
JENNIFER DAVIO, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, APPELLEE AND CROSS-APPELLANT, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES ET AL., APPELLANTS AND CROSS-APPELLEES.

___N.W.2d___

Filed July 23, 2010. No. S-09-985.

1. **Administrative Law: Statutes: Appeal and Error.** To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.
2. **Jurisdiction: Appeal and Error.** A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of law, which requires the appellate court to reach a conclusion independent of the lower court's decision.
3. **Pleadings: Notice.** Under the liberalized rules of notice pleading, a party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief. The party is not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted.
4. **Justiciable Issues.** The required showing of a case or controversy is made when the plaintiff shows the existence of a justiciable controversy and an interest in the subject matter of the action, i.e., that there is a controversy between persons whose interests are adverse and that the plaintiff is a person whose rights, status, or other legal relations are affected by the challenge.
5. **Class Actions.** A class action cannot be employed to circumvent affirmative defenses or to revive claims which are no longer viable.

6. **Administrative Law: Time.** Litigants who fail to seek an administrative hearing within the time period set by applicable regulations are forever barred from recovering retroactive monetary relief under the Administrative Procedure Act.
7. **Actions: Parties: Time.** Even if a suit is against a private party, where retroactive relief would be paid from public funds, the suit is in essence an action against the State.
8. **Administrative Law.** Neb. Rev. Stat. § 84-911 (2008) provides for the right to challenge the validity of any rule or regulation directly to the district court without first requesting that the administrative agency pass upon the question.
9. **Administrative Law: Parties.** A regulation deemed invalid cannot be implemented against anyone, whether or not a party to the action to declare the regulation invalid.
10. **Administrative Law: Statutes: Legislature.** The Legislature may enact statutes to set forth the law, and it may authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, but the limitations of the power granted and the standards by which the granted powers are to be administered must be clearly and definitely stated in the authorizing act.
11. **Administrative Law: Statutes.** An administrative agency may not employ its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering.
12. **Statutes: Legislature: Intent.** Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.
13. **Statutes.** If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning.
14. ____. To the extent there is a conflict between two statutes on the same subject, the specific statute controls over the general statute.
15. **Public Assistance: Contracts: Legislature: Medical Assistance.** Neb. Rev. Stat. § 68-1723 (Reissue 2009) provides that a family's cash assistance benefits shall be removed as a sanction for noncompliance with an Employment First self-sufficiency contract; the Legislature has not authorized the Department of Health and Human Services to remove Medicaid for failure to comply with such contract.

Appeal from the District Court for Lancaster County: KAREN B. FLOWERS, Judge. Affirmed.

Matthew G. Dunning, Special Assistant Attorney General, for appellants.

James A. Goddard and Rebecca Gould, of Nebraska Appleseed Center for Law in the Public Interest, for appellee.

HEAVICAN, C.J., WRIGHT, CONNOLLY, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

McCORMACK, J.

I. NATURE OF CASE

Jennifer Davio failed to comply with a self-sufficiency "Employment First" contract entered into between herself and the Department of Health and Human Services (DHHS). The contract was part of her application for assistance through the Aid to Dependent Children (ADC) program. As a result of her noncompliance, Davio lost both her family's ADC benefits and her Medicaid coverage pursuant to DHHS' administrative code (Regulation 2-020.09B2f),[1] which stated: "If the parent fails or refuses to participate in [Employment First] without good cause, all ADC cash assistance for the entire family must be closed as well as the medical assistance for the adult(s)." Davio alleges that Regulation 2-020.09B2f is an unconstitutional enlargement of the stated policy by the Legislature that the sanction for failure to comply with Employment First shall be only the removal of ADC benefits.[2] We agree that Regulation 2-020.09B2f is invalid insofar as it authorizes the removal of Medicaid benefits as a sanction for the failure to comply with Employment First.

II. BACKGROUND

Davio is an unemployed single mother. She suffers from a heart condition which necessitates monthly visits to a cardiologist, medication, and the drainage of fluid around the heart. Before receiving ADC benefits, Davio signed a self-sufficiency contract which required her to follow a case plan that included 30 hours of job search activities per week, with set check-in and checkout sessions at an employment education and training service. DHHS agreed to provide Davio with ADC cash assistance, childcare assistance, and a bus pass. She was also found eligible for Medicaid coverage without a separate application, pursuant to departmental regulations.

Davio chose a childcare provider she trusted, but who was located a substantial distance from her home and the employment service. As a result, she was eventually unable to meet

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[1] 468 Neb. Admin. Code, ch. 2, § 020.09B2f (2006).

[2] See Neb. Rev. Stat. § 68-1723(2) (Reissue 2009).

the job search attendance requirements, and DHHS sanctioned Davio for noncompliance. DHHS removed all her family's ADC cash assistance and Davio's Medicaid coverage. Since that time, Davio has not sought medical care for her heart condition.

Davio challenged the sanction in an administrative hearing before a hearing officer for DHHS. Davio argued that she had good cause for her noncompliance and that Regulation 2-020.09B2f violated separation of powers insofar as it authorized removal of Medicaid coverage. The hearing officer found against her on both points.

Davio next filed a class action in the district court for Lancaster County on behalf of herself and all Nebraska parents who have received ADC and whose Medicaid has been removed because of a sanction under Employment First. Davio's petition asked for reversal of the hearing officer's decision removing her Medicaid, a declaration that Regulation 2-020.09B2f violates separation of powers, an injunction from future implementation of that regulation, and reimbursement to all members of the class for any medical care paid which would have been covered by Medicaid but for the enforcement of the regulation. The action was brought against DHHS, as well as various individuals who work for DHHS and are in charge of implementing Employment First and Medicaid benefits. For simplicity, we will refer only to DHHS. In the statement of facts of her 12-page petition, she also stated: "Davio no longer contests the validity of the sanction issued in August 2007."

DHHS moved to dismiss the petition for lack of subject matter jurisdiction, and it objected to class certification. The district court denied the motion to dismiss. The court granted the motion for class certification as to the declaratory and injunctive relief, but denied it with respect to the appeal pursuant to the Administrative Procedure Act (APA) and request for damages. In support of the certification, Davio presented evidence that in the first 3 months of 2008, approximately 400 ADC participants had their Medicaid benefits taken away for failure to cooperate with Employment First. No further evidence was presented regarding the participants' challenges before DHHS or their specific expenses incurred because of the removal of Medicaid.

DHHS filed an answer generally denying the allegations against it and pleading sovereign immunity. For the sake of completeness, although noting that Davio no longer seemed to contest her noncompliance, the district court found that she had failed to be actively engaged in the activities outlined in her self-sufficiency contract and that she did not have good cause for her lack of cooperation. But the court agreed with Davio that the sanction she received should have been limited to the loss of her cash assistance. The court declared that Regulation 2-020.09B2f was invalid insofar as it removed Medicaid benefits for adults who fail to comply with their self-sufficiency contracts and that an injunction should be granted prohibiting the implementation of that aspect of the regulation. The parties stipulated that Davio had incurred no medical expenses during the period in question; therefore, no damages were granted. DHHS appeals, and Davio cross-appeals.

III. ASSIGNMENTS OF ERROR

DHHS assigns, consolidated and restated, that the district court erred in (1) finding that it had subject matter jurisdiction, (2) finding that class action status should be granted to Davio's challenge of the validity of Regulation 2-020.09B2f, and (3) finding that Regulation 2-020.09B2f is invalid and unconstitutional.

Davio's cross-appeal asserts that the district court erred in failing to permit the class members from seeking all the remedies available under Neb. Rev. Stat. § 84-917 (Reissue 2008).

IV. STANDARD OF REVIEW

[1] To the extent that the meaning and interpretation of statutes and regulations are involved, questions of law are presented, in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below.[3]

[2] A jurisdictional question which does not involve a factual dispute is determined by an appellate court as a matter of

[3] *Kosmicki v. State*, 264 Neb. 887, 652 N.W.2d 883 (2002).

law, which requires the appellate court to reach a conclusion independent of the lower court's decision.[4]

V. ANALYSIS

1. SUBJECT MATTER JURISDICTION AND CLASS CERTIFICATION

DHHS presents several arguments pertaining to the jurisdiction of the lower court and the appropriateness of the class action. Although sovereign immunity is waived by the APA, DHHS argues that any issues relevant to an appeal under the APA became moot when Davio stated in her petition that she "no longer contests the validity of the sanction issued in August 2007." DHHS also asserts that the district court erred in certifying the class, because there was no evidence that the members of the class had exhausted their administrative remedies. Davio, for her part, appeals the district court's decision to limit the class action to declaratory and injunctive relief.

(a) Case or Controversy

DHHS' principal focus is on the single sentence from the statement of facts in Davio's petition quoted above. DHHS argues that Davio conceded she no longer had a present case or controversy and that she simply sought an abstract declaration of the validity of Regulation 2-020.09B2f, which would not directly affect her interests. This argument completely ignores Davio's request for relief and the theory upon which the case was tried, and it lacks any merit.

[3] Under the liberalized rules of notice pleading,[5] a party is only required to set forth a short and plain statement of the claim showing that the pleader is entitled to relief.[6] The party is not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted.[7] The rationale for this liberal notice pleading standard is that

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[4] *Jacob North Printing Co. v. Mosley*, 279 Neb. 585, 779 N.W.2d 596 (2010).

[5] See *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010).

[6] *Id.*

[7] See *id.*

when a party has a valid claim, he or she should recover on it regardless of a failure to perceive the true basis of the claim at the pleading stage, provided always that a late shift in the thrust of the case will not prejudice the other party in maintaining a defense upon the merits.[8]

Davio's petition clearly asked not only that the court declare Regulation 2-020.09B2f unconstitutional, but also that it reverse the hearing officer's order removing her Medicaid benefits. Read in context, we agree with Davio that her statement that she "no longer contests the validity of the sanction issued in August 2007" referred to the determination by the hearing officer that she did not have cause for her failure to perform her Employment First contract. Although Davio had originally challenged, in the proceedings before the hearing officer, the decision to sanction her at all, nowhere in her petition before the district court does she contest the fact of her noncompliance and the consequential removal of her family's ADC benefits. DHHS' attempt to read the sentence as a concession that Davio no longer contests the removal of her Medicaid benefits makes the petition nonsensical. More important, it places that sentence above the issues actually presented and argued by the parties.

[4] The required showing of a case or controversy is made when the plaintiff shows the existence of a justiciable controversy and an interest in the subject matter of the action, i.e., that there is a controversy between persons whose interests are adverse and that the plaintiff is a person whose rights, status, or other legal relations are affected by the challenge.[9] Davio has made such a showing.

(b) Class Certification

Both parties dispute the certification of the class. Davio argues that the court erred in limiting the class action to declaratory and injunctive relief. DHHS argues, in contrast, that the court should not have allowed class certification at all. In

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[8] *Id.*

[9] See *Professional Firefighters of Omaha v. City of Omaha*, 243 Neb. 166, 498 N.W.2d 325 (1993).

determining whether a class action is properly brought, broad discretion is vested in the trial court.[10]

[5] Addressing Davio's cross-claim first, we conclude that the district court did not abuse its discretion in refusing to certify the class for any claims involving monetary relief. We note that DHHS does not argue that there can never be a class action under any provision of the APA. Rather, it argues that, in this case, there can be no showing that most of the alleged class members had first challenged the removal of their Medicaid benefits before a hearing officer in a timely manner—and that they had preserved that challenge by appealing to an appellate court. DHHS notes that the purported class in this case includes all participants who have had their Medicaid benefits removed pursuant to a regulation that is over 10 years old. We agree with DHHS that the absence of such a showing of exhaustion of administrative remedies was a proper consideration by the district court in denying certification of the class. A class action cannot be employed to circumvent affirmative defenses or to revive claims which are no longer viable.[11]

[6] In *Golden Five v. Department of Soc. Serv.*,[12] we explained that litigants who fail to seek an administrative hearing within the time period set by applicable regulations are forever barred from recovering retroactive monetary relief under the APA. In that case, eight medical care facilities that participated in a Medicaid reimbursement program contested a statutory provision that mandated a 3.75-percent cap on any increase in future payments to the facilities regardless of the costs actually incurred.[13] Rather than challenge the agency's action before a

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[10] See, *Lynch v. State Farm Mut. Auto. Ins. Co.*, 275 Neb. 136, 745 N.W.2d 291 (2008); *Riha Farms, Inc. v. County of Sarpy*, 212 Neb. 385, 322 N.W.2d 797 (1982).

[11] See, *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331 (4th Cir. 1998); *Escott v. Barchris Construction Corporation*, 340 F.2d 731 (2d Cir. 1965); *Clayborne v. Omaha Public Power Dist.*, 211 F.R.D. 573 (D. Neb. 2002); *Barnes v. City of Atlanta*, 281 Ga. 256, 637 S.E.2d 4 (2006).

[12] *Golden Five v. Department of Soc. Serv.*, 229 Neb. 148, 425 N.W.2d 865 (1988).

[13] *Id.*

hearing officer, the facilities first brought an action in federal court against the director of the Department of Social Services, asking for a declaration that the 3.75-percent cap provision was in violation of a federal provision stating that reimbursement must meet the costs incurred by efficiently and economically operated facilities.[14] The Eighth Circuit Court of Appeals held in favor of the facilities and declared the regulation to be in violation of the Supremacy Clause.[15]

Afterward, the facilities filed under the APA for retroactive monetary relief through administrative appeal hearings. We affirmed the hearing officer's decision to deny retroactive relief because the facilities had failed to timely contest the case before the agency. We explained that the implementation of the statute was not an ongoing act and was thus governed by a regulation stating that the facility may request an appeal within 90 days of the decision or inaction.[16]

We stated that although it was true that the hearing officer would not have had the power to declare the statute unconstitutional, "[i]f appellants wanted something more than an injunction to be applied in the future, they were required to exercise their rights timely under state administrative procedures."[17] The constitutionality of the statute could, after all, have been decided on appeal from the hearing officer's decision.[18]

[7] But the facilities instead chose to contest the constitutionality of the statute in federal court.[19] And, we explained, sovereign immunity precluded federal courts from granting the facilities the monetary relief they sought.[20] Even if it was a suit against a private party, such retroactive relief would be paid from public funds and was, therefore, in essence, an action

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[14] *Id.*

[15] *Nebraska Health Care Ass'n v. Dunning*, 778 F.2d 1291 (8th Cir. 1985).

[16] *Golden Five v. Department of Soc. Serv., supra* note 12.

[17] *Id.* at 155-56, 425 N.W.2d at 870.

[18] See *Golden Five v. Department of Soc. Serv., supra* note 12.

[19] *Id.*

[20] *Id.*

against the State.[21] We concluded that the facilities' decision to bring action in federal court "achieved the result of protection from any future application of the 3.75-percent limitation by the Department, but it did not preserve a remedy which can only be awarded by a state agency or court, insofar as retroactive relief is sought."[22]

While *Golden Five* was not a class action, it illustrates the necessity of filing a contested case before a hearing officer in order to preserve the right to retroactive monetary relief. The case of *Thiboutot v. State*[23] presents a class action very similar to the case at bar and further illustrates this point. The original plaintiffs in *Thiboutot* had fully pursued their administrative remedies to challenge a regulation governing Aid to Families with Dependent Children benefits. They sought to declare the regulation invalid and to obtain retroactive monetary relief.

However, while their appeal was pending before the district court, the plaintiffs amended their complaint to allege a class action seeking both monetary and injunctive relief for other beneficiaries of Aid to Families with Dependent Children. The district court ultimately decided to grant the injunction against the Maine Department of Human Services from enforcing the regulation, which the court determined to be invalid. But the court refused to consider claims for retroactive monetary benefits on behalf of the class,[24] and the plaintiffs appealed. The court of appeals held that the district court's limitation was proper because the waiver of sovereign immunity for administrative appeals referred only to individuals who have sought administrative review of an agency hearing.[25]

Similarly, here, the waiver of sovereign immunity for an action seeking monetary relief from a state agency is found

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[21] See *id.*

[22] *Id.* at 156, 425 N.W.2d at 870. See, also, *Edelman v. Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974).

[23] *Thiboutot v. State*, 405 A.2d 230 (Me. 1979).

[24] *Id.*

[25] *Id.*

in Neb. Rev. Stat. §§ 84-913 to 84-917 (Reissue 2008). Those provisions first require a hearing before the administrative agency contesting its action. We are unaware of any other means of redress applicable to Davio's claims which would waive sovereign immunity for an action for retroactive monetary relief. Because it appears that a large number of the members of the purported class did not first challenge before a hearing officer the removal of their Medicaid benefits, the district court's limitation of the class certification in this case was proper.

[8,9] As for DHHS' argument that the court erred in certifying the class even for the purpose of declaratory and injunctive relief, we find no harm and no reason to reverse the district court's decision. We note first that Neb. Rev. Stat. § 84-911 (Reissue 2008) provides for the right to challenge the validity of any rule or regulation directly to the district court without first requesting that the administrative agency pass upon the question. But regardless of whether this provision envisions class actions as such, the limited certification of the class in this case was harmless error. It is axiomatic that a regulation deemed invalid cannot be implemented against anyone, whether or not a party to this suit. In other words, even if the court had denied class certification, the declaratory and injunctive relief requested by Davio would have inured to the benefit of the purported class.[26] We therefore find no merit to DHHS' assignments of error pertaining to the district court's certification of the class, which was strictly for purposes of declaratory and injunctive relief.

2. Is Removal of Medicaid Benefits Authorized?

[10,11] We turn now to the underlying merits of the dispute. Before setting forth the labyrinth of pertinent federal and state welfare laws, we briefly discuss the relationship of the Legislature to DHHS and the principles of separation of

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[26] See, *United Farm. of Fla. H. Proj., Inc. v. City of Delray Beach*, 493 F.2d 799 (5th Cir. 1974); 7A Charles Alan Wright et al., Federal Practice and Procedure § 1771 (2005).

powers upon which Davio relies. Neb. Const. art II, § 1, states that "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." This provision prohibits the Legislature from improperly delegating its own duties and prerogatives.[27] The Legislature may enact statutes to set forth the law,[28] and it may authorize an administrative or executive department to make rules and regulations to carry out an expressed legislative purpose, but the limitations of the power granted and the standards by which the granted powers are to be administered must be clearly and definitely stated in the authorizing act.[29] Such standards may not rest on indefinite, obscure, or vague generalities, or upon extrinsic evidence not readily available.[30] And an administrative agency may not employ its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering.[31]

[12-14] We also set forth the standards of statutory interpretation which are relevant to this case and which guide our analysis. Components of a series or collection of statutes pertaining to a certain subject matter are in pari materia and should be conjunctively considered and construed to determine the intent of the Legislature, so that different provisions are consistent, harmonious, and sensible.[32] If the language of a statute is clear, however, the words of such statute are the end of any judicial inquiry regarding its meaning.[33] To the extent there is a conflict

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[27] See *Clemens v. Harvey*, 247 Neb. 77, 525 N.W.2d 185 (1994).

[28] *Id.*

[29] See *Boll v. Department of Revenue*, 247 Neb. 473, 528 N.W.2d 300 (1995).

[30] *Ponderosa Ridge LLC v. Banner County*, 250 Neb. 944, 554 N.W.2d 151 (1996).

[31] *Clemens v. Harvey, supra* note 27.

[32] See *Kosmicki v. State, supra* note 3. See, also, *Placek v. Edstrom*, 148 Neb. 79, 26 N.W.2d 489 (1947).

[33] *State ex rel. Lanman v. Board of Cty. Commissioners*, 277 Neb. 492, 763 N.W.2d 392 (2009).

between two statutes on the same subject, the specific statute controls over the general statute.[34]

We turn now to the statutes. Broadly, two comprehensive acts, the Medical Assistance Act[35] and the Welfare Reform Act,[36] govern this case.

(a) Medical Assistance Act

Medicaid is provided for in the Medical Assistance Act. The Medical Assistance Act was enacted as a cooperative federal-state program to provide health care to needy individuals.[37] DHHS is assigned the responsibility of administering this program.[38] It was originally enacted in 1965, but it has been continuously revised, most extensively in 2006.[39] The current public policy statement for the Medical Assistance Act, contained in § 68-905, states:

> 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 (1) assists eligible recipients to access necessary and appropriate health care and related services, (2) emphasizes prevention, early intervention, and the provision of health care and related services in the least restrictive environment consistent with the health care and related needs of the recipients of such services, (3) emphasizes personal independence, self-sufficiency, and freedom of choice, (4) emphasizes personal responsibility and accountability for the payment of health care and related expenses and the appropriate utilization of health care and related services, (5) cooperates with public and private sector entities to promote the public health, (6) cooperates with providers, public

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[34] *Sack v. Castillo*, 278 Neb. 156, 768 N.W.2d 429 (2009).

[35] Neb. Rev. Stat. §§ 68-901 to 68-967 (Reissue 2009).

[36] Neb. Rev. Stat. §§ 68-1708 to 68-1734 (Reissue 2009).

[37] *Thorson v. Nebraska Dept. of Health & Human Servs.*, 274 Neb. 322, 740 N.W.2d 27 (2007).

[38] §§ 68-907(2) and 68-908(1).

[39] See 2006 Neb. Laws, L.B. 1248.

> and private employers, and private sector insurers in providing access to health care and related services and encouraging and supporting the development and utilization of alternatives to publicly funded medical assistance for such services, (7) is appropriately managed and fiscally sustainable, and (8) qualifies for federal matching funds under federal law.

Eligibility for Medicaid is defined in § 68-915, which sets forth specific disability, income, or dependency prerequisites.

DHHS is authorized in § 68-912 to place "[l]imits on goods and services":

> (1) The department may establish (a) premiums, copayments, and deductibles for goods and services provided under the medical assistance program, (b) limits on the amount, duration, and scope of goods and services that recipients may receive under the medical assistance program, and (c) 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.
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> (2) In establishing and limiting coverage for services under the medical assistance program, the department shall consider (a) the effect of such coverage and limitations on recipients of medical assistance and medical assistance expenditures, (b) the public policy in section 68-905, (c) the experience and outcomes of other states, (d) the nature and scope of benchmark or benchmark-equivalent health insurance coverage as recognized under federal law, and (e) other relevant factors as determined by the department.

Prior to the adoption and promulgation of proposed rules and regulations under § 68-912 or relating to the implementation of Medicaid state plan amendments or waivers, DHHS is required to report to the Governor, the Legislature, and the Medicaid Reform Council with a summary of the proposed rules and regulations and their projected impact.[40] Legislative

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[40] See § 68-909(2).

consideration includes, but is not limited to, the introduction of a legislative bill, a legislative resolution, or an amendment to pending legislation relating to such rules and regulations.[41]

Section 68-916 of the Medical Assistance Act mandates that the recipient assign to DHHS any medical care support available under court order or under rights to pursue or receive payments from any third party liable for the medical care. Section 68-917 is entitled "Applicant or recipient; failure to cooperate; effect." It is limited on its face to the failure to cooperate in obtaining reimbursement for medical care or services as mandated in § 68-916.

(b) Welfare Reform Act

The primary benefit described by the Welfare Reform Act is up to 60 months of cash assistance.[42] This benefit is derived from Neb. Rev. Stat. § 43-512 (Reissue 2008), which sets forth ADC benefits and which is incorporated into the Welfare Reform Act. In addition, the Welfare Reform Act provides qualifying participants assistance with transportation expenses, participation and work expense, parenting education, family planning, budgeting, and relocation.[43] When no longer eligible to receive cash assistance, the Welfare Reform Act provides for transitional supportive services for those who still require it. Such services include health care coverage available on a sliding-scale basis to individuals and families with incomes up to 185 percent of the federal poverty level if other health care coverage is not available.[44]

The primary innovation of the Welfare Reform Act is the self-sufficiency Employment First contract. In order to receive the benefits of the Act, the recipient must first undergo a comprehensive assessment and develop an Employment First contract with a case manager that provides for a means to achieve specified self-sufficiency goals.[45] The contract

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[41] § 68-912(4).

[42] See § 68-1724.

[43] § 68-1722.

[44] §§ 68-1709 to 68-1724.

[45] § 68-1718.

is to have a timeline of benchmarks to facilitate "forward momentum."[46]

According to the Welfare Reform Act, the self-sufficiency evaluation procedure is triggered when an individual or family applies for ADC assistance pursuant to § 43-512.[47] It is not triggered by a Medicaid application under § 68-915. However, DHHS has passed regulations making ADC beneficiaries automatically eligible for Medicaid without a separate § 68-915 application.[48]

We have explained that the intent of the Welfare Reform Act, at least in part, was to reform the welfare system to remove disincentives to employment, promote economic self-sufficiency, and provide individuals and families with the support needed to move from public assistance to economic self-sufficiency.[49] It was intended to be implemented in a manner consistent with federal law[50] and to change public assistance from entitlements to temporary, "contract-based" support, accomplished through individualized assessments of the personal and economic resources of the applicant and the use of individualized self-sufficiency contracts.[51] But we have never addressed whether such self-sufficiency, contract-based support applies to Medicaid.

Section 68-1723(1) states that "[c]ash assistance shall be provided only while recipients are actively engaged in the specific activities outlined in the self-sufficiency contract . . . ." Section 68-1723(2) further specifies that in recipient families with at least one adult with the capacity to work, "[i]f any such adult fails to cooperate in carrying out the terms of the contract, the family shall be ineligible for cash assistance."

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[46] § 68-1719.

[47] § 68-1718(1).

[48] 468 Neb. Admin. Code, ch. 4, § 001.01A (2002).

[49] § 68-1709; *Mason v. State*, 267 Neb. 44, 672 N.W.2d 28 (2003); *Kosmicki v. State, supra* note 3.

[50] § 68-1710.

[51] See, § 68-1709; *Mason v. State, supra* note 49; *Kosmicki v. State, supra* note 3.

Section 43-512(5)(a), which has maintained the relevant language since its amendment in 1990, grants DHHS regulatory power:

> For the purpose of preventing dependency, 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. The provisions of this section with regard to determination of need, amount of payment, maximum payment, and method of payment shall not be applicable to families or children included in such programs.

The Welfare Reform Act grants DHHS the power and duty to "adopt and promulgate rules and regulations to carry out the Welfare Reform Act."[52]

In the preamble, the Welfare Reform Act sets forth 20 "policies" that DHHS "shall implement."[53] These policies range from the specific requirement that it exclude, for instance, the cash value of life insurance policies when calculating resources, to the general policy of encouraging minor parents to live with their parents. In this appeal, DHHS relies particularly on policy (d) of § 68-1713(1), which was added in 1995 and states in full: "Make Sanctions More Stringent to Emphasize Participant Obligations."

George Kahlandt, the administrator of the "Economic Assistance Unit" with DHHS, testified that this language was related to welfare reform committee recommendations in 1993. Kahlandt testified that prior to that time, if an individual refused to participate in Employment First, the only sanction was the removal of that individual's monthly $71 ADC cash assistance benefit, and even that was tempered by an increase in the family's food stamp allowance. It was Kahlandt's opinion that the language in policy (d) contemplated not only the

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[52] § 68-1715.

[53] § 68-1713(1).

increase in the removal of cash assistance from the individual to the entire family, an amount in excess of $400 for a family of four, but also the removal of Medicaid benefits. Prior to the passage of policy (d), DHHS did not remove Medicaid benefits for the failure to comply with self-sufficiency goals.

Kahlandt explained that the committee was formed in anticipation of the federal Personal Responsibility and Work Opportunity and Reconciliation Act, which was passed in 1996. That legislation created the Temporary Assistance for Needy Families program, which replaced the welfare programs known as Aid to Families with Dependent Children, the Job Opportunities and Basic Skills Training program, and the Emergency Assistance program. The law ended federal entitlement to assistance and instead created the Temporary Assistance for Needy Families program as a block grant that provides states, territories, and tribes federal funds each year. Under 42 U.S.C. § 1936u-1(3)(A) (2006) of the Social Security Act, participating states have the option, although they are not required, to terminate medical assistance for failure to meet the work requirement tied to cash assistance.

(c) No Authorization to Remove Medicaid

As is apparent from the above, there is nothing in any of the relevant statutes which expressly states DHHS may remove Medicaid benefits as a sanction for noncompliance with Employment First. DHHS relies instead on the fact that the law does not specifically *prohibit* the removal of Medicaid and that the Legislature has expressed a public policy of welfare as being temporary, contract-based support. DHHS also attempts to patch together the various provisions granting regulatory authority, the "[l]imits on goods and services" provision of § 68-912, and, especially, the statement in § 68-1713(1)(d) that it "Make Sanctions More Stringent to Emphasize Participant Obligations" to make an argument for a clear mandate by the Legislature. We do not find such a mandate.

As already discussed, it is the Legislature's stated public policy, at least in the Welfare Reform Act, that able-bodied recipients become self-sufficient as quickly as possible so

that their welfare benefits are merely temporary.[54] On the other hand, the acts also have beneficent purposes that go beyond simply pushing recipients toward the ultimate goal of self-sufficiency. We have said that in the absence of clearly expressed intent to the contrary, we must construe these laws so as to effectuate their beneficent purposes.[55]

It is particularly the policy of the Medical Assistance Act to provide medical care to persons in need.[56] And, unlike the Welfare Reform Act, which focuses on ADC and other transitional benefits, the Medical Assistance Act makes no reference to Employment First contracts. The lengthy set of policies set forth by the Medical Assistance Act does not indicate that Medicaid benefits should be tied to quasi-contractual obligations of "forward momentum." Section 68-912 of the Medical Assistance Act specifically sets forth the limits DHHS can place on benefits, and yet it focuses solely on the patient participation and responsibility concerns common to any health provider, such as copayments and limitations on what services are covered. It fails to make any reference to self-sufficiency contracts.

Section 43-512(5)(a) comes slightly closer inasmuch as it refers to both "medical assistance benefits" and "preventing dependency." However, it does so in the context of "providing for services" for the participant. It, again, makes absolutely no reference to sanctions. In fact, it seems from reading § 43-512 as a whole that the rules and regulations referred to in that section were meant to pertain to benefits supplemental to the basic welfare provisions—for which "need, amount of payment, maximum payment, and method of payment" *are* applicable.

Finally, we find, contrary to DHHS' assertion, that the provision that DHHS shall "Make Sanctions More Stringent to Emphasize Participant Obligations"[57] provides no particular

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[54] See, e.g., *Kosmicki v. State, supra* note 3.

[55] See *Mason v. State, supra* note 49.

[56] See § 68-905.

[57] § 68-1713(1)(d).

directive. It certainly does not and, indeed, cannot confer upon DHHS unlimited discretion in determining the measure and the means of sanctions for noncompliance. Instead, this provision must be read in conjunction with the limitations and standards expressly provided by the Legislature. In effect, these provisions define what rules and regulations DHHS may pass to "Make Sanctions More Stringent."

[15] What is most pertinent to this case is the fact that in § 68-1723 of the Welfare Reform Act, the Legislature has set forth specific provisions concerning the prescribed sanction for noncompliance with Employment First self-sufficiency contracts. That provision specifies only that the family's "cash assistance" shall be removed as a consequence of noncompliance. If the Legislature had intended Medicaid to be removed as a sanction for noncompliance, there was no reason not to have stated so in § 68-1723. We lack authority to add to this provision language that clearly is not there.[58]

DHHS asserts that if we do not construe "Make Sanctions More Stringent" to authorize the removal of Medicaid, then that provision is rendered meaningless. DHHS rests this assertion on the fact that policy (d) of § 68-1713(1) was finally adopted on June 13, 1995, while the sanction provision of § 68-1723 had already been adopted on April 20, 1994.[59] We find this argument unconvincing. The language of policy (d) is general and could mean nothing more than the stricter implementation of the sanctions outlined in § 68-1723. Or, as DHHS suggests, the language could have been contemplated in conjunction with other language that ultimately did not make it into the Welfare Reform Act. As Davio suggests, it could refer to the contemplated increase to removing the entire family's ADC benefits, even though the latter provision was ultimately adopted first. In other words, the reason and the timing of policy (d) are largely a matter of speculation. Such speculation is unnecessary when the statutes clearly define the appropriate sanctions for specified behavior.

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[58] See *State v. Havorka*, 218 Neb. 367, 355 N.W.2d 343 (1984).

[59] See, 1995 Neb. Laws, L.B. 455, § 10; 1994 Neb. Laws, L.B. 1224, § 23.

Nor are we convinced to stray from the clear language of the acts by DHHS' argument of legislative acquiescence. Where a statute has long been construed by administrative officials charged with its execution, and where the Legislature has several times been in session without amending or changing such statute—despite its full knowledge of the interpretation—we will not disregard that interpretation unless it is clearly erroneous.[60] But this seldom-used rule of legislative acquiescence to administrative interpretations is but a complement to the traditional rules of statutory construction already set forth. In *McQuiston v. Griffith*,[61] for instance, the plaintiff's proposed interpretation of a statute was already a stretch, and the fact that the Legislature had not acted to "correct" it was simply further evidence that our interpretation was correct.

We will not ignore the meaning of the statutes relevant to this case simply because DHHS has passed a regulation and the Legislature has since failed to amend its law to correct DHHS' error. In other words, DHHS' interpretation was clearly erroneous. Moreover, although DHHS points to provisions in the Medical Assistance Act which mandate that reports be sent to the Governor and the Legislature, there is no evidence in this case that the Legislature actually considered such a report or was specifically aware of Regulation 2-020.09B2f and its implementation.

VI. CONCLUSION

It is both consistent and logical that the Legislature chose to remove as a sanction only those benefits gained specifically as a result of entering into the self-sufficiency contract, and to not further penalize the recipient by taking away Medicaid. More to the point, we, like DHHS, are without the power to enlarge upon the expressed legislative purpose.[62] Finding specific provisions covering noncompliance, which do not authorize the removal of Medicaid, and finding no provision

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[60] See *McQuiston v. Griffith*, 128 Neb. 260, 258 N.W. 553 (1935).

[61] *Id.*

[62] See, e.g., *Boll v. Department of Revenue, supra* note 29; *Clemens v. Harvey, supra* note 27.

elsewhere that allows this as a sanction, we find the limitations of the Legislature's delegation clear. Therefore, in enacting Regulation 2-020.09B2f, DHHS unlawfully enlarged upon the authorizing statutes and violated the principles of separation of powers. The district court was correct in declaring Regulation 2-020.09B2f invalid.

AFFIRMED.

GERRARD, J., not participating.

IN RE INTEREST OF GABRIELA H., A CHILD UNDER 18 YEARS OF AGE. STATE OF NEBRASKA, APPELLEE, V. NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, APPELLANT.

___N.W.2d___

Filed July 23, 2010. No. S-09-1261.

1. **Juvenile Courts: Appeal and Error.** An appellate court reviews juvenile cases de novo on the record and reaches its conclusions independently of the juvenile court's findings.
2. **Statutes: Appeal and Error.** To the extent an appeal calls for statutory interpretation or presents questions of law, an appellate court must reach an independent conclusion irrespective of the determination made by the court below.
3. **Juvenile Courts: Jurisdiction: Statutes.** As a statutorily created court of limited and special jurisdiction, a juvenile court has only such authority as has been conferred on it by statute.
4. **Juvenile Courts: Minors.** The Nebraska Juvenile Code must be liberally construed to accomplish its purpose of serving the best interests of the juveniles who fall within it.
5. **Juvenile Courts: Child Custody.** Juvenile courts are accorded broad discretion in their determination of the placement of children adjudicated abused or neglected and to serve the best interests of the children involved.
6. **Statutes.** Statutes relating to the same subject matter will be construed so as to maintain a sensible and consistent scheme, giving effect to every provision.
7. **Juvenile Courts: Parental Rights: Adoption.** Where a juvenile has been adjudicated pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Reissue 2008) and a permanency objective of adoption has been established, a juvenile court has authority under the Nebraska Juvenile Code to order the Nebraska Department of Health and Human Services to accept a tendered relinquishment of parental rights.

Appeal from the Separate Juvenile Court of Douglas County: DOUGLAS F. JOHNSON, Judge. Affirmed.