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 **REPLY BRIEF 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 and Plaintiffs Memoranda of Law in Support of Preliminary Injunction. The Plaintiffs would like to rely on those briefs supplemented by the following response to Defendant's Brief.

ARGUMENT

The Defendant correctly articulates the four factors relevant to issuing a preliminary injunction: (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 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). No single factor is determinative. *Id.* at 113. The Defendant raises arguments with respect to each factor; these arguments will be addressed in turn.

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

Defendant essentially makes four arguments with respect to the Plaintiffs' likelihood of success on the merits: (1) the *Kai* decision is not binding on this court; (2) the existence of the spend-down program means that Congress did not intend to provide TMA to the medically needy; (3) the plain language of § 1396u-1 does not include medically needy caretakers; and (4) the letters from the CMS regional administrators prove Defendant's position is correct.

A. This Case Is Controlled By The Eighth Circuit Decision In *Kai*.

Defendant argues that the *Kai* decision is not binding on this Court because the Eighth Circuit left open the possibility that "further legal argument will illuminate this matter." (Defendant's brief pg. 7 (citing *Kai*, 336 F. 3d at 655-656)). It is important to remember the procedural context of *Kai:* it was a decision on a preliminary injunction. The standard was not certainty of success on the merits, only likelihood of success on the merits. *Dataphase Systems, Inc. v. CL Systems, Inc.*, 640 F.2d 109 (8th Cir. 1981)(en banc). Therefore, it is not surprising that the Court used language appropriate to this context. Regardless, the Eighth Circuit clearly decided that the plain language of 42 U.S.C. § 1396u-1 covers medically needy caretaker relatives. The Defendant concedes she must raise a new legal argument to avoid the *Kai*

precedent. To date, she has not presented a convincing rationale to justify a deviation from the Eighth Circuit's decision in *Kai*.

Defendant also argues that this case is distinguishable from *Kai* because of the way Ms. Bowlin lost her Medicaid benefits. (Defendant's Brief pg. 7). On this point, Defendant is correct; these cases are different. But the distinction actually makes the analysis here much easier. How an individual loses Medicaid benefits is only relevant to the TMA eligibility requirements set out in 42 U.S.C. § 1396r-6. In order to receive TMA, a person must have lost her Medicaid "due to hours of or income from employment." 42 U.S.C. § 1396r-6. The Eighth Circuit in *Kai* had to take an extra step in the analysis, ruling that the Plaintiffs' loss of Medicaid as a result of a change in the statute was a loss "due to income from employment" for purposes of 42 U.S.C. § 1396r-6. In this case, that extra step is unnecessary. Ms. Bowlin clearly meets the requirement because she lost her Medicaid due to a $0.50 increase in her earned income. (Plaintiffs Exhibit 2). Therefore, although this case is distinguishable from *Kai* in this one respect, it is a distinction that makes no difference.

B. The Spend-down Program is Irrelevant to the Merits of This Case.

The existence of the spend-down program is irrelevant to the merits of this case. Being potentially eligible for other categories of Medicaid does not affect Ms. Bowlin's rights under § 1396u-1. There is nothing in the language of § 1396u-1 that says a person eligible for the spend-down program cannot be "treated as receiving AFDC" under § 1396u-1. However, without pointing to any specific language in the statute, Defendant argues that the existence of the spend-down program somehow means Ms. Bowlin does not fit within § 1396u-1.

First, it is important to clarify how the medically needy category and the spend-down program work. The medically needy category and the spend-down program in Nebraska are open to anyone who could receive Medicaid under a mandatory coverage category. This

includes caretaker relatives, children, pregnant women, and the aged, blind, and disabled. 42 C.F.R. 435.301. The medically needy category can function in one of two ways: (1) people below the income limit *are eligible* to receive Medicaid without having to pay anything out of pocket; (2) people above the income limit must pay the amount they are over the income limit (spend-down) on medical expenses *before* they are eligible for Medicaid coverage. *Id*. Ms. Bowlin, like the plaintiffs in the *Kai* case, received Medicaid under the medically needy program without a spend-down. Moreover, Ms. Bowlin, like the plaintiffs in the *Kai* case, has the option of participating in the spend-down program now that she has been terminated from Medicaid. (Defendant's Exhibits 8 and 9).

Defendant argues that the spend-down program makes TMA unnecessary and duplicative because the spend-down program serves the same purpose as TMA. (Defendant's Brief pg. 12). This illustrates a misunderstanding of both the spend-down program and TMA. Defendant's argument rests on the assertion that when AFDC (TANF) benefits end there is no spend-down program available.[1] (Defendant's Brief pg. 13) To the contrary, a former AFDC (TANF) recipient *is* eligible for the spend-down program when benefits end. 42 C.F.R. 435.301. But a reasonable TANF recipient will always choose TMA over the spend-down program because there are no up-front costs for TMA coverage during the first six months. However, when former TANF recipients reach the end of their TMA period they can and do participate in the spend-down program. *Id*. Clearly, making the TMA program available to medically needy caretakers is no more unnecessary or duplicative than it is to provide TMA to former TANF recipients.

1 Defendant references AFDC benefits in this argument. While these benefits no longer exist, Plaintiff assumes that the Defendant means either current TANF recipients, called ADC recipients by Defendant or those who the Defendant feels are included in section 1396u-1 which would be TANF recipients and those who are eligible for TANF but decline a grant.

C. Kelly Bowlin Is Entitled To TMA Under The Plain Language of § 1396u-1 and § 1396r- 6.

As the Eighth Circuit correctly recognized in *Kai*, the plain language of § 1396u-1 covers Nebraska's medically needy caretakers and entitles them to TMA. The Defendant in her Answer and her exhibits concedes all of the relevant facts needed for Plaintiff to succeed on the merits. To be "treated as receiving AFDC," Ms. Bowlin must have countable income below the AFDC 1996 income limit. 42 U.S.C. § 1396u-1(b)(1)(A)(i). Defendant concedes that the AFDC income limit is $611.00. (Answer ¶18). Defendant also concedes that prior to Ms. Bowlin's raise she had countable income of $270.55, which is well below the AFDC income limit. *Id* at ¶ 23. Ms. Bowlin must also be a caretaker relative. 42 U.S.C. § 1396u-1(b)(1)(A)(ii). Defendant concedes that Ms. Bowlin is a caretaker relative. (Answer ¶ 1). In calculating countable income, the income and resource methodologies for the AFDC program as it existed in 1996 must be used, unless the state has chosen to use a less restrictive income and resource methodology. 42 U.S.C. § 1396u-1(b)(1)(B) and (b)(2)(C). Defendant concedes that Ms. Bowlin received Medicaid under a less restrictive income and resource methodology than was used by Nebraska's AFDC program in 1996. (Answer ¶ 23).

Defendant also concedes that Plaintiff meets all the elements of § 1396r-6, the section that creates the TMA program. Defendant concedes that Ms. Bowlin received at least three months of Medicaid in the six months prior to her termination and that Ms. Bowlin lost her Medicaid due to an increase in her earned income. (Answer ¶ 22; Defendant's Exh. 12)

Although making all of these concessions, Defendant makes three arguments with regard to the plain language of § 1396u-1 and § 1396r-6: (1) that there is a difference between AFDC countable income and medically needy countable income; (2) that the language "this section" and "under such part" in § 1396u-1 mean that medically needy caretakers cannot fall within §

1396u-1; and (3) that a person must have received benefits under the TANF program which replaced the AFDC program in order to fall within § 1396u-1. Each of these arguments will be addressed in turn.

First, Defendant argues that there is a difference between AFDC countable income and medically needy countable income and that AFDC countable income must be used under § 1396u-1. (Defendant's Brief pg. 10). The Defendant's argument contradicts the plain language of § 1396u-1. Countable income is determined by using an income and resource methodology. By specifying that a state can use a less restrictive income and resource methodology than it used in its AFDC program in 1996, § 1396u-1(b)(2)(C) allows the medically needy methodology and countable income to be used for purposes of determining who will be "treated as receiving AFDC." 42 U.S.C. § 1396u-1(b)(2)(C). So the fact that Ms. Bowlin does not meet the AFDC income limit using the AFDC income methodology is immaterial. *See Kai v. Ross*, 336 F.3d 650, 654 (2003).

The Defendant next argues that the language "this section" and "under such part" prohibit medically needy caretakers from falling under § 1396u-1. This is simply not true. "This section" is found in § 1396u-1(b)(2) and in context reads "STATE OPTION.- For purposes of applying *this section*, a State. . . ." "This section" is § 1396u-1. "Under such part" is found in § 1396u-1(b)(2)(C) and in context reads "may use income and resource methodologies that are less restrictive than the methodologies used under the State plan *under such part* as of July 16, 1996." Under such part is just a reference back to the beginning of the statute where it says:

> (a) REFERENCES TO TITLE IV-A ARE REFERENCES TO PRE-WELFARE-REFORM PROVISIONS.-Subject to the succeeding provisions of this section,…any reference in this subchapter…to a provision of part A of title IV, *or a State plan under such part*…, including income and resource standards and income and resource methodologies under such part or plan, shall be considered a reference to such a provision or plan as in effect as of July 16, 1996, with respect to the State.

42 U.S.C. § 1396u-1(a). After inserting these references this section of the statute reads "for purposes of applying [§ 1396u-1], a state may use income and resource methodologies that are less restrictive than the methodologies used under the [state's AFDC] State plan [in place] as of July 16, 1996." 42 U.S.C. § 1396u-1(b)(2)(C). Nebraska has chosen to use a less restrictive income methodology in its medically needy program which results in a countable income below the AFDC income limit in place in 1996. *See* Defendant's Answer ¶ 18 and ¶ 23. Therefore, these phrases when read in context, actually reinforce the Plaintiffs' position that medically needy caretakers are included within §1396u-1.

Finally, Defendant argues that § 1396u-1 only applies to people receiving benefits under the TANF program, which replaced the AFDC program. (Defendant's Brief pg. 15). Again, the Defendant's argument is inconsistent with the language of the statute. Congress clarified its intent that § 1396u-1 apply to the entire Medicaid Act: "In General for purposes of this *subchapter*, subject to paragraphs (2) and (3), in determining eligibility for *medical assistance*..." 42 U.S.C. § 1396u-1(b)(1) (emphasis added). The "subchapter" referenced is subchapter XIX of the Social Security Act, which is the Medicaid Act. "Medical assistance" is Medicaid as a whole, not any one particular category of Medicaid, but all categories of Medicaid. If Congress intended that this section only apply to TANF recipients or only certain groups of Medicaid categories, they would have restricted this statute's application to those sections. However, Congress clearly stated that § 1396u-1 applies to the entire Medicaid Act and all categories of medical assistance.

D. The Letters From CMS Presented By the Defendant Have No Persuasive Value.

Defendant argues that the two letters written by administrators at the regional office of the then Health Care Financing Administration (HCFA) and now Centers for Medicare and Medicaid prove their position is correct. The first letter, the one most relied upon by the

Defendant in her brief, is the same letter considered by the Eighth Circuit in *Kai*. In reference to this letter, the Eight Circuit stated:

> We note first that the letter is not a regulation of the Department of Health and Human Services, nor is it part of generally published advice, for example a practice manual distributed nationwide. It is simply a letter from the Associate Administrator of the region of the Health Care Financing Administration of which Nebraska is a part. Such an expression of opinion would not be entitled to the level of deference set out in the Supreme Court's landmark decision in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). We should consider it respectfully, and, indeed, we have done so, but *it is worth no more than its inherent persuasive value...We do not find the letter persuasive...it appears to deserve no legal weight.*

The second letter is also a letter from a regional CMS administrator and, therefore, the only deference it receives is its inherent persuasive value. *Id*. The Defendant concedes that the second letter is merely a confirmation of the first. (Defendant's Brief pg. 16). Since the Eighth Circuit found the first letter to be without any legal weight, a second letter saying essentially the same thing should receive the same treatment. *Id*.

After an examination of Defendant's arguments challenging Plaintiffs' success on the merits, it becomes clear that no new persuasive arguments have been presented justifying a deviation from the Eighth Circuit's decision in *Kai*. The Plaintiffs are likely to succeed on the merits.

II. Plaintiffs Face Irreparable Harm.

Defendant concedes that loss of medical benefits constitutes irreparable harm. (Defendant's Brief pg. 19). However, Defendant suggests that because Ms. Bowlin could participate in the spend-down program she was never terminated from Medicaid. (Defendant's Brief pg. 20). This is simply not the case. As was conceded by the Defendant in her Answer at paragraph 26, Ms. Bowlin was in fact terminated from the Medicaid program effective January 1, 2004. Further evidence of this termination can be found in Defendant's Exhibits 8 and 9, the Notice of Action letters that were used to terminate Medicaid coverage for Ms. Bowlin.

Under the TMA program, Ms. Bowlin is not required to pay anything out of pocket during the first six months. Defendant concedes that in order to participate in the spend-down program, Ms. Bowlin will have to pay $77.22 a month. (Defendant's Brief pg. 20). This $77.22 a month can never be recovered, even if Ms. Bowlin is ultimately successful with her case, due to the bar on retroactive relief imposed by the Eleventh Amendment. *Edelman v. Jordan*, 415 U.S. 651 (1974). The loss of even this small amount of money is devastating to a welfare recipient; as a result, the Eighth Circuit has recognized that the loss of $80.00 constitutes irreparable harm. *Nelson v. Likins*, 389 F. Supp. 1234 (1974) *aff'd per curiam*, 510 F.2d 414 (8th Cir. 1975). This point was made in Plaintiffs' brief and at oral argument on the preliminary injunction hearing and Defendant has failed to provide any arguments challenging this point. Ms. Bowlin's loss of $77.22 a month is enough to meet the Plaintiffs' burden to show irreparable harm.

III. The Balance of the Hardships Favors the Plaintiff.

The balance of the hardships favors Ms. Bowlin in this case. The Defendant agrees that Ms. Bowlin is obligated to pay $77.22 a month toward medical expenses under the spend-down program. (Defendant's Brief pg. 20). Plaintiff's harm is therefore $77.22 a month. The only harm claimed by the Defendant is budgetary. If Ms. Bowlin goes on the spend-down program as the Defendant suggests she should, the Medicaid program will cover all expenses over $77.22 each month. Therefore if an injunction is granted the only harm to the state is $77.22 a month. The Defendant is clearly in a much better position to absorb this cost than a low-income single working mother of two young children.

The Defendant argues that if a class is certified in this case this economic harm will be catastrophic. However, when comparing economic harm to the loss of welfare benefits, the balance of the hardships favors welfare recipients. *Kan. Hosp. Ass'n v. Whiteman*, 835 F. Supp.

1548, 1553 (D. Kan. 1993). Moreover, the Defendant is permitted by law to recover any benefits paid in error, while the welfare recipients cannot recover their losses retroactively. Simply put, the balance of the hardships tips decidedly in favor of the Plaintiffs.

IV. The Public Interest Supports Granting a Preliminary Injunction.

Defendant agrees that enforcement of the law is in the public interest. (Defendant's Brief pg. 22). However she argues that Plaintiffs are seeking a misapplication of the law. *Id*. As has been noted above and by the Eighth Circuit in *Kai*, the plain language of § 1396u-1 does cover Nebraska's medically needy caretakers. Furthermore, the Defendants concern that § 1396u-1 will be used to cover more than those it was designed to help is misplaced. (Defendant's Brief pg. 22). Section 1396u-1 can only be used to provide TMA to those who look like AFDC recipients (i.e., caretaker relatives). 42 U.S.C. § 1396u-1(b)(1)(a)(ii). Therefore, a decision in favor of the Plaintiffs will require the Defendant to cover more caretakers than the Defendant has been covering up to this point, but by no means will it entitle every Medicaid recipient to TMA.

CONCLUSION

For all of the foregoing reasons, the Plaintiffs respectfully request that this Court grant Plaintiff's Motion for Preliminary Injunction and require the Defendant to continue providing TMA to Kelly Bowlin during the pendency of this case.

Dated: July 29, 2004.

KELLY BOWLIN, on behalf of
herself and all others similarly
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CERTIFICATE OF SERVICE

I hereby certify that on July 29, 2004 the foregoing Reply Brief 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 Jaime Placek.

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