UNITED STATES DISTRICT COURT
DISTRICT OF NEBRASKA

KELLY BOWLIN on behalf of herself and all others similarly situated, Plaintiffs, v. NANCY MONTANEZ, as the Director of the Nebraska Department of Health and Human Services, Defendant.	)	Case No. 4:04-cv-03218 **MEMORANDA OF LAW IN SUPPORT OF PRELIMINARY INJUNCTION (Class Action)**

INTRODUCTION

Plaintiff brings this action for declaratory and injunctive relief under 42 U.S.C. § 1983 on behalf of herself and a class of needy Nebraska parents and other caretaker relatives, challenging the Defendant's refusal to provide them with Transitional Medical Assistance (TMA) once they have become ineligible for Medicaid because of their earned income. The Plaintiff and the proposed class members (hereafter Plaintiffs) are covered by the language of 42 U.S.C. § 1396u-1, a section of the Medicaid Act which requires certain people to be "treated as" recipients of Aid to Families with Dependent Children (AFDC), thereby making them eligible for TMA benefits pursuant to 42 U.S.C. § 1396r-6. By the current motion, the Plaintiffs seek a preliminary injunction requiring the Defendant to provide TMA benefits to the Plaintiffs. The issues relating to a preliminary injunction were briefed extensively in Plaintiffs' brief in support of the Temporary Restraining Order. The Plaintiffs would like to rely on that brief supplemented by the following information.

STATUTORY AND REGULATORY FRAMEWORK

The Plaintiffs would like to rely on the statutory and regulatory framework section set out in Plaintiffs' prior brief in support of Plaintiffs' Motion for a Temporary Restraining Order with

the following supplemental information. It is important to remember that there is only one Medicaid program in Nebraska. There are several different eligibility categories within the Medicaid program, such as the medically needy; aged, blind, and disabled; and children's poverty level categories. States can use different income and resource methodologies to determine eligibility for the different categories. However, once a person becomes eligible for Medicaid there are rules that apply to all recipients regardless of the category under which the person became eligible. 42 U.S.C. § 1396u-1, the section in question in this case, is a section that applies to all categories of Medicaid recipients, including the medically needy category.

As was briefly discussed during the hearing on the Temporary Restraining Order, one of the features of the medically needy category is something called a spend down (sometimes referred to as "a share of cost" or "excess income"). This is not a new thing; it has been in place since the inception of the medically needy program. If a person has countable income below the medically needy income limit, no spend down is required to receive Medicaid coverage. 42 CFR § 435.301(a)(1)(i). If a person's countable income exceeds the medically needy income level, they have the option to spend the amount of money that they are over the limit toward medical expenses. 42 C.F.R. § 435.301(a)(1)(ii). Once that money is spent, the individual becomes eligible for Medicaid for that month. 42 C.F.R. § 435.301(i)(1). For example, the medically needy income level for a household of three in Nebraska is $492.00. If a caretaker relative had countable income of $1492.00, they would not be eligible for Medicaid but they would have the option of participating in the spend down program. The caretaker relative would have to verify that they spend $1000.00 on medical expenses prior to the end of the month and then they would become eligible for Medicaid, but only until the end of the month. The next month the caretaker would have to spend another $1000.00 on medical expenses before Medicaid coverage would start again.

STATEMENT OF FACTS

The Plaintiffs would like to rely on the statement of facts set out in Plaintiffs Brief in Support of Plaintiffs' Motion for a Temporary Restraining Order with the following supplemental information. Since the temporary restraining order was put in place, Ms. Bowlin has been able to see her doctors and receive treatment for her medical needs. She has seen her gynecologist, who after running some tests put her on a high estrogen birth control pill for a three month trial period. Exhibit 6, ¶ 3. To date, this drug therapy has not improved her condition. *Id* at ¶ 4. Kelly has also developed an infection in her mouth related to a broken wisdom tooth. *Id* at ¶ 5. She is currently taking Amoxicillin for the infection. *Id*. She is scheduled to have it removed on July 30, 2004 and has a second tooth that will be removed August 12, 2004. *Id*.

ARGUMENT

I. DEFENDANT SHOULD BE PRELIMINARILY ENJOINED AND REQUIRED TO PROVIDE TRANSITIONAL MEDICAL BENEFITS TO THE PLAINTIFFS.

A preliminary injunction order is appropriate in this case because the Plaintiffs can demonstrate (1) a threat of irreparable harm; (2) a likelihood of success on the merits; (3) that the balance between the harm to the Plaintiffs and the harm to the Defendant tips decidedly in favor of the Plaintiffs; and (4) that the injunction is in the public interest. *Dataphase Systems, Inc. v. CL Systems, Inc.*, 640 F.2d 109, 114 (8th Cir. 1981)(en banc). However, if as in this case, "the issue presented is primarily one of law, and where there is irreparable injury to the plaintiff, preliminary relief is normally appropriate if the plaintiff will clearly prevail on the merits of the legal question." *Chu Drua Cha v. Noot*, 696 F.2d 594 (8th Cir. 1982).

A. The Loss of Medicaid Causes Irreparable Harm.

By simply being terminated from the Medicaid program, the Plaintiffs are irreparably harmed as a matter of law. Due to the grave risks to low-income families posed by the lack of access to medical care, the termination or reduction of Medicaid benefits alone is sufficient to

constitute irreparable harm to justify entering an injunction. *Turner v. Walsh*, 435 F. Supp. 707, 711 (W.D. Mo. 1977), aff'd per curiam, 574 F.2d 4566 (8th Cir. 1978) (approving the district court's decision as well reasoned). Moreover, the Plaintiffs in *Kai v. Ross*, 336 F.3d 650, 656 (8th Cir. 2003), who were in an identical situation to the Plaintiffs in this case, were found to be suffering irreparable injury by simply losing their Medicaid benefits; no impending medical condition was necessary. The fact that Ms. Bowlin has immediate medical needs only seeks to compound the harm.

The Defendant alleges in her Answer that the Plaintiffs are not irreparably harmed because they have access to the spend down program. Defendants Answer, ¶ 21. First, it is important to note that the existence of the spend down program in no way affects the merits of this case, it is only relevant to whether the Plaintiffs are suffering irreparable harm. Also, it is important to note that all of the Plaintiffs in *Kai* also had access to the spend down program, and yet they were found to be suffering irreparable harm. *Kai supra* at 656. In fact, any caretaker relative whose countable income exceeds the medically needy income limit has the option of buying into the spend down program, even if they exceed the limit by $10,000.

In this case Ms. Bowlin would be required to pay out of pocket just over $77.00 a month, the amount that she is over the medically needy income limit, in order to buy into this program. Defendant's Answer pg. 7, ¶ 26. To the average person this may not seem like a lot of money. However, the loss of even a small amount of money to a welfare recipient is devastating. This Circuit has recognized this fact in *Nelson v. Likins*, 389 F.Supp. 1234 (1974) *aff'd per curiam*, 510 F.2d 414 (8th Cir. 1975). In *Nelson*, the court found that "[w]hile the loss of money is normally not considered irreparable, this Court must point out that in this case those affected are not the average citizens but rather those who are in the grip of poverty. The loss to them of a certain sum of money each month is much more of an injury than it is to the average individual."

Nelson at 1237. This principle was echoed in *Chu Drua Cha v. Noot*, 696 F.2d 594, 599 (8th Cir. 1982), "For people at the economic margin of existence, the loss of [welfare benefits] cannot be made up by the later entry of a money judgement."

In Ms. Bowlin's case, she does not have the $77.00 a month required to meet her spend down obligation. Ms. Bowlin's net income is approximately $1000 a month. Exhibit 1, ¶ 1. Her expenses, which include a car payment of $75.00 a month, rent of $325.00, utilities of $350.00, and daycare of $600.00 a month, total approximately $1350.00 a month. *Id* at ¶ 6. Ms. Bowlin is already going over her monthly budget to meet her daily expenses and does not have even the $77.00 required to buy into the medically needy spend down program.

The harm to the Plaintiffs in this case is compounded further because if no preliminary injunction is ordered and the Plaintiffs ultimately succeed on the merits of their case, they will not be able to recover the money they have expended for their medical care during the pendency of the case. The Eleventh Amendment bar on the recovery of retroactive welfare benefits will prevent any recovery. *Edelman v. Jordan*, 415 U.S. 651 (1974). The *Nelson* court went on to find that because the "Eleventh Amendment bars the federal court from ordering 'retroactive benefits' in welfare cases…the irreparable harm becomes even more evident." *Id.* (*citing Edelman v. Jordan*, 415 U.S. 651 (1974)).

B. Plaintiffs Are Likely to Succeed on The Merits.

1. Plaintiffs Are Among Those Described in 42 U.S.C. § 1396u-1 and Are Therefore Entitled to TMA Now That They Have Lost Their Medicaid Coverage.

Plaintiffs present a strong likelihood of success on the merits. The issue in this case is simply whether the plain language of § 1396u-1 covers people who become eligible for Medicaid pursuant to Nebraska's medically needy income methodology. This issue was squarely decided by the 8th Circuit Court of Appeals in *Kai v. Ross*, 336 F.3d 650 (8th Cir. 2003). In *Kai* the 8th

Circuit held that the plain language of § 1396u-1 did in fact include people who received Medicaid under Nebraska's medically needy category and found that the Plaintiffs were therefore likely to succeed on the merits of their claim. *Id* at 654.

To date, the only arguments raised by the Defendant related to the merits of this case are that § 1396u-1 does not apply to a caretaker receiving Medicaid under Nebraska's medically needy category and that the Plaintiffs were not eligible for AFDC. Defendant's Answer pg. 5 ¶ 18, and pg. 8, ¶ 2. Both of these arguments were rejected by the 8th Circuit in *Kai*. With respect to the first argument, the plain language of § 1396u-1 clearly states that this section is not limited to any specific eligibility category of Medicaid, but rather applies to all categories of Medicaid recipients. The statute clearly says "for purposes of this *title*," which means for purposes of the entire Medicaid Act, not for any particular eligibility category, but rather, the entire pool of Medicaid recipients. 42 U.S.C. § 1396u-1. Additionally, the statute says "subject to paragraphs (2) and (3)," which means that "in the event of any conflict between (2) or (3) and (1), the former two paragraphs will prevail, or in the present context, that (2) and (3) add persons [to who can be treated as receiving AFDC] to the group that is already eligible under (1) by virtue of being AFDC recipients." *Kai* at 654.

With respect to the Defendant's second argument that the Plaintiffs were never eligible for AFDC, the 8th Circuit rejected this argument in *Kai* by saying that while it is true that the plaintiffs were never eligible for AFDC, "it seems to us irrelevant. Section [1396u-1] quite clearly covers not only those actually receiving AFDC, but additional persons who are treated as receiving AFDC." *Kai* at 654.

Because the Defendant does not present any new arguments related to the merits of this case, the 8th Circuit decision in *Kai* is controlling and the Plaintiffs are certain to succeed on the merits of their case.

2. Plaintiffs Meet the Eligibility Requirements for Transitional Medical Assistance.

Once an individual falls within § 1396u-1 she must still meet the other eligibility requirements for TMA. 42 U.S.C. § 1396r-6(a)(1) sets out these requirements:

> Notwithstanding any other provision of this title, each State plan approved under this title must provide that each family which was receiving aid...under part A of title IV [AFDC] in at least 3 of the 6 months immediately preceding the month in which such family becomes ineligible for such aid, because of hours of, or income from, employment of the caretaker relative ... shall, ...without any reapplication for benefits under the plan, remain eligible for [Medicaid] during the immediately succeeding 6-month period in accordance with this subsection.

The first requirement is that the individual be treated as receiving AFDC. As is discussed above, the Plaintiffs fall within § 1396u-1 and should be treated as receiving AFDC. Second, an individual must have received at least three months of Medicaid in the six months before they were terminated. The Defendant concedes that Ms. Bowlin meets this requirement. Defendant's Answer, ¶ 22. Finally, the individual must lose their Medicaid due to hours of or income from employment. Ms. Bowlin meets this requirement also. Ms. Bowlin lost her Medicaid due to a $0.50 raise she received from her employer. Exhibit 2, ¶ 9.

3. Plaintiffs Do Not Need to Exhaust Administrative Remedies in a § 1983 Action.

The Defendant's Affirmative Defense that Ms. Bowlin's § 1983 action is barred by her failure to exhaust her administrative remedies is without merit. Defendant's Answer, pg. 8, ¶ 1. The United States Supreme Court has stated categorically that exhaustion of administrative remedies is not a prerequisite to an action under § 1983. *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 500-01 (1982). The Supreme Court specifically considered an exhaustion argument in the context of the Medicaid Act in *Wilder v. Virginia Hospital Association*, 496 U.S. 498 (1990). The Court rejected the argument that the existence of state administrative procedures foreclosed resort to § 1983 in the Medicaid context. *Id.* at 523.

C. The Balance of the Hardships Favors the Plaintiffs.

The balance of the hardships tips decidedly in favor of the Plaintiffs. The Plaintiffs have suffered the loss of medical benefits necessary for their health, safety and continued productivity. In contrast, by this motion, the Plaintiffs seek only that the Defendant comply with the plain language of the controlling federal law and afford the Plaintiffs the benefits to which they are so clearly entitled.

Moreover, in this Circuit, budgetary harm to a state by providing Medicaid benefits has been found "not very significant in comparison to the irreparable harm that would be caused [to hospitals] and individual Medicaid beneficiaries.... The state is in a much better position to absorb the budgetary impact...as compared to individual plaintiffs." *Kansas Hosp. Ass'n., v. Whiteman*, 835 F. Supp. 1548, 1553, (D. Kan. 1993). *See also Arkansas Med. Soc'y v. Reynolds*, 6 F.3d 519 (8th Cir. 1993) (verbal order and then preliminary injunction froze a twenty percent cut in reimbursement rates meant to off set $60 million shortfall in state's Medicaid budget); *Kai v. Ross*, 336 F.3d 650, (8th Cir. 2003) (granting a preliminary injunction against the State of Nebraska requiring them to provide TMA benefits); *Olson v. Norman*, 830 F.2d 811 (8th Cir. 1987) (sustaining preliminary injunction and summary judgment against state for terminating welfare and Medicaid benefits).

D. The Injunction Is In the Public Interest.

Finally, Plaintiffs satisfy the requirement that the injunction sought be in the public interest. As this Circuit has noted, enforcement of laws passed by Congress is in the public interest, even when that means enjoining allegedly illegal action by another government body. *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 372 (8th Cir. 1991). *See also Heather K. v. City of Mallard, Iowa*, 887 F. Supp. 1249, 1263 (N.D. Ia. 1995) (finding public interest expressed by federal legislation). Moreover, "while achieving budgetary savings is also

in the public interest of state and federal taxpayers, that interest must give way if it is in conflict with federal substantive law." *Kansas Hosp. Ass'n., supra*, 835 F. Supp. at 1553.

CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that their motion for a preliminary injunction be granted.

DATED: July 20, 2004

KELLY BOWLIN, on behalf of herself and all others similarly situated, Plaintiffs

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2004 the foregoing Memoranda of Law in Support of Plaintiffs' Motion for Preliminary Injunction was filed with the Clerk of the United States District Court for the District of Nebraska using the CM/ECF system which will send notification of such filing to Royce N. Harper and Jamie Placek.

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