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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, TONY GREEN, Director of the Division of Developmental Disabilities of the Nebraska Department of Health and Human Services, and THE NEBRASKA DEPARTMENT OF HEALTH AND HUMAN SERVICES, Respondents.	Case No. CI 26-441 **BRIEF IN OPPOSITION TO RESPONDENTS' MOTION TO DISMISS**

Petitioner Angela Bessey as Guardian and Next Friend of Nicholas Bessey, by and through her attorneys of record, submits this brief in opposition to Respondents' Motion to Dismiss.

INTRODUCTION

The Petitioner, Nicholas Bessey, is an individual with developmental disabilities. He receives Developmental Disability Services (DD Services) under Nebraska's Developmental Disabilities Services Act through the state's Home and Community-Based Services (HCBS) Waiver. His waiver services are a necessary part of his life and

he seeks remedies to ensure the decisions made about these HCBS services are made based on properly promulgated standards and he has a meaningful opportunity to understand and challenge any reduction. The Nebraska Department of Health and Human Services (DHHS) is the state agency that administers DD Services, including the HCBS Waiver. Neb. Rev. Stat. § 83-1216.

The HCBS Waiver is authorized by federal law under 1915(c) of the Social Security Act, which gives states the option to receive a waiver of Medicaid rules governing institutional care. 42 U.S.C. § 1396n(c). "Under the HCBS waiver program, states can elect to furnish under Medicaid, as an alternative to institutional care, a broad array of services … that are not otherwise covered under the Medicaid program. Passage of this statute represented a first step towards recognizing that many individuals at risk of institutionalization can be supported in their homes and communities, thereby preserving their independence and bonds to family and friends, at a cost not higher than institutional care (Health Care Financing Administration, 1996)." *Home and Community Based Services Waivers*, Mary Jean Duckett and Mary R. Guy, Health Care Financing and Review, Fall 2000. (https://www.cms.gov/sites/default/files/repo-new/50/00Fallpg123.pdf) The United States Supreme Court recognized that unjustified segregation of disabled individuals perpetuates unwarranted assumptions about the ability of those individuals to participate in community life, and diminishes everyday life activities, including the ability to interact with friends and family, cultural enrichment and participation in community life. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 601-02 (1999).

In enacting the DD Services Act, Nebraska's Legislature intended that all 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.

The DD Services Act requires "eligible persons have their needs assessed and services delivered in accordance with individualized program plans," and "that the amount of funding for specialized services be determined by an objective assessment process." Neb. Rev. Stat. § 83-1209.

As part of Nebraska's HCBS waiver, DHHS indicated it would use the interRAI as the objective assessment process (OAP) effective July 1, 2025, which was approved. *See* Nebraska HCBS Waiver, NE.4154.R07.02, *available at* Medicaid.gov, NE Comprehensive Developmental Disabilities Waiver (4154.R07.00), https://www.medicaid.gov/medicaid/section-1115-demo/demonstration-and-waiver-list/82446. The prior OAP DHHS used was the Inventory for Client and Agency Planning (ICAP). *See* DHHS Division of Developmental Disabilities Policy Manual Updated March 2022). The interRAI system uses an algorithm. (See DHHS Website InterRAI Assessment Information, Nebraska's Use of interRAI Assessments – DD Waivers https://dhhs.ne.gov/Pages/interRAI.aspx).

In 2025, Nicholas Bessey was reassessed for DD Services using the interRAI. This was the first assessment for Nicholas using the interRAI instead of the ICAP. The Respondents determined his funding level should decrease by nearly $68,000 which is approximately a 36% decrease. If the Respondents' determination is affirmed, Nicholas' budget amount will be reduced from $194,379.86 to $126,437.19. The DD Services Nicholas Bessey receives are critical; making it possible for him to safely remain in the community, providing a level of autonomy, dignity, and opportunity to experience and enjoy things in life as a member of his community. Reducing his funding increases his risk to remain safely in and participate with his community.

In this case, the Petitioner is asking this Court to review the administrative decision to reduce his funding under the APA. The APA appeal is not part of Respondents' Motion to Dismiss.

The Petitioner is also challenging the actions of the Respondents on a number of grounds, which are part of Respondents' Motion to Dismiss. The Petitioner is alleging the process used by the Respondents, including the OAP used to make his funding determination and the notice Respondents provided, does not explain the decision, does not permit the Petitioner to meaningfully understand how his funding determination was made, or how to meaningfully challenge that determination. As a result, Petitioner alleges that Respondents are violating Petitioner's constitutional right to due process. The Petitioner also alleges Respondents are violating the APA and the DD Services Act. The Respondents failed to follow the APA to promulgate rules governing the objective assessment process they are using, including the criteria, standards, scoring and methodology used to determine funding for DD services an eligible person receives. Instead, the Respondents are using unpromulgated and undisclosed rules to determine funding levels. The regulations Respondents are using are too vague and fail to establish ascertainable standards governing agency decision-making that determine an individual's funding level. The Respondents' use of a secretive, unpromulgated assessment process results in their failure to implement an objective assessment process to determine an individual's funding level that is required by the DD Services Act, as currently no person or tribunal can determine if the process the Respondents are using satisfies the Act.

Without notice of the criteria and standards used in the assessment, how responses are scored, and how funding is determined, there is no meaningful opportunity to challenge the decision to reduce the funding for services he receives that enables him to reside safely in the community. Nicholas Bessey is alleging Respondents are violating his constitutional due process rights, and he is entitled to relief under 42 U.S.C. §§ 1983 and 1988 and declaratory and injunctive relief under

Neb. Rev. Stat. §§ 25-21,149 et seq., Neb. Rev. Stat. § 84-911, and Neb. Rev. Stat. §§ 25-1062 et seq. He is also alleging that Respondents are violating the APA and DD Services Act. The Petitioner is seeking declaratory and prospective injunctive relief declaring the Respondents are violating his rights, are violating the law, and enjoining the Respondents from using the interRAI as its OAP, as it does not comply with the law.

Facts and Claims Alleged in the Amended Petition

In his Amended Petition, Nicholas Bessey (the Petitioner) alleges he is a developmentally disabled individual who receives services under Nebraska's Developmental Disabilities Services Act, found at Neb. Rev. Stat. 83-1201 et seq. Am. Pet. ¶5. Pursuant to the DD Services Act, Respondents are responsible for administering Developmental Disabilities Services (DD Services). Am. Pet. ¶¶6-8.

The Petitioner was funded at the high tier level, with an annual budget of approximately $194,379.86. Am. Pet. ¶15. After Respondents implemented the interRAI as the objective assessment process (OAP), the Petitioner was reassessed. On September 26, 2025, the Respondents sent the Petitioner a Notice of Redetermination advising that effective November 1, 2025, his annual individual budget amount (IBA) will be Intermediate. In the comments the Notice states that "Level/IBA has been redetermined and has not changed." Am. Pet. ¶9. The Notice does not state the previous or redetermined IBA. Am. Pet. ¶10. The Petitioner requested an administrative fair hearing regarding the redetermination of his IBA, which was held on January 9, 2026. Am. Pet. ¶11.

On January 14, 2026, the Respondents entered an order affirming funding at the intermediate tier, resulting in a reduction in the Petitioner's annual budget amount from $194,279.86 to $126,437.19. Am. Pet. ¶15. The Order stated:

> DHHS showed the interRAI is a comprehensive tool and a more accurate assessment of need that [sic] 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.

Am. Pet. ¶14.

This case seeks judicial review of that decision under the APA. The Petitioner also seeks declaratory and injunctive relief. Respondents do not include the APA appeal in their Motion to Dismiss.

With respect to the declaratory and injunctive relief, the Petitioner further alleges federal law permits states to provide Home and Community-Based Services (HCBS) to individuals with disabilities through a waiver program allowing states to provide community-based services to individuals who would otherwise require institutional care. Am. Pet. ¶35. Nebraska operates HCBS waiver programs. Am. Pet. ¶¶38-39. The Developmental Disabilities (DD) Services Act establishes the framework through which the Department of Health and Human Services administers DD Services. Am. Pet. ¶42.

Under the DD Services Act, the Director of the Division of Developmental Disabilities is responsible for 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(1). Am. Pet. ¶44. The Nebraska Department of Health and Human Services "shall adopt and promulgate rules and regulations to carry out the Developmental Disabilities Services Act." Neb. Rev. Stat. § 83-1226. Am. Pet. ¶46.

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). Am. Pet. ¶48. The regulations provide that funding for an individual receiving services is determined through the OAP, and specialized services are authorized according to the individual's objective assessment. 404 NAC § 3-001.06(A)–(B). Am. Pet. ¶56. The Petitioner alleges Respondents use the interRAI as their OAP and cite to Nebraska's Home and Community-Based Services Waiver. Am. Pet. ¶62. The Petitioner alleges the regulations do not identify the criteria, standards, scoring methodologies, or decision rules used to assign individuals to funding tiers, and do not describe how assessment responses or scores are translated into funding tiers. Am. Pet. ¶65-66. Furthermore, the Petitioner alleges the criteria, standards, or methodologies used to determine funding tiers through the OAP used by Respondents have not otherwise been promulgated. Am. Pet. ¶70.

The Petitioner alleges 10 causes of action:

1. Violation of due process by Respondents' failure to provide adequate notice of reduction in funding. The notice Respondents provided stated the Petitioner's budget was intermediate, did not identify the amount of funding, did not explain how it was calculated, did not cite applicable statutes or regulations, and incorrectly stated his funding level had not changed. Am. Pet. ¶¶71-81.
2. Violation of due process by Respondents' failure to provide notice of criteria governing funding determinations resulting in the Petitioner's inability to understand how funding determinations are made and the inability to meaningfully challenge adverse funding decisions when standards are undisclosed or secret. Am. Pet. ¶¶82-94.
3. Violation of due process by Respondents' failure to follow required rulemaking procedures under the APA, resulting in the absence of publicly promulgated standards governing the

determination of funding levels, depriving the Petitioner of adequate notice and meaningful opportunity to contest the decision. Am. Pet. ¶¶95-106.

4. Violation of due process by Respondents' failure to provide standards governing funding determinations, as individuals cannot determine how funding levels are determined or how their assessment responses affect the funding tier. Regulations that fail to provide ascertainable standards governing agency decision-making are unconstitutionally vague and violate due process. Am. Pet. ¶¶107-14.
5. Violation of the APA as the regulations do not contain criteria, standards and methodology used to determine the amount of funding an individual receives pursuant to the OAP, but the Respondents have implemented and applied non-promulgated standards to the Petitioner, operating under unpublished rules, violating the APA. Am. Pet. ¶¶115-25.
6. Violation of the DD Services Act by the Respondents' failure to implement an objective assessment process. Am. Pet. ¶¶126-31.
7. Violation of the DD Services Act because the process used by Respondents to determine funding levels cannot be meaningfully evaluated as objective when the criteria, methodology and standards governing the process are undisclosed or unknown. Am. Pet. ¶¶132-35.
8. The first, second, third and fourth causes of action are actionable under § 1983 for Respondents depriving the Petitioner of protected liberty and property interests without due process guaranteed by the Fourteenth Amendment, and the Petitioner is entitled to declaratory and injunctive relief and attorney's fees under 42 U.S.C. § 1988. Am. Pet. ¶¶136-47.
9. A declaratory judgment that the Respondents' use of the interRAI to determine funding levels violates due process

under the federal and state constitutions, violates the APA, and violates the DD Services Act. Am. Pet. ¶¶148-54.

10. Prospective injunctive relief prohibiting Respondents from enforcing the decision reducing the Petitioner's funding level, prohibiting them from using the interRAI until Respondents comply with the law, and requiring Respondents to maintain current funding levels for individuals who received funding level increases after the interRAI assessment. Am. Pet. ¶¶155-63.

The Respondents generally assert sovereign immunity bars any claims against past conduct and allege the Petitioner's First, Third, Fourth, Fifth and Sixth Causes of Action fail to state claims for which relief can be granted. Contrary to Respondents' assertions, the Petitioner has sufficiently pleaded ten causes of action for which relief can be granted as none of them are barred by sovereign immunity. For the reasons set forth in this brief, Respondents' Motion to Dismiss should be denied.

STANDARD OF REVIEW

In Nebraska, a notice pleading state, civil actions are "controlled by a liberal pleading regime." *Tyron v. City of N. Platte*, 295 Neb. 706, 710 (2017). As such, a party is only required to set forth a short and plain statement of the claim" for relief and a party "is not required to plead legal theories or cite appropriate statutes so long as the pleading gives fair notice of the claims asserted." *Id.* To prevail on a motion to dismiss, a plaintiff must "allege sufficient facts, accepted as true, to state a claim to relief that is plausible on its face." *Rodriquez v. Cath. Health Initiatives*, 297 Neb. 1, 9 (2017) (citations omitted). "A motion to dismiss for failure to state a claim tests the legal sufficiency of the complaint, not the claim's substantive merits." *In re Estate of Ryan*, 302 Neb. 821, 825 (2019). "When analyzing a lower court's dismissal of

a complaint for failure to state a claim, an appellate court accepts the complaint's factual allegations as true and construes them in the light most favorable to the plaintiff." *Main St. Props. LLC v. City of Bellevue*, 310 Neb. 669, 674 (2022). To state a claim, a complaint need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Neb. Ct. R. Pldg. § 6-1108(a)(2). Motions to dismiss based on failure to state a claim under Neb. Ct. R. Pldg. § 6-1112(b)(6) "should be granted only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." *Johnson v. Johnson*, 272 Neb. 263, 264 (2006) (citations omitted). A complaint "should not be dismissed merely because it does not state with precision all elements that give rise to a legal basis for recovery." *Anderson v. Wells Fargo Fin. Acceptance Pa., Inc.* 269 Neb. 595, 603 (2005). "In cases in which a plaintiff does not or cannot allege specific facts showing a necessary element, the factual allegations, taken as true, are nonetheless plausible if they suggest the existence of the element and raise a reasonable expectation that discovery will reveal evidence of the element or claim." *Chaney v. Evnen*, 307 Neb. 512, 520 (2020), citing *Schaeffer v. Frakes*, 306 Neb. 904 (2020).

ARGUMENT

I. The Petitioner's Claims are not Barred by Sovereign Immunity

Sovereign Immunity does not bar the relief requested. Contrary to Respondents' assertions, the relief the Petitioner requests is prospective. Respondents also assert Sovereign Immunity bars relief throughout their brief. This section is intended to address all of Respondents' arguments related to Sovereign Immunity.

a. Sovereign Immunity does not Bar Petitioner's Claims either under § 1983 or Neb. Rev. Stat. § 25-21,149.

Petitioner is requesting prospective relief under 42 U.S.C. § 1983 and the Uniform Declaratory Judgments Act. "[U]nder the doctrine of *Ex parte Young* [209 U.S. 123 (1908)], a state's 11th Amendment immunity does not bar a suit against state officials when the plaintiff seeks only prospective relief for ongoing violations of federal rights." *Gillpatrick v. Sabatka-Rine*, 297 Neb. 880, 899 (2017) (citing *Verizon Md. Ind. v. Public Serv. Comm'n of Md.,* 535 U.S. 635 (2002)).

An action against public officials to "obtain relief from an invalid act or from an abuse of authority by the officer or agent is not a suit against the state and is not prohibited by sovereign immunity." *Doe v. Bd. of Regents*, 280 Neb. 492, 511 (2010) (overruled on other grounds). Such acts are not prohibited by sovereign immunity because "acts of state officers not legally authorized, or which exceed or abuse the authority conferred upon them, are judicially regarded as their own acts and not acts of the state." *Rein v. Johnson*, 149 Neb. 67, 69 (1947) (citations omitted). Official-capacity actions against state officials for prospective relief are "not treated as actions against the state." *Sanitary & Improvement Dist. No. 1 v. Adamy*, 289 Neb. 913, 921 (2015). Additionally, the court in *Doe* further held that "actions to restrain a state official from performing an affirmative act and actions to compel an officer to perform an act the officer is legally required to do are not barred by state sovereign immunity unless the affirmative act would require the state official to expend public funds" or "is in essence one for the recovery of money from the state." *Doe*, 280 Neb. at 511-12 (citing *Regents of Univ. of Cal. v. Doe,* 519 U.S. 425, 429 (1997). *Regents* cites to *Edelman v. Jordan,* 415 U.S. 651 (1997). *Edelman* recognized that prospective relief could involve fiscal consequences to the state treasuries which are the necessary result of compliance with decrees which by their terms were prospective in nature. *Edelman,* 415 U.S. at 667-68.

In this case, the Petitioner has asked the Court to order state officials to comply with their legal obligations. The agency itself is

shielded by sovereign immunity under these claims; the officials involved are not. All of the relief sought seeks to obtain a ruling that requires the Respondents to stop taking invalid acts and any state expenditures are only incidental to that relief. Plaintiffs do not seek money damages or restitution.

The Chief Executive Officer of the Department of Health and Human Services, and the Director of the Division of Developmental Disabilities, whose duties are to supervise and oversee all Departmental and Division functions respectively, are the individuals who are appropriately named in an official capacity action. Nebraska's Supreme Court has repeatedly entertained, and found appropriate, official capacity actions against director and executive level officials who actually control the legal compliance of the division or agency. *See Cmty. Care Health Plan of Neb., Inc. v. Jackson*, 317 Neb. 141 (2024); *Heist v. Neb. Dep't Corr. Serv.*, 312 Neb. 480 (2022)*; Shepard v. Houston*, 289 Neb. 399 (2014).

While this case seeks declaratory relief as to Respondents' ongoing conduct, the request for relief focuses on prospective relief to address the continuing violation that the Petitioner is suffering because the reduction in service level that the Petitioner faces *has not yet occurred*, and *will not occur* until this action, in all its parts, including the issues brought under the Court's jurisdiction pursuant to Neb. Rev. Stat. § 84-917, are finally concluded. Additionally, the assessment tool will continue to be applied as to future determinations. The Petitioner seeks prospective declaratory and injunctive relief in the truest sense.

The Petitioner receives services which are provided by Nebraska's DD Services Act because he is an individual with a developmental disability. Am. Pet. ¶5. For individuals receiving these services, the Nebraska regulations require annual and ongoing eligibility review. 403 NAC § 2-005.02; 404 NAC § 3-003. Those redeterminations are based on the OAP. 403 NAC § 2-008.01(B and C); 404 NAC 3-001.06. The state action described in the notice addressed in Petitioner's first cause of action (Am. Pet. ¶75) has not yet gone into

effect. If an individual appeals within 10 days of a notice of decision being mailed, it is assumed that the individual "is requesting that any ongoing assistance that is the subject of the appeal will continue during the pendency of the appeal", "unless the individual indicates a contrary intent." 403 NAC § 2-009.03; 404 NAC § 3-004.04. Additionally:

> 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. While judicial proceedings are pending in district court and unless the parties otherwise agree, the person with developmental disabilities shall remain in his or her current placement.

Neb. Rev. Stat. § 83-1224(3). The proposed state action referenced in the notice of action has not yet taken effect. Thus, requesting declaratory and injunctive relief is prospective.

Furthermore, the Petitioner alleges the actions of the Respondents are currently causing harm and will continue to cause harm to him. Respondents use the assessment tool. Petitioner will face the continued use of the tool at his annual reviews and at any point his care team determines his needs have changed. 403 NAC 2-005.02(A), (C). *Cf. 281 Care Comm. v. Arneson (281 Care Comm. I),* 638 F.3d 621, 632 (8th Cir. 2011); *see also Blum v. Yaretsky,* 457 U.S. 991, 1001 (1982) (threat of change to lower level of care is realistic and evidence of harm). The facts of this case clearly show both an ongoing violation and that the requested relief is prospective. *See Filyaw v. Corsi*, 150 F.4th 936 at 941 (2025).

Respondents argue that LB958 somehow resolves these issues. (Brief of Respondents p. 8). However, LB958 does not adequately resolve the need for relief or the ongoing violations regarding the notice of action addressed in the Petitioner's first cause of action. As described above, the negative effect of the notice of action on the Petitioner is a future harm; LB958 does not change or correct the notice already received.

In their brief, Respondents cite several cases to support their

contention that requests for relief are barred by sovereign immunity. As described above, the relief sought by the Petitioner in this matter is prospective. Additionally, the cases cited differ from the facts in this matter. In *Filyaw v. Corsi*, 150 F.4th 936 (8th Cir. 2025), the Court found no ongoing violations were related to the notice because "Filyaw received the allegedly inadequate Notice at a discrete point in the past, and Filyaw is not at risk to receive the same Notice in the future," because the court reasoned "[s]he would have to (1) requalify for Medicaid; (2) choose to apply and receive benefits; (3) earn income that exceeds the eligibility thresholds; and (4) receive the same termination Notice." *Id.* at 946. *Filyaw* is significantly different from the facts in this case because Filyaw was no longer enrolled in Medicaid whereas the Petitioner is currently enrolled in Medicaid and the HCBS waiver program and thus Petitioner is likely to continue to receive similar notices so long as he continues to qualify for the services and face future redeterminations.

Other cases relied upon by Respondents did not involve public benefits in their analyses of whether the relief requested was prospective such as *Anthony K. v. Neb. Dep't of Health and Hum. Serv.*, 289 Neb. 540 (2014); *Mullendore v. Nuernberger*, 230 Neb. 921 (1989); *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf*, 506 U.S. 139 (1993).

Because all the Petitioner's causes of action request prospective relief, sovereign immunity does not bar any of the relief requested.

b. Neb. Rev. Stat. § 84-911 Provides a Limited Waiver of Sovereign Immunity

The claims requesting relief pursuant to Neb. Rev. Stat. § 84-911 survive because that statute provides a waiver of sovereign immunity for challenges to invalid agency rules and regulations. "The validity of any rule or regulation may be determined upon a petition for a declaratory judgment if it appears that the rule or regulation or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the petitioner."

Neb. Rev. Stat. § 84-911(1). This statute specifically states, "[T]he agency shall be made a party to the proceeding." Neb. Rev. Stat. § 84-911(1). This specific waiver of sovereign immunity is recognized by the Nebraska Supreme Court. "Neb. Rev. Stat. §84-911 (Reissue 1994) of the Administrative Procedure Act provides a limited statutory waiver of sovereign immunity which permits a court to determine the validity of administrative rules and regulations. . . ." *Galyen v. Balka*, 253 Neb. 270, 277 (1997).

Here, the Petitioner alleges that Respondents' rules as applied to him violate constitutional provisions (Third and Fourth Causes of Action) and were adopted and applied without compliance with the statutory procedures (Fifth Cause of Action). Specifically, the Petitioner alleges the Respondents, through the interRAI, are using undisclosed criteria, methodologies and standards to make funding decisions; those standards were applied to the Petitioner; those standards directly impacted Petitioner's interests by resulting in a reduction of the services he was receiving under the DD Services Act; and the Respondents failed to promulgate any of those standards using the requisite processes required by the Nebraska Administrative Procedure Act.

Sovereign immunity, with respect to the Petitioner's Third, Fourth and Fifth causes of action, is waived under Neb. Rev. Stat. § 84-911. Even if § 84-911 did not act as a waiver, the Petitioner seeks prospective relief and therefore his claims are not barred by sovereign immunity as discussed above.

II. Respondents' Notice of Redetermination Violated Due Process

a. The Petitioner Sufficiently Pled Due Process Violations of the U.S. and Nebraska Constitutions.

The Petitioner has met his burden to plead a due process claim under the U.S. and Nebraska Constitutions. U.S. CONST. amend. XIV;

NEB. CONST. Art. 1, § 3. These constitutional provisions are interpreted similarly by Nebraska courts, which also look to interpretation by federal courts to inform their analysis. *See Marshall v. Wimes*, 261 Neb. 846, 850 (2001). A procedural due process violation is plausibly alleged if the Petitioner establishes that his protected liberty or property interest is at stake and that the Respondents deprived them of that interest without due process of law. *Elder v. Gillespie,* 54 F.4th 1055, 1064 (8th Cir. 2022) (finding plaintiffs sufficiently pled a notice claim under due process when they alleged their Medicaid benefits were reduced without an explanation in plain and clear terms of why the benefits were being reduced, the methodology used, and specifics to the extent reasonably practicable about their health conditions and reduced benefits) (citations omitted).

Respondents do not question whether the Petitioner has sufficiently alleged a property interest—rightfully so, as Nebraska courts have long held that Medicaid benefits, such as Petitioner's waiver budget, "are a matter of statutory entitlement for persons qualified to receive them" and any adverse action by Respondents affect "important rights." *Elliot v. Ehrlich,* 203 Neb. 790, 798 (1979) (citing *Goldberg v. Kelly,* 297 U.S. 254 (1970)). Instead, Respondents focus on the second part of the due process inquiry: whether the Petitioner was deprived of that interest without due process of law.

To determine whether state agencies such as Respondents have provided adequate due process, courts turn to the test set forth by the U.S. Supreme Court in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The Supreme Court held that it must determine:

> First the private interest that will be affected by the official action; second the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. The *Mathews* test was adopted by the

Nebraska Supreme Court in *Marshall v. Wimes,* 261 Neb. 846, 852 (2001). Courts have applied these factors to determine whether notice is adequate for Medicaid benefits. *See Elder,* 54 F.4th at 1061, 1064; *Bliek v. Palmer,* 102 F.3d 1472, 1475 (8th Cir. 1997).

b. The Notice Failed to Provide Basic, Required Elements of Due Process.

Although due process is flexible, the requirements for notice of an adverse action are longstanding and clear. Notice must be timely and detail the reasons for the proposed termination to guard against actions that may rest "on incorrect or misleading factual premises or on misapplication of what premises, rules, and policies underlie the government's decision." *Goldberg,* 397 U.S. at 267-68. The notice must be plain, clear, and provide an explanation for the decision that is "as specific as reasonably practicable" about the criteria. *Elder,* 54 F.4th at 1064 (citations omitted); *Vargas v. Trainor,* 508 F.2d 485, 489 (7th Cir. 1974) (collecting cases recognizing that a notice must include the reasons or grounds for the action); *see also Ortiz v. Eichler,* 616 F. Supp. 1046, 1062 (D. Del. 1985) (requiring detailed information so that claimants may assess the correctness of the decision and prepare for the issues to be addressed at the hearing). The federal Medicaid regulations reflect these requirements. 42 C.F.R. 431.200 *et seq*. Nebraska's Medicaid statute provides:

> Notice of a decision to discontinue eligibility or to modify medical assistance shall include an explanation of the proposed action, the reason for the proposed action, the information used to make the decision including specific regulations or laws requiring such action, contact information for personnel of the department to address questions regarding the action, information on the right to appeal, and an explanation of the availability of continued benefits pending such appeal.

Neb. Rev. Stat.§ 68-914(3); *see also* Neb. Rev. Stat. § 83-1209(4)

(requiring Director of DD Services to develop a due process mechanism for dispute resolution).

The use of an assessment tool or algorithm does not change the notice requirement. Courts consistently require understandable explanations of adverse decisions when such tools are used. *See, e.g., Elder,* 54 F.4th at 1064-66 (citations omitted) (finding a notice must explain the reasons for the reduction with "specific references (as applicable) to the methodology" of the assessment tool); *K.W. ex rel. v. Armstrong,* 789 F.3d 962, 970-74 (9th Cir. 2015) (affirming preliminary injunction on constitutional grounds where notice for waiver services budget reduction did not specify the reasons for the decrease); *K.W. v. Armstrong,* 180 F. Supp. 3d 703, 723-34 (D. Idaho 2016) (holding notice must provide the reasons for the reduction, both inside an assessment score and what was relied upon outside those scores to ensure a full explanation and sufficiently provides enough information to challenge the reduction); *M.A. v. Norwood*, 133 F. Supp. 3d 1093, 1100 (N.D. Ill. 2015) (denying motion to dismiss where the notice only referenced the determination of the assessment and requiring specific reasons for how the decision was reached); *Waldrop v. New Mexico Hum. Serv. Dep't,* Civ. No. 14-047, 2015 WL 13665460, at *23-24 (D.N.M. Mar. 10, 2015) (holding notice must inform the beneficiaries of the factual issues that had been resolved by the assessor and resulted in reduction of benefits); *L.S. by & through Ron S. v. Delia,* No. 5:11-cv-354-FL, 2012 WL 12911052, at *14 (E.D.N.C. Mar. 29, 2012) (granting preliminary injunction because the notice did not describe how the score to determine annual service budgets was reached); *Mocznianski v. Ohio Dep't of Job & Fam. Serv.,* 960 N.E.2d 522, 529 (Ohio Ct. App. 2011) (finding that without explaining how an assessment tool examined the weight given to each factor, it is impossible for beneficiaries to identify whether something is amiss); *Baker v. State*, 191 P.3d 1003 (Ala. 2008) (reversing denial of preliminary injunction on due process grounds where notice based on an assessment tool failed to "show how and why" the agency reached the decision).

Explaining the "how and why" of a Medicaid decision is a critical

part of due process. A state must tie eligibility and coverage to standards that are ascertainable to the public. *Holmes v. N.Y.C. Hous. Auth.,* 398 F.2d 262, 265 (2d Cir. 1968); *K.W.,* 180 F. Supp. at 715 (collecting cases). The use of an assessment tool that lacks transparency around an automated decision like an algorithm can render "individualized budget determinations potentially—if not effectively—standardless" and create such a high risk of arbitrary and erroneous determinations that it is impermissible under the Due Process Clause. *Michael T. v. Bowling,* 2:15-CV-09655, 2016 WL 4870284, at *11 (S.D.W. Va. Sept. 13, 2016), *modified sub nom. Michael T. v. Crouch,* 2018 WL 1513295 (S.D.W. Va. Mar. 26, 2018).

In this case, the Petitioner was only provided a notice that "Level/IBA has been redetermined and has not changed." Am. Pet. ¶ 9. The Notice simply says an Objective Assessment Process was used, with no further information or citation. It does not state the previous IBA nor does it explain the impact of the determination on his level of services/assigned budget amount. The notice does not explain the criteria and methodologies used, including how any responses in the assessment are weighed or influence the decision. Because it does not explain the methodology at all, it certainly does not provide the information in an understandable way. It does not cite to the relevant legal basis for the decision. Respondents assert in their brief that the notice suggests the Petitioner to contact staff with questions and states that someone will be in contact about using the funding to purchase services (Brief of Respondents, p. 7). The notice informs Petitioner that an individual will "contact you by phone to talk about the use of funding" and a phone number and general email to obtain additional information. Referring individuals to additional steps to understand a notice is insufficient. *See, e.g., Vargas,* 508 F.2d at 489-90 (finding that a notice instructing a person to contact someone to learn more about the reasons failed to meet due process); *see also Darjee v. Betlach,* No. CV-16-00489-TUC-RM, 2017 WL 11911100, at *11; *11 n.8 (D. Ariz. Mar. 31, 2017) (noting that a notice is not sufficient because it caused a recipient to take action; that an individual called a phone number on a

notice for an explanation is supportive of the inference that the notices themselves are defective).

c. The Occurrence of a Hearing does not Cure Constitutionally Insufficient Due Process.

Provision of a hearing without adequate notice does not resolve the notice failure. Respondents attempt to use the fact that the Petitioner had a hearing as evidence that he was afforded due process, but this argument fails. The notice failed to provide sufficient information so that the Petitioner could meaningfully engage in the hearing. In fact, the Petitioner is before this court because his efforts to restore services through the administrative hearing were thwarted by the lack of due process, and he lost—hence this appeal. Unless adequate notice is first provided, a hearing "serves no purpose and resembles more a scene from Kafka than a constitutional process." *Gray Panthers v. Schweiker,* 652 F.2d 146, 168 (D.C. Cir. 1980). When there is inadequate notice, "the other due process rights afforded [to] a benefits claimant . . . are rendered fundamentally hollow." *Kapps v. Wing,* 404 F.3d 105, 124 (2d Cir. 2005). Here, the Petitioner had a fair hearing but did not receive due process because the notice did not allow him to ascertain the basis of the decision to identify any errors and therefore prepare evidence to rebut any relevant information or identify improper application of policies.

d. Respondents' Future Obligations Under LB958 do not Resolve Petitioners' Claims.

Respondents' future actions to comply with LB958 do not change the failures in the notice received by the Petitioner. Any compliance by Respondents with that law or whether they will also make changes to meet constitutional due process for any future notices the Petitioner will receive are wholly speculative. As discussed above, Respondents have clear directions about what to include in a notice from existing

laws that it has failed to follow. Therefore, there is no reasonable expectation that any changes by Respondents to the notices to comply with LB958 will fare any better in complying with state and federal law. LB958 requires Respondents to communicate service tier assignments for waiver participants like the Petitioner in a "timely, clear, and specific manner" that includes "a complete explanation of the assigned service tier" and "a clear and precise explanation of the assessment tool results." Neb. Rev. Stat. § 68-9,112(3)(a)-(b).

The requirements of LB958 that Respondents believe solve all notice problems, arguably should have already be met by Respondents' obligations under due process and § 68-9,112(3)—obligations they failed to meet despite claiming they have done so. Respondents cannot simply assert compliance as it is a factual question and, therefore their Motion to Dismiss should not be granted. Respondents' arguments that LB958 requires something new only buttresses the Petitioner's arguments that the notices he faces from any upcoming annual or change in status assessments will be more of the same.

The Petitioner continues to suffer harm from the notice he received as he has not yet received the basic information required. Although he appealed, the Petitioner has done so without information necessary to protect himself from erroneous deprivation, as discussed above. Without adequate notice of the reasons for the denial, the "hearing serves no purpose." *Gray Panthers,* 652 F.2d at 168; *see also Goldberg,* 397 U.S. at 266, 268. There is no information before the court that any changes Respondents will make to the notice from LB958 or otherwise will eliminate the current deprivation of due process for the Petitioner, nor for notices issued after the required annual assessments he faces.

III. Petitioner's Third and Fifth Causes of Action Sufficiently State a Claim for Which Relief can be Granted Because the U.S. Constitution, Nebraska State Constitution, and Nebraska APA Require the Promulgation of Rules

through Notice and Comment Rulemaking.

The State of Nebraska adopted its first iteration of the Nebraska Administrative Procedure Act ("APA") in 1945. The language in Neb. Rev. Stat. § 84-901(2), at issue in this proceeding, "any standard of general application adopted by an agency… affecting private rights, private interests, or procedures available to the public is presumed to be relied upon to bind the public," remains essentially unchanged after exhaustive review by the District of Nebraska and the 8th Circuit Court of Appeals, which conducted extensive consideration of the legislative history of the Nebraska APA and what constitutes a "rule" under Neb. Rev. Stat. § 84-901. *Mogis v. Lyman-Richey Sand & Gravel Corp.*, 189 F.2d 130 (8th Cir. 1951), *aff'g Mogis v. Lyman-Richey Sand & Gravel Corp.*, 90 F. Supp. 251 (D. Neb. 1950), *reh'g denied*, 190 F.2d 202 (8th Cir. 1951) (concluding that an agency-created standard on railway rates was within the meaning of a rule, and was invalid because it was not properly promulgated under the APA). Following a decade of fierce debate over the expansion of the administrative state during the New Deal era, Nebraska joined many other states in adopting a state APA, as well as adopting the federal APA in 1946. George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges From New Deal Politics*, 90 NW. L. REV. 1557, 1560 (1996).

Society has changed greatly since Nebraska's initial adoption of the APA, but the underlying language of Nebraska's APA and the importance of fairness and justice in the administration of agencies have not. John Gedid, *Administrative Procedure for the Twenty-First Century: An Introduction to the 2010 Model State Administrative Procedure Act*, 44 ST. MARY'S L.J. 241 (2012) *citing* E. Blythe Stason, *The Model State Administrative Procedure Act*, 33 IOWA L. REV. 196, 200 (1948) ("[T]he conference was convinced that certain major principles of fairness should prevail wherever administrative rulemaking or adjudication impinge upon private rights.") Regardless of whether an agency effectuates standards that affect a person's private rights or interests via an old-fashioned paper memorandum, or

highly sophisticated computerized algorithmic tools, the APA still commands that regulated persons and the general public have some modicum of an idea of how the agency is making decisions.

Respondents correctly note that the Petitioner's Third and Fifth Causes of Action are both premised upon allegations that Respondents have failed to follow required procedures in the official promulgation of rules and regulations specifying certain criteria, standards, and methodology for funding determinations. Am. Pet., ¶¶ 115-25. Respondents appear to have a fundamental misunderstanding of their obligations under the Nebraska APA and mischaracterize the Petitioner's allegations as a complaint that the Respondents were, "not specific and detailed enough in its rulemaking." (Respondents' Brief, p. 10). While the Petitioner certainly takes issue with the specificity and detail of Respondents regulations in the Fourth Cause of Action, the Third and Fifth Causes of Action are focused on the allegation that Respondents are *currently* enforcing standards of general application, against the Petitioner, dramatically affecting his private rights and interests, and those standards have not been subject to the required rulemaking process.

The Petitioner's allegations related to Respondents' failure to comply with the notice and comment requirements of the Nebraska APA can be summarized: 1) Respondents contracted to the interRAI assessment tool; 2) The interRAI assessment tool entirely determines the level of funding for DD services a person receives under the DD Services Act without exception, and thus the "agency" has "adopted" the tool and its uniform methodologies as its "standard of general application"; 3) The standard applies to all persons, including the Petitioner, to determine their "rights and interests" under the DD Services Act; and 4) Respondents refuse to tell anyone, including the Petitioner, how the tool makes those determinations.

The Petitioner's Third and Fifth Causes of Action are tied to Respondents' failure to fulfill their obligations to inform the public, especially those they regulate, about their uniform decision-making standards through the notice and comment rulemaking process

described in Neb. Rev. Stat. § 84-907. The Petitioner's First, Third, and Fourth Causes of Action related to the violation of Petitioner's Constitutional rights due to Respondents' failure to inform the Petitioner as to how they applied this tool and failure to follow rulemaking procedures. In either case, Respondents cannot abdicate their statutory rulemaking or constitutional due process obligations by cloaking a computerized algorithmic tool with the adornments of the sovereignty of Nebraska.

a. The Petitioner Pleads a Colorable Cause of Action that the Objective Assessment Criteria and Components of the interRAI tool, are a Rule Within the Meaning of § 84-901.

> The plain language of the Nebraska APA reads:
> *Rule or regulation shall mean any standard of general application adopted by an agency* in accordance with the authority conferred by statute and includes, but is not limited to, the amendment or repeal of a rule or regulation. Rule or regulation shall not include (a) internal procedural documents which provide guidance to staff on agency organization and operations, lacking the force of law, and not relied upon to bind the public, (b) guidance documents as issued by an agency in accordance with section 84-901.03, and (c) forms and instructions developed by an agency. For purposes of the act, every standard which prescribes a penalty shall be presumed to have general applicability and *any standard affecting private rights, private interests, or procedures available to the public is presumed to be relied upon to bind the public.* Nothing in this section shall be interpreted to require an agency to adopt and promulgate rules and regulations when statute authorizes but does not require it.

Neb. Rev. Stat. § 84-901(2) (emphases added).

"Statutory interpretation begins with the text and the text is to be given its plain and ordinary meaning. An appellate court will not

resort to interpretation of statutory language to ascertain the meaning of words which are plain, direct, and unambiguous." *Jones v. Colgrove*, 319 Neb. 461, 474 (2025) (citations omitted). Respondents seem to tacitly acknowledge the plain reading of what constitutes a rule that the Petitioner puts forward in their complaint, namely that a "rule" is 1) any standard of general application adopted by an agency in accordance with the authority conferred by statute, and 2) any standard affecting private rights, private interests, or procedures available to the public is presumed to be relied upon to bind the public. (Respondents' Brief, p. 12).

With this logic, Respondents go astray—they incorrectly characterize the Petitioner's allegations as directing them to create a new rule out of whole cloth. This is not the case. The Petitioner merely contends that Respondents have *already adopted* a rule, namely the Objective Assessment Criteria and the algorithmic standards within the interRAI assessment. Respondents' use of the interRAI assessment constitutes adoption of a standard and thereby triggers the requirements within Neb. Rev. Stat. § 84-907, not an external legislative directive through Neb. Rev. Stat. § 83-1216(1). Respondents' misunderstanding of their own obligations is perhaps most clearly underscored by their predecessors' historical failure to understand this exact distinction.

In *Stewart v. Heineman,* 296 Neb. 262 (2017), the trial court raised the concern that Memo 1-95, an internal memorandum of the Department of Health and Human Services categorically barring same sex couples from obtaining foster care licenses, was an unlawful unpromulgated rule because it was a standard of general application, adopted by the Department, and was being applied to affect persons private rights and interests. *See Stewart v. Heineman*, Case No. 13-3157, Amended Order (Lancaster Cnty. Dist. Ct. Sep. 16, 2015) (Colborn, J.). The Honorable John A. Colborn, then correctly applied the Nebraska Supreme Court's holding in *McCallister* v. *Nebraska Dept. of Corr. Servs*., finding that this Memo 1-95 was invalid for its noncompliance with the APA and ordered that it be "rescinded, and

ordered stricken or replaced with the current policy, for the reason that it is not consistent with the current policy of DHHS. . . ." *Id*. at 13; *Cf. McCallister* v. *Neb. Dept. of Corr. Servs.*, 253 Neb. 910 (1998).

In a case concerning agency calculations, a Medicaid provider challenged Respondents' predecessors' failure to promulgate the formula utilized in reducing their 1979 Medicaid reimbursement rate in the Nebraska Public Welfare Manual. *Haven Home, Inc. v. Dep't of Pub. Welfare*, 216 Neb. 731, 734 (1984). The provider conceded that the applicable section of the manual had been promulgated but took issue with the level of detail contained therein as it failed to include an algebraic calculation or clear explanation. *Id*. The Nebraska Supreme Court concluded that the promulgated language was "not so obscure that a reasonably competent administrator could not determine both the total bed capacity and the occupancy rate. Through the use of simple multiplication and division, with only three variables, total reimbursement can be easily calculated. The regulation is not defective." *Id*. at 735.

Unlike in *Haven Home, Inc.*, here, the Petitioner has pleaded more than a colorable claim that one cannot simply look at existing regulations in 403 NAC, nor 404 NAC, pull out a calculator and figure out what the Objective Assessment Criteria and interRAI tools will produce for a benefit recipient. This failure is at the core of Respondents' deficiencies under the APA.

The rules and regulations at issue here are the algorithmic standards utilized by the Objective Assessment Criteria and the interRAI system that were applied to the Petitioner. Specifically, the Petitioner alleges in their complaint that the "[t]he regulations governing developmental disability services do not identify the criteria, standards, scoring methodologies, or decision rules used to assign individuals to funding tiers. The regulations also do not describe the methodology by which assessment responses or assessment scores are translated into funding tiers." Am. Pet, ¶¶ 65-66. There is no debate that these unpromulgated standards were applied to the Petitioner and will *prospectively* cause a drastic reduction in the level of services

should they be unsuccessful in their appeal pursuant to Neb. Rev. Stat. § 84-917, and at every future redetermination. Thus, dismissal of this action prior to allowing the Petitioner to discover what these standards are, how they are applied, and what they mean would be demonstrably inappropriate.

As such, the Petitioner sufficiently pleads a colorable claim that a set of unlawful rules have been applied to them. Respondents have applied these rules without going through the requirements of the Nebraska APA, in violation of the Petitioner's due process rights, and Petitioner should have the opportunity to discover and show precisely what standards were applied. Moreover, the two independently sufficient jurisdictional vehicles the Petitioner pleaded appropriately invoke this court's jurisdiction.

b. Petitioner Pleaded a Colorable Third Cause of Action: § 1983 Claim for Failure to Follow Required Rulemaking Procedures.

The Due Process Clause of the Fourteenth Amendment prohibits any state from depriving any person of a property interest without the due process of law. U.S. CONST. amend. XIV, § 1. Medicaid coverage, like other public assistance programs, is a constitutionally protected property interest that cannot be deprived without due process of law. *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970); *Bliek v. Palmer*, 102 F.3d 1472, 1475 (8th Cir. 1997).

Respondents contend that the Petitioner has no right enforceable under 42 U.S.C. § 1983 to have "the criteria and methodology of an assessment tool adopted and promulgated in the administrative code." (Respondents' Brief, p. 10). Respondents correctly note that § 1983 "provides a civil remedy for deprivations of federally protected rights, statutory or constitutional, caused by persons acting under color of state law." *Id.* (citations omitted). What Respondents fail to account for is that the Petitioner does have a constitutional due process right to be protected from unpromulgated

rules being utilized against him to deprive him of his property interests.

In a case involving the revocation of a driver's license, the Department of Motor Vehicles had a set of draft regulations governing the license revocation hearing process but had not yet fully complied with the Nebraska APA because the Department had not yet filed those regulations with the Secretary of State's office at the time of the revocation hearing. The Nebraska Supreme Court determined:

> Although the department claims it complied with procedural due process by affording Gausman timely notice of the hearing, an opportunity to refute or defend against the charge, an opportunity to confront and examine adverse witnesses, and a hearing before an impartial decisionmaker, the department's failure to comply with § 84-906 is a denial of due process. The department held a revocation hearing and proceeded against Gausman *using rules and regulations which it had failed to file with the Secretary of State*, as required by the Administrative Procedure Act, and which were not valid as against Gausman. Such activity does not comport with due process.

Gausman v. Dep't of Motor Vehicles, 246 Neb. 677, 684 (1994) (emphasis added).

Although the regulations at issue in *Gausman* were focused on the revocation hearing process itself, the principle remains the same. Respondents in this instance made a determination about the Petitioner's benefits using a system of rules that were not promulgated. The Petitioner appealed that decision, still not knowing the rules which determined the amount of his benefits. The Petitioner is left to guess which rules, calculations, and algorithms Respondents are applying. As courts have found for decades, "the stakes are simply too high for the welfare recipient, and the possibility for honest error or irritable misjudgment too great, to allow termination of aid without giving the recipient a chance" to be fully informed of the decision and

decide whether and how to challenge it. *Goldberg v. Kelly*, 397 U.S. 254, 266 (1970). Due process requires that Respondents explain the rules and show their work before reducing the Petitioner's DD services. The Petitioner could not effectively identify an error or prepare a challenge to Respondents' decision in this case because they have not provided rules and regulations describing their calculations and decisions for interRAI assessments.

c. Petitioner Pleaded a Colorable Fifth Cause of Action: Violation of the Nebraska APA.

Neb. Rev. Stat. § 84-911 provides a clear, albeit limited, statutory waiver of sovereign immunity for a declaratory judgment concerning the validity of a state agency's rule or regulation. *Perryman v. Neb. Dep't. of Corr. Serv.*, 253 Neb. 66 (1997). Moreover, this Court is expressly permitted to hear a challenge when a "rule or regulation or its threatened application interferes with or impairs or threatens to interfere with or impair the legal rights or privileges of the petitioner" regardless of whether the Petitioner asked Respondents to pass judgment on the rule or regulation in question first. Neb. Rev. Stat. § 84-911(1).

Respondents do not challenge the sufficiency of the Petitioner's claims as they relate to this court's jurisdiction under § 84-911. As described herein, the Petitioner has alleged that Respondents have adopted unlawful standards of general application, are applying them to the Petitioner and others served by the DD Services Act, and have asked this Court to pass judgment on their validity once the Petitioner has had an opportunity to discover exactly what those standards are.

Respondents seem to take issue with the fact that the Nebraska Legislature has not proscribed for them the exact mechanism in which they are to regulate these methodologies. Respondents wrongfully assume they are free to create, or in this instance purchase, standards from contractors and not inform the public or those they directly regulate exactly how they are making decisions or spending millions of

tax dollars. This level of detail or proscription from the Nebraska Legislature, however impractical, would arguably violate the separation of powers doctrine of the Nebraska Constitution. Furthermore, more precise statutory guidance is unnecessary because Nebraska's Constitution and statutes already require DHHS to make these rules.

The Nebraska Constitution divides the government into legislative, executive, and judicial branches. Art. II, § 1. Furthermore, "[n]o person or collection of persons being one of these departments shall exercise any power properly belonging to either of the others, except as hereinafter expressly directed or permitted." *Id.* "The Nebraska Constitution thus prohibits one branch of government from encroaching on the duties and prerogatives of the others." *Clemens v. Harvey*, 247 Neb. 77, 82 (1994) (citation omitted). Legislative powers are vested in the Legislature. Neb. Const. art. III, § 1. As such, "it is the function of the Legislature through the enactment of statutes to declare what is the law and public policy of this state." *Id.*

Indeed, Respondents' predecessors have previously raised issues with other branches of government telling them what to include in their "regulations". In the case of *In re Interest of Zachary D.*, the Department of Health and Human Services (DHHS) sought relief from a judicial contempt order which required them to, "distribute to all departmental and NFC employees a written policy regarding notifications in the event of a possible change in placement, and also to prepare and distribute a written policy regarding the retention of electronic records." *In re Interest of Zachary D.*, 289 Neb. 763, 770 (2015). DHHS argued that "that the doctrine of separation of powers is violated when the judicial branch imposes an order on the executive branch requiring it to institute and distribute a particular policy, because such a policy amounts to a rule or regulation and *it is solely the function of the executive branch to promulgate its own rules and regulations*." *Id.* (emphasis added). DHHS was ultimately unsuccessful in this argument not because the doctrine of separations of powers was inapplicable, but because the juvenile court's contempt directive in the

case was requiring the creation of policies that were not within the meaning of a "rule" but were akin to internal guidance documents that were essentially copying statutory language. *Id*. at 771.

Thus, the Respondents' argument now, that they should not be required to undergo formal rulemaking, unless and until the Nebraska Legislature gives them the minute detail as to how and what to regulate, seems inherently contradictory at best, and suborning the adoption of an unconstitutional position at worst.

IV. The Regulations are Unconstitutionally Vague

The Petitioner's request is simple—to understand the basis of the decisions used to determine the Medicaid benefits to which they are entitled. This request is based in core constitutional due process principles that regulations and similar standards must be such that "a person of ordinary intelligence" has a reasonable opportunity to know the rules and that there are "explicit standards for those who apply" those rules. *Cent. States Tire Recycling of Neb., LLC v. State,* 268 Neb. 712, 720 (2004) (citation omitted).

Respondents' reliance on *Nyeholt v. Sec'y of Veterans Aff.*, 298 F.3d 1350, 1357 (Fed. Cir. 2002) for the concept that the regulations cannot be challenged for vagueness is inapposite. Nebraska long has held, "[a]lthough most decisions invoking the void for vagueness doctrine have dealt with criminal statutes, the doctrine applies equally to civil statutes." *Cunningham v. Lutjeharms*, 231 Neb. 756, 763 (1989) (citations omitted). In *Central States Tire Recycling of Nebraska, LLC v. State*, 268 Neb. 712 (2004), the Nebraska Supreme Court addressed whether a regulation violated due process on the grounds that it was unconstitutionally vague. In this case, the Petitioner alleged that the Respondents violated the right to due process because the DD regulations failed to establish ascertainable standards governing agency decision-making that determines the amount of DD services funded through Nebraska's Medicaid Waiver an eligible individual is to receive, and are, therefore, unconstitutionally vague. Am. Pet.¶¶

107-14.

The existing regulations regarding the objective assessment process and use of the results are simply statements that an assessment will be used and the outcome will determine the funding available to that individual. 404 NAC § 3-001.06(A); 404 NAC § 2-001.13; 403 NAC § 2-008.01. These regulations do not provide the specific guidelines or criteria used to determine the budget amount. Identifying broad subject matter does not disclose the standards by which those factors are measured, weighted, or translated into individual budget determinations. The OAP is determining eligibility and the amount of services by standards that are not otherwise set forth to the public. Without ascertainable standards, the Petitioner cannot intelligibly show he is eligible for the level of services he needs and there is no way to know if determinations are arbitrary. *Cent. States Tire Recycling of Nebraska, LLC,* 268 Neb. at 720; *see also Morton v. Ruiz*, 415 U.S. 199 (1974) (finding that where the rights of individuals are affected, the agency must follow its own procedures regarding promulgation of policy).

Although the Constitution does not require a Medicaid agency to create administrative guidelines for every possible situation, it does require more than broad statements that fail to provide any ascertainable standard and an agency may need to promulgate policies or rules in order to remedy an issue with vague standards. *Hobbs ex rel Hobbs v. Zenderman,* 579 F.3d 1171, 1185 (discussing how vague standards may violate due process); *see also Strouchler v. Shah,* 891 F. Supp. 2d 504, 515-16 (S.D.N.Y. 2012) (holding decisions regarding government benefits must be made according to ascertainable standards); *Michael T. v. Bowling,* 2016 WL 4870284, at *10 (finding the assessment algorithm lacked ascertainable standards in violation of due process). Respondents' mechanism for setting these standards is through rulemaking, which they have not done.

The First Amended Petition alleges that regulations fail to provide constitutionally sufficient standards governing agency decision-making. This allegation is plausible on its face. See *Chaney v.*

Evnen, 307 Neb. 512, 520 (2020). Accordingly, the Fourth Cause of Action states a plausible claim for relief under 42 U.S.C. § 1983, and Respondents' Motion to Dismiss should be denied.

V. The Sixth and Seventh Causes of Action, Violations of the Developmental Disabilities Act, State Claims Upon Which Relief Can Be Granted.

The First Amended Petition alleges that the DD Services Act directs the Director of the Division of Developmental Disabilities to ensure 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 ("OAP"). Am. Pet. ¶44. The First Amended Petition further alleges that Respondents utilize an assessment process (the interRAI) to determine funding levels that does not satisfy the requirements of § 83-1209 and the DD Services Act. See Am. Pet. ¶62; ¶¶ 126-35; ¶¶148-63. Accepting those allegations as true, as the Court must at this stage, the First Amended Petition alleges that Respondents are not utilizing an OAP required by law which is plausible on its face.

The Petitioner does not seek damages under an implied private cause of action. Rather, the relief the Petitioner seeks is a declaration that Respondents' use of the interRAI violates the DD Services Act and prospective equitable relief to prevent Respondents from continuing to utilize an assessment process that fails to comply with § 83-1209. The alleged statutory violation is the basis for the requested equitable relief; the injunction is the remedy sought for the ongoing violation.

Respondents argue that pursuant to 403 NAC § 2-008, funding levels are determined by considering an individual's physical, cognitive, and emotional functioning and the effect of those conditions on activities of daily living, problematic behaviors, community living, and behavioral and health factors. See Respondents' Brief at p. 15. Respondents further contend that it is unclear what more Petitioner

believes the Act requires. *Id*.

The First Amended Petition clearly alleges that Respondents have failed to disclose the criteria, standards, methodology, scoring, validation, testing, and other components necessary to determine whether the interRAI constitutes an objective assessment process within the meaning of § 83-1209. Contrary to Respondents' assertions, identifying broad categories of information to be evaluated does not disclose the standards or methodology used to evaluate those categories, determine funding levels, or establish that the process used is an objective assessment. The Petitioner cannot identify how the tool assesses the required factors of daily living, problematic behaviors, community living, and behavioral and health factors to determine their funding levels, if it is even doing so at all, or if it is doing so in compliance with relevant statutes and regulations. There are questions of fact regarding how the tool works and whether it complies with the law, and discovery is needed.

The Sixth Cause of Action alleges that Respondents failed to implement an objective assessment process because information regarding the objectivity, accuracy, testing, and other critical components of the assessment process has not been disclosed and because the process lacks ascertainable standards by which it may be evaluated. Am. Pet. ¶¶ 126-31.

The Seventh Cause of Action further alleges that the assessment process 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. Am. Pet. ¶¶ 132-35.

The Sixth and Seventh Causes of Action allege that Respondents' failure to disclose ascertainable standards, methodology, scoring criteria, and validation measures prevents any meaningful determination of whether Respondents implemented and are utilizing the objective assessment process required by § 83-1209. These allegations are factual allegations, not merely legal conclusions. Taken as true, these allegations support the claim that Respondents have not

implemented an objective assessment process required by § 83-1209.

The Ninth Cause of Action seeks a declaration that Respondents' use of the interRAI assessment process to determine funding levels violates the DD Services Act and that such declaration is necessary to determine the rights and obligations of the parties. Am. Pet. ¶¶ 148-54.

The Tenth Cause of Action seeks prospective injunctive relief based on allegations of ongoing and irreparable harm and requests that Respondents be prohibited from continuing to use the interRAI assessment process unless and until they comply with the requirements of law, including the DD Services Act. Am. Pet. ¶¶ 155-63.

> The Nebraska Supreme Court determined that actions:
> [T]to restrain a state official from performing an affirmative act and actions to compel an officer to perform an act the officer is legally required to do are not barred by state sovereign immunity unless the affirmative act would require the state official to expend public funds. As the [U.S.] Supreme Court has consistently stated, "when the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants."

Doe v. Bd. of Regents of Univ. of Neb., 280 Neb. 492, 511–12 (2010), (overruled on other grounds by *Davis v. State*, 297 Neb. 955 (2017)) (citations omitted). *See also Heist v. Nebraska Dep't of Corr. Serv.*, 312 Neb. 480, 491(2022). "This is true because acts of state officers not legally authorized, or which exceed or abuse the authority conferred upon them, are judicially regarded as their own acts and not acts of the state." *Logan v. Dep't of Corr. Servs.*, 254 Neb. 646, 653 (1998) (citations omitted).

Here, the Respondents include DHHS CEO Steve Corsi and DD Services Director Tony Green in their official capacities along with

DHHS. The Petitioner is alleging the Respondents are not implementing an OAP as legally required to do by the DD Services Act. The Petitioner seeks a declaration that the interRAI does not meet the statutory requirements of an OAP and that state officials be restrained from using the interRAI as the objective assessment process. The relief requested is not barred by sovereign immunity.

Construing the allegations of the First Amended Petition as true and in the light most favorable to the Petitioner, the Petitioner has plausibly alleged that Respondents have failed to implement an objective assessment process required by the DD Services Act and has therefore stated claims upon which declaratory and injunctive relief may be granted. See *Chaney v. Evnen*, 307 Neb. 512, 520 (2020). Accordingly, Respondents' Motion to Dismiss should be denied as to the Sixth and Seventh Causes of Action.

CONCLUSION

The Petitioner respectfully requests the Court deny Respondents' Motion to Dismiss. In the alternative, the Petitioner requests leave to amend his First Amended Petition.

ANGELA BESSEY on behalf of
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CERTIFICATE OF COMPLIANCE

This is to certify that this reply brief complies with the word count and typeface requirements of Neb. Ct. R. §§ 6-1505, 2-103(C)(4). This brief contains 11,318 words, not including this certificate, and was prepared using Microsoft Word Version 2016.

By: */s/Mark T. Bestul*
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Certificate of Service

I hereby certify that on Tuesday, July 07, 2026 I provided a true and correct copy of the Brief to the following:

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