IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

AZAR WEBB, Petitioner, vs. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES; COURTNEY PHILLIPS, AS CHIEF EXECUTIVE OFFICER; AND CALDER LYNCH, AS DIRECTOR OF THE DIVISION OF MEDICAID AND LONG-TERM CARE, Respondents.	)	CASE NO. CI 16-1907 **ORDER**

INTRODUCTION

This matter comes before the Court on Petitioner Azar Webb's ("Petitioner") appeal from the May 6, 2016 decision of the Nebraska Department of Health and Human Services ("DHHS") Hearing Officer, affirming the termination of Petitioner's Medicaid coverage; a Motion to Dismiss filed by DHHS, Courtney Phillips, as Chief Executive Officer, and Calder Lynch, as Director of the Division of Medicaid and Long-Term Care (collectively "Respondents"); and a Motion for Summary Judgment filed by Petitioner. The matters were consolidated and the Court held a hearing in these matters on January 20, 2017. Robert E. McEwen and Sarah C. Helvey appeared on behalf of Petitioner. Assistant Attorney General Ryan C. Gilbride appeared on behalf of Respondents. The Court received Exhibits 1 through 5. Exhibit 1 is the certified transcript of the administrative proceeding and Exhibit 2 is Volume II of the Bill of Exceptions[1] filed on August 1, 2016. In reviewing Petitioner's appeal, the Court will only

[1] Volume I of the Bill of Exceptions contains the record from the proceedings before the Hearing Officer (pages 1–47) (marked as Exhibit 1) and Volume II contains Exhibits 1–15, which were offered, and received by the Hearing Officer (marked as Exhibit 2). All references to the Bill of Exceptions will be cited to the relevant page and line number or exhibit number as marked at the administrative hearing. All

consider evidence that was made part of the record in the proceeding before the administrative agency. Arguments were heard, briefs submitted, and the matter was taken under advisement. Being fully advised in the premises, the Court now finds and orders as follows:

FACTS AND PROCEDURAL BACKGROUND

Medicaid is a jointly funded state and federal program that provides health coverage to certain categories of low-income individuals pursuant to Title XIX of the Social Security Act. Ex. 2 at 1. Medicaid is an optional benefit that a state must agree to provide in exchange for federal financial participation. *Id.* Medicaid is administered by the states according to broad federal guidelines and is overseen by the Centers for Medicare & Medicaid Services ("CMS") in the U.S. Department of Health and Human Services. *Id.* There are two major eligibility categories under the Medicaid program: mandatory and optional. All states that participate in the Medicaid program must provide coverage and certain kinds of medical care and services to those who are eligible under the mandatory category. 42 U.S.C. § 1396a(a)(10)(A); 42 U.S.C. § 1396d(a). States have flexibility to extend eligibility to additional optional categories and to offer optional health benefits within the broad federal guidelines, subject to federal approval.

Before any state may utilize federal funds available under the Medicaid program, a state must apply for and receive approval of its State Plan that sets forth the exact services, programs, and functions the state must offer. Ex. 2 at 1. When a state intends to make changes to a qualified Medicaid program, or changes are required by federal, state, or local law, the state must first file a State Plan Amendment ("SPA") to CMS for approval. *Id.* The State Plans and SPAs are reviewed by CMS, the sole approving authority. *Id.* While states can use this process to change optional services or eligibility categories, it cannot be used to change mandatory services or eligibility categories under the federal law. A state may not spend any federal dollars on the

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references to the Order issued by the Hearing Officer on May 6, 2016 will be cited as "Or. __" by the corresponding page number.

change in services until the SPA is approved by CMS. *Id.* If the plan is not approved, the state may not make said changes to the state Medicaid program. *Id.*

Title IV-E of the Social Security Act offers a voluntary subsidy program for former foster children. *Id.* This subsidy is separate and distinct from Medicaid. Like Medicaid, the Title IV-E subsidy cannot be utilized unless a State Plan is submitted to, and approved by, the Administration for Children and Families ("ACF"). *Id.* Any changes to the operation of an existing plan must be preceded by an SPA that is approved by ACF. *Id.*

In 2008, Congress unanimously passed the Fostering Connections to Success and Increasing Adoptions Act of 2008 ("FCA"). Pub. L. No. 110-351, 122 Stat. 3949 (2008). Among other things, the FCA allowed states to extend Title IV-E foster care to children up to age twenty-one, who are enrolled in post-secondary education, are employed, or unable to work or attend school due to a medical condition. 42 U.S.C. § 675(8)(B)(iii).

In 2010, Congress amended the mandatory Medicaid eligibility categories through the enactment of the Patient Protection and Affordable Care Act of 2010 ("ACA"). Pub. L. No. 111-148, 124 Stat. 119 (2010). Under the ACA, all states must provide Medicaid to individuals who:

> (aa) are under 26 years of age;
> (bb) are not described in or enrolled under any of subclauses (I) through (VII) of this clause or are described in any of such subclauses but have income that exceeds the level of income applicable under the State plan for eligibility to enroll for medical assistance under such subclause;
> (cc) were in foster care under the responsibility of the State on the date of attaining 18 years of age or such higher age as the State has elected under section 675(8)(B)(iii) of this title;
> (dd) were enrolled in the State plan under this subchapter or under a waiver of the plan while in such foster care.

42 U.S.C. § 1396a(a)(10)(A)(i)(IX). Pursuant to this provision, individuals who meet the requirements of the Former Foster Care Child Category described in 42 U.S.C. § 1396a(a)(10)(A)(i)(IX) are mandatorily covered under the Medicaid program until they turn twenty-six years old.

In 2013, the State of Nebraska extended its foster care system to the age of twenty-one through the enactment of the Young Adult Voluntary Services and Support Act ("YAVSSA"). Ex. 14 at 1. The YAVSSA created a program called the "extended services program" that provides extended services and support to young adults aging out of foster care at age nineteen until they turn twenty-one. *Id.* In 2014, the Nebraska Legislature renamed the YAVSSA to be called the Young Adult Bridge to Independence Act and renamed the "extended services program" to be called the Bridge to Independence ("B2I") program. Ex. 13 at 56. Extended services and support provided under the B2I program include: (1) medical care under the medical assistance program; (2) housing, placement, and support in the form of foster care maintenance payments; and (3) case management services. NEB. REV. STAT. § 43-4505. The Act allowed eligible young adults, who voluntarily submitted themselves to the jurisdiction of the juvenile court and the care and placement responsibility of DHHS through a Voluntary Placement Agreement, to participate in the B2I program. NEB. REV. STAT. §§ 43-4504 & 43-4506.

In 2013, DHHS submitted a Title IV-E SPA to ACF, seeking approval for the use of Voluntary Placement Agreements for children over the age of nineteen to participate in the B2I program through the age of twenty-one. Ex. 2 at 1; Or. 1. The SPA was subsequently approved in 2014 and Nebraska received authority to use Voluntary Placement Agreements for former foster care children over the age of nineteen who participate in the B2I program. Ex. 2 at 1; Or. 1. The State of Nebraska currently utilizes Voluntary Placement Agreements as defined by 42 U.S.C. § 672(f) for every child in the B2I program pursuant to NEB. REV. STAT. § 43-4503(5). Ex. 15 at 32.

On July 1, 2015, various amendments to the B2I program became effective under state law. *See* NEB. REV. STAT. § 43-4504 & 43-4511.01. Specifically, the amendments broadened eligibility requirements for young adults, who had formerly entered into a guardianship from the foster care system, at age sixteen or older, to participate in the B2I program through a Voluntary Placement Agreement. NEB. REV. STAT. § 43-4504(2). The amendments also required DHHS to file an updated Title IV-E SPA prior to October 15, 2016 to obtain Title IV-E funding for the newly eligible young

adults in the B2I program. Ex. 2 at 1. DHHS filed the Title IV-E SPA with ACF by the statutory deadline. *Id.* The updated Title IV-E SPA had not been approved at the time of the administrative hearing which was held on April 5, 2016. Ex. 2 at 2; Or. 2–3.

Petitioner is a twenty-two year old young adult born on September 29, 1994. On July 1, 2015, the State of Nebraska entered into a Voluntary Placement Agreement with Petitioner. Ex. 2 at 1; Or. 1. Petitioner became eligible to participate in the B2I program based on the 2015 amendments to NEB. REV. STAT. § 43-4504. As a result of the Voluntary Placement Agreement, Petitioner was under the care and placement responsibility of DHHS while in the B2I program. Ex. 15 at 33. On July 7, 2015, the Honorable Douglas Johnson of the Separate Juvenile Court of Douglas County entered an order finding that it was in Petitioner's best interest to participate in the B2I program. *Id.* Petitioner actively participated in the B2I program from July 1, 2015, until September 29, 2015. Ex. 2 at 1; Or. 1.

On August 5, 2015, DHHS filed a Medicaid SPA with CMS, proposing to provide Medicaid coverage to qualified youth age nineteen but less than twenty-one, who entered into a kinship guardianship assistance agreement, an adoption assistance agreement, or a state-funded guardianship assistance agreement after turning sixteen, until they turn twenty-one. Ex. 2 at 1; Or. 2. On October 7, 2015, CMS approved the Medicaid SPA. Ex. 7 at 1. As a result, Petitioner was made retroactively eligible for Medicaid from July 1, 2015, until the end of September 2015, the month in which he turned twenty-one. Ex. 9 at 2. DHHS terminated Petitioner's Medicaid coverage as of October 1, 2015, upon determining that he was no longer eligible. *Id.*

On September 25, 2015, Petitioner appealed the actions of Respondents pursuant to the Nebraska Administrative Procedure Act ("APA"). On April 5, 2016, Petitioner, with his counsel, appeared before the DHHS Hearing Officer in this matter. On May 6, 2016, the DHHS Hearing Officer issued his opinion, affirming the termination of Petitioner's Medicaid coverage on the grounds that: (1) it was unclear whether Petitioner's participation in the B2I program through a Voluntary Placement Agreement constitutes "foster care" under the responsibility of the State; and (2) the updated Title IV-E SPA had not been approved at the time of the administrative hearing. Or. 2–3.

Petitioner appeals the Order entered by the DHHS Hearing Officer on May 6, 2016, affirming the termination of Petitioner's Medicaid coverage. In his Complaint, Petitioner also brings an action under 42 U.S.C. § 1983, seeking redress of the deprivation of federal rights by Respondents. On August 8, 2016, Respondents filed a motion to dismiss Petitioner's claim under 42 U.S.C. § 1983 for failure to state a claim upon which relief can be granted. On November 7, 2016, Petitioner filed a motion for summary judgment in support of his claim under 42 U.S.C. § 1983.

STANDARD OF REVIEW

The Administrative Procedure Act ("APA") governs this appeal. The APA provides, in relevant part:

> Judicial review shall be heard de novo on the record. The court shall receive the records of the administrative proceedings, base its decision on the preponderance of the evidence, and grant such relief as the court determines is appropriate. The district court may affirm, reverse, or modify the decision of the director, or remand the case to the director for further proceedings, including the receipt of additional evidence, for good cause shown.

NEB. REV. STAT. § 83-1224(5) (Reissue 2014). This review shall be conducted by the district court without a jury de novo on the record of the agency. NEB. REV. STAT. § 84-917(5)(a) (Reissue 2014); *Betterman v. State of Neb. Dep't of Motor Vehicles*, 273 Neb. 178, 191 (2007).

In a review de novo on the record, the district court is required to make independent factual determinations based upon the record, and the court reaches its own independent conclusions with respect to the matters at issue. *Schwarting v. Neb. Liquor Control Comm'n*, 271 Neb. 346, 351 (2006). To the extent the interpretation of statutes and regulations is involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made below, according deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent. *Utelcom, Inc. v. Egr*, 264 Neb. 1004, 1007 (2002). In appeals involving individual applicants for public assistance benefits, the one seeking public assistance has the burden of proving

entitlement thereto. *Sunrise Country Manor v. Neb. Dep't of Soc. Servs.*, 246 Neb. 726, 731 (1994).

In reviewing a motion to dismiss under Neb. Ct. R. Pldg. § 6-1112(b)(6), the court accepts as true all the facts which are well pled and the proper and reasonable inferences of law and fact which may be drawn therefrom, but not the pleader's conclusions. *Zawaideh v. Neb. Dep't of Health & Human Servs. Reg. & Licensure*, 280 Neb. 997, 1004 (2011). To prevail against a motion to dismiss for failure to state a claim, a plaintiff must allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face. *Doe v. Bd. of Regents*, 280 Neb. 492, 506 (2010). In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim. *Id.* However, if "matters outside the pleading are presented to and not excluded by the court on a motion to dismiss for failure to state a claim, the motion shall be treated as one for summary judgment and disposed of" in accordance with the summary judgment statutes. Neb. Ct. R. Pldg. §6-1112(b); *see also Lindsay v. Fitl*, 293 Neb. 677, 681 (2016).

Summary judgment is proper when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. NEB. REV. STAT. § 25-1332 (Reissue 2008); *Marcovitz v. Rogers*, 276 Neb. 199, 203 (2008). A party moving for summary judgment must make a prima facie case by producing enough evidence to demonstrate that the movant is entitled to judgment if the evidence were uncontroverted at trial; once the moving party makes a prima facie case, the burden to produce evidence showing the existence of a material issue of fact that prevents judgment as a matter of law shifts to the party opposing the motion. *Builders Supply Co., Inc. v. Czerwinski*, 275 Neb. 622, 629 (2008).

In reviewing a motion for summary judgment, the court views the evidence in the light most favorable to the nonmoving party and gives such party the benefit of all

reasonable inferences deducible from the evidence. *Cnty. of Hitchcock v. Barger*, 275 Neb. 872, 875 (2008). However, conclusions based upon guess, speculation, conjecture, or choices of possibilities do not create material issues of fact for purposes of summary judgment. *Marksmeier v. McGregor Corp.*, 272 Neb. 401, 410 (2006). On a motion for summary judgment, the question is not how a factual issue is to be decided, but, instead, whether any real issue of material fact exists. *Range v. Abbott Sports Complex*, 269 Neb. 281, 284 (2005).

ANALYSIS

Petitioner seeks a determination from this Court that he is eligible for Medicaid pursuant to 42 U.S.C. § 1396a(a)(10)(A)(i)(IX), or the Former Foster Care Child Category under the Medicaid Act. Petitioner argues that the DHHS Hearing Officer and Respondent Calder Lynch erred in holding that: (1) it was unclear whether his participation in the B2I program constitutes "foster care" under the responsibility of the State; and (2) DHHS properly terminated Petitioner's Medicaid coverage because the updated Title IV-E SPA had not been approved at the time of the administrative hearing. Petitioner argues that he was in "foster care" under the responsibility of the State while he was in B2I through a Voluntary Placement Agreement. Petitioner further requests the Court to grant him relief under 42 U.S.C. § 1983, upon finding that he is eligible for Medicaid under the Former Foster Care Child Category. In response, Respondents argue that Petitioner does not meet the eligibility requirements under 42 U.S.C. § 1396a(a)(10)(A)(i)(IX) because Petitioner's participation in the B2I program through a Voluntary Placement Agreement does not constitute "foster care" unless and until ACF approves the updated Title IV-E SPA. The Court will first address Petitioner's appeal from the Order of the DHHS Hearing Officer dated May 6, 2016, under the APA.

I. Petitioner's Appeal From the Order of the DHHS Hearing Officer

In 2010, Congress amended the mandatory Medicaid eligibility categories through the enactment of the Patient Protection and Affordable Care Act of 2010

("ACA"). Pub. L. No. 111-148, 124 Stat. 119 (2010). Under the ACA, all states must provide Medicaid to individuals who:

> (aa) are under 26 years of age;
> (bb) are not described in or enrolled under any of subclauses (I) through (VII) of this clause or are described in any of such subclauses but have income that exceeds the level of income applicable under the State plan for eligibility to enroll for medical assistance under such subclause;
> (cc) were in foster care under the responsibility of the State on the date of attaining 18 years of age or such higher age as the State has elected under section 675(8)(B)(iii) of this title;
> (dd) were enrolled in the State plan under this subchapter or under a waiver of the plan while in such foster care.

42 U.S.C. § 1396a(a)(10)(A)(i)(IX). Pursuant to this provision, individuals who meet the requirements of the Former Foster Care Child Category described in 42 U.S.C. § 1396a(a)(10)(A)(i)(IX) are mandatorily covered under the Medicaid program until they turn twenty-six years old.

Petitioner was born on September 29, 1994 and is currently twenty-two years old. The parties have stipulated that Petitioner was not eligible for any of the Medicaid categories described in 42 U.S.C. §§ 1396a(a)(10)(A)(i)(I)-(VII) at the time of the administrative hearing. Upon CMS's approval of the Medicaid SPA in October 2015, Petitioner received retroactive Medicaid coverage while he was in the B2I program pursuant to 42 C.F.R. 435.222 ("reasonable classification" category). As such, there is no dispute that Petitioner meets three of the four requirements under 42 U.S.C. § 1396a(a)(10)(A)(i)(IX). Accordingly, the main issues before the Court are: (1) whether Petitioner's participation in the B2I program constitutes "foster care"; and (2) whether ACF's approval of the updated Title IV-E SPA is necessary to provide Medicaid coverage to Petitioner. In order for Petitioner to be eligible for Medicaid under the Former Foster Care Category, he must have been in "foster care" under the responsibility of the State when he attained age eighteen or such higher age as the State has elected under 42 U.S.C. § 675(8)(B)(iii).

Petitioner argues that he meets all of the eligibility requirements under 42 U.S.C. § 1396a(a)(10)(A)(i)(IX) or the Former Foster Care Child Category. Petitioner argues, among other things, that he was in "foster care" under the responsibility of DHHS when

he turned twenty-one years of age. Petitioner argues that the State of Nebraska has elected to extend the foster care system to eligible young adults up to age twenty-one. Petitioner argues that ACF's approval of the updated Title IV-E SPA is not necessary because Title IV-E eligibility is not a requirement under the Former Foster Care Child Category.

Based on a preponderance of the evidence and the applicable laws, the Court finds that the DHHS Hearing Officer incorrectly determined that Petitioner was not in "foster care" through his participation in the B2I program. Under the federal law, a Voluntary Placement Agreement allows a child to be placed in foster care. 42 U.S.C. § 672(e)-(f); 45 C.F.R. § 1356.22. The State of Nebraska currently utilizes Voluntary Placement Agreements for every young adult in the B2I program pursuant to NEB. REV. STAT. § 43-4503(5). On July 1, 2015, Petitioner entered into a Voluntary Placement Agreement with DHHS based upon the 2015 amendments to the B2I program. NEB. REV. STAT. §§ 43-4504 & 43-4511.01. By signing the Voluntary Placement Agreement, Petitioner voluntarily submitted himself to the jurisdiction of the juvenile court pursuant to NEB. REV. STAT. § 43-247(11). On July 7, 2015, the Honorable Douglas Johnson of the Separate Juvenile Court of Douglas County entered an order finding that it was in Petitioner's best interest to participate in the B2I program. Ex. 2 at 1. The juvenile court found that Petitioner was under the placement and care responsibility of DHHS through his participation in the B2I program. Ex. 15 at 33. The record indicates that Petitioner actively participated in the B2I program from July 1, 2015 until he turned twenty-one on September 29, 2015. Ex. 2 at 1. DHHS was charged with providing case management, supervision, and a variety of transitional services to Petitioner while he was in the program. NEB. REV. STAT. § 43-4505 & 43-4506(3). DHHS was also required to provide continued efforts toward Petitioner's permanency. NEB. REV. STAT. § 43-4506(4).

Petitioner's participation in the B2I program further meets the federal definition of "foster care." Pursuant to 45 C.F.R. § 1355.20:

> *Foster Care* means 24-hour substitute care for children placed away from their parents or guardians and for whom the title IV-E agency has placement and care responsibility. This includes, but is not limited to, placements in foster family homes, foster homes of relatives, group homes, emergency shelters, residential facilities, child care institutions,

> and preadoptive homes. A child is in foster care in accordance with this definition regardless of whether the foster care facility is licensed and payments are made by the State, Tribal or local agency for the care of the child, whether adoption subsidy payments are being made prior to the finalization of an adoption, or whether there is Federal matching of any payments that are made.

In accordance with this definition, "foster care" includes "child care institutions." *Id.* Under 42 U.S.C. § 672(c), the term "child-care institution" includes "a supervised setting in which the individual is living independently." 42 U.S.C. § 672(c). At the time Petitioner entered the B2I program, he was living with his former guardian but was not in a guardianship because his guardianship had legally terminated at age nineteen pursuant to NEB. REV. STAT. § 43-1312.01 (5). Therefore, Petitioner was living with his former guardian in a supervised independent living setting under the placement and care responsibility of DHHS.

Petitioner further argues that the State of Nebraska has elected to extend the foster care system to age twenty-one. 40:10–23. This contention is supported by the Fostering Connections to Success and Increasing Adoptions Act of 2008. Pub. L. No. 110-351, 122 Stat. 3949 (2008) and the Young Adult Bridge to Independence Act (or formerly known as the Young Adult Voluntary Services and Support Act of 2013). NEB. REV. STAT. § 43-4501.

In 2008, Congress unanimously passed the Fostering Connections to Success and Increasing Adoptions Act of 2008 ("FCA"). Pub. L. No. 110-351, 122 Stat. 3949 (2008). Among other things, the FCA allowed the states to extend their foster care system to children up to age twenty-one, who are enrolled in post-secondary education, are employed, or unable to work or attend school due to a medical condition. 42 U.S.C. § 675(8)(B)(iii). Specifically, the FCA gave states the option to expand their definition of "child" to include an individual "who has not attained 19, 20, 21 years of age, as the State may elect" for the purposes of Title IV-E funding. *Id.* Under the ACA, individuals qualify for mandatory Medicaid coverage if, among other things, they were in foster care under the responsibility of the State on the date of attaining 18 years of age or *such higher age as the State has elected* under 42 U.S.C. § 675(8)(B)(iii). 42 U.S.C. § 1396a(a)(10)(A)(i)(IX) (emphasis added). Under the Young Adult Bridge to

Independence Act, the term "child" is defined as "an individual who has not attained *twenty-one years of age*." NEB. REV. STAT. § 43-4503(2) (emphasis added). The Act also defines the term "young adult" as "an individual who has attained nineteen years of age but who has not attained twenty-one years of age." NEB. REV. STAT. § 43-4503(6). The B2I program under the Act provides extended foster care services and support to a "young adult" who signs a Voluntary Placement Agreement and meets certain eligibility requirements. NEB. REV. STAT. §§ 43-4504 & 43-4506. These provisions, taken together, make it clear that the State of Nebraska has elected to extend its foster care system to the age of twenty-one through the enactment of the Young Adult Bridge to Independence Act.

Respondents argue that Petitioner is not eligible for Medicaid under the ACA because the updated Title IV-E SPA had not been approved by ACF at the time of the administrative hearing. Respondents argue that ACF's approval is necessary for the B2I program under the 2015 amendments to be considered a federal foster care maintenance program. 43:8–44:8; 46:1–26. Respondents cite 42 U.S.C. § 670 to argue that it is a condition precedent to have a current State Plan authorized by ACF prior to utilizing Title IV-E funds. 33:22–25; 34:1–24. After careful review and for the following reasons, the Court finds that ACF's approval is not necessary to provide Medicaid coverage to Petitioner.

Under the plain language of 42 U.S.C. § 1396a(a)(10)(A)(i)(IX), Petitioner is eligible for Medicaid under the Former Foster Care Child Category, if: (1) he is under the age of twenty-six; (2) are not described in or enrolled under any of the subclauses (I) through (VII); (3) was in foster care under the responsibility of the State on the date he turned twenty-one; and (4) was enrolled in the State Plan while in such foster care. If Petitioner meets all four requirements under the Former Foster Care Child Category, the State must provide Medicaid coverage until he reaches the age of twenty-six. There are no further requirements under the Former Foster Care Child Category. The ACA does not require states to consider how the individual came to be in foster care or whether the individual could receive Title IV-E funding.

As discussed above, Title IV-E subsidies cannot be utilized unless a State Plan is submitted to, and approved by, ACF. Any changes to the operation of an existing plan must be preceded by an SPA that is approved by ACF. This means that DHHS is precluded from expending Title IV-E funds for the newly eligible individuals, like Petitioner, under the 2015 amendments in the absence of ACF's approval. Medicaid, however, is separate and distinct from Title IV-E. While Title IV-E is administered by ACF, Medicaid is administered by CMS, a separate agency. CMS has made it expressly clear that the state must provide Medicaid coverage for all individuals under the Former Foster Care Child Category who were in foster care, regardless of their Title IV-E eligibility. 42 C.F.R. § 435.150 (stating that Medicaid is available to those who were in foster care under the state's responsibility "whether or not under Title IV-E of the Act"); *see also* Ex. 11 at 4 ("The coverage of former foster care individuals ages 18-25, set forth at proposed § 435.150 covers individuals who were either receiving IV-E or non-IV-E foster care and were enrolled in Medicaid either when they turned 18 or aged out of foster care."). The Court finds no basis for the DHHS Hearing Officer's conclusion that ACF must approve the Title IV-E SPA in order to provide Medicaid coverage to Petitioner under the Former Foster Care Child Category. B2I is an extended foster care program available to eligible young adults between the ages of nineteen and twenty-one. The record indicates that Petitioner was in the B2I program when he turned twenty-one, and therefore, he was in "foster care" at age twenty-one. The fact that Petitioner became eligible for the B2I program under the 2015 amendments should not be the determining factor in deciding whether the program constitutes "foster care" under 42 U.S.C. § 1396a(a)(10)(A)(i)(IX)(cc).

In sum, the Court concludes that Petitioner was in "foster care" under the responsibility of the State through his participation in the B2I program because: (1) he entered into a Voluntary Placement Agreement with DHHS; (2) he was under the jurisdiction of the juvenile court; (3) he was under the placement and care responsibility of DHHS; (4) DHHS was charged with providing case management, supervision, and other transitional services to Petitioner; (5) DHHS was required to provide continued efforts toward Petitioner's permanency; and (6) Petitioner's placement in a supervised

independent living setting meets the federal definition of "foster care." The Court further concludes that ACF's approval of the updated Title IV-E SPA is not necessary because Title IV-E eligibility is not a requirement under the Former Foster Care Child Category.

II. Petitioner's Cause of Action Under 42 U.S.C. § 1983

The Medicaid Act, 42 U.S.C. § 1396, et seq., established a cooperative federal – state program under which the federal government furnishes funding to states for the purpose of providing medical assistance to eligible low-income persons. States are not required to participate in the program, but states that do accept federal funding must comply with the Medicaid Act and with regulations promulgated by the Secretary of Health and Human Services. 42 U.S.C. § 1396a(a)(5). Having concluded that Petitioner is eligible for Medicaid by virtue of being a former foster care child within the meaning of the Medicaid statutes, the next issue to address is whether that assertion can be enforced through a private cause of action under 42 U.S.C. § 1983. Respondents move this Court to dismiss Petitioner's claims under 42 U.S.C. § 1983 for failure to state a claim upon which relief may be granted pursuant to Neb. Ct. R. Pldg. § 6-1112(b)(6). [2]

This Court has jurisdiction to adjudicate an action brought under the APA and 42 U.S.C. § 1983 in the same proceeding. *Maldonado v. Neb. Dep't of Pub. Welfare*, 223 Neb. 485, 490 (1986) ("[A] claim under § 1983 may be brought in a state court in the procedural context of a state court's reviewing the actions of a state administrative agency and attorneys fees may be awarded under § 1988 in such a case."). Respondents argue that the federal Medicaid statute does not create an individually enforceable federal right for Petitioner under 42 U.S.C. § 1983 because the provisions of the statute do not impose a mandatory obligation on Respondents. *Blessing v.*

[2] Respondents first argue that Petitioner has failed to state a claim for relief against DHHS because DHHS is not a "person" within the meaning of 42 U.S.C. § 1983. Petitioner concedes that it would be proper for this Court to dismiss his Second Claim for Relief as to Respondent DHHS. Respondents further argue that Petitioner has failed to state a claim for relief against Respondent Phillips because there are no specific allegations against her. The Court agrees with Petitioner that Respondent Phillips, as CEO of DHHS, has authority over the administration of the medial assistance program and is properly sued in her official capacity for unlawfully terminating Petitioner's Medicaid eligibility. *See Bowlin v. Montanez*, 446 F.3d 817 (2006); *Kai v. Ross*, 336 F.3d 650 (2003).

Freestone, 520 U.S. 329, 340 (1997). In response, Petitioner filed a motion for summary judgment under 42 U.S.C. § 1983, asking the Court to enjoin Respondents from denying Petitioner's Medicaid coverage upon finding that Respondents' actions were unlawful under 42 U.S.C. § 1396a(a)(10)(A)(IX).

"Section 1983 provides a federal cause of action against anyone who, acting pursuant to state authority, violates any rights, privileges or immunities secured by the Constitution and laws of the United States." *Midwest Foster Care & Adoption Ass'n v. Kincade*, 712 F.3d 1190, 1195 (8th Cir. 2013) (internal citations and quotations omitted). "However, § 1983 holds out a mechanism to vindicate only the violation of a federal right, not merely a violation of federal law." *Id.* (quoting *Blessing*, 520 U.S. at 340). In *Blessing*, the Supreme Court created a three-part test for determining whether a statute creates an individually enforceable federal right under § 1983. *Midwest*, 712 F.3d at 1195. This test requires the courts to analyze whether: (1) Congress intended the statutory provision to benefit the plaintiff; (2) the asserted right is not so vague and amorphous that its enforcement would strain judicial competence; and (3) the provision clearly imposes a mandatory obligation upon the states. *Id.* (citation omitted). If the plaintiff demonstrates that a statute meets the above test, it is presumptively enforceable under § 1983. *Midwest*, 712 F.3d at 1195-96.

In *Gonzaga Univ. v. Doe*, 536 U.S. 273, 279 (2002), the Supreme Court defined the first prong of the *Blessing* test, to make clear that a statute is not privately enforceable unless Congress has unambiguously manifested its intent to confer individual rights. *Id.* The statutory provision in question must contain "rights-creating terms," because statutes that focus on the person or entity regulated rather than an individual protected tend not to create enforceable rights. *Id.* at 287. A Court must also look to whether the statute has an individual as opposed to an "aggregate focus," since statutes with an aggregate rather than individual focus cannot create individual rights. *Id.* at 288. And finally, Courts must look at whether there exists a centralized federal review mechanism for individuals asserting statutory violations which would obviate the need to create an individually enforceable right through the courts. *Id.* at 289-90.

In this case, Petitioner's § 1983 claim against Respondents relies upon 42 U.S.C. § 1396a(a)(8)[3] and § 1396a(a)(10)(A)(i)(IX). Section 1396a(a)(8) provides that "[a] State plan for medical assistance must - (8) provide that all individuals wishing to make an application for medical assistance under the plan shall have the opportunity to do so and that such assistance shall be furnished with reasonable promptness to all eligible individuals." Section 1396a(a)(10)(A)(i)(IX) provides:

> (a) A State plan for medical assistance must—
> (10) provide—
> (A) for making medical assistance available, including at least the care and services. . . , to—
> (i) all individuals—
> (IX) who—
> (aa) are under 26 years of age;
> (bb) are not described in or enrolled under any of subclauses (I) through (VII) of this clause . . . ;
> (cc) were in foster care under the responsibility of the State on the date of attaining 18 years of age or such higher age as the State has elected;
> (dd) were enrolled in the State plan under this subchapter or under a waiver of the plan while in such foster care.

In each of these provisions, the statutory language is clear and unambiguous. The plain language of the statute clearly conveys that a state "must provide" medical assistance to "all individuals" who meet certain requirements. 42 U.S.C. § 1396a(a)(10)(A)(i)(IX). *See also* 42 U.S.C. § 1396a(a)(8) ("must provide" medical assistance to "all eligible individuals"). The terms used in §§ 1396a(a)(8) and 1396a(a)(10)(A)(IX) are "mandatory rather than precatory." *Blessing*, 520 U.S. at 341. Under these provisions, Congress has conferred specific entitlements on individuals in a way that is clear and unambiguous.[4]

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[3] Although Petitioner does not expressly cite § 1396a(a)(8) in his Petition, he argues in his brief that he also has an enforceable federal right to receive Medicaid pursuant to 42 U.S.C. § 1396(a)(8).

[4] The majority of federal Circuit Courts which have addressed this issue have held that 42 U.S.C. §§ 1396a(a)(8) & 1396a(a)(10) create a private cause of action enforceable through 42 U.S.C. § 1983. *See, e.g., Bontrager v. Ind. Family & Soc. Servs. Admin.,* 697 F.3d 604 (7th Cir. 2012) (Court held 42 U.S.C. § 1396a(a)(10)(A) creates an enforceable federal right under 42 U.S.C. § 1983 where class action challenged Indiana's limit for dental services covered by Medicaid); *Watson v. Weeks*, 436 F.3d 1152 (9th Cir. 2006) (residents found to have a private right of action under 42 U.S.C. § 1983 to enforce rights to nursing facility services mandated by 42 U.S.C. § 1396a(a)(10)); *Westside Mothers v. Olszewski*, 454 F.3d 532 (6th Cir. 2006) (district court erred in dismissing with prejudice claims under 42 U.S.C. §§

As discussed earlier, this Court has found that Petitioner met all of the eligibility requirements for Medicaid under the Former Foster Care Child Category. This means that Petitioner was an intended beneficiary of 42 U.S.C. § 1396a(a)(10)(A)(i)(IX). Therefore, the Court finds that the provisions of 42 U.S.C. §§ 1396a(a)(8) & 1396a(a)(10)(A)(i)(IX) create individual rights enforceable under § 1983 because: (1) Petitioner is an intended beneficiary of 42 U.S.C. § 1396a(a)(10)(A)(i)(IX); (2) the rights sought to be enforced are specific and enumerated, not "vague and amorphous"; and (3) the obligation imposed on the State is unambiguous and binding.

The Court finds that Respondents improperly and unlawfully terminated Petitioner's Medicaid coverage, and thus, violated the federal Medicaid statute, 42 U.S.C. § 1396a(a)(8) and § 1396a(a)(10)(A)(i)(IX). Petitioner has produced sufficient evidence to show that no genuine issue of material fact exists in this case. Based on the foregoing, the Court overrules Respondents' Motion to Dismiss Petitioner's Second Claim for Relief (except as to Respondent DHHS) and sustains Petitioner's Motion for Summary Judgment on his 42 U.S.C. § 1983 claim against Respondents Phillips and Lynch.

CONCLUSION

In summary, the Court has reviewed the entire record from the administrative hearing and finds that the evidence does not support the DHHS Hearing Officer's determination that Petitioner is not eligible for Medicaid under 42 U.S.C. §

1396a(a)(8) & 1396a(a)(10)); *S.D. v. Hood*, 391 F.3d 581 (5th Cir. 2004) (statutory provision under 42 U.S.C. § 1396a(a)(10) requiring the state to provide medically necessary supplies held enforceable through 42 U.S.C. § 1983); *Sabree v. Richman*, 367 F.3d 180 (3d Cir. 2004) (Court held that the language in 42 U.S.C. §§ 1396a(a)(8), 1396a(a)(10) & 1396d(a)(15) unambiguously conferred rights under § 1983 where plaintiffs sued to obtain intermediate care facilities the state was required to provide under the Medicaid Act). The Eighth Circuit in *Lankford v. Sherman*, 451 F.3d 496 (8th Cir. 2006) held plaintiffs did not have a private right of action under 42 U.S.C. § 1983 to enforce Medicaid's reasonable standards provision in 42 U.S.C. § 1396a(a)(17). That decision was later distinguished by *Ctr. For Special Needs Trust Admin., Inc. v. Olson*, 676 F.3d 688, 699-700 (8th Cir. 2012) wherein the Eighth Circuit held that 42 U.S.C. § 1396p(d)(4)(C) affords plaintiff a right of action under 42 U.S.C. § 1983. The Court is not aware of any Eighth Circuit cases discussing the particular provisions at issue in this case.

1396a(a)(10)(A)(i)(IX). The Court thus concludes that the DHHS Hearing Officer's decision affirming the termination of Petitioner's Medicaid coverage should be reversed.

Petitioner's right to Medicaid coverage under 42 U.S.C. § 1396a(a)(10)(A)(i)(IX) is enforceable through 42 U.S.C. § 1983. The ACA requires mandatory Medicaid coverage to those who meet the requirements under the Former Foster Care Child Category. In this case, Petitioner meets the requirements because he: (1) is under the age of twenty-six; (2) is not eligible under any of subclauses (I) through (VII); (3) was in foster care under the responsibility of the State on the date of attaining twenty-one years of age; and (4) was enrolled in Medicaid while in the B2I program. Therefore, the Court concludes that Respondents unlawfully terminated Petitioner's Medicaid coverage under 42 U.S.C. § 1396a(a)(10)(A)(i)(IX).

IT IS THEREFORE ORDERED:

1. On Petitioner's First Claim for Relief, the Order of the Nebraska Department of Health and Human Services dated May 6, 2016 is hereby reversed and this case is remanded to DHHS with directions to reinstate Petitioner's Medicaid coverage and reimburse him for medical expenses which should have been covered on and after October 1, 2015.
2. Respondents' Motion to Dismiss Petitioner's Second Claim for Relief under 42 U.S.C. § 1983 is sustained as to Respondent DHHS and overruled in all other respects.
3. Petitioner's Motion for Summary Judgment on its Second Claim for Relief under 42 U.S.C. § 1983 against Respondents Phillips and Lynch is sustained and overruled as to Respondent DHHS.
4. Respondents are enjoined from denying the Petitioner Medicaid eligibility pursuant to the former foster care child category under 42 U.S.C. § 1396a(a)(10)(A)(i)(IX).

5. Petitioner's request for reasonable attorney's fees under 42 U.S.C. § 1988 is granted.[5] Petitioner has ten (10) days within which to submit evidence in support of an award of reasonable attorney's fees concerning his § 1983 claim.
6. Costs are taxed to Respondents.

DATED this 10th day of May, 2017.

BY THE COURT:

Susan I. Strong
District Court Judge

cc: Robert E. McEwen, Attorney for Petitioner
Sarah C. Helvey, Attorney for Petitioner
Ryan C. Gilbride, Assistant Attorney General

[5] *See Maldonado*, 223 Neb. at 490. The Court finds attorney fees are not properly awarded pursuant to Neb. Rev. Stat. § 25-1803. While Respondents erred in terminating Petitioner's Medicaid coverage the Court cannot find that DHHS' decision was without a reasonable basis and not "substantially justified." *Meier v. State Dep't of Soc. Servs.*, 227 Neb. 376, 385 (1988). Any request for fees pursuant to Neb. Rev. Stat. § 25-1803 is denied.