IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

TYLESHA L. MASON and FERNANDEZ MASON , BY AND THROUGH LISA CANNON, AS THEIR NEXT FRIEND; HANNAHA WHITE, BY AND THROUGH CRYSTAL D. WHITE, AS HER NEXT FRIEND; SIMEYON EVANS, BY AND THROUGH ANDREA EVANS, AS HIS NEXT FRIEND, Plaintiffs, v, STATE OF NEBRASKA, NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, and RON ROSS, DIRECTOR Defendants.	)	Case No. CI 00-3389 **PLAINTIFFS: TRIAL BRIEF**

The Plaintiffs, by and through their attorneys, submit this Trial Brief to outline the issues present in this case.

INTRODUCTORY REMARKS

Newborn babies of low-income disabled mothers across Nebraska are being denied necessary Aid to Dependent Children (ADC) welfare benefits by the Nebraska Department of Health and Human Services. Through this lawsuit, these children are demanding the return of these benefits. The lawsuit challenges the State of Nebraska's imposition of the so-called "Family Cap" on these needy children, and the causing of increased hardship for these very poor families.

The plaintiffs, from Omaha and Lincoln, are all children of low-income disabled mothers. Their mothers are not able to be employed at this time due to their disabilities. Nevertheless, these are typical low-income families, with all the needs of families headed by low-income working adults. Without access to ADC benefits for these children, these families are forced to struggle even harder to provide a healthy, safe, and nurturing environment for their children. These children are at risk, and the health and well-being of these families is being damaged. The State of Nebraska's improper decision to prohibit welfare benefits for new children in these households is only making very poor families even poorer.

In the mid-1990's, the Nebraska Legislature passed the Welfare Reform Act. The so-called "Family Cap" is a part of Nebraska's Welfare Reform Act, and it prohibits cash welfare benefits (about $71 per month) for newborn children, if the child is born ten or more months after the family first "participated in the program." This "Family Cap" is only to be applied to those families required to be involved in the time-limited welfare reform program, sign "Self-Sufficiency contracts," and be "actively engaged" in the required "work activities" enumerated in the contracts. Low-income disabled mothers receiving ADC for their children are not part of the time-limited program or required to sign "Self-Sufficiency Contracts." Thus, the "Family Cap" cannot be applied to their children.

The Nebraska Legislature intended the Nebraska Welfare Reform Act to enable greater self-sufficiency for those families able to work. The Nebraska Legislature did not intend to punish the newborns of poor disabled women without the "capacity to work" and not, at least in the near future, likely to gain employment and become self-sufficient.

This lawsuit demands that the Nebraska Department of Health and Human Services cease applying the "Family Cap" to children of low-income disabled mothers, and for full payment of benefits to these needy children.

QUESTION PRESENTED.

Does the "Family Cap" [1] excluding children from welfare cash assistance, Neb.Rev.Stat. §68-1724(2)(b), apply to children born into families not required to "participate" in the self-sufficiency "program," whose "principal wage earner" is exempt from participating in "work activities" described within a "self-sufficiency contract"?

STATUTE AND REGULATION IN QUESTION.

> "(2) Cash assistance conditions under the Welfare Reform Act shall be as follows:… (b) The payment standard shall be based upon family size. Any child born into the recipient family after the initial ten months of participation in the program shall not increase the cash assistance

[1] This statute is described by the Defendants as a "Family Cap," when in truth it is an exclusion of each covered child from benefits rather than a cap on the benefits paid to the entire family. The Plaintiffs will use the Defendants' term "Family Cap" to refer to this statute throughout this Brief.

payment, except that child support or other income received on behalf of such child or children shall not be considered as countable income to the recipient family in determining the amount of their cash assistance payment." Neb.Rev.Stat. §68-1724(2)(b)(Reissue 1996)

"2-007.01 Family Cap: The family Self-Sufficiency Contract or Non-Time Limited Agreement is based on the number of members in the family unit at the time of application or redetermination… The contract will be revised to include children already conceived at the time of ADC application but born after the contract is signed. The contract will not be revised and no additional ADC cash benefit will be issued to- 1. A new ADC case due to the birth or anticipated birth of a child when the birth occurs or is expected to occur more than ten calendar months after the date of the interview…; or, 2. An existing ADC case when the birth is expected to occur more than ten calendar months after the date of the eligibility interview." 468 NAC 2-007.01 (eff. 12/27/97)

MATERIAL FACTS.

The named plaintiffs and the class they represent are children who live with their parents, and whose older siblings receive ADC. The children in the class were all born more than ten months or more after their parents applied for public assistance benefits. Their parents are exempt from participating in any required self-sufficiency programs. Most parents in the class are exempt from participation requirements because they have been identified as disabled by the federal Social Security program. Other parents in the class are exempt for other reasons such as a disability which will last more than three months, but not rise to the severity of being covered under a Social Security program.

Before the passage of the Nebraska Welfare Reform Act, the birth of an additional child into a family receiving ADC would trigger an additional payment of $71 per month to support that child, based upon a payment standard defined by the state. For example, a mother with one child and no earned income receives a maximum cash assistance payment of $293; the birth of the second child increases the payment to $364 ($71 additional payment). This payment is approximately one-third of the federal poverty level.

The members of the class all have different situations of becoming exempt from participation and the timing of the birth of their children, resulting in one or more to whom the "Family Cap" has been applied.

Named plaintiff Simeyon Evans was born several years after his mother had signed the AChild Exclusion Notification@ form. When his older sister was about four, his mother had lost her job because

tending to her older sons interrupted her work so often. She was beginning the process of applying for disability. She had three case workers in one year also at this same time. She did not want to sign the form. However, with her disability, loss of her job, and her inability to develop a constructive relationship with a case worker, she had no choice except to sign it as a condition of receiving any ADC for her family at that time. At least one of her case workers attempted to require her to participate in work activities. Letters from her mental health counselor and her psychiatrist failed to convince the caseworker that Ms. Evans no longer had the capacity to work. Ms. Evans appealed and received a Finding and Order stating that in fact she no longer had the capacity to work and would be exempt from any participation requirements of the self-sufficiency program. However, when Simeyon was born four years later, she was shocked to find out that indeed, even though no one in her household had the capacity to work, there would not be an increase in their ADC allowance because the "Family Cap" would be imposed on her household.

Tylesha Mason was born May 25, 1999. Her mother, Lisa Cannon was already receiving Social Security Disability payments due to her permanent disability when her older brother was born in 1995. Her family had received ADC since her older sister was born in 1992. Ms. Cannon never had a formal assets assessment and no one ever talked to her about a Aself-sufficiency@ contract because her disability was so apparent. Nonetheless, when Tylesha was born the "Family Cap" was applied to her. It put a very great financial strain on her needy family. When her little brother Fernandez was born fourteen months later the strain was even greater. This five-person family, none of whom have the capacity to work, are in great hardship because of the incorrect imposition of the "Family Cap" on their entire family.

Hannaha White=s mother, Crystal White, was found to be disabled and certified for federal Supplemental Security Income (SSI) after her family began receiving ADC in October, 1997. Hannaha's brother was born in 1996 and Ms. White was able to support her family until several crises in a row brought her long-time symptoms into full activity. Ms. White was required to sign a "Child Exclusion" notification form as a condition of receiving ADC. By 1998, Ms. White's symptoms prevented her from working. Not until January, 1999 was she asked to fill out an "Assets Assessment" form. By then her

disability application was already in progress, and she began receiving SSI in September 1999. When Hannaha was born on January 1, 2000, the "Family Cap" was applied to her. Ms. White filed an administrative appeal of this decision, and received a Finding and Order upholding this decision. Ms. White is not able to support her needy family adequately, and is extremely anxious about how she can support her two children. She believes with therapy she can overcome her disability within two or three years and become self-sufficient, but at this time she remains without the capacity to work.

ARGUMENT.

The Nebraska Welfare Reform Act, Neb.Rev.Stat. §§68-1708 through 68-1734 (2000 Cumm. Supp.), is very clear: the exclusion of subsistence benefits for children born into a family receiving cash assistance ten or more months after the initial ten months of "participation in the program," Neb.Rev.Stat. §68-1724(2)(b) (Reissue 1996) does not apply to the children of those families whose "principal wage earner" is exempt from "participation in the program." This statute is clearly intended solely for those families with the capacity to enter into a "self-sufficiency contract" and participate in its required activities. The actual language of the Nebraska Welfare Reform Act and legislative intent make this abundantly clear. The Defendants are incorrect in arguing to the court that "participation in the program" is the same as simply receiving cash assistance benefits. Rather, the statute and legislative history is clear that such "participation" is to be "actively engaged" in required "work activities" described within a "self-sufficiency contract." As the class members are families in which the "principal wage earner" is exempt from participation in such a "program," the Defendants are unlawfully excluding subsistence benefits for members of the class.

Given this clear policy, it is disturbing to realize the broad brush nature of the Defendants' position. The exclusion of subsistence benefits for the children of parents unable to work and support themselves does not help these families become self-sufficient, the primary policy goal of the Nebraska Welfare Reform Act. In fact, it merely lets very poor families and children become even poorer, places these children at risk, and damages the entire family. The Defendants are engaged in a policy that is at total odds with the Nebraska Welfare Reform Act, and their actions must be stopped.

I. **The plain language of the Nebraska Welfare Reform Act, public policy set by the Nebraska Legislature, requires the "Family Cap" to be applied only to children of mothers required to participate in the self-sufficiency program.**

The Plaintiffs contend a plain reading of the Nebraska Welfare Reform Act, public policy set by the Nebraska Legislature, leads to the inescapable conclusion that children of disabled mothers, the class of Plaintiffs in this matter, are not covered by the so-called "Family Cap."

A statute is open for interpretation to determine its meaning only when the language used may reasonably be considered ambiguous, for example, when the plain meaning of a particular term used in the statute is unclear, or when the plain meaning of the statute is open to varying definitions, all of which may be reasonable. See Affiliated Foods Co-op v. State, 259 Neb. 549, 611 N.W.2d 105 (2000).

The Plaintiffs argue there is no ambiguity as to the applicability of the "Family Cap." Nevertheless, assuming an ambiguity, the interpretation of an ambiguous statute requires the court to determine and give effect to the purpose and intent of the Nebraska Legislature as ascertained from the language of the statute and the legislative history of the act in question. State ex rel. Stenberg v. Moore, 258 Neb. 199, 602 N.W.2d 465 (1999). In interpreting a statute, a court must look to the statute's purpose and provide a reasonable construction which best achieves that purpose, rather than a construction that would defeat it. Thompson v. Kiewit Constr. Co., 258 Neb. 323, 603 N.W.2d 368 (1999). No sentence, clause, or word contained in the statute should be rejected as superfluous if it can be avoided. A & D Tech. Supply Co. v. Nebraska Dept. of Revenue, 259 Neb. 24, 607 N.W.2d 857 (2000). In addition, statutes relating to the same subject matter should be construed together to maintain a consistent and harmonious scheme. Chrysler Corp. v. Lee Janssen Motor Co., 248 Neb. 281, 534 N.W.2d 568 (1995).

Applying these principles, the Nebraska Welfare Reform Act's "Family Cap" provision clearly does not apply to children of mothers not required to participate in the cash assistance self-sufficiency program.

The first requirement of statutory construction is to go to the plain language of the statute itself. "In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an 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).

The Nebraska Welfare Reform Act states that "the 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 a manner as possible, with the goal of attaining such self-sufficiency within two years of the initial receipt of public assistance." Neb.Rev.Stat. §68-1709 (Reissue 1996). This goal "is to be accomplished through individualized assessments of the personal and economic resources of each applicant for public assistance and through the use of individualized self-sufficiency contracts." Id.

The required individualized approach to each family and a resulting self-sufficiency contract is restated several times throughout the Nebraska Welfare Reform Act. The Act requires that "[a]t the time an individual or family applies for financial assistance pursuant to section 43-512 [statute authorizing ADC cash assistance payments], an assessment shall be conducted. Eligibility determination shall begin with a comprehensive assets assessment…" Neb.Rev.Stat. §68-1718(1)(Reissue 1996). The required comprehensive assets assessment determines the "economic and personal resources" of the "applicant" family, Neb.Rev.Stat. §68-1718(1), (2), and (3), in particular an assessment for "barriers to economic self-sufficiency." Neb.Rev.Stat.§68-1718(2)(1996). This assessment then "shall be used (a) 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(emphasis added). The statute makes this point again: "Based on the results of the comprehensive assets assessment under section 68-1718, the applicant and the case manager shall develop a self-sufficiency contract." Neb.Rev.Stat. §68-1719.

The Nebraska Welfare Reform Act continues by requiring that "[u]nder 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)(emphasis added). These "work activities" are further defined in statute. For example, "education" is defined as "general

education development [GED] program, high school, Adult Basic Education, English as a Second Language, or other education programs approved in the contract." Neb.Rev.Stat. §1721(2). "Employment" is defined as "work for pay. The employment may be full-time or part-time but shall be adequate to help the recipient family reach economic self-sufficiency." Id. at §1721(6).

The self-sufficiency contract is also to include an itemization of services "to provide for specific needs critical to the recipient's or the recipient family's self-sufficiency contract," Neb.Rev.Stat. §68-1722, including case management services, transportation, child care, and participation and work expenses.

These work activities and services are then detailed in the self-sufficiency contract, a document signed by both the principal wage earner in the family and the State of Nebraska's caseworker. Neb.Rev.Stat. §68-1720. The Act further requires that the self-sufficiency contract for each individual and family is to help them "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.

Critically important, a failure to participate in the work activities agreed upon in the self-sufficiency contract renders the entire family ineligible for cash assistance: "Cash assistance shall be provided only while recipients are actively engaged in the specific activities outlined in the self-sufficiency contract If the recipients are not actively engaged in these activities, no cash assistance shall be paid." Id. at §1723 (emphasis added). Further, the statute requires that "recipient families 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." Neb.Rev.Stat. §68-1723(2)(emphasis added).

The primary sponsor of the Nebraska Welfare Reform Act made clear the understanding by the Nebraska Legislature of the importance of the individualized assessments and the self-sufficiency contracts for each family:

> "The system changes that are being proposed by this legislation are as follows. 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 be advocating for intensive case management so that we can reduce the caseload to a place where case managers can work in a meaningful way with people on welfare to enhance their skills for independence. We are going to be talking about making work pay by using earnings disregards. 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. and we will be talking about the relationship of jobs that pay as well as jobs that have benefits and the training that we do to get people into those jobs."

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

These provisions clearly enunciated the Nebraska Legislature's intent that the newly reformed cash assistance program, through the above process, enabled those with the "capacity to work" to actively participate in self-sufficiency programs leading to economic self-sufficiency while they are receiving cash assistance from the state. The Nebraska Legislature sought consistently throughout the Act to insure opportunity for economic self-sufficiency and the provision of services to families engaged in activities leading to economic self-sufficiency.

In keeping with this clear intent, the Nebraska Welfare Reform Act consistently exempts families without the "capacity to work" from participation in required work activities as part of a self-sufficiency contract while they are receiving cash assistance. The statute's plain language requires this conclusion, and is stated by the statute several times.

First, the initial assessment process used to create a self-sufficiency requirement requires an assessment of "barriers to economic self-sufficiency," including health care needs. Neb.Rev.Stat. §68-1718(2). This is clearly an assessment for the "capacity to work."

Second, if the "principal wage earner and other nonexempt members of the applicant family" are not required to complete a self-sufficiency contract, they are not "required to participate in one or more" work activities. Neb.Rev.Stat. §68-1721(1).

Third, if this assessment determines that "recipient families with at least one adult"" does not have the "capacity to work," the family is not required to complete and "participate in the self-sufficiency contract as a condition of receiving cash assistance." Neb.Rev.Stat. §68-1723(2).

Read together, this consistent reiteration of these objectives make it abundantly clear the Nebraska Welfare Reform Act does not require participation in self-sufficiency contracts for those families whose principal wage earners do not have the "capacity to work" in order to receive continuing benefits.

The above conclusion is reinforced by the fact these families are also exempt from other conditions placed on cash assistance, such as the time-limits imposed on those required to sign self-sufficiency contracts: "(1) Cash assistance shall be provided for a period or period of time not to exceed a total of two years for recipient families with children subject to the following… (b) The two-year time period for cash assistance shall begin when the self-sufficiency contract is signed…" Neb.Rev.Stat. §68-1724(1)(b)(emphasis added). Since no self-sufficiency contract is required, the time limits do not apply to these families.

Further, if a family has not prepared a signed a self-sufficiency contract, no "sanctions" (the loss of all cash assistance for a period of time based upon a "failure to participate" with the self-sufficiency program) may be imposed. "It is clear that a condition precedent to the applicability of [self-sufficiency program sanctions] is the execution of a self-sufficiency contract. There was not an executed self-sufficiency contract in this case; therefore, the imposition of a sanction… was inappropriate and unauthorized." Order, Jones v. Nebraska DHHS, Case No. CI 00-2511, Lancaster County District Court (March 1, 2001)(Merritt, J.)

The Nebraska Welfare Reform Act set these conditions on cash assistance for the self-sufficiency program featuring self-sufficiency contracts, not on cash assistance generally. Indeed, the Nebraska Legislature candidly recognized the need to continue cash assistance benefits for these "exempt" families. In its legislative declarations, the Nebraska Legislature stated that the welfare system should be reformed by "providing continuing assistance and support for persons sixty-five years of age or over and for

individuals and families with physical, mental, or intellectual limitations preventing total economic self-sufficiency." Neb.Rev.Stat. §68-1709(9)(emphasis added).

The plain language of the Nebraska Welfare Reform Act also leads to the conclusion that the "Family Cap" is a condition only applied to the cash assistance of those "participating" in the self-sufficiency "program." Therefore, the fact the Defendants apply it to all children means it is being unlawfully applied to children of those families "exempt" from participating in work activities required in a self-sufficiency contract.

The term "participation in the program" described in Neb.Rev.Stat. §68-1724(2)(b), clearly refers to the work activities of a self-sufficiency contract formed after an "applicant" completes a comprehensive assets assessment and becomes a "recipient" engaged in a "self-sufficiency contract," not the act of merely receiving cash assistance benefits. This is demonstrated, once again, by a simple review of the clear statutory language.

First, as described above, the "applicant family" without an adult with the "capacity to work" is early on exempted from the conditions placed on cash assistance due to the simple fact they are not required to complete and be "actively engaged" in a self-sufficiency contract. The requirements of the self-sufficiency "program," including the self-sufficiency contract and its conditions on cash assistance, simply do not apply to these families.

Second, the "applicant family" never "participates" in the sense clearly intended by the language of the Act. The use of the term "participation" in the Act consistently refers to the activities required as part of a self-sufficiency contract. For example, the term "to participate" is first used to refer to the required work activities in a self-sufficiency contract. Neb.Rev.Stat. §68-1721(1). This is followed in statute, as described above, by the clear statement that "[r]ecipient families with at least one adult with the capacity to work… shall participate in the self-sufficiency contract as a condition of receiving cash assistance." Neb.Rev.Stat. §68-1723(2) (emphasis added). This section goes on to use the term "participation" repeatedly, consistently referring to the "activities outlined in the self-sufficiency contract." Id. at (2)(b), (d), (e), (f), and (g).

The Act further describes the "responsibilities [the State has] to insure the success of the self-sufficiency contract for each recipient" by referring to the "services [employed] 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 (emphasis added).

Thus, the use of the term "participation" in Neb.Rev.Stat. §68-1724, including the "Family Cap" found at Neb.Rev.Stat. §68-1724(2)(b), is solely with reference to the work activities required as part of a self-sufficiency contract.

This is further buttressed by the use of the term "program" in the statute. The Nebraska Welfare Reform Act at no point defines the term "program" used in Neb.Rev.Stat. §68-1724(2)(b). Nevertheless, the term "programs" is used throughout the Act, and its use is highly instructive.

First, the Act consistently refers to "welfare programs" as the varied subject of its reform initiatives. See, e.g., Neb.Rev.Stat. §68-1709 ("the primary purpose of the welfare programs in this state…", "the best interests… [of] those receiving public assistance through welfare programs in this state…")(emphasis added). This repeated use of the term "programs" is a recognition there is no unitary welfare "program," many different "programs" exist to serve the needs of Nebraska's poor, and reform was needed throughout these "programs."

The Nebraska Welfare Reform Act thus affected many different welfare "programs." For example, the Nebraska Welfare Reform Act includes specific reforms of the Food Stamp program, child care program, and health care for the poor (Medicaid) program. See, e.g., Neb.Rev.Stat. §68-1713(1)(h), (j), and (r).

Second, these reforms included the "dependent children" cash assistance program authorized by Neb.Rev.Stat. §43-504 and §43-512 (Reissue 1996). See, e.g. Neb.Rev.Stat. §68-1713(m), (n), (o), and (p).

Third, this "program" for those applying for "financial assistance pursuant to 43-512 [the ADC program]" was further reformed, to focus on the individual assessment and self-sufficiency contract process for those with the "capacity to work," and to placing conditions on cash assistance for those with

the capacity to work. Neb.Rev.Stat. §68-1718 through §68-1726. In the remainder of the Act, the Legislature returned to the reform of other "programs," such as family resource centers, unemployment, and job training. Neb.Rev.Stat. §68-1727 through §68-1737.

The specific welfare "program" at issue in Neb.Rev.Stat. §68-1724(2)(b) is clearly the self-sufficiency program designed to help families through a comprehensive assets assessment and a self-sufficiency contract. It is <u>not</u> the cash assistance program generally.

The administrative rules adopted by the Defendants to implement the self-sufficiency program also consistently treat "participation" in the "program" as clearly referring to the self-sufficiency contract and its required work activities. For example, the Defendants' implemented rules for the "Employment First (EF) Self-Sufficiency Program" are found at 468 NAC 2-020 et seq (eff. 12/27/97). The first regulation regards "Exemptions from Employment First," defined as "not required to participate in the Self-Sufficiency Contract." 468 NAC 2-020.01 (eff. 12/27/97). These exemptions include "[a] person who-… [i]s incapacitated with a medically determinable physical or mental impairment which… prevents the individual from engaging in employment or training… If the individual is determined to be incapacitated for EF participation, s/he will be placed in the non-time limited group." Id. at (3)(b). In addition, someone who "qualifies for an exemption from participation in EF may elect to volunteer to participate in the program." 468 NAC 2-020.02 (eff. 12/27/97). Plus, the work activities ("components") as part of a self-sufficiency contract are those engaged in by "participants," 468 NAC 2-020.06 (eff. 12/27/97), and aided by supportive services necessary "to permit the individual to participate in any component in Employment First." 468 NAC 2-020.07 (eff. 12/27/97). Most importantly, the rule defining "Non-Participation" ("failing to participate") refers specifically to assessment, self-sufficiency contract, and work-related activities. 468 NAC 2-020.08 (eff. 12/27/97).

II. If continued statutory interpretation is required to address any ambiguity in Neb.Rev.Stat. §68-1724(2)(b), legislative intent is abundantly clear that this statute is only to apply to those families required to "participate" in the self-sufficiency "program," with a "principal wage earner" with the "capacity to work" required to create and "actively engage" in required "work activities" described within a "self-sufficiency contract."

The Defendants' profound mistake in applying the "Family Cap" condition on cash assistance to the Plaintiffs is made even clearer by the legislative history of Neb.Rev.Stat. §68-1724(2)(b)(Reissue 1996). If the plain language of the statute is not enough to establish this basic point, the intent of the Nebraska Legislature is abundantly clear. The legislative history is unambiguous: the "Family Cap" is to be applied only to children of mothers required to sign and participate in a self-sufficiency contract.

The sponsors of the Welfare Reform Act consistently explained that the "Family Cap" would apply to adults who signed self-sufficiency contracts and participated in the state's self-sufficiency program. In fact, the sponsors repeatedly justified the "Family Cap" based upon the fact that no one would be subject to it until she had entered into a self-sufficiency contract with the state in which she acknowledged that her family would be subject to the "Family Cap." For example, the chief sponsor of the Welfare Reform Act, Senator Don Wesely, stated:

> "The idea is you come into ADC, you sign this self-sufficiency contract… Part of the contract is envisioned to say this amount of children that now are in your family would be covered and have this assistance… [I]f, the months after that contract, you bear a child, what we're saying is we signed a contract, we had an understanding of what the conditions were and a decision was made to have another child… there will not be the additional $71."

Floor Debate, LB 1224, 93d Legis., 2d Sess., March 29, 1994, at 11940 (emphasis added). Senator Wesely described the children who would be subject to the "Family Cap" as "those children born after 10 months of the contract." Floor Debate, LB 1224, 93d Legis., 2d Sess., April 11, 1994, at 13043, and reiterated in later debate that the exclusion would affect "a child born after the first 10 months of the self-sufficiency contract." Id. at 13045. The other chief sponsor of the Welfare Reform Act, Senator Jessie Rasmussen, also explained as she fought a proposed amendment to eliminate the "Family Cap": "If we pass this [Family Cap] legislation what we will have is a contract, and under that contract there will be support for the family of size at the beginning of that contract…. What it is saying is we are not going to give the additional $71 for that child born ten months beyond the initiation of the contract." Floor Debate, LB 1224, 93d Legis., 2d Sess., March 29, 1994, at 11951. In further debate on the "Family Cap" during the next year, again in response to efforts to eliminate the "Family Cap," Senator Wesely again

explained the operation of the "Family Cap" as follows: "[S]omebody would come into the welfare office and say, I need ADC, we would negotiate with them and then sign a contract between the state and the individual…. [I]f she should become pregnant after that point, after the contract is signed, ten months or so later she would not get the cash payment." Floor Debate, LB 455, 94th Legis., 1st Sess., May 23, 1995, at 7954. And again: "This doesn't occur until after the individual has signed a contract." Id. at 7967.

The Defendants have ignored this legislative history as they have developed and implemented the "Family Cap."

III. The "Family Cap" rule at 468 NAC 2-007.01 is both wrongly applied by the Defendants to the Plaintiffs, and is a misstatement of Neb.Rev.Stat. §68-1724(2)(b)'s condition on cash assistance.

It is thus inescapable: the statutory directive that the "Family Cap" be applied to children "born into the recipient family after the initial ten months of participation in the program,"Neb.Rev.Stat. §68-124(2)(b), is clearly directed to the families engaged in the work activities of a self-sufficiency contract, not to all children and families receiving cash assistance.

Given this statutory directive, the Defendants' "Family Cap" rule is wrongly applied by the Defendants to the Plaintiffs.

Further, the Defendants' rule itself is a misstatement of the statute. The Defendants' rule states that "[t]he family Self-Sufficiency Contract or Non-Time Limited Agreement is based on the number of members in the family unit at the time of application… The contract will be revised to include children already conceived at the time of ADC application but born after the contract is signed." 468 NAC 2-007.01 (effective 12/27/97)(emphasis added).

The clear inapplicability to those families without self-sufficiency contracts is due to the use of the term "time of application" in the rule rather than the statute's "participation in the program." This misstatement of the statute allows the Defendants to apply the "Family Cap" to all families. It is difficult to understand the Defendants' substitution of one very different term for that used by the Nebraska Legislature. The Nebraska Legislature clearly knew when to use the term "applicant" or "application"; as

described above, it did so in the Nebraska Welfare Reform Act repeatedly. The Nebraska Legislature also knew what it was doing when it used the term "participation in the program," something entirely different than the act of applying for benefits. The Defendants are obviously wrong to use "time of application" rather than "participation in the program" as the defining event in the "Family Cap" rule.

This incorrect rule also causes the incorrect regulatory date regarding the commencement of the ten-month period as the "time of application." In fact, the Nebraska Welfare Reform Act, as described above, requires the "Family Cap" to be a condition on cash assistance only on those families required to prepare and sign a self-sufficiency contract. Thus, the date of this first "participation in the program" must be read to be the commencement of "participation" in the work activities described in the self-sufficiency contract. As this required participation only begins after the signing of a contract completed after a comprehensive assets assessment, this first date is clearly not the "time of application."

IV. The court should give no deference to the Defendants' interpretation of the "Family Cap" statute to apply to all families receiving cash assistance, as their interpretation is plainly erroneous and inconsistent.

There is no dispute the Defendants were given general authority to promulgate rules and regulations regarding the Nebraska Welfare Reform Act. This authority, however, is limited to implementing the policies as enunciated by the Nebraska Legislature, not change the policy. 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)). As a corollary to the foregoing, an administrative agency cannot interpret its rules and regulations in such a manner so that self-interpreted rules and regulations

contravene the statute which the agency is obliged to administer. Dodge County v. Department of Health, 218 Neb. 346, 354 (1984)

Deference to an agency's interpretation of its own regulations is appropriate unless plainly erroneous or inconsistent. A & D Technical Supply Co. v. Nebraska Department of Revenue, 259 Neb. 24, 607 N.W. 2d 857 (2000); See also Schmidt v. State, 255 Neb. 551, 586 N.W. 2d 148 (1998); Inner Harbour Hospitals v. State 251 Neb. 793, 795, 559 N.W. 2d 487 (1997); Slack Nursing Home v. Department of Social Services, 247 Neb. 452, 528 N.W. 2d 285 (1995). The interpretation of regulations presents questions of law according deference to an agency's interpretation of its own regulations, unless plainly erroneous or inconsistent. Vinci v. Nebraska Department of Correctional Services, 253 Neb. 423, 571 N. W. 2d 53 (1997).

A. The Defendants' interpretation is plainly erroneous.

It is plainly erroneous to interpret a rule in such a way that alters, modifies, or enlarges a statute. Clemens v. Harvey, 247 Neb. 77, 80, (1994) In this case, as described above, the Defendants have clearly erred in applying their "Family Cap" rule to all recipients of cash assistance, including the class members, thereby modifying the Nebraska Welfare Reform Act. In addition, the Defendants' "Family Cap" rule misstates the point from which the "Family Cap" is to be applied, also in plain error.

B. The Defendants' interpretation is inconsistent.

The Defendants' position is highly inconsistent as well. Even assuming the Defendants are applying the "Family Cap" to all families to fulfill the Nebraska Welfare Reform Act's primary public policy goal of helping families attain economic self-sufficiency, the Defendants cannot explain away a serious inconsistency with the Nebraska Welfare Reform Act's companion requirement to provide continuing assistance and support for families with physical, mental, and intellectual limitations. Neb.Rev.Stat. §68-1709(9) (Reissue 1996). The Plaintiffs are children of mothers with permanent disabilities, with a need for continuing assistance due to their mother's disability. In contrast with children of mothers able to work, who are allowed by state regulation to earn income sufficient to go off welfare assistance, reapply six months later, and then gain benefits for their excluded children, see 468

NAC 2-007.01B (eff. 12/27/97), these children will never be eligible for cash assistance- unless their family goes without continuing assistance. The Defendants' position causes effectively a life-time ban on cash assistance for children of disabled mothers, when children of mothers able to work become eligible for assistance at a later date. This is, at best, an inconsistent position by the Defendants, given public policy stated by the Nebraska Legislature.

V. Conclusion.

The Defendants have unlawfully applied the "Family Cap" to children of disabled mothers. The Defendants must be ordered to cease applying the "Family Cap" to children of low-income disabled mothers, and for full payment of benefits to these needy children.

Dated: June 11, 2001

Respectfully submitted,

Tylesha Mason and Fernandez Mason, by and through Lisa Cannon as their next friend, Hannaha White, by and through Crystal D. White as her next friend, and Simeyon Evans, by and through Andrea Evans as his next friend, and all others similarly situated, Plaintiffs.

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CERTIFICATE OF SERVICE

This is to certify that a copy of this Trial Brief was delivered via hand delivery to counsel for the Defendants, Royce Harper, Assistant Attorney General, 2001 State Capitol, Lincoln, NE 68509, on Monday, June 11, 2001.

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