to these specific pooled trusts. Thus, not only did CMS fail to engage in a process worthy of substantial *Chevron* deference, but its conflicting interpretations regarding the age requirement also argue against persuasiveness under *Skidmore*.

In 2001, the Director of the Disabled and Elderly Health Programs Group at the Health Care Financing Administration (HCFA)¹ sent a letter in response to an inquiry by Clifton B. Kruse Jr., an elder advocate researching trusts under Medicaid. *See* HCFA Letter to Clifton B. Kruse Jr. (Aug. 9, 2001), *available at* <http://www.nslc.org/areas/medicaid/HC-financing-admin-letter.pdf>. The HCFA official wrote: “the statute does not impose an age limit on the trust cited at 42 U.S.C. § 1396p(d)(4)(C).” *Id.*

The agency took a contrary view of the statutory text in a letter written a few years later. The district court in the instant case relied upon a letter written in 2008 by CMS’s Associate Regional Administrator of the Division of Medicaid and Children’s Health Operations based in Chicago. *See* CMS Chicago Regional State Letter No.: 08-03, Subject: Pool Trusts (July 2008), *available at* <http://lawyersusaonline.com/wp-files/pdfs/08-03-cms-pool-trusts.pdf>. In the 2008 letter, the Associate Regional Administrator stated: “only trusts established for

¹ HCFA has since been renamed CMS.

disabled individuals age 64 or younger are exempt from application of the transfer of assets penalty provisions.” *Id.*

The persuasiveness of the more recent letter is greatly diminished by the agency’s failure to acknowledge the shift in its position. In a case involving whether a shift in agency policy was arbitrary and capricious in violation of the Administrative Procedure Act, the Supreme Court noted that, in order to be reasonable, an agency must “display awareness that it *is* changing position. An agency may not ... depart from a prior policy ‘*sub silentio*.’” *F.C.C. v. Fox Television Stations, Inc.*, 129 S. Ct. 1800, 1811 (2009) (emphasis in original) (citing *United States v. Nixon*, 418 U.S. 683, 696 (1974)). In the instant case, CMS’s failure to even acknowledge the change in its position undercuts the persuasiveness of its present position.

CMS’s claim that its interpretation is mandated by the statutory text is rebutted by the agency’s contrary interpretation just a few years earlier. The Supreme Court has noted that an “agency interpretation of a relevant provision which conflicts with the agency’s earlier interpretation is “entitled to considerably less deference” than a consistently held agency view.” *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987) (citing *Watt v. Alaska*, 451 U.S. 259, 273 (1981)). Since the agency cited the text of the statute as the basis for its 2001 interpretation,

the 2008 letter is totally unpersuasive in arguing that the age limitation is mandated by the statutory text.

In addition, the fact that CMS's 2008 letter provided an interpretation that was not "longstanding" or announced contemporaneously with the statute's enactment further weakens the persuasiveness of the argument. *See Sai Kwan Wong v. Doar*, 571 F.3d 247, 262 (2d Cir. 2009). As has been demonstrated, CMS's stark reversal within a span of less than ten years clearly shows that its position on this matter was not "longstanding." Indeed, the letter was issued just a few months before NDDHS issued its decision denying Medicaid eligibility based on an individual being over age 65. Also, since Congress amended the relevant language to the Medicaid statute as part of the Omnibus Budget Reconciliation Act of 1993, this 2008 letter did not provide a contemporaneous interpretation of the relevant statutory provisions.

Moreover, CMS's revised interpretation in this 2008 letter cannot be characterized as final or even relatively formal, but instead appears to be ad hoc. *See Estate of Landers v. Leavitt*, 545 F.3d 98, 110 (2d Cir. 2008). The position of a regional officer in a "nonprecedential letter ruling" should not be provided the same deference as would be provided if CMS had offered the same interpretation in a policy manual. *See id.* Rather, the conflicting letters from different offices demonstrate that the agency lacks a coherent and final position on this matter.

Indeed, the position espoused in the 2008 letter is not being followed by numerous states, further eroding the persuasiveness of the letter. Multiple states do not penalize individuals older than 65 who transfer assets to § 1396p(d)(4)(C) pooled trusts. See Tara Siegel Bernard, *What's a Pooled Trust? A Way to Avoid the Nursing Home*, N.Y. TIMES, Nov. 4, 2010, available at <http://www.nytimes.com/2010/11/05/business/businessspecial5/05TRUST.html> (“The pooled trusts themselves, meanwhile, are available ... in about a dozen states for people over the age of 65”).

For example, Maryland recently enacted legislation to permit those over 65 to utilize these specific trusts without suffering a penalty. S.B. 888, 2011 Leg., 428th Sess. (Md. 2011). Similarly, the Illinois Medicaid policy manual states that these trusts can be exempt if they meet the necessary requirements for “a person of any age.” Illinois Dept. of Human Services, PM 07-02-15-b: Exempt Trusts, available at <http://www.dhs.state.il.us/page.aspx?item=14937> (last accessed June 29, 2011). In early 2009, Wisconsin revised its Medicaid eligibility handbook to specify that transferring assets into a pooled trust would not result in a penalty for a “disabled individual of any age.” Wisconsin Department of Health Services, January 22, 2009 Letter to Jack Longert, available at <http://www.wisbar.org/AM/Template.cfm?Section=Home&CONTENTID=78757>

&TEMPLATE=/CM/ContentDisplay.cfm. Thus, CMS's 2008 regional letter does not embody national policy.

If CMS seeks to reverse its position on the age limit for these particular trusts, it should conduct a transparent process through notice and comment rulemaking to develop the appropriate regulation. That would permit the relevant stakeholders, including beneficiaries, to present comments on the issue, so that CMS can carefully consider the consequences of such a decision. The 2008 letter is not a substitute for an open and inclusive regulatory process.

CONCLUSION

For the reasons stated above, *Amici Curiae* respectfully request that this Court reverse the district court's order granting defendant's motion for summary judgment.

Dated: July 11, 2011

Respectfully submitted,

/s/ Rochelle Bobroff

Rochelle Bobroff
Federal Rights Project
National Senior Citizens Law Center
1444 I St., NW, Suite 1100
Washington, DC 20005
(202) 683-1997
Counsel for *Amici Curiae*
rbobroff@nsclc.org

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

Pursuant to Fed. R. App. P. 32(a), the attached *amici* brief is proportionally spaced, has a typeface of 14 points or more and contains 2,628 words. The word processing system software used to prepare this brief was Microsoft Word 2007.

CERTIFICATE OF COMPLIANCE WITH CIRCUIT RULE 28A

Pursuant to Circuit Rule 28A(h), the electronic version of this brief is in Portable Document Format, and was generated by printing to PDF from the original word processing file. This brief has been scanned for viruses and is virus free.

Date: July 11, 2011

/s/ Rochelle Bobroff
Rochelle Bobroff
Federal Rights Project
National Senior Citizens Law Center
1444 I St., NW, Suite 1100
Washington, DC 20005
(202) 683-1997
Counsel for *Amici Curiae*
rbobroff@nsclc.org

CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: July 11, 2011

/s/ Rochelle Bobroff

Rochelle Bobroff
Federal Rights Project
National Senior Citizens Law Center
1444 I St., NW, Suite 1100
Washington, DC 20005
(202) 683-1997
Counsel for *Amici Curiae*
rbobroff@nsclc.org