IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

KELLY BOWLIN, on behalf of herself and all others similarly situated, Plaintiffs, vs. NANCY MONTANEZ, as the Director of the Nebraska Department of Health and Human Services, Defendant.	)	CASE NO. 4:04CV3218 MEMORANDUM AND ORDER

On June 17, 2004, following a telephonic hearing on a motion for a temporary restraining order filed by the Plaintiff, Kelly Bowlin, the Court granted Bowlin's motion. (Filing No. 11.) In the order, the Court restrained the Defendant, Nancy Montanez, in her capacity as the Director of the Nebraska Department of Health and Human Services ("DHHS"), from denying temporary medical assistance (hereafter "TMA") to Bowlin under Section 1925 of the Medicaid Act, 42 U.S.C. § 1396r-6. This matter is now before the Court on the Plaintiffs' Motion for Preliminary Injunction. The parties have stipulated, and the Court has ordered, that the temporary injunctive relief granted on June 17, 2004, shall remain in effect until the date that this Memorandum and Order is filed. (Filing Nos. 10 and 11.)

A hearing on the motion for preliminary injunction was conducted on July 23, 2004, at which time the parties offered evidence, including all the documents that have now been properly redacted for filing on CM/ECF (Filing Nos. 37 and 40), and the Defendant offered

the testimony of Michael Harris of DHHS. Having considered all the evidence and the arguments of counsel (including briefs at Filing Nos. 5, 20, 35 and 33), I conclude that the Plaintiff is entitled to a preliminary injunction enjoining the Defendant from denying her TMA to which she is likely entitled pursuant to 42 U.S.C. § 1396r-6 and §1396u-1. [1]

Standard on Motion for Preliminary Injunction

In determining whether preliminary injunctive relief should issue, this Court must consider the factors set forth in *Dataphase Systems, Inc. v. C L. Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981)(en banc). The Eighth Circuit Court has summarized those factors as follows:

> When considering a motion for a preliminary injunction, a district court weighs the movant's probability of success on the merits, the threat of irreparable harm to the movant absent the injunction, the balance between the harm and the injury that the injunction's issuance would inflict on other interested parties, and the public interest. *Dataphase Systems, Inc. v. C L. Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981)(en banc). We reverse the issuance of a preliminary injunction only if the issuance "is the product of an abuse of discretion or misplaced reliance on an erroneous legal premise." *City of Timber Lake v. Cheyenne River Sioux Tribe,* 10 F.3d 554, 556 (8th Cir. 1993) *cert. denied* 512 U.S. 1236, 114 S. Ct. 2741, 129 L.Ed. 2d 861 (1994).

Pottgen v. Missouri State High Sch. Activities Ass'n., 40 F.3d 926, 929 (8th Cir. 1994). The burden of establishing the propriety of a preliminary injunction is on the movant. *Baker Elec. Co-op, Inc. v. Chaske*, 28 F.3d 1466, 1472 (8th Cir 1994); *Modern Computer Sys., Inc., v. Modern Banking Sys., Inc.*, 871 F.2d 734, 737 (8th Cir. 1989)(en banc). "No single [*Dataphase*] factor in itself is dispositive; in each case all of the factors must be considered

[1] Although the Complaint is styled as a class action, a class has not been certified under Fed. R. Civ. P. 23. Thus, Plaintiff Kelly Bowlin is the only person who has had the benefit of the temporary injunction and who, for now, will have the benefit of the preliminary injunction.

to determine whether on balance they weigh towards granting the injunction." *Baker Elec. Co-op*, 28 F.3d at 1472 (quoting *Calvin Klein Cosmetic Corp. v. Lenox Labs, Inc.,* 815 F.2d 500, 503 (8th Cir. 1987), and also citing *Dataphase*. Following a discussion of the relevant law, each of the *Dataphase* factors is considered below.

The Medicaid Act and the Relevant Statutes

Medicaid is the federal medical assistance program of Title XIX of the Social Security Act that is administered by participating states. While a state's participation in the Medicaid program is optional, the states that choose to participate in the Medicaid program are given matching funds by the federal government only if the states comply with the applicable federal rules and regulations. *Schweiker v. Gray Panthers*, 453 U.S. 34, 37 (1982). The State of Nebraska participates in the Medicaid program, and Defendant Nancy Montanez, as the Director of DHHS, (hereafter the "Director") is responsible for administering the program.

States are required to provide Medicaid benefits to certain groups of people. When the federal program known as Aid to Families with Dependent Children ("AFDC") was in existence, families who qualified for AFDC automatically were entitled to Medicaid benefits. In 1996, the Personal Responsibility and Work Opportunity Reconciliation Act (commonly referred to as the "Welfare Reform Act") repealed the AFDC program and replaced it with a program known as the Temporary Assistance to Needy Families ("TANF"). Unlike former AFDC recipients, TANF recipients were not automatically entitled to Medicaid benefits. Thus, at the same time that Congress enacted TANF, Congress also amended the Medicaid Act by enacting 42 U.S.C. §1396u-1, which ensured that certain people would

be "treated as receiving" AFDC benefits for purposes of satisfying the eligibility requirements for Medicaid.

The entitlement to TMA is found in 42 U.S.C. §§ 1396r-6(a)(1), which is captioned "Extension of eligibility for medical assistance," and states:

(a) Initial 6-month extension -

> (1) Requirement - Notwithstanding any other provision of the title, 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 [AFDC][2] 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, 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.

42 U.S.C. § 1396r-6(a)(1)(2002 Supp.). The section mandates that State plans that provided aid to AFDC recipients in three of the six months before the recipients became ineligible for the aid must also provide that those persons remain eligible for TMA for the next six months. Section 1396u-1, which was enacted in 1996, expanded the group of persons who were eligible to receive TMA.

Bowlin was not receiving AFDC, TANF, or ADC, the State of Nebraska's parallel program. Bowlin was receiving aid under an optional State plan designed for medically needy caretaker relatives. See §1396a(a)(10)(A)(ii). In determining which applicants received which benefits, Nebraska employed different methodologies to measure an applicant's income. The parties agree that TMA extends only to those persons who had

[2] "Part A of subchapter IV" is the section of the Social Security Act that formerly provided benefits to eligible families through the AFDC program. 42 U.S.C. §1396(a)(10)(A)(i)(I).

received AFDC or others included in the categories of persons identified in 42 U.S.C. § 1396u-1, which provides in part:

> **a) References to subchapter IV-A are references to pre-welfare-reform provisions**
>
> Subject to the succeeding provision of this section, . . . any reference in this subchapter . . . to a provision of part A of subchapter IV of this chapter, or a State plan under such part . . . 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 subchapter, ***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 subchapter IV [AFDC] of this chapter 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 606 of this title and section 607(a) of this title 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 subchapter IV of this chapter [AFDC], but not below the income standards applicable under its State plan under such part on May 1, 1988
>
> * * * *

(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.

42 U.S.C. §1396u-1(b)(1-2). [3]

Success on the Merits

In determining whether Bowlin is likely to succeed on the merits of this case and show that she is entitled to TMA under state and federal law, she must show that she is in the group of persons that Congress intended to include when it drafted 42 U.S.C. §1396u-1. Bowlin claims to be entitled to TMA because she satisfies all three eligibility requirements that are set forth in § 1396r-6. Thus, Bowlin argues that she is a person who has been "treated as having received" AFDC under §1396u-1 as that section has been construed by the Eighth Circuit Court of Appeals in *Kai v. Ross*, 336 F.3d 650, 655-56 (8th Cir. 2003), and that her inclusion in §1396u-1 satisfies the first eligibility requirement for TMA under §1396r-6. Bowlin also contends, and the Director concedes, that she satisfies the second eligibility requirement because Bowlin received at least three months of Medicaid in the six months before her Medicaid eligibility was terminated by the Director.

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[3] The TMA statute also provides:

1396u-1(c)(2) Treatment for purposes of transitional coverage provisions

* * * * *

(2) Transition in the case of earnings from employment - For continued medical assistance in the case of individuals . . . described in subsection (b)(1)(A), . . .who would otherwise become ineligible because of hours or income from employment, see sections 1396r-6 and 1396a(e)(1) of this title.

42 U.S.C. § 1396u-1(c)(2). Section 1396r-6 is the entitlement to TMA and 1396(a)(e)(1) makes former AFDC recipients who remain employed eligible for a continuation of Medicaid for four months.

Bowlin satisfies the third eligibility requirement for TMA, she contends, because she lost her Medicaid due to her income from employment.

The Director contends that Bowlin is not eligible for TMA because she is not included in the category of persons described in §1396u-1. She argues that *Kai* has no precedential value because it was decided with reference to a preliminary injunction and not a final judgment on the merits. Alternatively, the Director argues that *Kai* is not relevant because it can be distinguished from this case. While I acknowledge that the Eighth Circuit Court did not review a final judgment in *Kai,* I am compelled to defer to the Court's construction of the relevant statutes in this case.

In reversing this Court's denial of a motion for preliminary injunction sought by a certified class of medically needy caretaker relatives, the *Kai* Court held that the class members' claim was "likely to succeed under the plain meaning of the relevant statutes." *Id.* at 651. The Eighth Circuit determined that the *Kai* class members were "within the class of people eligible for Medicaid benefits under the Welfare Reform Bill passed in 1996, and remained within that class until the State of Nebraska amended the relevant statute in 2002." *Id.* at 653. That statute changed the State's income and resource counting methodology from a more generous to a more strict standard.

There are similarities between the *Kai* class members and Bowlin. Like Bowlin, the *Kai* class members were not receiving and were not eligible for AFDC or the State's ADC. Like Bowlin, the *Kai* class members were eligible for, and receiving, Medicaid benefits. The *Kai* class members received such benefits under a state-determined method of counting income called "stacking." When the state's new income-counting methodology

was used, the *Kai* plaintiffs became ineligible for Medicaid, but Bowlin remained eligible. Bowlin later became ineligible for Medicaid due to a raise in pay from her employer, although she could access Medicaid benefits by submitting a co-pay through a "spend-down" program, discussed below. At issue before the Court at this time is whether the factual mechanism resulting in Bowlin's ineligibility for Medicaid, or her potential access to Medicaid through the "spend-down" program, distinguishes Bowlin's status from that of the *Kai* plaintiffs for purposes of TMA eligibility. I conclude that these differences do not distinguish Bowlin from the *Kai* plaintiffs for purposes of determining TMA eligibility.

The *Kai* Court held that §1396u-1 states in "unmistakable terms that it is not limited to AFDC eligibles." *Id.* at 655. The Court also noted, however, that "[m]edically needy caretaker relatives are not entitled to Medicaid by reason of any mandatory provision of federal law." *Id.* at 654. However, the *Kai* Court concluded that "when the State removes these persons, it must do so subject to the condition, under Section 1925, that they receive Transitional Medical Assistance." *Id.*

The Eighth Circuit Court stated:

> The plain language of this provision appears to fit the plaintiffs and their class. They were not receiving AFDC, but the effect of the provision is clearly to make eligible for medical assistance not only persons who were receiving AFDC on July 16, 1996, but also certain other persons. Section 1396u-1(b)(1) makes persons receiving AFDC eligible for medical assistance, but the provision is expressly made "subject to paragraphs (2) and (3)." The phrase "subject to" must mean 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 the group that is already eligible under (1) by virtue of being AFDC recipients.
>
> It appears to us that plaintiffs are members of a group that was added in this way. They had been beneficiaries of "stacking," which is an "income . . .

> methodolog[y] that [is] less restrictive than the methodologies used under" Nebraska's AFDC plan on July 16, 1996. The "stacking" less-restrictive income methodology has now been removed by statute. This the State may do. Medically needy caretaker relatives are not entitled to Medicaid by reason of any mandatory provision of federal law. But, when the State removes these persons, it must do so subject to the condition, under Section 1925, that they receive Transitional Medical Assistance.

Kai, 336 F.3d at 654. I read *Kai* to hold that if a State provides Medicaid to persons under a State plan that uses an income "methodolog[y] that [is] less restrictive than the methodologies used under" Nebraska's AFDC plan on July 16, 1996,[4] then when these persons become ineligible for Medicaid, the State is obliged to provide them with TMA. Although the *Kai* Court discussed the manner in which the *Kai* class members became ineligible -- through a change in State law and regulation -- there is nothing in the *Kai* opinion that calls into question Bowlin's entitlement to TMA simply because she became ineligible "because of hours of, or income from, employment of the caretaker relative" as contemplated by 42 U.S.C. § 1396r-6. Indeed, this circumstance was contemplated by Congress as evidenced by §1306u-1(c)(2), which refers back to 1396r-6.

The State's medically needy income eligibility limit for Bowlin's household of three was $492. The 1996 AFDC income limit for a household of three was $673. (Filing No. 6, Brief in Support of Motion for Temporary Restraining Order at 11.) Because Bowlin had countable income below the AFDC income limit applicable in 1996, she must be "treated as receiving" AFDC under §1396u-1.

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[4] The *Kai* plaintiff class was defined as: "All caretaker relatives in Nebraska with earned income a) who have received Medicaid for at least three of the six months prior to having their Medicaid benefits terminated due to the defendant's elimination of its stacking methodology; and b) who, but for the defendant's elimination of its stacking methodology, would continue to be eligible to receive Medicaid."

The Director asserts two main arguments in challenge to this conclusion. First, she argues that Bowlin was eligible only for Medicaid through the State's "medically needy caretaker relative" program, which is an optional program administered by the State pursuant to 42 U.S.C. §1396a(a)(1). Consequently, the Director asserts that Bowlin was not, and could not have been, eligible for Medicaid through AFDC, TANF, or Nebraska's ADC program as contemplated in § 1396u-1. The Director emphasizes, and I find no genuine dispute, that Bowlin's medically needy countable income is distinct from her ADC countable income. She argues that the "treated as receiving" language in §1396u-1 refers only to AFDC's replacement programs, such as TANF and Nebraska's ADC, but it does not include Nebraska's optional plan that covers medically needy caretaker relatives. (Defendants' Brief at 15-16.)[5] However persuasive this argument may be, it appears to be the same argument that the Eighth Circuit Court expressly rejected in *Kai v. Ross*, 336 F.3d 650, 655-56 (8th Cir. 2003).

The *Kai* Court held that the medically needy caretaker relative class members were included in the category of "additional" persons who were "treated as receiving" AFDC by construction of the "subject to paragraph (2)" language in §1396u-1. (*Id.* at 654.) The *Kai* Court included the *Kai* class members as additional persons who were "treated as receiving" AFDC because they were recipients of Medicaid under a State option that used

[5] In support of her position, the Director relies on the opinion of the an administrator of the Centers for Medicare and Medicaid Service which states that "individuals who are eligible . . . as medically needy . . . are not eligible for TMA." (Filing No. 40, Exs. 10 and 11.) The *Kai* Court acknowledged that such opinions, which are contained in correspondence, should be considered respectfully, but that they are "worth no more than its inherent persuasive value," and it found a similar letter not to be persuasive. Kai, 336 F.3d at 655.

a less restrictive income and resource counting methodology than was employed by the State in the AFDC program in place in 1996. (*Id.*; 42 U.S.C. §1396u-1(b)(2)(C).)

The Director also argues that the *Kai* court's analysis is irrelevant to the issues presented here because the issue in *Kai* was the effect of the State's decision to revise the income counting methodology applicable to the medically needy caretaker relatives class. In this case, the Director argues, Bowlin became ineligible for Medicaid not through any act of the State, but because she received a raise at her place of employment. Though the factual distinction is apparent, I do not find it alters the legal analysis that Bowlin, as a medically needy caretaker relative under the State plan that uses a less restrictive methodology to calculate income eligibility, has lost her eligibility for Medicaid and is entitled to TMA.

The Director also argues that Bowlin's eligibility under § 1396u-1(b)2 can and should be distinguished from the *Kai* class members because Bowlin can access Medicaid benefits under the medically needy excess income shared cost program, also referred to as a "spend-down" program. Under the spend-down program, Bowlin may seek any necessary medical or dental care, and the cost of the care will be covered by the State, if she makes an initial out-of-pocket payment, in her case $77 per month, for the care and related expenses such as mileage that she incurs. Thus, the "spend-down" operates much like a monthly deductible. The $77 per month is derived from the amount Bowlin earns that exceeds the State's income limit for medically needy caretaker relatives.

The Director argues that "TMA is not available to those receiving medically needy Medicaid as the shared cost program makes TMA unnecessary and duplicative." (Filing

No. 33, Defendant's Brief as 12.) The evidence and arguments before the Court at this preliminary stage indicate that the *Kai* plaintiffs also had access to the spend-down program. (See, *e.g.*, Filing No. 35, Plaintiff's Brief in Support of Preliminary Injunction at 3-4.) Bowlin's eligibility for the spend-down program does not distinguish her from the *Kai* plaintiffs; nor does it remove her from the scope of § 1396u-1; nor does it render TMA unnecessary or redundant. The TMA benefit that Bowlin is entitled to receive lasts for a period of at least six months and up to one year, and it is a straightforward extension of Medicaid benefits. If Bowlin were denied TMA for a period of six months after she became ineligible for Medicaid, and if she were required to pay $77 each month before the Medicaid benefit were available, she would be out-of-pocket $462. While the spend-down program is a common-sense initiative designed to assist people in the transition from complete dependence on Medicaid to independence, the availability of this shared-cost program does not negate Bowlin's entitlement to TMA under section 1396r-6 and 1396u-1 as construed by *Kai.*

Bowlin's circumstances are distinguishable from the facts in the *Kai* case. Certainly the State had no part in securing Bowlin's raise in pay that resulted in the loss of her Medicaid benefits. With her raise in pay, she may be in a better position to absorb the cost of the spend-down program than were the *Kai* plaintiffs and thereby access the Medicaid benefits. However, I am not persuaded that these factual distinctions make any legal difference in whether Bowlin should be "treated as receiving" AFDC under the Eighth Circuit Court's construction of 42 U.S.C. § 1396u-1. The *Kai* Court found that §1396u-1 requires a State to pay TMA to all persons who had been treated as recipients of AFDC

by virtue of their receipt of Medicaid under a less restrictive methodology used under the State plan available in 1996.[6] That Bowlin became ineligible "because of hours of, or income from, employment" as is contemplated by 42 U.S.C. §1396r-6, is not relevant to whether she should be treated as an additional person who is entitled to be "treated as receiving" AFDC under §1396u-1.

For all these reasons, I conclude that Bowlin is likely to succeed on the merits of her claim. This *Dataphase* factor weighs in favor of issuance of the preliminary injunction.

Irreparable Harm

Bowlin argues that the deprivation of temporary medical assistance will cause her irreparable harm because she will be unable to pay for needed health care. The Director argues that Bowlin is not subject to any risk of irreparable harm by the deprivation of TMA because, based on the depositions of Bowlin's physician's assistant and a person employed in the physician's billing office, that health care provider working with that business office would not withhold treatment from Bowlin based on her inability to pay. Nevertheless, whether Bowlin would be so fortunate with other health care providers is not a foregone conclusion. The Court finds that Bowlin's risk of irreparable harm, because the harm is health-related, weighs in favor of granting the motion. See *Harris v. Blue Cross Blue Shield of Missouri,* 995 F.2d 877, 879 (8th Cir. 1993)(acknowledging appropriateness of preliminary injunction when plaintiff had life-threatening illness and sought medical care).

[6] Recognizing that a State plan may use a less restrictive methodology for income counting than was used for calculating AFDC.

Balance of Hardships

The balance between the harm that the injunction's issuance would inflict on other interested parties compared to the benefit to the plaintiff is also a *Dataphase* factor. The Director argues that the State of Nebraska is operating under serious budget constraints and that, if the class is certified, the expense to the State of providing TMA would be "catastrophic." However, at this time, the State would be required to provide TMA only for Bowlin and, by its own admissions, that will cost approximately $77 per month. To the extent that this factor tips the balance, it is in favor of injunctive relief.

Public Interest

Bowlin argues that enforcement of laws passed by Congress is in the public interest, even when that means enjoining allegedly illegal action by a State, citing *Glenwood Bridge, Inc. v. City of Minneapolis*, 940 F.2d 367, 372 (8th Cir. 1991). There is certainly a public interest in securing medical care for the working poor of this nation. How best to accomplish that goal is a matter of widespread and lively debate. The State of Nebraska, working within its budgetary constraints, has adopted one manner of accomplishing this goal. However, the State cannot implement its solution to the exclusion of a benefit required under federal law. I find this factor does not tip the balance in either direction.

CONCLUSION

The Court has considered the *Dataphase* factors and is mindful that no single factor, in itself, is dispositive. On balance, the factors that are relevant to the matter weigh in favor of issuance. Therefore, the Court is persuaded that the preliminary injunction should issue. For these reasons, Bowlin's motion for a preliminary injunction will be granted.

IT IS ORDERED:

1. Plaintiffs' Motion for Preliminary Injunction (as sought in Filing No. 1) is granted; and

2. The Defendant is hereby enjoined from denying temporary medical assistance as is required under 42 U.S.C. § 1396r-6 to Kelly Bowlin pending final disposition of this case.

Dated this 23th day of August, 2004.

BY THE COURT:

s/Laurie Smith Camp
Laurie Smith Camp
United States District Judge