

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

LANCASTER COUNTY

KENDRA JOHNSEN, JAMIE)	2) JUL -CASE NO. CI 02 2304
LONGWELL, AND JAMIE KOCH)	
INDIVIDUALLY AND ON BEHALF OF)	
ALL OTHERS SIMILARLY)	
SITUATED,)	
)	
Plaintiffs,)	
)	
vs.)	ORDER
)	
STATE OF NEBRASKA, GOVERNOR)	
MIKE JOHANNNS, ATTORNEY)	
GENERAL DON STENBERG,)	
NEBRASKA DEPARTMENT OF)	
HEALTH AND HUMAN SERVICES,)	
and RON ROSS, DIRECTOR,)	
)	
Defendants.)	

THIS MATTER CAME on for hearing on July 1, 2002, on the Plaintiff's Motion for Temporary Injunction. Evidence was adduced and the parties filed briefs advising the Court in the premises. The Court being fully informed, now finds and orders as follows:

FACTS

Child care subsidies are available to welfare recipients pursuant to two separate programs, the Transitional Child Care Program and the Child Care Subsidy Program. The Child Care Subsidy Program is generally 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 of 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, housing improvement services, legal services, adult day services, home delivered or congregate meals, and education services.”

In January of 1998, the Nebraska Department of Health and Human Services (NDHHS) enacted Rule 474-000-504 which modified the sliding fee schedule and adjusted the incomes guidelines in the appendix of Title 474 of the Nebraska Administrative Code. 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 Subsidy Program. Previously, the cutoff had been set by Rules of NDHHS at 120% of the federal poverty level. This change authorized child care subsidies to families whose incomes fell between 120% and 185% of the federal poverty level even though they had not received Aid to Dependent Children (ADC) within the past twenty-four months.

During the regular session in April 2002, the Nebraska Legislature passed LB 1309, an appropriations bill. LB 1309 addressed necessary changes in the state budget passed during the 2001 regular session and modified in the special session in November, 2001. LB 1309 included budget appropriations for the Child Care Subsidy Program. After the bill was presented to the Governor for approval, Governor Johanns returned LB 1309 to the Legislature pursuant to his authority under Art. IV § 15 of the Nebraska Constitution with several line item vetoes. Specifically, with one of the line item vetoes, Governor Johanns reduced the funding for the Child Care Subsidy Program. This reduction in funding effectively reduced those eligible for the Child Care Subsidy Program from 185% to 120% of the federal poverty level.

Following the action by Governor Johanns, the Nebraska Legislature did not override the Child Care Subsidy Program line item veto, and as a result, the reduction in funding became part of LB 1309 and became law. On June 17, 2002, NDHHS repealed 474 NAC 7-002.01 and replaced it with 392 NAC 3-004.01D which states: "Those individuals whose family income exceeds the maximum for Low Income Family but is equal or less than 120% of the Federal Poverty Level are eligible as Low Income Sliding Fee Schedule. To be eligible under this category, the client must pay a fee as shown in the fee schedule." The termination of benefits for those families no longer eligible to receive child care subsidy took effect July 1, 2002.

The other child care program, the Transitional Child Care Program, is authorized pursuant to the 1997 Nebraska Welfare Reform Act. The Transitional Child Care Program is designed for families that have previously received ADC cash assistance but who are no longer eligible for ADC. Transitional Child Care is specifically authorized under NEB. REV. STAT. §68-1724(1)(c) which provides:

"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."

Under the Transitional Child Care Program, ADC families who have received cash assistance for two years are then eligible to continue receiving child care subsidies for up to twenty-four additional months. The Transitional Child Care Program is not affected by the reductions to the Child Care Subsidy Program pursuant to Rule 392 NAC 3-004.01D. The court notes that there is no specific statutory provision establishing the Child Care Subsidy Program. As previously stated, it is authorized under the general provisions of NEB. REV. STAT. § 68-1202.

The plaintiffs allege the following seven causes of action in their petition: (1) Governor Johanns' line item veto of NDHHS' general fund is invalid under NEB. REV. STAT. §81-134 because Governor Johanns failed to provide the necessary justification for his line item veto of the budget reduction to the general fund of NDHHS as required by Nebraska law; (2) 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 because it violates the constitutional separation of powers as the Governor cannot use his line item veto powers to make program modifications; (3) 392 NAC 3-004.01D is unconstitutional under Art. II § 1 and Art. III § 1 of the Nebraska Constitution because it violates the constitutional separation of powers as the Legislature did not properly delegate authority to NDHHS to set income eligibility for the Child Care Subsidy Program; (4) 392 NAC 3-004.01D is unconstitutional under Art. 1 §3 of the Nebraska Constitution because it deprives the Plaintiffs of their right to equal protection under the law by treating similarly situated families differently; (5) 392 NAC 3-004.01D is unconstitutional under Art. III § 18 of the Nebraska Constitution because it violates the prohibition on special legislation through 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; (6) because the Defendants failed to provide the Plaintiffs with adequate notice and the opportunity for a fair hearing regarding determinations made as to eligibility for child care subsidies, this failure constitutes a violation of the Plaintiffs' rights to due process of law guaranteed by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and the Constitution of Nebraska, Article I, §3; and (7) the action of the Defendants with regard to sending notices of denial of eligibility for

child care subsidies prior to when 392 NAC 3-004.01D took effect violates the Plaintiffs' rights to due process of law guaranteed by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution and the Constitution of Nebraska, Article I, §3.

For the purposes of this order, the Plaintiffs seek a temporary injunction enjoining the Defendants from implementing Rule 392 NAC 3-004.01D to terminate eligibility for the Child Care Subsidy Program to families whose household income is between 120% and 185% of the federal poverty level until a trial on the merits is held and a final order is entered in this action.

STANDARD OF REVIEW

Temporary Injunctions are authorized under NEB. REV. STAT. §25-1063 (Reissue 1995), which provides:

"When it appears by the petition that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce great or irreparable injury to the plaintiff, or when, during the litigation, it appears that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action and tending to render ineffectual, a temporary injunction may be granted to restrain such act, subject to the limitations of §§ 25-1062 to 25-1080. It may also be granted in any case where it is specially authorized by statute."

ANALYSIS

In order to obtain a preliminary injunction, the Plaintiff must establish the following: "(1) the threat of irreparable harm to the movant; (2) the state of the balance between this harm and the injury that granting the injunction would inflict on the other parties litigant; and (3) the probability that the movant will succeed on the merits; (4) there is no adequate remedy at law; and (5) the public interest." *Ellison Education Equipment, Inc. V. Tekservices, Inc.*, 903 F. Supp. 1350, 1354 (D.C. Neb. 1995). Each of the above referenced criteria must be met in order for the

Plaintiffs' to establish their prima facie case. With respect to Causes of Action 1 through 5, the court concludes that it is unlikely that the Plaintiffs will succeed on the merits. Consequently, Plaintiffs have not met their burden, and the Plaintiffs' Motion for Temporary Injunction should be denied as to Causes of Action 1 through 5.

Due to the similarity between Plaintiffs' sixth and seventh causes of action, they will be discussed together. The Plaintiffs' remaining causes of action allege violations of the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution and Art. 1, § 3 of the Nebraska Constitution for failure to receive adequate notices and for sending out notices denying eligibility for child care subsidies prior to 392 NAC 3-004.01D taking effect. Under the Code of Nebraska Rules, 474-7 (2000), NDHHS must follow a specific procedure when sending out notice to clients of benefit termination. Section 7-004.06C of the Code of Nebraska Rules provides:

"The worker shall use Form DSS-6 to provide written notification of agency action to applicants or recipients when - (1) An applicant is determined ineligible for social services or a client is found ineligible at the time of verification redetermination; and (2) A requested service is denied or provided services are to be reduced or terminated. These notices must include a statement of what action(s) the worker intends to take, the reason(s) for the intended action, and the corresponding manual reference(s). Form DSS-6 must also be sent when an applicant is determined eligible or a client redetermined eligible for social services."

In addition, section 7-004.06C1 of the Code of Nebraska Rules states: "When a provided service is to be reduced or terminated, the worker shall provide formal written notice. This notice must be dated and mailed or given to the client at least ten calendar days before the adverse action is effective." Essentially there are five requirements that NDHHS must meet when sending out notices: (1) a written notice provided on Form DSS-6 must be used if an applicant or recipient is

determined to be ineligible for social services or provided services are to be terminated; (2) a statement of what actions the workers intends to take; (3) a reason for the intended action; (4) a specific state regulation that requires the action; and (5) the notice must be mailed at least 10 calendar days before the adverse action is effective.

As to the three Plaintiffs named in this case, the evidence revealed that plaintiff Jamie Longwell is still eligible to receive child care subsidy at this time. Therefore, her request for a temporary injunction is moot. The evidence revealed that plaintiff Kendra Johnsen received proper notice that her benefits would terminate on July 1, 2002. Therefore, any injunction that would be available for inadequate notice does not apply to Ms. Johnsen. The evidence revealed that plaintiff Jamie Koch received a letter from her caseworker regarding termination of her child care subsidy. The notice given to Ms. Koch failed to meet the 5 requirements as set forth above. This notice did not include the state regulation that necessitated the action. Ron Ross acknowledged during his testimony that there may have been notices sent out without setting forth the appropriate rule or regulation. It appears that NDHHS intends to remedy this situation and provide an additional month of benefits to those individuals who did not receive proper notice.

Plaintiffs allege that their due process rights were violated when NDHHS sent out notices after the Governor signed the regulation on June 12, 2002, but before it became effective on June 17, 2002. The court concludes that the Plaintiffs have failed to show how they were prejudiced by this action. The notice informed the clients that their benefits would terminate on July 1, 2002. This was well after the regulation became effective on June 17, 2002. The notices indicated a future action that would occur on July 1, 2002, after the regulations were in effect. The court

concludes that the due process rights of the Plaintiffs were not violated because notices were sent prior to the regulation taking effect on June 17, 2002. Therefore, a temporary injunction will only be granted to Plaintiff Jamie Koch for the reason that NDHHS failed to give her proper notice of the termination of her benefits.

IT IS THEREFORE HEREBY ORDERED, ADJUDGED, AND DECREED that Plaintiff Jamie Longwell's Motion for Temporary Injunction is overruled and denied in its entirety. It is further ordered that Plaintiff Kendra Johnson's Motion for Temporary Injunction is overruled and denied in its entirety. Plaintiff Jamie Koch's Motion for Temporary Injunction is sustained in part, and the Nebraska Department of Health and Human Services is enjoined from terminating her child care benefits until such time as NDHHS provides plaintiff Jamie Koch with proper notice of termination of benefits as required by the rules and regulations of NDHHS. It is further ordered that Plaintiff Jamie Koch's Motion for Temporary Injunction is otherwise overruled and denied.

Dated this 8th day of July, 2002.

BY THE COURT:



John A. Colborn
District Court Judge

cc: *Rebecca L. Gould and Milo Mumgaard, Attorney for Plaintiffs*
Michael J. Rumbaugh and Royce N. Harper, Attorney for Defendants