

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

KENDRA JOHNSEN, JAMIE	)	
LONGWELL, AND JAMIE KOCH,	)	Case No. CI_____
INDIVIDUALLY AND ON BEHALF OF	)	
ALL OTHERS SIMILARLY SITUATED,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	<b>PETITION FOR DECLARATORY</b>
	)	<b>AND INJUNCTIVE RELIEF AND</b>
STATE OF NEBRASKA, GOVERNOR	)	<b>PRECIPE</b>
MIKE JOHANNNS, ATTORNEY GENERAL)	)	
DON STENBERG, NEBRASKA	)	<b>CLASS ACTION</b>
DEPARTMENT OF HEALTH AND	)	
HUMAN SERVICES, and RON ROSS,	)	<b>EQUITY</b>
DIRECTOR,	)	
Defendants.	)	

**COME NOW**, the Plaintiffs by and through their attorneys of record, and for their causes of action allege as follows:

**INTRODUCTORY STATEMENT**

1. A central goal of welfare reform in Nebraska undertaken since the mid-90s has been to increase parents’ self-sufficiency and end dependence on government benefits. For this goal to be realized, assistance must be available to help provide access to quality child care, the single most costly expense for most low-income families. The State of Nebraska provides this support through a “seamless” child care subsidy program for working yet low-income families who have both received cash assistance benefits and those “at risk” of being dependent on government benefits. This lawsuit seeks to enforce the continuing eligibility for subsidies for child care for those families across Nebraska who are at risk of being dependent. Without these subsidies, these working families will be forced into desperate situations, facing homelessness, dangerous and inadequate care for their children, and the increased likelihood they will be forced to cease working and

turn to other welfare programs, such as the cash assistance program, just to, once again get the child care their children need and deserve. The decision to take away eligibility for these child care subsidies is, among other things, unconstitutional and against public policy set by the Nebraska Legislature. Executive agency officials, including the Governor, are seeking to unlawfully eliminate child care subsidy eligibility for these families through a line item veto of a budget appropriation and a subsequent regulatory change. These state officials give no other reason for this change other than the State of Nebraska's budget difficulties. The working families in this lawsuit understand the budget problems facing the state. This lawsuit is not an attempt to make the state spend money it does not have. The Plaintiffs seek only to enforce their eligibility for child care program subsidies that the Governor unlawfully seeks to take away. The Governor and state officials have many lawful alternatives to stretch the state's limited resources other than this unlawful elimination of eligibility for these many Nebraska families.

### **PARTIES**

2. Plaintiff Kendra Johnsen is a resident of Lancaster County, Nebraska and proceeds on her own behalf and on behalf of all others similarly situated.
3. Plaintiff Jamie Longwell is a resident of Lancaster County, Nebraska and proceeds on her own behalf and on behalf of all others similarly situated.
4. Plaintiff Jamie Koch is a resident of Scotts Bluff County, Nebraska and proceeds on her own behalf and on behalf of all others similarly situated.
5. The Defendants are the State of Nebraska, Mike Johanns in his official capacity as Governor of the State of Nebraska, Don Stenberg in his official capacity as Attorney General for the State of Nebraska, the Nebraska Department of Health and Human

Services, the state administrative agency charged with implementing the Child Care Subsidy Program, and Ron Ross, in his official capacity as Director of Health and Human Services, responsible for the administration and supervision of the public assistance programs in Nebraska.

### **CLASS ACTION ALLEGATIONS**

6. Plaintiffs bring this action on behalf of themselves and all persons similarly situated pursuant to Neb.Rev.Stat. § 25-319.
7. Plaintiffs class consists of all Nebraska families whose household income is between 120% and 185% of the federal poverty level and who have been denied eligibility for Nebraska's Child Care Subsidy Program due to the implementation of 392 NAC 3-004.01D.
8. Plaintiffs class is made up of a group of Nebraskans so numerous that it would be impracticable to bring them all before this court. Defendant NDHHS estimates that over 1000 families and 1500 children lost their Child Care Subsidy with the implementation of 392 NAC 3-004.01D. See Exhibit 1 attached.
9. This case presents questions of law and fact common to all members of the Plaintiff class. The common question of fact is that all members have been denied assistance with child care costs due to the implementation of regulation 392 NAC 3-004.01D.
10. The claims set forth in this complaint apply to all members of the class and do not vary with the individualized factual circumstances of the members of the class.
11. Common questions of law include the claims that the line item veto of NDHHS' general fund in LB 1309, which reduced the appropriation and modified the Child Care

Subsidy Program, is invalid under Nebraska Law and that the Defendants violated Article II § 1 and Article III § 1 of the Nebraska Constitution, that the enactment of 392 NAC 3-004.01D violates Article II § 1 and Article III § 1 of the Nebraska Constitution, that the enactment of 392 NAC 3-004.01D violates Article I § 3 and Article III, § 8 of the Nebraska Constitution, and that the Defendants violated Article I § 3 of the Nebraska Constitution.

12. The claims of the individual named Plaintiffs are typical of the claims of the members of the class. 392 NAC 3-004.01D applies equally to all families whose income falls between 120% and 185% of the federal poverty level and who have not received Aid to Dependent Children cash assistance in the past twenty-four (24) months.

13. The individual named Plaintiffs will fairly and adequately protect the interests of the class and present no issues adverse to the interests of the class.

### **JURISDICTION AND VENUE**

14. Jurisdiction and venue in Lancaster County District Court are proper pursuant to Neb. Rev. Stat. § 84-901 *et seq.*, Neb. Rev. Stat. § 25-21,149 *et seq.* and 42 U.S.C. § 1983.

15. Plaintiffs bring this action for declaratory and injunctive relief as authorized by Neb. Rev. Stat. § 84-901 *et seq.* and Neb. Rev. Stat. §§ 25-1062-1080.

### **STATEMENT OF FACTS**

#### **STATUTORY AND REGULATORY FRAMEWORK**

16. The Nebraska Legislature has enunciated and reformed welfare public policy for Nebraska through the Nebraska Welfare Reform Act (WRA), Neb. Rev. Stat. §§ 68-1708 *et seq.* The legislature declared in the WRA that:

It is in the best interests of the state, its citizens, and especially those receiving public assistance through welfare programs in this state that the welfare system be reformed to support, stabilize, and enhance individual and family life in Nebraska by: (1) Pursuing efforts to help Nebraskans avoid and prevent the need for welfare; (2) eliminating existing complex and conflicting welfare programs; (3) creating a simplified program in place of the existing complex and conflicting welfare programs; (4) removing disincentives to work and promoting economic self-sufficiency; (5) providing individuals and families the support needed to move from public assistance to economic self-sufficiency;...”

Neb. Rev. Stat. § 68-1709.

### **Child Care Program**

17. The legislature declared its intent to create a comprehensive child care program in

Neb. Rev. Stat. § 43-2602:

It is the intent of the Legislature to promote the growth and development of a comprehensive child care system which meets the needs of families in Nebraska by encouraging high-quality, affordable, and accessible child care services that are educationally and developmentally appropriate. The Legislature finds that existing child care resources are inadequate to meet the need for services and that high-quality services can substantially increase the well-being of children and families.

18. Pursuant to policy directives from the Nebraska Legislature, the NDHHS replaced a complex and conflicting program with a “seamless” child care program that provided equal treatment for Nebraska families with incomes between 120% and 185% of the federal poverty level in need of assistance in obtaining affordable and safe child care services. The NDHHS was able to merge different funding streams and provide a less complex and simpler administration of the child care subsidy programs.

19. Federal funding for child care and welfare services were blended with state funds appropriated by the Nebraska Legislature for child care services under Nebraska’s seamless child care program.

20. For example, for the one year period October 1, 2001 through September 30, 2002, the State of Nebraska planned to receive and spend a total of over \$50,171,246 in combined federal and state dollars on child care: approximately \$38,336,053 in federal funds from the Child Care and Development Block Grant and the Temporary Assistance to Needy Families (TANF, or welfare program) block grant on child care services, and \$11,835,193 in state funds.

21. For Nebraska families with incomes between 120% and 185% of the federal poverty level in need of assistance in obtaining affordable and safe child care services, the amount of assistance, the required co-payment, and the program rules are the same.

22. The NDHHS' administered these identical child care services for this population through the Transitional Child Care program and the Child Care Subsidy Program.

23. These two programs are administered in a seamless manner, as families are moved from one to the other depending upon administrative convenience or benefit to the family.

24. For example, many families eligible for Transitional Child Care received assistance through the Child Care Subsidy Program because it does not have a time limit, and caseworkers found it simpler to record use of child care services through the Child Care Subsidy Program.

25. This seamless approach to the child care subsidy program meant families, however, remained largely unaware of how they received child care subsidy assistance, just that they were eligible and received the assistance.

26. During fiscal year 1999, Nebraska provided child care assistance through its seamless child care subsidy program to over 12,000 children per month.

27. The Transitional Child Care Program was established under the Nebraska Welfare Reform Act (WRA) for families that have previously received Aid to Dependent Children (ADC) cash assistance but who are no longer eligible for ADC due to increased income. Transitional Child Care is authorized under Neb. Rev. Stat. 68-1724(1)(c) which provides in relevant part:

When no longer eligible to receive cash assistance, assistance shall be available to reimburse work-related child care expenses even if the recipient family has not achieved economic self-sufficiency. The amount of such assistance shall be based on a cost-shared plan between the recipient family and the state which shall provide assistance *up to one hundred eighty-five percent of the federal poverty level* for up to twenty-four months.

(emphasis added).

28. The Child Care Subsidy Program was established by the federal Child Care and Development Block Grant Act. Under this Act states may submit a request for funds accompanied by a state plan showing how those funds will be used.

29. The Child Care Subsidy Program is authorized under state law by Neb. Rev. Stat. § 68-1202 which provides in relevant part:

Social services may be provided on behalf of recipients with payments for such social services made directly to vendors. Social services shall include those mandatory and optional services to former, present, or potential social services recipients provided for under the federal Social Security Act, as amended, and described by the State of Nebraska in the approved State Plan for Services. Such services may include, but shall not be limited to, foster care for children, *child care*, family planning, treatment for alcoholism and drug addiction, treatment for persons with mental retardation, health-related services, protective services for children, homemaker services, employment services, foster care for adults, protective services for adults, transportation services, home management and other functional education services, housing improvement services, legal services, adult day services, home delivered or congregate meals, and educational services.

(emphasis added).

30. Neb. Rev. Stat. § 68-1204 provides:

For the purpose of providing or purchasing social services described in section 68-1202, the state hereby accepts and assents to all applicable provisions of the federal Social Security Act, as amended. The Director of Health and Human Services may adopt and promulgate rules and regulations, enter into agreements, and adopt fee schedules with regard to social services described in section 68-1202.

31. Under the policy directive of the Nebraska Welfare Reform Act , in January of 1998 NDHHS acted to create this seamless approach to child care services for this identical population. NDHHS modified the sliding fee schedule and adjusted the incomes guidelines in the appendix of title 474 of the Nebraska Administrative Code. This change allowed for equal treatment of all similarly situated families whose incomes fell between 120% and 185% of the federal poverty level regardless of whether or not they had received ADC within the past twenty-four months.

32. Similarly situated families were able to participate in the child care program under 474 NAC 7-002.01B1 which provided:

Those individuals whose family income exceeds the maximum for LF [Low Income Family] but is within the level for LC [Low Income Sliding Fee Schedule] as shown in 474-000-504 are eligible. To be eligible under this category, the client shall accept the responsibility for a portion of the child care fee shown in 474 NAC 7-006.07.

(effective July 10, 2000).

33. The Low Income Sliding Fee Schedule found in appendix 474-000-504 allowed households with incomes up to 185% of the federal poverty level to participate in the child care program.

34. On June 17, 2002 NDHHS repealed 474 NAC 7-002.01 and replaced it with 392 NAC 3-004.01D which provides:

Those individuals whose family income exceeds the maximum for LF but is equal to or less than 120% of the Federal Poverty Level are eligible as LC. To be

eligible under this category, the client must pay a fee as shown in the fee schedule.

(effective June 17,2002).

35. Under Neb. Rev. Stat. § 43-3402 the Early Childhood Interagency Coordinating Council (ECICC) was established as an advisory board to all state agencies that deal with early childhood issues, including NDHHS.

36. The ECICC's duties include making "recommendations to the Department of Health and Human Services...on the needs priorities and policies relating to such programs throughout the state." Neb. Rev. Stat. § 43-3402.

37. The ECICC did not make any recommendations to NDHHS concerning the change in eligibility for the Child Care Subsidy Program. The program change was not mentioned in their minutes until May 5, 2002, and then only as noting the Governor was going to use his budget line item veto to change the eligibility for child care subsidies.

38. The State of Nebraska under state law has many options to increase its ability to provide some child care assistance with limited resources apart from restricting eligibility. For example, the NDHHS has the direct statutory authority to set lower reimbursement rates for providers, under Neb.Rev.Stat. § 43-536:

In determining the rate of reimbursement for child care, the Department of Health and Human Services Finance and Support shall conduct a market rate survey of the child care providers in the state. The Department of Health and Human Services shall adjust the reimbursement rate for child care every second year beginning July 1, 1997, at a rate not less than the sixtieth percentile and not to exceed the seventy-fifth percentile of the current market rate survey, except that nationally accredited child care providers may be reimbursed at higher rates.

39. NDHHS also has the direct statutory authority to set higher copayments from families receiving child care subsidies under Neb.Rev.Stat. § 68-1204.

40. The taking of either of these authorized actions would allow the state to continue to provide child care subsidies to families with less funding, without restricting eligibility. Nevertheless, the Defendants have not taken either action, and have instead chosen to restrict eligibility, an action they have not been authorized to take.

### **Line Item Veto**

41. The Nebraska Constitution grants the Governor the power to make line item vetos of items of appropriation under Art. IV § 15 which provides in relevant part:

Every bill passed by the Legislature, before it becomes law, shall be presented to the Governor...The Governor may disapprove or reduce any item or items of appropriation contained in bills passed by the Legislature, and the item or items so disapproved shall be stricken therefrom, and the items reduces shall remain as reduced unless the Legislature has reconsidered the items or items disapproved or reduced and has repassed any such item or items over the objection of the Governor by a three-fifths approval of the members elected.

42. Neb. Rev. Stat. § 81-134 further defines the parameters of the line item veto with respect to state budget appropriations: “The Governor shall have the right and authority to raise, lower, or reject any requested appropriation or item therein, but in making any changes whatsoever, he shall give his reasons therefore in transmitting the budget to the legislature.”

43. The scope of the Governor’s line item veto power only extends to raising, lowering or rejecting an item of appropriation in a budget bill.

44. By statute the Governor is required to provide reasons for each budget appropriation that is either raised, lowered, or rejected.

### **Separation of Powers**

45. Art. II § 1 of the Nebraska Constitution provides: “The powers of the government of this state are divided into three distinct departments, the legislative, executive and

judicial, and no person or collection of persons being one of these departments, shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted.”

46. Art. III § 1 of the Nebraska Constitution provides in relevant part: “...the legislative authority of the state shall be vested in the Legislature consisting of one chamber....”

47. The legislature is granted the authority to set policy for the state of Nebraska and agency cannot make policy unless such powers are delegated to them by the legislature.

48. For a delegation of authority to an agency to be constitutional the legislature must provide adequate, sufficient, and definite standards within which the agency can exercise its discretion.

### **Equal Protection and Due Process**

49. Art. I § 3 of the Nebraska Constitution provides: “No person shall be deprived of life, liberty or property, without due process of law, nor be denied equal protection of the laws.”

50. Under Art. I § 3 of the Nebraska Constitution, similarly situated people must be treated alike.

51. Under Art. 1 § 3 no one may be deprived a property interest without procedural due process. People whose rights are to be affected are entitled to notice and a hearing.

52. Neb. Rev. Stat. § 84-906 provides in relevant part:

No rule or regulation of any agency shall be valid as against any person until five days after such rule or regulation has been filed with the Secretary of State. No rule or regulation required under the Administrative Procedure Act to be filed with the Secretary of State shall remain valid as against any person until the certified copy of the rule or regulation has been filed on the date designated and in the form prescribed by the Secretary of State....

53. Neb. Rev. Stat. § 84-908 provides in relevant part: “No adoption, amendment, or repeal of any rule or regulation shall become effective until the same has been approved by the Governor and filed with the Secretary of State after a hearing has been set on such rule or regulation pursuant to section § 84-907....”

### **Special Legislation**

54. Art. III § 18 of the Nebraska Constitution provides: “The Legislature shall not pass local or special laws in any of the following cases, that is to say:... Granting to any corporation, association, or individual any special or exclusive privileges, immunity, or franchise whatever....”

55. Under Art. I § 1 of the Nebraska Constitution, a regulation cannot confer privileges on a class arbitrarily selected from a large number of persons standing in the same relation to the privileges, without a reasonable distinction or substantial difference.

### **FACTUAL ALLEGATIONS**

56. In April of 2002, during its regular session the Nebraska Legislature passed appropriations bill LB 1309, which was an omnibus budget appropriations bill designed to address necessary changes in the state budget passed during the 2001 regular session and modified in special session in November, 2001. LB 1309 made deficit and mid-biennium budget appropriation adjustments for Nebraska state government.

57. LB 1309 included budget appropriations for the Child Care Subsidy Program.

58. Governor Johanns returned LB 1309 to the legislature pursuant to his authority under Art. IV § 15 with several “line item” vetos. These “line item” vetos were specific lowering or rejections of budget adjustments passed in LB 1309. This was done through

a letter and three (3) page attachment sent to the Members of the Nebraska Legislature.  
See Exhibit 2 attached.

59. The line item veto letter for LB 1309 sent by Governor Johanns to the legislature did not mention the Child Care Subsidy Program in any manner.

60. The attachment to Governor Johanns letter contained a listing of the programs to be cut or modified. If a program was to be modified, Governor Johanns provided a brief description of the modification.

61. One of the line item vetos listed in the attachment was a reduction in the general fund of NDHHS. Governor Johanns provided a description of how he planned to modify programs funded through NDHHS' general fund to cover the reduction.

62. On page two (2) of the attachment, Governor Johanns described how he planned through his line item vetos to modify the Child Care Subsidy Program: "Return non-ADC child care subsidy eligibility to 120% FPL [federal poverty level]."

63. The letter sent by Governor Johanns to the legislature did not provide a reason for his cut to the NDHHS general fund or his modification of the Child Care Subsidy Program, funded through LB 1309.

64. Subsequently, this cut in appropriations for the Child Care Subsidy Program became part of LB 1309 after the Nebraska Legislature, on April 10, 2002, did not seek an override of the Child Care Subsidy Program line item veto.

65. Thereafter, in response to the cut in appropriations, Governor Johanns directed NDHHS to reduce eligibility for the Child Care Subsidy Program from 185% to 120% of the federal poverty level.

66. NDHHS drafted regulation 392 NAC 3-004.01D which expressly reduced eligibility for the Child Care Subsidy from 185% to 120% of the federal poverty level.
67. NDHHS held hearings on proposed regulation 392 NAC 3-004.01D on May 28, 2002 and June 7, 2002.
68. NDHHS listed on the notice of hearing that its authority for implementing regulation 392 NAC 3-004.01D came from Neb. Rev. Stat. § 68-1204.
69. Regulation 392 NAC 3-004.01D was signed by the Attorney General and the Governor and filed with the Secretary of State's Office on June 12, 2002 and took effect June 17, 2002.
70. Neb. Rev. Stat. § 68-1204 does not grant NDHHS the authority to set eligibility for the Child Care Subsidy Program.
71. Neb. Rev. Stat. § 68-1204 does not provide adequate, sufficient, and definite standards within which NDHHS could exercise its discretion to set eligibility for the Child Care Subsidy Program.
72. Prior to Governor Johanns' directive, the Child Care Subsidy Program provided child care assistance for families with household incomes up to 185% of the federal poverty level.
73. The implementation of 392 NAC 3-004.01D however, seeks to directly change this situation and create two separate but similarly situated classes of people. By reducing eligibility for the Child Care Subsidy Program to 120%, two separate classes were created: families with household incomes between 120% and 185% of the federal poverty level who receive child care assistance under the Transitional Child Care Program because they received ADC within the past twenty-four months and families

with household incomes between 120% and 185% of the federal poverty level who cannot receive child care assistance because they have not received ADC within the past twenty-four months.

74. Families with household incomes between 120% and 185% of the federal poverty level are similarly situated to families with household incomes between 120% and 185% of the federal poverty level that were previously eligible under the Child Care Subsidy Program.

75. There is no rational basis between the state's interest in helping families avoid the need for welfare and denying child care assistance based on whether a family has received ADC within the past twenty-four months.

76. Upon information and belief, while the administrative rulemaking process was pending the NDHHS central office informed its local offices in late May and early June, 2002, to begin the process of notifying class members of the termination of their eligibility for child care subsidies effective July 1, 2002.

77. Upon information and belief, the central office prepared lists of those families, based on a review of computer databases, it believed likely to be terminated from child care subsidies due to the proposed rule change. These lists were distributed throughout the state to caseworkers, with instructions to determine eligibility for those on the list under the proposed rule.

78. Caseworkers were further given lists of those families the NDHHS Central Office believed may be eligible for Transitional Child Care and were instructed to assess potential continuing eligibility under the Transitional Child Care program for those on this list.

79. Caseworkers in turn began to notify class members of their respective eligibility for child care subsidy programs, although the rule change had not had all its required public hearings, been reviewed for legality, or been correctly implemented.

80. These notices were given to class members in person, by telephone, and through written notices of action.

81. Even when provided, some written notices were provided to class members days before the actual signing, filing, and implementation of 392 NAC 3-004.01D.

82. Indeed, some class members to date have not received any written notice of action that they are not eligible for child care subsidy programs, yet have been told by their caseworkers they will not receive child care subsidies effective July 1, 2002.

83. Even when written notices of action terminating eligibility for child care subsidies were provided to class members after the effective date of the rule change, they did not include adequate information regarding the basis for these decisions.

84. Significantly, written notices of action did not refer to the specific regulatory change found in 392 NAC 3-004.01D as a basis for the termination of eligibility for child care subsidies. One representative notice included such vague language as “child care closing due to signing of child care bill” and “effective 07-01-2002, it has been determined that you are not eligible for Child Care Assistance.”

85. Furthermore, these written notices of action did not indicate whether any assessment and determination had been made regarding eligibility for the Transitional Child Care program, and, if not, the basis for this decision.

86. Upon information and belief, no effort has been undertaken by the Defendants to have caseworkers independently identify and assess for eligibility individual families,

allowing caseworkers to rely upon lists generated at the central office. Nevertheless, some caseworkers have sought to perform this level of review, while most have not.

87. Thus, caseworkers throughout the state did not consistently review class members for eligibility for continuing child care subsidies under one or the other administered child care subsidy programs, did not consistently assess and determine eligibility for continuing eligibility under the Transitional Child Care program, and did not consistently provide adequate notice of such determinations to the class members.

88. This arbitrariness led to some class members being assessed and rejected for continuing child care subsidies under the Transitional Child Care program without notice of such a determination, and other class members not being assessed at all for continuing child care subsidies without notice of any such action.

89. The NDHHS has further informed class members they do not have the right to appeal and have an opportunity for a fair hearing on the issue of their eligibility for child care subsidies, despite the fact class members may be eligible for continuing child care subsidies.

90. On June 7, 2002 a demand letter was sent by Plaintiffs attorneys to the Defendants regarding the legality of the proposed regulation 392 NAC 3-004.01D. See Exhibit 3 attached.

91. On June 12, 2002 Governor Johanns responded to the demand letter. See Exhibit 4 attached.

### **Impact On Plaintiffs**

92. When working poor parents do not receive a subsidy or cannot find publicly supported child care, they must pay substantial out-of-pocket costs for whatever care they

can find. Surveys reveal that low-income families commonly pay over 30% of their income for child care. In contrast, affluent families spend only 5% of their income, on average, for child care.

93. The class members face huge and unaffordable increases in their child care costs due to the implementation of 392 NAC 3-004.01D. For example, named Plaintiff Longwell will face an increase of between \$606 and \$861 per month in her child care costs, Plaintiff Johnsen will face an increase of \$585, and Plaintiff Koch will face an increase of \$388 per month. None of these plaintiffs or class members can afford these increases without seeing a simultaneous decrease in their ability to meet other basic costs.

94. The child care subsidy program is thus a critically important program for these low-income families, providing necessary support as these families build towards self-sufficiency.

95. Plaintiff Kendra Johnsen (hereinafter Johnsen) is a single parent of two minor children, a son age 6, and a daughter age 4.

96. Johnsen's household income is between 120% and 185% of the federal poverty level.

97. The Johnsen family has received assistance under the Child Care Subsidy Program for just over two years.

98. Johnsen was notified by a written notice of action drafted by the Defendants that she was no longer eligible for the Child Care Subsidy Program effective July 1, 2002.

99. Johnsen is employed by the State of Nebraska Department of Health and Human Services.

100. Johnsen's gross monthly income is \$1648.50.

101. Johnsen's net monthly income is \$1402.00.
102. Johnsen's child care costs for her two children while under the Child Care Subsidy Program were \$135.00 per month.
103. Johnsen's child care costs for her two children without the Child Care Subsidy Program will be \$720.00 per month.
104. After paying her child care, Johnsen will only be able to cover her rent and utilities and will be unable to purchase food, clothing or pay transportation expenses.
105. When the change in eligibility for the Child Care Subsidy Program takes effect, Johnsen will have to either quit her job and rely on state assistance programs to survive or place her children in sub-standard daycare and risk being evicted from her home.
106. Plaintiff Jamie Longwell (hereinafter Longwell) is a single parent of three minor children, Nathan Daniel Longwell age 8, born October 14, 1993, Jillean Armani Longwell age 4, born November 3, 1997, and Noah Mitchell Sami Longwell age 3, born April 15, 1999.
107. The Longwell family's household income is between 120% and 185% of the federal poverty level.
108. The Longwell family has received assistance under the Child Care Subsidy Program since June of 1999.
109. Longwell was notified by phone by the Defendants that she was no longer eligible for the Child Care Subsidy Program effective July 1, 2002.
110. Longwell has not received a written notice from the Defendants saying she will no longer be eligible for the Child Care Subsidy Program effective July 1, 2002.

111. Longwell has been employed as a secretary by the Psychology Department at the University of Nebraska since 1997.
112. Longwell's gross monthly income is \$1816.44.
113. Longwell's net monthly income is \$1084.56.
114. Longwell's child care costs for her three children while under the Child Care Subsidy Program were \$174.00 per month.
115. Longwell's child care costs for her three children without the Child Care Subsidy Program will be \$1035.00 per month during the summer and \$780.00 a month during the school year.
116. Without the Child Care Subsidy during the summer, Longwell will have \$49.00 left after paying her child care expenses to pay her rent of \$337.00, utilities of \$150.00, auto insurance, gasoline, clothing, out of pocket medical expenses, and groceries.
117. Without the Child Care Subsidy during the school year, Longwell and her three children will have \$304.56 left after child care expenses to pay rent, utilities, auto insurance, gasoline, clothing, out of pocket medical expenses, and groceries.
118. Longwell has a child support order in place but the father only pays sporadically. He is presently \$1500.00 in arrears.
119. When the change in eligibility for the Child Care Subsidy Program takes effect, the Longwell family will have to choose between continuing to work or quitting her job and using other state assistance programs to survive.
120. If Longwell stays at her present job she will be forced to place her children in sub-standard daycare and lose her apartment because she will be unable to pay rent.

121. Plaintiff Jamie Koch (hereinafter Koch) is a single parent of two minor children, a son age 4 and a daughter age 3.

122. Koch's household income is between 120% and 185% of the federal poverty level.

123. The Koch family has received assistance under the Child Care Subsidy Program for four years.

124. On June 14, 2002, prior to the effective date of 392 NAC 3-004.01D, Koch was notified by the Defendants that she was no longer eligible for the Child Care Subsidy Program effective July 1, 2002.

125. The June 14, 2002 notice did not provide a manual reference for the denial of child care assistance.

126. On June 20, 2002 Koch received a second notice that she was not eligible for the Child Care Subsidy Program and would lose her benefits effective July 1, 2002.

127. No manual reference was provided in the June 20, 2002 notice.

128. Koch works at Regional West medical Center.

129. Koch's net income is \$1120 a month.

130. Koch's child care costs for her two children under the Child Care Subsidy Program were \$212 per month.

131. Without the Child Care Subsidy Program, Koch's child care costs will rise to \$600 per month.

132. Without the Child Care Subsidy, the Koch family will have approximately \$400.00 in bills that she will be unable to cover.

133. When the change in eligibility for the Child Care Subsidy Program takes effect, the Koch will have to sell her car to cover her expenses in the short term. Without a car, Koch would not have transportation to get to her job.

### **FIRST CAUSE OF ACTION**

134. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1-133 as if set forth fully herein.

135. Governor Johanns line item veto to NDHHS' general fund is invalid under Neb. Rev. Stat. § 81-134 because Governor Johanns failed to provide reasons for his line item veto of the budget reduction to the general fund of NDHHS as required by Nebraska Law. Therefore, the veto is invalid.

### **SECOND CAUSE OF ACTION**

136. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1-135 as if set forth fully herein.

137. Governor Johanns line item veto to NDHHS' general fund with specific modifications to the Child Care Subsidy Program is unconstitutional under Art. II § 1 and Art. III § 1 of the Nebraska Constitution in that it violates the constitutional separation of powers because the Governor cannot use his line item veto powers to make program modifications.

### **THIRD CAUSE OF ACTION**

138. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1-137 as if set forth fully herein.

139. 392 NAC 3-004.01D is unconstitutional under Art. II § 1 and Art. III § 1 of the Nebraska Constitution, in that it violates the constitutional separation of powers because

the Legislature did not properly delegate authority to NDHHS to set income eligibility for the Child Care Subsidy Program.

#### **FOURTH CAUSE OF ACTION**

140. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1-139 as if set forth fully herein.

141. 392 NAC 3-004.01D is unconstitutional under Art. I § 3 of the Nebraska Constitution in that it deprives the Plaintiffs of their right to equal protection under the law by treating similarly situated families differently.

#### **FIFTH CAUSE OF ACTION**

142. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1-141 as if set forth fully herein.

143. 392 NAC 3-004.01D is unconstitutional under Art. III § 18 of the Nebraska Constitution in that it violates the prohibition on special legislation by conferring privileges on a class arbitrarily selected from a large number of persons standing in the same relation to the privileges, without a reasonable distinction or substantial difference.

#### **SIXTH CAUSE OF ACTION**

144. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1 to 143 as if fully set forth fully herein.

145. The failure of the Defendants to provide the class adequate notice and the opportunity for a fair hearing regarding determinations made as to eligibility for child care subsidies constitutes a violation of the Plaintiffs' rights to due process of law guaranteed by the Due Process Clause of the Fourteenth Amendment to the US Constitution and the Constitution of Nebraska, Article I, § 3.

## SEVENTH CAUSE OF ACTION

146. Plaintiffs reallege and incorporate by reference each and every allegation contained in paragraphs 1 to 145 as if fully set forth fully herein.

147. The action of Defendants of sending out notices of denial of eligibility for child care subsidies prior to 392 NAC 3-004.01D taking effect violates the Plaintiffs rights to due process of law guaranteed by the Due Process Clause of the Nebraska Constitution Article I, § 3.

**WHEREFORE**, Plaintiffs respectfully request that this Court grant the following relief:

1. Certify this action as a class action pursuant to Neb. Rev. Stat. §25-319.
2. Declare Governor Johanns' line item veto to the general fund of NDHHS which reduced funding for the Child Care Subsidy Program invalid under Neb. Rev. Stat. § 81-134.
3. Declare Governor Johanns' line item veto to the general fund of NDHHS with specific modifications to the Child Care Subsidy Program unconstitutional on the grounds it violates the separation of powers under Art. II § 1 and Article III § 1 of the Nebraska Constitution.
4. Declare that 392 NAC 3-004.01D is unconstitutional on the grounds that it violates the Plaintiffs' rights to equal protection under Art. I § 3 of the Nebraska Constitution.
5. Temporarily and permanently enjoin 392 NAC 3-004.01D on the grounds that it violates the Plaintiffs' rights to equal protection under Art. 1 § 3 of the Nebraska Constitution.

6. Declare that 392 NAC 3-004.01D is unconstitutional on the grounds that it violates the prohibition on special legislation under Art. III § 18 of the Nebraska Constitution.
7. Temporarily and permanently enjoin 392 NAC 3-004.01D on the ground that it violates the prohibition on special legislation under Art. III § 18 of the Nebraska Constitution.
8. Declare that Defendants violated Plaintiffs due process rights under the Fourteenth Amendment to the United States Constitution and Art. 1 § 3 of the Nebraska Constitution by failing to provide adequate notice.
9. Temporarily enjoin the Defendants from terminating eligibility for the Child Care Subsidy Program to the Plaintiffs until proper notice has been provided.
10. Declare that the Defendants violated the Plaintiffs due process rights under the Fourteenth Amendment to the United States Constitution and Art. 1 § 3 of the Nebraska Constitution by sending notices denying eligibility for the Child Care Subsidy program under 392 NAC 3-004.01D prior to the regulation taking effect.
11. Temporarily and permanently enjoin the Plaintiffs from terminating eligibility for the Child Care Subsidy Program until proper notice has been provided.
12. Order Defendants to reimburse Plaintiffs for all benefits they would have received but for the enactment of 392 NAC 3-004.01D.
13. Order that costs and attorneys' fees be taxed as the Court finds appropriate to the Defendants.
14. Grant Plaintiffs such further relief as this Court deems just.

DATED: \_\_\_\_\_

KENDRA JOHNSEN, JAMIE LONGWELL, AND JAMIE KOCH, INDIVIDUALLY  
AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, Plaintiffs.

By: \_\_\_\_\_  
D. Milo Mumgaard #19919  
Nebraska Appleseed Center  
for Law in the Public Interest  
941 O Street, Suite 105  
Lincoln, NE 68508  
(402) 438-8853

By: \_\_\_\_\_  
Rebecca L. Gould #22246  
Nebraska Appleseed Center  
for Law in the Public Interest  
941 O Street, Suite 105  
Lincoln, NE 68508  
(402) 438-8853

Attorneys for Plaintiffs

PRAECIPE

TO THE CLERK OF THE DISTRICT COURT OF LANCASTER COUNTY:

Please prepare a summons in the above captioned matter to be served along with a copy of the petition upon the Defendants, at the office of Attorney General Don Stenberg, Room 2115 State Capitol, Lincoln, NE 68509, during usual business hours.

By: \_\_\_\_\_  
Rebecca L. Gould #22246  
Nebraska Appleseed Center  
for Law in the Public Interest  
941 O Street, Suite 105  
Lincoln, NE 68508  
(402) 438-8853