

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE GRAY PANTHERS PROJECT FUND;)
ACTION ALLIANCE OF SENIOR CITIZENS OF)
GREATER PHILADELPHIA; THE NORTHERN)
VIRGINIA MEDICARE MANAGED CARE)
OMBUDSMAN PROGRAM; MEDICARE)
RIGHTS CENTER; and HORACE BAKER,))

Plaintiffs,)

5.)

TOMMY G. THOMPSON, Secretary of Health)
and Human Services,)

Defendant.)

Civil Action
No. 1:01-CV-01374 (HHK)

**MEMORANDUM IN SUPPORT OF PLAINTIFFS’ APPLICATION FOR ATTORNEY’S
FEES PURSUANT TO THE EQUAL ACCESS TO JUSTICE ACT**

INTRODUCTION

Four organizations which serve elderly and disabled Medicare recipients, and a Medicare beneficiary, filed this action to stop the defendant Secretary of Health and Human Services (“the Secretary”) from repudiating two clear-cut statutory mandates. Those obligations required Medicare+Choice organizations (MCOs) to submit information to the Secretary by July 1 about their plans for providing services in the subsequent calendar year, 42 U.S.C. § 1395w-24(a)(1), and, based on the information so provided, required the Secretary to mail written comparative information to Medicare+Choice beneficiaries in the region served by those plans by mid-October. *Id.*, § 1395w-21(d)(2). After the Secretary suddenly and secretly reversed course in

late May 2001 by unilaterally resetting the first deadline to September 17, 2001 and deciding not to include comparative information in the fall mailing, plaintiffs filed their complaint, on June 22, 2001. In two decisions since that filing, this Court has emphatically rejected the Secretary's actions and ordered both preliminary and permanent injunctive relief.

Plaintiffs now seek an award of fees pursuant to the Equal Access to Justice Act (EAJA).¹ They contend that the defendant Secretary acted in bad faith, thereby entitling them to fees under 28 U.S.C. § 2412(b). In addition, his position was not substantially justified, thereby entitling them to fees under 28 U.S.C. § 2412(d).

I. HISTORY OF THE ISSUE AND THE LITIGATION

(1) **Precipitating agency action:** On April 27, 2001, following his consistent practice from previous years, the Secretary issued Operational Policy Letter (OPL) 132 which set out, among other things, the calendar for MCOs to follow in the planning cycle for the upcoming calendar year. As required by statute, July 1 was set as the deadline for MCOs to submit the required information to the Secretary. In addition, the OPL stated that the Secretary would mail the written comparative information based on the plans' submissions to beneficiaries during September, which was also required by statute.

On May 25, 2001, however, in a letter sent only to three industry associations representing MCOs, the Secretary reset the deadline for submission to September 17. No public announcement of this unilateral decision was ever made. In a May 31, 2001 memorandum to

¹ Plaintiffs have previously filed a bill of costs with the clerk pursuant to 28 U.S.C. § 2412(a), and that is not here at issue.

MCOs, an employee of the Secretary reiterated the new deadline and also stated that the comparative information would not be mailed to beneficiaries. Two more memoranda, dated June 7 and 14, were sent to MCOs further explaining the new deadline and the fact that comparative information would not be mailed.

The upshot of these actions was that, without seeking input or even giving prior warning, without public notice before or after the fact, and contrary to explicit statutory requirements the meaning of which the Secretary did not dispute and which the Secretary had followed in previous years, the Secretary unilaterally (1) changed the statutory deadline for submission by MCOs of their plan information from July 1 to September 17, and, (2) because the later deadline allegedly did not give him sufficient time, decided to ignore the statutory requirement that he prepare and mail written comparative information to beneficiaries.

(2) **Initial litigation developments**: Responding as quickly as they could to the belated discovery of these actions, plaintiffs filed a complaint, and on July 19, 2001, moved for a preliminary injunction, or, in the alternative, for summary judgment, seeking an expedited hearing on their preliminary injunction motion pursuant to LCvR 65.1(d). They supported their alternative motion with a comprehensive legal memorandum and with declarations and exhibits establishing what had transpired and the impact on the plaintiff organizations and on the elderly and disabled population which they serve. The defendant Secretary filed an opposition to the motion for preliminary injunction (but not to the summary judgment motion) on August 3, and plaintiffs filed their reply on August 7. The Court heard oral argument on the preliminary injunction motion on August 8 and, from the bench, announced its decision granting a

preliminary injunction on August 9, 2001.²

(3) **Preliminary injunction decision**: In that decision, the Court reviewed the four factors necessary for the granting of a preliminary injunction. It first concluded that the language of the relevant statutory provisions “could hardly be clearer.” Tr. at 4, lines 2-3. Consequently, focusing on defendant’s claim of “administrative necessity,” the Court observed that an agency’s discretion to create statutory exceptions based upon alleged administrative infeasibility “is extremely limited ... and do[es] not apply where there exists an ... unambiguous demonstration of congressional intent to foreclose them ...” Tr. at 4, lines 16-22. Furthermore, the Court noted that the controlling Circuit authority on the issue also stated that “there exists no general administrative power to create exemptions to statutory requirements based upon the agency’s perceptions of costs and benefits” Tr. at 4, lines 24-25 to Tr. at 5, line 1. In addition, “an agency seeking relief from a statutory obligation on the grounds of administrative necessity bears a heavy burden of establishing the impossibility of compliance.” Tr. at 5, lines 2-5.

Having thus set out the legal standard, the Court concluded that the Secretary could not meet his heavy burden. First, the Court pointed out that the Secretary’s concerns had not swayed Congress, which had rejected amendments like those which the Secretary unilaterally sought to impose: “[N]either the existence of pending legislation nor support from its sponsors gives the Secretary authority to ignore the current congressionally mandated requirements. Both Congress

² A copy of the transcript of the Court’s August 9 statement from the bench is attached as an exhibit to this Memorandum (hereinafter, “Tr.”).

and the Secretary know how to change these deadlines legislatively and have done so in the past.” Tr. at 6, lines 7-12. Second, the Court noted that the Secretary’s claim of infeasibility was “further undermined by the fact that for the past several years CMS has complied with the statute to at least some extent and certainly more so than it intends to do this year.” Tr. at 6, lines 14-18. Third, the Secretary’s suggestion that beneficiaries should rely on the Internet and telephone was unacceptable because those methods could not replace the mailing of written comparative information which Congress had expressly required. Tr. at 6-7.

In addition to thus concluding that plaintiffs had “demonstrated a substantial likelihood of success on the merits,” Tr. at 7, lines 8-9, the Court also determined that plaintiffs had shown irreparable harm and that the Secretary’s contention that this would be mitigated by telephone and Internet sources was unconvincing, even with the Secretary’s promise to spend millions on publicity to inform beneficiaries about obtaining information on Medicare: “[T]he Court is astounded that the Secretary has the audacity to argue that compliance with the statutory mailing requirement is too expensive while simultaneously electing to spend \$35 million on advertisements.” Tr. at 8, lines 9-13.

The Court also concluded that the public interest favored the injunction, as it “almost always favors agency compliance with the law. Such compliance is especially important when, as here, the statute being violated by the agency concerns the provision of health care to millions of Americans.” Tr. at 8, lines 18-22. Finally, the Court rejected the Secretary’s claims of alleged harm: “These policy considerations are within Congress’ domain not that of the Secretary. [¶] Congress has carefully weighed these issues and nonetheless enacted the existing statutes. The fact that the Secretary would have preferred a different outcome is of no relevance

here.” Tr. at 9, lines 4-9.

On the question of relief, the Court first concluded that, “[d]espite the Secretary’s blatant violation of ... [42 U.S.C. §] 1395w-24(a) it may very well be overly disruptive for the Court to order the Secretary to now require MCO’s to submit ACR information on such short notice.” Tr. at 10, lines 13-17. Since the second statutory deadline was not until mid-October, however, the Court ordered the Secretary to comply with section 1395w-21(d) by timely mailing the written comparative information to beneficiaries:

The Court finds the Secretary’s protestations that a compliance is not possible at this late stage unconvincing. The Secretary’s logic is similar to that of a child who kills his parents and then seeks pity as an orphan. The Court looks dimly upon such excuses. Any timing or budgetary problems the Secretary now faces in complying with the statute are problems of his own making.

Tr. at 11, lines 3-9.

The Order granting the preliminary injunction and directing the Secretary to comply with the statutory mandate was filed on the same date, August 9, 2001.

(4) Subsequent developments: On December 17, 2001, defendant moved to dismiss or for a stay, arguing that his compliance with the injunction rendered the case moot and that the matter was not ripe for review. Plaintiffs timely opposed that motion and also filed a reply memorandum in support of their motion for summary judgment. Neither at that time nor at any time in the litigation did defendant file an opposition to the motion for summary judgment or a statement of undisputed facts, thus indicating agreement with plaintiffs’ statement of facts. See LCvR 7.1(h).

On May 10, 2002, pursuant to an order signed May 3, 2002, defendant filed a calendar setting out how he intended to comply with the statutory mandates in 2002-2003.

In June 2002, Congress extended the deadline for plans to submit information to the Secretary from July 1 to mid-September for the three plan years of 2003, 2004, 2005 (*i.e.*, for submission dates in 2002, 2003, and 2004, respectively). Pub. L. No. 107-188, § 532(b)(1), 116 Stat. 594, 696 (2002) (amending 42 U.S.C. § 1395w-24(a)(1)). That legislation also temporarily (for the same three years) pushed back the deadline slightly for the Secretary to send information to beneficiaries, from mid-October to October 31, by changing the period of the coordinated election period from November 1-30 to November 15-December 31. Pub. L. No. 107-188, § 532(c)(1)(A), 116 Stat. 594, 696 (2002) (amending 42 U.S.C. § 1395w-21(e)(3)(B)).³ No

³ In the Memorandum Opinion, this Court recognized that, during this three-year period the time frame between the deadlines for MCOs' submission of information to the Secretary and the Secretary's mailing of comparative written information would be shorter, thereby making it less likely that the Secretary would comply unless subject to a court order. See Mem. Op. at 6-7 n.7. Because the Court slightly misstated the new deadline for mailing out the material, in fact the amount of time available to the Secretary will be less than that on which the Court premised its analysis. The temporary change to the deadline was effected by changing the period of the "coordinated election period" in 42 U.S.C. § 1395w-21(e)(3)(B) from "the month of November" to "the period beginning on November 15 and ending on December 31." The statute setting out when the information must be mailed was not changed, however, and remains as "[a]t least 15 days before the *beginning* of each annual coordinated election period" 42 U.S.C. § 1395w-21(d)(2) (emphasis supplied). Consequently, the Secretary had only until October 31 to prepare and mail the comparative written information, a period of 1-1/2 months from the mid-September

changes were made in the substantive obligations of MCOs to submit the information or of the Secretary to mail the comparative written information to beneficiaries.

At a July 10, 2002 status conference, the Court stated that, unless the parties had settled the remaining issues by July 24, 2002, the matter would be put on a decision track.

(5) Summary judgment decision: In its Memorandum Opinion filed September 6, 2002 (hereinafter, “Mem. Op.”) the Court rejected the Secretary’s claim of mootness. First, the Court dismissed any suggestion that the legislative change to the deadline in and of itself mooted the controversy: “The issue here is not merely whether information is to be submitted in July rather than September. The issue is whether the Department of Health and Human Services may disregard the clear mandate of Congress in its administration of the Medicare+Choice Program.” *Id.* at 4 n.4.

Second, despite his “voluntary compliance,” the Secretary had not met his “‘heavy’ burden of showing that the violation will not reoccur, i.e., that he will abide by the relevant statutory provisions in future years” Mem. Op. at 6. The Court expressed extreme doubt that the Secretary could be trusted in the future:

Given that the Secretary’s violation of the statute was no mere oversight, and that recent changes to the Medicare+Choice program likely make compiling and disseminating relevant information by the statutory deadline more, not less challenging, the court fears that, without its intervention, the Secretary will again violate the statute.

Id. at 6-7 (footnote omitted); see also *id.* at 6 n.7. The Court was also

troubled by the Secretary’s failure to confess error regarding his past conduct. Instead, the Secretary has repeatedly asserted that his actions were reasonable, in

deadline for the MCOs’ submissions.

light of relevant constraints Given this position, the court cannot be convinced that the violations will not reoccur, absent the court's involvement.

Id. at 7.⁴

Having concluded that the matter was justiciable, the Court granted summary judgment to plaintiffs because the Secretary's actions, as described in the decision, were not in dispute and were dispositive. *Id.* at 9. Summarizing the case, the Court once again reiterated how far the Secretary had strayed from his obligations:

Agencies may not choose to follow some laws while ignoring others, and an agency "may not substitute its own policy for that of the legislature." Put simply, agencies, like the rest of us, must obey the law – even if compliance is cumbersome, burdensome, or costly.

Id. (citation omitted). The Judgment accompanying the Memorandum Opinion therefore directed the Secretary "to comply with the requirements of 42 U.S.C. § 1395w-21(d) and 24(a), as amended, and [to] obey the statute as written."

(6) Subsequent development: At a meeting on October 3, 2002 which was attended by advocates for beneficiaries, including plaintiffs' counsel Vicki Gottlich, CMS employees stated that the handbook to be sent out later in the fall to beneficiaries would not include comparative information about 33 Preferred Provider Organizations (PPOs) which were participating in a demonstration project. See Declaration of Vicki Gottlich (filed with this Application), ¶ 11. Responding to this apparent violation of the Court's Order, plaintiffs' counsel Gottlich and Deford prepared pleadings to enforce it. Just before those pleadings were

⁴ The Court also rejected the Secretary's contention that the matter was not ripe for review, noting that the Secretary "is trying to have it both ways." *Id.* at 8 n.8.

to be filed, CMS employee Michael McMullan sent them a letter stating that CMS would in fact include written information on the PPOs in the handbook. Relying on this representation, plaintiffs' counsel did not file the motion to enforce and its accompanying papers.

II. PLAINTIFFS MEET THE REQUIREMENTS FOR AN AWARD OF FEES UNDER TWO SECTIONS OF THE EQUAL ACCESS TO JUSTICE ACT, 28 U.S.C. §§ 2412(b) AND 2412(d).

Plaintiffs satisfy the standards for an award of fees: they are eligible for fees; they are the prevailing party; the government's position is not substantially justified; and they have itemized the time worked and the rate to which they are entitled as part of both this Memorandum and in their attorneys' declarations. They will discuss the first three factors in this section.

They are also entitled to fees pursuant to 28 U.S.C. § 2412(b) because the government acted in bad faith. That will be also be discussed in this section. Section III of the brief will discuss the appropriate amount of fees based on the itemization of time worked and appropriate hourly rates under both subsections (b) and (d).

A. Plaintiffs are eligible.

A party's eligibility for an award under section 2412(d) is established by meeting subsection 2412(d)(2)(B). See *Nat'l Ass'n of Manufacturers v. Dept. of Labor*, 159 F.3d 597, 599 (D.C.Cir. 1998). The four organizational plaintiffs are non-profits and not subject to the statute's net worth requirements because they have 501(c)(3) status. See 28 U.S.C. § 2412(d)(2)(B)(ii). In any event, they all had a new worth below \$7 million and had fewer than 500 employees at the time that the complaint was filed, June 22, 2001. *Id.* Similarly, the individual plaintiff, Horace Baker, is an eligible party because his net worth at the time that the action was filed did not exceed \$2 million. *Id.*, § 2412(d)(2)(B)(i).

B. Plaintiffs prevailed.

Plaintiffs sought and obtained a preliminary injunction requiring the Secretary to comply with the statutory deadline for mailing written comparative information in 2001, pursuant to 42 U.S.C. § 1395w-21(d)(2). They also sought and obtained a permanent injunction, via a grant of summary judgment, enjoining the Secretary from not complying in the future with the explicit requirements of 42 U.S.C. §§ 1395w-21(d)(2) and 1395w-24(a)(1). Their actions were not a mere catalyst to achieving this relief; their success was complete and ordered by the Court. By any definition of the term, they are the prevailing party. See, e.g., *Oil, Chemical and Atomic Workers Int'l Union v. Dept. of Energy*, 288 F.3d 452, 455 (D.C.Cir. 2002); *F.J. Vollmer Co., Inc. v. Magaw*, 102 F.3d 591, 594 (D.C.Cir. 1996).

C. Since the Secretary acted in bad faith, fees should be awarded pursuant to 28 U.S.C. § 2412(b).

Like the more commonly used section 2412(d), section 2412(b) also is a waiver of sovereign immunity. *American Hosp. Ass'n v. Sullivan*, 938 F.2d 216, 219 (D.C.Cir.1991). It renders the United States liable for fees and expenses “to the same extent that any other party would be liable under the common law,” and bad faith by the losing party is a basis for an award of fees under the common law. *Id.* The bad faith can occur either in the litigation or “as an aspect of the conduct giving rise to the lawsuit.” *Id.* (citation omitted).

Although the standard for a bad faith finding is “stringent,” *Nepera Chemical, Inc. v. Sea-Land Services, Inc.*, 794 F.2d 688, 702 (D.C.Cir. 1986), the D.C. Circuit has made it clear that conduct such as that in this case represents the paradigm of bad faith:

Bad faith in conduct giving rise to the lawsuit may be found where a party, confronted with a clear statutory ... duty towards another, is so recalcitrant in performing that duty that the injured party is forced to undertake otherwise

unnecessary litigation to vindicate plain legal rights.

American Hosp. Ass'n, 938 F.2d at 220 (internal quotation marks and citation omitted).⁵ The instant situation is actually more extreme than that described above in the *American Hosp. Ass'n* quotation because it does not depict mere “recalcitrant” behavior in carrying out a clear statutory directive; rather, it presents a federal agency, acting through high officials, intentionally, quickly, and secretly repudiating and refusing to effect a legislative mandate and consciously choosing not to follow explicit congressional directives.

It bears repeating the extent of the misbehavior here:

1) *The decision was made and carried out not by low level or even mid-level government officials, but by a Cabinet official, the Secretary of the Department of Health and Human Services.* Secretary Thompson initiated the unilateral decision to rewrite two statutes by sending the letter to the MCO industry associations in which he took full credit for the action, stating that “I am delaying the deadline ... until September 17, 2001.” Letter of May 25, 2001 (attached as ex. A to the complaint). This was not a decision made by individuals for which the government should not be held fully accountable because of their relatively low position.

⁵ See also *American Employers Ins. Co. v. American Sec. Bank*, 747 F.2d 1493, 1502 (D.C.Cir. 1984) (fees appropriate when party “has been forced to sue to enforce a plain legal right”); accord, *Ass'n of American Physicians and Surgeons, Inc. v. Clinton*, 187 F.3d 655, 661 (D.C.Cir. 1999) (reversing bad faith finding because “[t]he government was under no ‘clear’ duty”).

2) *The decision was carried out secretly and expeditiously.* The Secretary's OPL 132 of April 27, 2001 was consistent with instructions to MCOs in past years and stated, *inter alia*, that July 1 was the deadline for submission and that the handbook would be sent out between September 1 and October 1 (with no suggestion that the comparative information would not be included). On May 25, less than a month later, responding to MCO complaints⁶ but with no effort to obtain input from any other interested entity, and without warning, the Secretary sent out his letter to the three industry organizations. The only possible inference is that the Secretary did not want anyone other than MCOs to be aware of his repudiation of both the statutory language and his consistent prior position.

3) *The public in general and Medicare beneficiaries in particular were never informed about the changes.* Within three weeks of the private letter to the three organizations, the Secretary sent three memoranda to MCOs detailing the new rules. Not only was there no notice and comment period for the change in rules, but the Secretary did not even publish a notice of what he was doing, in the Federal Register or by any other method. Nor was any effort made after the May 25 letter to contact beneficiaries or their advocates to advise them informally of what was happening. HCFA's web sites for beneficiaries, the *What's New* folder and *Information for Beneficiaries* folder, did not contain links to the three memoranda; that information only appeared in HCFA's *Information for Plans and Providers* folder. Declaration of Vicki Gottlich, ¶ 4 (filed with Memo. in Support of Pl. Motion for a Pre. Inj., or, in the

⁶ See Declaration of Michael R. McMullan (filed with Def. Opp. to Pl. Motion for a Pre. Inj.), ¶ 14.

Alternative, for Summary Judgment (July 18, 2001). By contrast, a link to OPL 132 appeared on the *What's New* folder in April 2001. *Id.*, ¶ 3. It is inconceivable that these actions were taken with any purpose other than to hide the reversal in policy from those who were adversely affected – and who had reason to challenge it if they did find out – for as long as possible.

Consequently, not only did the Secretary decide to repudiate congressional directives, but he did so in the context of attempting to conceal his actions from the very beneficiaries whom his agency supposedly serves. This was not a benign effort to skirt statutory directives in order to achieve a perceived greater good; this was a calculated attempt to secretly ease the alleged burden on MCOs at the expense of beneficiaries. As the Secretary's designated spokesperson in the litigation put it: "The decision to permit MCOs to revise their ACR submissions through September 17th was warmly received by the MCO industry and Congressional leaders" McMullan Dec., ¶ 16.⁷ No one asked what beneficiaries thought of this action and its component conduct, the refusal to send out written comparative information; in fact, every effort was made to keep these developments from them until it was too late to do anything about it.

"[T]he underlying rationale of fee-shifting upon a showing of bad faith is punishment of the wrongdoer rather than compensation of the victim." *Nepera Chemical, Inc.*, 794 F.2d at 702. In this case, a cabinet-level federal agency, personally led by its Secretary, explicitly refused to comply with two federal statutes and unilaterally altered those statutes, with the goal of assisting a provider group with whom it was sympathetic and to the detriment of beneficiaries supposedly served by that agency. That describes precisely the kind of situation for which a bad faith

⁷ Ms. McMullan does not name the "Congressional leaders" who were pleased with a Cabinet member's unilateral decision to repudiate statutory language.

finding is appropriate.

The Circuit's definition of bad faith in the context of blatant misbehavior by a federal agency can lead to no other resolution. A slight paraphrase of the *American Hosp. Ass'n* language (see 938 F.2d at 220) leaves no doubt: *Confronted with a clear statutory duty, the Secretary forced Medicare beneficiaries to undertake otherwise unnecessary litigation to vindicate plain legal rights.* Since there is no dispute that this is precisely what happened here, the consequence must be a finding of bad faith.

D. The government's position was not substantially justified.

The Court should also determine that the government's position was not substantially justified and that fees are therefore warranted under 28 U.S.C. § 2412(d).

The rules applicable to determining whether the government has demonstrated that its position was substantially justified are well settled:

The government's position includes both its pre-litigation and litigation positions and is substantially justified if it is justified in substance or in the main – that is, justified to a degree that could satisfy a reasonable person. That is no different from [having] a reasonable basis both in law and fact.

Jacobs v. Schiffer, 204 F.3d 259, 263 (D.C.Cir. 2000) (quotation marks and citations omitted); see also, e.g., *Halverson v. Slater*, 206 F.3d 1205, 1208 (D.C.Cir. 2000); 28 U.S.C. § 2412(d)(2)(D). “The Government bears the burden of establishing that its position was substantially justified.” *F.J. Vollmer Co., Inc.*, 102 F.3d at 595 (citations omitted). A determination that the government was unreasonable in either the underlying action or in its litigation position renders its position not substantially justified. *Lundin v. Meacham*, 980 F.2d 1450, 1459-1461 (D.C.Cir. 1992). In this case, the government cannot meet its burden of demonstrating that its position at either stage was reasonable in law and fact. Indeed, its

behavior was unreasonable in every respect and therefore its position is not substantially justified.

“[T]he court’s merits reasoning may be quite relevant to the resolution of the substantial justification question,” but its relevance “depends on the nature of the case.” *F.J. Vollmer Co., Inc.*, 102 F.3d at 595. In this case, the Court’s reasoning is entirely relevant. As in *Halverson*, 206 F.3d at 1211, the government’s position is not substantially justified “for a very good reason: the merits panel, as even a cursory review of its opinion reveals, found the [government’s] position entirely without merit.” Just as the panel reviewing the merits in that case thought “the issue before it was easy,” *id.*, so too did this Court find this to be “an easy case.” Tr. at 3, line 2.

As this Court noted, even “the Secretary doesn’t dispute the plain language of the statute.” Tr. at 3, lines 20-21. In that respect, this case is even easier than *Halverson*, for there the government at least attempted to present a statutory basis for its position. The panel reviewing the merits determined, based on step one of *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), that the plain meaning of the statute required rejecting the government’s interpretation. See 206 F.3d at 1211. In turn, the *Halverson* fee panel found persuasive for its substantial justification analysis that “the merits panel’s rejection of the Department’s argument ... rested on the easily ascertainable plain meaning of one provision.” *Id.* at 1212. In this case, the Court did not even have to consider the Secretary’s reading of the statute, for he was unable to devise any interpretation beyond the clear language of the statute. The statutory meaning here is thus more easily ascertainable, as there has never been any dispute about it.

Thus, the underlying agency action is not even a stretched or weak attempt to interpret a statute to the agency's liking. It is, instead, the Secretary's unilateral decision to ignore congressional directives and replace them with an approach which he and the industry prefer. Without warning, contrary to his actions of just a few weeks before, and with notification only to MCO industry organizations, the Secretary simply changed the deadline for submission of plan information and decreed that the comparative data would not be mailed out. See Mem. Op. at 3. Lacking even an arguable statutory basis for his action, the Secretary did not bother to offer one. If the facts and analysis in *Halverson* require a finding of no substantial justification, then this situation demands the same conclusion.

Although a determination that the government was not substantially justified in its underlying position is sufficient to end the inquiry, the government also cannot meet its burden with respect to its litigation position. Still unable to devise a statutory interpretation to support his action, the only legal handle which the Secretary could muster in court was his "administrative necessity" argument. But, as the Court determined, this argument was far off the mark in at least two ways. First, to the extent that there exists even limited discretion for agencies to carve out exceptions to statutory requirements, it does "not apply where there exists an ... unambiguous demonstration of congressional intent to foreclose them ..." Tr. at 4, lines 19-22. Giving the Secretary every benefit of the doubt, however, the Court accepted, for purposes of argument, "that such an exception might exist," but then concluded "that the Secretary has not met his *especially heavy burden* of establishing that compliance with the statute is not feasible." Tr. at 5, lines 9-12 (emphasis added). That burden could not be satisfied because (1) "neither the existence of pending legislation nor support from its sponsors gives the

Secretary authority to ignore the current congressionally mandated requirements” (Tr. at 6 lines 7-10) and (2) “for the past several years CMS has complied with the statute to at least some extent and certainly more so than it intends to do this year.” Tr. at 6, lines 15-17.

Further demonstrating the unreasonability of his litigation position is that the Secretary did not even attempt to defend his position on the merits at the summary judgment stage of the case. He did not try to resurrect his “administrative necessity” argument – probably because he recognized how weak it was. Indeed, the Secretary never filed an opposition to plaintiffs’ motion for summary judgment, thereby effectively conceding that plaintiffs were entitled to summary judgment. LCvR 7.1(b).

Instead, he moved to dismiss on the ground that the claims were simultaneously moot and not ripe. As the Court noted, however, the Secretary was “trying to have it both ways” and the ripeness argument was dispatched without further ado. Mem. Op. at 8 n.8. The Court’s resolution of the mootness contention fully demonstrates how unreasonable that position is, especially in light of the “stringent” standard which imposes a “heavy burden” on defendants to demonstrate that violations will not recur. See *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189 (2000), as discussed in Mem. Op. at 5-6.⁸ Two factors convinced the Court that there were no assurances that the Secretary “intends to comply with the applicable provisions in the long run” (*id.* at 8): 1) The Secretary had intentionally failed to follow the statute in its previous form, claiming impossibility, and the

⁸ Lest there could have been any doubt as to the Supreme Court’s view that “mooting out” cases through voluntary behavior is only achievable in the most unusual circumstances, the Court repeated the language from *Friends of the Earth* the following Term. See *Buckhannon Bd. and Care Home, Inc. v. W. Va. Dept. of Health and Human Resources*, 532 U.S. 598, 609 (2001).

subsequent legislative change would only make it more difficult for the Secretary to meet the deadline (*id.* at 6-7 & n.7); and 2) the Secretary never “confess[ed] error regarding his past conduct.” *Id.* at 7. In short, the Secretary did not meet “his weighty burden of showing that the unlawful conduct will not recur.” *Id.* at 8.

The Secretary’s litigation position was therefore also not substantially justified. Since the Secretary “has the burden of proving that [his] position, including both the underlying agency action and the arguments defending that action in court, was ‘substantially justified,’” *Halverson*, 206 F.3d at 1208, and since he is incapable of meeting that burden for *either* position, the Secretary is doubly incapable of demonstrating substantial justification. That requirement of section 2412(d) is also satisfied.

III. CALCULATION OF THE AWARD OF FEES

To determine the reasonable fee, three factors may be considered: the reasonable hours expended, the determination of a reasonable hourly rate, and, where appropriate, a multiplier or other adjustment. *Covington v. District of Columbia*, 57 F.3d 1101, 1107 (D.C.Cir. 1995); see also, *e.g.*, *F.J. Vollmer Co., Inc.*, 102 F.3d at 599; *Nong v. Reno*, 28 F.Supp.2d 27, 30 (D.D.C. 1998). In this case, plaintiffs do not seek a multiplier, so that the fee should be calculated with respect to hours and rates.

A. The hours worked on the case are reasonable.

The hours worked by plaintiffs’ counsel are itemized in their declarations filed with this application⁹ and are summarized as follows:¹⁰

⁹ The declarations of plaintiffs’ attorneys are in the Declarations package filed with the Application.

<u>Attorney</u>	<u>2001</u>	<u>2002</u>	<u>Total</u>
Chiplin	16.3	0	16.3
Deford 115.8		81.7	197.5
Gottlich	165.4	20.0	185.4
Hart	18.6	0	18.6
Nemore	26.5	1.5	28.0
Stein	14.7	0	14.7
TOTAL	357.3	103.2	460.5

Plaintiffs' attorneys have therefore worked a total of 460.5 hours to date. The great bulk of that time (over 80%) was spent by their two lead counsel, Vicki Gottlich and Gill Deford, who have devoted 382.9 hours to the case. They organized the other attorneys and directed their contributions, were primarily responsible for developing the strategy, and did the bulk of the research and drafting. See Declarations of Gill Deford, ¶ 15 and Judith Stein, ¶ 11.

¹⁰ Plaintiffs are using November 1, 2002 as the present cut-off date. Since there will be additional time worked on this motion before the fee award is ruled on, plaintiffs will supplement their declarations and update the hours worked at the time of the filing of their reply brief.

The other four attorneys made their primary or sole contributions in the first few months of the litigation, when plaintiffs' counsel were quickly trying to develop the case, to obtain immediate relief, and to ensure its implementation. In plaintiffs' counsel's public interest law office, there are only 1-1/2 attorneys whose work is devoted solely to litigation, so that, with time at a premium, it was imperative that other attorneys in the office assist. Stein Dec., ¶11 . Once the preliminary injunction phase of the case was completed, Gottlich and Deford did virtually all the remaining work.¹¹

Given that plaintiffs' counsel's team only became aware of the Secretary's action on June 1, 2001, and that the first statutory deadline was already looming, they had to move as quickly as possible in order to prevent the very harm that the defendant was attempting to carry out. Under these circumstances, it was necessary to have two primary attorneys working on the case during its first stage (June through early August 2001), with the others providing various degrees of assistance and expertise. Without that complete dedication of time and effort in the first two months of the litigation (through the decision on the preliminary injunction), it would have been impossible to achieve the full degree of success. Deford Dec., ¶ 15.

The speed and secrecy with which the government attempted to change the rules at issue, and its effort throughout the litigation to downplay what had happened and to make the case go

¹¹ Hart, Nemore, and Stein put in most of their time in the period up through the preliminary injunction hearing. Chipin put in the bulk of his time in August and September 2001 on the preliminary injunction hearing, and then on review and other matters associated with enforcing that order.

away, demanded that plaintiffs' counsel devote considerable time to its prosecution. Although this was "an easy case" in the sense that, once fully presented, there was only one possible resolution, the fact remains that plaintiffs' counsel had to fully develop the case, work with the plaintiffs, research the law and the Secretary's actions, prepare a complaint, and draft motions, memoranda, and declarations in support of a preliminary injunction and summary judgment. Only that effort made the case "easy." The hours expended are reasonable.

B. The appropriate hourly rates under subsections (b) and (d).

1. Rates under subsection (b): The limitation on the hourly fee rate under section 2412(d) (see 28 U.S.C. § 2412(d)(2)(A)(ii)) is not applicable to fees awarded pursuant to 28 U.S.C. § 2412(b). Consequently, if the Court finds that the Secretary acted in bad faith and awards fees accordingly, the hourly rate ceiling is not applicable. See, e.g., *Newmark v. Principi*, 283 F.3d 172, 178 (3d Cir. 2002); *Kerin v. U.S. Postal Service*, 218 F.3d 185, 190-191 (2d Cir. 2000). In that situation, plaintiffs' counsel are entitled to market rates as established by the *Laffey* matrix. See *Covington*, 57 F.3d at 1108 & nn. 16, 17.

As the Declaration of Judith Stein sets out (¶¶ 4, 11), plaintiffs' counsel's employer, the Center for Medicare Advocacy, Inc. ("the Center"), of which Ms. Stein is the founder and executive director, is a public interest law office specializing in education and advocacy for the elderly and disabled on health care issues, especially Medicare. It has offices in Connecticut and Washington, D.C., with a one-half time attorney in Tucson, Arizona. The Center provides assistance to individuals in a variety of ways through its Connecticut office, including representing Medicare beneficiaries in administrative hearings, and, through all of its offices, it advocates on behalf of individuals, classes of individuals, and organizations serving the elderly

and disabled in the federal administrative process (*e.g.*, commenting on proposed regulations), in Congress, and by litigating in the federal courts.

The Center does not charge fees for its representation of clients, and its attorneys are salaried employees who are not paid by clients or by the hour. Consequently, the Center has no billing rates for its representation. Of the six Center attorneys working on this case, only Mr. Deford and Ms. Hart, who works half-time for the Center and half-time for the Arizona Center for Disability Law, devote their time exclusively to litigation. Stein Dec., ¶ 11.

As their declarations set out, the attorneys who worked on this case are highly experienced, in years as an attorney, in work on legal subject matters affecting the elderly and disabled in general and in Medicare in particular, and in litigation. All plaintiffs' counsel have devoted virtually their entire legal careers, all of which have been for more than twenty years, to legal services and/or public interest work on behalf of the elderly and disabled. All but Ms. Stein worked for many years for the National Seniors Citizens Law Center, which provides legal assistance to the elderly and disabled around the country and to advocates representing them in a range of legal areas. Ms. Stein co-founded the Center for Medicare Advocacy in 1986 after more than ten years working with local legal services programs, most of which was with a project specializing in assisting Medicare beneficiaries. Ms. Hart, Ms. Stein, Mr. Chiplin, and Ms. Gottlich are among the most experienced and knowledgeable advocates of Medicare law in the country, having spent most of their careers working on Medicare issues. Ms. Nemore is an expert on Medicaid and the relationship between Medicaid and Medicare. Ms. Hart is probably the pre-eminent Medicare litigator in the country, having represented Medicare beneficiaries since 1975. Mr. Deford, who clerked for a federal judge immediately after law school, has been

litigating since 1976, mostly in federal court, on a variety of issues affecting the elderly and disabled, including Medicare, Medicaid, SSI, and pensions.

Plaintiffs’ attorneys, therefore, brought considerable experience, knowledge, and expertise to this case, both in the subject matter of the litigation and in litigation itself.

Given the public interest nature of their law office, which has no billing rates, and their high levels of experience and skill, plaintiffs’ attorneys should have their rates based on the *Laffey* matrix.¹² For work performed from June 1, 2001 through May 31, 2002, by attorneys with 20 or more years of experience, the hourly rate is \$360, and since then the rate is \$370. Plaintiffs believe that those are appropriate rates for the work of all their attorneys, as they all had at least twenty years of experience when their work on this case began (June 1, 2001).

Consequently, the fee should be calculated as follows:

<u>Attorney</u>	<u>6/01/01-5/31/02</u>	<u>6/01/02-11/1/02</u>	<u>Total</u>
Chiplin:	16.3 hours @ \$360: \$5,868	0	\$5,868
Deford:	116.6 hours @ \$360: \$41,976	80.9 hours @ \$370: \$29,933	\$71,909
Gottlich:	171.4 hours @ \$360: \$61,704	14.0 hours @ \$370: \$ 5,180	\$66,884
Hart:	18.6 hours @ \$360: \$ 6,696	0	\$ 6,696
Nemore:	26.5 hours @ \$360: \$ 9,540	1.5 hours @ \$370: \$ 555	\$10,095
Stein:	14.7 hours @ \$360: \$ 5,292	0	\$5,292
TOTAL:	364.1 hours @ \$360: \$131,076	96.4 hours @ \$370: \$35,668	\$166,744

Plaintiffs therefore request that attorneys’ fees be rewarded, pursuant to 28 U.S.C. § 2412(b), in the amount of \$ 166,744.

¹² A copy of the most recent version of the *Laffey* matrix is attached to the Declaration of Gill Deford as exhibit A.

2. Rates under subsection (d): For an award under subsection (d), however, a different calculation must be employed, as “attorney fees shall not be awarded in excess of \$125 per hour unless the court determines that an increase in the cost of living ... justifies a higher fee.” 28 U.S.C. § 2412(d)(2)(A)(ii). Because there has been a rise in the cost of living, courts invariably authorize the increase. See, e.g., *F.J. Vollmer Co., Inc.*, 102 F.3d at 599; *Willett v. I.C.C.*, 844 F.2d 867, 874 (D.C.Cir. 1988); *Nong v. Reno*, 28 F.Supp.2d 27, 30 (D.D.C. 1998); *Chen v. Slattery*, 842 F.Supp. 597, 600 (D.D.C. 1994).

In making the calculation, the “historic” rate, or rate for the calendar year in which the work was done (as opposed to the current rate), is used to calculate each year’s fee amount. *Masonry Masters, Inc. v. Nelson*, 105 F.3d 708, 711-713 (D.C.Cir. 1997). The annual rate is calculated by using the cost of living at the time that the EAJA cap was reset to \$125 (March 1996) as the base, see, e.g., *National Ass’n of Mfrs. v. U.S. Dept. of Labor*, 962 F.Supp. 191, 198 n.13 (D.D.C. 1997), and then applying the ratio of price increase in that geographic area to the \$125 figure. See, e.g., *Nong*, 28 F.Supp.2d at 30-31; *Chen*, 842 F.Supp. at 600 & n.2. The U.S. Attorney’s Office uses the Bureau of Labor Statistics’ (BLS) Consumer Price Index for All Urban Consumers (CPI-U) for the Washington metropolitan area and determines each year’s rate by taking the average rate for that year based on the bi-monthly rates compiled by the BLS. See *Chen*, 842 F.Supp. at 601. (The calculation is rendered slightly more complicated because the BLS combined the Baltimore and Washington metropolitan areas in November 1996. Consequently, there has to be one calculation for the period from March 1996 to November 1996, and a separate calculation for the period from November 1996 on.¹³)

¹³ The CPI-U’s for the old and new Washington metropolitan areas are attached as

Based on this formula, plaintiffs calculate their rates as follows:

I. The November 1996 figure

- 1) The CPI-U for the (old) Washington metropolitan area in March 1996: *158.4*.
- 2) The CPI-U for the (old) Washington metropolitan area in November 1996: *161.2*.
- 3) Applying the ratio of increase (161.2 divided by 158.4) to \$125: *\$127.21* for November 1996.

II. The rate for work in 2001

- 1) The CPI-U for the (new) Washington metropolitan area in November 1996: *100.0*.
- 2) The average CPI-U for the (new) Washington metropolitan area in 2001: [(108.9 + 109.7 + 110.1 + 110.8 + 111.7 + 110.9) = 662.1] divided by 6 = *110.35*.
- 3) Applying the ratio of increase (110.35 divided by 100) to \$127.21: ***\$140.38***.

III. The rate for work in 2002

- 1) The CPI-U for the (new) Washington metropolitan area in November 1996 was *100.0*.
- 2) The average CPI-U (to date) for the (new) Washington metropolitan area in 2002: [(110.9 + 111.9 + 112.8 + 113.4 + 114.0) = 563.0] divided by 5 = *112.6*.
- 3) Applying the ratio of increase (112.6 divided by 100) to \$127.21: ***\$143.24***.

Consequently, if the Court awards fees based on subsection (d), the hourly rate should be \$140.38 for work in 2001 and \$143.24 for work in 2002. That produces the following result:

<u>Attorney</u>	<u>2001</u> (@ \$140.38)	<u>2002</u> (@ \$143.24)	<u>Total</u>
-----------------	--------------------------	--------------------------	--------------

exhibit B to the Declaration of Gill Deford.

Chiplin:	16.3 hours: \$ 2,288.19	0	\$2,288.19
Deford:	115.8 hours: \$16,256.00	81.7 hours: \$ 11,702.71	\$27,958.71
Gottlich:	165.4 hours: \$23,218.85	20.0 hours: \$ 2,864.80	\$26,083.65
Hart:	18.6 hours: \$ 2,611.07	0	\$2,611.07
Nemore:	26.5 hours: \$ 3,720.07	1.5 hours: \$ 214.86	\$3,934.93
Stein:	14.7 hours: \$ 2,063.59	0	\$2,063.59
TOTAL:	357.3 hours: \$50,157.77	103.2 hours: \$ 14,782.37	\$64,940.14

Therefore, if fees are awarded pursuant to 28 U.S.C. § 2412(d), the appropriate amount is \$64,940.17.

CONCLUSION

The Court should find that the Secretary acted in bad faith and award fees pursuant to 28 U.S.C. § 2412(b) in the amount of \$ 166,744. Alternatively, if the Court determines only that the Secretary’s position was not substantially justified, the award of fees under 28 U.S.C. § 2412(d) should be \$ 64,940.17.

Respectfully submitted,

By: _____
VICKI GOTTLICH
D.C. Bar No. 937185
PATRICIA NEMORE
D.C. Bar No. 204446
Center for Medicare Advocacy, Inc.
1101 Vermont Ave., N.W., Suite 1001
Washington, D.C. 20005
(202) 216-0028

GILL DEFORD
D.C. Bar No. 459280
JUDITH STEIN
Center for Medicare Advocacy, Inc.
P.O. Box 350

Willimantic, CT 06226
(860) 456-7790

SALLY HART
Center for Medicare Advocacy, Inc.
100 N. Stone Ave., Suite 305
Tucson, AZ 85701
(520) 327-9547

DATED: November , 2002

Attorneys for Plaintiffs