

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

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

Plaintiffs,

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,

Defendants.

Case No: CI08-2202

**BRIEF IN SUPPORT OF
DEFENDANTS'
MOTION TO DISMISS
PETITIONERS' PETITION**

The Nebraska Department of Health and Human Services and defendants Christine Z. Peterson, Todd Landry and Vivianne Chaumont, in their official capacities as employees of the Nebraska Department of Health and Human Services, (referred to collectively as "Defendants"), by and through counsel, submitted Defendants' Motion to Dismiss Petitioners' Petition on or about July 8, 2008. Defendants' motion, pursuant to Nebraska Rules of Pleadings in Civil Actions, Rule 12(b)(1) and (6), requested that this Court dismiss all claims against the Defendants for the reasons that the Court lacks subject matter jurisdiction to hear the Petition and the Petition fails to state a claim upon which relief can be granted. In support of their Motion, Defendants respectfully submit the following brief.

INTRODUCTION

Petitioners seek relief under Neb. Rev. Stat. §§ 84-901 *et seq.*, Neb. Rev. Stat. §§ 25-1062 to 1080, and the Nebraska Welfare Reform Act, Neb. Rev. Stat. §§ 68-1708 *et seq.* See Petitioners' Petition and Praecipe (hereinafter "Petition"), ¶ 2. Specifically, Petitioner Davio "is appealing the Finding and Order entered by Respondent Todd Landry on April 22, 2008." *Id.* at ¶ 5. Defendants have filed a Motion to Dismiss Plaintiffs' Petition for lack of subject matter jurisdiction and failure to state a claim for relief.

STANDARD OF REVIEW

For purposes of a motion to dismiss, "[c]omplaints should be liberally construed in the plaintiff's favor and should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of the claim that would entitle him or her to relief." *Parkert v. Lindquist*, 269 Neb. 394, 396, 693 N.W.2d 529, 531 (2005); *Spear T Ranch v. Knaub*, 269 Neb. 177, 182, 691 N.W.2d 116, 125 (2005). However, "complaints must nonetheless set forth sufficient information to suggest that there is some recognized theory upon which relief may be granted. *Anderson v. Wells Fargo Financial Acceptance Pennsylvania, Inc.*, 269 Neb. 595, 603, 694 N.W.2d 625, 632 (2005).

When a Motion to Dismiss is brought under both Rules 12(b)(1) and (6) of the Nebraska Rules of Pleading in Civil Actions, the court should first determine whether the court has subject matter jurisdiction under Rule 12(b)(1). *Anderson*, 269 Neb. at 601, 694 N.W.2d at 630. "If the court determines that it lacks subject matter jurisdiction, the court should dismiss on that basis and should not consider

the rule 12(b)(6) grounds.... [T]he court should consider the rule 12(b)(6) grounds only after it has determined that it has subject matter jurisdiction.” *Id.*

APPLICABLE STATUTORY AND REGULATORY PROVISIONS

I. The Nebraska Medical Assistance Program (i.e. Medicaid)

The Medicaid program, 42 U.S.C. § 1396 et seq. (2001), was established by Congress in 1965 as a cooperative federal-state program in which the federal government reimburses states for a portion of the costs of medical care for persons in need. The purpose of the program is to provide medical assistance to those whose resources are insufficient to meet the costs of necessary medical care. While participation in the federal Medicaid program is optional, once a state elects to participate, it must comply with the requirements imposed by the federal Medicaid act and by the Secretary of Health and Human Services, who administers the program through the Health Care Financing Administration.

Boruch v. Nebraska Dept. of Health and Human Services, 11 Neb.App. 713, 716, 659 N.W.2d 848, 852 (Neb.App. 2003) (internal citations omitted).

Nebraska elected to participate in the federal Medicaid program through the enactment of the Nebraska Medical Assistance Act. See Neb. Rev. Stat. §§ 68-903 *et seq.*

It is the public policy of the State of Nebraska to provide a program of medical assistance on behalf of eligible low-income Nebraska residents that . . . emphasizes personal independence, self-sufficiency, . . . personal responsibility and accountability for the payment of health care and related expenses and the appropriate utilization of health care and related services. . . is appropriately managed and fiscally sustainable, and [] qualifies for federal matching funds under federal law.

Neb. Rev. Stat. § 68-905.

Neb. Rev. Stat. § 68-908(2) provides that the Department of Health and Human Services (“Department” or “DHHS”) “may (a) enter into contracts and interagency agreements, (b) **adopt and promulgate rules and regulations**, (c) adopt fee schedules, (d) apply for and implement waivers and managed care

plans for eligible recipients, and (e) perform such other activities as necessary and appropriate to carry out its duties under the Medical Assistance Act.” (emphasis added). “The department may establish . . . limits on the amount, duration, and scope of goods and services that recipients may receive under the medical assistance program, and **□ requirements for recipients of medical assistance as a necessary condition for the continued receipt of such assistance**, including, but not limited to, active participation in care coordination and appropriate disease management programs and activities.” Neb. Rev. Stat. § 68-912 (emphasis added). Prior to adopting rules and regulations under the Medical Assistance Act, DHHS must first submit them to the Governor, the Legislature, and the Medicaid Reform Council for review. Neb. Rev. Stat. § 68-909(2) (the Medicaid Reform Council submittal has only been required since 2006).

An applicant may appeal the denial or discontinuance of medical assistance by DHHS in accordance with the Administrative Procedures Act. Neb. Rev. Stat. § 68-914.

II. The Welfare Reform Act

The Welfare Reform Act includes the following Legislative findings and declarations:

The Legislature finds and declares that the primary purpose of the welfare programs in this state is to provide temporary, transitional support for Nebraska families so that economic self-sufficiency is attained in as expeditious a manner as possible. The Legislature further finds and declares that this goal is to be accomplished through individualized assessments of the personal and economic resources of each applicant for public assistance and through the use of individualized self-sufficiency contracts.

The Legislature further finds and declares 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 poverty 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; (6) changing public assistance from entitlements to temporary, contract-based support; (7) removing barriers to public assistance for intact families; (8) basing the duration of public assistance upon the individual circumstances of each applicant within the time limits allowed under federal law; (9) providing continuing assistance and support for persons sixty-five years of age or over and for individuals and families with physical, mental, or intellectual limitations preventing total economic self-sufficiency; (10) supporting regular school attendance of children; and (11) promoting public sector, private sector, individual, and family responsibility.

Neb. Rev. Stat. § 68-1709.

The Welfare Reform Act requires DHHS to implement policies, including a **requirement** to “Make Sanctions More Stringent to Emphasize Participant Obligations.” Neb. Rev. Stat. § 68-1713. The Welfare Reform Act further requires that “[c]ash assistance shall be provided only while recipients are actively engaged in the specific activities outlined in the self-sufficiency contract developed under section 68-1719. If the recipients are not actively engaged in these activities, no cash assistance shall be paid.” Neb. Rev. Stat. § 68-1723. Specific time limitations for cash assistance are also set forth in Neb. Rev. Stat. § 68-1724.

“The Department of Health and Human Services **shall** adopt and promulgate rules and regulations to carry out the Welfare Reform Act.” Neb. Rev. Stat. § 68-1715 (emphasis added).

III. DHHS Regulations

Title 468, Chapter 4 of the Nebraska Administrative Code provides procedures for applicants to seek eligibility for medical assistance/Medicaid without participating in a self-sufficiency program. Title 468, Chapter 4, section 4-001.01A allows individuals, such as Appellant Davio, who are eligible for Aid to Dependent Children ("ADC") to also be eligible for Medical Assistance/Medicaid without submitting to a separate eligibility determination. Individuals who choose to seek medical assistance eligibility through 468 N.A.C. 4-001.01A are required to fulfill all the requirements that relate to their ADC benefits, including those described below.

468 N.A.C. 2-010 requires that:

As a condition of eligibility for an ADC payment, a client determined to be subject to Employment First participation must complete his/her Employment First Self-Sufficiency Contract before the family can be determined eligible to receive ADC cash assistance. If a client does not cooperate in developing and completing an Employment First Self-Sufficiency Contract, the family is ineligible for ADC cash assistance. Medicaid eligibility for all family members, parents as well as children, must be determined.

468 N.A.C. 2-020 declares that:

The primary purpose of Employment First is to provide temporary, transitional support for Nebraska families so that economic self-sufficiency is attained in as expeditious a manner as possible through the provision of training, education and employment preparation.

468 N.A.C. 2-020.01 requires that "all individuals who are defined as a work-eligible individual are required to participate in the Employment First program. 468 N.A.C. 2-020.02 provides for exemptions from Employment First.

468 N.A.C. 2-020.09 sets forth the following provisions related to nonparticipation:

Nonparticipation may occur only after a client has signed a Self-Sufficiency Contract. Some examples of failing to participate include, but are not limited to:

1. Not participating in Self-Sufficiency Contract revisions;
2. Not meeting the terms of the Self-Sufficiency Contract;
3. Failing to appear for a job interview or follow up on a job opening when the potential job meets the appropriate work criteria;
4. Failing to keep appointments with the case manager or with another agency providing service to the participant;
5. Voluntarily leaving a component activity before its completion;
6. Failing or refusing to report on his/her job search as required; or
7. Quitting employment or refusing a bona fide offer of employment without good cause.

468 N.A.C. 2-020.09A provides examples of good cause for nonparticipation in Employment First, and 468 N.A.C. 2-020.09B sets forth DHHS case management actions (including a supervisory review) that must be taken prior to sanctions being imposed for nonparticipation.

468 N.A.C. 2-020.09B1(6) provides that:

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 (see 468 NAC 2-020.09B2f).

468 NAC 2-020.09B2f also requires that:

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).

If at any time during a sanction period a parent qualifies for an exemption, "the exemption will be granted and the sanction will be lifted." 468 N.A.C. 2-20.09B2f(2).

STATEMENT OF FACTS

Petitioner Davio has received assistance under the Aid to Dependent Children Program in Nebraska since December 2005. Petition, ¶ 49. Petitioner Davio and her family also received Medicaid under 468 NAC 4-001.01A. Petition, ¶ 50.

On or about July 20, 2007, the Department sanctioned Petitioner Davio for her failure to participate in Employment First, by removing all of the family's cash assistance and Petitioner Davio's Medicaid beginning August 1, 2007 for a minimum three month period (referred to hereinafter as the "August 2007 Sanction"). Petition, ¶ 51-52. Petitioner Davio had received a prior Employment First Sanction in November 2006. Petition, Exhibit 1, p. 3. Petitioner Davio appealed the August 2007 Sanction, and a hearing was held on that appeal on February 6 and March 7, 2008. Petition, Exhibit 1, p. 1. Petitioner Davio argued at her hearing that the sanction on her medical coverage was beyond the statutory authority of DHHS and was thus unconstitutional. Petition, Exhibit 1, p. 6. Director Todd A. Landry of Children and Family Services entered an order affirming Petitioner Davio's sanction on April 22, 2008. Petition, Exhibit 1, p. 1.

Petitioner subsequently filed this action appealing Director Landry's order on or about May 20, 2008. Petition, ¶ 5. However in her Petition, Davio admits that she "no longer contests the validity of the sanction issued in August 2007." Petition, ¶ 53.

ARGUMENT

I.

**WITH THE EXCEPTION OF THE ADMINISTRATIVE
PROCEDURES ACT APPEAL OF THE FINDING AND ORDER ISSUED
BY DIRECTOR LANDRY ON APRIL 22, 2008 TO PETITIONER DAVIO,
PETITIONERS HAVE STATED NO CLAIMS OVER WHICH THIS
COURT HAS SUBJECT MATTER JURISDICTION.**

Petitioners allege that this Court has jurisdiction over their claims pursuant to Neb. Rev. Stat. §§ 84-901 *et seq.*, Neb. Rev. Stat. §§ 25-1062 to 1080 (“”, and the Nebraska Welfare Reform Act, Neb. Rev. Stat. §§ 68-1708 *et seq.* Petition, ¶ 2. Yet, the only claim Petitioners raise over which this Court has jurisdiction is Petitioner Davio’s appeal of the finding and order issued by Director Landry on April 22, 2008. The other statutes referenced by Petitioners fail to provide for a private right of action against the State over which this Court has jurisdiction.

A.

The Nebraska Constitution allows for the State to sue and be sued only in the manner and form provided by the Legislature.

“[I]t is inherent in the nature of sovereignty [that a state is not] amenable to the suit of an individual without its consent.” *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54, 116 S. Ct. 1114, 1122, 134 L.Ed.2d 252 (1996) (plurality opinion) (*citing Hans v. Louisiana*, 134 U.S. 1, 13, 10 S.Ct. 504, 506, 33 L.Ed. 842 (1890)). A State’s consent to abrogate its immunity from suit must be indicated expressly, by “a clear legislative statement.” *Blatchford v. Native*

Village of Noatak and Circle Village, 501 U.S. 775, 786, 111 S.Ct. 2578, 2584, 115 L.Ed.2d 686 (1991). Any waiver or overriding of the sovereign immunity of a state must be explicit and clear. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242, 105 S.Ct. 3142, 3147, 87 L.Ed.2d 171 (1985); *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99, 104 S.Ct. 900, 907, 79 L.Ed.2d 67 (1984)). For purposes of applying the doctrine of sovereign immunity, a suit against an agency of the State is the same as a suit against the State. *Will v. Michigan Department of State Police*, 491 U.S. 58, 71; 109 S.Ct. 2304, 2312 105 L.Ed.2d 45(1989); *Hoiengs v. County of Adams*, 245 Neb. 877, 887, 516 N.W.2d 223, 233 (1994) (citations omitted).

The Nebraska Constitution allows for the state to sue and be sued in the manner and form provided by the Legislature. Neb. Const. Art. V, §22; *Vision Quest, Inc. v. Dept. of Public Welfare*, 222 Neb. 228, 236, 383 N.W.2d 22, 27 (1986). However, the Nebraska Supreme Court has repeatedly held that “[t]his section is not self-executing, but requires legislative action for waiver of a state’s sovereign immunity.” *Riley v. State*, 244 Neb. 250, 256, 506 N.W. 2d 45, 49 (1993). See also *Concerned Citizens v. Department of Environ. Contr.*, 244 Neb. 152, 505 N.W. 2d 654 (1993) and *Gentry v. State*, 174 Neb. 515, 516, 118 N.W. 2d 643, 645 (1962).

B.

Neb. Rev. Stat. §§ 25-1062 to 1080 do not waive the State’s sovereign immunity or provide a private cause of action for Petitioners over which this Court has jurisdiction.

Neb. Rev. Stat. §§ 25-1062 to 1080 sets forth the statutory civil procedures related to the provisional remedy of injunctive relief. These statutes do not provide for a manner in which the State may sue or be sued, nor do they in any way waive the State's sovereign immunity from suit. They merely indicate how injunctive relief may be obtained when a court already has jurisdiction over a particular matter. Thus, Defendants respectfully request that Petitioners' claims alleged under Neb. Rev. Stat. §§ 25-1062 to 1080 be dismissed.

C.

With the exception of the Administrative Procedures Act Appeal of the Finding and Order Issued by Director Landry on April 22, 2008 to Petitioner Davio, Neither Neb. Rev. Stat. §§ 68-1708 *et seq.* nor Neb. Rev. Stat. § 84-917 waive the State's sovereign immunity or provide a private cause of action for Petitioners over which this Court has jurisdiction.

Neb. Rev. Stat. §§ 68-1708 *et seq.* contains the Nebraska Welfare Reform Act provisions. With the sole exception of providing for an administrative hearing for individual recipients impacted by DHHS decisions pursuant to the Act, the Nebraska Welfare Reform Act does not provide for a manner in which the State may sue or be sued, nor does it in any other way waive the State's sovereign immunity from suit. While Neb. Rev. Stat. § 84-917 provides this Court with jurisdiction to review the final decision in a contested case before an agency, it does **not** provide this Court with jurisdiction to review the rights of unnamed

individuals who have failed to exhaust their procedural remedies provided for in the Nebraska Welfare Reform Act or other related statutes.

Thus, Defendants respectfully request that Petitioners' claims alleged under Neb. Rev. Stat. §§ 68-1708 *et seq.* and Neb. Rev. Stat. § 84-917, with the exception of Petitioner Davio's Administrative Procedures Act Appeal of the Finding and Order Issued by Director Landry on April 22, 2008, be dismissed. As the Administrative Procedures Act only allows for a "person aggrieved by a final decision in a contested case" to bring an appeal in the district court, and Petitioner Davio is the only such person described in Petitioners' Petition, Defendants respectfully request that this Court dismiss all claims for individuals "similarly situated" for whom Petitioner Davio alleges to be suing on their behalf.

D.

As Petitioner Davio has already admitted that she "no longer contests the validity of the sanction issued in August 2007," there is no existing case or controversy relating to Petitioner Davio's Administrative Procedures Act Appeal of the Finding and Order Issued by Director Landry on April 22, 2008, and this Court should dismiss this action as it is moot.

Petitioner Davio appeals Director Landry's order dated April 22, 2008, yet the text of her petition admits that she "no longer contests the validity of the sanction issued in August 2007." "A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. A case becomes moot when the issues initially

presented in litigation cease to exist or the litigants lack a legally cognizable interest in the outcome of litigation.” *Chambers v. Lautenbaugh*, 263 Neb. 920, 644 N.W. 2d 540 (2002). As Petitioner has clearly admitted that she is no longer contesting the sanction she seeks to appeal, the issue has become moot.

Further, “[w]hile it is not a constitutional prerequisite for jurisdiction, the existence of an actual case or controversy is necessary for the exercise of judicial power. ...A case becomes moot when ... the litigants seek to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.” *Johnston v. Nebraska Dept. of Correctional Services*, 270 Neb. 987, 990, 709 N.W. 2d 321, 321 (2006) (citing *Swoboda v. Volkman Plumbing*, 269 Neb. 20, 690 N.W. 2d 166 (2004); *In re Application No. C-1889*, 264 Neb. 167, 647 N.W. 2d 45 (2002)). Due to the fact that Petitioner no longer contests the sanction levied by the Department, the issues presented in her claim are no longer alive and are in fact, moot.

Thus, Defendants respectfully request that Petitioner Davio’s Administrative Procedures Act Appeal of the Finding and Order Issued by Director Landry on April 22, 2008 be dismissed.

II.

IN THE EVENT THIS COURT DECLINES TO DISMISS THIS ACTION PURSUANT TO NEBRASKA RULES OF PLEADINGS IN CIVIL ACTIONS, RULE 12(b)(1), THIS ACTION SHOULD BE DISMISSED PURSUANT TO RULE 12(b)(6) BECAUSE PLAINTIFF HAS FAILED TO STATE A CAUSE OF ACTION UPON WHICH RELIEF MAY BE GRANTED; THE NEBRASKA

WELFARE REFORM ACT DOES NOT PROHIBIT DHHS FROM IMPOSING SANCTIONS ON RECIPIENTS OF MEDICAID BENEFITS FOR VIOLATIONS OF THEIR SELF-SUFFICIENCY CONTRACTS.

Petitioner Davio admits in her Petition that she “no longer contests the validity of the sanction issued in August 2007,” the very action that is being appealed. Petition, ¶ 53. It appears that, notwithstanding the validity of Davio’s August 2007 sanction, Petitioners seeks a determination from this Court regarding the constitutionality of 468 N.A.C. 2-020.09B1(6) and 468 N.A.C. 2-020.09B2f. Petitioners allege that the Department cannot terminate medical assistance for individuals to violate their Employment First self sufficiency contracts. Petitioners are incorrect, however, and the Department respectfully requests that this Court dismiss their Petition.

In adopting the Welfare Reform Act, the Nebraska Legislature clearly intended its goal “to be accomplished through individualized assessments of the personal and economic resources of each applicant for public assistance and through the use of individualized self-sufficiency contracts.” Neb. Rev. Stat. § 68-1709. The Legislature declared 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: . . . (5) providing individuals and families the support needed to move from public assistance to economic self-sufficiency; (6) changing public assistance from entitlements to temporary, contract-based support. . . and(11) promoting public sector, private sector, individual, and family responsibility.”

Id.

The Welfare Reform Act contains a requirement that DHHS “**shall**” implement policies to “make sanctions more stringent to emphasize participant obligations.” Neb. Rev. Stat. § 68-1713. The Act further requires that “[c]ash assistance shall be provided only while recipients are actively engaged in the specific activities outlined in the self-sufficiency contract developed under section 68-1719. If the recipients are not actively engaged in these activities, no cash assistance shall be paid.” Neb. Rev. Stat. § 68-1723. Specific time limitations for cash assistance are also set forth in Neb. Rev. Stat. § 68-1724. The Department is **required** to “adopt and promulgate rules and regulations to carry out the Welfare Reform Act.” Neb. Rev. Stat. § 68-1715.

Petitioners argue that Neb. Rev. Stat. § 68-1723 limits self-sufficiency contract/Employment First participation and related sanctions only to the ADC program. The statutes contain no such limitation, however, and merely require that, **at a minimum**, sanctions of ADC benefits are to be imposed for failure to comply with self-sufficiency contract requirements. That the Legislature has set forth a specific requirement for the ADC program cannot be construed as a prohibition on the Department’s ability to impose similar requirements and sanctions on other public assistance programs (such as medical assistance). This is particularly true when the Legislature has directly commanded the Department to implement more stringent sanctions to emphasize participant obligations. As required in the Medical Assistance Act, all such regulations are reviewed by the Governor and the Legislature prior to their adoption. See Neb. Rev. Stat. § 68-909(2). If the Legislature did not intend for the Department to

adopt more stringent public assistance requirements, then why would they direct the Department to do so? Additionally, if the Department had attempted to act outside of their statutory authority in implementing the disputed regulations, the legislative review procedures would have prevented their implementation.

Petitioner argues that the Department has violated the Separation of Powers clause by exceeding the authority delegated to it by the Legislature (Petition, ¶ 61), yet the Department has merely acted precisely as directed by the Legislature. As further assurance that the Department has not exceeded its authority, that action (i.e. the adoption of rules and regulations) was required to be reviewed by the Legislature per § 68-909(2).

The Department has made it easier for individuals receiving ADC to qualify for Medicaid, by providing for a simplified eligibility determination process. The Department has adopted regulations to ensure that Employment First participants are provided the necessary supports to allow individuals to fulfill their self-sufficiency contracts (i.e. transportation, childcare, etc). See Title 468 N.A.C., Chapter 2. Employment First is not intended to be an additional hurdle for those needing public assistance, but instead it is intended to promote self-sufficiency through enhanced benefits. The receipt of those benefits, however, does however require recipient participation. When circumstances beyond a participant's control arise that exempt them from their self-sufficiency contract requirements, the Department's regulations allow for those exemptions to be applied and for those individuals to be released from their self-sufficiency

contract obligations for purposes of public assistance benefits (even if the individual has already been sanctioned). See 468 N.A.C. 2-20.09B2f(2).

It is also important to note that the practice of terminating medical assistance when an individual's cash assistance is terminated for refusing to work was provided for in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996. See Public Law 104-193 (1996), codified at § 1931(b)(3)(A) of the Social Security Act.

Petitioner Davio is simply wrong in her assertion that the Department's regulations are unconstitutional. She may not appreciate that the Legislature has directed the Department to emphasize self-sufficiency in public assistance programs (not just in the ADC program), but she accepted the benefits of the Department's public assistance programs (including the additional self-sufficiency supports provided for by Employment First). In doing so, she was obligated to either fulfill her self-sufficiency contract, or establish that she was covered by one of the Employment First exemptions due to her changed circumstances. She fulfilled neither of those obligations and must now accept responsibility for her actions.

The Department's regulations are consistent with the directives from the Legislature in the Welfare Reform Act, and are not unconstitutional. Thus, Defendants respectfully request that this Court deny Petitioners' Petition.

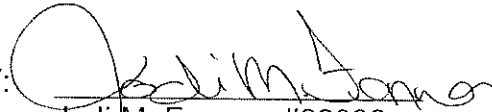
CONCLUSION

Based on the foregoing, Defendants request that the Court dismiss this action for lack of jurisdiction and/or for failure to state a cause of action upon which relief may be granted.

DATED this 4th day of September, 2008.

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, Defendants.

BY:



Jodi M. Fenner, #22038

Matt Dunning, #20057

Special Assistant Attorneys General
Legal Counsel, Nebraska Department of
Health and Human Services
301 Centennial Mall
Lincoln NE 68509
Tel: (402) 471-4731

Attorneys for Defendants.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above and forgoing Brief in Support of Defendants' Motion to Dismiss Petitioners' Petition was hand delivered to Petitioners' counsel of record Erin Ching and/or Rebecca Gould of the Nebraska Appleseed Center, 941 O Street, Ste. 105, Lincoln, NE 68508 on this _____ day of September, 2008.

Jodi M. Fenner