Case No. S-99-0714

In the
Supreme Court of Nebraska
_____ 0 _____
Marilyn Bauer,

Plaintiff-Appellant,

vs.

JESSIE K. RASMUSSEN, Director of the
Nebraska Department of Health and Human Services, and the
NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendant-Appellee.

_____ 0 _____
APPEAL FROM THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA
Honorable Donald E. Endacott, District Judge

_____ 0 _____

BRIEF OF APPELLANT

_____ 0 _____

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STATEMENT OF THE CASE

This is a case about a low-income grandmother who has temporary custody of her grandchildren and was unlawfully denied public benefits. They have been eligible for public assistance, including cash assistance, food stamps, Medicaid, and child care subsidies. The grandmother sought to prepare for higher paying employment, and returned to college. While still attending school, she took a position with the AmeriCorps USA federal community service program, which is designed to further education. Her intent was to use the financial assistance stipend she would receive while participating in AmeriCorps USA to help support her family while she was going to school, and to then use her AmeriCorps USA educational award when she had completed 1,700 hours of service to help pay off her student loans. Then, the Appellant would be able to obtain higher paying employment and ultimately attain economic self-sufficiency. The Nebraska Department of Health and Human Services (hereafter NDHHS), however, refused to disregard the financial assistance provided through the AmeriCorps USA program when calculating her family's eligibility for continued cash assistance (Aid to Dependent Children or ADC). The Appellant's family was therefore denied needed public benefits, including cash assistance and health care.

This was an unlawful act by the NDHHS. The Nebraska Legislature passed the Welfare Reform Act, Neb.Rev.Stat. §§68-1708 to -1734 (Reissue 1996 & Cumm.Supp.1998), (hereinafter WRA) which requires the disregarding of this type of financial assistance when making a cash assistance benefit calculation. The Appellant appealed this matter to the Lancaster County District Court pursuant to the Administrative Procedures Act, (APA), Neb.Rev.Stat. §84-917 (Reissue of 1996), and now to this court. This case is the first time the Nebraska Supreme Court has been asked to interpret any provisions of the WRA.

ISSUES BELOW AND THEIR DISPOSITION

In 1997 the Appellee determined that the yearly stipend the Appellant received from the AmeriCorps USA program should be considered when calculating the Appellant and her

grandchildren's eligibility for ADC. Appellant then appealed the NDHHS decision to include the AmeriCorps USA stipend as income when calculating income for ADC purposes. The NDHHS hearing officer upheld the NDHHS decision to consider Appellant's AmeriCorps USA stipend as income when calculating her family's ADC benefits. The Appellant then sought review of the decision of the NDHHS hearing officer in the Lancaster County District Court pursuant to the Administrative Procedures Act (APA), Neb.Rev.Stat. §84-917 (Reissue of 1996).

After hearing, on April 13, 1999 the Lancaster County District Court ruled that, there being no substantial dispute with respect to the facts, the appeal involved the interpretation of statutes and regulations, which presented questions of law. The Lancaster County District Court ruled that it had, therefore, an obligation to reach an independent conclusion irrespective of the decision made by the NDHHS. The Lancaster County District Court also ruled that it must accord deference to the NDHHS' interpretation of its own regulations unless plainly erroneous or inconsistent, and that a rebuttable presumption of validity attached to the actions of the NDHHS.

Applying these principles, the Lancaster County District Court found that the agency's interpretation of its regulations was not plainly erroneous or inconsistent. The District Court found that, while the AmeriCorps USA yearly stipend is similar to the "school grants, scholarships, vocational rehabilitation payments, Job Training Partnership Act payments" that are not counted as income under the WRA, Neb.Rev.Stat. §68-1726(3)(c), the "financial assistance" in question more closely resembles income under Neb.Rev.Stat. §68-1726(3)(b), "in that it primarily supports life necessities rather than educational expenses," and is to be counted as income. Order, at 4. The District Court deferred to the NDHHS reliance upon an interpretative memo put out by the NDHHS, in which the NDHHS followed earlier federal agency interpretations of the treatment of this income under former federal welfare law but not under the provisions of the current WRA.

STANDARD OF REVIEW

A final order rendered 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. Neb.Rev.Stat. § 84-918(3) (Reissue 1994); Wolgamott v. Abramson, 253 Neb. 350, 570 N.W.2d 818; Martin v. Nebraska Dept. of Public Institutions, 7 Neb. App. 585, 584 N.W.2d 485 (1998).

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. When reviewing a question of law, an appellate court reaches a conclusion independent of the lower court's ruling. J.C. Penney Co. v. Balka, 254 Neb. 521, 577 N.W.2d 283 (1998)

Statutory interpretation is a matter of law in connection with which an appellate court has an obligation to reach an independent conclusion irrespective of the determination made by the court below. Central States Foundation v. Balka, 256 Neb. 369, 590 N.W.2d 832 (1999); Neb.Account. & Disc. v. Citizens for Resp. Judges, 256 Neb. 95, 588 N.W.2d 807 (1999).

In connection with this the court should accord deference to an agency's interpretation of its own regulations unless plainly erroneous or inconsistent. Inner Harbour Hospitals v. State, 251 Neb. 793, 795, 559 N.W.2d 487, 491 (1997); Slack Nsg. Home v. Department of Soc.Services, 247 Neb. 452, 528 N.W.2d 285 (1995).

ASSIGNMENTS OF ERROR

1. The District Court erred by failing to apply rules of statutory interpretation that requires the court to look to the purpose of the WRA and give a construction which best achieves that purpose.
2. The District Court erred by failing to apply rules of statutory interpretation that requires the court to give effect to the entire language of the WRA and to reconcile different provisions of the statute so they are consistent, harmonious, and sensible.
3. The District Court erred when it deferred to the plainly erroneous actions of the NDHHS to refuse to apply its own properly promulgated rules and regulations pursuant to the WRA.
4. The District Court erred when it deferred to the plainly erroneous actions of the NDHHS

to refuse to disregard the financial assistance received by the Appellant although required by the WRA.

5. The District Court erred when it deferred to the inconsistency in the manner in which income is treated by the NDHHS for eligibility purposes for programs authorized by the WRA.

6. The District Court erred when it deferred to the plainly erroneous action by the NDHHS to rely upon internal interpretative memos interpreting former federal welfare law rather than the WRA.

7. The District Court erred when it deferred to the plainly erroneous actions of the NDHHS to rely upon internal interpretative memos for implementing the WRA without first complying with the Administrative Procedures Act.

PROPOSITIONS OF LAW

1. AmeriCorps USA was created by the National and Community Service Trust Act of 1993. AmeriCorps USA was created by Congress as a new domestic program designed, in part, to assist low-income people achieve higher educational levels and be able to earn their way out of poverty. Pub.L.No. 103-82, codified at 42 USC §12555 et seq. (1998).

2. In general, except as restricted by the Constitution, it is the function of the Nebraska Legislature by the enactment of statutes to declare what the law is in Nebraska. Clemens v. Harvey, 247 Neb. 77, 525 N.W.2d 185 (1994); Nebraska P.P. Dist.v. City of York, 212 Neb. 747, 326 N.W.2d 22, 28 (1982). The Nebraska Constitution prohibits one branch of government from encroaching on the duties and prerogatives of the others. Clemens, supra at 189.

3. Present public policy in Nebraska as to the provision of welfare assistance for needy families was set by the Nebraska Legislature through the passage of the Welfare Reform Act in 1994 and subsequent amendments. Laws 1994, LB 1224, codified at Neb.Rev.Stat. §§68-1708 to 68-1734 (Reissue of 1996, Cumm.Supp. 1998)

4. Nebraska Legislature through the Welfare Reform Act intended and mandated that

individuals receiving welfare assistance and seeking to attain economic self-sufficiency were to be allowed to participate in post-secondary education, and that the financial assistance associated with that effort was to be disregarded when making eligibility and benefit determinations. This would, in turn, enable a more effective transition to economic self-sufficiency, a fundamental goal of the Welfare Reform Act. Neb.Rev.Stat. §§68-1709, -1726(3)(c) (Reissue of 1996, Cumm.Supp. 1998)

5. On August 22, 1996, Congress passed the Personal Responsibility and Work Opportunity Act of 1996. The PRA abolished the 61-year commitment to a federal safety net for poor families with children, repealed the federal AFDC program statutes, repealed all rules and regulations promulgated under the repealed federal statute, and replaced it with the Temporary Assistance for Needy Families (hereafter TANF) block grant program. The passage of the federal PRA in 1996 transferred the responsibility for determining eligibility factors for public assistance entirely to Nebraska. Pub.L.No. 104-193, 110 Stat. 2105 (1996), codified at 42 U.S.C. § 601 et seq. (1998); Saenz v. Roe, ___ U.S. ___, 67 U.S.L.W. 4291 (1999).

6. When construing the Welfare Reform Act, the court must look to objects sought to be accomplished, evils and mischief sought to be remedied, or purposes to be served, and must place upon the statute a reasonable or liberal construction which will best effect its purposes rather than one which will defeat it. Central States Foundation v. Balka, 256 Neb. 369, 590 N.W.2d 832 (1999); Brown v. Wilson, 252 Neb. 752, 567 N.W.2d 124 (1997); In re Interest of Joshua M., 251 Neb. 614, 558 N.W.2d 548 (1997).

7. It is further the duty of the court to give effect to the entire language of the Welfare Reform Act, and to reconcile different provisions so they are consistent, harmonious, and sensible. Hoiengs v. County of Adams, 254 Neb. 64, 71, 574 N.W.2d 498, 503 (1998).

8. Properly adopted and filed agency regulations have the effect of statutory law. Regulations bind the agency that promulgated them just as they bind individual citizens. Schmidt v. State, 255 Neb. 551, 559, 586 N.W.2d 148, 153-54 (1998)

9. When the Nebraska Legislature delegated to the Nebraska Department of Health and Human Services the power to make rules and regulations to implement the policy of the Welfare Reform Act, this delegated authority was limited to the powers delegated to the agency by the Welfare Reform Act which the agency is to administer. Clemens v. Harvey, 247 Neb. 77, 525 N.W.2d 185, 189 (1994); State ex rel. Spire v. Stodola, 228 Neb. 107, 421 N.W.2d, 436 (1988).

10. The Nebraska Department of Health and Human Services may not employ its rulemaking power to modify, alter, or enlarge provisions of the Welfare Reform Act. Id.

11. The Nebraska Legislature, in the Welfare Reform Act, required the simplification of rules between welfare programs, and the elimination of conflicting welfare program rules. Neb.Rev.Stat. §§68-1709(2), (3)(Reissue of 1996, Cumm. Supp. 1998)

12. When promulgating rules interpreting the WRA, the Nebraska Department of Health and Human Services is required to follow the requirements of the Administrative Procedures Act, Neb.Rev.Stat. §84-901 et seq. (Reissue of 1994, Cumm. Supp. 1998)

13. The practice of the Nebraska Department of Health and Human Services to make rules through internal interpretative memorandums regarding rights under the Welfare Reform Act did not comply with the requirements of the Administrative Procedures Act, and therefore are invalid. Neb.Rev.Stat. § (Reissue of 1994, Cumm.Supp. 1998); McAllister v. Dept. of Corr. Services, 253 Neb. 910, 914, 573 N.W.2d 143, 146-47 (1998).

STATEMENT OF FACTS

The Nebraska Legislature passed the WRA, Neb.Rev.Stat. §§68-1708 to -1734 (Reissue 1996) in 1994. It was subsequently amended in 1995 and 1997.

The Appellant, Marilyn Bauer, a resident of Lancaster County, Nebraska, is the grandmother of three children. They were ages 8, 6, and 3 when she assumed the responsibility of physical custody and full time care of these children in the absence of their parents. She was fifty-two years old at that time. (T16:15-17) At all times, the Appellant has cooperated with Appellees and followed their directives to the best of her ability.

In February, 1997, the Appellant applied for and was found eligible for the following forms of public assistance for her household, including herself and her grandchildren: Aid to Dependent Children (hereinafter ADC) cash benefits, Food Stamps, and Medicaid health insurance coverage. The Appellant was included by Appellee in the so-called "Employment First" program, the administrative title for the Nebraska welfare reform program implemented pursuant to the WRA. (E 6)

In 1997, the maximum ADC benefit (e.g. the cash assistance benefit under the "Employment First" program) for a four person household in 1997 with no countable income was $435 per month. This is approximately 33% of the federal poverty level for her four person

household. This is the amount of cash benefits her household received at this time. (T 3:15-4:7) Appellant continued enhancing her job skill level and her education by pursuing a Bachelor of Arts degree at Doane College. (T 16:20)

In late April, 1997, the Appellant was accepted for a one-year position in the AmeriCorps USA education support program at the Lincoln Action Program (hereinafter LAP). AmeriCorps USA was created by the National and Community Service Trust Act of 1993. Pub.L.No. 103-82, codified at 42 USC §12555 et seq. (hereafter NCSTA) AmeriCorps USA was created by Congress as a new domestic program designed, in part, to assist low-income people achieve higher educational levels and be able to earn their way out of poverty. The NCSTA was passed to help address unmet community needs in the United States and to "(3) expand educational opportunity by rewarding individuals who participate in national service with an increased ability to pursue higher education or job training." Pub.L. 103-82, Sec. 2(b); (E8)

The AmeriCorps USA program includes a community service component with a small monthly stipend for the participant. (T 15:24-16:14) The Appellant worked with the Supportive Housing Program at LAP to fulfill her AmeriCorps USA obligation. (E3) The AmeriCorps USA stipend is $7495 yearly, paid in bi-weekly installments of $288, or $576 per month. (T 4:2-3) In addition, participants who complete seventeen hundred hours of service in a year for AmeriCorps USA also receive an educational award of $4,725. This educational award is to be used for current educational costs, or applied to student loan payments. (T 9:14-17) The Appellant has incurred student loans during her pursuit of a degree. (T 16:21-25)

The Appellant continued as a student while participating in AmeriCorps USA at LAP. (T 15:18-17:3).

In May 1997, the Appellant reported her AmeriCorps USA position to her NDHHS case worker. At that time, both Appellant and her case worker correctly believed the stipend was to be disregarded as income for the purpose of the “Gross Income Limit Test” (to determine initial income eligibility for her four person household) and for the subsequent “Budget Test” (to determine the actual amount of ADC cash benefits for her household). The “Gross Income Limit

Test" requires the comparison of all countable income against the eligibility standard for that size family (185% of the "standard of need" for the size of family). If the family's gross income is less than this standard, the subsequent "Benefits Test" requires the comparison of all countable income to the maximum payment standard for this size family to determine the payment level. (E9, 16)

The Appellant's family passed the Gross Income Limit test with or without the counting of the AmeriCorps USA stipend. For purposes of the Budget Test (cash benefit payment level calculation), the disregarding of this stipend meant the Appellant's household had no countable income, and they continued to be eligible for the full $435 per month cash benefit. The Appellant also continued to be eligible for Medicaid. (T 6:11-8:23)

In August 1997, the Appellant was informed by her case worker that the stipend from the AmeriCorps USA program would actually be counted as income for both the Gross Income Limit Test for eligibility and the Budget Test for the amount of benefits. The net effect of this decision was to cause a significant reduction in benefits for the Appellant's household. The inclusion of the AmeriCorps USA stipend as income in the payment level calculation for a four-person household caused a reduction of cash assistance to only $70 per month. (T 4:1-25)

As a grandmother with custody of her grandchildren, the Appellant was allowed by NDHHS rules the option of "removing" herself from the household (i.e. not be counted as a member of the household) to avoid this significant reduction in cash benefit assistance. The Appellant informed her caseworker she wanted to exercise this option in order to avoid this near total loss of cash assistance. Thus, for payment level calculation purposes her resulting three-child household with no countable income was found eligible for an ADC cash benefit of $364 per month, a reduction of cash benefits of $71 per month if considered to be a four-person household with no countable income.

The decision by her caseworker to not disregard the AmeriCorps USA stipend carried other consequences. By "removing" herself from her family's household so her grandchildren would have more cash assistance, however, the Appellant also became ineligible for the

Medicaid health care insurance coverage that accompanies eligibility for cash assistance. The Appellant was left with no health care insurance. (T 4:1-25)

This decision to count the AmeriCorps USA stipend was made by the Appellant's NDHHS caseworker after she was told by personnel at the Central Office of the NDHHS in August, 1997 to count the AmeriCorps USA stipend. (E1) Initially, these state officials told the caseworker not to count the stipend. (T12) These same NDHHS state officials later informed the Appellant's caseworker that, while AmeriCorps VISTA stipends were not to be counted for cash assistance eligibility and benefit calculation purposes, the AmeriCorps USA stipends were to be counted. At the same time, however, the AmeriCorps USA stipends were not to be counted for food stamp calculations.

As support for this confusing and significantly different treatment of the same or similar income, the state officials cited an internal interpretative memorandum on this issue dated September 7, 1994 from the Nebraska Department of Social Services' (hereinafter DSS) (predecessor to today's NDHHS) Administrator of Public Assistance and Food Programs. This memorandum was entitled "Treatment of Allowances and Other Benefits Under the National and Community Service Trust Act of 1993." The memorandum described the various programs authorized by the NCSTA, including the AmeriCorps VISTA, AmeriCorps USA, AmeriCorps NCCC, the Senior Corps, and the Youth Corps. The memorandum stated that the NDHHS was to treat the payments and in-kind support provided by these various programs in different ways, depending upon the welfare program (e.g. ADC, Food Stamps, disability benefits, Medicaid, energy assistance, etc.). In some programs, the payments were always to be disregarded; in other programs, they were not. The memorandum gave no explanation or reasons for this different treatment. (E7, 1-2)

This September 27, 1994 interpretative memo was also referenced in an April 4, 1996 internal interpretative NDHHS memorandum provided by the NDHHS Central Office to the caseworker (E8). The memorandum was from the NDHHS Central Office to the Lincoln office, and stated:

"EF [Employment First] questions for the day: Client is participating in one of the versions of AMERICORPS [sic]; don't know which specific Americorps/Vista [sic] program; but isn't Americorps/Vista. The question was whether the income is counted for ADC/CMAP [cash assistance and children's Medicaid]. I called Bill Davenport [another Central Office official]. He referenced two memos; September 27, 1994 and October 17, 1994. Apparently the feds changed interpretation, thus the reason for the two memos. The following is Bill's answer to the question: "There are three Americorps programs: Americorps/Vista, Americorps/USA and Americorps/NCCC. For Americorps/Vista: Income is disregarded. For Americorps/USA or NCCC: Living allowance is counted as earned income, so appropriate earned income disregards would apply.. The educational award given is disregarded, as in-kind contribution." (E8)(emphasis added)

This April 4, 1996 memorandum gave no explanation or reasons for this different treatment, other than the reference to the "feds" (e.g. federal agency) interpretation.

The Appellant's caseworker later acknowledged these 1994 and 1996 interpretative memorandums, apparently relying upon federal interpretation of law as it existed in 1994, were found nowhere in Nebraska's welfare program rules and regulations in 1997, including the new "Employment First" regulations found in "Chapter VII" of the Nebraska Administrative Code, Title 468 (Aid to Dependent Children). The only policy guidance she received on this matter in August, 1997, was the direction to use the interpretative memorandums from 1994 and 1996. (T13-14)

The WRA, in effect at this time, required a broad disregard for "financial assistance" (e.g. income) associated with an educational program. Neb.Rev.Stat. §68-1726(3)(c)(Reissue 1996). At the time of this appeal, the NDHHS, pursuant to the authority granted it by the WRA, had in fact promulgated rules and regulations for the "Employment First" program as to the disregarding of financial assistance associated with an educational program. For the purpose of the Gross Income Limit Test, the rules required the disregarding of "[a]ny student financial

assistance intended for books, tuition, or other self-sufficiency related use for a student." 468 NAC 7-019.09A(13). (E9,16) For the purpose of the subsequent Budget Test, the rules required the disregarding of "[a]ny student financial assistance." 468 NAC 7-019.09M(E9, 20) This latter Budget Test rule is an illustrative listing of certain kinds of income and their treatment, and is clearly intended not to be an exhaustive list: "If the unit passes the 185 percent test, the case manager shall compute the budget. Following is a listing of some income types and treatment." Id. (emphasis added)

Inexplicably, neither of the above rules were applied to the Appellant's situation. Instead, rather than using properly promulgated rules implementing the will of the Nebraska Legislature to disregard the Appellant's stipend from the AmeriCorps USA program, the NDHHS applied the policy positions defined in the internal memoranda described above to not disregard the stipend. This led to a significant reduction, as described above, in the Appellant family's subsistence and health care benefits.

Prior to the events subject to this appeal, on August 22, 1996, Congress passed its own federal welfare reform law, the Personal Responsibility and Work Opportunity Act of 1996, Pub.L.No. 104-193, 110 Stat. 2105 (1996), (hereinafter PRA), codified at 42 U.S.C. § 601 et seq. This Act repealed the federal ADC program statutes and all rules and regulations promulgated under the repealed federal statutes, and replaced it with a block grant program with few federal requirements. Nebraska was free as of late 1996 to exercise its own policies with respect to cash assistance program eligibility, and was free to administer its own eligibility policies without needing to comply with federal standards or interpretations.

The Appellant timely appealed the decision to NNDHHS and an administrative hearing was held on September 17, 1997.

On October 29, 1997, Appellee issued a Finding and Order in Appellant's appeal and continued to assert that AmeriCorpsUSA stipends were to be included as income, for both the "Gross Income Limit" and the "Budget Limit" tests. The Appellant then sought review of the decision of the NDHHS hearing officer in the Lancaster County District Court pursuant to the

Administrative Procedures Act (APA), Neb.Rev.Stat. §84-917 (Reissue of 1996).

After hearing, on April 13, 1999 the Lancaster County District Court found that, while the AmeriCorps USA yearly stipend is clearly similar to the "school grants, scholarships, vocational rehabilitation payments, Job Training Partnership Act payments" that are not counted as income under the WRA, Neb.Rev.Stat. §68-1726(3)(c), the "financial assistance" in question more closely resembles income under Neb.Rev.Stat. §68-1726(3)(b), "in that it primarily supports life necessities rather than educational expenses," and is to be counted as income. Order, at 4. The District Court deferred to the NDHHS reliance upon the interpretative memos put out by the NDHHS, in which the NDHHS followed earlier federal agency interpretations of the treatment of this income under former federal welfare law but not under the provisions of the current WRA, and to the fact the AmeriCorps USA stipend was not specifically addressed in state rules regarding treatment of income.

ARGUMENT

I. It is the function of the Nebraska Legislature through the enactment of statutes to declare what is the law and public policy for the State of Nebraska.

In general, except as restricted by the Constitution, it is the function of the Nebraska Legislature by the enactment of statutes to declare what the law is in Nebraska. Clemens v. Harvey, 247 Neb. 77, 525 N.W.2d 185 (1994); Nebraska P.P. Dist.v. City of York, 212 Neb. 747, 326 N.W.2d 22, 28 (1982). The Nebraska Constitution prohibits one branch of government from encroaching on the duties and prerogatives of the others, or from improperly delegating its own duties and prerogatives. Clemens, supra at 189.

II The Nebraska Legislature passed the WRA, Neb.Rev.Stat. §§68-1708 through 68-1734 (1996) in 1994, setting welfare public policy for Nebraska. The Act encouraged education, including post-secondary education, as a means of attaining economic self-sufficiency, and required the disregarding for eligibility and benefit determination purposes broadly defined student financial assistance to help effectuate that goal.

II Present public policy in Nebraska as to the provision of welfare assistance for needy families was set by the Nebraska Legislature through the passage of the WRA in

1994. Laws 1994, LB 1224, codified at Neb.Rev.Stat. §§68-1708 to 68-1734 (1996).

D. The WRA, passed in 1994 by Nebraska Legislature, reformed existing programs and established public policy and eligibility rules for welfare programs in Nebraska, including disregards for financial assistance related to education and training programs. In 1994, both Nebraska Governor Nelson and the Nebraska Legislature were anxious to reform existing welfare programs and create new programs in Nebraska. The Governor had convened a task force the previous year to assemble ideas for reforming Nebraska's welfare system. The recommendations of this task force then became the basis for LB 1224, sponsored by Senators Wesely and Rasmussen. The primary desire of this initiative was to allow the State of Nebraska the opportunity to create its own welfare system rules and programs, particularly with respect to cash assistance. The consensus among Nebraska policymakers at this time was that Nebraska, if allowed to create its own rules and programs, could more effectively help low-income Nebraskans become economically self-sufficient. The consensus view was that rules and standards imposed by the Federal government were often more harm than help. Therefore, a reform effort calculated to give the State of Nebraska maximum freedom to create its own rules and programs was viewed as the appropriate public policy route. Committee Hearing, LB 1224, 93rd Legislature, Second Session, 1994, at 4-7 (Testimony of Senator Wesely, sponsor), at 7-12; (Testimony of Governor Nelson)("In short, we want to reshape Nebraska's public policy to keep people out of the welfare system by focusing on job training and decent jobs, jobs that will enable people to support their families" at 10); at 22-26 (Testimony of Robert L. Armstrong, Chair of Governor's Welfare Reform Task Force); Floor Debate, LB 1224, 93rd Legislature, Second Session, March 29, 1994, at 11821-11823 (Senator Rasmussen).

F. The Nebraska Legislature, in keeping with Nebraska's constitutional framework, thereafter enunciated welfare public policy for Nebraska. Laws 1994, LB 1224 §9, codified at Neb.Rev.Stat. §68-1709 (Reissue 1996). The WRA's primary public policy purposes are to require the welfare programs in Nebraska to provide temporary and transitional support for families so that economic self-sufficiency is attained as soon as possible, to use individualized assessments and self-sufficiency contracts to build on the personal and economic resources of each family, and to reform the welfare system to support, stabilize, and enhance individual and family life in Nebraska. Id.

The WRA sought to accomplish these public policy purposes through a wide variety of welfare system reforms. These reforms included a twenty-four month limit on receipt of cash assistance, with limited exceptions; "self-sufficiency contracts" and a reciprocal relationship

between the welfare recipient family and State of Nebraska; increased sanctions for any "failure to cooperate" with the self-sufficiency contract; and various reductions in cash benefit programs.

These reforms also included a commitment to providing families the support needed to move from public assistance to economic self-sufficiency. To effectuate this public policy purpose, the Nebraska Legislature through the WRA specifically mandated among other things more generous income and resource eligibility rules, liberalized disregarding of the earned income or financial assistance provided to the principle wage earner in a welfare recipient family, and a broad definition of required "work activities" to include education and job training. In addition, this broadened approach to eligibility for ongoing cash assistance brought with it ongoing child care, health care, transportation assistance, and case management assistance that under prior law was abruptly cut off when income exceeded, at most, one-third of the poverty level. Laws 1994, LB 1224, passim. The intended effect of these latter reforms was to provide continuing public assistance eligibility for families with higher income due to the fact the principal wage earner was either working for pay, participating in educational programs and receiving financial assistance, or engaged in both activities. The intended result of these reforms was to insure a more effective transition from public assistance to economic self-sufficiency. Floor Debate, LB 1224, 93rd Legislature, Second Session, March 29, 1994, at 11822 (Senator Rasmussen)

The WRA also required the simplification of rules between welfare programs, and the elimination of conflicting welfare program rules. Laws 1994, LB 1224, §9(2) and (3), codified at

Neb.Rev.Stat. §1709(2) and (3)(Reissue 1996). For example, at this time a very low-income family living at or below 33% of the poverty level (the approximate cut off point for eligibility for ongoing cash assistance) and few assets faced at least five separate sets of work activity, resource, and earnings disregard rules with respect to cash assistance, food stamps, child care, emergency assistance, and health care. This had led to considerable inefficiencies and the failure to serve families in need. Id. ("It's important to realize when we talk about welfare reform there

are probably over twenty-nine different programs to support people of low income.")

The Nebraska Legislature, recognizing the need for these policy reforms, therefore stated through legislation, in a direct and concrete manner, how these goals of the WRA were to be accomplished on an individual family level:

> "The Legislature further finds and declares that this goal is to be accomplished through individualized assessments of the personal and economic resources of each applicant for public assistance and through the use of individualized self-sufficiency contracts." Id.

This individualized approach to each family is restated several times throughout the Act. The comprehensive assets assessment was defined and requires, among other things, an assessment for "educational background" and other barriers to economic self-sufficiency. Neb.Rev.Stat.§68-1718(2)(1996). This assessment was then to be used, in turn, "to develop a self-sufficiency contract under [section 68-1719] and promote services which specifically lead to self-sufficiency." Id. at §68-1718(3)(a). These services, which include significant case management services, transportation expenses, participation and work expenses, and other services "to provide for specific needs critical to the recipient's or the recipient family's self-sufficiency contract," Neb.Rev.Stat. §68-1722, were then to be 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.

In each of these self-sufficiency contracts, the principal wage earner was to be required to list the activities in which she will be "required to participate" during the term of the self-sufficiency contract. These activities specifically included "one or more of the following: Education, job skills training, work experience, job search, or employment." Neb.Rev.Stat. 68-1721(1). "Education" was defined in LB 1224 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). "Job skills training" was defined as including "vocational training in technical job skills and equivalent knowledge. Activities shall consist of formalized, technical jobs skills training, apprenticeships, on-the-job training, or

training in the operation of a microbusiness enterprise. Job skills training shall be prioritized and approved for occupations that facilitate economic self-sufficiency." Id. at §1721(3). A failure to participate in these work activities would render the 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.

The Nebraska Legislature continued by defining the eligibility factors that help effectuate this goal. Neb.Rev.Stat.§68-1726. The Act requires that the initial comprehensive assessment, which is required to assess for educational background, among other things, must lead to a self-sufficiency contract for each individual and family helping them to "reach for his or her highest level of economic self-sufficiency or the family's highest level of economic self-sufficiency." Id. The Legislature then set, in this section of the statute, the eligibility rules that relate to income, resources, and disregards (including those for financial assistance for education and training programs) that enable an effective attainment of these goals for Nebraska's poor:

> "The following eligibility factors shall apply:. (3) Income received by family members, except income earned by children attending school, shall be considered in determining total family income. Income earned by an individual or a family by working shall be treated differently than unearned income in determining the amount of cash assistance [e.g. making a benefit calculation] as follows: (a) Earned income shall be counted in determining the level of cash assistance after disregarding an amount of earned income equal to or including fifty to seventy percent of earned income or other incentives to work. (c) Financial assistance or those portions of it intended to pay for books, tuition, or other self-sufficiency related expenses shall not be counted in determining financial resources. Such assistance shall include, but not be limited to, school grants, scholarships, vocational rehabilitation payments, Job Training Partnership Act payments, and education-related loans or other loans that are expected to be repaid."

Neb.Rev.Stat §68-1726(3)(a) and (c)(1996)(emphasis added).

The primary sponsor of the WRA made clear the understanding by the Nebraska Legislature of what it expected the reforms under LB 1224 to address with 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 to see that participants in the new welfare reform program, through the above eligibility and assessment process, are enabled to actively participate in education and job training programs while they are receiving cash assistance from the state. The Nebraska Legislature sought consistently throughout the Act to insure educational and job training opportunity and the provision of services to families engaged in such activities. It is abundantly clear that the Nebraska Legislature viewed these activities as paths to economic self-sufficiency:

"As a matter of fact, I think what we're doing is rewarding [these low-income families] by insisting that in fact they do go out and enhance themselves as far as education, as far as their ability to get better jobs and to become a [more effective] part of society." Floor Debate, LB 1224, 93rd Legislature, Second Session, April 11, 1994, at 12955 (Senator Vrtiska)

The Nebraska Legislature thereupon set sail on a multi-year reform process as LB 1224 was passed in the 1994 legislative session and signed by Governor Nelson. The passage of LB 1224, set the direction for welfare program public policy in Nebraska.

B **Federal Social Security Act requirements in 1994 conflicted with policies found in the WRA, especially those requiring disregards for financial assistance related to**

education or training programs.

The desire by Nebraska policymakers to be free from federal rules and reform its own programs, however, was limited in 1994 by the requirements of the Social Security Act. Social Security Act of 1935, 42 U.S.C. §§601-687 (1994). At the time of the passage of LB 1224, the Social Security Act still regulated the relationship between the State of Nebraska and the federal government with respect to cash assistance welfare policy. The federal program at this time was named "Aid to Families with Dependent Children" (AFDC). Id. The AFDC program guaranteed that aid would be provided to those needy families eligible under federal law, backed up that commitment with open-ended federal funding, and required states to match federal dollars. 42 U.S.C. §603 (1994).

The State, as a recipient of federal dollars to support its own "Aid to Dependent Children (ADC)" program, was required at this time to follow federal law regarding eligibility for assistance under these programs. 42 U.S.C. §602 (1994).

Courts were very consistent in holding to this interpretation of the requirements of this federal-state program. For example, the Nebraska Supreme Court interpreted the interplay of Social Security Act requirements and former Nebraska ADC law many times, including as recently as 1996. Knowlton v. Harvey, 249 Neb. 693, 699, 545 N.W.2d 434, 439 (1996)(in pre-WRA case, court found the DSS had unlawfully promulgated eligibility rules and interpretations which did not conform to federal law, thereby unlawfully limiting eligibility for ADC); see Elliott v. Ehrlich, 203 Neb. 790, 280 N.W.2d 637, 642 (1979)(determining that Nebraska's irrebuttable presumption requiring counting all income of the parents of an unmarried minor parent did not conform to law); see also Anderson v. Graham, 492 F.2d 986, 990-91 (8th Cir. 1973)(ADC recipients in Nebraska successfully challenged Nebraska state rule regarding determination of net income as being more restrictive than federal law); King v. Smith, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2 1118 (1968); Shea v. Vialpando, 416 U.S. 251, 94 S.Ct. 1746, 40 L.Ed.2d 120 (1974).

The WRA conflicted with federal law as found in the Social Security Act in several

relevant areas. Federal law at this time contained the general rule that all income and resources in a household from whatever source were to be counted when making an eligibility determination or a benefits calculation, with limited exceptions. See 42 U.S.C. §602(a)(7)(A) (1994). The intent of the more generous earned income and financial assistance disregard provisions required by LB 1224 was to create additional exceptions to this general rule. Further, these new provisions were not to be limited in amount, time, or which member of the family was eligible to claim the disregard. Neb.Rev.Stat. §68-1726(3)(1996). LB 1224's earned income and financial assistance disregards were therefore in direct conflict with federal law.

In addition, although there were several federal exceptions to the general income rule, these federal earned income and financial assistance disregards were less generous and were limited in their application. 42 U.S.C. §602(a)(8)(A)(ii) and (iv)(1994); 42 U.S.C. §602(a)(8)(B)(ii)(I)(1994); 45 C.F.R. 233.20(a)(11)(i)(B), (C), (E), and (ii)(B)(1994). Also, at this time the Social Security Act included only one provision similar to LB 1224's treatment of financial assistance related to education or training programs, and limited them in amount, time, and most relevantly limited such a disregard to only the dependent children in an eligible household. 42 U.S.C. §602(a)(8)(A)(v)(1994); 45 C.F.R. §233.20(a)(11)(i)(A) and (ii)(A)(1994).

The WRA, on the other hand, allowed its generous financial assistance disregard for any student in the household, including the principal wage earner, and for a far wider range of educational activity. Neb.Rev.Stat. §68-1726(3)(c) (1996).

It was clear that the more generous earned income and financial assistance disregards found in Nebraska's WRA were in conflict with federal law. Therefore, these changes in welfare public policy were, at this time, unlawful under existing federal-state welfare law. As these Nebraska welfare policy changes were not allowed by existing law, Nebraska could not, absent other activity, lawfully implement these changes. See Knowlton v. Harvey, supra.

C. The Nebraska Legislature required the NDHHS to seek a waiver of these conflicts with federal law as to, among other provisions, disregards for financial assistance related to education and training programs.

The Nebraska Legislature was obviously aware that it was creating more generous earned income and financial assistance disregards than allowed under federal law. Therefore, the

Nebraska Legislature included several provisions in LB 1224 which reflected the need to seek "waivers" of federal law in order to implement the changes in policy found in the WRA.

In 1994 the Secretary of the United States Department of Health and Human Services had broad authority to waive federal AFDC requirements when the purpose of the waiver was to allow states to implement "demonstration projects" judged likely to promote the purposes of the AFDC program. 42 U.S.C. §1315(a) (1994); see Beno v. Shalala, 30 F.3d 1057, 1067-1072 (9th Cir. 1994).

Fully aware of this provision, the Nebraska Legislature very specifically guided the waiver process through LB 1224: "The Department of Social Services shall submit a waiver request or requests to the United States Department of Health and Human Services and the United States Department of Agriculture as necessary for federal authorization to implement the provisions [of sections 18 to 26] of the WRA. ." Neb.Rev.Stat. §68-1713 (1996).

The Nebraska Legislature maintained a firm control over the content of these waivers of federal law by requiring that the waivers be only implemented after subsequent legislative approval. Id. The Nebraska Legislature's intent as to this process was very clear:

> "We will need federal waivers in order to do much of what we are talking about and there are two stages to the waivers that we are proposing. One is to propose waivers that would allow us to do what we design in LB 1224. The second will be to, after that is completed and we begin implementation in a phased-in approach, we will then also direct the department to apply for a waiver to examine the potential of developing a single program, taking food stamps, energy assistance, cash subsidy, child support and moving them into a single program, single set of rules regarding eligibility and resource consideration as well as a single cash payment or cash support system for families."

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

Therefore, pursuant to the direction of the Nebraska Legislature, following the 1994 legislative session the DSS submitted a waiver request to the United States Department of Health and Human Services, Administration for Children and Families. This request itemized specific desired waivers of federal law that had been mandated by LB 1224, including the provisions

found at Section 26(3) of LB 1224 ("Disregard Financial Assistance Received Intended for Books, Tuition, or Other Self-Sufficiency Related Use"). State of Nebraska, DSS, Welfare Reform Waiver Request (September 1994).

After negotiations with the federal government, an agreement was struck between the two governments regarding the allowed waivers of federal law, and under what conditions. The agreement specified that the "Nebraska Welfare Reform Demonstration" would be implemented no later than July 1, 1996, and would only be implemented in five counties (including Lancaster County, the home of the Appellant). Furthermore, this demonstration would require an "experimental group" (e.g. those families subject to all welfare reform provisions) and a "control group" (e.g. those families subject to the regular program rules). Families in these counties were to be randomly assigned to one or the other group. The waiver agreement specified that the federal government would waive certain specific provisions of the Social Security Act for a seven year period. Waiver Agreement Between U.S. Department of Health and Human Services and DSS (February 1995).

C. The Nebraska Legislature confirmed the waivers in 1995 through amendments to the WRA, and specifically mandated opportunity for post-secondary education.

The Nebraska Legislature continued its control over welfare policy in Nebraska in the following legislative session. As planned, the Nebraska Legislature reviewed the waiver agreement and amended the WRA. Laws 1995, LB 455.

LB 455 as introduced featured the adoption of the waiver agreement through the amending of Neb.Rev.Stat. §68-1713, and included the specific reference to the provisions mandated by LB 1224, §26(3)(c): "The Department of Social Services may implement the waivers approved by the United States Department of Health and Human Services or the United States Department of Agriculture, which waivers are entitled:.(y) Disregard Financial Assistance Received Intended for Books, Tuition, or Other Self-Sufficiency Related Use." LB 455, §6.

Subsequently, the Nebraska Legislature's Health and Human Services Committee sent LB 455 to the full Unicameral with a committee amendment including, among other things, the

specific addition of "postsecondary education" as an allowable work activity as part of a self-sufficiency contract. LB 455, 94th Legislature, First Session, AM 1397, §5, Legis. Journal, at 1503.

In turn, an effort was made on the floor of the Unicameral to strip the committee amendment of this specific addition of post-secondary education. The Nebraska Legislature fully debated and rejected this effort. LB 455, 94th Legislature, First Session, AM 1563, Legis. Journal, at 1594-95. During debate on this effort to strip this provision from the committee amendment, Senator Wesely, the primary sponsor of the original LB 1224 and chair of the Nebraska Legislature's Health and Human Services Committee, passionately defended the committee amendment and the opportunity for welfare recipients to participate in post-secondary education:

> "[L]et me tell you, if you had a chance to talk to some of the recipients of welfare that have been meeting with us and talking to us over the past couple of years, many of them are postsecondary education students. Some of them, in the time that we've talked about this in the last two years, got their [certificates, degrees, etc.]. They're now working, they're now productive taxpaying citizens and proud of it and I'm proud of them as well. And it seems to me that if they've got the skills and the ability and the drive and the desire and the dream to get a higher education, then we shouldn't deny that to them if that's one of the options that can make them a successful citizen in our state. It's part of the fabric of this country and of the state in particular that education is the key to opening the door to success. The better the education, the better the chance you have of promoting yourself and your family and being successful in the economic workforce. And so to me, to deny this is to deny the dream to the poor among us that we all I think would share in . . . " Floor Debate, LB 455, 94th Legislature, First Session, April 10, 1995, at 4244 (Senator Wesely)(emphasis added)

The Legislature was aware that low-income students engaged in post-secondary education would also be receiving, in addition to the cash assistance and related benefits provided by the WRA, other forms of "financial assistance" while they pursued their postsecondary education:

> "We're talking about [this] as part of the training program. [and] including among the options postsecondary education, but that doesn't mean we go in and pay the tuition. It doesn't mean we go in and pay the fees. It means that the support mechanism there in

terms of the cash payment and the other things that go along with welfare can be there for this mother and child or children if she goes on to higher education." Id. at 4245

Senator Wesely explained the necessity of specifically itemizing "postsecondary education" in the WRA through the committee amendment, as he was concerned the NDHHS was not fully complying with the policy purposes of the original WRA:

> "[T]he reason we've added it in here is that in the initial [information] back from the Department [about implementation of the WRA] it was not even mentioned in a number of those. It didn't look like it was on the radar map and we talked about it last year [in LB 1224]. I thought we all decided that this should be among the options there would be. Higher education is among those options and whether that's community college or the university or something in between, that's an option that shouldn't be denied these people and I would ask your support for the amendment and opposition to the [proposed striking of "postsecondary education" from the committee amendment]." Id. at 4245.

Senator Wesely then directly explained the relationship of these two key concepts in the WRA (postsecondary educational opportunity and the disregard of financial assistance for educational programs):

> "Right now [welfare recipients] can go and go into college and [still] receive ADC benefits. [But s]ome of [the financial assistance provided to students] are counted against their income. [But] under the law we passed though [the WRA] and will take effect with the new program, that [won't] happen any longer. So if they win a scholarship [for example], they'll be able to keep it now." Id. at 4251.

Senator Wesely was joined by several other State Senators in clarifying the intent of the Nebraska Legislature. The senators reiterated the fundamental premise stated in LB 1224 supporting educational opportunity and now reinforced by the committee amendment. For example:

> "Now I have to stand in opposition to [this amendment to strike "postsecondary education" as an allowable work activity] because a high school education, a GED, adult basic education, or training in English as a second language, none of those, none of those will get you better than a minimum wage job in my part of the state." Id. at 4256 (Senator McKenzie)

The effort to strike "postsecondary education" as an allowable work activity was then summarily rejected by the Nebraska Legislature.

This activity by the Nebraska Unicameral established conclusively that it intended and mandated that individuals seeking to attain economic self-sufficiency were to be allowed to participate in post-secondary education, and that the financial assistance associated with that effort was to be disregarded when making eligibility and benefit determinations. This would, in turn, enable a more effective transition to economic self-sufficiency, a fundamental goal of the WRA.

LB 455 was thereafter passed with the inclusion of "postsecondary education" as a work activity, and included the specific reiteration of the financial assistance disregard provisions of LB 1224 as an agreed upon waiver of federal law. The passage of LB 455, as amended, opened the doors to the "demonstration project" implementation of welfare reform policy as enunciated in the WRA and agreed to by the federal government.

III The federal Personal Responsibility and Work Opportunity Reconciliation Act, passed in August, 1996, repealed existing federal welfare law and allowed the State of Nebraska to proceed with WRA public policy reform without federal waivers.

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

A. Federal welfare reform intended to give states the flexibility to implement their own welfare reform programs.

Congress acted primarily out of a desire to allow states the freedom to administer, without federal oversight, their own welfare programs while continuing to receive some federal assistance. Id. at § 601 ("The purpose of this part is to increase the flexibility of States in operating a program designed to [among other things] (2) end the dependency of needy parents on

government benefits by promoting job preparation, work, and marriage").

> Congress explained its position as follows:
> "[Federal reform] cuts through the bureaucratic maze that the Washington-centered welfare regime has created. The plan gives States the freedom to innovate in developing income support programs for welfare families that encourage personal responsibility and move welfare recipients into the work force. Furthermore, States are permitted to harmonize cash welfare assistance and food stamps, so that one set of rules can be used for families applying for both programs. This eliminates bureaucratic duplication while providing one-stop service to program participants." U. S. Code Cong.and Admin. News, 104th Congress, Second Session, 1996, House Report, at 2186-2187

A. The passage of federal welfare reform freed Nebraska from nearly all federal constraints on public policy as to public assistance programs, allowing the State of Nebraska to implement its own welfare reform policy as articulated by the WRA, including disregards for financial assistance related to education or training programs.

The passage of the federal PRA in 1996 transferred the responsibility for determining eligibility factors for public assistance entirely to Nebraska. Instead of a requirement that Nebraska administer their eligibility rules in compliance with a set of federal standards, see supra, the PRA gave the Nebraska full discretion in determining who was eligible for cash assistance and related programs. See 42 USC § 617 (1998) ("No officer or employee of the Federal Government may regulate the conduct of States under this part or enforce any provision of this part, except to the extent expressly provided in this part") Nebraska was free then to use its own eligibility rules and conditions, such as income and resource standards and budgeting and payment methodologies, provided it did not violate the federal constitution. Id.; see Saenz, et al. v. Roe, ___ U.S. ___, 67 U.S.L.W. 4291 (1999).

A. Following the passage of the PRA, in 1997 the Nebraska Legislature reiterated the public policies found in the WRA and authorized statewide implementation of these public policies.

The fact that federal welfare reform created the freedom that had long been desired by Nebraska policymakers was welcomed by the Nebraska Legislature. Nebraska could now make welfare public policy changes without any federal interference, review or requirements. As

Nebraska had already stated its public policies through the WRA, it now acted to put them into full operation across the state. In 1997, LB 864 was introduced and passed. This legislation included a recognition that the Social Security Act provisions had been repealed and Nebraska was no longer required to gain federal approval of the provisions of the WRA, and that the program could be implemented across the state. Laws 1997, LB 864, §12, codified in Neb.Rev.Stat. § 68-1710 (1998 Cumm.Supp.).

With this new freedom from federal oversight and control the Nebraska Legislature also readdressed several policy matters within the WRA. Among other things, LB 864 amended the WRA's earned income disregard rule found at Neb.Rev.Stat. §68-1726(3)(a) to make it identical to the 20% of gross earnings found in the food stamp program. Laws 1997, LB 864, §§13(s) and 15, codified at Neb.Rev.Stat.§§68-1713, -1726(3)(a) . The impetus for this change was the continuing public policy effort enunciated in the WRA to simplify the welfare system and create a single set of rules for eligibility.

The public policy as to the disregard of financial assistance defined in Neb.Rev.Stat.§68-1726(3)(c), however, remained unchanged by the 1997 amendments to the WRA.

Therefore, the public policy requirement that all financial assistance described in this provision of the WRA is to be disregarded was in full effect in July and August, 1997. All federal oversight "regulat[ing] the conduct of States", 42 U.S.C. §617, was over. At the time of the issues in this appeal, the DSS was required to disregard the Appellant's financial assistance pursuant to the WRA.**IV. The District Court was clearly erroneous when it failed to correctly apply rules of**

statutory interpretation and properly conclude that the type of financial assistance received by the Appellant was to be disregarded pursuant to the WRA.

A. The District Court correctly asserted that it was required to engage in statutory interpretation to resolve this appeal. However, the District Court failed entirely to correctly apply rules of statutory interpretation in its incorrect determination that the AmeriCorps USA stipend received by the Appellant should <u>not</u> be disregarded for income eligibility and benefit determination purposes.**The District Court erred by failing to apply rules of statutory interpretation that**

requires the court to look to the purpose of the WRA and give a construction which best achieves that purpose.

When construing a statute, the court must look to objects sought to be accomplished, evils and mischief sought to be remedied, or purposes to be served, and places upon statute a reasonable or liberal construction which will best effect its purposes rather than one which will defeat it. Central States, 374, 837, Brown v. Wilson, 252 Neb. 752, 567 N.W.2d 124 (1997); In re Interest of Joshua M., 251 Neb. 614, 558 N.W.2d 548 (1997).

In this instance, the District Court was required to give the WRA a construction that best effectuated the purposes of the WRA. The District Court failed entirely to assess the purpose of the WRA, and to apply its terms accordingly.

1. A primary purpose of the WRA is to encourage participation in education or training programs as a means of attaining economic self-sufficiency, and to disregard financial assistance related to such programs when making eligibility and benefit determinations.

In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning. An appellate court is not to resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. Central States, *Id.*; Piska v. Nebraska Department of Social Services, 252 Neb. 589, 567 N.W.2d 544 (1997)

The Unicameral, through the WRA, plainly intended and mandated that individuals seeking to attain economic self-sufficiency were to be allowed to participate in post-secondary education while receiving public assistance, and that other financial assistance associated with that effort was to be disregarded when making eligibility and benefit determinations. This would, in turn, enable a more effective transition from public assistance to economic self-sufficiency, a fundamental goal of the WRA. See supra discussion; e.g. Neb.Rev.Stat.§68-1709 (Reissue 1996).

1. **The interpretation given by the District Court defeats the purpose of the WRA, as it discourages rather than promotes post-secondary education as an allowed work activity under the WRA.**

The District Court's construction of the WRA defeated a very basic purpose of the statute: to help low-income families become self-sufficient by, among other things, disregarding "financial assistance" when it comes as part of the pursuit of higher education. In order to help accomplish

this goal, earnings and financial assistance disregards were put into statute. The statute is clear: If "financial assistance" is received as part of an educational program, the Legislature wanted it to be disregarded. If "financial assistance" is not received as part of an educational program, it is not to be disregarded.

1. The Appellant received a stipend from the AmeriCorps USA program as part of her pursuit of higher education. The District Court, in its order, did find that the AmeriCorps USA stipend was "similar" to other forms of educational financial assistance. Its analysis should have stopped there, and the District Court should have similarly disregarded the Appellant's financial assistance. By requiring this stipend to be counted, this discouraged the Appellant from seeking additional assistance related to her educational program and served to negatively impact the Appellant's transition from public assistance to economic self-sufficiency. This is clearly not in keeping with the clear statutory purpose of the WRA.**The statutory interpretation which best achieves the purpose of the WRA is to require a disregarding of the Appellant's AmeriCorps USA stipend as income when making eligibility and benefit determinations.**

The clear and simple conclusion is that the financial assistance received by the Appellant must be disregarded in order to best effect the purposes of the WRA. Therefore, the District Court's interpretation of the WRA does not conform to the law.

B. **The District Court erred by failing to apply rules of statutory interpretation that require a court to give effect to the entire language of the statute and to reconcile different provisions so they are consistent, harmonious, and sensible.**

It is further the duty of the court to give effect to the entire language of the WRA, and to reconcile different provisions so they are consistent, harmonious, and sensible. Hoiengs v. County of Adams, 254 Neb. 64, 71, 574 N.W.2d 498, 503 (1998). In the case of the WRA, this general principle of statutory construction is easily followed due to the consistent statements of public policy found throughout the Act. See, e.g. Neb.Rev.Stat. §68-1709 (Reissue of 1996)

1. The entire language of the WRA mandates opportunity for participation in education or training programs as a means of attaining economic self-sufficiency, and mandates the disregard of financial assistance related to such programs when making eligibility and benefit determinations to enable a more effective transition from public assistance to economic self-sufficiency.

3. As described throughout this Brief, the WRA specifically requires the disregarding of

financial assistance associated with an educational or training program. If there is any ambiguity in the WRA's provisions about the disregarding of financial assistance, it is only because Neb.Rev.Stat. §§68-1726(3)(b) and (c) use the identical term "financial assistance."

4. Nevertheless, the WRA throughout the statute consistently and plainly requires that financial assistance associated with an educational or training program is to be disregarded. Neb.Rev.Stat. §68-1726(3)(c) defines the type of financial assistance to be disregarded by reference to other statutes and public programs, along with common terms for student financial assistance. The additional use of the term "shall include, but not be limited to" in Section (c) requires the disregarding the Appellant's financial assistance when subjected to general principles of statutory construction. "Where the statute contains an enumeration of certain things to which the act applies and also a general expression concerning application of the act, the general expression may be given effect if the context shows that the enumeration was not intended to be exclusive." 82 C.J.S. Statutes §333(b). Therefore, the maxim "expressio unius est exclusio alterus" is not applicable, as the Legislature's use of the plain language "shall include, but not be limited to" showed its plain intent that this enumeration of types of financial assistance was illustrative and not exclusive. The Nebraska Legislature "clearly comprehend[ed] many different cases in which some only are mentioned expressly by way of example, and not of excluding others of a similar nature." Id. Nebraska courts routinely have adopted this general principle of statutory construction. See, e.g., Papillion/LaVista Schools Principals and Supervisors Organization (PLPSO) v. Papillion/LaVista Sch. Dist, 152 Neb. 308, 314, 562 NW2d 335, 339 (1997)

5. Indeed, the District Court, while deferring to the actions of the NDHHS, did in fact find that "[t]he Americorps yearly stipend is provided as part of a program designed to exchange public service for educational opportunities. [and] is similar to the 'school grants, scholarships, vocational rehabilitation payments, Job Training Partnership Act payments' that not considered income under the statute." Order, at 4. Rather than comparing the type of financial assistance received by the appellant to JTPA payments, scholarships, and similar financial assistance related to education and job training programs, the District Court inappropriately compared it the type of financial assistance defined in Neb.Rev.Stat.§68-1726(3)(b). Clearly, by the plain meaning of the statute, the type of financial assistance in question should have been compared to the financial assistance in Neb.Rev.Stat.§68-1726(3)(c).

6. The District Court ignored this basic rule of statutory construction and, by deferring to the interpretations of the NDHHS, substituted its own subjective determination about how to treat the financial assistance received by the Appellant. "The exceptions are few indeed that authorize a court to read something into [a statute] that the law writers did not themselves

put therein." 82 C.J.S. Statutes §322(2).

7. A consistent, harmonious, and sensible interpretation of the WRA and Neb.Rev.Stat. §68-1726(3) requires the disregarding of the Appellant's AmeriCorps USA stipend as income when making eligibility and benefit determinations.

It is therefore highly consistent with the entire language of the WRA to include the AmeriCorps USA stipend in the definition of financial assistance found at Neb.Rev.Stat. §68-1726(3)(c). The District Court's decision, therefore, did not conform to the law.

V. The District Court erred by according deference to the NDHHS' interpretation of the WRA in this circumstance, as it is plainly erroneous and inconsistent with the statute.

The District Court clearly erred by deferring to the interpretations by the NDHHS of the WRA and its own regulations. This is demonstrated in several ways. In any event, the appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below, and deference to an agency's interpretations of its own regulations is appropriate, unless plainly erroneous or inconsistent. Schmidt v. State, 255 Neb. 551, 586 N.W.2d 148 (1998); Inner Harbour Hospitals, supra., 795, 491; Slack Nsg. Home, supra., 452, 285.

This appellate court should not defer to the agency's interpretations of its own rules to deny assistance to the Appellant's family, as these interpretations are both plainly erroneous and inconsistent.

A. The NDHHS was required to disregard the Appellant's AmeriCorps USA stipend as income for eligibility and benefit determination purposes pursuant to properly promulgated administrative rules.

A remarkable feature of this appeal is that the NDHHS simply ignored and refused to apply its own properly promulgated rules to the financial assistance in question. In doing so, it violated its own rules.

1. The NDHHS was specifically authorized by the WRA to adopt and promulgate rules and regulations to carry out the public policy purposes enunciated in the WRA.

There is no dispute that the NDHHS was given the authority by the Nebraska Legislature to create rules implementing the WRA: "The Department of Health and Human Services shall adopt and promulgate rules and regulations to carry out the WRA." Neb.Rev.Stat.§68-1715

(1996). There is no dispute that the NDHHS promulgated such rules for the "Employment First" program, and that they were in effect in July and August, 1997. See generally 468 NAC §7-000

1. The NDHHS rules in effect at the time in question appropriately implemented the public policy purpose enunciated in the WRA requiring the disregarding of the Appellant's financial assistance for income eligibility and benefit determination purposes.

The NDHHS rules in effect in July and August 1997 included the specific requirement that the type of financial assistance in question be disregarded for both income eligibility and benefit determination purpose. For the purpose of the Gross Income Limit Test, the rules required the disregarding of "[a]ny student financial assistance intended for books, tuition, or other self-sufficiency related use for a student." 468 NAC 7-019.09A(13). (E9,16) For the purpose of the subsequent Budget Test, the rules required the disregarding of "[a]ny student financial assistance." 468 NAC 7-019.09M(E9, 20)(emphasis added).

It is plain error, given these properly promulgated rules, for both the NDHHS and the District Court to refuse to apply these rules. Courts have ruled repeatedly that the NDHHS cannot apply some of its rules and ignore others. See Schmidt v. State, 559, 153-54 ("Properly adopted and filed agency regulations have the effect of statutory law. Regulations bind the agency that promulgated them just as they bind individual citizens")

Further, the District Court, while deferring to the actions of the NDHHS, did in fact find that "[t]he Americorps yearly stipend is provided as part of a program designed to exchange public service for educational opportunities. [and] is similar to the 'school grants, scholarships, vocational rehabilitation payments, Job Training Partnership Act payments' that not considered income under the statute." Order, at 4. Having made this correct finding that the stipend in question is "student financial assistance," the court should have ended its analysis by then applying the properly promulgated rules disregarding "any student financial assistance."

The failure by both the NDHHS and the District Court to apply specific and properly promulgated rules to the financial assistance in question is plainly erroneous.

B. **The NDHHS abused its delegated powers under the WRA when it refused to disregard the Appellant's financial assistance.**

While the NDHHS had simple and specific rules to apply, as described above, the NDHHS and the District Court went even a step further to deny assistance to the Appellant and her family. The District Court thereafter incorrectly deferred to the abuse by the NDHHS of its delegated authority when interpreting its own regulations.

1. **The delegated power of the NDHHS to make rules and regulations to implement public policy is limited to the powers delegated to the agency by the terms of the WRA.**

There is no dispute the NDHHS was given general authority to promulgate rules and regulations regarding the WRA. Nonetheless, it is fundamental that, when the Nebraska Legislature delegates to an administrative agency the power to make rules and regulations to implement the policy of a statute, this delegated authority is limited to the powers delegated to the agency by the statute which the agency is to administer. Clemens, supra, at 77, 189 ("Absent specific statutory authority, DSS did not have the power to issue the regulation eliminating benefits, and the regulation is therefore invalid"); State ex rel. Spire v. Stodola, ,supra, at 107, 436. Further, it is fundamental that an administrative agency may not employ its rulemaking power to modify, alter, or enlarge provisions of a statute which it is charged with administering. Id. To do so would be an unconstitutional violation of the doctrine of separation of powers. Id.

1. **The WRA requires the disregarding of financial assistance associated with education and training programs. Therefore, the power delegated to the NDHHS under the statute includes the obligation to disregard such financial assistance.**

In this instance, the WRA plainly requires that financial assistance associated with an educational or training program is to be disregarded. Neb.Rev.Stat. §68-1726(3)(c)(1996). The statute further articulates that "[s]uch assistance shall include, but not be limited to," a listing of types of such financial assistance. Id.(emphasis added) Therefore, a plain reading of the statute requires the NDHHS, when exercising its delegated authority, to disregard financial assistance that is similar to the financial assistance listed in the statute but not actually listed in the statute.

Indeed, the NDHHS's own rules recognize the illustrative nature of the statute: "If the unit

passes the 185 percent [Gross Income] test, the case manager shall compute the budget. Following is a listing of some income types and treatment." 468 NAC 7-019.09M (E9, 18-21)(emphasis added) This language recognizes it is impossible to list each and every specific kind of financial assistance and how to treat it for income eligibility and benefit determination purposes. It is therefore axiomatic that the NDHHS would exercise its delegated authority when determining what to disregard, but must do so according to the public policies in the WRA.

1. **The action by the NDHHS to refuse to disregard the Appellant's financial assistance was an abuse of the delegated authority granted to the NDHHS.**

Nevertheless, in this case the NDHHS refused to disregard the financial assistance that all acknowledge is similar to the types of disregarded financial assistance listed in the statute. This action was an abuse of its delegated authority.

The AmeriCorps USA stipend is financial assistance related to an educational or job training program. The Nebraska Legislature requires that such financial assistance be disregarded. The NDHHS was required to use its delegated authority to disregard this financial assistance. The fact the NDHHS did not reveals an abuse of its authority, and unlawfully modified and altered the WRA as it applied to the Appellant. See Clemens, supra, at 77, 188-189. This was a clearly erroneous action by the NDHHS.

C. **The NDHHS was required by the WRA to create and implement simplified, uniform and consistent rules to carry out the public policies of the WRA.**

The Nebraska Legislature, in the WRA, required the simplification of rules between welfare programs, and the elimination of conflicting welfare program rules. Neb.Rev.Stat. §68-1709(2) and (3)(1996); supra discussion. The failure to do so by the NDHHS requires a low level of deference to be accorded to the interpretations of the NDHHS of its own regulations.

1. **The NDHHS rules as to the disregarding of income for eligibility and benefit determination purposes have not been simplified, are not uniform, and are not consistent.**

The picture cast by the regulatory listing of how to treat certain income with respect to either the "Gross Income Limit Test," 468 NAC 7-019.09A (E9, 16-17) or the "Budget Limit

Test", 468 NAC 7-019.09M (E9, 18-21), is hardly one the Nebraska Legislature intended. The NDHHS' regulations as to the disregarding of income reflect wholesale confusion, lack of uniformity, and arbitrariness.

The origins of many of these disregards are murky. At best, these disregards appropriately reflect public policy as stated in the WRA. See supra discussion regarding the properly promulgated rule disregarding "any student financial assistance." At worst, many may simply not now be allowed by the WRA, and have become law at various times due to various federal options or requirements and merely kept in place after the passage of the WRA.

In any event, it is impossible to reconcile, given the public policy purposes of the WRA, the refusal to disregard the Appellant's AmeriCorps USA stipend for either tests with the required regulatory disregarding of at least the following: "JTPA allowance paid to the client.," 468 NAC 7-019.09A (10), "[p]ayment for an internship or on-the-job training,"id. at (14), "earnings received from the employer or compensation in lieu of wages under a JTPA program,"468 NAC 7-019.09M(13), "any student financial assistance," id. at (21), "payments to a client participating in training or school attendance subsidized by the Division of Vocational Rehabilitation," id. at (23), and "payments to VISTA volunteers," id. at (31). Each is clearly financial assistance associated with an educational or job training program in the same sense as the AmeriCorps USA stipend.

The idiosyncracy of these regulations can be almost charming. For example, the caseworker must disregard the value of "home produce from garden, livestock and poultry used by the household for their own consumption," id. at (9), but it must count as unearned income the "sale of home produce, livestock, poultry." Id. at (8). Thus, if a poor Nebraskan eats the tomato she raised, the potential sale value of that tomato would not be counted against her family's potential assistance from the NDHHS. But if she sells that tomato in an effort to become economically self-sufficient, the value of that tomato would be counted and the assistance would be lowered. As described throughout this Brief, this hardly complies with the WRA's public policy goal of assisting the transition from public assistance to economic self-sufficiency through,

among other things, the disregarding of income.

Further, the regulations reveal no articulated rationale for which sources of "financial assistance" are used for "life's basic necessities" and therefore to be counted, Neb.Rev.Stat. §68-1726(3)(b), and those which are used for "self-sufficiency related expenses" and not to be counted, Neb.Rev.Stat. §68-1726(3)(b). The WRA, though, is clear on this point. For example, the statute is clear that if a family is given money to buy a tomato to eat, it would be considered "financial assistance" for "life's basic necessities" and would be counted as income. But if this family were given the money to buy a tomato to eat to help the principal wage earner participate in an education or training program, it would be considered "financial assistance" for "self-sufficiency related expenses" and not be counted as income. For this family receiving money to help buy its food (i.e. a clear basic necessity), there clearly is an incentive in the statute to participate in education and job training programs.

The NDHHS, though, struggles mightily with this distinction in its regulations. For example, it is unclear why "in-kind income received by Job Corps participants for food, shelter, etc.", id. at (42) is disregarded, but the "living allowance issued to Job Corps recipients", id. at (41) is counted. Clearly the Job Corps is an education or job training program. Under the WRA, all of the "financial assistance" associated with this education or job training program should be disregarded. It matters not at all whether the "in-kind income" is used for "food or shelter", or whether the "living allowance" is used for the same. It is self-evident both types of income are used for basic necessities for these individuals and families living at the sub-poverty level. What matters to the Nebraska Legislature, for disregard purposes, is whether this financial assistance is associated with an education or job training program.

This is the same dilemma the NDHHS posed for the Appellant and her caseworker with respect to her AmeriCorps USA stipend. No articulated reasons were given for why, on the one hand, this stipend would count for cash assistance purposes (while other similar types of financial assistance would not count), while on the other hand it would be disregarded for food stamp eligibility. The NDHHS income eligibility regulations were clearly rife with inconsistency and a

failure to clearly implement the public policy purposes of the WRA.

1. **The lack of simplification, uniformity, and consistency requires a low level of deference to the interpretations of the NDHHS of its own regulations.**

The failure by the NDHHS to simplify, make uniform, and make consistent its income disregard rules and regulations in light of the requirements of the WRA requires this court to give a low level of deference to the interpretations of the NDHHS. The lack of consistency that is plainly apparent in the language of the these rules implementing the WRA argues very persuasively that any deference to the NDHHS' interpretation of its own rules would be misplaced. See, e.g. Good Samaritan Hospital v. Shalala, 113 S.Ct. 2151, 508 U.S. 402, 124 L.Ed.2d 368 (1993)(lack of consistency within NDHHS' regulations lowered the deference accorded the agency); Slack Nsg. Home, supra, at 467, 296.

D. **The NDHHS was plainly in error to rely upon repealed and superseded federal law rather than the WRA and properly promulgated state rules and regulations implementing the WRA when it determined in 1997 that the AmeriCorps USA stipend was not be disregarded as income for eligibility and benefit determination purposes.**

The District Court was clearly erroneous when it allowed the NDHHS to rely upon a federal interpretation of welfare law as it existed in 1994 to interpret state welfare law as it existed in 1997. As described in detail above, this interpretation and application of superseded federal law is plain error on the part of the NDHHS and the District Court.

The use by the NDHHS in July and August, 1997 of NDHHS interpretative memos of September 27, 1994 (E7, 1-2) and April 4, 1996 (E8) to require the counting of the AmeriCorps USA stipend reveal that the NDHHS was interpreting and applying federal law as it existed prior to the passage and amending of the WRA and the subsequent passage of the federal Personal Responsibility and Work Opportunity Act of 1996, Pub.L.No. 104-193, 110 Stat. 2105 (1996). The NDHHS was clearly not seeking to apply the public policy purposes of the WRA.

For example, the September 27, 1994 memo does not give any authority for its detailed descriptions of varying treatments for the same or similar income. Nonetheless, even though the

WRA was passed in April, 1994, as of September 7, 1994 the NDHHS was still required to follow federal law and regulatory interpretations when determining how to treat income for eligibility and benefit determination purposes. It is therefore assumed that the September 7, 1994 memo was reciting the federal interpretation pursuant to federal law in effect at that time. See, e.g. Letter from Donna E. Shalala, Secretary of Health and Human Services to Eli J. Segal, Chief Executive Officer, Corporation for National Services (May 27, 1994), cited in "Special Legal Issues for AmeriCorps USA," Nonprofit Risk Management Center at 35 (1998).

In addition, the April 4, 1996 memo giving policy guidance at the state level about AmeriCorps is more explicit in its reference to the use and reliance upon federal interpretative guidance. Therefore, it is clear that, as of April 4, 1996, the NDHHS was giving policy guidance that referenced back to federal law in effect in 1994. It is true that the federal PRA had yet to pass. Nonetheless, at this point in time, the State of Nebraska, pursuant to the WRA, had asked for and received a waiver from the federal government regarding the treatment of financial assistance associated with education and training programs, rules and regulations had been promulgated reflecting this waiver, and the "Employment First" program had been authorized for the "demonstration project" counties. See supra. As of April 1996, then, any public policy question about how to treat the AmeriCorps program stipends for purposes of the "Employment First" program should have been referencing the requirements of the WRA, not relying upon federal agency interpretation of federal law.

This is doubly true as of July and August, 1997, when the events of this appeal transpired. There is no explanation for why the NDHHS relied upon this superseded federal interpretation of superseded federal law to deny the Appellant public assistance.

As the WRA requires the disregarding of financial assistance associated with an education or training program, these actions by the NDHHS (and the deference to this action by the District Court) is plain error.

F. **The NDHHS, in relying upon internal interpretative memos to render the Appellant ineligible for assistance, unlawfully promulgated rules implementing the WRA**

without first complying with the Administrative Procedures Act.

The Appellant's caseworker acknowledged that the only policy guidance she received on this matter in August, 1997, was the direction to use internal NDHHS interpretative memorandums from 1994 and 1996. (T13-14) The NDHHS interpretation of law regarding how to treat AmeriCorps USA stipends when making income eligibility and benefit determinations was found, according to the direction given this caseworker, solely in these interpretative memorandums. This guidance was found nowhere in Nebraska's welfare program rules and regulations in 1997, including the new "Employment First" regulations found in "Chapter VII" of the Nebraska Administrative Code, Title 468 (Aid to Dependent Children); see generally 468 NAC §7-000 et seq.

The NDHHS refused to disregard the Appellant's financial assistance pursuant to its own interpretative memorandum relying upon federal interpretative memoranda on the subject of AmeriCorps from 1994. This approach to rulemaking through interpretative memorandums was a failure by the NDHHS to comply with the requirements of the Administrative Procedure Act, and renders the decision to find the Appellant and her grandchildren ineligible for assistance invalid.

1. **The NDHHS was required to promulgate its rules and regulations through the Administrative Procedures Act, including how it implemented Neb.Rev.Stat. §68-1726(3)(c).**

When promulgating rules interpreting the WRA, the NDHHS is required to follow the requirements of the Administrative Procedures Act, Neb.Rev.Stat. §84-901 et seq. (Reissue of 1994, Cumm. Supp. 1998). These requirements include public notice, hearing, and filing with the Secretary of State. Id. The definition of rule or regulation is quite broad:

> "Rule or regulation shall mean any rule, regulation, or standard issued by an agency, including the amendment or repeal thereof whether with or without prior hearing and designed to implement, interpret, or make specific the law enforced or administered by it or governing its organization or procedure."

Neb.Rev.Stat. §84-901(2)(Reissue of 1994, Cumm.Supp. 1998)(emphasis added)

1. **The NDHHS interpretative memos regarding the treatment of the Appellant's**

financial assistance was the making of a rule as defined by the Administrative Procedures Act.

The NDHHS, as described above, acted through its internal interpretative memorandums to "implement, interpret, or make specific" the financial assistance disregard provisions of the WRA. The NDHHS internal interpretative memorandums were regarded by the NDHHS as the definitive interpretation of this section of the law as to AmeriCorps stipends. These internal interpretative memorandums, even though they relied upon superseded federal law, were clearly in the nature the type of "rule or regulation" covered by the Administrative Procedures Act.

Further, these internal interpretative memorandums directly affected the "private rights and interests" of the Appellant and her grandchildren by rendering them ineligible for cash assistance public benefits. The Appellant was forced to go without medical care and other assistance, and her family, already living in sub-poverty, suffered from far less income in the household. Therefore, the exception to the Administrative Procedures Act requirements for those rules that do not affect such private rights or interests does not apply. Id.; see Richardson v. Clarke, 2 Neb.App. 575, 512 N.W.2d 44, 49 (1994)("When [the Department] decided to determine the length of these sentences [pursuant to old statute] rather than the new law, the decision was a 'standard issued by an agency . . . designed to implement, interpret, or make specific the law' administered by it").

1. **The NDHHS policy guidance as to the Appellant's eligibility for assistance was therefore invalid due to the failure to comply with the requirements of the Administrative Procedures Act.**

As the NDHHS internal interpretative memorandums on this issue created a rule "designed to implement, interpret, or make specific" the WRA, the agency was required to comply with the terms of the Administrative Procedures Act prior to effectuating the rule. In particular, an agency's rules or regulations must be filed with the Secretary of State. If not, they are invalid. Neb.Rev.Stat. §84-906 (Reissue of 1994, Cumm.Supp. 1998); McAllister v. Dept. of Corr. Services, 253 Neb. 910, 914, 573 N.W.2d 143, 146-47 (1998).

It is undisputed that the NDHHS did not file this rule as to the treatment of the AmeriCorps USA stipend with the Secretary of State, or follow other requirements of the Administrative Procedures Act. Therefore, this rule is invalid.

1. The NDHHS reliance upon an invalid rule to deny the Appellant eligibility for assistance renders their decision denying assistance invalid.

The inescapable conclusion as to this "rulemaking by interpretative memos" is that any decision premised upon the alleged authority of this "rule" is also invalid. The Appellant and her grandchildren should be able to disregard her AmeriCorps USA financial assistance pursuant to the WRA and properly promulgated rules, and in turn they should be able to receive the public benefits due them while they seek economic self-sufficiency.

VII Conclusion

For all the above reasons, the Appellant asks that the decision of the District Court be reversed.

Date: _____

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CERTIFICATE OF SERVICE

This is to certify that two copies of this Appellant Brief were served on counsel for the

Nebraska Department of Health and Human Services, Royce Harper, Assistant Attorney General, 2115 State Capitol, Lincoln, NE, 68509, via regular first class mail on October 27, 1999.

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