CASE NO. 05-2791

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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

Appellees,

v.

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

Appellant.

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

The Honorable Laurie Smith Camp, District Court Judge

REPLY BRIEF OF APPELLANT

JON BRUNING, #20351
Attorney General

Michael J. Rumbaugh, #13612
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-8920
Tel: (402) 471-2682
Fax: (402) 471-4725
mike.rumbaugh@ago.ne.gov

Attorneys for Appellant.

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INTRODUCTION

This Reply Brief is the Defendant's response to the Appellees' Brief filed in this matter. This brief will be limited to argument only. No recitation of facts or other matters previously covered in the briefs of the parties will be made.

ARGUMENT

THE PLAINTIFFS ARE NOT AMONG THOSE DESCRIBED IN 42 U.S.C. § 1396u-1 AND SHOULD NOT BE "TREATED AS RECEIVING AFDC".

A. Because the Statutes and Administrative Practices Involved In This Action Are Complicated, Statutory Interpretation Should Be Conducted In the Light Of Relevant Legislative History and The Federal Department Of Health And Human Services' Recent Interpretations of 42 U.S.C § 1396u-1.

In Kai, this Court's review was limited to the likelihood of the plaintiff's success on the merits in the context of a Preliminary Injunction. *Kai v. Ross*, 336 F.3d 650 (8th Cir. 2005). This Court did not make a final determination on the merits and used verbs such as "seems" or "appears," acknowledging that the "statutes and administrative practices involved are complicated, to say the least." *Kai*, 336 F.3d at 656. As such, statutory interpretation of 42 U.S.C. § 1396u-1 should be conducted

carefully, and within the context of relevant legislative history and the Federal Department of Health and Human Services' recent interpretations of the statute.

B. The Plaintiffs Do Not Fall Within the Plain Language of 42 U.S.C. § 1396u-1.

The language at issue here, located in 42 U.S.C. § 1396u-1(b)(2)(C), provides that a State "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 option may be used for the "purposes of applying this section," or § 1396u-1, which would refer to Nebraska's AFDC equivalent program, ADC. Furthermore, the statute indicates that 42 U.S.C. § 1396u-1 applies to pre-welfare reform provisions under subchapter IV-A, or in other words, the former AFDC program. 42 U.S.C. § 1396u-1(a). On the other hand, the statute makes no reference to 42 U.S.C. § 1396(a)(1), under which the "medically needy" category was created. Consequently, the fact that the "medically needy" category uses a less restrictive methodology is irrelevant.

As such, an individual would be treated as receiving Medicaid under AFDC if the individual qualified to receive benefits under the state's pre-1996 AFDC counting methodology. In the alternative, if the state chose to replace that earlier methodology with a post-1996 AFDC counting methodology that was less restrictive and the individual qualified to receive benefits under that standard, then that individual would

be "treated as receiving" medicaid under AFDC. Therefore, the fact that an individual may qualify under a less restrictive, "medically needy" category created under a different section is irrelevant.

As mentioned in the Appellant's brief, this interpretation is consistent with the legislative history of the *Personal Responsibility and Work Opportunity Reconciliation Act*, which demonstrates that TMA is intended for former block grant recipients, and mentions nothing about TMA applying to those who meet the "medically needy" classification under a state program. (Appellants Brief, p. 19). Furthermore, the Federal Department of Health and Human Services has confirmed its position in three documents (including an affidavit) that "TMA is based on eligibility for Medicaid under the [42 U.S.C. § 1396u-1] group . . . ." and those "who are eligible under poverty level groups or as medically needy or any other group than [42 U.S.C. § 1396u-1] are not eligible for TMA." (A-140). Therefore, construing the statute in the light of legislative history and the interpretations of the Federal Department of Health and Human Services, the Plaintiffs do not fall within the plain language of 42 U.S.C. § 1396u-1.

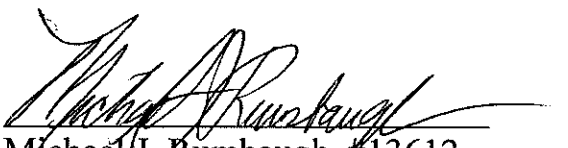
CONCLUSION

For the reasons set forth above, the Defendant respectfully requests that this Court reverse the decision of the lower court and dismiss the Plaintiffs' Complaint herein.

DATED this 23rd day of November, 2005.

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

BY JON BRUNING, #20351
Attorney General

BY 

Michael J. Rumbaugh, #13612
Assistant Attorney General
2115 State Capitol
Lincoln, NE 68509-8920
Tel: (402) 471-2682
Fax: (402) 471-4725
mike.rumbaugh@ago.ne.gov

Attorneys for Appellant.

PROOF OF SERVICE

STATE OF NEBRASKA)
) ss.
COUNTY OF LANCASTER)

I, Heather A. Leuschen, being first duly sworn, depose and state that two copies of the brief in the above-entitled case were served upon the Appellees by depositing said copies in the United States Mail, first class postage prepaid, addressed to counsel for Appellees, Rebecca L. Gould and Pat A. Knapp, Nebraska Appleseed Center for Law in the Public Interest, 941 "O" Street, Suite 105, Lincoln, NE 68508, on this 23rd day of November, 2005.

Heather A. Leuschen
Affiant

Subscribed and sworn to before me, a notary public, on this 23rd day of November, 2005.

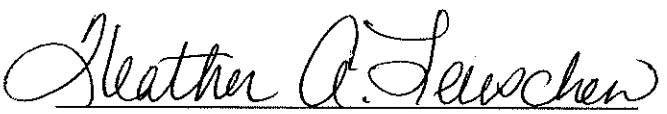
GENERAL NOTARY - State of Nebraska
PATRICIA L. SELK
My Comm. Exp. Nov. 17, 2007

Patricia L. Selk
Notary Public

56-114-18

CERTIFICATE OF COMPLIANCE

The foregoing reply brief was prepared using WordPerfect 8.0. The undersigned hereby certifies that the Appellant's Reply Brief complies with the typeface and page 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. Re. App. P. 32(a)(7)(B)(iii), there are 644 words in the reply brief; and that the enclosed diskette containing a copy of the brief has been scanned for viruses and is virus free.



Heather A. Leuschen
Legal Assistant

56-114-18