IN THE SUPREME COURT OF THE STATE OF NEBRASKA

JENNIFER DAVIO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,	)	CASE NO. S09-00985
APPELLEE	)	
V.	)	
NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, KERRY T. WINTERER, CHIEF EXECUTIVE OFFICER, TODD RECKLING, DIRECTOR OF DIVISION OF CHILDREN AND FAMILY SERVICES, AND VIVIANNE M. CHAUMONT, DIRECTOR OF MEDICAID AND LONG TERM CARE,	)	
APPELLANTS	)	

APPELLANTS' BRIEF

On appeal from The District Court of
Lancaster County, Nebraska

The Honorable Karen B. Flowers, Lancaster County
District Court Judge, presiding.

Submitted by:

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STATEMENT OF THE BASIS FOR JURISDICTION

Jurisdiction is appropriate in this court according to Neb.Rev. Stat. § 25-1912 (Reissue 2008) and § 84-919 (1) and (3) as this is an appeal from the September 2, 2009 Order of the Lancaster County District Court (T100) incorporating the court's prior Order dated June 30, 2009. (T97-99). Appellants filed their Notice of Appeal on October 1, 2009, at which time the docket fee was also deposited.

STATEMENT OF THE CASE

A. Nature of the Case

Appellants appeal from that part of the September 2, 2009 Order of the Lancaster County District Court in which the court entered a declaratory judgment that the Department exceeded the authority granted it by the Unicameral. See Neb. Rev. Stat. § 25-21,149 (Reissue 2008). In addition, Appellants appeal from that part of the Order under the Administrative Procedures Act in which the court found that the sanctions imposed on Appellee should have been limited to the loss of cash assistance, and should not have included the loss of medical assistance. See Neb. Rev. Stat. §§ 84-901 et seq. (Reissue 2008). Appellants do not appeal the remainder of that Order, which affirmed the remainder of the findings of the Department of Health and Human Services under the Administrative Procedures Act.

B. Issues Tried to the Court Below

Whether the Department of Health and Human Services exceeded its grant of authority under Neb. Rev. Stat. §§ 43-501 et seq., §§ 68-901 et seq. and/or §§ 68-1701 et

seq. by imposing sanctions against Appellee in the form of removing her eligibility for medical assistance under the applicable statutory and regulatory authority.

C. How the Issues were Decided

The Lancaster County District Court entered an Order that the Department exceeded its grant of authority.

D. Scope of Review

Regulation of medical assistance benefits is within the expertise of the Department of Health and Human Services, and agencies with such expertise exercise a breadth of judgment and policy determination to which considerable deference is given even by a reviewing court. *Schumacher v. Johanns, 272 Neb. 346, 366 (2006).*

ASSIGNMENTS OF ERROR

I.

THE DISTRICT COURT ERRED IN ITS FINDING THAT IT HAD SUBJECT MATTER JURISDICTION OVER THE ISSUE ON WHICH IT RENDERED DECLARATORY JUDGMENT.

II.

THE DISTRICT COURT ERRED IN ITS FINDING THAT CLASS ACTION STATUS SHOULD BE GRANTED TO APPELLEE'S CHALLENGE OF THE VALIDITY OF 468 NAC 2-020.09B2f.

III.

THE DISTRICT COURT ERRED IN ITS ORDER THAT THE DEPARTMENT OF HEALTH AND HUMAN SERVICES EXCEEDED ITS GRANT OF AUTHORITY FROM THE UNICAMERAL.

IV.

THE DISTRICT COURT ERRED IN ITS ORDER THAT 468 NAC 2-020.09B2f IS INVALID AND UNCONSTITUTIONAL.

V.

THE DISTRICT COURT ERRED IN ITS ORDER THAT 468 NAC 2-020.09B2f EXCEEDS THE AUTHORITY DELEGATED TO THE DEPARTMENT BY THE UNICAMERAL.

VI.

THE DISTRICT COURT ERRED IN ITS FINDING THAT 468 NAC 2-020.09B2f VIOLATES THE SEPARATION OF POWERS SET OUT IN THE CONSTITUTION OF THE STATE OF NEBRASKA.

VII.

THE DISTRICT COURT ERRED IN ITS FINDING THAT SANCTIONS IMPOSED ON APPELLEE SHOULD BE LIMITED TO THE LOSS OF HER CASH ASSISTANCE.

VIII.

THE DISTRICT COURT ERRED IN ITS FINDING THAT AN INJUNCTION SHOULD ISSUE TO BAR ENFORCEMENT OF 468 NAC 2-020.09B2f.

IX.

THE DISTRICT COURT ERRED IN ITS ORDER THAT THE NEB. REV. STAT. § 68-1713 DOES NOT GRANT THE DEPARTMENT THE AUTHORITY TO IMPOSE SANCTIONS IN THE FORM OF THE LOSS OF MEDICAL ASSISTANCE.

X.

THE DISTRICT COURT ERRED IN ITS FINDING THAT NEB. REV. STAT. § 68-1713 IS AN UNLAWFUL DELEGATION OF LEGISLATIVE AUTHORITY.

XI.

THE DISTRICT COURT ERRED IN ITS FINDING THAT CONDITIONING THE RECEIPT OF MEDICAL ASSISTANCE ON COMPLIANCE WITH SELF-SUFFICIENCY CONTRACT WOULD AMEND NEB REV STAT. § 68-1723.

XII.

THE DISTRICT COURT ERRED IN ITS ORDER THAT THE DEPARTMENT DOES NOT HAVE THE AUTHORITY TO REMOVE MEDICAL ASSISTANCE BENEFITS UNDER NEB REV. STATUS § 68-901 ET SEQ.

PROPOSITIONS OF LAW

I.

THE DISTRICT COURT DID NOT HAVE SUBJECT MATTER JURISDICTION OVER THE ISSUE ON WHICH IT RENDERED DECLARATORY JUDGMENT.

Johnston v. Nebraska Dept. of Correctional Services, 270 Neb. 987, 709 N.W. 2d 321 (2006);
Chambers v. Lautenbaugh, 263 Neb. 920, 644 N.W. 2d 540 (2002);
Riley v. State, 244 Neb. 250, 256, 506 N.W. 2d 45, 49 (1993);
Concerned Citizens v. Department of Environ. Contr., 244 Neb. 152, 505 N.W. 2d 654 (1993);
Vision Quest, Inc. v. Dept. of Public Welfare, 222 Neb. 228, 383 N.W.2d 22 (1986); and
Gentry v. State, 174 Neb. 515, 118 N.W.2d 643(1962).
Neb. Rev. Stat. §§ 25-1062 to 1080

II.

THE DISTRICT COURT ERRED IN ITS FINDING THAT CLASS ACTION STATUS SHOULD BE GRANTED TO APPELLEE'S CHALLENGE OF THE VALIDITY OF 468 NAC 2-020.09B2f.

Lynch v. State Farm Mutual Automobile Insurance Company, 275 Neb. 136, 745 N.W.2d 291 (2008);
Hoeings v. County of Adams, 245 Neb. 877, 516 N.W.2d 223 (1994);
Benesch v. City of Schuyler, 5 Neb. App. 59, 555 N.W.2d 63 (Neb. App. 1996);
NEB. REV. STAT. §25-319.

III.

THE DISTRICT COURT ERRED IN ITS ORDER THAT THE DEPARTMENT OF HEALTH AND HUMAN SERVICES EXCEEDED ITS GRANT OF AUTHORITY FROM THE UNICAMERAL.

NEB REV. STAT. §§ 43-501 ET SEQ.
NEB REV. STAT. §§ 68-901 ET SEQ.
NEB REV. STAT. §§ 68-1701 ET SEQ.

IV.

THE DISTRICT COURT ERRED IN ITS ORDER THAT 468 NAC 2-020.09B2f IS INVALID AND UNCONSTITUTIONAL.

NEB REV. STAT. §§ 43-501 ET SEQ.
NEB REV. STAT. §§ 68-901 ET SEQ.

NEB REV. STAT. §§ 68-1701 ET SEQ.

STATEMENT OF FACTS

Appellee has received assistance under the Aid to Dependent Children Program in Nebraska since December 2005. (T11). Appellee and her family also received Medicaid under 468 NAC 4-001.01A. (T11).

On or about July 20, 2007, the Department sanctioned Appellee for her failure to adequately participate in the Employment First program, by removing all of the family's cash assistance and also Appellee's medical assistance beginning August 1, 2007 for a minimum three month period (referred to hereinafter as the "August 2007 Sanction"). (T11). Appellee had received a prior Employment First Sanction in November 2006. (T18). Appellee appealed the August 2007 Sanction, and an administrative hearing was held on that appeal. (T16). Appellee argued at her administrative hearing that the sanction on her medical coverage was beyond the statutory authority of the Department and was thus unconstitutional. (T21). On April 22, 2008, Director Todd A. Landry of Children and Family Services entered an order affirming the Department's sanction of Appellee. (T16).

On or about May 20, 2008, Appellee filed an action in Lancaster County District Court appealing Director Landry's order. (T3). Appellee admitted as part of her Petition that she "no longer contests the validity of the sanction issued in August 2007." (T11). Proceedings were held at the District Court level with Orders being entered which are now the subject of this appeal. (T94, 97-99, 100).

SUMMARY OF ARGUMENT

The district court erred in this matter by taking subject matter jurisdiction over these issues based on the immunity and other arguments outlined below, including mootness. In addition, the court erred by certifying a class in this case where neither the commonality or numerosity requirements were established by Appellee. The court further erred by entering an order that the Appellants were without the authority to impose sanctions of the type at issue in this matter, as Appellants have a clear grant of authority and explicit direction from the Unicameral and there is no restriction or prohibition preventing the Appellants from issuing these types of sanctions.

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 APPELLEE, APPELLEE HAS STATED NO CLAIMS OVER WHICH THE DISTRICT COURT HAD SUBJECT MATTER JURISDICTION.

Appellee alleged that the lower court had jurisdiction over her 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. §§ 68-1701 *et seq.* (T2). Yet, the only claim Appellee alleges over which the lower court should have taken jurisdiction is Appellee'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.

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, Appellants respectfully request that the lower court's ruling that it had jurisdiction over claims alleged under Neb. Rev. Stat. §§ 25-1062 to 1080 be reversed, and that the case be remanded with directions to dismiss those claims.

C.

As Appellee admitted in the lower court that she "no longer contests the validity of the sanction issued in August 2007"; as a result there was no existing case or controversy relating to Appellee's Administrative Procedures Act Appeal of the Finding and Order Issued by Director Landry on April 22, 2008, and the lower court should have dismissed this action as moot.

Appellee appealed Director Landry's order dated April 22, 2008, yet the text of her Petition admitted that she "no longer contests the validity of the sanction issued in

August 2007." (T11). "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 Appellee clearly admitted in the court below, she is no longer contesting the sanction she seeks to appeal; as a result, 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 NW. 2d 45 (2002).* Due to the fact that Appellee did not contest the sanction levied by the Department, the issues presented in her claim in the lower court were no longer alive and were, in fact, moot.

II.

APPELLEE FAILED TO ESTABLISH A SUFFICIENT BASIS ON WHICH TO CERTIFY THIS MATTER AS A CLASS ACTION.

The lower court certified a class in this matter, consisting of "those persons who, on or after May 20, 2008, are or in the future will be under a sanction pursuant to 468 NAC 2-020.09B1(6) or 468 NAC 2-020.09B2f and, thus, had or will have their medicaid removed for failure to comply with an Employment First contract." (T94).

Appellee failed to show that the question at issue in this matter is of "a common or general interest of many persons" as required by Nebraska law, and cannot show that it is impracticable for individual claimants to bring their matters before the court. Nebraska's class action statute provides as follows:

> When the question is one of a common or general interest of many person, 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.

Neb. Rev. Stats. §25-319 (Reissue 2008). In determining whether a party may sue as a representative of a class, "considerable discretion is vested in the trial court." *Lynch v. State Farm Mutual Automobile Insurance Company*, 275 Neb. 136, 144, 745 N.W.2d 291, 298 (2008), citing *Berkshire and Andersen v. Douglas County Board of Equalization*, 200 Neb. 113, 115-16, 262 N.W.2d 449, 451-452 (1978); *Gant v. City of Lincoln*, 193 Neb. 108, 110, 225 N.W.2d 549, 551 (1975). Class certification may be denied even if a named Petitioner meets all of the technical requirements of Neb. Rev. Stat. § 25-319. *Id.*, citing *Berkshire*, 200 Neb. At 115-16, 262 N.W.2d at 452.

Appellee did not and can not establish that a class is appropriate in this matter. First, as described above, the relief requested by Appellee was outside of the lower court's jurisdiction. The only claims which Appellee properly had before the lower court were her own personal claims under the Administrative Procedure Act, for which the court denied class status. (T94). This matter by necessity involves decision of the Department, and before a party may obtain relief from such a decision, the person must exhaust his or her administrative remedies under the Administrative Procedure Act. There was no evidence to suggest that there was a large class of person who have so

exhausted their remedies as to be eligible for relief. To the contrary, the evidence was that there was only one other pending case under which a person had pursued a district court appeal after exhausting. (19:3-12). This is not sufficient to satisfy the numerosity requirements of Neb. Rev. Stat. § 25-319. While recognizing "[t]here is no mechanical test for determining whether in a particular case the class is so numerous that the requirement of numerosity has been satisfied..." the Nebraska Supreme Court in *Hoeings* noted "it would be absurd to say that two person litigating a question of common interest should, for that reason alone, be afforded class action treatment..." *Hoeings v. County of Adams*, 245 Neb. 877, 901, 516 N.W.2d 223, 240-41 (1994) (ultimately holding that a group of 9,000 parties does meet the numerosity requirement.). See also *Benesch v. City of Schuyler*, 5 Neb. App. 59, 67-68, 555 N.W.2d 63, 68-69 (Neb. App. 1996) (Finding that eleven parties do not satisfy the numerosity requirement.). Appellee did not sustain her burden of establishing compliance with Neb. Rev. Stat. 25-319, and no class should have been certified by the lower court.

For those person who have not complied with the Administrative Procedure Act, to include them in the class would violate that act. Failure to comply with the requirements of the Administrative Procedure Act acts as a bar. *Roubal ex rel. Holm v. State, Dept. of Health and Human Services*, 14 Neb. App. 554, 710 N.W.2d 359 (2006). The procedural requirements of the Administrative Procedure Act are in place in order to allow the Appellants an opportunity to further review and assess the factual circumstances of each party. Those individuals whose claims have not been further assessed and considered under the administrative remedies available to them do not have a common or general interest with Appellee, as required by Neb. Rev. Stat. 25-319.

Finally, the evidence suggests that at least some applicants who have been sanctioned under the Employment First program have successfully appealed those sanctions and have had their benefits restored. (15:2-16:1) These parties should not be considered members of the class as they have not suffered any harm, and are not entitled to any relief.

III.

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

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 Act applied to all applicants for public assistance, and not just applicants for ADC/cash assistance. The Legislature declared that:

> it is in the best interests of the state, its citizens, and especially those receiving public assistance ... that the welfare system be reformed to support, stabilize, and enhance individual and family life in Nebraska...

Id. The Legislature sought to accomplish these goals 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.

As background:

> The purpose of the [Medicaid] program is to provide medical assistance to those whose resources are insufficient to meet the costs of necessary medical care. ...[O]nce a state elects to participate, it must comply with the requirements imposed by the federal Medicaid act and [CMS which] administers the program...

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. Neb. Rev. Stat. §§ 68-901 *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 [] qualifies for federal matching funds...

See Neb. Rev. Stat. § 68-905. The Medical Assistance Act 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.

Neb. Rev. Stat. § 68-908(2)(emphasis added). In addition:

> The department may establish . . .**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). In establishing such requirements, the Department must consider the public policy set forth by the Legislature in Neb. Rev. Stat. § 68-905. See Neb. Rev. Stat. § 68-912.

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). Furthermore, "[f]or the purpose of preventing dependency" the Legislature required that:

> the department **shall** adopt and promulgate rules and regulations providing for services to former and potential recipients of aid to dependent children **and medical assistance benefits**. The department shall adopt and promulgate rules and regulations establishing programs and **cooperating with programs of work incentive, work experience, job training, and education**.

Neb. Rev. Stat. § 43-512(5)(a). For individuals and families included in such programs, the Legislature provided additional transition assistance that they would have otherwise been ineligible for when the programs successfully assisted them with obtaining or improving their employment opportunities. Where individuals and families would have otherwise lost benefits due to increased income, Neb. Rev. Stat. § 43-512 authorized the

Department to adopt rules and regulations providing enhanced transition benefits such as transitional payments, child care subsidies, continued medical assistance, etc.

Under the Welfare Reform Act the Legislature found and declared that to allow temporary, transitional support for Nebraska families to attain self-sufficiency is the primary purpose of the state's welfare programs. Neb. Rev. Stat. § 68-1709. In addition:

> 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.**

Neb. Rev. Stat. § 68-1709.

The Welfare Reform Act applies to **all** public assistance programs administered by the Department. Neb. Rev. Stat. § 68-1709. With the exception of Aid to Dependent Children ("ADC") benefits (which are provided for in Chapter 43 of the Revised Statutes of Nebraska), Chapter 68, entitled Paupers and Public Assistance, contains the provisions related to public assistance programs administered by the Department. The Welfare Reform Act is the concluding Title of Chapter 68, but as it specifically references the ADC program, it has been interpreted to include ADC benefits **in addition to** the public assistance programs provided for within Chapter 68.

Title 468, Chapter 4, section 4-001.01A allows individuals, such as Appellee, 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:

> 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 provisions related to nonparticipation in the Employment First program and 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).

468 NAC 2-020.09B2(f) 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).

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 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.

This is also consistent with the requirement of Neb. Rev. Stat. § 43-512(5)(a) that:

> The department shall adopt and promulgate rules and regulations establishing programs and **cooperating with programs of work incentive, work experience, job training, and education**.

Neb. Rev. Stat. § 43-512(5). This is applicable to both recipients of aid to dependent children **and medical assistance benefits**, and is intended to prevent dependency. *Id.* Consistent with the Department's rules and regulations related to the Employment First Program, for individuals and families included in such programs, the Legislature provided additional transition assistance that they would have otherwise been ineligible for when the programs successfully assisted them with obtaining or improving their employment opportunities. Where individuals and families would have otherwise lost benefits due to increased income, Neb. Rev. Stat. § 43-512 authorized the Department to adopt rules and regulations providing enhanced transition benefits such as transitional payments, child care subsidies and continued medical assistance.

As required in the Medical Assistance Act, the Department's 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 sanctions, then why would they direct the Department to do so? If they only intended to sanction cash assistance for failure to comply with participant obligations, then they would not have directed the Department to make sanctions more stringent to emphasize participant obligations in Neb. Rev. Stat. § 68-1713(1)(d), because more stringent sanctions on cash assistance benefits are already required by § 68-1723. 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.

Appellee alleges that the Department has violated the Separation of Powers clause by exceeding the authority delegated to it by the Legislature. (T12). However, the Department has acted as directed by the Legislature (through both Neb. Rev. Stat. § 68-1713(1)(d) and § 43-512(5)(a)). 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.

CONCLUSION

Based on the foregoing, Defendants request that the Court reverse the Lancaster County District Court and remand this matter for proceedings consistent with its opinion.

DATED this 4th day of February, 2010.

NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, KERRY T. WINTERER, CHIEF EXECUTIVE OFFICER, TODD RECKLING, DIRECTOR OF DIVISION OF CHILDREN AND FAMILY SERVICES, AND VIVIANNE M. CHAUMONT, DIRECTOR OF DIVISION OF MEDICAID AND LONG TERM CARE, Appellants.

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IN THE SUPREME COURT OF THE STATE OF NEBRASKA

JENNIFER DAVIO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, APPELLEE V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, KERRY T. WINTERER, CHIEF EXECUTIVE OFFICER, TODD RECKLING, DIRECTOR OF DIVISION OF CHILDREN AND FAMILY SERVICES, AND VIVIANNE M. CHAUMONT, DIRECTOR OF MEDICAID AND LONG TERM CARE, APPELLANTS	CASE NO. S09-00985

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 4 day of February, 2010, two copies of the foregoing Appellants' brief has been served on the Plaintiffs by mailing a copy to their attorneys of record by regular United States mail, first class postage prepaid as follows:

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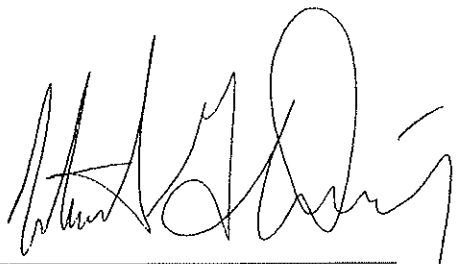

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