IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

KELLY JONES, JANICE MONTGOMERY, AQUARIUS HOPKINS, SARAH ENGELHART, and LYNN HOUSEMAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, Plaintiffs, v. STATE OF NEBRASKA, NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, and RON ROSS, DIRECTOR, Defendants.	)	Case No. CI 00-2771 **PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

The plaintiffs respectfully submit this Brief in Support of their Motion for Summary Judgment.

I. INTRODUCTION

The Nebraska Welfare Reform Act (WRA) is specific that time-limited months of Aid to Dependent Children (ADC) are to be counted beginning the month after the ADC recipient signs a self-sufficiency contract with the state. The facts are uncontroverted that the defendants made rules that use non-statutory methods of counting time-limited months. They have applied those rules in the cases of the named plaintiffs, and in the cases of class members identified in the future. All of those plaintiffs have been harmed by the incorrect counting of the months of time-limited ADC. Furthermore, it is uncontroverted that the plaintiffs were not notified in a timely fashion that their months of ADC were being counted, nor given a fair hearing, violating their rights to due process.

The plaintiffs bring this action to standardize the participation of recipients of public assistance benefits with the statutory requirements of the WRA, Nebraska Revised Statutes § 68-1709 *et. seq.* (Reissue of 1996). The sequence of implementation assigned to the defendants after a family applies for public assistance is laid out with great specificity in the statute.

The defendants have promulgated rules which alter the statutory requirements for counting the time-limited months of Aid to Dependent Children (ADC) payments in a manner which is impermissible. *Clemens. v. Harvey*, 247 Neb.77, 525N.W.2d 185 (1994). They have violated their delegated authority. Rule 468 NAC 2-020.09B1(2) allows the months to begin to be counted arbitrarily 90 days after application for assistance is received, in direct conflict with the statute. Rule 468 NAC 2-020.05 sets an arbitrary deadline that the contract must be signed within 90 days of application for assistance. There is nothing in the statute, nor the legislative intent, that authorizes such a deadline. An arbitrary deadline alters the plan for economic self-sufficiency set up by the legislature. For the class in this case improper imposition of the deadline turns the whole program upside down for the clients, giving them the exact opposite of what the legislature intended to happen for them.

The plaintiffs believe this case requests the enforcement of a simple, straight forward requirement of the statute. The statute requires:

(1) application and determination of income and resource eligibility for a client;

(2) a complete assets assessment of the client; and

(3) the formation of a self sufficiency contract negotiated freely and cooperatively by the state case worker and the recipient family.

The counting of the twenty-four time-limited assistance begins the month after the

contract is signed. Neb.Rev.Stat § 68-1724(1)(b) (See Statutory and Regulatory Framework)

II. STANDARD OF REVIEW

Summary judgment is proper only when the pleadings, depositions, admissions, stipulations, and affidavits in the record disclose that there is no genuine issue as to any material fact or as to the ultimate inferences that may be drawn from those facts and that the moving party is entitled to judgment as a matter of law. *Talle v. Nebraska Dept. of Soc. Servs.,* 249 Neb. 20, 23, 541 N.W.2d 30 (1995), see also *Anderson/Couvillon v. Nebraska Dept. of Soc. Servs.,* 248 Neb. 651, 538 N.W.2d 732 (1995); *Oliver v. Clark,* 248 Neb. 631, 537 N.W.2d 635 (1995); *Krohn v. Gardner,* 248 Neb. 210, 533 N.W.2d 95 (1995)

III. THERE ARE NO GENUINE ISSUES OF MATERIAL FACT. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW

The material facts in this case are undisputed. There is no evidence on the record to support the defendants' defense of the 90 Day Rules. The undisputed facts are as follows:

(1) The named plaintiffs and the class they represent are all clients of the defendants in the Employment First program, and are income and resource eligible to receive public assistance.

(2) The description of the class accurately represents the contested issue in this case. "Those families eligible for ADC and receiving ADC cash assistance at any time since July 31, 1998, who had the 24 month calculation for time limited cash assistance begin 90 days after the date a signed application for cash assistance was received in a local office of the defendants and who had not signed a self-sufficiency contract." (Order, May 18, 2001)

(3) The rules in question, 468 NAC 2-020.09B1 and 2-020.05 went into effect on December 15, 1997.

(4) The purpose of the rule, according to the defendants is to prevent clients from arbitrarily refusing to sign an Employment First self-sufficiency contract and continue getting non-time limited ADC payments and avoid the work activity which would be required under the contract.

(5) During this time there have been no executed contracts in place for named plaintiffs Jones, Hopkins, Houseman and Montgomery.

(6) The defendants allege that Ms. Engelhart signed a contract of which she has no recollection. The defendants never produced the contract when Ms. Engelhart was attempting to appeal her loss of time-limited months. (Exhibit 7)

(7) Each named plaintiff has had months of eligibility counted against their twenty-four time-limited months of ADC, even though no named plaintiff signed, or recalled signing, a contract.

(8) In the absence of signed contracts there were no enforceable service plans to lay out the obligations of the plaintiffs and the defendants in carrying out their respective duties leading to economic self-sufficiency.

(9) Application of the 90 Day Rules operates to cut-off assets assessment activities, cuts off a thorough search of appropriate work activities, and it cuts off mutual contract negotiations, in direct violation of the statutory plan designed by the legislature in the WRA.

(10) Authority for the defendants to apply a 90 day deadline to a limited group of recipients during the trial implementation phase of the WRA was rescinded by the legislature in LB 864 in 1997.

There are no material facts in dispute. The plaintiffs are entitled to summary judgment as

a matter of law.

III. ARGUMENT

A. STATUTORY AND REGULATORY FRAMEWORK OF THE NEBRASKA WELFARE REFORM ACT.

The Nebraska Legislature, in keeping with Nebraska=s constitutional framework, has enunciated and reformed welfare public policy for Nebraska. Nebraska Welfare Reform Act, Neb.Rev.Stat. §§ 68-1708 to -1734 (Reissue 1996 & Cumm.Supp.1998)(hereinafter WRA). Through the WRA, the Nebraska Legislature stated Athe primary purpose of the welfare programs [in Nebraska] is to provide temporary, transitional support for Nebraska families so that economic self-sufficiency is attained in as an expeditious manner as possible, with the goal of attaining such self-sufficiency within two years of the initial receipt of public assistance. [T]his 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 (Reissue 1996)(emphasis added).

The Nebraska Legislature further mandated, among other things, that the reform of the welfare system includes Aproviding individuals and families the support needed to move from public assistance to economic self-sufficiency,@ and Achanging public assistance from entitlements to temporary, contract-based support.@ Id.

The WRA therefore sought to accomplish these public policy purposes through a wide variety of welfare system reforms. These reforms included a two year limit on receipt of cash assistance, with limited exceptions, followed by two years of ineligibility; such limits to be imposed following the preparation and signing of an enforceable “self-sufficiency contract”; a reciprocal

relationship between the welfare recipient family and State of Nebraska; and increased sanctions for any "failure to cooperate" with the self-sufficiency contract, including the loss of all cash assistance for the entire family and Medicaid health insurance for the parent(s). Neb.Rev.Stat. §68-1708 et seq.

These reforms also included a commitment to providing families the intensive support needed to move from public assistance to economic self-sufficiency. To effectuate this public policy purpose, the Nebraska Legislature through the WRA specifically mandated among other things a broad definition of allowed "work activities" within a self-sufficiency contract to include education, including post-secondary education and job training. In addition, this broadened approach to eligibility for ongoing cash assistance brought with it ongoing child care, health care, transportation assistance, and case management assistance. Id.

Specific to this suit, the WRA limited eligibility for the receipt of cash assistance to a total of two years: A(1) Cash assistance shall be provided for a period or periods of time not to exceed a total of two years for recipient families with childrenY@ Neb.Rev.Stat.'68-1724(1). The WRA further mandated this two year period of eligibility for and receipt of cash assistance shall be followed by a two year period of ineligibility for cash assistance. Neb.Rev.Stat. '68-1724(1)(d).

The WRA also mandated a highly specific time as to when to begin the calculation of the two year period of eligibility for cash assistance: AThe two year time period for cash assistance shall begin when the self-sufficiency contract is signed or when any children born into the recipient family prior to the initial ten months of assistance reach the age of six months, whichever is later.@ Neb.Rev.Stat. '68-1724(1)(b)(emphasis added).

The WRA also mandated a specific process to be followed when creating and

signing each self-sufficiency contract:

> (1) The A[e]ligibility determination shall begin with a comprehensive assets assessment, in which the applicant and case manager collaborate to identify the economic and personal resources available to the applicant.@ Neb.Rev.Stat. '68-1718(1)(emphasis added)
>
> (2) Further, A[e]ach applicant=s personal resources shall be assessed in the comprehensive assets assessment,@ defined as Aeducation, vocational skills, employment history, health, life skills, personal strengths, and support from family and the community,@ Neb.Rev.Stat. '68-1718(2), and there shall be an assessment of Aan applicant=s goals, employment background, educational background, housing needs, child care and transportation needs, health care needs, and other barriers to economic self-sufficiency.@ Id. (emphasis added)
>
> (3) This comprehensive assets assessment Ashall be usedY to develop a self-sufficiency contract under section 68-1719 and promote services which specifically lead to self-sufficiency.@ Neb.Rev.Stat. '68-1718(3)(a)(emphasis added)
>
> (4) "Based on the comprehensive assets assessment, each individual and family receiving assistance under the Welfare Reform Act shall reach for his or her highest level of economic self-sufficiency or the family=s highest level of economic self-sufficiency.@ Neb.Rev.Stat. '68-1726
>
> (5) "Based on the results of the comprehensive assets assessment under section 68-1718, the applicant and the [State of Nebraska] case manager shall develop a self-sufficiency contract. The contract shall be built upon the premise of urgent action. To ensure that

the applicant can make constant, measurable progress toward self-sufficiency, goals shall be set with time lines and benchmarks that facilitate forward momentum. In the case of an entire family applying for assistance, each family member shall have responsibilities within the self-sufficiency contract.@ Neb.Rev.Stat. '68-1719 (emphasis added)

(6) "The responsibilities, roles, and expectations of the applicant family, the case manager, and all other service providers shall be detailed in the self-sufficiency contract developed under section 68-1719. The contract shall be signed by the applicant and by the case manager representing the state. The state and the applicant shall fulfill their respective terms of the contract.@ Neb.Rev.Stat. '68-1720 (emphasis added)

(7) Under the self-sufficiency contract developed under section 68-1719, the principal wage earner and other nonexempt members of the applicant family shall be required to participate in one or more of the following: Education, job skills training, work experience, job search, or employment.@ Neb.Rev.Stat. '68-1721(1)

(8) Under the self-sufficiency contract developed under section 68-1719, Athe state has responsibilities to help ensure the success of the self-sufficiency contract for each recipient. The Department of Health and Human Services shall employ case management practices and supportive services to the extent necessary to facilitate movement toward self-sufficiency within the two-year limit on participation as provided in section 68-1724.@ Neb.Rev.Stat. '68-1722. These supportive services Ashall include, but not be limited to, assistance with transportation expenses, participation and work expenses, parenting education, family planning, budgeting and relocation to provide for specific needs critical to the recipient=s or the recipient family=s self-sufficiency contract.@

Id.

(9) Cash 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(1). ARecipient families with at least one adult with the capacity to work, as determined by the comprehensive assets assessment, shall participate in the self-sufficiency contract as a condition of receiving cash assistance. If any such adult fails to cooperate in carrying out the terms of the [self-sufficiency] contract, the family shall be ineligible for cash assistance." Neb.Rev.Stat. '68-1723(2). (Emphasis added.)

(10) "Periodic assessments, including an exit assessment prior to implementation of the two year time limit on cash assistance as provided in § 68-1724, shall be conducted with recipients to establish if the terms of the self-sufficiency contract have been met by the recipient family and by the state." Neb.Rev.Stat. § 68-1718(4)

(11) "If the state fails to meet the specific terms of the self-sufficiency contract, the two-year limit on cash assistance under section 68-1724 shall be extended for an additional period of not more than two years." Neb.Rev.Stat. '68-1722.

(12) The WRA provides specific exemptions for participation in the self-sufficiency contract (other than for those without the Acapacity to work" as identified by the comprehensive assets assessment) for minor parents or the parent of a child less than twelve weeks old. Neb.Rev.Stat. ''68-1723(2)(a) and (e).

The WRA went into effect across the State of Nebraska on October 1, 1997. The WRA

delegated to the Appellees the authority to make rules and regulations to carry out the WRA. Neb.Rev.Stat. '68-1715**.**

The law provides a clear set of rules for the steps the defendants must take to help their clients reach their highest level of economic self-sufficiency during the time they are receiving ADC. The application of the 90 Day Rules interferes with that process when a proper assessment and mutual contract negotiations do not result in a signed contract, following which the twenty-four months of time-limited ADC shall begin to be counted.

B. STATUTORY INTERPRETATION RULES UPHOLD PLAIN MEANING

"In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; and appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *Sack v. State,* 259 Neb. 463, 467, 610 N.W.2d 385, 389 (2000)." *Bauer v. State,* S.Ct. A-99-0714 (Jan. 5, 2001). This statutory construction rule also applies to the Nebraska Welfare Reform Act, an entered in this recent decision. Marilyn Bauer sued the defendants because they refused to disregard her Americorps stipend, reducing the ADC her household received and denying her Medicaid. The Supreme Court found the relevant sections of law ambiguous and construed them to say the stipend was "financial assistance provided in connection with further education or job training, and was therefore to be disregarded." *Bauer*, at 13. "Accordingly**,** we conclude that DHHS' interpretation of § 68-1726(3)(c) in its October 1997 order is not persuasive. This court's interpretation of § 68-1726(3)(c) to exempt AmeriCorps U.S.A. stipends is consistent with the purpose of the WRA in 'removing disincentives to work and promoting economic self-sufficiency.'" *Id.* at 14. See also *No Frill*

Supermarket v. Neb. Liquor Control, 246 Neb. 822 (1994); *Association of Commonwealth Claimants v. Moylan*, 519 N.W.2d 275 (1994), and *In re Application of Jantzen*, 245 Neb. 81, 511 N.W.2d 504 (1994).

No Frills Supermarket expanded on statutory interpretation.

> A statute is not to be read as if open to construction as a matter of course. Where the words of a statute are plain, direct, and unambiguous, no interpretation is needed to ascertain the meaning. In the absence of anything to indicate the contrary, words must be given their ordinary meaning. It is not within the province of a court to read a meaning into a statute that is not warranted by the legislative language. Neither is it within the province of a court to read anything plain, direct, and unambiguous out of a statute. *Gilliam v. Firestone Tire & Rubber Co.*, 241 Neb. 414, 418, 489 N.W.2d 289, 292 (1992)." *Id.* at 827.

The statute in question could not be more clear. If the courts cannot read more in or out of a statute than the plain meaning of the words, then certainly neither may the defendants as they promulgate rules to enforce the statute.

C. THE STATUTE SAYS TIME-LIMITED MONTHS ARE TO BE COUNTED STARTING AFTER THE SELF-SUFFICIENCY CONTRACT IS SIGNED. THERE IS NO STATUTORY DEADLINE TO SIGN A CONTRACT.

> AThe two year time period for cash assistance shall begin when the self-sufficiency contract is signed or when any children born into the recipient family prior to the initial ten months of assistance reach the age of six months, whichever is later.@ Neb.Rev.Stat. '68-1724(1)(b)(emphasis added).

"The 24 months begin with the earlier of the following**:**
1. The month following the month the Self-Sufficiency Contract is signed; or
2. 90 days after the date the signed application received is in the local office."

468 NAC 2-020.09B1 (emphasis added).

> "When the Self-Sufficiency Contract is signed, the 24-month time limit on the receipt of cash assistance begins, effective the first of the month following the month of signature. The Contract must be signed 90 days after the date the signed application is received in the local office."

468 NAC 2-020.05 (Emphasis added.)

Months cannot be counted before the contract is signed. There is no question that the rules are different from the statute. Rule 2-020.09B1(2) provides for counting the months in the absence of a signed contract. The statute requires the signed contract to be in place before the months start being counted. The statute is clear-- there must be a signed contract before the months begin to be counted. This rule modifies and alters the statute. There is no different point in time to start counting time limited months other than *after* the contract is signed. The contract for families with a new baby can be negotiated during the time the baby is three to six months old. Neb.Rev.Stat. § 68-1723(b). After the baby reaches six months, one parent can be required to participate in the "activities outlined in the self-sufficiency contract." A signed contract is a condition precedent to counting time-limited months.

C. 1. There can be no arbitrary deadline to sign a contract.

Rule 2-020.05 sets an arbitrary limit of 90 days when a contract must be signed. It is inconsistent with the plain, direct language of the statute, and the policy the statute seeks to implement. If a proper assessment is conducted, and the case worker and the client seriously plan and negotiate what should go into a contract, or to find the appropriate programs for a client to participate in to remove barriers and/or enhance skills, it may take longer than three months. There is nothing is the statute, or the legislative history, to indicate it cannot take longer if necessary.

There are only two lawful times to start counting the time-limited months of ADC payments: the month after the month in which the self-sufficiency contract is signed or when a new baby

reaches six months of age, whichever is later. The contract must be based on a complete assets assessment, mutually negotiated by the case worker and the client. Whether that takes a few days, weeks, or longer, depending on her individual circumstances, the statute is clear about the only time when the months can begin to be counted.

C. 2. Urgency to start the contract is relative.

Another argument the defendants raise in defense of the 90 Day Rules is the need for "urgency" for the clients to become economically self-sufficient. (Defendants' Brief in Support of Objection to Certify the Class, at 2). There is language in both the statute and the legislative history about "urgency," and moving "quickly." NEB. REV. STAT. § 68-1719. These are relative terms. Urgency to call 911 when the house is on fire is different from urgency to remove barriers or enhance skills for better employability.

Section 1719 describes the purpose of the self-sufficiency contract. The goal is to achieve economic self-sufficiency. The Legislature described the need not to waste time with mis-directed activities. The word "urgent" means immediate action, concentrated attention on an issue. The statute continues in that vein, "constant," "measurable," "progress," "goals," "time lines," "benchmarks," "forward momentum," are all words which described deliberate, meaningful actions focused on a result which will be as effective as possible for the client. *Id.*

When the client cannot negotiate a contract which is based on her assets assessment, which plans for directed action to the maximum result, urgency is lost. The 90 Day Rules inhibit urgent action for the class. It takes time for people to engage in activities sufficiently to change. The more they have to change, the longer it may take to figure out what needs to be changed, how to make those changes, and find who can help make those changes. Setting an arbitrary deadline for

a contract to be signed harms the people who need the time the most–the hardest cases. It limits the actual time people have to make significant changes. The defendants simply do not have the authority to do that.

C. 3. Application of the 90 Day Rules harms, not helps, the clients.

The 90 Day Rules both modify and alter the statutory provision for when the 24 months can begin to be counted. The rules are not necessary for the reason the defendants say they are. They already have a remedy for clients who truly refuse to cooperate. They can close the client's case

When a client is receiving ADC, but not engaged in a productive plan to become employable at her highest level her family is in jeopardy by the future loss of that much needed support. When the ADC stops, the family does not have an enhanced earning capacity to replace the ADC. Thus, the legislative plan to reduce poverty is turned on its head–by spending state resources with less benefit, and leaving a family in poverty for an even longer time.

Plaintiffs state that summary judgment is appropriate because there are no disputed material facts that the defendants have modified and altered the statute**.** The rules are both inconsistent with the underlying statute–and therefore must be ruled invalid and unenforceable. Under Nebraska law the defendants are not allowed to change the law, only to implement it.

D. ADMINISTRATIVE RULES ARE SUBJECT TO SCRUTINY IF THEY ARE NOT CONSISTENT WITH THE STATUTE THEY UNDER WHICH THEY ARE PROMULGATED.

An administrative agency or department is constitutionally empowered to adopt rules and regulations concerning statutes and legislative policy, which they are charged with administering.

> The Legislature may delegate to an administrative agency the power to make rules and regulations to implement policy of a statute, but this delegated authority is limited to the powers delegated to the agency by the

> statute which the agency is to administer. An administrative agency may not employ its power to modify, alter, or enlarge provisions of a statute which it is charged with administering.

Clemens v. Harvey, 247 Neb. 77, 80, (1994) (quoting *State ex rel. Spire v. Stodola*, 228 Neb. 107 (1988)).

"The Legislature can delegate to an administrative agency the power to make rules and regulations to implement the policy of a statute." *Robotham v. State*, 241 Neb. 379, 388 N.W.2d 533 (1992). **In order to be valid, a rule must be consistent with the statute under which it is promulgated**. *Id.*" *Wagoner v. Central Platte Nat. Resources Dist.* 247 Neb. 233. (1995).

The Supreme Court was succinct in *Busch v. Omaha Pub. Sch. Distr.*, 261 Neb. 484 (2001). "Busch argues that OPS exceeded its statutory authority by adopting the rule pursuant to which Busch was expelled. The district court disagreed and upheld the expulsion. **Because we determine that OPS acted within its statutory authority, we affirm the judgment of the district court.**" *Id.* at 484. (Emphasis added.)

Because the defendants have exceeded their delegated authority, this court must grant the plaintiffs' summary judgment. The 90 Day Rules modify and alter the statute. They are not consistent with the words of the statute, which are plain, direct, and unambiguous. The 90 Day Rules are also not consistent with the policy of the statute which the defendants are authorized to implement.

E. AUTHORITY TO APPLY 90 DAY RULES TO ALL PROGRAM PARTICIPANTS WAS DENIED BY THE LEGISLATURE

The 90 Day Rules were implemented in violation of the Defendants' delegated rulemaking authority, and as such are invalid. In contrast, the Defendants have acted in compliance with

statutory direction in other aspects of the rules related to the two-year time limit. This further reveals the Defendants' intentional disregard of the WRA requirement as to when to begin counting the two-year time limit.

For example, 468 NAC 2-020.09B1 states that "[f]amilies subject to a time limit may receive a grant for a total of 24 months within a 48-month period…" This 24/48 month formula is a direct expression of the will of the Nebraska Legislature, in contrast to the arbitrary 90 day rule. This is explained through a brief review of how the time limit provisions became law.

In 1994, a time limit on cash assistance benefits was impermissible under the federal welfare laws. These laws dictated the terms of the rules implemented by state agencies. Nevertheless, in 1994 the Secretary of the United States Department of Health and Human Services had broad authority to waive federal AFDC requirements when the purpose of the waiver was to allow states to implement "demonstration projects" judged likely to promote the purposes of the AFDC program. 42 U.S.C. §1315(a) (1994); see Beno v. Shalala, 30 F.3d 1057, 1067-1072 (9th Cir. 1994).

With this in mind, the Nebraska Legislature included several provisions in the proposed Nebraska Welfare Reform Act in 1994 (LB 1224) which reflected the need to seek "waivers" of federal law in order to implement the changes in policy found in the WRA. The Nebraska Legislature very specifically guided the waiver process through LB 1224:

> "The Department of Social Services shall submit a waiver request or requests to the United States Department of Health and Human Services and the United States Department of Agriculture as necessary for federal authorization to implement the provisions [of sections 18 to 26] of the WRA. ."

Laws 1994, LB 1224 §13, codified at Neb.Rev.Stat. §68-1713 (1996). In addition, the Nebraska Legislature maintained a firm control over the content of these waivers of federal law by requiring that the waivers be only implemented after subsequent legislative approval. Id. The Nebraska Legislature's intent as to this process was very clear:

> "We will need federal waivers in order to do much of what we are talking about and there are two stages to the waivers that we are proposing. One is to propose waivers that would allow us to do what we design in LB 1224."

Floor Debate, LB 1224, 93rd Legislature, Second Session, March 29, 1994, at 11823 (Senator Rasmussen).

Therefore, pursuant to the direction of the Nebraska Legislature, following the 1994 legislative session the Nebraska Department of Social Services submitted a waiver request in September 1994 to the United States Department of Health and Human Services, Administration for Children and Families. This request itemized specific desired waivers of federal law that had been mandated by LB 1224, including the time limit provisions found at Section 24 of LB 1224. Laws LB 1224 §24(1)(b), codified at Neb.Rev.Stat. §68-1724(1)(b)(1996).

After negotiations with the federal government, an agreement was struck between the two governments regarding the allowed waivers of federal law, and under what conditions. The agreement specified that the "Nebraska Welfare Reform Demonstration" ("WRD") would be implemented no later than July 1, 1996, and would only be implemented in five counties (Lancaster, Adams, Clay, Nuckolls, and Webster). Furthermore, this experimental demonstration project would be operated as follows:

> "A random assignment evaluation will be conducted in Lancaster county which will be the research site. Within the research site, all AFDC applicants and AFDC cases at the time of

> redetermination will be randomly assigned to 1 of 2 groups: 1) an experimental group which will be subject to all WRD provisions and 2) a control group subject to the regular program rules according to the State's approved AFDC and Medicaid State Plans and approved Food Stamp Plan of Operations.
>
> "Within the four non-research demonstration counties all AFDC applicants and AFDC cases at the time of redetermination will be assigned to the non-experimental treatment group whose eligibility and amount of benefits for AFDC, Food Stamps, and Medicaid will also be determined based on all WRD provisions.
>
> "The experimental and non-experimental treatment groups together will comprise the 'treatment groups'; the experimental and control groups together will comprise the 'research sample.'"

Waiver Terms and Conditions, Nebraska Welfare Reform Demonstration, Section 2.0 (February 1995)(emphasis added).

> With respect to time limits, the waiver agreement provided as follows, and for the first time a mention of an arbitrary period to start the counting of the time limit is found:
> "Time-Limit: Cash assistance… is provided for a total of 24 months within a 48-month period. The 48-month period will begin with assignment of the case to a treatment group. The 24-month period shall begin with the month following the completion of the self-sufficiency contract or 90 days after assignment to a treatment group, whichever is earlier."

Id. at Section 2.9 (emphasis added).

The waiver agreement thus created a "24/48 month" rule for all families. It also created a 90 day rule for when to begin to count the 24 month period for those assigned to a "treatment group." The "treatment group" was carefully defined as those families in the "experimental and non-experimental treatment groups." These were to be effectively all the families receiving ADC assistance in the "Welfare Reform Demonstration" in Lancaster, Adams, Clay, Nuckolls, and Webster counties, during the demonstration period.

Prior to implementation of the "Welfare Reform Demonstration" in these counties, however, the Nebraska Legislature continued its control over the terms and conditions of new welfare policy in the following legislative session as required by the original act. Laws 1994, LB 1224, §13, codified at Neb.Rev.Stat. §68-1713 (1996). Thus, in the 1995 legislative session, the Nebraska Legislature specifically reviewed the waiver agreement and, with certain amendments, approved it. Laws 1995, LB 455. The adoption of the waiver agreement was accomplished through the amending of Neb.Rev.Stat. §68-1713, and included the specific reference to the provisions mandated by LB 1224, §24(1)(b):

> "The Department of Social Services may implement the waivers approved by the United States Department of Health and Human Services or the United States Department of Agriculture, which waivers are entitled:...(w) Make ADC a Time-Limited Program."

Laws LB 455, §6, codified at Neb.Rev.Stat. §68-1713(w)(Supp.1995).

The Nebraska Legislature, through its approval of the waiver agreement, thus amended the Welfare Reform Act in 1995. These amendments included allowing the two-year time limit to be defined as "a total of 24 months within a 48-month period," and to allow a form of the 90 day rule only as to the "treatment group," e.g. those families receiving assistance in Lancaster, Adams, Clay, Nuckolls, and Webster counties and assigned to "experimental" or "non-experimental" groups.

This split between the majority of the state being governed by one set of rules and five counties operating under new "Welfare Reform Demonstration" rules commenced in early 1996, when the "Welfare Reform Demonstration" was launched on the "treatment groups" in those counties. All other counties across Nebraska continued to operate under the pre-Welfare Reform Act rules, including the ban on time limits altogether. In implementing this dual system, the DSS

promulgated two entirely separate sets of rules- one for the counties in the WRD, one for everyone else.

On August 22, 1996, Congress passed the Personal Responsibility and Work Opportunity Act of 1996, Pub.L.No. 104-193, 110 Stat. 2105 (1996), (hereinafter PRA), codified at 42 U.S.C. § 601 et seq. (1998) It abolished the 61-year commitment to a federal safety net for poor families with children, repealed the federal ADC program statutes, repealed all rules and regulations promulgated under the repealed federal statute, and replaced it with the Temporary Assistance for Needy Families (hereafter TANF) block grant program. Id.

Congress acted primarily out of a desire to allow states the freedom to administer, without federal oversight, their own welfare programs while continuing to receive some federal assistance. Id. at § 601 ("The purpose of this part is to increase the flexibility of States in operating a program designed to [among other things] (2) end the dependency of needy parents on government benefits by promoting job preparation, work, and marriage"). The passage of the federal PRA in 1996 transferred the responsibility for determining eligibility factors for public assistance entirely to policymakers in Nebraska. Instead of a requirement that Nebraska administer its eligibility rules in compliance with a set of federal standards, see supra, the PRA gave Nebraska policymakers full discretion in determining who was eligible for cash assistance and related programs. See 42 USC § 617 (1998) ("No officer or employee of the Federal Government may regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part") Nebraska was free then to use its own eligibility rules and conditions, such as time limits on cash assistance, provided it did not violate the federal constitution. Id.; see Saenz, et al. v. Roe, ___ U.S. ___, 67 U.S.L.W. 4291 (1999).

The fact that federal welfare reform created the freedom that had long been desired by Nebraska policymakers was welcomed by the Nebraska Legislature. Nebraska could now make welfare public policy changes without any federal interference, review or requirements. As the Nebraska Legislature had already stated its public policies through the WRA, it now acted to put them into full operation across the state. In 1997, LB 864 was introduced and passed. This legislation included a recognition that the Social Security Act provisions had been repealed and Nebraska was no longer required to gain federal approval of the provisions of the WRA, and that the terms of the statute could be implemented across the state. Laws 1997, LB 864, §12, codified in Neb.Rev.Stat. § 68-1710 (1998 Cumm.Supp.).

At this juncture, the "Welfare Reform Demonstration" effectively ceased to exist- including the "treatment groups." Now all families were covered by the two-year time limit required by Neb.Rev.Stat. §68-1724 (1998 Cumm. Supp.). In launching these new laws statewide, in December, 1997 the Nebraska Department of Health and Human Services repealed the old pre-Welfare Reform Act rules, repealed those rules applying only to the "Welfare Reform Demonstration" "treatment groups," and implemented the rules at issue in this case to apply to all cash assistance recipients across the state.

In doing so, the Defendants transferred both their "24/48 month rule" and the 90 day rule from the rules governing the "treatment groups" to all cash assistance recipients. With respect to the 90 day rule, however, the Defendants exceeded their delegated authority. The Nebraska Legislature had only authorized the 90 day rule as to the "treatment group," not to all recipients of cash assistance.

This history is instructive on several levels. First, the Nebraska Legislature, although engaged in aggressive amending of the original Welfare Reform Act in 1995, 1996, or 1997, not once amended their original and clear policy decision stated in Neb.Rev.Stat. §68-1724(1)(b) to require that the two-year time limit was to begin upon the signing of the self-sufficiency contract. Second, the Nebraska Legislature did amend the original act to allow the two-year time limit to be administratively defined as twenty-four months out of a forty-eight month period- an amendment which did not change when the twenty-four month clock was to start. Third, the Nebraska Legislature did amend the original act to allow the twenty-four month period to administratively begin for the "treatment groups" within the "Welfare Reform Demonstration" at either the signing of the self-sufficiency contract or 90 days after the "random assignment" of the "experimental group" occurred- an amendment which did not change public policy as to when the twenty-four month clock was to start for all families not in the "treatment groups."

The rules in question are clearly an abuse of the delegated authority granted to the Defendants to implement the policies defined by the Nebraska Legislature. Ultimately, the Welfare Reform Act requires one very simple thing: start counting the two-year time limit on cash assistance (defined as 24 months out of a 48 month period) when the self-sufficiency contract is signed (unless you happen to be in the "treatment groups," which ceased to exist in December, 1997).

The class in this case are all those families affected by the rules in question since December, 1997. Therefore, none of these families are in the "treatment groups"- and all have been denied their right to commence their two-year time limit for cash assistance upon the signing of a self-sufficiency contract.

F. PLAINTIFFS HAVE RIGHTS TO DUE PROCESS IF THEIR TIME-LIMITED ADC BENEFITS ARE COUNTED IN THE ABSENCE OF A SIGNED SELF-SUFFICIENCY CONTRACT

The first inquiry of whether due process attaches is whether or not the party has a property interest in what is being taken away by a state actor. "In order to have a protected property interest, one must have a legitimate claim of entitlement." *Benitez v. Rasmussen* 261 Neb. 806, 810 (2001), quoting *Prime Reality Dev. V. City of Omaha*, 258 Neb. 72, 602 N.W.2d 13 (1999), citing *Board of Regents v. Roth,* 408 U.S. 564 (1972).

Historically, people who qualified for public assistance and received benefits are deemed to have a property interest in those benefits. *Goldberg v. Kelly*, 397 U.S. 254 (1970) stated that "[Welfare] benefits are a matter of statutory entitlement for persons qualified to receive them." *Id.* at 256**.**

> Relevant constitutional restraints apply as much to the withdrawal of public assistance benefits as to disqualification for unemployment compensation . . . The extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be condemned to suffer grievous loss and depends upon whether the recipient's interest in avoiding that loss outweighs the governmental interest in summary adjudication. . . . Accordingly, consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by government action. *Id.*, internal cites omitted.

The Goldberg ruling on the need for due process was adopted by the Nebraska Supreme Court. "Welfare benefits are a matter of statutory entitlement for persons qualified to receive them. Their termination involves state actions that adjudicates important rights. *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L.Ed. 287." *Elliott v. Ehrlich*, 203 Neb. 790, 798 (1979)

"Procedural due process limits the ability of the government to deprive people of interests which constitute "liberty"or "property" interests within the meaning of the Due Process Clause and

requires that parties deprived of such interests be provided adequate notice and an opportunity to be heard. *Benitez* at 810 . See also *In re Interest of Natasha and Sierra H. v. Angel H. and John H.*, 258 Neb.131 (1999); *Bauers v. City of Lincoln*, 255 Neb. 572, 586 N.W.2d (1998).

"The central meaning of procedural due process is that parties whose rights are to be affected are entitled to be heard, and, in order that they may enjoy that right, they must first be notified." *In re Interest of Natasha*, at 134. See also *Holse v. Burlington Northern RR. Co.,* 256 Neb. 713, 592 N.W.2d 894 (1999); *McAllister v. Neb. Dept. Of Corr. Servs.*, 253 Neb. 910, 573 N.W.2d 143 (1998).

"When a person has a right to be heard, procedural due process includes notice to the person whose right is affected by a proceeding, that is, timely notice reasonable calculated to inform the person concerning the subject and issues involved in the proceeding . . ." *In re Interest of L.V.* 240 Neb. 404 (1992), quoting *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972)**,** *Goldberg, In re Appeal of Levos*, 214 Neb. 507 (1983). See also *In re Interest of Joseph L.* 8 Neb. App. 539 (1999).

The need for a hearing before the benefits are terminated is particularly necessary for welfare recipients. "A welfare recipient is destitute, without funds or assets. Suffice it to say that to cut off a welfare recipient in the face of brutal need without a prior hearing of some sort is unconscionable, unless overwhelming considerations justify it. . . . Under all the circumstances, we hold that due process requires an adequate hearing before termination of welfare benefits, and the fact that there is a later constitutionally fair proceeding does not alter the results." *Goldberg* at 256.

The law is well settled that when a property right is secured and the state takes that property, there must be timely and adequate notice so the property holder is informed of the subject and nature of the issues, and there must be an adequate hearing. In the case of property rights for

welfare benefits, a pre-deprivation hearing is essential due to the critical impact of the taking on welfare recipients.

It is true, the length of time people are eligible receive welfare benefits has changed, and they are now required to engage in certain activities while they receive them which they were not in the past. However, as long as they are qualified and receiving benefits, they still have a property interest in those benefits. Due process is still necessary if the benefits are taken away. Public assistance recipients suffer a particularly grievous loss if basic subsistence support is taken from them. A recent Colorado case did a clear job of explaining how due process rights still attach during the shortened period when people can receive ADC. *Weston v. Cassata*, Ct.App. No. 99CA2449, (2001 Colo. Ct. App.) (Attached) The issue in this case was the adequacy of notice clients were getting when they were losing benefits through a sanction. There were at least five different notice forms, none of which were acceptable to the trial court or the appellate court. The court reviewed various types of property rights. "On the 'absolute' entitlement end of the spectrum, there is the notion of a property right that creates a right of action to sue the state under certain 'entitlement programs.' Under the [old] AFDC program, individuals, by virtue of having a property right in welfare benefits, could sue the state to enforce their rights." (Internal cites included *King v. Smith*, 392 U.S. 309 (1968) and *Goldberg.) Weston* at 5. Then it noted the "political and fiscal notion of entitlement" because the states are required to give the federal funding they receive to all eligible participants. The participants have the ultimate right to the benefits; states are mandated to distribute the federal money they get to participants. *Id.*

Then the court identified a "less absolute" notion of property rights related to property allocated on the basis of a regulatory scheme. If the scheme contains discretion-constraining standards, it invokes constitutional due process protection. *Id.*, at 6 ¶ 1.

Quoting *Board of Regents v. Roth*, 408 U.S. 564 , 577 (1972), the determination of this type of property right is tied to the degree of discretion vested in an official decision maker to withhold the benefit or impose the burden:

> "Thus if the statutory scheme comprehensively sets forth the conditions under which claims of entitlement attach, and the individual recipient meets those conditions, the official decision maker merely acts as a conduit for distribution of welfare benefits. In such a situation the official decision maker merely acts as a conduit for distribution of welfare benefits. In such a situation, the potential recipient's compliance with the statutory standards, rather than the decision of an official, gives rise to the welfare benefit. *Weston* at 6, ¶ 2.

The WRA set up a scheme that a client and her case worker must complete an assets assessment and negotiate and sign a contract. Then and only then may the decision maker start counting time-limited months of ADC. There is no discretion in the statute. The decision maker is constrained by the regulatory scheme to impose the burden of counting time-limited months at only one time.

As long as the client is cooperative and participating in the program they have that right. Participating in an appropriate adequate assets assessment and negotiating for allowable work activities are actions that are cooperative and to which the clients have a legal right. They are not required initially to agree with the case worker's ideas, although they both have to find agreement eventually.

G. DEFENDANTS OWN ADMINISTRATIVE RULES MANDATE DUE PROCESS

Finally, by the defendants' own properly promulgated rules, the plaintiffs are entitled to due process. In 465 NAC 2-000, policies common to all departmental functions, 465 NAC 2-001 Client Rights includes "3. To receive adequate notice of any action affecting her/her application or case; 9. To appeal to the Director for a fair hearing." Rule 465 NAC 2-001.02 Right to Appeal, clients may appeal when 3. . . .assistance is suspended, 4. . . . assistance or services are reduced, 5. . . .assistance or services are terminated. (Exhibit 12, p. 3)

In Chapter 468, which governs ADC benefits, rule 468 NAC 1-009.03A defines Adequate Notice (.03A1), Timely Notice (.03A2), and Adequate and Timely Notice (.03B). (Exhibit 12, p. 4).

Adequate Notice describes al of the information which the client must receive about what will happen, why, and specific manual references, and must be sent no later than the effective date of the action.

Timely Notice requires notice dated and mailed at least ten days from the first day of the effective month.

Adequate and Timely Notice: "In cases of intended adverse action (action to discontinue, terminate, suspend, or reduce assistance . . . the worker shall give the client adequate and timely notice."

The forms of notice the defendants currently use are the WP-5, which is preliminary notice and offers an opportunity for conciliation and/or mediation. (Exhibit 12, p. 5); and a Notice of Action, which is the official notice of the action to be taken. (Exhibit 12, p. 6.)

The plaintiffs have a property right for their benefits. They have a right to timely and adequate notice if their benefits are going to be suspended, reduced or terminated. They have an right to be heard. This has not occurred for any of the class members.

H. THE DEFENDANTS' COUNTING OF TIME-LIMITED MONTHS OF ADC WITHOUT A SIGNED VALID CONTRACT CONSTITUTES AN UNLAWFUL TAKING OF PROPERTY WITHOUT PROCEDURAL DUE PROCESS OF LAW.

The class members all have property rights in their twenty-four months of time-limited assistance. Proper, legal notice must be given when the months are first being counted when there is no contract signed that would allow the counting–not when the months are already gone. The taking of each month is an adverse action in the absence of the signed contract and attendant opportunities for improvement.

The defendants' consistent position is that counting the twenty-four months without a contract and without attendant activities to benefit the client is not adverse to the client. It is in fact, a taking of property without due process. The WRA provides a plan for constraining the ability of the decision maker, the defendants, from imposing the burden of counting months, until the contract is signed. There is no statutory authority for any other time. The Legislature in particular made sure that the 90 day limit placed on the treatment groups before statewide implementation began was rescinded. The 90 Day Rules are invalid because they modify, alter and enlarge the statute. Further, the defendants failed to provide timely, adequate notice that the months were being counted before the months in question occurred, so the plaintiffs had no opportunity for a hearing. By the time some of them got a hearing, many or all of the months were gone.

The defendants failure to implement the statutory requirements further led to their failure to follow due process requirements. Section 68-1718 of the WRA requires periodic review of

progress under the contract. If there is no contract, then there can be no periodic reviews and tallying of the months. There can be no exit assessment, resulting in no notice that the twenty-four months are up.

Further, there is a statutory requirement to do the whole process over again if the state has failed to perform its duties. Neb.Rev.Stat. §§ 68-1722. "The state has responsibilities to help ensure the success of the self-sufficiency contract for each recipient. . . .If the state fails to meet the specific terms of the self-sufficiency contract, the two-year limit on cash assistance . . . shall be extended for an additional period of not more than two years." The plaintiffs do not know anyone who had allegedly used up their twenty-four time-limited months and was offered another opportunity to do a thorough assets assessment and negotiate a new contract. The violations of the law by the defendants are directly tied to these 90 Day Rules and the refusal of the defendants to implement the program in the manner which the Legislature intended.

Plaintiffs Jones and Montgomery, arguably the most difficult of the named plaintiffs to serve, failed to get effective assessments to identify core problems and targeted assistance to try to address them. They did not receive from their case workers the caliber of analysis and resources identification that their situations required–and that the Legislature intended they get.

On the other hand, Houseman and Hopkins, probably the easiest named plaintiffs to serve, both wanted education work activities permissible under the statute and the rules. All the defendants needed to do was get out of their way and let them be successful.

Engelhart wanted a chance to work on a barrier, rather than be instructed to go on being a hotel maid. All of these clients were cooperative, kept appointments and tried to do what their case workers wanted them to do. They were in compliance with the statutory standards.

None of the named plaintiffs was informed that their twenty-four time-limited months were being counted against them for a long time after the counting began. None of them received a WP-5 notice or final Notice of Action when their months were allegedly used up, which the defendants own rules require. Janice Montgomery got a Speednote on June 19, 2000. (Exhibit 10, at 1,6). Aquarius Hopkins and Lynn Houseman were verbally told by a case worker or other employee.

Having an opportunity to be heard should result in receiving an answer. Kelly Jones raised the issue at his hearing, but there is no mention of it in his Finding and Order. (Exhibit 8) Sara Engelhart was denied a hearing. (Exhibit 7, at 8) Aquarius Hopkins' Finding and Order indicated that her case worker applied 468 NAC 2-020.09B1 to her case to begin counting time-limited months 90 days after the application for benefits, with no regard to the absence of a signed contract. (Exhibit 6, p.14, p.25) She was not told in March, 1998 when she presented her case worker with a signed contract that her months were going to be counted against her for the year it took the defendants to refuse to sign it.

The defendants have no system known to the plaintiffs of notifying all ADC recipients of the status of their time limited months on a routine basis. Notice that the last month is approaching does not appear to be systematized. Plaintiffs do not know if the statutory requirement for an exit assessment is ever carried out. It was not for any of the named plaintiffs, and none were offered an opportunity to start over with a new assessment and a new contract.

The plaintiffs did not receive adequate notice that their ADC months were being counted against them. They did not receive a fair hearing on the issue because it was ignored by the defendants. There are no material facts in dispute. They are entitled to summary judgment on this point.

I. THE LEGISLATURE FOCUSED ON THE CENTRALITY OF THE CONTRACT TO THE ENTIRE WELFARE REFORM PROGRAM

The statute is not ambiguous and can be interpreted on its face-- the months begin to be counted after the contract is signed. However, the policy the statute seeks to implement is best understood in the words of the senators who enacted the policy into the Nebraska Welfare Reform Act.

The execution of the contract, without an arbitrary deadline, and before time-limited months are counted, is so key to the whole point of changing the delivery of public benefits, it is valuable to review what the senators had in mind when they crafted this new plan. It is significantly different from the old way welfare was administered. It is significantly different from plans developed by other states, "Work First" plans that got so much publicity in the mid-1990s. Understanding what the Nebraska Legislature intended to do for and with recipients of public benefits is critical to understanding why the law must be followed exactly as it was written.

The Legislature spent hours discussing and planning how the new program would work. Attached to this brief are a number of pages of the Legislative History of LB 1224, (Appendix A) which include the quotes below. It is helpful to see the context in which certain remarks are made**.** No matter what topic the senators discussed, their intent for how the plan would be implemented weaves all through their remarks.

Throughout the extensive debate, the centrality of the contract is striking. Also striking is the intent of the senators that their process of assessment, contract negotiation, and mutual performance be followed thoroughly. It is very apparent that they intended a positive relationship between the state and the recipients, and the creation of true enforceable contracts with proper performance by each side. The fact that these issues came up often, in discussions of various

aspects of the bill is indicative of the importance the senators attached to the process being done exactly the way they envisioned it.

I. 1. Committee hearing testimony

In the committee hearings, Governor Nelson introduced the plan for the new program in his opening testimony. "After applying for assistance, an assessment will establish the family's personal, social and economic resources as well as their needs. The contract in essence will be tailored to meet that family's particular situation. The goal of the contract will be to help the family attain economic independence and self-sufficiency in two years or less."[1] Committee Hearing, LB 1224, 93rd Leg., 2d Sess., 10 (February 10, 1994) He continued, "In short, we want to reshape Nebraska's public policy to keep people out of the welfare system by focusing on job training and decent jobs, jobs that will enable people to move quickly beyond welfare to the job market and a decent job." *Id.*

Mary Dean Harvey, then Director of the Department of Social Services, also noted, "Truly this bill puts the state on the line. It says not only does the customer have some obligations, but the state has obligations also. And if the *state* fails to meet them, the clock is not over for the customer." *Id.* at 95. (Emphasis added.) She was agreeing with the plaintiffs' position that if the state fails to perform its duties properly, the onus must fall on the state, not on the client. The clients should not lose time-limited months, the clock is not over. Rather, the state must do a

[1] It should be noted that in both the legislative history and the statute the phrase "two years" is almost always shorthand for "twenty-four months of time-limited ADC." There are months exempted (for having a baby, for instance) or months of non-qualification (getting a job) which automatically interrupt the consecutive months. There is no indication that any anyone ever meant literally, twenty-four consecutive months and the program is over. The overall forty-eight month eligibility during which people can receive their twenty-four time-limited months is reflective of that interpretation. See III.E, above.

legitimate assessment and mutual contract negotiation so that the client benefits from the program–not be harmed as the plaintiffs have been. Once again, the defendants' application of the 90 Day Rules turns the original legislative intent on its head.

I. 2. Floor debate regarding the assessment, contract, performance process

At the beginning of the floor debate, the primary sponsoring senators, Jessie Rasmussen and Don Wesely introduced the concept of the bill to the entire body.

On March 29, 1994, Senator Rasmussen jumped right into one of problems with the old welfare system and the need for change. "Second of all, it has become very clear from welfare recipients themselves it is extremely difficult to get off of welfare. It appears to them that every time they try and become independent, every time they try and go to work, the system kind of knocks the feet out from under them and does not support that effort." Appendix A, Legislative History, Floor Debate, 93rd Leg., 2d Sess. 11821-22 (April 11, 1994) The plaintiffs contend that the application of the 90 Day Rules is another way for the "system" to knock them off their feet and impede their ability to become economically self-sufficient. The senators thought they were getting rid of that problem of having the system impede overcoming the need for welfare, not continuing it.

Senator Rasmussen went on to introduce the plan, "One of the critical statistics is the fact that there is a 44 percent recidivism rate, so that means people are on welfare, off again, on again, off again, and that reflects of the problems with the system . . .We are going to be talking about, number one, doing an initial comprehensive assessment. Based on that assessment we will move to a self-sufficiency contract which defines the responsibilities for the state and the individuals. We are going to be requiring full participation as defined by the self-sufficiency contract. . . . We will

also be talking about time limitations to promote the concept that welfare should be temporary, not a lifetime status for those people who are able to work and we will also be talking about the importance of education and the importance of getting children to school as one of the means of maximizing education for the purpose of getting out of poverty." (*Id.*. at 11823-24)

Senator Wesely's remarks reiterated the assessment, contract, and added the exit assessment. "We have, in the original bill, an initial assessment that occurs when you come into the welfare system and a self-sufficiency contract is signed. We add, in the committee amendments, that there be an exit assessment, as well, to determine how much progress has been made and what the status of individuals are before they leave the system, and to see whether or not the system has been effective." (*Id*. at 11872)

I. 3. Floor debate, reciprocity expected between the state and the clients

Later in the debate, Rasmussen described the plans and the attitudes expected of both the state and the parties. (Speaking of the need to be sure children to attend school) "the reciprocity that we're attempting to get here between the state and the family about (sic) we will support with case management, with child care, with health care, with food, with energy, with housing, but we expect some other things from the people that we are providing those supports for. We expect you to get your children to school and we're going to have other expectations like we expect you to participate whether in education or training or job search or actual employment. <u>It is not to try and be punitive</u>, but simply to make a clear relationship between what is expected between <u>both</u> parties involved and there is a difference. And, yes, it does put the state in a position of control when they are doling out the money, but the intent here is not to beat up on families, but to make it very clear what the expectancies are and I don't think it's unreasonable to expect their parents make every effort that

their children go to school . . . But one of the messages, one of the themes that we're trying to stress throughout this change in the way we do things is reciprocity, that we have shared responsibilities and those responsibilities on the state as well as on the families and it is not intended to be in an adversarial way, but with a clear understanding between the two about what is expected and that will go for the recipients as well as for the state. There will be a clearly written plan with goals, objectives, who is responsible for what and clear time lines and a clear understanding of what will happen if either the state or the welfare recipient does not comply with that written agreement. It is not just a matter if the recipient doesn't [do] it, it's also if the state does not either and we have indicated in the main part of the bill that the state is responsible for such support services . . . .(*Id*. at 12944-45) (Emphasis added)

Senator Ardyce Bohlke reinforced the centrality of the contract. " . . . but the real difference here is one word that I think is important that is new with the new welfare system and that word is a contract. And what we're asking people to do now is to come in and be a part of a contract. When you sign a contract you say here's what the one side, party, is willing to do, here's what is expected of the other party." (*Id*. at 12945-46)

Again, the clients were intended to be equal players in planning what activities they would undertake to improve their situations. Application of the 90 Day Rules gives the defendants the power to force their judgment on a client and perverts the intent of the senators about how the program should be conducted. Senator Rasmussen indicated the state was not to force its judgment on the clients in response to a question from Senator Chambers about what the word "values" in the assessment tool means, and if it is not defined, who would make that determination? "The intent there, since this is an asset assessment, to look at what people, what strengths people have,

what resources they have. It was to look at it from their perspective about what is important to them and what they value. It was *not* to be done in the sense that it, okay, these are the state values and let's see if those measure up to ours. That was the intent of this language." (*Id*. at 12946) (Emphasis added.)

The plaintiffs believe the process should be handled the way the statute directs. The senators recognized the possibility of power imbalances, and from the tone of the debate, they intended for the clients not to be harmed by the program's implementation.

Later that same day, the discussion continued. Senator Wesely discussed and how to analyze if a contract had been properly performed by both parties, then he addressed concerns of Senator Chambers "about caseworkers and the power given to caseworkers. . . . Now we're talking about a partnership, in a sense, between the state and the recipient, between the caseworker representing the state and the recipient to identify what the assets are, what the needs are for that individual and how we can best address their concerns and enhance their assets. This is a partnership that should be positive, but in some cases, and there are caseworkers, obviously that have a negative view and could be, in fact, turned into a punitive result." He reflected on a mediation process and concerns that administrative appeals go to the same people who have just told the client no, "to ask them to consider saying yes." (*Id*. at 13006-07) He considered the possibility of legitimate disagreements between the state and a client during contract negotiations. "Look, we're talking about a two-way street here on a contract that maybe we do need an independent individual or process to look at this and help resolve disputes." (*Id*. at 13007) He later emphasized again that "the intent is that we're not going to dump you off into some job where you work and you're making less than you would on welfare in terms of your assistance and then also,

again, child care and health care would be there to supplement so that it isn't a step down **when your two years are up but in fact, you will be at least as good or better off** with that job." (*Id*. at 13008) (Emphasis added.)

The whole idea of an artificial deadline to sign a contract with which the client does not agree, or counting months without a contract and the accompanying beneficial services and activities is completely contrary to the vision the senators had of how the new plan would work In as many contexts, and as many times as they could the senators reiterated that they wanted the clients to be "in a partnership," "have reciprocity," "be on a two-way street"–all things the 90 Day Rules deny to the clients.

The defendants have chosen to place their judgment and interpretation of how the program should be implemented over the judgment of the Legislature. The 90 Day Rules are not consistent with the statute. The rules and the impact of their implementation completely contravenes the intent of the senators for what should happen to people in this program. Clearly the defendants' actions in this case are contrary to the legislative intent and the plaintiffs are entitled to summary judgment.

J. NAMED PLAINTIFFS' EXPERIENCES REFLECT IMPROPER APPLICATION OF THE STATUTE AND EXAMPLES OF HARM EXPERIENCED BY THE CLASS.

The plaintiffs and the members of the class they represent have each been harmed. They have had of one or more months in which they received ADC counted against the twenty-four time-limited months the WRA allows. They have not had proper assessments, mutually negotiated contracts, or a supportive plan to remove barriers and enhance skills.

None of the named plaintiffs knew their months were being counted until well after the fact. They received no proper notice under the defendants' own rules. They were either denied hearings

when they asked to have one on the issue, or when they raised the issue at an administrative appeal hearing, the issue was summarily addressed, at best by a hearing officer in one Finding and Order.

The contract formation process varies a good deal depending on the case worker and the client. **Janice Montgomery,** for instance, never went through a complete assets assessment. Her (new) case worker testified that she was to complete an assessment and negotiate a contract all in one meeting on March 24, 1998. She did look for a computer training program to enter. There was not one available at the time she and her case worker talked about. There was one that would start several months later. She engaged in a number of allowable work activities as she received her ADC, but no contract was signed because she and her case worker either could not find or agree on a work activity. At no time did the assessment process include aptitude or employment preference tests. Could her interests in "computers" lead her to be a word processor, a data entry operator, a programmer, a technician? Did she have any aptitudes in one area over another? She was allowed to choose her work activities at random, with no assessment that would lead her to be successful in a particular area. She complained that she did not always receive supportive services when she needed them. She sat next to another welfare recipient in a class who seemed to receive whatever services she asked for. She filed an appeal on a number of issues, and raise the issue of racial discrimination based the fact that her white friend got supportive services help when she needed it, while Ms. Montgomery, who is African-American, did not.

Ms. Montgomery was not aware that months of ADC were being counted until the summer of 2000 when she was told her two years were up. Her appeal hearing, held after this case was filed, was heard on August 29, 2000, and the Finding and Order was issued on September 25, 2000. (Exhibit 10) The hearing officer relied completely, and only, on the 90 Day Rules (Ex. 10, p. 6)

in his decision. He noted that she received a Speednote dated June 19, 2000 that her months of ADC were being counted as of May 1, 1998–and that since she had not received a final notice that her case would be closed, that fact had no effect on her current ADC case. By then, she had wasted two years in a random, unsuccessful sampling of activities because the state did not provide the guidance and assistance to make her activities purposeful. There was no contract with measurable goals. The hearing officer only ruled that May 1998 was an appropriate month to start counting her time-limited ADC because it was more than 90 days after she filed an Application for Assistance. The hearing officer failed to recognize the missing components of service the state failed to provide.

Kelly Jones never signed a contract. (Ex. 8, p.4) He had a series of things happen, such as being on a medical exemption after his ex-wife drove over his foot, or he would get a job he could keep briefly, which would have tolled the counting of the months. He never received a periodic review of which months were being counted and which were not. One of his children has serious behavioral problems. A complete assets assessment in preparation to form a contract might have led a case worker to understand that Mr. Jones was needed as the caregiver of his child and put him on a non time-limited contract. However, when contract formation activities did not occur, it was the case worker, and not he, who determined what the work plan would be. No one investigated the possibility of having Mr. Jones spend intensive work with his behaviorally disordered child to lessen his behavioral problems, in preparation of Mr. Jones' eventual return to full-time employment.

When Mr. Jones appealed a number of issues, the hearing officer ignored Jones' complaint that months were being counted against his time limit in the absence of a contract. There is no mention of it in the Finding and Order (Exhibit 8).

Aquarius Hopkins presented her worker with a signed contract with a university education program as the allowable work activity. After "reviewing" it for a year, the defendants finally notified her that they would not approve her education work plan. Then, they informed her that all the months she was receiving ADC while *they* were sitting on the proposed contract would be counted against her twenty-four months of eligibility.

The defendants claim that an artificial deadline is necessary to keep some clients from "gaming the system." Ms. Hopkins' case is a prime example of the defendants using the counting of time-limited months to "game the system" against the client's best interests. Ms. Hopkins' plan to intersperse months of ADC with months of work study or other work activities was a viable solution to equip her to be economically self-sufficient. She persevered in spite of the defendants' efforts to reduce her work plan and render her significantly less self-sufficient than she is. Today, she is a teacher in the Lincoln Public Schools. Her daughter still receives health insurance through the Medicaid Kids' Connection. Otherwise, she receives no public assistance and never will.

Sara Engelhart allegedly has a contract. She has severe dyslexia and cannot read. She has no memory of working with her case worker to identify the best activities for her to undertake during the contract. She has no memory of signing a contract, and no knowledge of what is written in the alleged contract. The defendants refused to allow Ms. Engelhart or her counsel see the contract. (Exhibit 7) Yet, the defendants, who have not offered or provided any services to her to attempt to provide her training to overcome her dyslexia, and have just insisted she work as a hotel maid, have very diligently counted her months of ADC.

Lynn Houseman also attempted to negotiate in good faith for a four-year degree program as her allowable work activity in her contract. She started attending the University of Nebraska at

Kearney in January 1999. When the telemarketing company she worked for went out of business, she applied for public assistance in October 1999. She was barely thirty days on assistance before her case worker refused to allow an education program, and sanctioned her. Several months later, after Ms. Houseman timely appealed and was receiving her ADC, her case worker taunted her that she would have to pay back her ADC after she lost her case, and that they were counting her ADC checks against her time-limit. Once again, it was the defendants who tried to force the client into a contract with work activities she did not agree with. In Ms. Houseman's case she did not even get 90 days to negotiate. During her appeal hearing on March 17, 2000, when the HHS regional administrator learned that Ms. Houseman had declared a business marketing major, she gave some indication that since that major can lead directly to higher level employment she might have considered approving it as an allowable work activity. But the application of the 90 Day Rule had cut off negotiation and communication early in the assessment and contract formation process–so the regional administrator did not learn until too late information that might have led to a productive contract.

In fact, the illegal counting of months is a tool the defendants use as a method of enforcing their unwritten "policies," such as not approving education programs that cannot be completed in the next twenty-four consecutive months, or forcing clients to participate in activities they do not agree with. Such actions create illusory contracts. They are negotiated by the state unilaterally, in opposition to the client's wishes, or unknown to the clients. They are enforced by the defendants by counting months of ADC during which the provisions for the assistance envisioned by the WRA are ignored to the detriment of the clients. The clients have no immediate knowledge that months are being counted. When they finally find out and appeal that fact, the defendants claim no adverse

action has occurred. (Englehart, Ex. 7) The defendants ignore the issue when raised on appeal, or deny the right to appeal ADC months counted without an enforceable contract.

F. ADMINISTRATIVE REVIEW PROCESS FAILS

As noted above, use of the Administrative Procedures Act to clarify and rectify the problem of the 90 Day Rules has been particularly ineffective. A key component of due process is the right to an opportunity to be heard. Only Ms. Montgomery got a ruling that the 90 day rule was properly applied–but no analysis reflecting failure of the state to do a comprehensive assessment and find effective services to include in a contract. (Exhibit 10)

The point is not only to provide an ADC payment to the family. That is an executory function–a short-term help, but not a long-term solution. For many clients it is the "allowable work activities" listed in the service plan of the contract that will make the difference if they can survive sufficiently without public assistance in the future–if, as Senator Wesely said, that they are as good or better at the end of the twenty-fourth month than when they started.

If a client negotiates a contract within the first month or two after her family begins to receive public assistance, and she uses her twenty-four months of time-limited assistance consecutively, she would face two more years (twenty-two months) with no ADC for her family if she can scrimp by on low-paying inadequate jobs and avoid qualifying for a "hardship exemption."

When a client has those months counted against her and she does not get to participate in activities that will improve her employability, her family suffers from that failure. The purpose of the Welfare Reform program has been thwarted; the defendants have failed to carry out their statutorily designed duties. And, the response of the defendants through the administrative

appeal process has been that the counting of time-limited months without a contract and a service plan does not constitute an adverse action to the clients.

IV. CONCLUSION

The WRA requires a complete assets assessment, and mutually satisfactory signed contract and no more than twenty-four months of ADC along with supportive services such as child care and transportation, and targeted, productive activities individually designed to remove barriers and enhance skills for economic self-sufficiency. The goal is for a client to "turn out as good or better off " than she started. Counting time-limited months before all of those components are in place is beyond the scope of the defendants' authority under Nebraska's Welfare Reform Act, and under any administrative authority the defendants may have. Further, the defendants' violated the plaintiffs' constitutional rights to due process.

The stipulated facts all turn in the plaintiffs' favor. There are no material disputed facts. The law is clear and unambiguous. The rules are inconsistent with the law, and its underlying policy intent. The 90 Day Rules must be ruled invalid and the defendants enjoined to apply the welfare reform program in a manner consistent with the direction of the Legislature as it is mandated by the statute.

Respectfully submitted,

Kelly Jones, Janice Montgomery, Aquarius Hopkins, Sarah Engelhart, and Lynn Houseman, Individually and on behalf of all others similarly situated, Plaintiffs

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