

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

MOLLY KEITH,

Petitioner,

v.

NEBRASKA DEPARTMENT OF
HEALTH AND HUMAN SERVICES and
NANCY MONTANEZ, DIRECTOR,

Respondents.

Case No. CI 04-3591

REPLY BRIEF OF PETITIONER

ARGUMENT

Petitioner, Molly Keith, was unjustly denied by the Respondents, the opportunity to pursue an educational program that will lead her family to lasting self-sufficiency. Ms. Keith clearly and affirmatively requested an appeal to address not only the sanction imposed by the Respondents, but the Respondents' refusal to let her renegotiate and include her educational program in her self-sufficiency contract. (E3,1:E2,6).

The Welfare Reform Act created a program to assist struggling families in climbing out of poverty and into sustainable employment that would allow them to live without the need for public assistance. Neb. Rev. Stat. § 68-1709. The Legislature recognized that there are a number of ways a family could approach this journey and they wanted to provide flexibility for the family to capitalize on their own strengths and reach for their highest level of self-sufficiency. Neb. Rev. Stat. §§ 68-1709 and 68-1726. The Respondents have created a rule and regulation that seeks to defeat this goal by shifting the focus of the Welfare Reform Act away from self-sufficiency to a focus on program completion. 468 NAC 2-020.06D (effective October 14, 2002). Because the Respondent's decision in Ms. Keith's appeal is inconsistent with the Welfare Reform Act, the administrative appeal decision should be overturned by this Court and

Ms. Keith should be allowed to continue attending classes full time as her only work activity under her self-sufficiency contract.

I. PETITIONER PROPERLY APPEALED THE RESPONDENT'S DECISION NOT TO INCLUDE EDUCATION IN HER SELF-SUFFICIENCY CONTRACT.

Pursuant to 465 NAC 2-001.02, "Every applicant for or recipient of assistance or services provided through the Nebraska Department of Social Services has the right to appeal any action, inaction, or failure to act with reasonable promptness with regard to the assistance or services." (effective August 21, 1995). Title 465 contains administrative "rules and regulations common to all programs and general information regarding Department policies." 465 NAC 1-000 (effective August 21, 1995). The right to appeal described in 465 NAC 2-001.02 is considered a "Program Universal" and is a policy common to "all benefit and services programs administered by the Nebraska Department of Social Services." 465 NAC 2-000 (effective August 21, 1995). In this case, one of the Department's actions or inactions was refusing to let Ms. Keith include her educational program in her self-sufficiency contract.

The Respondents argue that on the Request for Fair Hearing, Ms. Keith only indicated her intent to appeal the sanction and therefore no other issues could be considered at the appeal. Respondents' Brief p. 5. However, the Respondents ignore paragraph (6) of the form where Ms. Keith clearly indicates her intent to appeal the Department's "failure to allow me to include education in my contract." (E3,1:E2,6). It is important to remember that the administrative appeals process is designed so that clients can pursue an appeal without the assistance of an attorney. To require recipients to know that only the things listed in paragraph (1) can be considered during their appeal and nothing listed in paragraph (6) would be to place low-income families in a bureaucratic trap that leaves no room for justice. There is no question that Ms. Keith indicated on her appeal form her intent to contest the Department's decision regarding her

education. *Id.* There is also no question that the Department was on notice that Ms. Keith intended to raise the education issue during her appeal. (E2,8:1-8) and (T5-6). Moreover, the entire transcript of the administrative hearing addresses why the Department refused to let Ms. Keith include education in her contract. (E2). To say that the “Petitioner’s appeal *did not* address her ability to include the secondary [sic] education program in her self-sufficiency contract” is absurd. Respondent’s Brief p. 5.

II. THE PETITIONER’S EDUCATIONAL PROGRAM IS PERMITTED UNDER THE NEBRASKA WELFARE REFORM ACT.

“In discerning the meaning of a statute, a court must determine and give effect to the purpose and intent of the Legislature as ascertained from the entire language of the statute considered in its plain, ordinary, and popular sense. It is the court’s duty to discover, if possible, the Legislature’s intent from the language of the statute itself.” *Kosmicki v. State*, 264 Neb. 887, 893-894 (2002). “When construing a statute, an appellate court must look to the statute’s purpose and give to the statute a reasonable construction which best achieves that purpose, rather than a construction which would defeat it.” *Id.* When construing a statute that seeks to achieve a beneficent purpose, such as the Welfare Reform Act, it should be liberally construed in favor of those the statute is designed to benefit. *Mason v. State*, 267 Neb. 44, 52 (2003).

As the Respondents concede, the purpose of the Welfare Reform Act is to help families achieve their *highest level of self-sufficiency* within two years. Respondent’s Brief p. 6. The regulation at issue in this case, 468 NAC 2-020.06D, does not consider whether a client can be self-sufficient within the time period, but only whether they can complete a degree within the time limits. This regulation not only modifies, alters, and enlarges what is permitted under the Welfare Reform Act, it frustrates the purpose and intent of the Act.

The Welfare Reform Act only requires that a recipient attempt to become *self-sufficient* within the two-year time limit. Neb. Rev. Stat. § 68-1709. Self-sufficiency is not synonymous with degree completion; it is much broader. The statute defining the activities that must be included in a self-sufficiency contract does not contain any requirement that a degree be completed. Neb. Rev. Stat. § 68-1721. The only requirement is that the occupation being pursued be one that will lead to economic self-sufficiency. *Id.* This makes sense given that not all programs will lead to a degree or certification and that there may be situations, like Ms. Keith's, where it is only necessary to complete part of the program to obtain a job that will take the family off assistance. In providing support to an Employment First participant, the only issue should be whether they have a reasonable plan to be self-sufficient within the time limit.

It is important to remember that the Welfare Reform Act envisions a system that not only helps a family move off of ADC, but one that puts a family in a position where it is unlikely they will need assistance in the future. Neb. Rev. Stat. §§ 68-1709, 68-1718 and 68-1726. For parents, like Ms. Keith, who are able to pursue an associates degree, have already enrolled in a program, begun classes and have found a way to be self-sufficient within the time limits, it better achieves the goal of stabilizing families and ensuring they will not need to return to public assistance to support them rather than derailing them from their education and forcing them into a low-wage job that does not represent their highest level of economic self-sufficiency and will likely not lead to lasting self-sufficiency.

This case is what the Nebraska Supreme Court envisioned was possible in *Kosmicki v. State*, 264 Neb. 887, 896 (2002). In *Kosmicki*, the Court acknowledged that “[I]t may be possible for a recipient of benefits to demonstrate that even without obtaining a degree, his or her

course of postsecondary education will lead to self-sufficiency within the cash assistance limitation period. That circumstance, however, is not presented in the instant case.” *Id.*

Unlike Ms. Kosmicki, Ms. Keith has clearly established in the record that she can be self-sufficient within the two-year time limit by continuing to take classes toward her degree, but without actually completing her degree. She provided a plan to her caseworker illustrating that by the last quarter of her program she would be qualified to work as a Respiratory Care Aide (RCA), and could work in that capacity while she finished her degree. (E3,52-53:E2,6). Ms. Keith also illustrated that an RCA position would pay approximately \$9.38 per hour, enough money to take her off ADC and make her self-sufficient. *Id.* In addition, Ms. Keith established in the record that there was a high demand for both RCAs and Respiratory Therapists in the Lincoln area. *Id.*

The Respondents argue that Ms. Keith’s plan is speculative. Respondents’ Brief p. 7. However, if that is true, every self-sufficiency plan developed is equally speculative. There is never any guarantee, even if you receive an associate’s degree, that you will be able to find a job immediately upon completion. Furthermore, the Respondents did not reject Ms. Keith’s plan for self-sufficiency because it was too speculative or because it would not lead to self-sufficiency. The only reason the plan was rejected was because Ms. Keith would not complete her degree within the time limit. (E2,25:15-25, 26:1-11). As noted above, Ms. Keith did all that could be asked of any recipient to establish she could be self-sufficient within the time limit. (E3,52-53:E2,6).

The Welfare Reform Act specifically allows for recipients to seek additional training and education so that they can move out of minimum wage and low-income jobs and find employment that will keep them off public assistance for the long-term. Neb. Rev. Stat. §§ 68-

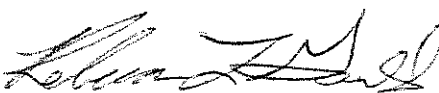
1709 and 68-1721. After being out of the work force for over two years, Ms. Keith found herself in need of additional education to be able to find a job that will allow her to support her family. For the purposes of the Employment First Program, Ms. Keith's goal for self-sufficiency is to complete enough hours of the Respiratory Therapy program to qualify to be an RCA. (E3,52-53:E2,6). She does not intend to stop her education at that point, but she will no longer need assistance through the ADC program to support her family. *Id.* The Respondents think this plan is "offensive." Respondents Brief p. 8. What would be truly offensive to the purpose of the Welfare Reform Act would be to force Ms. Keith to abandon her educational program and relegate her to a low-wage job that will always leave her and her two children teetering on the edge of poverty.

CONCLUSION

For all of the foregoing reasons, the Petitioner asks that this Court overturn the decision of the Department, strike down the Department's policy requiring degree completion, and allow Ms. Keith to continue her Respiratory Therapy coursework.

DATED: December 23, 2004

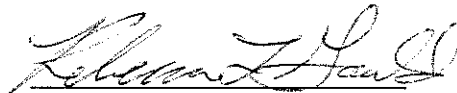
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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the foregoing Reply Brief of Petitioner were served on the Respondents via United States First Class Mail to the Respondents' counsel Royce Harper, Assistant Attorney General, 2115 State Capitol, Lincoln, NE 68509, Douglas D. Dexter, Assistant Attorney General, 2115 State Capitol, Lincoln, Nebraska 68509, and Gail Steen, Legal Counsel for NDHHS, P.O. Box 95026, Lincoln, NE 68509 on December 23, 2004.

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