

UNITED STATES COURT OF APPEALS  
THURGOOD MARSHALL UNITED STATES COURTHOUSE  
40 FOLEY SQUARE  
NEW YORK, NY 10007

CATHERINE O'HAGAN WOLFE  
CLERK OF COURT

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October 23, 2019

Robert P. Charrow  
General Counsel  
United States Department of Health and Human Services  
200 Independence Ave., S.W., Room 713-F  
Washington, D.C., 20201

Re: *Lisnitzer v. Zucker*, No. 19-470-cv

Dear Mr. Charrow:

On December 19, 2019, a panel of the Second Circuit will hear the case *Lisnitzer v. Zucker*, 19-470-cv. One of the two questions on appeal is whether current New York State Medicaid fair hearing decisions that remand to the local agency with instructions to conduct further analysis qualify as “final administrative actions[s]” for purposes of the Medicaid regulations. *See* 42 C.F.R. § 431.244(f)(1).

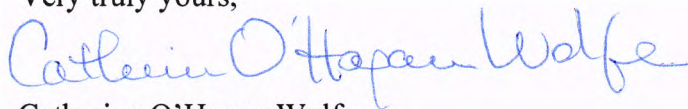
We have previously considered the scope of the Section 431.244 “final administrative action” language in *Shakhnes v. Berlin*, 689, F.3d 244 (2d Cir. 2012), but that opinion does not resolve the precise question at hand. An administrative remand like the one at issue in the case exists in other jurisdictions, including Idaho and Virginia. *See* Idaho Admin. Code rs. 16.05.03.138, 16.05.03.152; 12 Va. Admin. Code § 30-110-370(A).

Given the importance of the issue, the parties’ diverging interpretations of the statutory and regulatory language, and the policy implications for the Medicaid program that would result from our resolution of this case, the Court hereby solicits any views the Department of Health and Human Services may have on the subject. While the Court would welcome any response, in the form of a letter brief or amicus brief, it is particularly interested in the Department’s views regarding the following: (1) whether the applicable statutes and regulations, including 42 U.S.C. § 1396, 42 C.F.R. § 431.244 and § 431.246, require a state’s fair hearing to decide the fate of the applicant’s eligibility for Medicaid benefits conclusively and (2) the policy implications of resolving this case in favor of the plaintiff or defendants.

We would appreciate a response of no more than twenty double-spaced pages either in letter or brief format by December 5, 2019.

Thank you for your assistance.

Very truly yours,



Catherine O'Hagan Wolfe

cc: Noel Francisco,  
Solicitor General of the United States  
Blair Greenwald,  
Assistant Solicitor General of the State of New York  
Peter Vollmer, Esq.