Case No. S-01-001265

In the Supreme Court of the State of Nebraska

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STATE OF NEBRASKA,
NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, and
RON ROSS, Director

Defendants-Appellants,

v.

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, and on behalf of all others similarly situated,

Plaintiffs-Appellees.

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APPEAL FROM THE DISTRICT COURT OF
LANCASTER COUNTY, NEBRASKA

Honorable Paul D. Merritt, District Judge

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BRIEF OF APPELLEES

_____0_____

Prepared and submitted by:

Rebecca L. Gould #22246
D. Milo Mumgaard #19919
Nebraska Appleseed Center
For Law in the Public Interest
Welfare Due Process Project
941 O' Street, Suite 105
Lincoln, NE 68508
Tel: (402) 438-8853

Martha F. Davis #D7630
Geoffrey A. Boehm #B7956
NOW Legal Defense and
Education Fund
395 Hudson Street, 5th Floor
New York, New York 10014
Tel: (212) 925-6635

Sue Ellen Wall #21552
941 O Street, Suite 920
Lincoln, NE 68508
Tel: (402) 438-8815

Susan A. Koenig #16540
1266 South 13th Street
Omaha, NE 68108
Tel: (402) 346-1132

Attorneys for Appellees

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BASIS FOR THE JURISDICTION OF THE SUPREME COURT

The Appellees accept the Appellants' basis for jurisdiction as correct.

STATEMENT OF THE CASE

1. The Nature of the Case. The Appellees accept the Appellants' description of the Nature of the case as correct.

2. The Issues Tried in the Court Below. The issue tried by the District Court was whether Neb. Rev. Stat. § 68-1724(2)(b), referred to as the Family Cap, applies to recipient families whose primary wage earner is unable to work and is therefore exempt from participation in the Self-Sufficiency program.

3. Disposition of the Issues by the Court Below. The District Court held that the phrase "participation in the program," as it appears in Neb. Rev. Stat. § 68-1724(2)(b), refers to families whose primary wage earner is taking part in the Self-Sufficiency program. Moreover, the court held that application of the Family Cap to Appellees and the class they represent is inconsistent with the legislative intent and purpose of the Welfare Reform Act, and that such application exceeds the statutory authority granted to Appellants by the Nebraska Legislature.

4. Scope of Review. "A judgment or final order entered by a district court in a judicial review pursuant to the Administrative Procedure Act may be reversed, vacated, or modified by an appellate court for errors appearing on the record." Davis v. Wimes, 263 Neb. 504, 506, 641 N.W.2d 37, 40 (2002) (citations omitted). "When reviewing an order of a district court under the Administrative Procedure Act for errors appearing on the record, the inquiry is whether the decision conforms to the law, is supported by competent evidence, and is neither arbitrary, capricious, nor unreasonable." Id.

"Statutory interpretation presents a question of law. When reviewing questions of law, an appellate court has an obligation to resolve the question independently of the conclusion reached by the trial court." Sydow v. City of Grand Island, 263 Neb. 389, 394, 639 N.W.2d 913, 919 (2002) (citations omitted).

PROPOSITIONS OF LAW

1. "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." Sydow v. City of Grand Island, 263 Neb. 389, 397, 639 N.W.2d 913, 921 (2002) (citations omitted).

2. "If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning." First Data Corp. v. State, 263 Neb. 344, 639 N.W.2d 898 (2002) (citations omitted).

3. "Cash assistance conditions under the Welfare Reform Act shall be as follows:…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 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) ("Family Cap").

4. "As a condition of eligibility for aid for children included in section 43-504, a partially or totally unemployed parent or needy caretaker shall participate in the employment preparation or training program for aid to dependent children, unless

considered exempt under rules and regulations adopted and promulgated by the Director of Health and Human Services." Neb. Rev. Stat. § 43-504.01 (Reissue 1996).

5. "Exemptions for Employment First: The following individuals are not required to participate in the Self-Sufficiency Contract. A person who-

> …is incapacitated with a medically determinable physical or mental impairment which, by itself or in conjunction with age, prevents the individual from engaging in employment or training and which is expected to exist for a continuous period of at least three months….If the individual is determined to be incapacitated for EF [Employment First] participation, s/he will be placed in the non-time limited benefit group….

468 NAC 2-020.01(3)(b) (effective March 25, 2001).

6. "A statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous." Sydow v. City of Grand Island, 263 Neb. 389, 397, 639 N.W.2d 913, 921 (2002) (citations omitted).

7. "In construing a statute, a court must look at the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then place on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose." In re Interest of DeWayne G. & Devon G., 263 Neb. 43, 52, 638 N.W.2d 510, 518 (2002).

8. "The primary objective of the WRA 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…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. The Legislature further finds and declares that it is in the best interests of the state, its citizens, and especially those receiving public assistance through welfare programs in this state that the welfare system be reformed to support, stabilize, and enhance individual and family life in Nebraska 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 (Reissue 1996).

9. "The components of a series or collection of statutes pertaining to a certain subject matter may be conjunctively considered and construed in pari materia to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible." In re Interest of DeWayne G. & Devon G., 263 Neb. 43, 52, 638 N.W.2d 510, 518 (2002).

10. "When a statutory term is reasonably considered ambiguous, a court may examine the legislative history of the act in question in order to ascertain the intent of the Legislature." Sydow v. City of Grand Island, 263 Neb. 389, 397, 639 N.W.2d 913, 921 (2002) (citations omitted).

11. "It is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state." Continental Western Ins. Co. v. Conn, 262 Neb. 147, 157, 629 N.W.2d 494, 501 (2001), (quoting Clemens v. Harvey, 247 Neb. 77, 82, 525 N.W.2d 185, 189 (1994)).

12. "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, 525 N.W.2d 185, 187 (1994) (quoting State ex rel. Spire v. Stodola, 228 Neb. 107, 421 N.W.2d 436 (1988)).

13. "The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for purposes of the challenged governmental action. Absent this threshold showing, one lacks a viable equal protection claim." Benitez v. Rasmussen, 261 Neb. 806, 817, 626 N.W.2d 209, 219 (2001) (citations omitted).

14. "The dissimilar treatment of dissimilarly situated persons does not violate equal protection rights." State v. Atkins, 250 Neb. 315, 320, 549 N.W.2d 159, 163 (1996) (citations omitted).

STATEMENT OF FACTS

The named Appellees and the class they represent are children who live with their parents, and whose older siblings receive Aid to Dependent Children (ADC) cash assistance. The children in this class were all born more than ten months after their parents applied for ADC cash assistance. Their parents are exempt from participating in the Employment First Self-Sufficiency program (hereinafter Self-Sufficiency Program) due to a long-term or permanent disabilities which prevent employment. Most of the

parents in the class are exempt from participation requirements because they have been identified as disabled by the federal Social Security Administration.

Prior to the passage of the Nebraska Welfare Reform Act (WRA), the birth of an additional child into a family receiving ADC would trigger an additional payment of approximately $71 per month to support the child. Now, under the WRA, these children are subjected to the Family Cap, which does not increase the family's cash grant to cover children born more than ten months after the family applies for ADC cash assistance.

Appellees Tylesha Mason (Tylesha) and Fernandez Mason (Fernandez) are the children of Lisa Cannon (Lisa). Due to a permanent disability resulting from undiagnosed scoliosis, Lisa has received federal Supplemental Security Income (SSI) since 1992. (17:18-25, 18:1-3). "To receive SSI, an individual must be unable to engage in any substantial gainful activity by reason of a medically determinable physical or mental impairment which has lasted or can be expected to last for a continuous period of not less than 12 months." (E5, 6:44, Appendix). Lisa's scoliosis prevents her from being able to stand for more than four (4) hours at a time and occasionally causes muscles spasms which render her unable to walk for several days. (18:18-21).

In 1992, Lisa gave birth to her daughter Marquesha, and began receiving ADC six months later. (19:7-14). In 1999 Tylesha was born and Marjorie Cook, the family's caseworker, sent a speednote notifying Lisa that "due to the child exclusion act, that went into effect 10-1-97, children conceived after October 1997 will not be added to the ADC grant payment." (E9, 1:22, Appendix). Because Tylesha was born after October 1997, she was not included in the family's ADC grant. Fernandez was born in July of 2000 and again, in accordance with the Family Cap policy, the family's ADC grant was not

increased. (23:16-22). Because of her disability, Lisa has never had a comprehensive assessment or been asked to sign a Self-Sufficiency Contract. (20:14-16, 21:4-10).

Appellee Hannaha White (Hannaha), is the daughter of Crystal White (Crystal). Crystal suffers from severe Anxiety and Panic Disorder which at times renders her physically incapacitated with seizure-like symptoms. (E5, 3-4:44, Appendix). As a result of her disability, Crystal has received SSI payments since September of 1999. (E5, 2:44, Appendix). Crystal began to receive ADC for her son Matthew in October of 1997, signed a child exclusion form, and at that time did not plan to have any more children. (E5, 4:44, Appendix). On January 1, 2000, Hannaha was born and the family's ADC grant did not increase due to the Family Cap policy. (E5, 2:44, Appendix). Crystal has never signed a Self-Sufficiency contract or participated in the Self-Sufficiency program. (E5, 7:44).

Appellee Simeyon Evans (Simeyon) is the son of Andrea Evans (Andrea). Andrea suffers from severe Anxiety Disorder which prevents her from working. *District Court Opinion*, p. 3. In the fall of 1998, Andrea began to receive SSI payments as a result of her disability. Id. Simeyon was born more than ten months after the Evans family applied for ADC and as a result was found ineligible for ADC because of the Family Cap. Id.

ARGUMENT

Needy children of low-income disabled parents across Nebraska are being unjustly denied necessary Aid to Dependent Children (ADC) cash assistance by Appellants. Appellants have incorrectly applied the policy known as the Family Cap to

children whose parents are unable to be participants in the Employment First Self-Sufficiency program due to a long-term or permanent disability.

In the mid-1990's the Nebraska Legislature passed the Welfare Reform Act, which dramatically changed welfare in Nebraska. The WRA included a Family Cap provision, which prohibits cash assistance grants to children born ten or more months after the family begins "participation in the program." Neb. Rev. Stat. § 68-1724(2)(b) (Reissue 1996). In passing the WRA, the Nebraska Legislature clearly expressed, in the statute itself and in the legislative history, that the Family Cap applies only to those families who are participants in the Self-Sufficiency program.

The District Court correctly held that the Family Cap is only to be applied to those families participating in the Self-Sufficiency program. *District Court Opinion*, p. 10. The plain language of the Family Cap provision provides that the "Cap" only applies to participants in the Self-Sufficiency program. Moreover, the purpose, structure, and the legislative history clarify that the Nebraska Legislature never intended the Family Cap to apply to children of parents who are exempt from participation in the Self-Sufficiency program due to a long-term or permanent disability. By applying the Family Cap to ADC recipients who are not participants in the Self-Sufficiency program, the Appellants have exceeded the authority granted them by the Legislature.

I. THE PLAIN MEANING OF SECTION 68-1724(2)(b) REQUIRES THAT THE FAMILY CAP BE APPLIED ONLY TO CHILDREN WHOSE PARENTS ARE PARTICIPANTS IN THE EMPLOYMENT FIRST SELF-SUFFICIENCY PROGRAM.

This Court has continually recognized the principle that "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." Sydow v. City of Grand Island, 263 Neb. 389, 397, 639 N.W.2d 913, 921 (2002) (citations omitted). "If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning." First Data Corp. v. State, 263 Neb. 344, 639 N.W.2d 898 (2002) (citations omitted).

This case rests on the meaning of the phrase "participation in the program" found in the Family Cap provision:

> Cash assistance conditions under the Welfare Reform Act shall be as follows:…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 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) (emphasis added).

Before delving into the plain meaning analysis, it is helpful to consider the structure of the ADC system. Eligibility for ADC is determined under Neb. Rev. Stat. § 43-504, which is not part of the WRA:

> As a condition of eligibility for aid for children included in section 43-504, a partially or totally unemployed parent or needy caretaker *shall participate* in the employment preparation or training *program* for aid to dependent children, *unless considered exempt* under rules and regulations adopted and promulgated by the Director of Health and Human Services.

Neb. Rev. Stat. § 43-504.01 (Reissue 1996) (emphasis added).

This statute creates two categories of ADC recipients: the Self-Sufficiency program participants and those exempt from participation because they lack the capacity to work. Appellees are exempt under the following regulation:

> Exemptions for Employment First: The following individuals are not required to *participate* in the Self-Sufficiency Contract.
>
> …A person who-…is incapacitated with a medically determinable physical or mental impairment which, by itself or in conjunction with age, prevents the individual from engaging in employment or training and which is expected to exist for a continuous period of at least three months….If the individual is determined to be incapacitated for EF [Employment First] *participation*, s/he will be placed in the non-time limited benefit group….

468 NAC 2-020.01(3)(b) (effective March 25, 2001).

Appellants concede that Appellees are not required to participate in the Self-Sufficiency program. *Appellants' Brief*, p. 17. Moreover, Appellants acknowledge that Appellees do not sign Self-Sufficiency Contracts and are only required to sign a WP-9a, a form for ADC recipients who are exempt from participation in the Self-Sufficiency program. Id. A comparison of the Self-Sufficiency Contract and the WP-9a shows that the Family Cap is a term of the Self-Sufficiency Contract, but not a term contained in the WP-9a form. *See* (E7 1:44-45, Appendix) and (E8 1-2:45, Appendix). Therefore Appellees and the class they represent do not sign contracts which include the Family Cap.

While the WRA has some impact on both participants and those exempt from participation, Appellants agree that the majority of the WRA's provisions only apply to families actively participating in the Self-Sufficiency program. *Appellants' Brief*, p. 16. The plain language of the statute clarifies which provisions apply to participants in the Self-Sufficiency program and which sections apply to all ADC recipients, including those exempt from participation in the Self-Sufficiency program.

Neb. Rev. Stat. § 68-1724(2) begins with: "Cash assistance conditions under the Welfare Reform Act shall be as follows:." Appellants argue that this introductory clause leads to the conclusion that all the provisions that follow apply to all ADC recipients. *Appellants' Brief*, p. 14. However, this conclusion ignores the language of the subsections that follow, most of which limit their application to specific groups of ADC recipients. Subsection (a) provides a definition for the phrase "adults in recipient families." Neb. Rev. Stat. § 68-1724(2)(a) (Reissue 1996). Clearly this provision does apply to all ADC recipients. Also, subsection (c), which requires that all adults in recipient families ensure that their children attend school, does not contain any language or reference that would limit its application. Neb. Rev. Stat. § 68-1724(2)(c) (Reissue 1996).

However, subsection (d) applies only to "Two-parent families." Neb. Rev. Stat. § 68-1724(2)(d) (Reissue 1996). Subsection (e) applies only to "minor parents." Neb. Rev. Stat. § 68-1724(2)(e) (Reissue 1996). Subsection (f) applies only to "adults who are not biological or adoptive parents or stepparents of the child or children in the family." Neb. Rev. Stat. § 68-1724(2)(f) (Reissue 1996). These examples clearly illustrate that not all of the subsections apply universally to all ADC recipients.

Subsection (b), the section at issue in this case, contains two sentences. The first sentence, "[t]he payment standard shall be based upon family size," does not contain any language limiting its application and therefore applies to all ADC recipients. Neb. Rev. Stat. § 68-1724(2)(b) (Reissue 1996). However, the second sentence, which creates the "Cap" on payments, does contain language limiting its application: "Any child born into the recipient family after the initial ten months of *participation in the program* shall not increase the cash assistance payment…." Id. The plain meaning of the Family Cap provision is clear and unambiguous. By using the phrase "participation in the program," the Legislature expressed its intent that only ADC recipients who are participating in the Self-Sufficiency program are to be subject to the Family Cap. Appellants admit that Appellees are not required to participate in the Self-Sufficiency program or sign Self-Sufficiency Contracts. *Appellants Brief*, p. 17. Because the Appellees are exempt from participation, they are also exempt from the Family Cap.

II. EVEN IF THE FAMILY CAP PROVISION IS AMBIGUOUS, THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE PURPOSE, STRUCTURE, AND LEGISLATIVE HISTORY ILLUSTRATE THAT IT WAS THE INTENT OF THE NEBRASKA LEGISLATURE THAT THE FAMILY CAP ONLY APPLY TO FAMILIES THAT ARE PARTICIPANTS IN THE SELF-SUFFICIENCY PROGRAM.

It is a long standing principle of statutory interpretation that "[a] statute is open for construction when the language used requires interpretation or may reasonably be considered ambiguous." Sydow v. City of Grand Island, 263 Neb. 389, 397, 639 N.W.2d 913, 921 (2002) (citations omitted). Should this Court decide that the phrase "participation in the program" in the Family Cap provision is ambiguous, the purpose, structure, and legislative history clarify that the Family Cap only applies to families who are participants in the Self-Sufficiency program.

A. Limiting the application of the Family Cap to participants in the Self-Sufficiency program best achieves the objectives of the WRA.

When construing an ambiguous statute, this Court looks to "the statutory objective to be accomplished, the problem to be remedied, or the purpose to be served, and then places on the statute a reasonable construction which best achieves the purpose of the statute, rather than a construction defeating the statutory purpose." In re Interest of DeWayne G. & Devon G., 263 Neb. 43, 52, 638 N.W.2d 510, 518 (2002).

The primary objective of the WRA:

> … 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…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. The Legislature further finds and declares that it is in the best interests of the state, its citizens, and especially those receiving public assistance through welfare programs in this state that the welfare system be reformed to *support, stabilize, and enhance individual and family life* in Nebraska 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 (Reissue 1996) (emphasis added). The position of Appellees and the District Court--that the Family Cap provision applies only to participants in the Self-Sufficiency program--best achieves the purpose of the WRA.

The Family Cap increases the risks of hunger, homelessness, and deprivation of other basic necessities. For the members of the Appellees' class, who are disabled and unable to work, the Family Cap causes extraordinary hardship and greater damage than it does to other families receiving welfare. The hardships caused by the application of the Family Cap to families of disabled adults run directly contrary to the stated purposes of the Welfare Reform Act to provide "continuing assistance and support for…individuals and families with physical, mental, or intellectual limitations preventing total economic self-sufficiency." Neb. Rev. Stat. § 68-1709(9) (Reissue 1996).

1. Families subject to the Family Cap face housing problems and hunger

Families who find it necessary to depend on welfare are generally on the edge of intense suffering due to hunger, homelessness, and the deprivation of basic necessities. See, e.g., Kathryn Edin & Laura Lein, Making Ends Meet: How Single Mothers Survive Welfare and Low-Wage Work 58-59 (1997). A family's level of material hardship varies according to the level of benefits that they receive. See id. at 59. There is no question that depriving a child of all monetary support when he or she is born into an already struggling family that receives welfare is likely to cause that child serious harm and increase the level and intensity of hardship for the rest of the family. See id.

By any measure, a full welfare grant to a family in Nebraska, even if a member of the family receives Supplemental Security Income, leaves them with far less than the minimum income necessary to meet their basic needs. According to the Bureau of Business Research, the minimum necessary expenditures for the basic needs of a Nebraska family of three is approximately $3137 per month in metropolitan areas or $2573 in non-metropolitan areas. Lisa Darlington, A Livable Wage: What Does it Take

to Get By in Nebraska?, Business in Nebraska, July/Aug. 2000 (Bureau of Business Research, Lincoln, Neb.), available at http://www.bbr.unl.edu/BINLEADS/binjulyaug2000.pdf. A 1997 study, adjusted for inflation to 2002, found that the monthly budget for "a minimally decent standard of living" for a family of three was $2054 in metropolitan areas or $1925 in non-metropolitan areas. Patricia E. Funk, Economic Self-Sufficiency: The Minimum Cost of Family Support in Nebraska, 1997 13-14 (Nebraska Appleseed Center, Feb. 1998) (Minimum budgets in 1997 of $1854 and $1738 are adjusted to 2002 dollars based upon the Consumer Price Index. Bureau of Labor Statistics, U.S. Dep't of Labor, Consumer Price Index, available at http://stats.bls.gov/cpi/.). However, a family of three on ADC, if they are receiving a full grant because no one is denied benefits due to the Family Cap, receives only $364 in ADC benefits each month, a fraction of the minimal costs of living. NAC 3-008-07B5, App. 468-000-209.

Families struggling to survive on limited benefits are even more likely to suffer from inadequate or unsafe housing, lack of sufficient food, and other shortages of basic necessities where the only adult(s) in the family are disabled. Although SSI may be available, the higher benefit levels available under the SSI system are only expected to make up for the recipients' higher expenses, providing enough for the recipients' "basic necessities of food, clothing and shelter." Social Security Administration, Management of the Supplemental Security Income Program: Today and in the Future (Oct. 8, 1998), available at http://www.ssa.gov/reports/ssi/intro.htm. SSI is "a program of last resort, [that] targets those who are the neediest. The vast majority of the people who receive SSI

benefits are too limited by their disabilities or too elderly to be expected to provide fully for their own needs." Id.

Nebraska families relying on welfare, even where the parent receives SSI (which provides approximately $545 monthly), still fall below the poverty level and below the minimum income necessary to meet their basic needs. 20 C.F.R. §§ 416.401-.435 (2002); Social Security Admin., SSI Payment Amounts, 1975-2002, at http://www.ssa.gov/OACT/COLA/SSIamts.html; U.S. Census Bureau, Poverty Thresholds for 2001, at http://www.census.gov/hhes/poverty/threshld/thresh01.html (last revised Jan. 22, 2002); see also, e.g., Darlington, supra; Funk, supra. A family of three in Nebraska, with a single parent on SSI and both children receiving ADC, receives no more than $838 monthly, which is 41 to 44% of the minimum cost to maintain a "minimally decent standard of living," Funk at 2, or 72% of the federal poverty threshold. U.S. Census Bureau, supra. Neither figure, however, takes into account the greater expenses that may arise because the parent of the family is disabled. Some of the additional costs for a disabled parent and her family may include: high electric bills because of medical equipment; payments for a van with a wheelchair lift; over-the-counter nutritional supplements; or computers to enable someone with limited speech to communicate her basic needs, thoughts, and ideas. See, e.g., Institute for Child Health Policy, SSI Briefing Book, http://www.ichp.edu/ssi/materials/briefing/3_ssiprog.pdf (last visited Apr. 8, 2002). Families of disabled parents where one or more children are denied ADC benefits under the Family Cap law, such as the families of Appellees, are even more likely to have difficulty meeting their basic needs. The family of Appellee Hannah White, for example, receives only $754 for her family of three because her disabled mother receives SSI but

Hannah has been excluded from assistance under the Family Cap. (E4, 6:43-44, Appendix).

When a child is denied benefits under the Family Cap, the shortages and likelihood of hunger and other harm increase. A recent survey of welfare recipients confirms that families who experience a reduction in their welfare benefits—as is experienced by members of a recipient family into which an excluded child is born—suffer substantial hardship. New Jersey Poverty Research Institute, Legal Services of New Jersey, Assessing Work First: What Happens After Welfare? (1999). According to the survey, nearly four out of five (79.8%) families who experienced a reduction or termination of benefits reported that they were not able to support themselves and their households financially after the reduction. Id. at 41. More than one out of three (36.4%) reported that they could not sufficiently clothe themselves or their families after the reduction or termination, almost one in three (32.7%) reported an inability to sufficiently feed themselves or their families, nearly one in six (16.5%) reported that they or their family members did not receive necessary health care, nearly one in six (15.8%) lost their housing, more than one in ten (10.3%) reported that they placed their children outside of their homes, and almost one in ten (9.1%) reported exposure to a greater risk of violence or abuse. Id. at 54. It is clear that all needy families deprived of benefits for a child suffer devastating harm.

For example, housing is a serious issue for all families receiving welfare. Decent housing is essential to the health and safety of families with children; without a safe place to live, it becomes difficult for children to grow properly, physically and emotionally, and for adults to parent their children. Poor housing is more likely to have elevated lead

levels and other conditions that may harm children's health. See, e.g., Robert P. Clickner et al., U.S. Dep't of Housing and Urban Development, National Survey of Lead and Allergens in Housing: Final Report 3-5 to 3-7 (2001), http://www.hud.gov/lea/Vol1finalreport.pdf. Homelessness makes it more difficult for children to acquire a decent education. See, e.g., National Coalition for the Homeless, Education of Homeless Children and Youth (2001), http://www.nationalhomeless.org/edchild.html.

Appellee families, even if they receive SSI and ADC for all but one excluded child, do not receive sufficient income to pay for decent housing in any part of the state. The fair market rent for a two-bedroom apartment in Nebraska is $536 to $608 in metropolitan areas and $410 to $525 in non-metropolitan areas, according to the U.S. Department of Housing and Urban Development (hereinafter HUD). 66 Fed. Reg. 23,804-06 (May 9, 2001). Furthermore, for some families of three, depending on the age and gender of the children, HUD public housing programs may require a minimum of three bedrooms. The fair market rent for such an apartment in this state is $668 to $797 in metropolitan areas and $524 to $690 in non-metropolitan areas. Id.; Funk at 13-14.

Because grants do not cover the costs of decent housing, it is often necessary for families on welfare to live in unsafe, unstable, or overcrowded housing. Despite the recommendation of HUD that families spend 25 to 30% of their income on rent, HUD, Renter's Kit, at http://www.hud.gov/renting/index.cfm (last updated Mar. 4, 2002), it is necessary for most families receiving ADC and/or SSI to pay far more than 30% of their income in order to secure any housing. Indeed, some pay nearly all their income in rent, requiring that the family forego other necessities.

Given the housing situation faced by poor families in Nebraska, any minor setback—such as the birth of a child denied benefits by the Family Cap—can push the family over the edge, increasing the risk of homelessness or of inadequate, unsafe, or overcrowded housing. For a family trying to make ends meet in non-subsidized housing and already paying most of their income toward rent, the birth of a new baby without any additional income to meet that baby's material needs will mean that there is less money for housing at a time when there is an additional person to be housed. Meeting one more child's needs can easily mean the difference between having enough money to pay the rent and an eviction notice. For those families sharing housing with friends or relatives, the birth of a new baby will often mean that the family has become too large to stay in shared quarters and may no longer be welcome, especially if they cannot contribute more money to the shared housing costs.

Lisa Cannon testified that after her two children were born and subjected to the Family Cap, she has had to cope with "almost getting bills cut off, behind on rent, but I eventually got it caught up, a lot of stuff that I had to get behind on for, like two months, then I have to catch it back up with my money two months later. So I've kind of been playing jeopardy with my money." (29:2-6).

Similarly, the denial of cash benefits resulting from the Family Cap increases the risk of hunger for the excluded child and her family. For most families in Nebraska, Food Stamps are not adequate to provide food for the entire month. Food Stamps provides $341 or less monthly for a family of three. NAC App. 475-000-201. For example, the family of Appellee Hannah White receives $176 in food stamps for a family of 3 (E4, 6:43-44, Appendix), and the family of Appellees Tylesha and Fernandez Mason

receive $295 in food stamps for a family of five. (33:14). Yet the low-cost food plan of the U.S. Department of Agriculture (USDA)—the lowest cost USDA plan that would provide a nutritionally healthy diet, Funk, supra, at 11—costs a family of three, such as Crystal White's approximately $386 per month and a family of five such as Lisa Cannon's approximately $581. Center for Nutrition Policy and Promotion, U.S. Dep't of Agriculture, Official USDA Food Plans: Cost of Food at Home at Four Levels, U.S. Average, February 2002, http://www.usda.gov/cnpp/FoodPlans/Updates/foodfeb02.PDF; see also Funk, supra, at 11-12.

Not all families on ADC experience hunger, but it is more likely that families that do not receive benefits for all their members will be among those unable to provide sufficient food for those members. See Edin & Lein, supra, at 25. According to the low-cost food plan of the USDA, an additional child in a family adds $88.40 to $171.60 in food costs per month (increasing as the child grows older). U.S. Dep't of Agriculture, supra. Although the normal ADC benefit increase of $71 per family member, plus the corresponding increase in food stamps, might meet most of a child's nutritional needs, the absence of that $71 when a child is excluded from ADC can be expected to leave all the members of the family at greater risk of hunger and undernutrition. Furthermore, Appellants' application of the Family Cap to families of disabled parents denies benefits to the child as long as she remains in the household, so, according to the USDA plan, the hardship and hunger in the family is likely to increase further over time as the children in the family grow and the costs of meeting their nutritional needs increase.

Even with the availability of Food Stamps and Women, Infants and Children (WIC), families without sufficient cash income are unable to purchase food of adequate

quality and quantity. E.g., Denise F. Polit et. al, Manpower Demonstration Research Corp., Food Security and Hunger in Poor, Mother-Headed Families in Four U.S. Cities (2000), http://www.mdrc.org/Reports2000/UrbanChange/FoodSecurityHunger.htm. Studies of nutritional deficiency, or undernutrition, among poor children confirm the likelihood that the denial of incremental welfare benefits to children born into families receiving welfare—who are already struggling to provide adequate food for all family members—will result in the increased prevalence of hunger and undernutrition, and a decline in dietary quality. See, e.g., Polit, supra. When Lisa Cannon was asked "Have you been able to buy enough formula for Fernandez to get the amount of formula that he needs?" she responded, "Not really, not really." (27:21-23). When asked about diapers Ms. Cannon explained "well, I call a lot of – a couple of church organizations in my area, they kind of came out and helped me with – like when I ran out of food or diapers." (27:12-15).

Hunger and undernutrition in and of themselves are harmful to children and adults. In addition, repeated periods of inadequate nutrition can lead to permanent damage to children's health in the form of cognitive impairments, physical weakness, anemia, stunting, and growth failure. See, e.g., Center on Hunger and Poverty, Statement on the Link Between Nutrition and Cognitive Development in Children (1998), http://www.centeronhunger.org/pubs/cognitive.html. Specifically, the denial of support for a newborn baby puts that baby at risk of nutritional deficit at the most important time for brain growth. David E. Barrett & Deborah A. Frank, The Effects of Undernutrition on Children's Behavior 189-193 (1987). Consequences of undernutrition in early childhood include increased vulnerability to infection, decreased learning capacity, and

increased vulnerability to lead intoxication. Center on Hunger and Poverty, supra. Iron deficiency, a particular risk when dietary quality declines, has been specifically correlated with behavioral and academic problems as well as long-term developmental problems. Id.

2. Families subject to the Family Cap face other hardships and shortages

In addition to hunger and homelessness, the denial of benefits to a child or children in the family is likely to lead to utility shut-offs, lack of adequate winter clothing, and lack of medical care when needed, especially with respect to over-the-counter medicine like Tylenol and cold medications. See Edin & Lein, supra, at 28-29. A family's basic needs include not only food and housing, but also transportation, clothing, health care, and childcare. Darlington, supra; Funk, supra, at 9.

In this state, the minimum monthly cost for transportation for a family of three is approximately $150 in metropolitan areas and $198 in non-metropolitan areas. Funk, supra, at 18 (adjusted to 2002 dollars based upon the Consumer Price Index). Even if work-related travel is excluded (because the Plaintiff class includes adults who do not have the capacity to work), the minimum non-work travel costs are $90 (metropolitan) or $119 (non-metropolitan). Id. (as adjusted). Transportation costs cover the expense of taking children to doctors, childcare, and other necessary appointments and tasks such as shopping for groceries. Darlington, supra.

Clothing and household items (such as cleaning and home maintenance supplies and household furnishings) are also necessary expenses. Darlington, supra; Funk, supra, at 20. Monthly clothing and household expenses for a minimally decent standard of living average $92 for families in metropolitan areas of Nebraska and $90 in non-

metropolitan areas. Funk, supra, at 20-21 (as adjusted). Minimum telephone costs are $27 in metropolitan areas and $23 in non-metropolitan areas. Id. (as adjusted). Minimal health care costs, including health care services and supplies (such as dental and eye care) but excluding health care premium costs (because families receiving ADC will, presumably, be eligible for Medicaid) average $50 to $53 for a mother and $30 to $32 for each child. Id. at 14-15 (as adjusted).

A family relying on welfare often cannot afford even these minimum expenses. If a family cannot afford transportation, they may neglect health care or miss other necessary appointments. If they cannot afford over-the-counter medications or appropriate winter clothing, they are more likely to get sick. A family without telephone service will have trouble contacting doctors or schools or reaching help in case of emergency.

Families relying on welfare are likely to suffer some of these hardships even if they receive a full grant. When a baby is born into the family and excluded from ADC, the likelihood of harm to the family increases further. For example, a newborn baby will, of course, need diapers and other appropriate supplies. In the absence of any cash assistance for a baby subject to the Family Cap, all the costs for those items will have to come out of the other family members' cash assistance. Similarly, clothing needs of the child, as a baby and when she is older, must be met without any increase in cash for her. The minimum cost of clothing and footwear for an additional child is approximately $44 to $47 per month. Funk, supra, at 21 (as adjusted). Without any assistance to pay those costs, families are likely to keep using clothing and footwear that is inappropriate for the weather, leaving children colder and at greater risk of illness. Lisa Cannon testified that

since the birth of Fernandez, her second child subjected to the Family Cap, "I haven't been able to really buy any clothing. It's like my son's – My son that's four years old, I've been kind of using his clothes to rotate on my daughter and him." (27:16-18).

"The denial of welfare benefits for additional children solely because they are born while the family receives welfare can devastate the family unit…. To take a family that is already deprived and to deprive them further can only exacerbate the negative problems associated with childhood poverty, including lowered behavior and cognitive skills, augmented health problems, and reduced access to medical care." Yvette Marie Barksdale, And the Poor Have Children: A Harm-Based Analysis of Family Caps and the Hollow Procreative Rights of Welfare Beneficiaries, 14 Law & Ineq. J. 1, 65-66 (1995).

Supporters of the Family Cap in the Nebraska legislature acknowledged that the law would make little or no difference to the State's budget, but they mistakenly argued that the loss of $71 per month would also make little or no difference to families living in poverty. E.g., Floor Debate, LB 1224, 93d Legis., 2d Sess., March 29, 1994, at 11941 (Senator Wesely) ("Now, it's not a huge payment, it doesn't have that big an impact on the budget, but symbolically it's an important element."). Senator Bohlke, one of the sponsors of the Welfare Reform Act, stated: "It is merely the $71…that is taken away, which really you say is not a great amount of money, Senator Dierks, and it's really not, it's almost symbolic…. [T]he $71 a month, I don't think, is going to make a difference." Id. at 11949.

In fact, the $71 could avoid hunger, undernutrition, homelessness, illness, or other harm to the newborn child and her family. In light of the hardships endured by families relying on welfare, an additional birth with no increase in cash assistance will, as Senator

Lindsay stated, mean "the diapers are going to stay wet longer, the baby formula is going to get thinned down just a little bit more, the clothes are going to get maybe a little bit less appropriate for the weather. The doctor is maybe going to be just a little bit less often visited. Bottom line is it's the children who are going to suffer." Floor Debate, LB 455, 94th Legis., 1st Sess., April 20, 1995, at 5014. Senator Dierks, the sponsor of several amendments that would have struck the Family Cap, stated: "[W]e not only make it difficult for that child for diapers and those necessary items but we also make it difficult for the children that are already in that family because the money that they would normally get and still will get is going to have to be divided." Id. at 5022.

3. The Family Cap is more punitive when applied to families of disabled adults

The Family Cap is considerably more punitive to families where the parent is disabled. When the Family Cap is applied to children whose parents who are able to work, they are able to lift the Family Cap if the parent becomes employed and is able to go off ADC assistance for a period of at least six months. In addition, if a family whose primary wage earner has the capacity to work uses up their twenty-four months of assistance and reapplies forty-eight months after their initial application, any children previously subjected to the Family Cap will then be included when determining the size of the grant.

However, Appellees and other exempt families can never lift the Family Cap placed on their children. Since they have a disability or other circumstances which prevent employment, exempt families will be unable to go off assistance for six months or more. See 468 NAC 2-007.01B (effective Dec. 27, 1997). Furthermore, because exempt families are not subject to the time limit, they will not be able to lift the Family

Cap by reapplying once they have reached the end of the time limit. See 468 NAC 2-007.01 (effective July 10, 2000). The net effect of the Family Cap policy when applied to families with disabled parents is to exclude these children from benefits until they reach the age of majority.

Applying the Family Cap to those not participating in the Self-Sufficiency program, defeats the primary goals of the WRA. The only construction of the Family Cap provision that is consistent with the purpose of the WRA is that the Family Cap applies only to participants in the Self-Sufficiency program.

B. Limiting application of the Family Cap to participants in the Self-Sufficiency Program maintains consistency within the structure of the WRA.

When this Court examines a collection or series of related statutes, the entire series of statutes "may be conjunctively considered and construed in pari materia to determine the intent of the Legislature so that different provisions of the act are consistent, harmonious, and sensible." In re Interest of DeWayne G. & Devon G., 263 Neb. 43, 52, 638 N.W.2d 510, 518 (2002). "Participation," as it is used throughout the WRA consistently refers to participation in the Self-Sufficiency program. To give participation a different meaning under the Family Cap provision would be inconsistent, and contrary to legislative intent.

The first reference to "participation" in the WRA is in reference to the duties of participants in the Self-Sufficiency program: "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) (Reissue 1996) (emphasis added). "Participate" in this section refers only to participants in the Self-Sufficiency program.

The term "participation" is also found in the statute that describes case management services: "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 (Reissue 1996) (emphasis added). Clearly "participation" in the above statute refers only to those ADC recipients participating in the time-limited Self-Sufficiency program not all ADC recipients.

The only other place "participation" is found in the WRA is in the statute that deals with the requirements for cash assistance:

> Recipient 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…(b) *Participation* in activities outlined in the self-sufficiency contract shall not be required for one parent of a recipient family whose youngest child is under the age of twelve weeks…(d) *Full participation* in the activities outlined in the self-sufficiency contract shall be required for adult members of a recipient family whose youngest child is over the age of six months.(e) *Full participation* in the activities outlined in the self-sufficiency contract and the two-year time limit on cash assistance under section 68-1724 shall begin for a minor parent [at specified times].…(f) [in specified types of cases], the family *shall participate* in the activities outlined in the self-sufficiency contract as a condition of receiving cash assistance.

Neb. Rev. Stat. § 68-1723 (Reissue 1996). "Participation" as it is used in the above statute is consistently referring to participation in the Self-Sufficiency program. This is clear because each appearance of the word "participation" is followed by a reference to the Self-Sufficiency Contract.

Appellants, by suggesting that "participation" means receipt of ADC, are asking this Court to ignore the way "participation" is used throughout the entire WRA. To apply the Family Cap provision to families exempt from participation in the Self-Sufficiency program would be to grant "participation" a meaning that is wholly inconsistent with the way "participation" is used in the entirety of the WRA. Therefore, the appropriate construction of "participation in the program" in Neb. Rev. Stat. § 68-1724(2)(b) is that it means participation in the Self-Sufficiency program.

C. Limiting the application of the Family Cap to participants in the Self-Sufficiency program is consistent with the Nebraska Legislature's intent expressed in the legislative history of the WRA.

When this Court determines that a statute is ambiguous, the Court may look "to the legislative history of the act in question in order to ascertain the intent of the Legislature." Sydow v. City of Grand Island, 263 Neb. 389, 397, 639 N.W.2d 913, 921 (2002) (citations omitted).

During the floor debate on the WRA, there was an extensive discussion of the Family Cap and how it would be implemented. The sponsors of the WRA consistently explained that the Family Cap only applies to families where the parent signs a Self-Sufficiency Contract and participates in the Self-Sufficiency program. The chief sponsor of the WRA, Senator 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…. If, 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, 93rd Legis., 2nd Sess., (March 29, 1994), at 11940 (emphasis added). In later debate, Senator Wesely described who would be subject to the Family Cap by saying "a child born after the first 10 months of the *self-sufficiency contract*." Floor Debate, LB 1224, 93rd Legis., 2nd Sess., (April 11, 1994), at 13045 (emphasis added).

The other sponsor of the WRA, Senator Rasmussen, explained, as she fought a proposed amendment to eliminate the Family Cap:

> If we pass this 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*. We will not be deducting or sanctioning someone for having an additional child, that is not what this policy is about. What it is saying is we are not going to give additional $71 for that child born ten months beyond the initiation of the *contract*.

Floor Debate, LB 1224, 93rd Legis., 2nd Sess. (Mar. 29, 1994) at 11951, (debate on Senator Dierks' Amendment 4132 to strike the Family Cap and Senator Chambers' motion to reconsider Amendment 4132) (emphasis added).

In further debate on the Family Cap during the next year Senator Wesely again explained: "[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 (debate on Senator Dierks' Amendment 2464 to delay implementation of the Family Cap for two years) (emphasis added).

The legislative history continuously reiterates that the Family Cap only applies to those ADC recipients who sign Self-Sufficiency Contracts and participate in the Self-Sufficiency program. The only construction of the Family Cap provision that preserves this clear legislative intent is that "participation in the program" means participation in the Self-Sufficiency program.

III. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE APPELLANTS EXCEEDED THE STATUTORY AUTHORITY GRANTED THEM BY THE NEBRASKA LEGISLATURE BY APPLYING THE FAMILY CAP TO THE APPELLEES.

There is no dispute that Appellants were given general authority to promulgate rules and regulations regarding the WRA. However, this authority is limited to implementing the policies enunciated by the Nebraska Legislature. "[I]t is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state." Continental Western Ins. Co. v. Conn, 262 Neb. 147, 157, 629 N.W.2d 494, 501 (2001), (quoting Clemens v. Harvey, 247 Neb. 77, 82, 525 N.W.2d 185, 189 (1994)).

> 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, 525 N.W.2d 185, 187 (1994) (quoting State ex rel. Spire v. Stodola, 228 Neb. 107, 421 N.W.2d 436 (1988)).

Appellants' regulations dealing with the application of the Family Cap are plainly erroneous because they modify, alter, and enlarge the Neb. Rev. Stat. § 68-1724(2)(b). The regulation that implements the Family Cap provides:

> 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*. 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 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…..

468 NAC 2-007.01 (effective July 10, 2000).

Appellants have exceeded their authority in two respects. Initially, the plain meaning, purpose, structure, and legislative history allow application of the Family Cap only to participants in the Self-Sufficiency program. Appellants' regulation goes beyond what is allowed by statute and includes ADC recipients, such as Appellees, who are exempt from the Self-Sufficiency program.

Additionally, the Family Cap is to be applied only to children who are "born into the recipient family after the initial ten months of *participation* in the program" not at the time of application. Neb. Rev. Stat. § 68-1724(2)(b) (Reissue 1996). By applying the

Family Cap at the time of application for assistance, the Family Cap is applied to families such as Appellees, who never "participate in the program."

Moreover, Appellants' application of the Family Cap is inconsistent with the WRA's goals. As noted above, the WRA makes a special promise to families whose primary wage earner is disabled and lacks the ability work. Namely, the state has promised to provide "continuing assistance and support for families with physical, mental, and intellectual limitations." Neb. Rev. Stat. § 68-1709(9) (Reissue 1996). By subjecting children of disabled parents to the Family Cap, the family is left without support and adequate means to obtain even the most basic necessities of food, clothing and shelter.

When an agency exceeds the authority granted to it by the Legislature the resulting regulations are invalid. Clemens v. Harvey, 247 Neb. 77, 525 N.W.2d 185, (1994). Because Appellants' Family Cap regulation modifies, alters, and enlarges the Family Cap statute, regulation 468 NAC 2.007.01 as enacted by the Appellants is plainly erroneous and invalid.

IV. EXEMPTING NON-PARTICIPANTS IN THE SELF-SUFFICIENCY PROGRAM FROM THE FAMILY CAP WILL NOT HARM THE APPELLEES OR THE CLASS THEY REPRESENT.

Appellants assert that "if the Appellees' interpretation of the family cap provision is adopted, members of their own classification of recipients could be harmed financially, as they would be unable to retain child support for any child born ten months or more after initial receipt of assistance." *Appellants' Brief*, p. 18. However, this argument is irrelevant to the issue of the correct interpretation of the Family Cap statute.

Moreover, the evidence in the record contradicts Appellants' position. Appellants claim that the "typical minimum child support order is $100.00 to $150.00." *Appellants' Brief*, p. 19. There is no support for this in the record and they provide no citation for these statistics in their brief. Furthermore, Ms. Cannon testified that she has child support orders for all four of the children living in her home and that each child's order is only $50.00. (34:25, 35:1-23).

Additionally, Appellants' contention about typical child support orders is speculative and based on the often erroneous assumption that the absent parent is both paying child support regularly and paying the full amount. In reality, "in many cases, a family is forced to turn to ADC precisely because they are not receiving child support." Floor Debate, LB 455, 94th Legis., 1st Sess., (May 20, 1995), at 4999 (Sen. Dierks).

Nationally, only 53% of women below the poverty level who are eligible for child support are awarded support, and only 24.8% actually receive any payment. Furthermore, of all women who do receive some payment of child support, only about two-thirds receive full payment of the amount ordered. House Comm. on Ways and Means, 106th Cong., 2000 Green Book: Background Material and Data on Programs within the Jurisdiction of the Committee on Ways and Means 527 tbl. 8-7 (Comm. Print 2000).

In this case, Ms. Cannon testified that the father of her two children subjected to the Family Cap is "ordered to pay, but right now he does not have a job, so they're working with him, I guess, on that. But, right now, I haven't got any child support money to me, you know, where I can benefit my family from. I haven't got paid from anybody yet." (26:3-7).

Clearly the evidence in the record reflects that Ms. Cannon's family is being harmed by the imposition of the Family Cap. Furthermore, Appellants did not call any witnesses who testified that they benefited from the Family Cap policy. Dan Cillessen admitted that he could not quantify how many families, if any, are benefiting from the Family Cap and could only speculate that "there are some out there who would benefit by having the family cap in play." (80:2-4).

Moreover, Appellants state that it is Dan Cillessen's testimony that "many recipients ask to have the family cap apply to them, so as to exempt their child support from accountable income." *Appellants' Brief*, p. 19. There is no testimony from Dan Cillessen in the record that reflects that "many," or any, families "ask" to have their children subjected to the Family Cap. Clearly, the argument that the Family Cap actually benefits families is irrelevant, speculative, and inconsistent with the testimony and evidence contained in the record.

V. UPHOLDING THE CLEAR INTENT OF THE NEBRASKA LEGISLATURE THAT THE FAMILY CAP APPLY ONLY TO PARTICIPANTS IN THE SELF-SUFFICIENCY PROGRAM WILL NOT CREATE A DENIAL OF EQUAL PROTECTION OF THE LAW.

Appellants argue "Allowing for the Appellees' interpretation would deny equal protection of the law for those recipients who are part of the Employment First program." Appellants cannot meet the threshold inquiry required in any equal protection claim. "The initial inquiry in an equal protection analysis focuses on whether the challenger is similarly situated to another group for purposes of the challenged governmental action. Absent this threshold showing, one lacks a viable equal protection claim." Benitez v. Rasmussen, 261 Neb. 806, 817, 626 N.W.2d 209, 219 (2001) (citations omitted).

The Self-Sufficiency program participants and those exempt from participation are not similarly situated. The primary difference is that the Self-Sufficiency program participants have the capacity to work, while those exempt from participation are exempt because of long-term or permanent disabilities or other circumstances which make employment impossible. See 468 NAC 2-020.01(3)(b) (effective March 25, 2001).

In addition, those exempt from participation do not sign Self-Sufficiency Contracts and are not subject to the time limits on ADC cash assistance. These real differences in circumstances between Self-Sufficiency program participants and those exempt from participation illustrate that these two groups are not similarly situated. As this Court has held, "the dissimilar treatment of dissimilarly situated persons does not violate equal protection rights." State v. Atkins, 250 Neb. 315, 320, 549 N.W.2d 159, 163 (1996) (citations omitted). Therefore, there is no equal protection problem created by limiting the application of the Family Cap to Self-Sufficiency program participants.

In the event that this Court finds that there is a real equal protection problem, then the entire Family Cap provision should be ruled unconstitutional. The only interpretation of the Family Cap provision that is consistent with the plain language of the statute, the purpose, structure and intent of the statute, and the legislative history is that the Family Cap only applies to families actively participating in the Self-Sufficiency program. Because this is the only plausible interpretation of the statute, if this Court finds that this interpretation leads to a violation of the equal protection clause, then the entire Family Cap statute is unconstitutional.

CONCLUSION

The Nebraska legislature recognized the unique hardships that face families whose primary wage earner has a long-term or permanent disability or other circumstances that prevent employment. As a result, the legislature wrote the Family Cap statute so that it would only apply to those who have the capacity to work and are participants in the Self-Sufficiency program. This is evident from the plain language of the statute which only applies the Family Cap to "children born after the initial ten months of participation in the program." Applying the Family Cap to Appellees and the class they represent would be in clear contravention of the purpose and structure of the statute. Furthermore, the legislative history clears up any possible confusion about what the legislature intended by referring to the Family Cap only in reference to children whose parents are participants in the Self-Sufficiency program.

Appellants exceeded their authority to create rules and regulations when they created regulations that allow the Family Cap to be applied in a manner inconsistent with the statute. When regulations modify, alter, or enlarge a statute, as in this case, the regulations are invalid. For all of the above reasons, Appellees ask that the decision of the District Court be affirmed.

Date:_____

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, Appellees.

By: _____

D. Milo Mumgaard #19919
Nebraska Appleseed Center for Law in the Public Interest
941 O Street, Suite 105

Lincoln, NE 68508
(402) 438-8853

By: _____
Rebecca L. Gould #22246
Nebraska Appleseed Center for Law in the Public Interest
941 O Street, Suite 105
Lincoln, NE 68508
(402) 438-8853

By: Sue Ellen Wall #21552
941 O Street, Suite 920
Lincoln, NE 68508
(402) 438-8815

By: Susan A. Koenig #16540
1266 South 13th Street
Omaha, NE 68108
(402) 346-1132

By: Martha F. Davis #07630
Geoffrey A. Boehm #07956
NOW Legal Defense and Education Fund
395 Hudson Street, 5th Floor
New York, New York 10014
(212) 925-6635

Attorneys for Appellees

CERTIFICATE OF SERVICE

This is to certify that two copies of this Appellees Brief were served on counsel for the Appellants, Senior Assistant Attorney General, Royce Harper, 2115 State Capitol, Lincoln, NE 68509, and Special Assistant Attorney General, Michael Rumbaugh, P.O. Box 95026, Lincoln, NE 68509, via regular first class mail on April _____, 2002.

_____
Rebecca L. Gould
Attorney for Appellees