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I. THE APPELLEE HAS OFFERED NO LEGAL AUTHORITY IN SUPPORT OF ITS POSITION THAT THE CLASS SHOULD NOT RECEIVE TMA.

Appellants Teresa Kai and Stacey Noller seek a preliminary injunction on behalf of a certified class of approximately 10,000 caretaker relatives, mostly single working mothers like themselves, who have earned income and who lost their Medicaid coverage when Nebraska abandoned "stacking," the method by which it had determined their income eligibility for that program. The class members contend they are entitled to transitional medical assistance (TMA) under the Medicaid Act because, along with being eligible for Medicaid as medically needy caretaker relatives, they were simultaneously eligible as members of the group of people that 42 U.S.C. § 1396u-1 says shall "be treated as receiving" AFDC (the so-called "1931 group"). That group is entitled to receive TMA if they lose their Medicaid coverage because of income from employment. All the parties to this litigation agree that if the class members do indeed fall within the ambit of § 1396u-1 (§ 1931 of the Social Security Act), then they are entitled to TMA.

The class members pointed out in their main brief that the district court, in concluding they were not likely to succeed on the merits, had considered neither a critical section of § 1396u-1 nor the Nebraska statute that authorized stacking, but rather hypothesized that Nebraska had rendered the class members eligible for its

medically needy caretaker relative Medicaid category by raising the income eligibility standards for that program; conduct which, if true, would be inconsistent with Nebraska's published regulations and illegal under the federal Medicaid Act for any state accepting federal financial participation, as does Nebraska.

In response, the appellee (referred to herein either as the appellee or the department) proffers two main arguments. First, he contends that the class members were found eligible as medically needy caretaker relatives, not as people covered by § 1396u-1, and that medically needy caretaker relatives are not entitled to TMA. He suggests that the class' claim to those benefits is premised upon a failure to distinguish between those two categories of Medicaid assistance. Second, appellee asserts that stacking, the methodology by which the class members were found eligible for Medicaid, did not involve dividing families into separate units and then allocating income from the parents to their children, but rather considered the family as one unit and operated by raising the eligibility limits for those medically needy families to levels above those listed in the Nebraska regulation on the subject. As such, appellee contends that stacking was not an income budgeting methodology at all.

In this reply, the class will demonstrate that it is the appellee who has failed to consider properly the interrelationship of the various subcategories of the Medicaid program, which has in turn led him to ignore the implications of a

recipient being simultaneously eligible for more than one of those categories. Further, the class members will show that the appellee's contention that stacking did not involve allocating income to their children is inconsistent not only with the language of Neb. Rev. Stat. § 68-1020(2)(c), but with the understanding of the Nebraska legislators who commented on that methodology in the process of considering the legislation that eventually repealed it. As for the claim that stacking was not even an income budgeting methodology, the class will demonstrate that position to be one of convenience adopted by the department solely for this litigation. It is an argument at odds with what the department told the Nebraska Legislature when the repeal of stacking was being debated, and one that is betrayed by the testimony of the department's own witness, Mike Harris, at the hearing held in the district court. In short, the appellee's entire response to the class' claim for TMA benefits is unsupported either by any published law or regulation of the State of Nebraska, or even by the department's prior pronouncements related to the nature and function of stacking.

A. The Class Members Simultaneously Qualified Under Two Medicaid Categories.

The appellee first contends that: "The class members do not distinguish between the different categories of Medicaid." Appellee Brief at 8. This matters in his view because "It is important to look at these categories individually as the

federal and state laws regard them differently and Nebraska determines their eligibility differently." *Id.*

The class of course has recognized and distinguished between the two categories of Medicaid that are relevant to this case; medically needy caretaker relatives and caretaker relatives whose countable incomes are below the 1996 AFDC income eligibility limit used by Nebraska (the 1931 group). Indeed, their claim to entitlement to TMA is premised upon the fact that they claim to fall within both of those categories, as 42 C.F.R. § 435.404 anticipates will often be the case, and that their presence in the latter triggers the entitlement to TMA in the circumstances of this case.

Perhaps because of his mind set that the various Medicaid categories must be considered as individual entities, not merely as administratively convenient subgroups of medical assistance recipients, all of whom receive benefits under Nebraska's single Medicaid program (Tr. 62:19-23), the appellee appears not to recognize the implications of the fact that people receiving Medicaid may be simultaneously eligible under more than one category of assistance. It is apparently this perspective that has led him to believe that a letter from someone in a regional office of the federal Health Care Financing Administration (now CMS) supports his position in this case. Appellee Brief at 16, citing Ex. 108.

The letter in question in fact does no such thing. In relevant part, it provides:

> TMA is based on eligibility for Medicaid only under the 1931 group. Individuals who are eligible under poverty level groups or as medically needy or any other group other than 1931 are not eligible for TMA.

Far from authorizing the defendant's conduct in this case, this statement merely reiterates a position that all of the parties have already agreed upon, *i.e.*, that only people covered by the language of § 1396u-1 ("the 1931 group") are entitled to TMA. It does not address, much less resolve, the issue of TMA for caretaker relatives who are eligible to receive Medicaid under both the medically needy and the 1931 categories.

Hence, Ex. 108 will not bear the weight that the appellee assigns it. The letter merely frames the issue as the class has presented it throughout these proceedings. If, after applying the stacking methodology that Nebraska used to determine their eligibility for the medically needy caretaker relative category of Medicaid,[1] the class members' countable incomes were below Nebraska's 1996

[1] The appellee has devoted much of his brief to demonstrating something that is self-evident, *i.e.*, that the class members neither qualified for ADC benefits nor would have had countable income below the 1996 ADC eligibility limit *if one applied the 1996 ADC income counting methodology*. But, as the class explained in its main brief at 20-22, §§ 1396u-1(b)(1) and (2)(C) say that to determine membership in the 1931 group, one must apply any less restrictive methodology (in this case, stacking) that the state actually used to determine eligibility for "medical assistance," not ADC. Each class member applied for Medicaid, not any

ADC limit, then they fall within "the 1931 group" and are entitled to TMA, even pursuant to the language of the letter that the appellee relies upon. If, however, the class members' incomes, as calculated by the state through the use of the stacking methodology, had been above Nebraska's 1996 ADC limit, then they would not have been part of "the 1931 group," but rather would *only* have been in the medically needy category, and they would not be entitled to TMA. The class has demonstrated in its main brief that the former scenario applies to this case, and Ex. 108 offers nothing to contradict that conclusion.

B. Appellee Has Previously Acknowledged That Stacking Was An Income Budgeting Methodology That Divided Families Into Sub-Units.

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particular category of Medicaid. The class member contend that the department determined that each of them was eligible for Medicaid, not ADC, as a medically needy caretaker relative, based on the countable income of each as calculated through the use of stacking. The department having determined how much countable income it would attribute to each class member, it is that amount that §§1396u-1(b)(1) and (2)(C) say must be compared to the 1996 ADC income eligibility limit. Subsection (2)(C) thus belies the department's argument, and the appellee has chosen to deal with that troubling fact by simply deleting reference to the subsection while purporting to quote the statute.

And because the appellee refuses to acknowledge the use of his less restrictive methodology in determining the class members' countable income, he lists the countable income of Ms. Kai as $799.87 and that of Ms. Noller as $1243.39, and states that those amounts of income were measured against maximum allowable income limits of $1130 and $1374, respectively. (Appellee's Brief at 2-3). These numbers are only correct, however, if one accepts the appellee's view of the law, the accuracy of which is of course the issue on appeal. Nonetheless, the appellee has presented these numbers not in his argument, but rather imbedded in his Statement of Facts. This incorrect characterization can offer nothing but confusion to the proper resolution of this case.

The appellee next contends that stacking did not involve dividing a family into separate units and then allocating some of each class member's gross income to her child(ren) in order to bring her countable income below the income eligibility limit for medically needy caretaker relatives published at 468 Neb. Admin. Code § 4-010 and Appendix 468-000-204. Appellee Brief at 18. As the class has demonstrated in its main brief at 31-32, this contention appears inconsistent with the language of Neb. Rev. Stat. § 68-1020(2)(c),[2] which, prior to the amendment that eliminated stacking, authorized Medicaid benefits for individuals, not families, "who are medically needy caretaker relatives . . . and who have children with allocated income. . .." While the language of § 68-1020(2)(c) does not specify from whom a child would receive the "allocated income" required by the statute, the income has to be that of the child's parent(s), for the Medicaid Act specifically prohibits the attribution of income to a minor child from any other source. 42 U.S.C. § 1396a(a)(17)(D).

Were the language of § 68-1020(2)(c) not sufficiently clear to do so, the legislative history surrounding the amendment of that section by 2002 Second Special Session, LB 8, directly belies the appellee's characterization of stacking. That legislative history is replete with evidence that the Nebraska Legislature

[2] Although cited correctly throughout the text of the class' main brief, subsection (c) was inadvertently denoted (d) in the quotation of the statute that appears on page 31.

certainly regarded stacking as a methodology that divided families into separate units and then allocated income from the parent(s) to the child(ren). For example, Senator Jensen, the Chair of the Health and Human Services Committee which has jurisdiction over the Medicaid program, stated: "But at least we are addressing an issue, particularly when it comes to stacking, which is an issue I think most of you are aware of, . . . that allows a family to subdivide and therefore to qualify different parts of the family to the Medicaid proposal." Floor Debate of LB 8, 97th Legislature, Second Special Session (Aug. 7, 2002) p. 170 (statement of Senator Jensen, Chair of the Heath and Human Services Committee). Senator Jensen was not the only legislator who understood that stacking worked by breaking families up into separate units. Thus, Senator Erdman commented that: "And if you look at that, as Senator Brown pointed out, through rules, stacking accomplished some of that by breaking families into units and making people eligible depending on their income . . . " *Id.* at p. 181(statement of Senator Erdman). Similarly, Senator Beutler stated as follows his understanding of, and discontent with, stacking:

> But going back to the concept of stacking, . . . I think the reason that we were all so offended by it is because it took a common sense concept, in this case family, and started to use the computer to divide it up and allocate family income in different sorts of ways so that what most of us thought of as family income didn't really have the result of the . . . [*sic*] of what you would have expected from the overall family income.

Floor Debate of LB 8, 97th Legislature, Second Special Session (Aug. 9, 2002) p. 374-375 (statement of Senator Beutler).

Consequently, it can be seen that those in the Nebraska Legislature considering the legislation that ultimately repealed stacking certainly viewed that process as one that subdivided families into units and then allocated income from one unit, the parent(s), to the other(s) made up of the child(ren).

That then leaves the appellee's new found position that stacking was not an income budgeting methodology at all, but rather a mechanism by which the eligibility limits for each "applicant family" (Appellee Brief at 18) was raised to levels that far exceed those listed as the maximums in 468 Neb. Admin. Code § 4-010 and Appendix 468-000-204. Appellee Brief at 21. Along with finding no support anywhere in the published laws or regulations of the State of Nebraska, this contention is at odds with both the department's testimony in front of the Nebraska Legislature when the latter was considering the repeal of stacking, and with the testimony of the department's only witness at the preliminary injunction hearing held in the court below.

Neb. Rev. Stat. § 68-1020(2)(2001) charged the department's Director of Finance and Support with adopting and promulgating rules and regulations governing the provision of medical assistance, including assistance to the class members in this case. The Director of Finance and Support in 2002 was Steve

Curtiss, and he testified as follows to the Nebraska Legislature when they were considering the repeal of stacking:

> The second proposal is the elimination of the eligibility determination practice known as "stacking." Stacking is a budgeting methodology designed to impoverish a family on paper so that the members of the family qualify for more benefits than their income level would otherwise entitle them to. Its main tenet is to artificially break a family into sub-families so that income can be assigned over these multiple families, and the end result is that people qualify for Medicaid when their income is higher than the stated levels.

Hearing on LB 8 Before the Health and Human Services Committee, 97th Legislature, Second Special Session, (Aug. 2, 2002) p. 10 (statement of Steve Curtiss, Director of the Department of Health and Human Services Finance and Support). This description of stacking, provided at a time when the department was not embroiled in litigation, could not be clearer, and it exactly reflects the position of the class members, not that now taken by the appellee.

In addition, it appears that the novelty of the appellee's position is such that it was difficult for his sole witness at the preliminary injunction hearing, and his attorney, to maintain consistency in their description of it. Thus, on direct examination, the following colloquy occurred between Mike Harris, the department's witness at the preliminary injunction hearing, and the department's attorney:

> Mr. Rumbaugh: Now I believe we discussed earlier LB 8 causing change in the budgeting methodology; is that correct?

Mr. Harris: Yes.

Mr. Rumbaugh: Did that undo the method that has been referred to somewhat colloquially as stacking?

Mr. Harris: Yes. (Tr. 60:24 - 61:4)

Again on cross examination, as the following testimony indicates, Mr. Harris and his counsel seem to have forgotten that the department was no longer characterizing stacking as a budgeting methodology.

Mr. Rumbaugh: Was Nebraska's budgeting methodology reviewed by the federal government as far as you know?

Mr. Harris: Yes.

Mr. Rumbaugh: Was it ever disapproved?

Mr. Harris: No. (Tr. 87:6-10)

All of the above testimony, but especially that of the appellee's Director of Finance and Support in front of the Nebraska Legislature, demonstrates that stacking was in fact, and was considered by the department to be, an income budgeting methodology, not a mechanism for illegally raising the income eligibility limits for Nebraska's medically needy category of Medicaid. *See* Appelants' Main Brief at p. 33-36. The fact that such income budgeting methodologies are allowed to be as liberal as a state chooses to make them would also explain why stacking was never disapproved by the federal government. (Tr. 87:9-10). Consequently, the department's belated contention that stacking was not an income budgeting methodology at all, founders on its own prior statements and

representations, and should be dismissed by the Court as nothing more than argument adopted for the purpose of this litigation.

CONCLUSION

For all of the reasons set forth above and in the class' main brief, this Court should reverse the decision of the district court denying the class a preliminary injunction and find that as a matter of law each of the class members was determined by the appellee to have countable income below the 1996 ADC eligibility limit, thereby placing the class members within "the 1931 group" described in 42 U.S.C. § 1396u-1 and entitling them to transitional medical assistance (TMA) now that they have lost their ongoing Medicaid benefits due to the amount of their countable earned income.

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CERTIFICATION

The foregoing brief was prepared using Microsoft Word 2002. The undersigned hereby certifies that the Appellant's Brief complies with the typeface and volume limitations imposed by Fed. R. App. P. 32(a)(5) and 32(a)(7); that, according to an electronic word count of those sections designated in Fed. R. App. P. 32(a)(7)(B)(iii), there are 2,903 words in the brief; and that the enclosed diskette containing a copy of the brief has been scanned for viruses and is virus free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served the foregoing upon all parties hereto by mailing a true and correct copy thereof by U. S. First Class Mail, postage prepaid and properly addressed, on this 9th day of June, 2003, to each of the following attorneys for Defendant-Appellee:

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