TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Legislative History

Regulations

STATEMENT OF THE ISSUES

I. Did the District Court err in granting Plaintiffs'/Appellees' motion for summary judgment and denying Defendant's/Appellant's motion for summary judgment by finding that the class of single working mothers and other caretaker relatives fall within the provisions of 42 U.S.C. § 1396u-1 and were thereby entitled to transitional medical assistance (TMA) when they lost their Medicaid benefits due to their earned income?

STATEMENT OF FACTS

This case involves a certified class of over 764 single working mothers and other caretaker relatives who lost their Medicaid benefits due to their income from employment. (A-46). The class contends that they are eligible for transitional medical assistance (TMA) benefits described in 42 U.S.C. § 1396r-6, which provides up to a year of transitional medical coverage to working caretakers who lose Medicaid because of the amount of their earned income.

Class representative Kelly Bowlin lives in Ogallala, Nebraska with her two young children, Trisden and Morgan. (A-16). Ms. Bowlin works full-time as a Detailer at Bill Summers Ford of Ogallala. *Id*. The dealership offers health insurance to its employees, but the premium is $450.00 a month, which is an entire paycheck for Ms. Bowlin and is therefore not an option for her. *Id*.

Ms. Bowlin received Medicaid under Nebraska's optional "medically needy" category continuously from at least August of 2002 to December of 2003. (A-17). The medically needy category has an income standard of $492.00 a month for a household of three. (A-84). Using the medically needy income methodology, Ms. Bowlin was determined to have countable income below $492.00 a month. *Id*. In December of 2003, she received a notice that her Medicaid benefits were being terminated. (A-138). The $0.50 an hour raise,

which she received from her employer in September 2003, caused her countable income to exceed the $492.00 a month income standard for the medically needy program. (A-17, A-85). Following her termination from the Medicaid program, Defendant refused to provide Ms. Bowlin with TMA. (A-93).

Even though she manages to work full-time and support her family, Ms. Bowlin suffers from constant and abnormal menstrual bleeding. (A-16). Over the course of the past two years she has undergone numerous tests and tried a variety of treatments including hormone therapy. (A-21). Shortly before she lost her Medicaid, Ms. Bowlin had surgery to remove some abnormal cells from her uterus and to stop the bleeding. (A-17). After the surgery, Ms. Bowlin continued to suffer from abnormal menstrual bleeding and her doctors recommended that she undergo additional testing. *Id*. Following the District Court's order granting a temporary restraining order, Ms. Bowlin underwent some additional testing and was put on a high estrogen medication. (A-120). Ms. Bowlin also received some treatment for a dental infection. (A-121).

In addition to Ms. Bowlin, many other caretaker relatives experienced a change in their circumstances that caused their income to exceed the medically needy income standard. (A-45-46). These caretaker relatives were then terminated from the Medicaid program and the Defendant refused to provide them with TMA.

Id. On March 1, 2005, the District Court determined that Ms. Bowlin represents a class of Plaintiffs defined as:

> All caretaker relatives in Nebraska with earned income: (a) who have received Medicaid under the medically needy category without a spend down for at least three of the six months prior to having their Medicaid benefits terminated due to their earned income; (b) who, but for their earned income would continue to receive Medicaid under the medically needy category without a spend down; and (c) who have not been or will not be afforded the transitional Medicaid benefits provided for in 42 U.S.C. § 1396r-6.

(A-41).

On April 5, 2005 the District Court granted the class member's Motion for Summary Judgment in all respects and denied the Director's Motion for Summary Judgment in all respects. (A-256). On April 18, 2005 the District Court entered a final judgment requiring the Director to provide TMA to the class members pursuant to 42 U.S.C. § 1396r-6. (A-257).

SUMMARY OF ARGUMENT

The only issue in this case is whether the class members fall within the provisions of 42 U.S.C. § 1396u-1. Section 1396u-1 contains a test for determining which Medicaid recipients can be "treated as receiving" Aid to Families with Dependent Children (AFDC). If a person is "treated as receiving" AFDC they are automatically eligible to receive TMA when they lose their Medicaid due to hours of or income from employment.

The plain language of section 1396u-1 requires that caretakers, who are found to have countable income at or below a state's income standard for its Aid to Families with Dependent Children (AFDC) program as it existed in July 1996, shall be "treated as receiving" AFDC for purposes of the Medicaid Act. 42 U.S.C. § 1396u-1. In determining if an individual has countable income below the income standard in the state's AFDC program on July 16, 1996, the state uses the income methodology used under the state's AFDC program on July 16, 1996 only if the state has not chosen to use a less restrictive income methodology to determine Medicaid eligibility for caretakers. 42 U.S.C. § 1396u-1(b)(2)(C).

The class members in this case are all caretakers who were found eligible for Medicaid under Nebraska's medically needy income methodology, which is less restrictive than the one used by Nebraska's AFDC program on July 16, 1996. (A-

97). Applying this less restrictive income methodology resulted in the class members having countable income below the AFDC income standard in place on July 16, 1996 and therefore, under section 1396u-1, triggered the requirement that they be "treated as receiving" AFDC for purposes of the Medicaid Act. (A-97).

The District Court correctly agreed with this Court's interpretation of the plain language of section 1396u-1 in *Kai v. Ross*, 336 F.3d 650 (8th Cir. 2003), and found that the class members did fall within the provisions of section 1396u-1 and therefore were entitled to receive TMA. (A-255-256).

ARGUMENT

Introduction

Medicaid is a jointly funded state and federal program that provides medical services to certain low-income people pursuant to Title XIX of the Social Security Act, 42 U.S.C. §§ 1396, et seq. State participation in the Medicaid program is optional, but a state that chooses to participate, and receive federal funds to administer the program, must comply with the requirements of the federal Medicaid Act and its implementing regulations. *See Schweiker v. Gray Panthers*, 453 U.S. 34, 37 (1982). Nebraska has chosen to participate in the Medicaid program. (A-80).

Medicaid is only available to low-income children, their parents or caretakers, pregnant women, the elderly, and the blind or disabled. *Children's Healthcare Is a Legal Duty, Inc. v. De Parle*, 212 F.3d 1084 (8th Cir. 2000). These groups are further divided into groups Nebraska must cover, called mandatory categories, and those the state may choose to cover, called optional categories. One of the mandatory categories of people that Nebraska must cover is children and their parents or caretakers who "receive" AFDC. 42 U.S.C. § 1396a(a)(10)(A)(i)(I). People eligible under this category are also eligible to

receive TMA when they lose their Medicaid due to hours of or income from employment.

Determining eligibility under this mandatory category has changed because it is no longer possible to receive AFDC. AFDC was a welfare program that was eliminated by Congress with the passage of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) of 1996. *Kai* at 651. Under the AFDC program, recipients who were eligible for AFDC were automatically eligible for Medicaid. *Id*. Another benefit of being an AFDC recipient was that you were eligible to receive TMA when you lost your AFDC and Medicaid benefits due to hours of or income from employment. 42 U.S.C. § 1396r-6. When Congress decided to eliminate AFDC and the automatic link between cash welfare and Medicaid, it also wanted to make sure that low-income families who were participating in the former AFDC program and others who were similar to those people would continue to receive Medicaid. Therefore, Congress enacted section 1396u-1 which contains a test for determining, in the absence of an AFDC program, who can be "treated as receiving" AFDC. Persons who meet this test are eligible for Medicaid under section 1396a(a)(10)(A)(i)(I) and receive TMA when they lose their Medicaid due to earned income. 42 U.S.C. § 1396r-6.

Nebraska has also chosen to cover parents and caretakers under an optional category called "medically needy caretaker relatives." (A-81). This category also

covers low-income parents and caretaker relatives who do not qualify for any other category of Medicaid. (A-82). The class members in this case were all found eligible for Medicaid under Nebraska's optional medically needy program. (A-241). Nebraska's medically needy income standard is lower than the income standard Nebraska used in its AFDC program in 1996. (A-97). Therefore, when the class members are determined to be eligible for the medically needy category, they automatically fall below the AFDC 1996 income limit and should be "treated as receiving" AFDC under section 1396u-1. This also causes the class members to be eligible under both the optional medically needy category described in section 1396d(a)(ii) and the mandatory category described in section 1396a(a)(10)(A)(i)(I).

It is not unusual for a person to be eligible for more than one category of Medicaid at one time. *See* 42 C.F.R. § 435.404. When that happens, a person is allowed to choose between the categories. *Id*. In this case, it is more advantageous for the class members to be in the "treated as receiving" AFDC mandatory category because when they lose benefits due to their earned income, they are eligible to receive TMA. *See* 42 U.S.C. § 1396r-6.

I. THE DISTRICT COURT DID NOT ERR IN HOLDING THAT THE CLASS MEMBERS WERE AMONG THOSE DESCRIBED IN 42 U.S.C. § 1396u-1 AND THEREFORE ENTITLED TO TMA.

The only issue in this case is whether the class members are entitled to receive TMA when they lost their Medicaid due to their earned income. The right to receive TMA is found in 42 U.S.C. § 1396r-6 which provides in relevant part:

> …Not withstanding any other provision of this subchapter, each State plan approved under this subchapter must provide that each family which was *receiving aid pursuant to a plan of the State approved under part A of subchapter IV* of this chapter 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 (as defined in subsection (e) of this section)…shall, subject to paragraph (3) and without any reapplication for benefits under the plan, remain eligible for assistance under the plan approved under this subchapter during the immediately succeeding 6-month period in accordance with this subsection.

(emphasis added). Section 1396r-6 outlines three basic requirements to receive TMA: 1) the person must have received aid under "part A of subchapter IV;" 2) the person must have received aid for at least 3 of the 6 months prior to the person losing the benefits; and 3) they must have lost their benefits due to hours of or income from employment.

The only requirement being disputed by the Director in this case is whether the class members received aid "under part A of subchapter IV." (Appellant's Brief p. 18).[1] It is undisputed that Ms. Bowlin and the class she represents

[1] The Director also seems to suggest that class member Bowlin should have either filed an appeal or participated in the shared cost/spend down program rather than

automatically meet the other two requirements to receive TMA. (A-125-126; A-241; A-246).

As noted above, in 1996 Congress passed PRWORA, which eliminated the longstanding AFDC program and changed the way certain caretakers become eligible for Medicaid. *Kai* at 651. The AFDC program was located in part A of subchapter IV of the Social Security Act. When Congress eliminated AFDC, rather than delete and redraft all of the sections of the Act that referred to the former AFDC program, Congress created a test that could be used to determine who, in the absence of an AFDC program, could be "treated as receiving" AFDC. *Rabin v. Wilson-Coker*, 362 F. 3d 190, 192-193 (2nd Cir. 2004). By doing this, Congress breathed life back into the otherwise obsolete references to the AFDC program that remain in the Medicaid Act, including the one found in section 1396r-6. Therefore, it continues to be relevant for purposes of the Medicaid Act to determine whether or not a person can be "treated as receiving" AFDC.

---

pursuing her right to receive TMA. (Appellant's Brief p. 13-14). However, under 42 U.S.C. § 1396r-6, neither of these actions are prerequisites to receiving TMA. Therefore, it is irrelevant to this case that Ms. Bowlin did not do either of these things.

A. The Class Members Should Be "Treated As Receiving" AFDC.

The test for determining who should be "treated as receiving" AFDC is found in 42 U.S.C. § 1396u-1 which provides in relevant part:

> (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 title…to a provision of part A of title IV, or a State plan 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.
>
> (b) APPLICATION OF PRE-WELFARE-REFORM ELIGIBILITY CRITERIA. –
>
> (1) IN GENERAL. – For purposes of this title, subject to paragraphs (2) and (3), in determining eligibility for medical assistance –
>
> (A) an individual shall be treated as receiving aid or assistance under a State plan approved under part A of title IV [AFDC] only if the individual meets –
>
> (i) the income and resource standards for determining eligibility under such plan, and
>
> (ii) the eligibility requirements of such plan under subsections (a) through (c) of section 406 and section 407(a), as in effect as of July 16, 1996; and
>
> (B) the income and resource methodologies under such plan as of such date shall be used in the determination of whether any individual meets income and resource standards under such plan.
>
> (2) STATE OPTION. – For purposes of applying this section, a State –
>
> (A) may lower its income standards applicable with respect to part A of title IV, but not below the income standards applicable…on May 1, 1988;
>
> (B) may increase income and resource standards under the State plan referred to in paragraph (1)…by a percentage that does not exceed the percentage increase in the Consumer Price Index…; and

(C) 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.

This test can be broken down into four steps: 1) identifying the income standard used by Nebraska's AFDC program on July 16, 1996; 2) selecting the appropriate income methodology to apply to the individual; 3) applying the income methodology to determine an individual's countable income and comparing that countable income to the income standard used by the state on July 16, 1996; and 4) determining that the individual is a caretaker relative. At the end of this process, if a caretaker receiving Medicaid has countable income below the state's income standard used by its AFDC program in 1996, that caretaker is "treated as receiving" AFDC and is eligible for TMA. *See* 42 U.S.C. § 1396r-6; 42 U.S.C. § 1396u-1.

The Director does not dispute the District Court's factual findings that using the medically needy income methodology, Ms. Bowlin and the class she represents had countable income below the AFDC income standard used by Nebraska's AFDC program in 1996. (A-245; A-256). The only part of the section 1396u-1 test that is in dispute is whether the medically needy income methodology can be used to determine countable income under section 1396u-1. (Appellant's Brief p. 16-17).

A Medicaid recipient's countable income is determined using an income methodology, or a process of disregards and deductions that are subtracted from a recipient's gross income to achieve a final countable income. (A-5, A-33). Nebraska employs several different income methodologies within its Medicaid program. (A-89-91).

Section 1396u-1 requires that the income methodology used under the state's AFDC program on July 16, 1996 be used to determine a recipient's countable income, unless the state has chosen to use a less restrictive income methodology. 42 U.S.C. § 1396u-1(b)(2)(C). The Director admits that Nebraska has chosen to use a less restrictive income methodology for the medically needy category than was used for Nebraska's AFDC program in 1996. (A-97). Pursuant to section 1396u-1(b)(2)(C), this less restrictive income methodology can be used to determine the class members' countable income.

When the medically needy income methodology is used, the class members fall below Nebraska's AFDC income standard in place on July 16, 1996. For example, the medically needy income standard for a household of three is $492.00 a month. (A-97). Nebraska's AFDC income standard on July 16, 1996 for a household of three was $673.00 a month. (A-129). In June 2003, class member Kelly Bowlin, who lives in a household of three, was determined to have countable income of $424.00 using the medically needy income methodology. (A-116). Ms.

Bowlin's countable income of $424.00 was also below Nebraska's AFDC 1996 income standard of $673.00. (A-129). Therefore, while Ms. Bowlin and the other caretakers were determined to have countable income below the medically needy income standard, they simultaneously had countable income below the AFDC 1996 income standard.

The final requirement to be "treated as receiving" AFDC is that the class members must look like a person who could have received AFDC, or in other words, they must be a caretaker relative. *See* 42 U.S.C. § 1396u-1(b)(A)(ii). There is no dispute that Kelly Bowlin and the class members in this case are caretaker relatives. (A-97-98; A-241). Because the class members clearly meet all of the requirements set out in § 1396u-1, they are entitled to be "treated as receiving" AFDC.

With this designation, the class members now also meet the first prong of the test to receive TMA; "receiving aid pursuant to a plan of the State approved under part A of subchapter IV of this chapter." 42 U.S.C. § 1396r-6. As noted above, there is no dispute that Ms. Bowlin and the class members meet the other two requirements for TMA; receiving Medicaid for at least 3 of the 6 months prior to their termination from the program and losing their Medicaid due to hours of or income from employment. 42 U.S.C. § 1396r-6 and (A-241). Therefore, the

District Court correctly determined that the class members were entitled to receive TMA.

B. This Court's Decision in Kai, Appropriately Determined That the Plain Language of § 1396u-1 Covers Nebraska's Medically Needy Caretakers.

The Director's primary argument in this case is that people receiving Medicaid under Nebraska's medically needy category cannot fall within section 1396u-1. More specifically, the medically needy income methodology cannot be used to determine countable income under section 1396u-1 because there is no relationship between the medically needy optional category and either the former AFDC program or the TANF program that replaced AFDC. (Appellant's Brief p. 16). This Court considered this exact issue in *Kai v. Ross*, 336 F.3d 650 (8th Cir. 2003). While the *Kai* decision involved a preliminary injunction, this Court's interpretation of the plain language of section 1396u-1 in that opinion should be affirmed in this case.

In *Kai*, this Court found that the plain language of section 1396u-1 covered caretaker relatives receiving Medicaid under Nebraska's optional medically needy program, which in turn made them eligible to receive TMA. The focus of this Court's decision in *Kai* was on the language contained in subsection (b)(1) and specifically the phrase "subject to paragraphs (2) and (3)." This Court determined that the phrase "subject to paragraphs (2) and (3)" indicates that if there is a

conflict between paragraph (1) and either (2) or (3) that paragraphs (2) and (3) should prevail. *Kai* at 655. Paragraph (1) outlines that people shall be "treated as receiving" AFDC if they meet the income and resource standards of the State's AFDC program as it existed in July 1996. 42 U.S.C. § 1396u-1(b)(1)(A)(i). It also provides that the income and resource methodologies that were used under the state's AFDC program are to be used to determine if the person meets the income and resource standards of the state's AFDC program in July 1996. 42 U.S.C. § 1396u-1(b)(1)(B).

Paragraph (2), on the other hand, allows states to include additional people in the category of people who will be "treated as receiving" AFDC. Specifically, the state is allowed, through the use of less restrictive income and resource methodologies, to include people who would not have been eligible for AFDC in July 1996. 42 U.S.C. § 1396u-1(b)(2)(C). Nebraska's choice to use a less restrictive income methodology for its Medically needy program creates a conflict between paragraph (1) (requiring the AFDC 1996 methodology be used) and paragraph (2) (allowing the medically needy income methodology to be used). Because the plain language of the statute dictates that paragraph (2) will prevail over paragraph (1), the less restrictive medically needy income methodology should be used to determine countable income under section 1396u-1.

C. The Director Has Not Provided Any Justification for This Court to Deviate From Its Decision in Kai.

The Director has not provided any new evidence or arguments that justify a deviation from the plain reading of section 1396u-1 set out in *Kai*. The Director offers three main arguments in support of her position that this Court's reading of the statute in *Kai* was erroneous and should not apply in this case: (1) that section 1396u-1 only applies to AFDC replacement programs and cannot be applied to the medically needy; (2) that the District Court did not apply the appropriate level of deference to the letters and affidavits from regional and national CMS personnel; and (3) that the circumstances of this case are materially different from the circumstances presented in *Kai*. Each of these arguments will be addressed in turn.

1. Section 1396u-1 Applies to All Medicaid Recipients.

The Director's first argument is that section 1396u-1 only applies to AFDC replacement programs and therefore cannot apply to persons found eligible for Medicaid under the medically needy category. (Appellant's Brief p. 16). The initial problem with the Director's argument is that it is inconsistent with the plain language of the statute. Section 1396u-1 does not apply to any particular category of Medicaid, but rather to every category of Medicaid and the entire Medicaid Act. Congress made this clear when they included the language "For the purposes of this title…" in paragraph (b)(1). "This title" is title XIX of the Social Security Act, which is the entire Medicaid Act. If Congress had intended that section 1396u-1

only apply to TANF recipients they would have specified TANF recipients or cited to the TANF program. However, by using the phrase "for purposes of this title" Congress clearly expressed its intent that this section apply to all categories of Medicaid, which would include Nebraska's medically needy recipients.

The Director attempts to support her argument by pointing to the language "for purposes of applying this section" found in section 1396u-1(b)(2). (Appellant's Brief p. 16). The Director asserts that this phrase indicates Congress' intent that the state option to use less restrictive income methodologies only applies to AFDC replacement programs. *Id*. However, the word "section" as used in that phrase refers to section 1396u-1. When read in context, this phrase reads: for purposes of applying section 1396u-1, a State – (C) 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. There is nothing in the plain language of this section that indicates the state option to use less restrictive income standards only applies to AFDC replacement programs.

Moreover, the plain language of section 1396u-1(b)(2)(C) allows states to use multiple less restrictive methodologies. Specifically, section 1396u-1(b)(2)(C) refers to "income and resource *methodologies*" without out specifying any specific category of Medicaid. This allows states to use a less restrictive methodology for

their TANF program and a medically needy program and allow both categories of Medicaid recipients to be "treated as receiving" AFDC.

Additionally, the Director attempts to support her position by arguing that the legislative history of PRWORA clarifies that Congress only intended to ensure that former AFDC recipients and future TANF recipients would be eligible for Medicaid. (Appellant's Brief p. 18-19). Generally, legislative history is only relevant in constructing a statute when the statute at issue is ambiguous. The class members maintain, as this Court determined in *Kai,* that the plain meaning of this statute is clear and there is no need to delve into legislative history to discern Congressional intent. *Kai* at 654. However, the legislative history cited by the Director does not indicate that section 1396u-1 only applies to AFDC replacement programs.

The Director quotes the following legislative history: "States *must* provide medical assistance for families that become ineligible for block grant assistance due to increased earnings or child support collections and whose incomes falls below the poverty line." Personal Responsibility and Work Opportunity Reconciliation Act of 1996, H.R. Rep. No. 104-651, at 1351-1353 (1996), 1996 U.S.C.C.A.N. 2183, 2410-2412 (emphasis added). This section clearly indicates that Congress intended that AFDC replacement program participants *must* be eligible for TMA. However, it does not say that *only* AFDC replacement program

participants can receive TMA. Congress' intent to extend TMA to groups other than AFDC replacement program recipients, which is clearly outlined in section 1396u-1(b)(2)(C), is not at odds with this section of legislative history.

2. The Letters and Affidavit Received the Appropriate Level of Deference.

The second argument raised by the Director is that the letters and affidavits from CMS personnel did not receive the appropriate level deference by this Court in *Kai* and by the District Court below. (Appellant's Brief p. 19-20). However, this Court's opinion in *Kai* and the District Court's opinion below clearly indicate that the letters and affidavits received the appropriate level of deference in both cases. Letters and statements by agency officials that are not part of a regulation or part of generally published advice are not entitled to the level of deference set out in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984), but rather are only entitled to be respectfully considered for their persuasive value. *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

One of the letters offered in this case is the same letter that was presented to this Court in *Kai*. (A-253). The other letter and the affidavit are merely restatements of the content of that letter by other CMS officials. (A-253-254). While these statements are entitled to their persuasive value, this Court in *Kai* and the District Court below found them unpersuasive because they contradict the plain language of the statute. *See Kai v. Ross*, 336 F.3d 650, 655 (8th Cir. 2003) and (A-

253-254). *See also Comacho v. Tex. Workforce Comm'n*, 408 F.3d 229, (5th Cir. 2005).

3. There Is No Legally Significant Factual Difference Between This Case and Kai.

The final argument raised by the Director is that the way in which the class members lost their Medicaid is distinguishable from the way in which the *Kai* class members lost their Medicaid. (Appellant's Brief p. 21-22). While this is true, the difference is not legally significant. The *Kai* class lost their Medicaid when the State of Nebraska statutorily changed the way the income eligibility was determined for caretaker relatives. *Kai* at 653. The class members in this case lost their Medicaid due to a change in their earned income, for example Ms. Bowlin's $0.50 raise. (A-17). How the class members lost their Medicaid is only relevant to determining if the person is eligible for TMA under section 1396r-6, which requires that recipients must lose their Medicaid due to hours of or income from employment to be eligible to receive TMA. 42 U.S.C. § 1396r-6. This case is actually clearer than *Kai* because there is no need to determine if a statutory change in eligibility can be considered a loss of Medicaid "due to hours of or income from employment." *Id*.

In this case, the Director has not raised any new arguments or presented any new evidence that justifies a deviation from this Court's decision in *Kai*. The plain language of the statute clearly entitles the class members in this case to TMA.

CONCLUSION

For the reasons set forth above, this Court should affirm the decision of the District Court and deny the Appellant's appeal.

Dated: October 25, 2005

Respectfully submitted,
KELLY BOWLIN, on
behalf of her self and all
others similarly situated,
Appellees.

By: _____

Rebecca L. Gould #22246
Nebraska Appleseed Center
for Law in the Public Interest
941 O Street, Suite 105
Lincoln, NE 68508
Attorney for Appellee

CERTIFICATION

The foregoing brief was prepared using Microsoft Word 2002. The undersigned hereby certifies that the Appellees' 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 section designated in Fed. R. App. P. 32(a)(7)(B)(iii), there are 4,701 words in the brief; and that the enclosed CD-ROM containing a copy of the brief has been scanned for viruses and is virus free.

_____

Rebecca L. Gould
Attorney for Appellees

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 25th day of October, 2005, to each of the following attorneys for Defendant-Appellant:

Mr. Jon Bruning, Attorney General
c/o Mr. Jaime Placek
Assistant Attorney General
2115 State Capitol Building
Lincoln, Nebraska 68509

_____
Rebecca L. Gould
Attorney for Appellees

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Case No. 05-2791

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

Plaintiffs-Appellees,

v.

NANCY MONTANEZ, as the Director of the
Nebraska Department of Health and Human Services,

Defendant-Appellant.

(Class Action)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

The Honorable Laurie Smith Camp, District Court Judge

BRIEF OF APPELLEE

REBECCA L. GOULD, #22246
Nebraska Appleseed Center
For Law in the Public Interest
941 O Street, Suite 105
Lincoln, NE 68508
Tel: (402) 471-2682
bgould@neappleseed.org

Attorney for Appellee.