

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA**

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| BILL M., et al., |) | Case No. 4:03CV3189 |
| |) | |
| Plaintiffs, |) | |
| |) | |
| vs. |) | PLAINTIFFS' MOTION |
| |) | IN SUPPORT OF CLASS |
| |) | CERTIFICATION AND |
| |) | APPOINTMENT OF CLASS |
| NEBRASKA DEPARTMENT OF |) | COUNSEL |
| HEALTH AND HUMAN SERVICES |) | |
| FINANCE AND SUPPORT, et al., |) | |
| |) | |
| Defendants. |) | |

Comes Now the Plaintiffs, by and through their attorneys of record, and respectfully move this Honorable Court for an Order certifying a class in this action and declaring that this action be maintained as a class action pursuant to Rule 23(a) and 23(b) of the Federal Rules of Civil Procedure. Said motion is made on the following grounds:

1. The proposed class is defined as: all present and future individuals with developmental disabilities in Nebraska who are eligible for Medical Assistance Home and Community-Based Services but either are not receiving funding for such services, or are not receiving sufficient funding for such services to reasonably achieve the purpose of the service, assure the class member's health and safety, or ensure progress toward independence, interdependence, productivity and community integration.

2. The proposed class in this matter and its named representatives comply with the criteria and requirements for class certification set forth in Rule 23(a) and Rules 23(b)(1)(A), 23(b)(1)(B), and 23(b)(2). Specifically:

- (a) The class is so numerous that joinder of all members is impracticable. Over fourteen hundred people are on list of persons with unmet needs, and while over two thousand individuals are receiving Home and Community-Based Services, Defendants' use of a flawed mechanism for determining the level of service it will fund for each individual results in a large percentage of those individuals receiving an inadequate level of service.
- (b) There are questions of law and fact common to the class. Common questions of law include, without limitation, (a) whether it is permissible under federal law for Nebraska to fail to provide an individual eligible for services under the community-based services waiver with funding for such services; (b) whether it is permissible under federal law for Nebraska to fail to provide an individual eligible for services under the community-based services waiver with a choice between an institutional setting and Home and Community-Based Services; (c) whether it is permissible under federal law for Nebraska to fail to provide an individual eligible for services under the community-based services waiver with funding for such services in a timely manner; (d) whether it is permissible under the Due Process Clause of the Fourteenth Amendment to deny funding for Home and Community Based waiver services to eligible individuals without notice and an opportunity to be heard; (e) whether it is permissible under the ADA to fail to provide individuals who are eligible for funding for services under the Home and Community Based Services waiver with funds for residential services and day habilitation services in the most integrated setting appropriate to the needs of the individual with disabilities; and (f) whether it is permissible under federal law, as well as applicable state law, for NDHHS and Finance & Support to provide a level of funding to individuals approved for Home and Community-Based Services which is insufficient to accomplish the purpose of the services, to assure the individuals' health and safety, or to ensure the individuals' progress toward independence, interdependence, productivity and community integration. Common questions of fact include, without limitation, (a) whether the Defendants have failed to provide the putative class with funds for Home and Community-Based Waiver Services; (b) whether the Defendants have failed to provide putative class members with a choice between an institutional setting and Home and Community-Based Services; (c) whether the Defendants have failed to provide putative class members with funds for waiver services in a timely manner; (d) whether the Defendants have denied putative class members with notice and an opportunity to be heard; (e) whether the Defendants have failed to provide putative class members with funds for residential and day habilitation services in the most integrated setting appropriate to the needs of the individual with disabilities; and (f) whether Defendants have failed to provide a level of funding to individuals approved for Home and Community Based services sufficient to accomplish the purpose of the services, to assure the individuals' health and safety, or to ensure the

individuals' progress toward independence, interdependence, productivity and community integration.

- (c) The claims of the representative Plaintiffs are typical of the claims of the class in that the representative Plaintiffs have each either been denied funding for requested services, or they are receiving funding inadequate to reasonably achieve the purpose of the service, assure the class member's health and safety, or ensure progress toward independence, interdependence, productivity and community integration
- (d) The representative Plaintiffs will fairly and adequately protect the interests of the class. The representative Plaintiffs have no interests in conflict with the class, and Plaintiffs have selected qualified, experienced, competent counsel.

3. The further requirements of Rule 23(b)(2) are met in this cause because the Defendants have acted or refused to act on grounds generally applicable to the class as a whole, thereby making final injunctive relief or corresponding declaratory relief with respect to the class as a whole an appropriate remedy.

4. Appropriate notice in this case can be accomplished by state-wide newspaper publication in the Omaha World Herald and/or use of the U.S. mail. On the basis that the Defendants have easy access to all records and documentation pertaining to all the potential members of the class and will be the first to have knowledge of potential future members, it is strongly suggested that the Defendants assist in providing notice to the class.

5. Plaintiffs seek the appointment of Nebraska Advocacy Services, Inc. and Kinsey Ridenour Becker & Kistler, LLP as class counsel. Both firms have knowledge and experience with the facts and legal issues presented in this case. In addition, both firms have experience representing individuals with disabilities and class action cases. The attorneys of both firms are extremely competent and able to effectively represent the interests of the class.

6. That in further support of this Motion, Plaintiffs submit their Memorandum Brief and supporting Evidence Index in Support of Motion for Class Certification which is hereby

incorporated by reference.

Wherefore, Plaintiffs respectfully pray that this case be certified as a class action as defined above, directing notice to the class be made state-wide publication by newspaper in the Omaha-World Herald and with assistance from the Defendants, approving the named plaintiffs as representative plaintiffs, appointing Nebraska Advocacy Services, Inc. and Kinsey Ridenour Becker & Kistler, LLP as co-class counsel, and for all other proper relief.

Dated this 1st day of July 2004.

Respectfully submitted,
BILL M., et al., Plaintiffs,

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Attorneys for the Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2004, I electronically filed Plaintiffs' Motion, and the with the Clerk of the Court using CM/ECF system, which sent notification of such filings to Attorney General Jon Bruning by and through Assistant Attorney General Douglas D. Dexter, attorneys for Defendants, and I hereby certify that I hand delivered the Plaintiffs' Evidence Index to Attorney General Jon Bruning by and through Assistant Attorney General Douglas D. Dexter, attorneys for Defendants

s/Shirley A. Mora James

Shirley A. Mora James

One of the Attorneys for Plaintiffs.