

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 08-2202

**PETITIONERS' BRIEF IN
OPPOSITION TO RESPONDENTS'
MOTION TO DISMISS
(Class Action)**

INTRODUCTION

Petitioners bring this action challenging the constitutionality of the Respondents' actions to remove access to basic health care through the Medicaid program as a punishment for failing to meet the terms of an Employment First Self-Sufficiency Contract. Petitioners file this brief in response to Respondents' Motion to Dismiss. Because 1) this Court has subject matter jurisdiction pursuant to Neb. Rev. St. 84-917 and 2) because the Petition clearly states a claim on which relief can be granted, the Respondents' Motion to Dismiss should be denied.

ARGUMENT

I. Standard of Review

When analyzing a Motion to Dismiss, the Court should accept the Petition's allegations as true and view them in the light most favorable to the Petitioners. *See, e.g., Doe v. Omaha Public School District*, 273 Neb. 79, 82, 727 N.W.2d 447, 452 (2007). The sufficiency of the Petition should be construed liberally in the Petitioner's favor, *Anderson v. Wells Fargo Financial Acceptance Pennsylvania, Inc.*, 269 Neb. 595, 603, 694 Neb. N.W. 2d 625, 633 (2005), giving the Petitioner the benefit of all reasonable inferences from the allegations in their Petition. *Johnson v. Johnson*, 272 Neb. 263, 264, 720 N.W.2d 20, 23 (2006). When a motion to dismiss is based on both lack of subject matter jurisdiction and failure to state a claim, the Court should consider the subject matter jurisdiction challenge first. *Anderson*, 269 Neb. at 600, 694 Neb. N.W. 2d at 630.

II. This Court Has Subject Matter Jurisdiction Over This Case.

Subject matter jurisdiction is defined as "a court's power to hear and determine a case in the general class or category to which the proceedings in question belong and to deal with the general subject involved in the action before the court and the particular question which it assumes to determine." *Rozsnyai v. Svacek*, 272 Neb. 567, 570, 723 N.W.2d 329, 333 (2006). The sources of jurisdiction for state district courts are the Nebraska Constitution and Nebraska statutes. NEB. CONST. art. V, § 9. The Court has subject matter jurisdiction because 1) Ms. Davio is challenging the Final Order from her

administrative appeal pursuant to Neb. Rev. St. § 84-917, and 2) the class meets all requirements of Neb. Rev. St. § 25-319 and therefore gains subject matter jurisdiction through Neb. Rev. St. § 84-917. Further, 3) the class should not be required to exhaust administrative remedies because exhaustion would be futile, and 4) Petitioner's case is not moot because she is challenging the constitutionality of her sanction.

A. The Lancaster County District Court has subject matter jurisdiction over Ms. Davio's appeal pursuant to the Nebraska Administrative Procedure Act.

Ms. Davio is appealing the Final Order of an administrative appeal pursuant to the Nebraska Administrative Procedure Act (APA), which provides, "Any person aggrieved by a final decision in a contested case, whether such decision is affirmative or negative in form, shall be entitled to judicial review under the Administrative Procedure Act." Neb. Rev. St. § 84-917(1). The APA instructs the petitioner to file an appeal in the district court of the county where the administrative hearing took place. Neb. Rev. St. § 84-917(2). The district court may consider whether the agency decision is: 1) in violation of constitutional provisions; 2) in excess of the statutory authority or jurisdiction of the agency; 3) made upon unlawful procedure; 4) affected by other error of law; 5) unsupported by competent, material, and substantial evidence in view of the entire record as made on review; or 6) arbitrary and capricious. Neb. Rev. St. § 84-917(6).

In this case, Respondents concede that subject matter jurisdiction exists for this Court to review the administrative hearing officer's Finding and Order entered by Todd Landry on April 22, 2008 for Ms. Davio as an individual Petitioner pursuant to Neb. Rev.

St. § 84-917. (Respondent's Brief at 9). Additionally, it is clear that this Court has subject matter jurisdiction over Ms. Davio's assertion that relevant evidence was improperly excluded during the administrative appeal. The exclusion of relevant evidence is an error of law, and Petitioner has the right to challenge errors of law pursuant to Neb. Rev. St. § 84-917(6)(a)(iv). The only question of subject matter jurisdiction raised by Respondents is whether this Court has subject matter jurisdiction over those similarly situated to Ms. Davio, or in other words, the proposed class members.

B. This Court has subject matter jurisdiction over the class pursuant to Neb. Rev. St. § 25-319 and Neb. Rev. St. § 84-917.

This Court should use its broad discretion to certify a class because in this case, a class action is the best use of judicial resources and the only way to vindicate the rights of these low-income Petitioners. Respondents assert that the Court does not have subject matter jurisdiction to hear this case as a class action. (Respondents' Brief at 9 - 12.) This Court does have subject matter jurisdiction to hear this case as a class action because 1) the named Petitioner has subject matter jurisdiction pursuant to Neb. Rev. St. § 84-917, the Court has broad discretion to join a class to any valid legal claim, and the class meets all the class action requirements pursuant to Neb. Rev. St. § 25-319; 2) the administrative exhaustion requirement in Neb. Rev. St. § 84-917 should be waived in this case because exhaustion would be futile; 3) Petitioners are willing to modify the class definition in order to address Respondents' concern that some members of the class are

time barred; and 4) in the alternative, this Court should certify a class pursuant to Neb. Rev. St. § 84-911.

1. The class gains subject matter jurisdiction through Neb. Rev. St. § 84-917 because they are similarly situated to the named Petitioner.

As outlined in the previous section, this Court has subject matter jurisdiction over Ms. Davio's claim pursuant to Neb. Rev. St. § 84-917. She also has a valid legal claim. Courts have broad discretion to join a class to a valid legal claim in any case where the requirements of a class are met. *Lynch v. State Farm Mut. Auto. Ins. Co.*, 275 Neb. 136, 144, 745 N.W.2d 291, 298 (2008) (citing *Berkshire v. Douglas County Board of Equalization*, 200 Neb. 113, 262 N.W.2d 449 (1978)). If the Court certifies this case as a class action, then both jurisdiction and a waiver of sovereign immunity will be provided to the similarly situated class through the same statute that provides jurisdiction and a waiver of sovereign immunity to the named Petitioner, Neb. Rev. St. § 84-917. Respondents imply that the class must find a source of subject matter jurisdiction in addition to the statute that gives the named Petitioner jurisdiction and the statute that provides the requirements for a class action, but they do not provide any authority for this argument. (Respondents' Brief at 11-12). Because the Court has broad discretion to certify a class, and because the class is similarly situated to the named Petitioner who has asserted a valid claim, the Court has subject matter jurisdiction over the class.

The proposed class meets all the requirements for a class action pursuant to Neb. Rev. St. § 25-319, and therefore the Court should use its broad discretion to certify a

class in this case. The Lancaster County District Court properly exercises jurisdiction over this class action pursuant to Neb. Rev. St. § 25-319, which provides, “When the question is one of a common or general interest of many persons, or when the parties are very numerous, and it may be impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.” In addition, the named party must be a typical member of the class who does not have conflicts with other class members. *Gant v. Lincoln*, 193 Neb. 108, 109, 225 N.W.2d 549, 551 (1975). Once the named party establishes that she has met these requirements, “considerable discretion” is vested in the Court to decide whether the case should be certified as a class action. *Id.* at 110, 225 N.W.2d at 551.

Here, this Court properly exercises subject matter jurisdiction over the class because the Petition alleged all the required elements of a class action. The Petition states that over 450 parents had their Medicaid removed due to an Employment First sanction in the first three months of 2008. Petition, ¶ 8. The parties are numerous and it is impracticable to bring them all before the court. *Id.* All members of the class present the common legal question of whether Medicaid removal pursuant to an Employment First sanction exceeds the Department’s statutory authority in violation of the Nebraska Constitution. Petition, ¶ 11. Ms. Davio is a typical member of the class who does not have conflicts with other class members. Petition, ¶ 12-13. Since Petitioners have

established that they meet all the required elements for a class action, this Court should use its considerable discretion to certify a class in this case.

2. This Court should waive any need for class members to exhaust administrative remedies because exhaustion would be futile.

Respondents assert that class members cannot gain subject matter jurisdiction and a waiver of sovereign immunity through Neb. Rev. St. § 84-917 because most class members have not met the requirement that they exhaust administrative remedies. (Respondents' Brief at 11 – 12). However, Petitioners urge the Court to use its considerable discretion to allow the class to proceed even for those who have not exhausted their administrative remedy. In *Bowen v. New York*, 476 U.S. 467 (1986), the U.S. Supreme Court affirmed the certification of a class that included members who had not exhausted their administrative remedy. The Court found it significant that the challenged rule did not depend on the particular facts of the case before it, that administrative exhaustion would have been futile, and that “there was nothing to be gained from permitting the compilation of a detailed factual record, or from agency expertise”. *Id.* at 485.

Like *Bowen*, Petitioner's action does not depend on the particular facts of the individual class members' situations and nothing would be gained from compiling a detailed factual record for each class member. Petitioner's case is a pure question of law which turns on statutory interpretation rather than questions of fact. Further, administrative exhaustion would be futile because administrative hearing officers do not

have the authority to determine whether regulations are constitutional. In Ms. Davio's administrative appeal, the constitutional issue was raised and the hearing officer did not make a constitutional determination, stating that she did not have the authority to do so. Petition, Exhibit 1, p. 6. If the Court does not certify a class, then everyone who would have been part of Petitioner's class will have to file an administrative appeal and go through the process of an administrative hearing, which will expend the resources of caseworkers, hearing officers, and legal staff. Once the hearing officer issues a final order, these individual plaintiffs will have to individually file their claims in district court, and multiple district court judges will have to expend resources determining the constitutional claim based on the same factors and arguments that are already before this court. Because trying this case as a class action makes the best use of judicial resources, and because exhausting administrative remedies is futile, this case should be tried as a class action.

3. Petitioners are willing to narrow the class definition in response to some of Respondents' concerns.

Respondents assert that some class members are time barred according to the guidelines in Neb. Rev. St. § 84-917 (claimants must appeal to administrative agency within 90 days, and must appeal final administrative agency decision to district court within 30 days of final agency decision). (Respondents' Class Certification Brief at 5). Petitioners are willing to modify the class in order to conform to the time limits set forth in Neb. Rev. St. § 84-917. Specifically, Petitioners suggest certifying a class of

Petitioners whose Medicaid was removed pursuant to an Employment First sanction after May 20, 2008, which was the date on which Jennifer Davio filed her APA Appeal in the District Court. This would address the Respondents' concern that many of the challengers are time barred, as none of the people in this class would have been time barred at the time of filing.

4. In the alternative, this Court should certify a class pursuant to Neb. Rev. St. § 84-911.

In the alternative, if the Court determines that Neb. Rev. St. § 84-917 does not provide subject matter jurisdiction to the class, the Administrative Procedures Act contains another statute that provides both subject matter jurisdiction and a waiver of sovereign immunity to plaintiffs who wish to challenge the validity of an administrative rule or regulation. Neb. Rev. St. § 84-911(1) provides:

The validity of any rule or regulation may be determined upon a petition for a declaratory judgment thereon addressed to the district court of Lancaster County if it appears that the rule or regulation or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the petitioner. The agency shall be made a party to the proceeding. The declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule or regulation in question.

Petitioners brought their action under Neb. Rev. St. § 84-901 et seq., which includes Neb. Rev. St. § 84-911. Petition, ¶ 2. Neb. Rev. St. § 84-911 provides a waiver of sovereign immunity, does not require exhaustion of administrative remedies, and does not contain a 30 day time limit in which Petitioners must file an action.

For all of these reasons, this Court has subject matter jurisdiction to hear this case as a class action.

C. Ms. Davio's appeal should not be dismissed based on mootness.

Ms. Davio's Petition should not be dismissed based on mootness because she presents a justiciable issue and, in the alternative, the case falls under the public interest exception to mootness. For a case to be justiciable, the case must not be moot. *Myers v. Neb. Inv. Council*, 272 Neb. 669, 683, 724 N.W.2d 776, 793 (2006). A case is moot if it "seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive." *Wilcox v. City of McCook*, 262 Neb. 696, 699, 634 N.W.2d 486, 489 (2001).

Here, Ms. Davio had standing at the commencement of the action based on her loss of Medicaid benefits and the resulting medical expenses that should have been covered by Medicaid. Every recipient has the legal right to appeal if their Medicaid benefits are suspended, reduced, or terminated regardless of whether they have a current medical need. 465 NAC 2-001.02 (implemented Aug. 21, 1995). Ms. Davio had the right to pursue judicial review in the Lancaster County District Court pursuant to Neb. Rev. St. § 84-917. Ms. Davio's case is not moot because she is continuing to challenge the constitutionality of her Medicaid removal. Petition, ¶ 61.

Respondents assert that the case is moot because of Ms. Davio's allegation that she "no longer contests the validity of the sanction issued in August 2007." Petition, ¶

53. Ms. Davio made this allegation to clarify that she is no longer challenging the Department's assertion that she failed to comply with her Employment First contract. She did challenge the factual question of whether she complied with her Self-Sufficiency contract at the administrative appeal hearing, and she chose not to pursue this issue on appeal. Petition, Exhibit 1, P. 1. However, it is clear from the Petition when read as a whole and, in particular, ¶ 61, that Ms. Davio is challenging the constitutionality of the Medicaid removal. The allegations in the Petition should be "construed liberally in the Petitioner's favor", *Anderson*, 269 Neb. at 603, 694 N.W.2d at 633. Since ¶ 53 can reasonably be construed to mean that Ms. Davio no longer challenges the factual determinations that led to her sanction, and since this is the reading that best fits within the overall context of the Petition, Ms. Davio's case should not be determined moot based on the allegation contained in ¶ 53 as construed by the Respondents.

In the alternative, as Respondents conceded at the hearing, the constitutional issue in this case qualifies for the public interest exception to the mootness doctrine. In Nebraska, there is a public interest exception to the mootness doctrine. *Chambers v. Lautenbaugh*, 263 Neb. 920, 927, 644 N.W.2d 540, 547 (2002). The court "may choose to review an otherwise moot case under the public interest exception if it involves a matter affecting the public interest or when other rights or liabilities may be affected by its determination." *Id.* In determining whether a case falls under the public interest exception, the court considers "the public or private nature of the question presented, the

desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem.” *Id.* The court may also consider the timeframe of the issue and whether determination of the legal question will ever be proper for appeal, or whether the issue is “capable of repetition, yet evading review”. *Williams v. Hjorth*, 230 Neb. 97, 98, 430 N.W.2d 52, 53 (1988).

First, the question presented is a public question, since a determination that the regulations at hand are unconstitutional in this case would change the rule not just for Ms. Davio, but also for everyone affected by this rule going forward. Second, an authoritative adjudication is desirable because it will guide public officials. Public employees at DHHS make the decision to remove Medicaid nearly every day, and a determination on this issue will clarify whether or not this practice is constitutional. Third, the same problem is likely to reoccur, since Medicaid removal due to an Employment First sanction affects hundreds of low-income parents in Nebraska every year. These parents have little or no income, they often have very serious health needs, and the removal of Medicaid makes them less able to find work, care for their kids, and move towards self-sufficiency. Additionally, low-income families frequently move in and out of Medicaid eligibility, which makes this issue capable of repetition but evading review. Medicaid sanctions occur frequently, affect hundreds of low-income Nebraskans, and require state officials to act based on regulations that may be unconstitutional.

III. Ms. Davio's Petition States A Valid Cause of Action Upon Which Relief Can Be Granted.

“Dismissal under rule 12(b)(6) should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief.” *Johnson v. Johnson*, 272 Neb. at 265, 720 N.W.2d at 23. A Motion to Dismiss may be granted if the plaintiff fails to allege facts that establish the existence of the prima facie case. *See, e.g., Id.*, 272 Neb. at 275, 720 N.W.2d at 30. A Motion to Dismiss may be granted if the plaintiff alleges facts that constitute an affirmative defense to the claim. *See, e.g., Ichtertz v. Orthopaedic Specialists of Nebraska, P.C.*, 273 Neb. 466, 469, 730 N.W.2d 798, 802 (2007). Finally, a Motion to Dismiss may be granted if the plaintiff does not use a viable legal theory. *See, e.g., Moglia v. McNeil Co., Inc.*, 270 Neb. 241, 700 N.W.2d 608 (2005).

Petitioners have 1) established the valid legal claim that Medicaid removal pursuant to an Employment First sanction is unconstitutional because it violates the Separation of Powers clause; 2) alleged facts necessary to state the claim that Medicaid removal is unconstitutional pursuant to the Welfare Reform Act; and 3) established that Medicaid removal is a policy decision that must be made by the Legislature. Therefore, the portion of Respondent's Motion to Dismiss based on Failure to State a Claim should be denied.

- A. Petitioners state the claim that Respondents violated the Separation of Powers clause in promulgating regulations that remove Petitioners' Medicaid.

Petitioners state the claim that the Department unconstitutionally exceeds its delegated authority and violates the Separation of Powers clause in removing Petitioners' Medicaid. The Separation of Powers clause 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 expressly directed or permitted in this Constitution.

NEB CONST. art. II, § 1. The Nebraska Constitution vests the authority to make laws in the Nebraska Legislature and clearly states that other government agencies should not be performing legislative actions. NEB CONST. art. II, § 1; NEB. CONST. art. III, § 1. Since the Nebraska Department of Health and Human Services is an administrative agency and not a legislative body, the Department cannot create new laws and policies; it can only promulgate regulations based on the clear instruction of the Nebraska Legislature. *Lincoln Dairy Company v. Finigan*, 170 Neb. 777, 780, 104 N.W.2d 227, 230 (1960) (administrative agencies are inherently entities of limited, specific power, whose rulemaking authority is limited to legitimate delegations). The Department can make rules that interpret state statutory provisions, but it cannot “employ its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering.” *Clemens v. Harvey*, 247 Neb. 77, 80, 525 N.W.2d 185, 188 (1994). If the Department promulgates regulations that exceed the scope of

authority delegated by the Nebraska Legislature, that is a constitutional violation.

Id. at 83, 525 N.W.2d at 189.

Petitioners are using a well-recognized, well-established legal doctrine in challenging the authority of an administrative agency's actions. The Separation of Powers legal claim is clearly established in Nebraska case law. *See, e.g., Clemens*, 247 Neb. 77, 525 N.W.2d 185 (DHHS unconstitutionally exceeded its delegated authority in eliminating a category of Medicaid recipients without statutory authority from the legislature); *County Cork v. Nebraska Liquor Control Comm'n*, 250 Neb. 456, 550 N.W.2d 913 (1996) (Liquor Commission unconstitutionally exceeded its delegated authority by creating rules regarding illegal activity without statutory authority from the legislature); *State ex rel. Spire v. Stodola*, 228 Neb. 107, 421 N.W.2d 436 (1988)(Administrative agency's regulation was broader than the authority granted in the authorizing statute, and therefore the regulation was declared unconstitutional).

B. Respondents violate the Separation of Powers clause because they promulgated regulations that exceed their delegated authority.

Petitioners have made all the necessary allegations to state a claim based on the constitutional Separation of Powers clause. Specifically, Petitioners alleged that Respondents exceeded the authority delegated to them in the Welfare Reform Act by promulgating regulations that remove adult Medicaid as part of an Employment First sanction. The Nebraska Legislature gave specific instructions on what should happen

when clients fail to participate in Employment First. Petition, ¶ 34. Neb. Rev. Stat. § 68-1723(2) 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. (Emphasis added).

This law clearly describes the Legislature's intended penalty for failure to cooperate in carrying out the terms of the Employment First Self-Sufficiency Contract. It directs that cash assistance must be removed and it does not authorize any other type of punishment. Petition, ¶ 34. It does not mandate that Medicaid should be removed, nor does it give the Department the option of removing Medicaid. Petition, ¶ 35. Like *State ex rel. Spire*, in which the administrative agency unconstitutionally added a whole new category of eligibility beyond those contemplated by the Legislature, the Department is adding a whole new category of punishment that was never authorized or even considered by the Legislature. 228 Neb. 107, 421 N.W.2d 436.

Despite this lack of authority, the Department does remove adult Medicaid in sanctions for failure to participate in Employment First. Petition, ¶ 36-37. 468 NAC 2-020.09B1(6) (implemented Dec. 2, 2006) states:

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. (Emphasis added).

Similarly, 468 NAC 2-020.09B2f (implemented Dec. 2, 2006) states: “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).” (Emphasis added). Respondents’ claim that “the Department has acted precisely as directed by the Legislature” in promulgating these regulations. (Respondents’ Brief at 15). However, the precise direction of the Legislature was to remove the family’s cash assistance and it does not require or allow anything else. The Department’s policy of removing adult Medicaid in addition to cash assistance, pursuant to 468 NAC 2-020.09B1(6) and 468 NAC 2-020.09B2f , goes beyond the scope of its delegated authority. Petition, ¶ 47.

C. The removal of Medicaid is a policy decision that must be made by the Legislature.

The removal of Medicaid coverage is a significant change to the sanctions policy, and it has serious consequences to the hundreds of Nebraskans impacted by Employment First sanctions each year. It is not simply a discretionary decision to be made by the Department, and it should not be taken lightly. Medicaid is an entitlement program for those qualified to receive it, and removal of Medicaid is a state action that “adjudicates important rights.” *Elliott*, 203 Neb. at 798, 280 N.W.2d at 642; Petition, ¶ 30.

The removal of Medicaid is a serious matter because it involves the state removing an adult's entitlement to health care. Nebraska families that qualify for both Aid to Dependent Children (ADC) and Medicaid depend on their health coverage as a safety net when someone in the family gets sick or needs medical treatment. If parents are unable to work enough hours in a month to meet the Employment First work requirement and consequently receive a sanction, they will most likely lose their only remaining source of income. The last thing parents need at this point, when all other supports have been removed, is to have their health care taken away. Consistent health care coverage enables parents to stay well and therefore attend work more frequently, care for their family, and eventually become self-sufficient. Taking health care away from struggling parents makes it much harder for them to find work, pay their bills, and move from welfare to economic security. Petition, ¶ 15-16.

The Nebraska Legislature only authorized cash assistance to be removed in an Employment First sanction. Despite the serious nature of removing health care, and despite the Legislature's silence on the matter, the Department unconstitutionally implemented regulations that remove parents' Medicaid when they receive a sanction for failure to participate in the Employment First program.

In their Brief, Respondents make a series of arguments on the merits of the case. (Respondents' Brief at 14-17). While we dispute these arguments, they are

not properly presented as part of a Motion to Dismiss. The only issue before the Court at this time is whether the Petition states a valid legal claim, and as outlined above, that requirement has been met.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that Respondents' Motion to Dismiss be denied.

DATED: September 15, 2008

Respectfully submitted:

JENNIFER DAVIO, on behalf of
herself and all others similarly
situated, Petitioners

By: _____
Erin A. Ching #23757
Rebecca L. Gould #22246
Nebraska Appleseed Center
for Law in the Public Interest
941 O Street, Suite 920
Lincoln, NE 68508
(402) 438-8853

Attorneys for Petitioners

CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of this Brief was hand delivered to the Respondents' counsel, Jodi M. Fenner and Matthew Dunning, 301 Centennial Mall South, Lincoln, NE 68509, on September 15, 2008.

By: _____
Erin A. Ching #23757
Nebraska Appleseed Center
for Law in the Public Interest
941 O Street, Suite 920
Lincoln, NE 68508