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 SUPPORT OF CLASS CERTIFICATION (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 support of their Motion for Class Certification. Because Petitioners meet the requirements for a class action pursuant to Neb. Rev. St. § 25-319 and because the equities weigh in favor of class certification, the Petitioner's Motion for Class Certification should be granted.

Petitioner seeks to have the Court certify a class in this case pursuant to Neb. Rev. St. § 25-319. Petitioners meet all of the requirements for class certification including that: (1) the questions of law and fact are of common or general interest to many persons; (2) the parties are very numerous and joinder of all members is impracticable; and (3) equity favors a grant of class certification.

ARGUMENT

The named Petitioner seeks to represent a class consisting of:

> All parents in Nebraska who have received Aid to Dependent Children and whose Medicaid has been removed due to a sanction for failure to participate in the Employment First program, pursuant to 468 NAC 2-020.09B1(6) and 468 NAC 2-020.09B2f.

In Nebraska, class actions are governed by 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." The court has 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)). Because the proposed class satisfies the requirements of Neb. Rev. St. § 25-319 and because class certification is essential to the fair and efficient adjudication of this controversy, Petitioners' Motion for Class Certification should be granted.

1. The Question Is One Of Common Or General Interest To Many Persons.

Neb. Rev. St. § 25-319 provides that a class may be formed "when the question is one of a common or general interest of many persons." The test to determine common interest "is whether all the members of the purported class desire the same outcome of the action that their representative desires." *Hoiengs v. County of Adams*, 245 Neb. 877, 903 (1994), 516 N.W.2d at 242 (citing *Browne v. Milwaukee Bd. Of School Directors*, 230 N.W.2d 704 (1975)). *Gant v. Lincoln*, 193 Neb. 108, 225 N.W.2d 549 (1975) further defines this requirement, explaining that a question of common interest is present when:

> the questions of law and fact presented were common to all and definitely predominated over individual interests; the claims of the interested individuals were similar to plaintiff's; in representing his own interests, plaintiff necessarily was required to represent the interests of all members of the class represented.

193 Neb. at 109, 225 N.W.2d at 551. A class should not be certified unless the named Petitioner "has the power as a member of the class to satisfy a judgment in behalf of all members of the class." *Archer v. Musick*, 147 Neb. 344, 349 (1946), 23 N.W.2d at 327, *rev'd on other grounds*, 147 Neb. 1018, 25 N.W.2d 908.

A. Questions of Law And Fact Are Common to All.

Here, "questions of law and fact presented [are] common to all and definitely predominat[e] over individual interests." *Gant*, 193 Neb. at 109, 225 N.W.2d at 551. Class members are parents who have lost Medicaid coverage due to a sanction for failing to participate in the Employment First program pursuant to 468 NAC 2-020.09B1(6) (implemented Dec. 2, 2006) and 468 NAC 2-020.09B2f (implemented Dec. 2, 2006). All

such individuals present the common legal question of whether the Medicaid removal exceeds the Department's statutory authority in violation of the Nebraska Constitution. *See NEB. CONST.* art. II, § 1 and art. III, § 1. As in *Hoiengs*, there is "nothing unique" about the named Petitioner's legal claim, whose action turns on the pure question of law common to the class. 245 Neb. at 902-3, 516 N.W.2d at 241. Although each of the Petitioners in the class has a distinct fact situation that caused her to be unable to comply with the requirements of the Employment First program, all of them have an identical fact situation for purposes of this lawsuit: all of them had their Medicaid removed pursuant to 468 NAC 2-020.09B1(6) and 468 NAC 2-020.09B2f. Furthermore, all Petitioners are asserting an identical legal challenge, that removal of Medicaid as part of the sanction penalty is unconstitutional, and all of them are seeking the same remedy, to invalidate the Department's regulations and to be made whole.

B. <u>The Named Petitioner is a Typical Representative of the Class.</u>

The named Petitioner is a typical representative of this class of Petitioners, and therefore the claims of other members of the class are similar to the named Petitioner's claims. Jennifer Davio was eligible for Medicaid. (Bill of Exceptions at 71). She was eligible for Aid to Dependent Children (ADC). (Bill of Exceptions at 73). As a condition of receiving the ADC grant, she was required to participate in the Employment First program. (Bill of Exceptions at 74). Ms. Davio received a sanction for failure to participate in Employment First pursuant to 468 NAC 2-020.09B1(6). (Bill of

Exceptions at 81). As part of this sanction, she had her Medicaid removed pursuant to 468 NAC 2-020.09B2f. (Bill of Exceptions at 82). Like Ms. Davio, all members of the class were eligible for ADC and Medicaid at the time when they were sanctioned. All class members were required to participate in Employment First as a condition of receiving their cash grant, and all class members failed to comply with their Employment First Self-Sufficiency Contract. As a result, all class members were sanctioned pursuant to 468 NAC 2-020.09B1(6) and had their Medicaid removed pursuant to 468 NAC 2-020.09B2f.

The Respondents allege in their Brief that Ms. Davio is not a typical member of the class and that class members do not share a common fact situation. However, the facts listed by Respondents that allegedly differentiate Ms. Davio from other members of the class are either not relevant or not applicable to the present action. Respondents list several reasons why the fact situation varies: class members have different components listed on their Self-Sufficiency contracts (Respondents' Brief at 7); participants have made different efforts to cooperate with the terms of the Employment First program (Respondents' Brief at 7); and class members are in different "phases" or "levels" of sanction. (Respondents' Brief at 7).

Although it is true that participants have different fact situations prior to receiving a sanction, all Employment First participants are treated identically by the Department once the decision is made to put a sanction in place. Regardless of the job activity

components and supportive services listed on their Employment First contract, regardless of the level of effort to comply with the Employment First program, and regardless of any other mitigating or aggravating factors, all participants are treated the same at the point that a sanction is imposed: the family's cash assistance is removed and adult Medicaid is removed for the length of the sanction.

Respondents refer to different "phases" and "levels" of sanctions (Respondents' Brief at 7), but the Health and Human Services regulations do not support the assertion that there is more than one "phase" or "level" for the type of sanction at issue. According to 468 NAC 2-020.09B2f, there is only one "phase" or "level" of sanction for non-compliance with the Employment First program, and that is removal of cash assistance and adult Medicaid. The regulations do not inflict harsher punishment on some participants and more lenient punishment on others. Everyone who fails to comply with Employment First program rules receives the same type of penalty pursuant to 468 NAC 2-020.09B2f. The only thing that varies is the length of time during which cash assistance and Medicaid are removed, and this is determined solely on the basis of whether the violation is a repeat offense. The variation in length of sanction does not affect the commonality of class members' desired outcome in this case, as everyone who had their Medicaid removed (whether for one month or several months) seeks to challenge this removal based on the same constitutional grounds. Everyone in Petitioner's proposed class had Medicaid removed for at least one month, so everyone

has a common situation of fact and a common question of law in all the ways that are relevant to this action.

Respondents state that "Not all members of the class will be denied benefits, and not all members of the class will have their benefits restored." (Respondents' Brief at 8). Each and every one of the people in Petitioner's proposed class were determined eligible for Medicaid, had their Medicaid removed at the time of sanction, and went without Medicaid coverage for at least one month. Whether their Medicaid was eventually restored or not is irrelevant to the present action. Respondents state that "many of the alleged members of the class may no longer be eligible for benefits" (Respondent's Brief at 6), but this is also irrelevant. Class members are not asking to be re-enrolled in Medicaid if they are not presently eligible. They are asking for reimbursement of any bills that were incurred during the time that they were eligible for Medicaid, and if not for the unconstitutional regulation, would have been paid by Medicaid. In all the relevant ways, Jennifer Davio shares a common interest with the potential class.

C. There Are No Potential Conflicts of Interest Between Class Members.

There is no conflict of interest between the named Petitioner's interests and class members interests. As in *Gant*, "[I]n representing [her] own interests, plaintiff necessarily [is] required to represent the interests of all members of the class represented." 193 Neb. at 109, 225 N.W.2d at 551. A favorable judgment in this action would adequately vindicate the rights of all Class members. The named Petitioner seeks a

declaration that 468 NAC 2-020.09B1(6) and 468 NAC 2-020.09B2f are unconstitutional, an injunction preventing the defendant from acting pursuant to the these regulations, and reimbursement to class members for medical expenses incurred as a result of the sanction that otherwise would have been covered by Medicaid. Such relief is available pursuant to the Administrative Procedure Act, Neb. Rev. St. § 84-901 *et seq.*, and the Nebraska Welfare Reform Act, Neb. Rev. St. § 68-1708 *et seq.* Hence, the named Petitioner has "the power as a member of the class to satisfy a judgment on behalf of all members of the class." *Archer*, 147 Neb. at 349, 23 N.W.2d at 327. The named Petitioner does not seek a remedy that would be harmful to any member of the class, nor does she omit to seek an available remedy that would be helpful to members of the class. Class certification is appropriate because the named Petitioner is typical of the class, she will adequately represent the class, and she states a claim that is of common interest to the class.

2. <u>The Number Of Parties in the Class Is Very Numerous And Joinder Of All Class Members Is Impracticable.</u>

Neb. Rev. St. § 25-319 authorizes the court to form a class "when the parties are very numerous, and it may be impracticable to bring them all before the court." In Nebraska, there is not a "mechanical test for determining whether in a particular case the class is so numerous that the requirement of numerosity has been satisfied." *Hoiengs,* 245 Neb. at 901, 516 N.W.2d at 240-41 (citing *Kelly v. Norfolk & W. Ry. Co.*, 584 F.2d 34

(4th Cir.1978)). The "rule of thumb" in Federal courts is "that a class over forty persons is sufficiently 'numerous.'" *Richter v. Bowen*, 669 F.Supp. 275, 281 (N.D. Iowa 1987). Although Nebraska courts have not formally adopted the federal court "rule of thumb," they have generally held that classes of less than 40 people fail the numerosity requirement, while classes of more than 40 people meet the numerosity requirement. *See, e.g., Benesch v. City of Schuyler*, 5 Neb.App. 59, 555 N.W.2d 63 (1996) (alleged class of 11 failed numerosity requirement); *Gant*, 193 Neb. 108, 225 N.W.2d 549 (class of 400 policemen met numerosity requirement). Every member of the class does not need to be specifically identifiable at the time of filing, but "something more than the suggestion of a class is necessary to fulfill the parties requirement". *Obstetricians-Gynecologists, P.C. v. Blue Cross and Blue Shield of Nebraska*, 219 Neb. 199, 208, 361 N.W.2d 550, 556 (1985).

Besides sheer number, the other important consideration in determining numerosity is whether it would be impracticable to join all the members of the class. In *Gant*, the Nebraska Supreme Court held that a trial court did not abuse its discretion by certifying a class of 400 policemen who challenged the deduction of $20,355.60 from their salaries for pension purposes. 193 Neb. 108, 225 N.W.2d 549. The "relatively small" amount at stake for each policeman "discourag[ed] and [render[ed] impractical the bringing of individual suits." *Id.* at 109, 225 N.W.2d at 551. Similarly, in *Hoiengs*, the Nebraska Supreme Court held that the trial court erred in dismissing a class which

consisted of 9,000 county employees who alleged that they were entitled to greater retirement contributions from their employers, stating that "the impracticality of joining such a large number of parties is obvious". 245 Neb. at 901, 516 N.W.2d at 241.

Here, the class of more than 450 people meets the statutory requirement that the class be "very numerous". Trish Bergman, Program Administrator for The Department of Health and Human Services, testified at the hearing that at least 450 Nebraska households met the class definition in the first three months of 2008. Hundreds of additional households have been harmed by the rule at issue since it was implemented. The members of the class are determinable, and the Respondents possess the information necessary to determine which persons fit within the proposed class.

It is impracticable to join more than 450 individuals to the suit. As in *Gant* and *Hoiengs*, each class member has been forced to incur a relatively small sum of medical expenses that would make individual legal actions infeasible. Individual actions are further infeasible because the class consists of extremely low-income Nebraskans who lack resources to prosecute claims on their own behalf. It would be impracticable for them to obtain legal services on an individual basis for their individual claims, and hence, their rights are likely to go unvindicated without a class action.

The number of people in the proposed class who have filed administrative appeals may be relatively small, but that does not defeat the numerosity requirement. The Respondents improperly conflate the notion of the number of cases that have been

brought to district court with similar allegations with the numerosity requirement. (Respondents' Brief at 4). Neb. Rev. St. § 25-319 does not require that class members have already filed a complaint. Instead, they simply must share a question of "common or general interest" with the named Petitioner, which was established in the previous section. Further, more Medicaid recipients are likely to challenge the constitutionality of their Employment First sanction based on a Separation of Powers theory now that the claim has been modeled in this action. Even if there have been no other lawsuits of this kind, they are likely to be filed now that potential plaintiffs know that the challenge is available. Class certification would help both administrative agencies and district courts avoid the unnecessary proliferation of litigation. Class certification is appropriate because it would maximize the available legal resources and provide for uniform redress of the class member's common grievances against the Respondents.

3. <u>The Equities Favor Class Certification.</u>

When all factors are considered, the equities favor a grant of class certification. "In determining whether a class action is properly brought, considerable discretion is vested in the trial court." *Lynch*, 275 Neb. at 144, 745 N.W.2d at 298 (citing *Berkshire*, 200 Neb. 113, 262 N.W.2d 449); *Gant*, 193 Neb. 108, 225 N.W.2d 549. Class certification may be denied even when it meets all the technical requirements of Neb. Rev. St. § 25-319 if "no useful purpose is served by bringing a suit as a class action." *Berkshire*, 200 Neb. at 115, 262 N.W.2d at 452 (class members would have received the

same relief whether or not a class was certified). A class action can render "unnecessary the proliferation of litigation of individual suits". *Hoiengs*, 245 Neb. at 902, 516 N.W.2d at 241.

Here, the class of Petitioners is made up of low income Nebraskans who lack the individual resources needed to defend their own interests in legal actions. Unlike a suit in which class certification would serve "no useful purpose," *Berkshire*, 200 Neb. at 115, 262 N.W.2d at 452, a class action provides the only realistic forum to protect the rights and interests of these Nebraskans. If Petitioners have to pursue this legal challenge individually, in most cases, they will not be able to pursue the case beyond the administrative hearing level because of lack of resources. For those who are able to pursue district court review, asking an identical legal question to the question presented here will result in the proliferation of unnecessary litigation. Additionally, Petitioners' counsel, Nebraska Appleseed Center for Law in the Public Interest, possesses the resources and skills necessary to represent this action on behalf of all members of this class. Counsel has extensive experience in matters relating to the Medicaid and Employment First programs and has litigated several large class action suits. *See, e.g.*, *Kai v. Ross*, 336 F.3d 650, 651 (8th Cir. 2003); *Bowlin v. Montanez*, 446 F.3d 817 (8th Cir. 2006).

Respondents assert that Petitioner's class lacks subject matter jurisdiction, is time barred, and fails due to sovereign immunity. Petitioners address these arguments in Petitioners' Brief in Opposition to Respondents' Motion to Dismiss.

If the court determines that Petitioner's proposed class definition is too broad, we would suggest, in the alternative, certifying a class of Petitioners whose Medicaid has been removed pursuant to an Employment First sanction after May 20, 2008, which was the date on which Jennifer Davio filed her APA Appeal. 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. This modified class would still meet the requirement of numerosity because, as Trish Bergman testified, hundreds of Employment First recipients are sanctioned each quarter. It would be futile for these Petitioners to pursue an administrative appeal because administrative hearing officers cannot decide the constitutionality of regulations. Because a class action is the best use of judicial resources and because a class action is the only way to vindicate the rights of these low-income Petitioners, class certification is appropriate in this case.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that their Motion for Class Certification be granted.

DATED: September 15, 2008

Respectfully submitted:

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

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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.

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