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Case No. 45187-2017

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE CERTIFIED QUESTION OF LAW:

POCATELLO HOSPITAL, LLC dba PORTNEUF MEDICAL CENTER,

Appellant,

vs.

CORIZON LLC,

Respondent.

APPELLANT'S REPLY BRIEF

ON ORDER CERTIFYING QUESTION TO THE IDAHO SUPREME COURT FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF IDAHO
Honorable Chief U.S. Magistrate Judge Ronald E. Bush, presiding
District of Idaho Case No. 4:16-CV-00032-REB

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INTRODUCTION

The Respondent's Brief filed by Corizon fails to address the certified question of law. The arguments contained in the Respondent's Brief are therefore irrelevant to the narrow issue before this Court. For the reasons discussed below, it is respectfully requested that the Court limit its decision to answering the certified question of law by holding that that terms "state board of correction" as used in I.C. § 20-237B(1) and "department of correction" as used in I.C. § 20-237B(2) do not include privatized correctional medical providers under contract with IDOC.

In so doing, the Court should not consider facts in the briefs on appeal that are not contained in the federal court's certification order. Corizon's attempt to abandon and replace the certified question of law with a different question of fact concerning whether it is IDOC's agent should be rejected. The question of whether Corizon is IDOC's agent should be deemed irrelevant to the applicability of the Medicaid Rate Limitation in I.C. § 20-237B. Corizon's proposed application of I.C. § 20-237B should be rejected, because it would void and make superfluous portions of that statute. Lastly, if the Court decides to consider Corizon's question of fact concerning whether it is IDOC's agent, the Court should find that Corizon is not IDOC's agent for purposes of payment to local medical providers and that Corizon's refusal to pay more than the Idaho Medicaid rate to PMC for services provided to Idaho inmates violates I.C. § 20-237B because those services are not "billed directly" to IDOC. Lastly, judicial deference should not be given to any purported IDOC interpretation of I.C. § 20-237B because no agency interpretation existed prior to the filing of the present litigation.

ARGUMENT IN REPLY

I. The Court should disregard all facts contained in both briefs on appeal which are not contained in the federal court's certification order.

When considering a certified question of law, the only facts that are considered by the Court are those contained in the federal court's certification order. *White v. Valley County*, 156 Idaho 77, 78, 320 P.3d 1236, 1237 (2014) ("When considering a certified question of law, this Court will consider "only those facts contained in the [certification] order."); *St. Luke's Magic Valley Reg'l Med. Ctr. v. Luciani (In re Order Certifying Question to Idaho Supreme Court)*, 154 Idaho 37, 40, 293 P.3d 661, 664 (2013) ("If 'the parties in their briefs and arguments before this Court present[] facts outside' the certification order, we consider 'only those facts contained in the order.'"); *Kunz v. Utah Power & Light Co.*, 117 Idaho 901, 903 n.1, 792 P.2d 926, 928 n.1 (1990) ("Although the parties in their briefs and arguments before this Court presented facts outside the Ninth Circuit's certification order, we consider only those facts contained in the order.").

Under these cases, facts not contained in the federal court's certification order are not considered by the Court with regard to a certified question even if both parties include those facts in their respective briefs. This would suggest that the parties cannot compel the Court through mere use or stipulation to consider facts not contained in the federal court's certification order.[1] It is recognized that this affects consideration of both the Appellant's Brief and the Respondent's Brief.

[1] On September 8, 2017, PMC and Corizon submitted a "Stipulation re: Record on Appeal." That Stipulation was a stipulation of the record and not a stipulation of facts.

II. The Court should reject Corizon's attempt to abandon and replace the question of law certified in this matter.

On page 5 of the Respondent's Brief, Corizon gives lip-service to the narrow question of law certified by the Court in this matter by merely quoting it:

> Whether, for purposes of the dispute in this lawsuit, the terms "state board of correction" as used in Idaho Code § 20-237B(1) and "department of correction" as used in Idaho Code § 20-237B(2), include privatized correctional medical providers under contract with the Idaho Department of Correction?

However, on page 6 of the Respondent's Brief, Corizon quickly abandons this certified question of law and attempts to replace it with Corizon's own unilaterally crafted question of fact:

> Instead, the question is whether, in this particular dispute, Corizon was acting as the IDOC, such that the statutory reimbursement rate cap in Idaho Code § 20-237B applies. The answer to this question turns on whether Corizon was acting as the agent of IDOC in this particular dispute.

The Court should reject Corizon's attempt to abandon and replace the question of law certified in this matter with a question of fact concerning whether it is IDOC's agent. The question of whether Corizon is IDOC's agent was not the question that Corizon jointly moved the federal court to propose for certification.[2] Nor was it the question of law that the federal district court proposed to the Idaho Supreme Court for certification.[3] Nor was it the question of law certified by this Court.

In addition, the question of whether Corizon is IDOC's agent is inappropriate for certification under I.A.R. 12.3, because it is a question of fact and not a question of law. "The existence or lack of authority of an agent is a question of fact." *Idaho Title Co. v. Am. States Ins. Co.,* 96 Idaho

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[2] R. Vol. 3, pp. 659-661 (Revised Motion to Certify Question of Law to the Idaho Supreme Court).
[3] R. Vol. 3, pp. 662-70 (Federal Court's certification order).

465, 468, 531 P.2d 227, 230 (1975); *see also Adkison Corp. v. Am. Bldg. Co.*, 107 Idaho 406, 409, 690 P.2d 341, 344 (1984) ("[T]he existence of an agency relationship is a question for the trier of fact to resolve from the evidence."); *Hilt v. Draper*, 122 Idaho 612, 616, 836 P.2d 558, 562 (Ct. App. 1992) ("Whether an agency relationship existed is a question of fact.").

The question of whether Corizon is IDOC's agent is not properly before the Court. "The Court's role 'is limited to answering the certified question' when the question it presents is narrow." *White,* 156 Idaho at 80, 320 P.3d at 1239. Corizon acknowledges this legal principle on page 5 of its Respondent's Brief and quotes *Peone v. Regulus Stud Mills, Inc.,* 113 Idaho 374, 375, 744 P.2d 102, 103 (1987) for the proposition that "to now decide [extraneous matters] would result in an advisory opinion on a question not certified."

Thus, the Court should limit its review to the question of law certified in this matter:

> Whether, for purposes of the dispute in this lawsuit, the terms "state board of correction" as used in Idaho Code § 20-237B(1) and "department of correction" as used in Idaho Code § 20-237B(2), include privatized correctional medical providers under contract with the Idaho Department of Correction?

Since this is the narrow question of law certified by the Idaho Supreme Court in this matter, one would expect the Respondent's Brief to address whether the terms "state board of correction" and "department of correction" as used in I.C. § 20-237B include privatized correctional medical providers. The Respondent's Brief, however, is devoid of any such argument or discussion. The Respondent's Brief wholly ignores the narrow question of law certified by the Court in this matter. Because the Respondent's Brief does not address the certified question of law, the arguments contained therein are irrelevant and should not be considered.

III. Even if the Court considers whether Corizon is IDOC's agent, it is irrelevant to the applicability of I.C. § 20-237B.

Whether Corizon is IDOC's agent is irrelevant to the applicability of I.C. § 20-237B. As discussed at length in the Appellant's Brief, when enacting I.C. § 20-237B, the Idaho legislature was only concerned about inmate medical expenses that IDOC might have to pay directly when those expenses were not otherwise paid by a third-party contractor. The legislature intended for the Medicaid Rate Limitation in I.C. § 20-237B to apply only to medical services that are "billed directly" to IDOC such as in the absence of a total-risk contract with a third-party contractor.

The language of I.C. § 20-237B achieves this legislative intent. Idaho Code § 20-237B(1) provides: "The state board of correction shall pay to a provider of medical service...an amount no greater than...the Idaho medicaid reimbursement rate." (Underline added). Idaho Code § 20-237B(2) defines "provider of a medical service" as including "only...health care service entities whose services are billed directly to the department of correction." (Underline added). If this definition from I.C. § 20-237B(2) is transposed into I.C. § 20-237B(1), it then reads: **"The state board of correction shall pay to only...health care service entities whose services are billed directly to the department of correction...an amount no greater than...the Idaho medicaid reimbursement rate."**

Pursuant to this unambiguous language in I.C. § 20-237B, the applicability of the Medicaid Rate Limitation is based solely upon whether the medical provider's services are "billed directly" to IDOC. If the services of the local medical provider are "billed directly" to IDOC, the Medicaid Rate Limitation applies. If the services of the local medical provider are not "billed directly" to

IDOC, the Medicaid Rate Limitation does not appeal. It is undisputed that PMC's services were not "billed directly" to IDOC but were instead billed to Corizon as a third-party privatized correction medical provider.[4] Because PMC's services were not "billed directly" to IDOC, payment of PMC's services is not subject to the Medicaid Rate Limitation in I.C. § 20-237B.

Whether the medical services are "billed directly" to IDOC is the only determining factor under I.C. § 20-237B. Consequently, the question of whether Corizon is IDOC's agent is irrelevant to a determination of the applicability of the Medicaid Rate Limitation in I.C. § 20-237B. Because the question of whether Corizon is IDOC's agent is irrelevant under I.C. § 20-237B, this Court should reject Corizon's suggestion to consider that question and, alternatively, reject Corizon's agency argument outright with respect to the certified question of law in this matter.

IV. Even if the Court considers Corizon's agency argument, it should be rejected because it would void and make superfluous the first sentence of I.C. § 20-237B(2).

In its Respondent's Brief, Corizon repeatedly argues that all private contractors are agents of IDOC and therefore entitled to limit all payments to all local medical providers to the Medicaid Rate Limitation under I.C. § 20-237B. The flaw in this argument is that it does not take into consideration whether the medical services are "billed directly" to IDOC. In other words, Corizon appears to be arguing that all private contractors are entitled to limit payments to the Medicaid Rate Limitation without regard to whether the services are or are not "billed directly" to IDOC.

[4] R. Vol. 3, p. 664 (Federal court's certification order) ("PMC was to submit all claims directly to Corizon and not seek payment form IDOC.").

Corizon's argument must be rejected, because it would void and make superfluous the phrase "whose services are billed directly to the department of correction" in the first sentence of I.C. § 20-237B(2) in contravention of the Idaho legal principle that "effect must be given to all the words of the statute if possible, so that none will be void, superfluous, or redundant." *BHC Intermountain Hosp., Inc. v. Ada County*, 150 Idaho 93, 95, 244 P.3d 237, 239 (2010) (quoting *State v. Mercer*, 143 Idaho 108, 109, 138 P.3d 308, 309 (2006)). If the Idaho legislature had desired that all private contractors limit payments to local medical providers for inmate medical care to the Idaho Medicaid rate under every circumstance, the Idaho legislature could have easily eliminated the first sentence of I.C. § 20-237B(2) and could have included language specifically limiting payments by private contractors to the Idaho Medicaid rate. However, the Idaho legislature did not take that approach. It was not the legislature's desired intent. Instead, the Idaho legislature included the first sentence of I.C. § 20-237B(2) and used the "only" for a very specific purpose – that is, for the specific purpose of limiting application of the Idaho Medicaid rate to "only" those medical bills that are "billed directly" to IDOC. Corizon's agency argument must be rejected, because it would void and make superfluous this first sentence of I.C. § 20-237B(2).

On page 17 of the Respondent's Brief, Corizon erroneously argues that PMC's interpretation of I.C. § 20-237B would make superfluous the exception in I.C. § 20-237B(2)(e). The second sentence of I.C. § 20-237B(2), which includes this particular exception, has no application to the present case. The second sentence of I.C. § 20-237B(2) excludes certain entities from the definition of "provider of medical service" and exempts those entities from the Medicaid Rate Limitation

even if those entities directly bill IDOC under the first sentence of I.C. § 20-237B(2). Consequently, the second sentence of I.C. § 20-237B(2) only applies when an entity *directly bills IDOC* but nevertheless wants IDOC to pay it more than the Idaho Medicaid rate. Because PMC does not directly bill IDOC, the second sentence of I.C. § 20-237B(2) has no application to the present case. Moreover, PMC's interpretation of I.C. § 20-237B does not make the exception in I.C. § 20-237B(2)(e) superfluous. Subsection (e) to I.C. § 20-237B(2) excludes from the definition of "provider of medical service" any and all "health care service entities whose services are provided within the terms of agreements with privatized correctional medical providers under contract with the department of correction." (Emphasis added). Whatever terms may be contained in that contract between the privatized correctional medical provider and the local health care service entity will control govern whether the exception in I.C. § 20-237B(2)(e) applies. If that contract between the privatized correction medical provider and the local health care provider includes terms requiring that the local health care services be "billed directly" to IDOC, the exception in I.C. § 20-237B(2)(e) will obviously apply. If the contract requires that the local health care provider bill the privatized correction medical provider instead of IDOC, the exception in I.C. § 20-237B(2)(e) would not apply. This is perfectly in line with PMC's interpretation of I.C. § 20-237B. In other words, PMC's interpretation of I.C. § 20-237B does not make the exception in I.C. § 20-237B(2)(e) superfluous.

V. If the Court considers Corizon's agency argument and the facts in the Record on Appeal, Corizon's agency argument should be rejected.

As discussed above, only those facts contained in the federal court's certification order are considered with respect to a certified question of law. *See White*, 156 Idaho at 78, 320 P.3d at 1237; *Luciani*, 154 Idaho at 40, 293 P.3d at 664; *Kunz*, 117 Idaho at 903 n.1, 792 P.2d at 928 n.1. However, if the Court were to look outside of the federal court's certification order and consider the alleged facts contained in the Record on Appeal, those alleged facts reveal that (1) Corizon is not IDOC's agent for purposes of payments to local providers, (2) the contract between Corizon and IDOC disclaims the existence of any legally imposed discounted rates such as the Idaho Medicaid rate, and (3) Corizon is not only violating I.C. § 20-237B but is also violating IDOC's purported "program" instructions.

A. Corizon is not IDOC's agent for payment to local providers.

The contract between Corizon and IDOC incorporated the "State of Idaho Standard Contract Terms and Conditions."[5] Paragraph 9 of the State of Idaho Contract Terms and Conditions provides the following:

> **Contract Relationship**: It is distinctly and particularly understood and agreed between the parties hereto [i.e. IDOC and Corizon] that the State is in no way associated or otherwise connected with the performance of any service under this Agreement on the part of the Contractor or with the employment of labor or the incurring of expenses by the Contractor. Said Contractor is an independent contractor in the performance of each and every part of this Agreement, and solely and personally liable for all labor, taxes, insurance, required bonding and other expenses, except

[5] R. Vol. 2, p. 431 (Contract Purchase Order); R Vol. 3, pp. 645-52 (State of Idaho Standard Contract Terms and Conditions).

> as specifically stated herein, and for any and all damages in connection with the operation of this Agreement...

(Emphasis added).[6] This provision specifically identifies Corizon as an independent contractor and goes to great lengths to divest IDOC of any connection or liability associated with "any service" provided by Corizon and "the incurring of expenses" by Corizon. In this provision, Corizon admits that it is an independent contractor and "solely and personally liable for all...expenses...and all damages" in connection with the contract. Corizon is not identified as an agent of IDOC anywhere in the contract.

As an independent contractor, Corizon is not IDOC's agent with respect to the payment of inmate medical bills. "As a general rule, independent contractors are not agents." *Melichar v. State Farm Fire & Cas. Co.,* 143 Idaho 716, 722-23, 152 P.3d 587, 593-94 (2007). Corizon contractually agreed to assume full-risk and financial responsibility for all inmate medical bills. The financial obligation to pay for all local medical services was assumed by Corizon as an independent contractor and not as an agent of IDOC.

Contrary to the argument on pages 7-9 of the Respondent's Brief, I.C. § 20-241A(1)(a) does not apply to Corizon. Idaho Code § 20-241A(1)(a) provides: "An authority or private prison contractor, receiving physical custody for the purpose of incarceration of a person sentenced by a court ...shall be considered as acting solely as an agent of this state." (Italics added). Corizon does not receive physical custody of inmates for the purpose of incarceration. Under its contract with

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[6] *Id.*

IDOC, Corizon is only responsible for the provision of medical care to inmates and for the payment of all medical expenses. Thus, Corizon is not an agent of IDOC under I.C. § 20-2341A(1)(a).

However, even if Corizon is considered IDOC's agent, it would be irrelevant to the applicability of the Medical Rate Limitation under I.C. 20-237B, because the sole determining factor under that statute is whether the services of the medical provider are "billed directly" to IDOC.

B. The contract between IDOC and Corizon disclaimed application of the Medicaid Rate Limitation under I.C. § 20-237B.

On or about July 30, 2013, IDOC issued a Request for Proposal ("RFP"), which contained numerous terms designating the resulting contract as a full risk contract and obligating Corizon to negotiate payments with local medical providers.[7] For example, Section 4.1.1 of the RFP states:

> The contract resulting from this RFP to provide healthcare to Idaho Offenders is a full risk contract. The Contractor will be held responsible for the provision of healthcare as described herein, and to absorb costs through the duration of the contract and any renewal periods. **The contractor is responsible for any and all agreements with local healthcare providers, pharmacies, specialists, et al; and for developing efficiencies and controlling costs.**[8]

(Emphasis added). Section 4.8.6 of the RFP states:

> **The Contractor shall contract with one (1) or more local hospitals to provide twenty-four (24) hour emergency services to Offenders and to provide inpatient hospitalization for Offenders if medically necessary**. The Contractor shall utilize the nearest hospital/clinic/medical resource that can provide the service that is required. (Emphasis added).[9]

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[7] Pursuant to IDOC's "Contract Purchase Order" dated November 8, 2013, the terms of the RFP (i.e. "state of Idaho's original solicitation document") are controlling. R. Vol. 2, p. 431 (Contract Purchase Order).
[8] R. Vol. 3, p. 452.
[9] R. Vol. 3, p. 474.

(Emphasis added). Section 4.19.6 of the RFP states:

> The Contractor shall be responsible for payment of all medical claims for Offenders. **The Contractor shall have in place contracts or written agreements with medical providers for both inpatient and outpatient services and must negotiate payment rates with these providers to ensure the provision of services to the incarcerated population.** The Offeror is financially responsible for claims from subcontractors or other providers for services provided prior to contract expiration. (Emphasis added).[10]

(Emphasis added).

These sections from the RFP are incorporated into the contract between IDOC and Corizon, have not been amended, and remain in full force and effect.[11] Under these terms in the RFP, Corizon was contractually obligated to "negotiate payment rates" with local medical providers "to ensure the provision of services to the incarcerated population." In addition to negotiating these payment rates, Corizon was contractually obligated to contract with the nearest hospital that could provide required services. PMC is the nearest hospital to the Pocatello Women's Correction Center. By including terms requiring that Corizon negotiate payment rates with local medical providers, IDOC and Corizon jointly acknowledged that the Medicaid Rate Limitation in I.C. § 20-237B did not apply to payments Corizon would make to local medical providers. Only by negotiating payment rates with local medical providers could Corizon ensure that inmates receive the constitutional mandated level of care to which they are entitled. By refusing to negotiate payment rates

[10] R. Vol. 3, p. 520.
[11] R. Vol. 2, p. 431 (Contract Purchase Order).

with local providers at any level above the Idaho Medicaid rate, Corizon is placing at risk the availability of medical care for Idaho inmates.

By including terms requiring that Corizon negotiate payment rates with local medical providers, the contract between IDOC and Corizon disclaimed application of the Medicaid Rate Limitation under I.C. § 20-237B. In light of those terms, both IDOC and Corizon fully understood and agreed when signing the contract on November 8, 2013, that Corizon would have to negotiate payment rates with local medical providers because those rates are not otherwise set by Idaho law.

Corizon's refusal to negotiate payment rates above the Idaho Medicaid rate with local medical providers including PMC is in violation of Corizon's contract with IDOC as well as in violation of I.C. § 20-237B which applies the Medicaid Rate Limitation only when the services of the local medical provider are "billed directly" to IDOC.

C. Contrary to Corizon's argument, Amendment 4 to the RFP and the subsequent IDOC letters do not justify Corizon's current conduct but instead spotlight Corizon's continuing violation of I.C. § 20-237B and IDOC's alleged "program" instructions.

As mentioned above, IDOC issued its RFP on or about July 30, 2013. Amendment 4 to the RFP was issued on September 13, 2013, and provided in relevant part the following:

> **3.9 Medicaid Rates During Hospital Stays**
> The IDOC is presently pursuing **a program that would allow the Contractor to realize reduced costs for Offenders hospitalized for over twenty-four (24) hours.** If the IDOC is successful in developing this program, Medicaid rates would be applied

> to those services rendered during the hospital stay. For any services provided within twenty-three (23) hours, Medicaid rates will not apply....
> http://legislature.idaho.gov/idstat/Title20/T20CH2SECT20-237BPrinterFriendly.htm
>
> Offerors shall propose two (2) additional Per Diem rates to be considered responsive, which are stated as follows in Attachment 5, Cost Proposal Form:
>
> - Per Diem cost per Offender, per day as Per Diem One with Medicaid Rates
> - Per Diem cost per Offender, per day as Per Diem Two with Medicaid Rates
>
> The IDOC does not guarantee that this program will be developed and put into effect. If such a program is put into effect, the Per Diem that the Contractor will charge under the contract must change to the Per Diem (with Medicaid Rates) that the State specifies in a letter to the Contractor. That change must occur no later thirty (30) calendar days after the date of that letter. (The change that the State will direct in that letter will be either from Per Diem One to Per Diem One with Medicaid Rates, or from Per Diem Two to Per Diem Two with Medicaid Rates.) (Emphasis added).[12]

In response to Amendment 4 to the RFP, Corizon submitted a Cost Proposal Form offering to assume the full risk of all inmate medical care under a contract with IDOC at a "Per Diem cost per Offender, per day as Per Diem One" without Medicaid Rates of $15.31 and alternatively at a "Per Diem cost per Offender, per day as Per Diem One, with Medicaid Rates" of $14.66.[13]

Amendment 4 to the RFP did not provide a description of the "program" IDOC was allegedly pursuing and, despite containing a link to I.C. § 20-237B, did not provide any explanation for how I.C. § 20-237B legally allowed Corizon to make reduced payments to local medical providers when inmates were "hospitalized for over twenty-four (24) hours" but not when medical services were provided in less than twenty-four (24) hours. Notably, there is no language in I.C. § 20-237B

[12] R. Vol. 3, pp. 641-43.
[13] R. Vol. 1, p. 88.

differentiating medical services in that way. Nor did Amendment 4 contain any explanation of how Corizon could make reduced payments to local medical providers when the services were not "billed directly" to IDOC but were instead billed to Corizon.

Although Amendment 4 to the RFP does not describe the "program" IDOC was considering, the reference to the applicability of Medicaid rates being dependent upon whether twenty-four (24) hour hospitalization was necessary suggests a program of formally enrolling inmates in the federal Medicaid program as discussed in the following:

> ...[S]tate governments are beginning to use Medicaid to fund prison health expenses. This change is largely due to the Patient Protection and Affordable Care Act (Affordable Care Act or ACA), which significantly expanded the number of people eligible to enroll in Medicaid, and provides that the federal government will pay nearly the entirety of the health costs of these newly eligible individuals. Since the program's inception in 1965, the law has prohibited federal "payments with respect to care or services for any individual who is an inmate of a public institution," effectively prohibiting states from enrolling incarcerated individuals in Medicaid. However, in 1997 the Centers for Medicare and Medicaid Services (CMS) - the federal agency tasked with overseeing Medicaid - interpreted the law to mean that incarcerated individuals were not "inmates of a public institution" **if they had been admitted to a hospital, inpatient facility, or nursing home not under the authority of the corrections agency for more than twenty-four hours**. CMS's interpretation thus allows federal Medicaid payments to reimburse states for certain health services provided to incarcerated individuals during the periods they are not considered "inmates." **Though some states already seek such reimbursement [from Medicaid], most states have not, until recently**, due to the confusion over which services are eligible for federal reimbursement and the administrative burdens of tracking and billing for these services.
>
> . . . .
>
> Further restrictions imposed by states themselves limit the availability of Medicaid's legal protections for incarcerated individuals. As described above, federal law does not limit an incarcerated individual's eligibility for Medicaid coverage, meaning that she can be enrolled during her incarceration if she meets other eligibility requirements. Upon an individual's incarceration, states either terminate enrollment in public benefits entirely or suspend it temporarily. . ..
>
> . . . .

> The distinction between termination and suspension is significant because it impacts whether an incarcerated individual is a Medicaid beneficiary and could claim the protections of Medicaid law, which will be discussed below. If a state terminates Medicaid enrollment, it may still seek federal reimbursement from qualifying expenses, though to do so it would have to enroll an individual in coverage, seek reimbursement, and again terminate coverage each time an incarcerated individual has a qualifying expense. This administrative burden is one major reason why states have avoided seeking Medicaid reimbursement for prison health costs. However, CMS encourages states to suspend coverage, rather than terminate it, and the National Commission on Correctional Health Care recommends suspension as well.
>
> . . . .
>
> As of early 2015, nine states both allow Medicaid enrollment during incarceration and offer coverage to most of their incarcerated population through the ACA's Medicaid eligibility expansion. These states are California, Colorado, Iowa, Maryland, Minnesota, New York, Ohio, Oregon, and Washington. . ..

ARTICLE: Medicaid Reform, Prison Healthcare, and the Due Process right to a Fair Hearing, 40 N.Y.U. Rev. L. & Soc. Change 429, 432-433 & 447-450 (citing 42 U.S.C. § 1396a(a)(3), 42 U.S.C. § 1396a(a)(10)(A), 42 U.S.C. § 1396d(a)(A) & 42 C.F.R. § 435.1010 (2012)) (emphasis added); *see also* ARTICLE: Medicaid and Financing Health Care for Individuals Involved with the Criminal Justice System, Justice Center of the Council of State Governments (Dec. 2013), https://csgjusticecenter.org/wp-content/uploads/2013/12/ACA-Medicaid-Expansion-Policy-Brief.pdf.

The reference in Amendment 4 to the RFP concerning twenty-four (24) hour hospitalization suggests that IDOC was considering enrolling inmates in the federal Medicaid program to obtain federal reimbursements for inmate medical care requiring hospitalization of more than twenty-four (24) hours. Such a program would have complied with both federal and state law,

would have reduced the cost of inmate medical care to Corizon, and would have reduced IDOC's costs of the contract with Corizon under Amendment 4 to the RFP.

On June 6, 2014, Pat Donaldson, IDOC Division Chief of Management Services, sent a letter to Corizon, which stated:

> The IDOC wishes to begin **the program** referenced in Amendment 4 of RFP02540, which is now a part of contract CP002617, **relating to Medicaid rates for hospital stays in excess of 23 hours**.
>
> . . . .
>
> Pursuant to § 3.9, Medicaid Rates During Hospital Stays, the IDOC hereby notifies Corizon to charge the Per Diem (with Medicaid Rates) as set forth in Corizon's Cost Proposal in Attachment Five Cost Proposal Form (the "Cost Proposal") effective July 1, 2014. As of July 1, 2014, Corizon shall charge Per Diem cost per Offender, per day as Per Diem One, with Medicaid Rates under the Cost Proposal ($14.66) ....[14]

(Emphasis added).

This letter's reference to hospital stays in excess of 23 hours again suggests that IDOC's "program" was to enroll inmates in the federal Medicaid program and thereby receive federal reimbursements for medical care requiring hospitalization. However, IDOC for some unexplained reason apparently did not enroll Idaho inmates in the federal Medicaid program. Instead, relying upon IDOC's letter from June 6, 2014, Corizon has since at least January 1, 2016, refused to pay any more than the Idaho Medicaid rate for any and all inmate medical services provided by PMC, without regard to the amount of time spent in the hospital and without regard to whether the medical services were "billed directly" to IDOC.[15]

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[14] R. Vol. 2, p. 422.
[15] R. Vol. 3, pp. 662-70 (Federal court's certification order).

There is a glaring inconsistency between IDOC's letter from June 6, 2014, and what Corizon ended up doing. In the letter, IDOC said it "wished" to begin "the program ... relating to Medicaid rates for hospital stays in excess of 23 hours." (Underline added). What Corizon ended up doing was applying the Idaho Medicaid rate to all inmate medical services regardless of the amount of time spent in the hospital.[16] In so doing, Corizon has at the very least violated the directive in IDOC's letter from June 6, 2014. Notwithstanding, applying the Medicaid Rate Limitation to any medical bill without regard to whether the services are "billed directly" to IDOC is in violation of I.C.§ 20-237B as well.

The closest we get to deciphering IDOC's thought process is found in a letter dated May 8, 2015, that the IDOC Division Chief of Management Services allegedly sent to PMC. PMC disputes having received this letter.[17] In that letter, the sole reason given by IDOC for implementing the undefined "program" was because "Corizon Health had the ability and technology to administer the processing of the hospital claims."[18] However, just because a private contractor has the technological ability to calculate and pay Idaho Medicaid rates does not provide legal authority for the private contractor to do so. Under I.C. § 20-237B, the application of the Idaho Medicaid rate is not contingent upon a private contractor having sufficient technological ability; rather, it is contingent only upon whether the medical services are "billed directly" to IDOC.

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[16] *Id.* (Federal court's certification order, stating "Regardless, as of July 1, 2014, Corizon has paid PMC at the Medicaid reimbursement rate identified in the statute.").
[17] *Id.* (Federal court's certification order, stating "Corizon claims to have sent a letter to PMC in May of 2014...PMC says it never received such a letter.").
[18] R. Vol. 3, pp. 657-58.

Idaho Code § 20-237B was enacted in 2005. The statute has not change in any material respect since its enactment. For nearly a decade after the enactment of I.C. § 20-237B, Corizon under its contracts with IDOC paid local medical providers including PMC at rates above the Idaho Medicaid rate. Had IDOC actually believed that Corizon could not pay more than the Idaho Medicaid rate under I.C. § 20-237B, IDOC would have taken that position years before 2014. Furthermore, there is nothing in the Record on Appeal in which IDOC provides any legal analysis or interpretation of I.C. § 20-237B. Amendment 4 to the RFP and the IDOC's letters mentioned above do not describe the so-called "program" IDOC wished to implement. Those documents do not explain how the language of I.C. § 20-237B allows Corizon to limit payments to the Idaho Medicaid rate based simply upon technological ability without regard to whether the services are "billed directly" to IDOC. Amendment 4 to the RFP and the IDOC's letters mentioned above do not even discuss Corizon's new argument regarding it being an agent of IDOC.

Amendment 4 to the RFP and the IDOC letter dated June 6, 2014, are the only documents referenced above that are directed by IDOC to Corizon.[19] It should be noted that Amendment 4 to the RFP and this IDOC letter do not expressly direct Corizon to limit its local provider payments to the Idaho Medicaid rate. Any suggestion by Corizon to the contrary should be rejected. Amendment 4 to the RFP indicates that IDOC was only considering the implementation of its undefined "program." And IDOC's letter dated June 6, 2014, only expresses IDOC's "wish" to implement

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[19] IDOC's letter dated May 8, 2015, was not directed to IDOC. It was purportedly directed to PMC.

its undefined "program" and instructs Corizon to bill IDOC at the reduced "Per Diem cost per Offender, per day as Per Diem One, with Medicaid Rates."[20]

Contrary to Corizon's argument, Amendment 4 to the RFP and the IDOC letters mentioned above do not justify Corizon's current conduct but instead spotlight Corizon's continuing violation of I.C. § 20-237B by not considering whether the services are "billed directly" to IDOC. They also spotlight Corizon's continuing violation of IDOC's purported "program" by failing to apply the Idaho Medicaid rates to only those medical services requiring hospitalization of more than twenty-four (24) hours.[21] They also spotlight Corizon's continuing violation of its contract with IDOC by failing to negotiate payment rates with local medical providers such as PMC.

VI. Because there is no IDOC interpretation of I.C. § 20-237B in the Record on Appeal, there is no basis for judicial deference.

In the Respondent's Brief, Corizon argues that this Court "should defer to ... the IDOC's construction of Idaho Code § 20-237B."[22] The flaw in this argument is that the Record on Appeal does not contain a formal interpretation of I.C. § 20-237B from IDOC. When there is no agency interpretation, there is nothing upon which judicial deference may rest.

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[20] R. Vol. 2, p. 422.

[21] However, even if Corizon applied the Idaho Medicaid rate only to services requiring hospitalization of more than twenty-four (24) hours, it would still violate I.C. § 20-237B if the Medicaid Rate Limitation was applied to services that were not "billed directly" to IDOC.

[22] Respondent's Brief at p. 15.

A. There is no agency interpretation of I.C. § 20-237B addressing the certified question of law before this Court.

The narrow question certified by the Idaho Supreme Court in this matter is as follows:

> Whether, for purposes of the dispute in this lawsuit, the terms "state board of correction" as used in Idaho Code § 20-237B(1) and "department of correction" as used in Idaho Code § 20-237B(2), include privatized correctional medical providers under contract with the Idaho Department of Correction?

There is nothing in the Record on Appeal in which IDOC provides an interpretation of the terms "state board of correction" and "department of correction" as used in Idaho Code § 20-237B or in which IDOC attempts to construe those terms as used in that statute as including privatized correctional medical providers under contract with IDOC. No such interpretation is contained in Amendment 4 to the RFP or the two IDOC letters mentioned above. There is simply no agency interpretation of I.C. § 20-237B addressing the certified question of law currently before the Court. Because there is no such agency interpretation in the Record on Appeal, Corizon's deference argument should be rejected.

B. There is no agency interpretation of I.C. § 20-237B construing Corizon as an agent of IDOC.

The Record on Appeal does not contain an IDOC document interpreting I.C. § 20-237B or any other Idaho statute as allowing Corizon as an alleged agent of IDOC to limit its payments to local medical providers to the Idaho Medicaid rate without regard to whether the services of the local medical providers are "billed directly" to IDOC. Amendment 4 to the RFP and the two IDOC letters don't even mention Corizon being IDOC's agent. Because there is no such agency interpretation in the Record on Appeal, Corizon's deference argument should be rejected.

C. **Amendment 4 to the RFP and the subsequent IDOC letters are not agency interpretations entitled to judicial deference.**

Regardless of the contents of Amendment 4 to the RFP and the IDOC letters mentioned above, those documents are not agency interpretations entitled to judicial deference. Corizon's argument for judicial deference should be rejected for the same reasons that it was rejected in the watershed case of *J.R. Simplot Co. v. Idaho State Tax Comm'n*, 120 Idaho 849, 860, 820 P.2d 1206, 1217 (1991).

In the *J.R. Simplot* case, the Idaho State Tax Commission issued a notice of deficiency to Simplot Chemical Company ("Simplot"). On appeal, the Tax Commission argued that its interpretation of the relevant tax statute should be given considerable deference. In its decision, the Idaho Supreme Court explained that "the level" of deference to be given to an agency's construction of a statute is dependent upon (1) whether the agency was entrusted with the responsibility to administer the statute at issue, (2) whether the agency's statutory construction is reasonable, (3) whether the statutory language at issue does not treat the precise issue, and (4) whether the rationales underlying the rule of deference are present. *Id.* at 862, 820 P.2d at 1219. The rationales of deference addressed by the Court include (a) whether the agency interpretation had been relied upon by the citizens of the state over a substantial period of time such that its undoing by the judiciary would unsettle the repose of those who have detrimentally relied thereon, (b) whether the agency's interpretation was any more practical than the interpretation offered by the opposing party, (c) whether there was a presumption of legislative acquiescence shown by more than mere inaction by the

legislature, (d) whether the agency's interpretation was made contemporaneously with the enactment of the statute, and (e) whether the agency has any expertise with respect to the issue addressed in the statute. *Id.* at 857-59, 862-66, 820 P.2d at 1214-16, 1219-23. "[T]he absence of one rationale in the presence of others could, in an appropriate case, still present a 'cogent reason' for departing from the agency's statutory construction." *Id.* at 863, 820 P.2d at 1220.

In applying these legal principles, the Idaho Supreme Court in the *J.R. Simplot* case concluded that the first three factors were satisfied. Nevertheless, "[e]ven though the Tax Commission's interpretation is reasonable," the Court held that the interpretation was "not entitled to considerable weight because our balancing of rationales supporting the rule of judicial deference provide 'cogent reasons' for leaving the Tax Commission's interpretation merely to its persuasive value." *Id.* at 863, 802 P.2d at 1220. The Supreme Court held that deference of the Tax Commission's otherwise reasonable interpretation was not justified because (1) the rationale of repose was not met since the Tax Commission's statutory interpretation had not existed over a sufficient period of time for reliance by Idaho citizens; (2) Simplot's interpretation was more practical than the Tax Commission's interpretation, (3) there was no evidence of legislative acquiescence beyond legislative inaction, (4) the Tax Commission's notice of deficiency containing its purported interpretation was not issued contemporaneously with the enactment of the statute at issue, and (5) the notice of deficiency was not a final agency rule or regulation. *Id.* at 863-66, 820 P.2d at 1221-23.

These same "cogent reasons" for not giving deference exist in this case with respect to the alleged interpretation by IDOC.[23] Just as in the *J.R. Simplot* case, IDOC's purported interpretation of I.C. § 20-237B is not contained in a final agency rule or regulation but is instead allegedly contained in Amendment 4 to the RFP and two informal letters. Just as in the *J.R. Simplot* case, IDOC's purported interpretation of I.C. § 20-237B allegedly contained in Amendment 4 to the RFP and the two informal letters were not issued by IDOC until 2013, 2014 and 2015, respectively, which was nearly a decade after enactment of I.C. § 20-237B in 2005. *See* Idaho Session Laws 2005, ch. 157, § 1. Just as in the *J.R. Simplot* case, the Court is not faced with an agency interpretation that has been relied upon by the Idaho citizens for years since IDOC's purported new interpretation of I.C. § 20-237B is a very recent occurrence. Just as in the *J.R. Simplot* case, PMC's interpretation of I.C. § 20-237B is far more practical than the purported interpretation from IDOC, because PMC's interpretation takes into account the "billed directly" language from the statute while IDOC's purported interpretation does not. And just as in the *J.R. Simplot* case, the fact that the Idaho legislature did not amend I.C. § 20-237B during the decade after its enactment is an indication that the legislature acquiesced in the original IDOC's original interpretation requiring that privatized correction medical providers negotiate payment rates with local medical providers instead of simply limiting payments to the Idaho Medicaid rate. Similarly, the new interpretation has not been applied long enough for the Idaho legislature to have acquiesced in its application.

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[23] As discussed above, it is PMC's position that the Record on Appeal does not contain any interpretation by IDOC of I.C. § 20-237B.

Moreover, in the *J.R. Simplot* case, this Court stated that "legislative inaction is a weak reed upon which to lean in determining legislative intent" and that "something more than mere silence is required [to find] implied legislation." *Id.* at 864, 820 P.2d at 1221.

For the same reasons expressed in the *J.R. Simplot* case, there are numerous "cogent reasons" to deny judicial deference to any IDOC interpretation of I.C. § 20-237B that may be contained in Amendment 4 to the RFP or in the IDOC letters mentioned above.

D. If IDOC is permitted to file an amicus brief, any interpretation of I.C. § 20-237B contained in that amicus brief should not be given judicial deference.

In the *J.R. Simplot* case, one of the reasons that the Idaho Supreme Court refused to give judicial deference to the Tax Commission's statutory interpretation was because "the Tax Commission did not issue any regulations on this issue," "did not utilize its expertise in formulating rules," and "did not prepare any regulations."[24] Instead, the Tax Commission's interpretation was only contained in a notice of deficiency. An agency is bound by its duly adopted rules and regulations. Unlike in the case of rules and regulations, an agency can change its mind every time a notice of deficiency is issued. In the *J.R. Simplot* case, the Court's refusal to give judicial deference to the Tax Commission's interpretation contained in a mere notice of deficiency was appropriate.

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[24] *J.R. Simplot*, 120 Idaho at 865, 820 P.2d at 1222 ("While the record does not disclose when the Tax Commission originated its statutory interpretation, it is unrefuted that the Tax Commission did not issue any regulations on this issue."); *Id.* ("[I]n this case the Tax Commission did not utilize its expertise in formulating rules."); *Id.* ("[T]he Tax Commission did not prepare any regulations for the inclusion of income of foreign subsidiaries in a corporation's preapportionment tax base.").

Based on this same reasoning the Ninth Circuit Court of Appeals has held that only "[a]n official, legally binding interpretation is entitled to *Chevron* deference." *Alaska v. Fed. Subsistence Board*, 544 F.3d 1089 (9th Cir. 2008). In the *J.R. Simplot* case, the Idaho Supreme Court quoted and relied upon *Chevron U.S.A. Inc. v. Natural Res. Def. Council Inc.*, 467 U.S. 837 (1984). The deference addressed in *J.R. Simplot* is to a large extent equivalent to the *Chevron* deference under federal law.

In light of the holdings in both the Idaho *J.R. Simplot* case and the federal *Alaska* case, agency interpretations are not entitled to considerable deference if those interpretations are not contained in official legally binding agency interpretations, such as formal agency rules and regulations. For this reason alone, any interpretations of I.C. § 20-237B which may be contained in Amendment 4 to the RFP or the IDOC letters mentioned above are not entitled to considerable deference, because they are not official interpretations legally binding on the agency.

In federal court, a significantly lower level of deference known as *Skidmore* deference may be applied under the right circumstances to official agency interpretations without the force of law. *Alaska*, 544 F.3d at 1095; *Tablada v. Thomas*, 533 F.3d 800 (9th Cir. 2008); *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) ("The weight of [an agency interpretation] will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all of those factors which give it power to persuade, if lacking power to control."). The Idaho Supreme Court has not addressed this lower level of judicial deference applied in federal court. Nor is it necessary to consider this level of deference with respect to the certified question of law.

The point is that federal courts don't even apply the lower *Skidmore* deference to agency interpretations that arise solely in the course of the litigation. In the *Alaska* case, the Ninth Circuit Court of Appeals held:

> [The agencies] have not interpreted "population" as synonymous with "species" in any legally-binding regulation or in any official agency interpretation of the regulation. **Rather, this interpretation appears to be purely a litigation position, developed during the course of the present case. As such, we owe the interpretation no deference.** *United States v. Trident Seafoods Corp.*, 60 F.3d 556, 559 (9th Cir. 1995) ("No deference is owed when an agency has not formulated an official interpretation of its regulation, but is merely advancing a litigation position."). We do not afford *Chevron* or *Skidmore* deference to litigation positions unmoored from any official agency interpretation because "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988) (quoting *Inv. Co. Inst. v. Camp,* 401 U.S. 617, 628, 91 S. Ct. 1091, 28 L. Ed. 2d 367 (1971)).

Alaska, 544 F.3d at 1096 (emphasis added).

In *Presidio Historical Association v. Presidio*, 811 F.3d 1154 (2016), the Ninth Circuit Court of Appeals held:

> In the face of its unsuccessful efforts to persuade the district court to embrace a broad reading of the statute, on appeal, the [agency] advanced a new, narrower interpretation of Section 104(c)(3).... Under this "banking lite" theory, the [agency] argues that the lodge proposal ... are "more than offset[]" ....
>
> .... [T]he new "banking lite" theory—**advanced for the first time on appeal** ... is nothing more than a convenient litigating position. "Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212, 109 S. Ct. 468, 102 L. Ed. 2d 493 (1988) (citation omitted). The "banking lite" interpretation is not the product of any considered development, nor has the [agency's] theory been consistent throughout the administrative process. **Because of the way it came about and its potentially broad reach, we decline to give the litigating position any special deference under *Skidmore*.** *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124

> (1944) ("The weight of [an agency interpretation] will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all of those factors which give it power to persuade, if lacking power to control.").

Presidio, 811 F.3d at 1166 (emphasis added). Under federal law, no deference is given to agency interpretations advanced for the first time in litigation or on appeal.

For these same reasons, it is respectfully requested that this Court not give any level of judicial deference to any interpretation of I.C. § 20-237B that IDOC may present for the first time in this litigation or on appeal in an amicus brief. As suggested in the *J.R. Simplot* case, any such interpretation offered by IDOC for the first time in this litigation or on appeal should not be given any deference and should be left to whatever persuasive value it may have. *See J.R. Simplot*, 120 Idaho at 863, 866, 867, 820 P.2d at 1220, 1223, 1224.

CONCLUSION

For the reasons presented in the Appellant's Brief and in this Reply Brief, it is respectfully requested that the Idaho Supreme Court answer the certified question of law by holding that that terms "state board of correction" as used in I.C. § 20-237B(1) and "department of correction" as used in I.C. § 20-237B(2) do not include privatized correctional medical providers under contract with IDOC. No other question of law or fact should be addressed by this Court.

DATED this 13th day of November 2017.

RACINE OLSON NYE & BUDGE, CHARTERED

By:
SCOTT J. SMITH
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of November 2017, I served two true and correct copies of the above and foregoing document to the following person(s) as follows:

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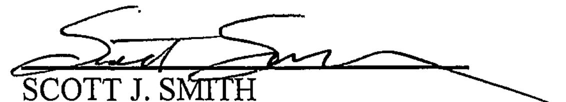
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