

IN THE DISTRICT COURT OF LANCASTER COUNTY, NEBRASKA

ANGELA BESSEY as Guardian  
and Next Friend and on Behalf  
of

NICHOLAS BESSEY, an  
Incapacitated Person,  
Petitioner,

vs.

STEVE CORSI, Chief Executive  
Officer of the Nebraska  
Department of Health and  
Human Services, in his official  
capacity, TONY GREEN,  
Director of the Division of  
Developmental Disabilities of the  
Nebraska Department of Health  
and Human Services, in his  
official capacity, and THE  
NEBRASKA DEPARTMENT OF  
HEALTH AND HUMAN  
SERVICES,

Respondents.

Case No. CI 26-441

**FIRST  
AMENDED  
PETITION FOR REVIEW  
OF AN  
ADMINISTRATIVE AGENCY  
DECISION AND REQUEST  
FOR DECLARATORY  
JUDGMENT AND  
INJUNCTIVE RELIEF**

COMES NOW the Petitioner, Angela Bessey, on behalf of Nicholas Bessey, by and through her attorneys, Mark T. Bestul, Jennifer Gaughan, and Brandy Mutehart of Legal Aid of Nebraska, and for the Petitioner's request for a review of an administrative decision, states and alleges as follows:

1. This is an appeal from a decision of the Director of the Division Developmental Disabilities for the Nebraska Department of Health and Human Services. It is brought

pursuant to applicable Nebraska law under the Developmental Disability Services Act, Neb. Rev. Stat. § 83-1201 *et seq.*, and the Administrative Procedures Act, NEB. REV. STAT. § 84-916 *et seq.* This is specifically filed in the Lancaster County District Court under Neb. Rev. Stat. § 83-1224 and, as such, the filing of a petition for judicial review to such district court shall operate to stay the enforcement of the final decision and order of the director.

2. Petitioner Angela Bessey is a resident of Omaha, Douglas County, Nebraska with her residence being 4027 Harman Circle, Omaha NE 68111 and her mailing address being the same.
3. Petitioner Angela Bessey is the guardian and next friend of Nicholas Bessey who is an incapacitated person and she brings this Petition for Review of Administrative Agency Decision on his behalf.
4. Nicholas Bessey, for the benefit of whom this action is brought, is a resident of Bellevue, Sarpy County, Nebraska with his residence being 2604 Geri Drive, Bellevue, NE 68147 and his mailing address being the same.
5. Nicholas Bessey is an individual who is developmentally disabled and is eligible for and receives services pursuant to the Developmental Disability Services (DD Services) Act. Developmental Disability Services (DD Services) and Waiver Services are provided to qualified individuals by the State of Nebraska to those who have a developmental disability. See Neb. Rev. Stat. § 84-1205 Developmental disability, defined.
6. Respondent Steve Corsi is the Chief Executive Officer of the Nebraska Department of Health and Human Services and is sued in his official capacity as such. Respondent Corsi's business address is P.O. Box 95026, Lincoln, NE 68509. Respondent Corsi's duties include the overall administration of all Nebraska Department of Health and Human Services

divisions including the Division of Developmental Disabilities.

7. Respondent Tony Green is the Director of the Division of Developmental Disabilities of the Nebraska Department of Health and Human Services and is sued in his official capacity as such. Respondent Green's business address is P.O. Box 95026, Lincoln, NE 68509. Respondent Green's duties include, *inter alia*, signing and entering orders as to determinations in administrative appeals on behalf of the Nebraska Department of Health and Human Services Division of Developmental Disabilities.
8. Respondent Nebraska Department of Health and Human Services (hereinafter "DHHS") is an agency of the State of Nebraska, which is charged, *inter alia*, with the oversight of developmental disability (DD hereinafter) services and benefits. Respondent DHHS's address is P.O. Box 95026, Lincoln, NE 68509.
9. On or about September 26, 2025, DHHS sent the Petitioner a Notice of Redetermination wherein the Department advised the Petitioner that, effective November 1, 2025, Nicholas Bessey's annual individual budget amount (IBA) will be "Intermediate." In the Notice's comments it states, "Level/IBA has been redetermined and has not changed." The Notice does not state what level the previous annual individual budget was.
10. The Notice of Redetermination sent to Petitioner does not state the dollar amount of the Individual Budget.
11. Pursuant to the Petitioner's Request for Fair Hearing on the matter, on January 9, 2026, an administrative hearing was held regarding the redetermination of the Petitioner's annual individual budget for DD services. The hearing took place in Lincoln, Lancaster County, Nebraska. Evidence was adduced.

12. On January 14, 2026, respondent Tony Green entered DHHS's Order.
13. On January 14, 2026, the DHHS hearing office mailed the January 14, 2026, Order ("Order" hereinafter)
14. The Order stated, "DHHS showed the InterRAI is a comprehensive tool and a more accurate assessment of need than the former tool used to determine Appellant's budget. Appellant also pointed out answers within the InterRAI incorrectly scored, including Appellant's Medicaid and Social Security status, race, hours of unpaid support, contact with formal service providers, key supports, health conditions, medications, assistance needs with meal preparation, and extrapyramidal symptoms. However, Appellant did not demonstrate that a change to any of the responses on the InterRAI would affect his funding level."
15. The Order affirmed the redetermination decision to lower the Petitioner's annual individual budget amount to "Intermediate" resulting in a reduction in the Petitioner's annual budget amount from \$194,279.86 to \$126,437.19.
16. This appeal stems from the Order entered by Tony Green, Director of the Division of Developmental Disabilities, on January 14, 2026, and mailed January 14, 2026, therein affirming DHHS's redetermination of Nicholas Bessey's annual DD services individual budget. A copy of said Order is attached hereto and marked as "Exhibit A" pursuant to Neb. Rev. Stat. § 84-917(b)(iii).
17. The hearing upon which said Order is based took place in Lincoln, Lancaster County, Nebraska and the decision was made in Lincoln, Lancaster County, Nebraska.

#### **STATEMENT OF ERRORS**

18. The Respondents erred as a matter of law in determining that the Petitioner's IBA funding level should be intermediate.

19. The Respondents erred as a matter of law in determining that the Petitioner's annual DD services budget should be reduced from \$194,379.86 to \$126,437.19.
20. The Respondents erred as a matter of law in determining an Objective Assessment Process (OAP) was used that complies with the law.
21. The Respondents erred as a matter of law in determining the InterRAI as implemented by DHHS was a proper OAP.
22. Respondents erred as a matter of law in determining the InterRAI was properly administered.
23. Respondents erred as a matter of law in determining that the errors in the InterRAI were inconsequential.
24. Respondents erred as a matter of law by relying on an edited version of Nicholas Bessey's InterRAI results.
25. The Respondents' Order, Exhibit A, is not supported by substantial evidence and is contrary to law.
26. The Respondents' Order is contrary to the testimony elicited from DHHS in their refusal to identify the specific factors relied upon in making the budget determination.
27. The Respondents' determination, and the State's position, that Nicholas Bessey requires less funding than he did when previously evaluated, is not substantially justified.
28. The Respondents' determination, and the State's position that Nicholas Bessey was fairly evaluated is not supported by substantial evidence and is contrary to law.
29. The Respondents denied the Petitioner due process of law because the Notice of Redetermination failed to provide sufficient notice of the reduction in funding levels.
30. The Respondents denied the Petitioner due process of law by failing to provide adequate notice of the criteria, standards, and methodologies used to determine funding levels.
31. The Respondents denied the Petitioner due process of law by failing to use reasonable, ascertainable, non-arbitrary

standards and procedures for determining eligibility and funding levels.

32. The Respondents denied the Petitioner due process of law by failing to publicly promulgate standards governing how funding levels are determined using the Objective Assessment Process as required by the Nebraska Administrative Procedure Act.
33. The Respondents denied the Petitioner due process of law by promulgating rules that are unconstitutionally vague.

WHEREFORE, the Petitioner requests this Court enter an order: reversing the Respondents' decision finding that the InterRAI is an Objective Assessment Process which was properly administered and scored in this case; reversing the Respondents' decision affirming the determination that the Petitioner's IBA funding level is Intermediate; reversing the Respondents' decision affirming the determination that the Petitioner's annual budget amount should be reduced; restoring the Petitioner's annual budget amount to \$194,379.86 or, in the alternative, that the court enter an Order requiring the Respondents to re-administer a lawful Objective Assessment Process to Nicholas Bessey; and, grant the declaratory and injunctive relief requested below.

### **REQUEST FOR DECLARATORY AND INJUNCTIVE RELIEF**

COMES NOW the Petitioner, in addition to the relief requested above, and requests that this Court, pursuant to its vested jurisdictional authority under Neb. Const. art. V, § 9 and Neb. Rev. Stat. § 24-302, and also pursuant to 42 U.S.C. §§ 1983 and 1988; Neb. Rev. Stat. §§ 25-21,149 et seq., Neb. Rev. Stat. § 84-911, and Neb. Rev. Stat. §§ 25-1062 et seq., to:

- A. Find and declare that the Objective Assessment Process used by the Nebraska Department of Health and Human

Services (NDHHS) to determine the funding level for the Petitioner and other individuals eligible for Developmental Disabilities Services (DD Services) under Neb. Rev. Stat. §§ 83-1201 et seq. violates:

- (i) The Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, §21 of the Nebraska Constitution by failing to provide adequate notice of the reduction in funding levels for DD Services;
- (ii) The Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, §21 of the Nebraska Constitution by failing to provide adequate notice of the criteria, standards, and methodologies used to determine funding levels;
- (iii) The Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, §21 of the Nebraska Constitution by failing to use reasonable, ascertainable, non-arbitrary standards and procedures for determining adequate notice of the criteria, standards, and methodologies used to determine funding levels;
- (iv) The Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, §21 of the Nebraska Constitution because NDHHS failed to follow the rulemaking requirements of the Nebraska Administrative Procedure Act, resulting in the absence of publicly promulgated standards governing how

funding levels are determined using the Objective Assessment Process;

- (v) The Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, §21 of the Nebraska Constitution because the regulations found in Title 404 of the Nebraska Administrative Code (NAC), promulgated by NDHHS pursuant to Neb. Rev. Stat. § 83-1226, are unconstitutionally vague as they fail to disclose the criteria, standards, and methodologies used to determine funding tiers;
- (vi) The Nebraska Administrative Procedure Act (“APA”), Neb. Rev. Stat. §§ 84-901 et seq., and Neb. Rev. Stat. § 83-1226, because NDHHS has failed to promulgate rules governing the criteria and standards used in the Objective Assessment Process to determine funding levels for individuals receiving Developmental Disabilities Services;
- (vii) The Developmental Disabilities Services Act, Neb. Rev. Stat. §§ 83-1201 et seq., because funding must be determined by an objective assessment process, and the Objective Assessment Process implemented through Section 404 NAC fails to provide criteria, methodologies, and standards governing the process used to determine funding levels;
- (viii) The Developmental Disabilities Services Act Neb. Rev. Stat. §§ 83-1201 et seq., the process used cannot be meaningfully evaluated as

objective when the criteria, methodologies, and standards governing the process are undisclosed or unknown to the individuals whose funding levels are determined through that process;

- B. Find and declare that the actions of the Respondents violated and continue to violate the Petitioner's rights guaranteed by the United States Constitution, and that those actions deprived the Petitioner of constitutional rights enforceable under 42 U.S.C. § 1983 and that the Petitioner is entitled to declaratory and injunctive relief and reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988.
- C. Enter temporary and permanent injunctive relief prohibiting the Respondents from enforcing the decision reducing the Petitioner's funding level and prohibiting Respondents from using the current Objective Assessment Process utilizing the InterRAI system to determine funding levels for individuals eligible for DD Services until Respondents promulgate and apply lawful rules, procedures, and standards governing that process.
- D. Enter temporary and permanent injunctive relief to prospectively reinstate DD Services that have been denied, reduced or terminated using the InterRAI system.
- E. Enter temporary and permanent injunctive relief requiring Respondents to maintain the current funding tier for DD Services recipients who received funding level increases through the InterRAI assessment process.

In support of this action, the Petitioner, states as follows:

## **FEDERAL MEDICAID HOME AND COMMUNITY-BASED SERVICES STATUTORY AND REGULATORY FRAMEWORK**

34. The Medicaid program is a cooperative federal-state program established under Title XIX of the Social Security Act, 42 U.S.C. § 1396 et seq., to provide medical assistance to individuals with limited income and resources.
35. Federal law permits states to provide Home and Community-Based Services (“HCBS”) to individuals with disabilities through waiver programs authorized under 42 U.S.C. § 1396n(c), which allow states to provide community-based services to individuals who would otherwise require institutional care.
36. Federal regulations governing HCBS waiver programs require that services be furnished pursuant to a person-centered service plan based on an assessment of the individual’s needs and developed through a planning process that includes the individual receiving services and others chosen by the individual. 42 C.F.R. § 441.301.
37. The person-centered planning process must be directed by the individual receiving services and must reflect the individual’s preferences, strengths, and support needs. The process must identify the services and supports necessary to meet those needs and must result in a person-centered service plan documenting the services and supports required to achieve the individual’s identified outcomes. 42 C.F.R. § 441.301(c).

### **NEBRASKA HCBS WAIVER**

38. Nebraska operates HCBS waiver programs providing developmental disability services under federal Medicaid law.
39. Nebraska has obtained approval for the Comprehensive Developmental Disabilities Waiver, identified as NE.4154.R07.02, which became effective July 1, 2025.

## **STATE STATUTORY AND REGULATORY FRAMEWORK**

40. Nebraska Revised Statutes §§ 83-1201 through 83-1228 are collectively known as the Developmental Disabilities Services Act (“DD Services Act”) and govern the provision of services for individuals with developmental disabilities in Nebraska. Neb. Rev. Stat. § 83-1201.
41. In enacting the Developmental Disabilities Services Act, the Legislature intended that persons with developmental disabilities receive services that promote independence, productivity, and community integration; have access to a full array of services appropriate to their individual needs; have the opportunity to live, work, and recreate alongside individuals without disabilities; be served in community settings whenever possible, with specialized services used only when necessary; receive age-appropriate services consistent with their needs and abilities; be afforded the same rights, dignity, and respect as others; and that service providers operate within a system that ensures adequate compensation, training, and workforce support. Neb. Rev. Stat. § 83-1202.
42. The DD Services Act establishes the framework through which the Nebraska Department of Health and Human Services (“DHHS”), through the Division of Developmental Disabilities, administers specialized services for individuals with developmental disabilities.
43. The DD Services Act defines developmental disability as a severe, chronic disability attributable to a mental or physical impairment that manifests before age twenty-two, is likely to continue indefinitely, and results in substantial functional limitations in areas of adaptive functioning such as conceptual, social, and practical skills. Neb. Rev. Stat. § 83-1205.
44. The DD Services Act directs the Director of the Division of Developmental Disabilities to ensure effective management

of developmental disability services by determining eligibility for specialized services, authorizing service delivery for eligible persons, ensuring services are available and coordinated, ensuring that eligible persons have their needs assessed and services delivered in accordance with individualized program plans developed through a team process, and that the amount of funding for specialized services be determined by an objective assessment process. Neb. Rev. Stat. § 83-1209.

45. The Act further requires DHHS, as the administrator of DD Services Waivers, to develop and use an objective assessment process approved by the Center for Medicare and Medicaid Services. Neb. Rev. Stat. § 83-1216(1).
46. The Act also requires DHHS to adopt and promulgate rules and regulations necessary to carry out the Developmental Disabilities Services Act. Neb. Rev. Stat. § 83-1226.

#### **NEBRASKA ADMINISTRATIVE PROCEDURE ACT**

47. The Nebraska Administrative Procedure Act (“APA”), Neb. Rev. Stat. §§ 84-901 et seq., governs the adoption and promulgation of rules and regulations by Nebraska state agencies.
48. Under the APA, a rule or regulation includes any standard of general application adopted by an agency pursuant to statutory authority, and any standard affecting private rights or private interests is presumed to bind the public. Neb. Rev. Stat. § 84-901(2).
49. Under the APA, a rule or regulation does not include internal process documents that provide guidance to agency staff, guidance documents issued by an agency, or forms or instructions developed by an agency. Neb. Rev. Stat. § 84-901(2).
50. Under the APA, a guidance document is binding on an agency, but shall not give rise to any legal right or duty or be

treated as authority for any standard, requirement, or policy.  
Neb. Rev. Stat. § 84-901(5).

51. Under the APA, no rule or regulation shall be adopted by any agency except after public hearing on the question of adopting, amending, or repealing such rule or regulation.  
Neb. Rev. Stat. § 84-907(1).

## **NEBRASKA DEVELOPMENTAL DISABILITY REGULATIONS**

52. The Nebraska Department of Health and Human Services has adopted regulations governing developmental disability services found in Title 404 of the Nebraska Administrative Code.
53. The regulations define the Objective Assessment Process (“OAP”) as the process used by the Department to determine the amount of funding for a participant receiving services which includes the inventory for Client and Agency Planning (ICAP) and other assessments. 404 NAC 001.13.
54. Title 404 of the NAC, Chapter 3 addresses eligibility, services, and authorization of funding for developmental disability services.
55. The regulations provide that funding for developmental disability services is authorized for eligible individuals contingent upon legislative appropriations and the availability of funds. 404 NAC 3-001.06.
56. The regulations further provide that the amount of funding for an individual receiving services is determined through the Objective Assessment Process, and specialized services are authorized according to the individual’s objective assessment. 404 NAC 3-001.06(A)–(B).
57. The regulations also provide that the Department authorizes funding for services only when such services and supports are not available through other sources. 404 NAC 3-001.06(C).

58. DHHS has also issued a Developmental Disabilities Provider Policy Manual, which provides policy guidance regarding the administration of developmental disability services.
59. The Provider Policy Manual identifies itself as a guidance document issued pursuant to Neb. Rev. Stat. § 84-901.03 and states that it provides information regarding the Department's interpretation and implementation of statutes and regulations relating to developmental disability services.

### **OBJECTIVE ASSESSMENT PROCESS AND INTERRAI SYSTEM**

60. The Nebraska Department of Health and Human Services determines the amount of funding authorized for individuals receiving Developmental Disabilities Services through the Objective Assessment Process.
61. The Objective Assessment Process is used to evaluate the support needs of individuals receiving developmental disability services and to determine the amount of funding authorized for services provided through Nebraska's developmental disability programs.
62. The Respondents utilize the InterRAI assessment system as part of the Objective Assessment Process used to determine waiver eligibility and funding levels for individuals receiving developmental disability services. See Nebraska's HCBS Waiver.
63. The funding tier assigned through the Objective Assessment Process affects the amount of funding available for the services and supports that may be authorized for the individual.
64. The regulations governing developmental disability services provide that the amount of funding for an individual receiving services is determined through the Objective Assessment Process and that specialized services are

authorized according to the individual's objective assessment.  
404 NAC 3-001.06(A)–(B).

65. The regulations governing developmental disability services do not identify the criteria, standards, scoring methodologies, or decision rules used to assign individuals to funding tiers.
66. The regulations also do not describe the methodology by which assessment responses or assessment scores are translated into funding tiers.
67. DHHS has issued a Developmental Disabilities Provider Policy Manual that provides guidance regarding the administration of developmental disability services.
68. The Provider Policy Manual identifies itself as a guidance document issued pursuant to Neb. Rev. Stat. § 84-901.03 and states that it provides information regarding the Department's interpretation and implementation of statutes and regulations governing developmental disability services.
69. The Provider Policy Manual does not identify the criteria, standards, or methodologies used by DHHS to determine funding tiers through the Objective Assessment Process.
70. The criteria, standards, or methodologies used by DHHS to determine funding tiers through the Objective Assessment Process have not otherwise been promulgated.

### **FIRST CAUSE OF ACTION**

#### **Violation of the Fourteenth Amendment to the United States Constitution and Article I, §21 of the Nebraska Constitution Failure to Provide Adequate Notice of Reduction in Funding**

71. All facts and allegations contained in this Petition and Request for Declaratory Judgment are incorporated herein by reference.
72. The Petitioner is eligible for and receives Developmental Disabilities Services administered by the Respondents.
73. The Respondents are required to determine the amount of funding authorized for individuals receiving Developmental

Disabilities Services through an Objective Assessment Process.

74. The Respondents reduced or authorized the reduction of the Petitioner's funding level for Developmental Disabilities Services.
75. The Respondent's sent the Petitioner a Notice of Redetermination that only advised the Petitioner that, effective November 1, 2025, Petitioner's annual individual budget amount (IBA) will be "Intermediate". In the Notice's comments it states, "Level/IBA has been redetermined and has not changed."
76. The Notice failed to provide a citation to any statute or regulation applicable to the redetermination decision.
77. The Notice failed to provide further information on the IBA amount, or how it was calculated.
78. The Notice incorrectly stated that the Petitioner's IBA level had not changed.
79. The Respondents failed to provide the Petitioner with adequate notice explaining the basis for the reduction in funding level.
80. The Respondents' actions therefore deprive the Petitioner of liberty and property without due process of law in violation of the Fourteenth Amendment to the United States Constitution and Article I, §21 of the Nebraska Constitution.
81. Respondents acted under color of state law and their conduct is actionable under 42 U.S.C. § 1983.

## **SECOND CAUSE OF ACTION**

### **Violation of the Fourteenth Amendment to the United States Constitution and Article I, §21 of the Nebraska Constitution Failure to Provide Notice of Criteria Governing Funding Determinations**

82. All facts and allegations contained in this Petition and Request for Declaratory Judgment are incorporated herein by reference.
83. The Respondents failed to disclose the criteria, standards, and methodologies used to determine funding levels through the Objective Assessment Process (OAP).
84. The Respondents assert that the OAP is comprehensive tool and a more accurate assessment of need than the former tool used to determine the Petitioner's budget.
85. The Respondents provide no information or explanation as to how it is a more comprehensive and accurate assessment of need.
86. Because the criteria and standards governing the Objective Assessment Process are not publicly available and were not disclosed to the Petitioner, the Petitioner cannot determine how the Respondents made the funding determination or meaningfully challenge that determination.
87. The failure to disclose the criteria, standards and methodology used to determine funding levels deprives the Petitioner of adequate notice and a meaningful opportunity to contest the decision affecting the Petitioner's services.
88. The OAP uses vague, subjective, arbitrary and secret criteria and procedures for allocating Petitioner's funding levels.
89. Because the criteria and methodologies used to determine funding tiers are not identified by Respondents in the statutes, regulations or guidance documents, individuals receiving developmental disability services are unable to determine how responses provided during the Objective Assessment Process affect the funding tier resulting from that score.
90. Individuals whose funding levels are determined through the Objective Assessment Process therefore lack access to the standards governing the funding determination process.

91. Without access to the criteria and methodologies used to determine funding tiers, individuals receiving developmental disability services cannot independently evaluate how funding determinations are made or determine whether the assigned funding level accurately reflects their support needs.
92. The absence of publicly disclosed standards governing the Objective Assessment Process prevents individuals receiving developmental disability services from understanding how funding determinations are made and from meaningfully challenging adverse funding decisions.
93. The Respondents' actions therefore deprived the Petitioner of liberty and property without due process of law in violation of the Fourteenth Amendment to the United States Constitution and Article I, §21 of the Nebraska Constitution.
94. Respondents acted under color of state law and their conduct is actionable under 42 U.S.C. § 1983.

### **THIRD CAUSE OF ACTION**

#### **Violation of the Fourteenth Amendment to the United States Constitution and Article I, §21 of the Nebraska Constitution Failure to Follow Required Rulemaking Procedures**

95. All facts and allegations contained in this Petition and Request for Declaratory Judgment are incorporated herein by reference.
96. The DD Services Act requires the director, in order “to carry out the policy and purposes” of the Act, to ensure effective management by “having the amount of funding for specialized services determined by an objective assessment process.” Neb. Rev. Stat. § 83-1209 (1).
97. The Respondents are required to promulgate regulations to carry out the DD Services Act. Neb. Rev. Stat. § 83-1226.

98. The Nebraska Administrative Procedure Act requires agencies to adopt and promulgate rules when establishing standards of general application affecting private rights or private interests. Neb. Rev. Stat. § 84-901(2).
99. The Respondents promulgated regulations governing DD Services contained in Title 404 of the Nebraska Administrative Code.
100. The regulations only provide that the amount of funding for an individual receiving services is determined through the Objective Assessment Process, and specialized services are authorized according to the individual's objective assessment. 404 NAC 3-001.06(A)–(B).
101. The objective assessment process should have criteria, standards and methodology used to determine the amount of funding authorized for individuals receiving DD Services, which are standards of general application affecting private rights or private interests.
102. The Respondents failed to hold a public hearing on the adoption and promulgation of the standards used in the Objective Assessment Process as required by the Nebraska Administrative Procedure Act.
103. As a result, the criteria governing the determination of funding levels for Petitioner are not publicly promulgated.
104. The absence of publicly promulgated standards governing the determination of funding levels deprives the Petitioner of adequate notice and meaningful procedural protections, including a meaningful opportunity to contest the decision affecting the Petitioner's services.
105. The Respondents' actions therefore deprived the Petitioner of liberty and property without due process of law in violation of the Fourteenth Amendment to the United States Constitution and Article I, §21 of the Nebraska Constitution.
106. Respondents acted under color of state law and their conduct is actionable under 42 U.S.C. § 1983.

#### **FOURTH CAUSE OF ACTION**

##### **Violation of the Fourteenth Amendment to the United States Constitution and Article I, §21 of the Nebraska Constitution Unconstitutionally Vague Regulations**

107. All facts and allegations contained in this Petition and Request for Declaratory Judgment are incorporated herein by reference.
108. The Respondents promulgated regulations governing DD Services contained in Title 404 of the Nebraska Administrative Code.
109. These regulations only provide that funding levels for DD Services are determined through the Objective Assessment Process. 404 NAC 3-001.06(A)–(B).
110. The regulations do not disclose the criteria, standards, and methodologies used to determine funding tiers.
111. Because the regulations fail to disclose the standards governing funding determinations, affected individuals cannot determine how funding levels are determined or how their assessment responses affect the resulting funding tier.
112. Regulations that fail to provide ascertainable standards governing agency decision-making are unconstitutionally vague.
113. The regulations contained in Title 404 of the Nebraska Administrative Code are therefore unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, §21 of the Nebraska Constitution.
114. Respondents acted under color of state law and their conduct is actionable under 42 U.S.C. § 1983.

#### **FIFTH CAUSE OF ACTION**

##### **Violation of the Nebraska Administrative Procedure Act**

115. All facts and allegations contained in this Petition and Request for Declaratory Judgment are incorporated herein by reference.
116. The DD Services Act requires the director, in order “to carry out the policy and purposes” of the Act, to ensure effective management by “having the amount of funding for specialized services determined by an objective assessment process.” Neb. Rev. Stat. § 83-1209(1).
117. The Respondents are required to promulgate regulations to carry out the DD Services Act. Neb. Rev. Stat. § 83-1226.
118. The Nebraska Administrative Procedure Act requires agencies to adopt and promulgate rules when establishing standards of general application affecting private rights or private interests. Neb. Rev. Stat. § 84-901(2).
119. The Respondents promulgated regulations governing DD Services contained in Title 404 of the Nebraska Administrative Code.
120. The regulations only provide that the amount of funding for an individual receiving services is determined through the Objective Assessment Process, and specialized services are authorized according to the individual’s objective assessment. 404 NAC 3-001.06(A)–(B).
121. The objective assessment process should have criteria, standards and methodology used to determine the amount of funding authorized for individuals receiving DD Services, which are standards of general application affecting private rights or private interests.
122. The Respondents failed to hold a public hearing on the adoption and promulgation of the standards used in the Objective Assessment Process as required by the Nebraska Administrative Procedure Act.
123. As a result, the criteria governing the determination of funding levels are not publicly promulgated.

124. The Respondents have implemented and applied these standards to Petitioner without adopting them through the rulemaking procedures required by the Nebraska Administrative Procedure Act.
125. Respondents' actions therefore violate the Nebraska Administrative Procedure Act.

### **SIXTH CAUSE OF ACTION**

#### **Violation of the Developmental Disabilities Services Act Failure to Implement an Objective Assessment Process**

126. All facts and allegations contained in this Petition and Request for Declaratory Judgment are incorporated herein by reference.
127. The Developmental Disabilities Services Act requires that the amount of funding for specialized services be determined through an objective assessment process. Neb. Rev. Stat. § 83-1209.
128. Information has not been provided by the Respondents regarding the objectivity, accuracy, testing, or other critical information necessary to assess or provide comment on whether the Objective Assessment Process is objective or otherwise meets the criteria.
129. The Objective Assessment Process implemented by the Respondents through Title 404 of the Nebraska Administrative Code does not disclose the criteria, methodologies, or standards used to determine funding levels.
130. Without defined criteria or standards governing funding determinations, the process cannot be evaluated as an objective assessment process.
131. Therefore, the process used by the Respondent's to determine funding levels fails to comply with the requirements of the Developmental Disabilities Services Act.

**SEVENTH CAUSE OF ACTION**  
**Violation of the Developmental Disabilities Services Act**  
**OAP Cannot Be Meaningfully Evaluated As Objective**

132. All facts and allegations contained in this Petition and Request for Declaratory Judgment are incorporated herein by reference.
133. The Developmental Disabilities Services Act requires that funding for specialized services be determined through an objective assessment process.
134. The process used by the Respondents to determine funding levels cannot meaningfully be evaluated as an objective assessment process when the criteria, methodologies, and standards governing the process are undisclosed or unknown to the individuals whose funding levels are determined through that process.
135. Therefore, the process used by the Respondent's to determine funding levels fails to comply with the requirements of the Developmental Disabilities Services Act.

**EIGHTH CAUSE OF ACTION**  
**Violation of the Fourteenth Amendment to the United States**  
**Constitution**  
**Enforceable Under 42 U.S.C. § 1983**

136. All facts and allegations contained in this Petition and Request for Declaratory Judgment are incorporated herein by reference.
137. The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits states from depriving individuals of liberty or property without due process of law.
138. The Petitioner has a protected liberty and property interest in the receipt of Developmental Disabilities Services

authorized under Nebraska law and administered through the Nebraska Department of Health and Human Services.

139. The Respondents determine the amount of funding authorized for individuals receiving Developmental Disabilities Services through the Objective Assessment Process.
140. The Respondents reduced or authorized the reduction of the Petitioner's funding level for Developmental Disabilities Services through the Objective Assessment Process.
141. As alleged in this Petition, the Respondents failed to provide adequate notice of the basis for the funding determination and failed to disclose the criteria, methodologies, and standards used to determine funding levels.
142. The Respondents fail to use reasonable, known, non-arbitrary standards and procedures for determining eligibility for and the level of services.
143. The regulations governing Developmental Disabilities Services fail to disclose the criteria and standards used to determine funding tiers and therefore fail to provide ascertainable standards governing agency decision-making.
144. As a result, the Petitioner was deprived of liberty and property without due process of law.
145. At all relevant times, the Respondents acted under color of state law.
146. The Respondents' actions violated the Petitioner's rights guaranteed by the Fourteenth Amendment to the United States Constitution and are actionable under 42 U.S.C. § 1983.
147. As a result of these violations, the Petitioner is entitled to declaratory and injunctive relief and reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988.

## NINTH CAUSE OF ACTION

### Declaratory Relief

**Neb. Rev. Stat. §§ 25-21,149 et seq.; Neb. Rev. Stat. § 84-911**

148. All facts and allegations contained in this Petition and Request for Declaratory Judgment are incorporated herein by reference.
149. An actual and justiciable controversy exists between the Petitioner and the Respondents regarding the legality of the Objective Assessment Process used to determine funding levels for Developmental Disabilities Services.
150. The Respondents continue to utilize the Objective Assessment Process, including the InterRAI assessment system, to determine funding tiers and authorize funding levels for individuals receiving Developmental Disabilities Services.
151. As alleged herein, the Objective Assessment Process is implemented without publicly disclosed criteria, methodologies, or standards governing how funding levels are determined.
152. The absence of such standards prevents individuals receiving services from understanding how funding determinations are made and from meaningfully challenging adverse decisions.
153. The Petitioner therefore seeks a declaration that the Respondents' use of the InterRAI Objective Assessment Process to determine funding levels for Developmental Disabilities Services violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution, Article I, §21 of the Nebraska Constitution, the Nebraska Administrative Procedure Act, and the Developmental Disabilities Services Act.
154. A judicial declaration is necessary to resolve the controversy and to determine the rights and obligations of the parties.

## **TENTH CAUSE OF ACTION**

### **Injunctive Relief**

#### **Neb. Rev. Stat. § 25-1062**

155. All facts and allegations contained in this Petition and Request for Declaratory Judgment are incorporated herein by reference.
156. The Respondents continue to apply the Objective Assessment Process to determine funding levels for individuals receiving Developmental Disabilities Services.
157. Unless enjoined by this Court, the Respondents will continue to enforce funding determinations made through the Objective Assessment Process, including reductions in funding levels for the Petitioner and similarly situated individuals.
158. The continued use of the Objective Assessment Process without lawful standards governing funding determinations will cause ongoing and irreparable harm to the Petitioner and other individuals receiving Developmental Disabilities Services.
159. Monetary damages are inadequate to remedy the deprivation of services necessary for individuals with developmental disabilities to remain in community settings.
160. The balance of equities favors injunctive relief because requiring the Respondents to comply with constitutional, statutory, and rulemaking requirements will not impose an undue burden on the Respondents.
161. The public interest favors ensuring that state agencies administer publicly funded disability services programs in compliance with constitutional and statutory requirements.
162. The Petitioner therefore seeks temporary and permanent injunctive relief prohibiting the Respondents from enforcing the decision reducing the Petitioner's funding level and prohibiting Respondents from utilizing the current Objective

Assessment Process to determine funding levels for individuals eligible for Developmental Disabilities Services until lawful rules, procedures, and standards governing that process are promulgated.

163. The Petitioner further seeks injunctive relief requiring the Respondents to maintain the current funding tier for individuals receiving Developmental Disabilities Services who received funding level increases through the InterRAI assessment process.

**WHEREFORE**, the Petitioner respectfully requests that this Court enter judgment in his favor and against the Respondents, and grant the following relief:

- A. Reverse the Respondents' decision finding that the InterRAI is an Objective Assessment Process which was properly administered and scored in this case;
- B. Reverse the Respondents' decision affirming the determination that the Petitioner's IBA funding level is Intermediate;
- C. Reverse the Respondents' decision affirming the determination that the Petitioner's annual budget amount should be reduced;
- D. Restore the Petitioner's annual budget amount to \$194,379.86 or, in the alternative, that the court enter an Order requiring the Respondents to re-administer a lawful Objective Assessment Process to Nicholas Bessey;
- E. Declare that the Objective Assessment Process used by the Respondents to determine funding levels for Developmental Disabilities Services violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, §21 of the Nebraska Constitution;

- F. Declare that the regulations contained in Title 404 of the Nebraska Administrative Code governing the Objective Assessment Process are unconstitutionally vague and fail to provide ascertainable standards in violation of due process;
- G. Declare that the Respondents have violated the Nebraska Administrative Procedure Act, Neb. Rev. Stat. §§ 84-901 et seq., and Neb. Rev. Stat. § 83-1226, by failing to promulgate rules governing the criteria, standards, and methodologies used in the Objective Assessment Process;
- H. Declare that the Objective Assessment Process, as implemented by the Respondents, fails to comply with the requirements of the Developmental Disabilities Services Act, Neb. Rev. Stat. §§ 83-1201 et seq., including the requirement that funding be determined through an objective assessment process;
- I. Enter temporary, preliminary, and permanent injunctive relief prohibiting the Respondents from enforcing the reduction in the Petitioner's funding level for Developmental Disabilities Services;
- J. Enter temporary, preliminary, and permanent injunctive relief prohibiting the Respondents from utilizing the current Objective Assessment Process, including the InterRAI system, to determine funding levels for Developmental Disabilities Services unless and until the Respondents promulgate lawful rules, standards, and procedures governing that process;
- K. Enter temporary and permanent injunctive relief to prospectively reinstate DD Services that have been denied, reduced or terminated using the InterRAI system;
- L. Enter temporary, preliminary, and permanent injunctive relief requiring the Respondents to maintain

- or restore the Petitioner's prior funding level for Developmental Disabilities Services pending compliance with constitutional and statutory requirements;
- M. Award the Petitioner reasonable attorney's fees and costs pursuant to 42 U.S.C. § 1988 and Neb. Rev. Stat. § 25-1803; and,
- N. Award such other and further relief as the Court deems just and equitable.

ANGELA BESSEY on behalf of  
NICHOLAS BESSEY,  
Petitioner

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