

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: CI08-2202

**REPLY BRIEF IN SUPPORT OF  
RESPONDENTS'  
MOTION TO DISMISS  
PETITIONERS' PETITION**

The Nebraska Department of Health and Human Services and respondents 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 "Respondents"), by and through counsel, submit this Reply Brief in Support of Respondents' Motion to Dismiss Petitioners' Petition.

On September 4, 2008, Respondents filed a Motion to Dismiss and related brief asserting that Petitioners' Petition should be dismissed for lack of subject matter jurisdiction and failure to state a claim for relief. Petitioners filed a brief in opposition to Respondents' motion, and this brief is submitted to the court in response thereto.

## ARGUMENT

### I.

#### **THIS COURT SHOULD DISREGARD PETITIONERS' CLAIM THAT CLASS MEMBERS SHOULD NOT BE REQUIRED TO EXHAUST THEIR ADMINISTRATIVE REMEDIES, AS THIS IS A JURISDICTIONAL REQUIREMENT UNDER THE ADMINISTRATIVE PROCEDURES ACT.**

Petitioners assert that this court should "waive any need for class members to exhaust administrative remedies because exhaustion would be futile," and they cite to *Bowen v. New York*, 476 U.S. 467 (1986) to substantiate this assertion. Petitioners' Brief in Opposition to Respondents' Motion to Dismiss, p. 7. Petitioners fail to recognize, however, that the 60-day statutory appeal requirement in *Bowen* is "not jurisdictional but rather constitutes a statute of limitation" which the court found could be waived. *Bowen*, 467 U.S. at 467. It is well established that the Commissioner of Social Security or the courts may waive the exhaustion of administrative remedies for social security claims similar to those raised in *Bowen*, pursuant to section 42 U.S.C. § 405(g). See *Surrell v. Willman*, 16 F.Supp.2d 1085, 1089-90 (1998). When considering claims under the same statutory scheme against the State of Nebraska, reviewing the applicability of the State's sovereign immunity, the U.S. District Court for the District of Nebraska recognized that the State's immunity from such claims was not waived and that only claims for prospective remedies (i.e. prospective injunctive relief) were allowable. *Surrell*, 16 F.Supp.2d at 1090-91. "[T]o the extent the state defendant is sued in his official capacity for money damages, the Eleventh Amendment to the United States Constitution applies and, therefore, bars recovery against the state defendant in his official capacity." *Id.*

There is no express waiver of sovereign immunity contained in the statutes providing the courts with authority to join parties into a class action. Counsel has been unable to identify any cases where a class action has been allowed against the State of Nebraska without an express jurisdictional provision that would waive the State's sovereign immunity. While the courts may have broad authority to certify a class, a court's jurisdiction over class members is provided for in Nebraska statutes and the Nebraska Constitution, neither of which provides a waiver of sovereign immunity for the claims brought by Petitioners.

Petitioners further argue that if Respondents' motion is granted, they should be allowed to amend their Petition to include only class members whose benefits have been removed within the past sixty days. Yet this only addresses the "time" requirement of the Administrative Procedures Act, and not the "mode and manner" in which an appeal must be taken.

[W]here a district court has statutory authority to review an action of an administrative\*\* agency, the district court may acquire jurisdiction **only** if the review is sought in the **mode and manner and within the time provided** by statute. *Essman v. Nebraska Law Enforcement Training Ctr.*, 252 Neb. 347, 562 N.W.2d 355 (1997); *McLaughlin v. Jefferson Cty. Bd. of Equal.*, 5 Neb.App. 781, 567 N.W.2d 794 (1997). The filing of the petition and the service of summons are the two actions necessary to establish the jurisdiction of the district court to review the final decision of an administrative agency under the Administrative Procedure Act. *Id.*

*Roubal ex rel. Holm v. State, Dept. of Health and Human Services*, 14 Neb.App. 554, 557, 710 N.W.2d 359, 361 - 362 (Neb. App. 2006) (emphasis added).

There is simply no mechanism under the Administrative Procedures Act to allow Petitioners to bring their claims via a class action either as provided for in their

Petition, or amended as set forth in their Petitioners' Brief in Opposition to Respondents' Motion to Dismiss.

For these reasons, this court should disregard Petitioners' claim that class members should not be required to exhaust their administrative remedies, or other wise comply with Neb. Rev. Stat. § 84-917, as this is a jurisdictional requirement under the Administrative Procedures Act. Respondents' Motion to Dismiss these claims should thus be granted.

## II.

### **PETITIONER DAVIO'S CLAIM THAT RELEVANT EVIDENCE WAS IMPROPERLY EXCLUDED DURING THE ADMINISTRATIVE APPEAL IS MOOT, AND THIS COURT SHOULD DECLINE TO EXERCISE JURISDICTION OVER IT BECAUSE THE PUBLIC INTEREST EXCEPTION DOES NOT APPLY TO THIS CLAIM.**

Petitioner Davio argues that this Court has subject matter jurisdiction over her "assertion that relevant evidence was improperly excluded during the administrative appeal." Petitioners' Brief in Opposition to Respondents' Motion to Dismiss, p. 4. Yet she again concedes in her brief 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 her 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.

Petitioners' Brief in Opposition to Respondents' Motion to Dismiss, p. 11. If Petitioner Davio is only contesting the constitutionality of her Medicaid removal,

then this is a purely legal issue to be resolved by this Court. The Court needs only to review the statutes and regulations to determine whether the Departments' regulations are within its statutory authority. Thus, Ms. Davio's evidentiary objections are moot, and this Court may appropriately grant Respondents' motion to dismiss Petition in this regard.

### III.

**RESPONDENTS ARE INCORRECT IN THEIR ASSERTION THAT NEB. REV. STAT. § 84-911 PROVIDES THIS COURT JURISDICTION TO GRANT THEM THE RELIEF THEY SEEK IN THEIR PETITION.**

While Petitioners may seek a declaration from this court under Neb. Rev. Stat. § 84-911 regarding whether the Departments' regulations at issue are valid, they cannot obtain the relief they seek in their Petition under § 84-911.

[Neb. Rev. Stat.] § 84-911 grants [this Court] no jurisdiction regarding factual issues, but, rather, authorizes only a declaration regarding "[t]he validity of any rule or regulation." Viewing the statute with the eye of strict construction, [the Nebraska Supreme Court has] conclude[d] that § 84-911 of the Administrative Procedure Act is limited to judicial determination of the validity of any rule or regulation of a state agency and does not confer jurisdiction for judicial resolution of a factual question pertaining to the merits of a controversy.

*Riley v. State*, 244 Neb. 250, 258, 506 N.W.2d 45, 50 (Neb. 1993)

If this Court were to declare the regulations at issue to be invalid, individual Petitioners would still be required to take further administrative actions in order to obtain the relief that they seek (reinstatement of their Medicaid benefits). See *Dozler v. Conrad*, 3 Neb.App. 735, 743, 532 N.W.2d 42, 48 - 49 (Neb. App. 1995). This would be no different than would be the result of this Court ruling on Petitioner Davio's claim under § 84-917 that the Department's

regulations are unconstitutional. Thus, Respondents' attempt to use § 84-911 to substantiate their class action claims in their Petition should be disregarded.

#### IV.

#### **THE DEPARTMENT'S REGULATIONS CITED IN PETITIONERS' BRIEF DO NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE, AND THEY WERE WITHIN THE DEPARTMENT'S STATUTORY AUTHORITY TO ADOPT.**

Respondents are not going to restate the arguments from their initial brief relating to the validity of the Department's regulations in their entirety, but instead are only going to distinguish a few of the cases cited in Petitioners' brief.

In *Clemens v. Harvey*, 247 Neb. 77, 25 N.W.2d 185, the Nebraska Legislature adopted by statutory reference federal provisions related to Nebraska's medical assistance program. If the Legislature chooses to adopt provisions in this manner and the federal requirements subsequently change, however, then the Legislature must pass further legislation adopting the federal changes. *Clemmens*, 247 Neb. At 81-82, 25 N.W.2d at 188-89. The Department's error in *Clemmens* was not that it passed regulations that exceeded its statutory authority, but rather that it adopted regulations that were expressly contradictory to the existing statutes (because the Department assumed, albeit in error, that the Legislature's reference to federal requirements automatically updated when those requirements were changed.) Where the Legislature has specifically regulated benefits, the Department cannot subsequently eliminate those benefits; to do so would require Legislative action.

In *County Cork v. Nebraska Liquor Control Comm'n*, 250 Neb. 456, 550 N.W.2d 913 (1996), the Court held that the Commission's regulations authorizing the suspension of a license for "other illegal activities" were not "necessary or convenient" to the enforcement of the Liquor Control Act. The Court found that "such a rule could result in a licensee being disciplined for numerous activities not connected to the sale of alcohol" (which was the purpose of the Act). *Id.*

In *State ex rel Spire v. Stodola*, 228 Neb. 107, 421 N.W.2d 436 (1988), the Court noted that "in order to be valid, a rule or regulation must be consistent with the statute under which the rule or regulation is promulgated." *Id.* (citations omitted). In *Stodola*, the Legislature identified a specific class of persons for which the Department of Public Institutions ("DPI") was authorized to determine their ability to pay for a patient's care. The Court found that DPI had exceeded its statutory authority because it extended, through regulation, their powers extend a statutorily created presumption to a class of individuals not covered by the statute. By adopting the presumption, DPI was failing to take into account the statutory ability to pay factors directed by the Legislature for this class of individuals.

Unlike these cases, the Department has been **expressly** authorized to adopt "requirements for recipients of medical assistance as a necessary condition for the continued receipt of such assistance," and to "make sanctions more stringent to emphasize participant obligations." Neb. Rev. Stat. § 68-912 and 1713. The Welfare Reform Act's stated goals of economic self-sufficiency through temporary, transitional support are 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 clearly intended to promote individual and family responsibility. *Id.*

The Department, pursuant to the Legislature’s direction, adopted regulations that provided individuals receiving public assistance with enhanced tools to assist them in obtaining self-sufficiency, and simplified the process for receiving benefits (i.e. requiring only one application, instead of multiple application processes). Consistent with federal law, and not inconsistent with Nebraska law, one of ways the Department made “sanctions more stringent to emphasize participant obligations” was to remove benefits (including medical assistance) for individuals not fulfilling their obligations in their self-sufficiency contracts.

These regulations are distinguishable from those in *Clemmons*, *Cork* and *Stoloda*, because they are consistent with the intent and the language of the Welfare Reform Act and the Medical Assistant Act, necessary or convenient to these Acts, and they do precisely what the Legislature directed the Department to do: They “make sanctions more stringent to emphasize participant obligations.” The Department did not act outside its Legislative authority in adopting these regulations.



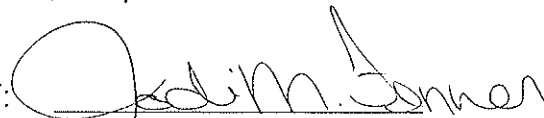
## CONCLUSION

The sole issue in this case is whether the Department's regulations that resulted in removal of Petitioner Davio's Medicaid benefits are unconstitutional. As this is a legal issue whose determination is not reliant on any of the facts in Davio's administrative appeal, a Motion to Dismiss is an appropriate method of resolving this case. As addressed in detail in the Brief in Support of Respondents' Motion to Dismiss and further discussed herein, Petitioner's claims regarding the validity of the Department's regulations are incorrect. 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 29<sup>th</sup> day of September, 2008.

NEBRASKA DEPARTMENT OF HEALTH AND  
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DIVISION OF MEDICAID AND LONG TERM  
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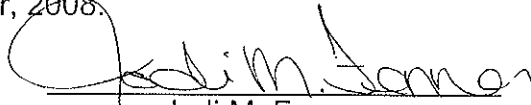
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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above and forgoing Brief in Support of Defendants' Motion to Dismiss Petitioners' Petition was sent via email and first class mail to Petitioners' counsel of record Erin Ching and Rebecca Gould of the Nebraska Appleseed Center, 941 O Street, Ste. 105, Lincoln, NE 68508 on this 29<sup>th</sup> day of September, 2008.

  
Jodi M. Fenner