

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

JENNIFER DAVIO, )  
INDIVIDUALLY AND ON BEHALF OF )  
ALL OTHERS SIMILARLY SITUATED, )

Petitioners, )

v. )

NEBRASKA DEPARTMENT OF )  
HEALTH AND HUMAN SERVICES, )  
CHRISTINE Z. PETERSON, )  
CHIEF EXECUTIVE OFFICER, TODD )  
LANDRY, DIRECTOR OF DIVISION OF )  
CHILDREN AND FAMILY SERVICES, )  
and VIVIANNE CHAUMONT, )  
DIRECTOR OF DIVISION OF )  
MEDICAID AND LONG-TERM CARE, )

Respondents. )

Case No. CI \_\_\_\_\_

**PETITION AND PRAECIPE**  
(Class Action)

COMES NOW the Petitioner by and through her attorney of record and for her causes of action alleges as follows:

**JURISDICTION AND VENUE**

1. Jurisdiction and Venue in Lancaster County District Court are proper pursuant to Neb. Rev. Stat. § 84-917.
2. The Petitioner brings this action under Neb. Rev. St. § 84-901 *et seq.*, Neb. Rev. Stat. § 25 1062-1080, and the Nebraska Welfare Reform Act (WRA), Neb. Rev. Stat. § 68-1708 *et seq.*

**PARTIES**

3. Petitioner Jennifer Davio resides at 3040 Q Street, Apt. 1, Lincoln, Nebraska, 68503, with her two children, Bryson and Dakota. She proceeds on her own behalf and on behalf of all others similarly situated.

4. Respondents, Nebraska Department of Health and Human Services (hereinafter “the Department”), Christine Peterson as Chief Executive Officer, Todd Landry as Director of Division of Children and Family Services, and Vivianne Chaumont as Director of Division of Medicaid and Long-Term Care, oversee the administration of the Aid to Dependent Children (ADC) cash assistance program and the Medicaid program. The Respondents have offices at 301 Centennial Mall South, Lincoln, Nebraska and can be reached by mail at P.O. Box 95044, Lincoln, Nebraska 68509-5044.

#### **DECISION BEING APPEALED**

5. The Petitioner is appealing the Finding and Order entered by Respondent Todd Landry on April 22, 2008. (See Exhibit 1 attached)

#### **CLASS ACTION ALLEGATIONS**

6. Petitioner brings this action on behalf of herself and all persons similarly situated pursuant to Neb. Rev. Stat. § 25-319.
7. Petitioner’s class consists of all Nebraska parents who have received Aid to Dependent Children and whose Medicaid has been removed because of a sanction for failure to participate in Employment First, pursuant to 468 NAC 2-020.09B1(6) and 468 NAC 2-020.09B2f.
8. Petitioner’s class is made up of a group of Nebraskans so numerous that it would be impracticable to bring them all before this court. Upon information and belief, in the first three months of 2008, 465 Nebraska households received a sanction for failure to participate in Employment First. As part of those sanctions, the adults in the

- household had their Medicaid removed. It would be impracticable to bring hundreds of parents before the court.
9. This case presents facts common to all members of the Petitioner class. The common facts are that all members received a sanction for failure to participate in Employment First pursuant to 468 NAC 2-020.09B1(6), and all members have had their Medicaid removed due to 468 NAC 2-020.09B1(6) and 468 NAC 2-020.09B2f.
  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. This case presents questions of law and fact common to all members of the Petitioner class. The common question of law is the claim that 468 NAC 2-020.09B1(6) and 468 NAC 2-020.09B2f impermissibly exceed the delegation of authority granted by the legislature in Neb. Rev. St. § 68-1723, in violation of Article II § 1 and Article III § 1 of the Nebraska Constitution.
  12. The claims of the individual named Petitioner are typical of the claims of the members of the class. 468 NAC 2-020.09B1(6) and 468 NAC 2-020.09B2f apply equally to all households who have their adult Medicaid taken away because of a sanction for failure to participate in Employment First regardless of the individual circumstances leading up to the sanction.
  13. The individual named Petitioner will fairly and adequately protect the interests of the class and presents no issues adverse to the interests of the class.

### **STATUTORY AND REGULATORY FRAMEWORK**

14. 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.

15. Consistent health care coverage for ADC recipients is essential to accomplish many of the goals listed in the Welfare Reform Act. Adult Medicaid provides support and stability to family life because it allows parents to access necessary medical care, stay healthier, and therefore maintain jobs and provide for their children.
16. When parents have continuing access to health care, they are less likely to miss work because of sickness and less likely to develop a more serious medical condition because they were unable to get preventative care at the early stages of sickness. Therefore, Medicaid coverage for parents helps ensure that families can meet the requirements of Employment First and have the support needed to move from public assistance to economic self-sufficiency.

#### **Aid to Dependent Children (ADC) and Employment First**

17. Nebraska’s ADC program is designed to “provide temporary, transitional support for Nebraska families so that economic self-sufficiency is attained in as expeditious a manner as possible.” Neb. Rev. Stat. § 68-1709.

18. Nebraska's self-sufficiency program is called Employment First. All adults who receive an ADC grant and who are capable of working must participate in the Employment First program. Neb. Rev. St. § 68-1723.
19. As part of the Employment First program, families and caseworkers work together to develop a self-sufficiency contract. "...The contract shall be built upon the premise of urgent action. To ensure that the applicant can make constant, measurable progress toward self-sufficiency, goals shall be set with timelines and benchmarks that facilitate forward momentum...." Neb. Rev. Stat. § 68-1719.
20. An Employment First recipient can choose among several activities in order to comply with the work requirements of the self-sufficiency contract, including "education, job skills training, work experience, job search, or employment." Neb. Rev. St. § 68-1721(1).
21. Upon information in belief, an average of 10,313 families received an ADC grant per month in 2007. An average of 7,072 adults per month participated in the Employment First program.
22. The caseworker must work with the Employment First participant to form an individualized Self-Sufficiency Plan that best fits the person's skills, goals, and interests. If the Employment First participant has barriers that prevent her from participating in her work plan, such as lack of child care or lack of transportation, the caseworker must provide a Service Plan that provides for these needs. The Self-Sufficiency Plan and the Service Plan are put into writing, signed by the caseworker and client, and treated by the Department as a binding contract. 468 NAC 2-020 *et. seq.*

## **Medicaid**

23. Medicaid is a jointly funded state and federal program that provides medical coverage to certain categories of low-income persons pursuant to Title XIX of the Social Security Act, 42 U.S.C. §§ 1396 to 1396u.
24. State participation in the Medicaid program is optional. However, a state choosing to participate, and thereby receive federal matching funds for its Medicaid program, must comply with the requirements of the federal Medicaid Act and the rules and regulations governing state Medicaid programs promulgated by the U.S. Department of Health and Human Services (HHS).
25. As a condition of participating in the federal Medicaid program, Nebraska must submit to HHS a Medicaid plan that fulfills the requirements of the Medicaid Act. 42 U.S.C. § 1396a.
26. Nebraska has chosen to participate in the Medicaid program and accepts federal matching funds for its program expenditures.
27. Under the Medicaid program, Nebraska is required to cover certain groups of people and has the option of covering others.
28. In Nebraska, all parents and caretakers that receive ADC are eligible for Medicaid. 468 NAC 4-001.01A.
29. Medicaid is an entitlement program for those qualified to receive it.
30. Removal of Medicaid is a state action that adjudicates important rights.

## **Employment First Sanctions**

31. If an Employment First participant does not comply with the rules of the Employment First program and cannot show good cause for her failure to participate in

- Employment First, then her caseworker can sanction her for a limited time. Neb. Rev. St. § 68-1723(2).
32. In a sanction for failure to participate in Employment First, the family loses their entire ADC cash assistance grant and all adults in the family lose their Medicaid during the sanction period. 468 NAC 2-020.09B1(6); 468 NAC 2-020.09B2f.
33. Sanctions based on failure to participate in Employment First have a minimum duration and then continue to last until the participant complies with Employment First. The first sanction will last for one month or until the individual participates in her work plan, whichever is longer. The second sanction will last for three months or until the individual participates in her work plan, whichever is longer. The third sanction and all subsequent sanctions will last for twelve months or until the individual participates in her work plan, whichever is longer. 468 NAC 2-020.09B2f(2).
34. The legislature has only authorized the removal of *cash assistance* in sanctions for failure to participate in Employment First, pursuant to Neb. Rev. Stat. § 68-1723(2).  
The statute provides:  
“Recipient families with at least one adult with the capacity to work, as determined by the comprehensive assets assessment, shall participate in the self-sufficiency contract as a condition of receiving cash assistance. If any such adult fails to cooperate in carrying out the terms of the contract, the family shall be ineligible for *cash assistance*.” Neb. Rev. St. § 68-1723(2) (emphasis added).
35. The legislature has not authorized the removal of Medicaid as part of a sanction for failure to participate in Employment First.

36. However, the Department promulgated regulations instructing the caseworker to take away both cash assistance and Medicaid in a sanction for failure to participate in Employment First.
37. The regulations that authorize the removal of both cash assistance and Medicaid provide:
- “If the parent(s) fails to participate in Employment First, the result is the loss of ADC cash assistance for the entire family as well as medical assistance for the adult(s). In a two-parent family, failure to participate by one parent will result in the loss of ADC cash assistance for the entire family and medical assistance for both adults.” 468 NAC 2-020.09B1(6) (Effective Dec. 2, 2006).
- “If the parent fails or refuses to participate in EF without good cause, all ADC cash assistance for the entire family must be closed as well as the medical assistance for the adult(s).” 468 NAC 2-020.09B2f (Effective Dec. 2, 2006).
38. The Nebraska state legislature does not authorize the Department to take away an Employment First participant’s Medicaid as part of a sanction for failure to participate in a work plan.
39. It is inconsistent with the goals of the Welfare Reform Act to take away an ADC recipient’s Medicaid. Removing a person’s health care puts them at greater risk of poverty, increases the barriers the individual faces in finding a job, and makes it much more difficult for the person to move off of public assistance and to achieve self sufficiency.

### **Separation of Powers**

40. 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.”

41. 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...”
42. The legislature is granted the authority to make policy for the state of Nebraska and the executive branch cannot make policy unless such powers are delegated to them by the legislature.
43. The Nebraska Department of Health and Human Services is part of the executive branch of the government.
44. 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.
45. The legislature provided a definite standard for the scope of Employment First sanctions in Neb. Rev. St. § 68-1723(2), clearly stating that only cash assistance should be removed in sanctions for failure to participate in Employment First.
46. The Departments may not write or interpret rules which alter, modify or enlarge the provisions of the statute they are interpreting.
47. The Department exceeded the bounds of its discretion and violated the Separation of Powers clause of the Nebraska constitution by promulgating 468 NAC 2-020.09B1(6) and 468 NAC 2-020.09B2f, which remove both cash assistance and Medicaid.

## **STATEMENT OF FACTS**

### **Named Petitioner**

48. Petitioner Jennifer Davio is the single parent of two children.
49. The Davio family has received assistance under the Aid to Dependent Children program in Nebraska since December 2005.
50. The Davio family received Medicaid under 468 NAC 4-001.01A.
51. On or about July 20, 2007, Ms. Davio received a Notice of Action from the Department stating that she was receiving a sanction for failure to participate in Employment First. The sanction began on August 1, 2007 and was supposed to last for a minimum of three months.
52. The Employment First sanction removed all of the family's cash assistance and Ms. Davio's Medicaid during the sanction period.
53. Ms. Davio no longer contests the validity of the sanction issued in August 2007.
54. Ms. Davio has a serious heart condition. A sac of fluid surrounds her heart and this fluid must be drained each month or Ms. Davio faces serious health risks.
55. Ms. Davio must see a cardiologist each month in order to treat her heart condition.
56. Ms. Davio cannot afford to see her cardiologist without Medicaid coverage. Ms. Davio's health is put at great risk when she does not see her cardiologist.
57. Ms. Davio became pregnant in October 2007.
58. Ms. Davio did not receive any prenatal care until January 2008 because she did not have Medicaid coverage, and she continues to receive limited medical care since her Medicaid coverage is currently restricted to services for her unborn child.
59. Ms. Davio has not been able to see her cardiologist since July 2007, even though her heart condition affects her pregnancy, because cardiology treatments are not considered to be services for her unborn child.

60. Ms. Davio's pregnancy is high-risk and she would greatly benefit from full medical coverage. Ms. Davio's unborn child has experienced serious kidney problems and will be born with only one functioning kidney.

#### **ASSIGNMENTS OF ERROR**

61. The Hearing Officer erred in holding that Petitioner's Medicaid removal was appropriate because the Department regulations that Director Landry relied upon, 468 NAC 2-020.09B1(6) and 468 NAC 2-020.09B2f, are unconstitutional. Specifically, 468 NAC 2-020.09B1(6) and 468 NAC 2-020.09B2f violate the Separation of Powers clause found in Article II Section 1 of the Nebraska Constitution because they exceed the delegation of authority granted by the Nebraska state legislature in Neb. Rev. St. § 68-1723.
62. The Hearing Officer erred in denying Petitioner's Motion for Supplemental Evidence because the evidence is competent, relevant, material, and non-repetitive.

WHEREFORE the Petitioner respectfully requests that this Court:

1. Reverse the decision of the administrative Hearing Officer;
2. Reverse the Hearing Officer's decision to deny Petitioner's Motion for Supplemental Evidence and admit the evidence for consideration.
3. Certify this action as a class action pursuant to Neb. Rev. Stat. § 25-319;
4. Declare that 468 NAC 2-020.09B1(6) and 468 NAC 2-020.09B2f are unconstitutional on the grounds that they violate the Separation of Powers clause under Art. II § 1 and Art. III § 1 of the Nebraska Constitution;

5. Permanently enjoin 468 NAC 2-020.09B1(6) and 468 NAC 2-020.09B2f on the grounds that they violate the Separation of Powers clause under Art. II § 1 and Art. III § 1 of the Nebraska Constitution;
6. Order the Department to reimburse Petitioner and all members of the class for all medical care they paid for which would have been covered by Medicaid but for the enforcement of 468 NAC 2-020.09B1(6) and 468 NAC 2-020.09B2f; and
7. Grant such other relief as the Court deems just.

DATED: May 20, 2008

JENNIFER DAVIO, Petitioner.

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**PRAECIPE**

**TO THE CLERK OF THE DISTRICT COURT OF LANCASTER COUNTY:**

Please prepare a Summons for personal service in the above captioned matter to be served by the Lancaster County Sheriff, along with a copy of the Petition upon each of the Defendants, Nebraska Department of Health and Human Services, Christine Peterson as Chief Executive Officer, Todd Landry as Director of Division of Children and Family Services, and Vivianne Chaumont as Director of Division of Medicaid and Long-Term Care, who can all be served at the office of the Attorney General, Room 2115 State Capitol, Lincoln, NE 68509, during usual business hours.

By: \_\_\_\_\_  
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This action was filed In Forma Pauperis.

# **Exhibit 1**