

Transcript Prepared by Clerk of the Legislature Transcribers Office
Judiciary Committee February 5, 2020

MORFELD: Afternoon and welcome to Judiciary Committee. My name is not Steve Lathrop. It's Adam Morfeld. I represent District 46 in Lincoln. And Senator Lathrop is actually presenting on another bill and Senator Patty Pansing Brooks had to attend to a family issue, so I'll be chairing the committee for a little while today. On the table inside the doors, you'll find the yellow testifier sheets. If you're planning on testifying today, please fill one out and hand it to the page when you come up to testify. There are also white sheets on the table if you do not wish to testify but would like to record your position on a bill. For future reference, if you are not testifying in person and would like to submit a letter for the official record, all committees have a deadline of 5:00 p.m. the last workday before the hearing. Keep in mind that you may submit a letter for the record or testify in person at the hearing, not both, and only those actually testifying in person at a hearing will be listed on the bill's committee statement. We will begin testimony with the introducer's opening statement followed by proponents of the bill, then opponents, and finally, anybody speaking in the neutral capacity. We'll finish with a closing statement by the introducer if they wish to give one. We utilize the on-deck chairs right up front there, to the left to the testifier's table. Please keep the on-deck chairs filled with next persons to testify to keep the hearing moving along. We ask that you begin your testimony by giving us first and last name and please spell them for the record. If you have any handouts, please bring at least 12 copies and give them to the page. If you do not have enough copies, the page can make more. If you're submitting testimony on someone else's behalf, you may submit it for the record, but you will not be allowed to read it. We'll be using a three-minute light system. When you begin your testimony, the light on the table will turn green, the yellow light is your one-minute warning, and when the red light comes on we ask that you wrap up your final thought and stop. As a matter of committee policy, I'd like to remind everybody that the use of cell phones and other electronic devices is not allowed during public hearings, though senators may use them to take notes or stay in contact with staff. At this time, I'd ask everybody to look at your cell phones and make sure they're in silent mode. Also, verbal outbursts or applause are not permitted in the hearing room. Such behavior may be cause for you to be asked to leave-- to leave the hearing. You notice committee members coming and going. This has nothing to do with the importance of the bills being heard, but senators may have bills to introduce in other committees or may have other meetings to attend. I'd like to have the members of the committee introduce themselves, starting with Senator DeBoer.

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DeBOER: My name is Wendy DeBoer. I represent District 10, which is northwest Omaha and the city of Bennington.

BRANDT: Tom Brandt, District 32, Fillmore, Thayer, Jefferson Saline, and southwestern Lancaster County.

CHAMBERS: Ernie Chambers, District 11, Omaha.

MORFELD: And as I said, Adam Morfeld, District 46. And assisting in the committee today are Laurie-- Laurie Vollertsen, our committee clerk. Sorry I got your last name wrong there, Laurie. Neal Erickson and Josh Henningsen are our two legal counsels. Our committee pages are Ashton Krebs and Lorenzo Catalano, both students at UNL. Thank you. And with that, we'll begin today's hearing with Senator Walz's LB1164.

WALZ: Thank you. And good afternoon, members of the Judiciary Committee. For the record, my name is Lynne Walz, L-y-n-n-e W-a-l-z, and I represent District 15. I'm here today to introduce LB1164-- LB1164, a bill to change terminology and harmonize language relating to disabilities. Throughout statute, there is currently a variety of terms that are being used to describe a person with a disability. Many of these terms, while accurate, are slightly out of date or could be more inclusive. Some of these terms include blind, visually handicapped, deaf or hard of hearing handicapped person, physically disabled person, and more. While some of these are more specific, like blind or hard of hearing, there are a number of areas where the phrase "a person with a disability" would suffice. There are a variety of definitions in statute relating to different disabilities. Instead of using all of these definite-- different definitions, we felt that it would be best to use the federal definition to provide more clarity and consistency. For your information, refer to the federal definition-- definition 42 U.S.C. 12102, stating: The definition of a disability means a physical or mental impairment that substantially limits one or more major life activities of such individual, a record of such impairment, or being regarded as having such an impairment. Making reference to a federal definition is beneficial because if the standard were to change, we wouldn't have to reword the statute. We are also looking to ensure that the statutes are consistent with contemporary use and norms. In addition, I would like to point out that in Section 20-134, relating to the provision of segregation of any person in place of a public accommodation, while it does include race, creed, color, sex, religion, national origin or ancestry, it does not include disability. This is about codifying the practice of the NEOC. They already address discrimination in public accommodation

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based on disability, but it is a practice and not specifically codified in law. It is an oversight we are attempting to address in order to make sure there is no question about the civil rights of people with disabilities and no question about the state's commitment to the civil rights of people with disabilities. Through this bill, we are not only harmonizing the language in statute but bringing us into the 21st century and further providing protections for the citizens of our state. Thank you. And with that, I would be happy to try and answer any questions.

MORFELD: Thank you, Senator Walz. Any questions for Senator Walz? OK, Senator Brandt.

BRANDT: Thank you, Chairman Morfeld. Thank you, Senator Walz, for bringing this today. From a practical standpoint, by changing the language in existing law, what does that do? Like if a handicapped person checks into a hotel today and we change this to disabled, what's the practical application?

WALZ: The practical application?

BRANDT: But, I mean, what-- I guess, what are we trying to accomplish by adding the language?

WALZ: I think that we're just trying to standardize it so it's just, instead of having-- instead of using all the different definitions, it would just be best to fit it into the federal definition and provide more clarity and more consistency across the board.

BRANDT: So it-- it gets the Nebraska statute in line with the feds.

WALZ: Yes.

BRANDT: OK.

WALZ: Yeah. Sorry.

BRANDT: Thank you. I didn't understand.

WALZ: That was probably a lot easier to say.

BRANDT: No, I--

MORFELD: Thank you, Senator Walz. Thank you, Senator Brandt. Any other questions? OK. Seeing none, we'll go with proponent testimony.

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BRAD MEURRENS: Good afternoon, Senator Morfeld and members of the committee. For the record, my name is Brad, B-r-a-d, Meurrens, M-e-u-r-r-e-n-s, and I am the public policy director for Disability Rights Nebraska. We are the designated protection and advocacy organization for persons with disabilities in Nebraska, and I'm here today in strong support of LB1164. We support the bill for a few reasons and I'll be brief. Again, like the senator said before me, it rectifies what we believe is an oversight in the statutes, the omission of "disability" as a protected class under Nebraska Statutes 20-132, -134, and -139. As it stands now in statute, as it reads, people with disabilities are protected from discrimination in employment and housing but not public accommodations. You know, I-- again, we agree with the senator that this-- that this bill would ensure that there is no question that people with disabilities are a class that should have discrimination protections regarding public accommodations on as much as any individual has on the grounds of race, color, sex, religion, national origin or ancestry, and that the protections are as strong as those already included for employment and housing regarding disability. Again, this bill would make it clear and in writing that Nebraska is committed to ensuring the rights and equality of Nebraskans with disabilities. (4) Reading Nebraska Statute 20-134, discrimination in public accommodation based on race, color, creed, sex, religion, national origin or ancestry is punishable, but not if discrimination is based on disability, and we fear that the lack of this term in the string of protected classes might be a disincentive for individuals with disabilities to recognize that they have these protections in antidiscrimination statutes, that they-- that they do apply to them. But since the word's not in the statute, there might be some confusion and we need to provide some clarity. (2) We support changing the static definition of disability and replacing it with a reference to the definition of disability in the federal Americans With Disabilities Act. If referenced, Nebraska does not have to go back and rewrite the statute if it were to change at the federal level. Plus, there is extra language in the federal code that helps establish definitional parameters that are not included in the state's definition. I have included those as a handout to my-- to my testimony today. Last-- and finally, the bill replaces old, outdated language with more contemporary language, much like what this Legislature did with LB343 in 2013, Senator Coash's bill, replacing the words "mental retardation" with the more contemporary "intellectual or developmental disability," and with what the Legis-- this body did with LB684 last session, replacing the term "hearing impaired" with "deaf or hard of hearing." "The term "handicapped" and "physically disabled" are antiquated terms that have gone out of fashion and are not generally

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used or accepted within the larger disability community. So we-- for that matter, we support the updated language in this bill. And for those reasons, we stand strongly in support of this bill and I'd be happy to answer any questions that you may have.

MORFELD: Thank you, Mr. Meurrens. Any questions? OK. Seeing none, thank you very much.

BRAD MEURRENS: Thank you.

MORFELD: Other proponent testimony?

EDISON McDONALD: Hello. My name is Edison McDonald, E-d-i-s-o-n M-c-D-o-n-a-l-d, representing The Arc of Nebraska. I just wanted to echo my colleague Brad Meurrens' comments. I think that, you know, that really covers a lot of what we wanted to talk about. Also keeping in mind you've got six other hearings today, I'll be brief. The one addition that I wanted to add in is that I think that this is a helpful, proactive, clean-up bill that as we're going forward, making sure to go and al-- always have these terms be in line is significant for our communities. Otherwise, what ends up happening is we frequently end up with people who have these cases that we think would be covered under a statute like this and then end up having that tiny little issue because of a simple change in phrases. So anytime that we can go and help to align this and align our statutes across the board, we're always supportive of that, and to update for more person-centered, friendly language. Thank you. Questions?

MORFELD: Any questions for the testifier? OK. Seeing none, thank you. Other proponent testimony? OK, Senator-- Senator Walz, you have to go? You're waiving? OK. Any opposition testimony? Any testimony in the neutral capacity? There is some testimony. Just barely made it.

MARNA MUNN: Sorry.

MORFELD: just barely made it.

MARNA MUNN: I literally ran here.

MORFELD: Welcome.

MARNA MUNN: Thank you. I'll fill the form out afterwards. Is that OK?

MORFELD: Yeah, that's fine.

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MARNA MUNN: Not hearing all that was said before me, I hope I'm not being repetitive, but I'll simply say good afternoon to the committee. My name is Marna Munn, M-a-r-n-a M-u-n-n. I'm an attorney and the executive director of the Nebraska Equal Opportunity Commission and I'm here today to testify in a neutral capacity on LB1164. Probably to echo what I did hear say-- said earlier from Senator Walz, LB1164 updates language under two of the acts enforced by the NEOC, the Fair Housing Act and the Public Accommodations Act. This bill is needed and will help, 30 years after the passage of the Americans with Disabilities Act, named Americans with Disabilities Act, to use the proper terminology of "disability" rather than the antiquated and outdated language of "handicapped." It will also ensure that under each act, all the relevant statutory provisions accurately and explicitly include disability as a protected basis, instead of having it in only certain provisions under each act. Operationally, it makes no actual difference, as each act includes references to disability, but it will harmonize the provisions related to disability, just as the bill's statement of intent suggests. So actually, I'm here just to answer any other questions you may have, wanted to weigh in on it and say that I do-- while I'm testifying in a neutral capacity, as is my general stance as the executive director, you know, I'm actually really in favor of the update of the language.

MORFELD: Excellent. Thank you.

MARNA MUNN: Answer any questions you may have.

MORFELD: And hopefully you caught your breath. Any questions? OK. Seeing none, if you could just fill out that form--

MARNA MUNN: I will.

MORFELD: --the pages will get it from you. That would be great.

MARNA MUNN: I'll turn it in. Thank you.

MORFELD: Yeah. Thank you. Any other people in the neutral capacity? OK, seeing none, Senator Walz waives closing. That ends our hearing-- oh, wait, we do have one letter. We have a letter of support from Dalt-- Dalton Meister with the National Association of Social Workers of Nebraska. And with that, that ends our hearing on LB1164. And, Neal, are you going to be opening?

NEAL ERICKSON: No. Zach's there.

MORFELD: Zach is going to be opening.

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ZACH PLUHACEK: You know, you can do it if you want.

MORFELD: OK. We are opening on LB1028, and it sounds like Senator Lathrop's legislative aide, Zach Pluhacek, will be opening.

ZACH PLUHACEK: Thank you. Senator Morfeld. Yeah, good afternoon, members of the Judiciary Committee. I'm Zach Pluhacek; that's Z-a-c-h P-l-u-h-a-c-e-k. I am Senator Lathrop's legislative aide. I'm just going to read his statement. He's sorry. He's still introducing a bill in another-- excuse me-- in another committee. LB1028 was brought to Senator Lathrop by the Court Administrator's Office and just makes a simple change to allow for electronic file-- excuse me-- filing of cases in small claims court. This bill would also allow the Supreme Court to establish rules for how the filing process would work, rather than spelling that out in statute. This is just another step as the court makes e-filing more broadly available. I think there's a representative from the courts who will be testifying after me and can speak to this in more detail and answer any questions you might have. And with that, I ask for your support of LB1028. Thank you.

MORFELD: Thank you, Mr. Pluhacek. As is tradition, we usually do not ask legislative staff questions, but it sounds like there will be somebody coming up. OK. Proponent testimony for LB1028.

AMY PRENDA: Good afternoon, members of the Judiciary Committee. My name is Amy Prenda, and I'm the deputy administrator for court services under the Administrative Offices of Courts and Probation, testifying in support of LB1028. The AOC did ask Senator Lathrop to introduce this legislation. The Supreme Court, in their technology strategic plan, is working towards implementing a statewide e-filing system for self-represented litigants, and this bill would allow the Supreme Court to fulfill this goal by removing a couple of barriers to filing small claims courses in the county court. The bill, number one, would strike language requiring a plaintiff to complete the small claims form in the presence of a judge, county court staff, or a notary; and it allows the Supreme Court, by court rule, to include-- excuse me-- other methods for filing a small claims case. Under current law, the plaintiffs [SIC] is limited to filing those in person or by mail. Thank you, and I'd be happy to answer any questions you have.

MORFELD: Thank you very much. Any questions? OK. Seeing none, thank you.

AMY PRENDA: Thank you.

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MORFELD: Any other proponent testimony? Welcome.

TIM HRUZA: Good afternoon. Members of the Judiciary Committee, my name is Tim Hruza, last name spelled H-r-u-z-a, appearing today on behalf of the Nebraska State Bar Association in support of the bill. Let me just say that the small claims court process serves an important role in providing litigants access to our trial courts, our courts in Nebraska. For that reason, the Nebraska State Bar Association supports the Supreme Court's efforts to improve that process and to streamline it, especially as we head toward more electronic filing and additional means of providing for access to the court system. With that, we support the bill, we ask that you advance it, and I'm happy to answer any questions you might have.

MORFELD: Thank you, Mr. Hruza. Any questions? Seeing none, thank you.

TIM HRUZA: Thank you.

MORFELD: Any other proponent testimony? Any opponent testimony? Anybody testifying in the neutral capacity? Seeing none, and we waive closing and there are no letters for LB1028, we'll then move on to LB1029. Welcome back, Mr. Pluhacek.

ZACH PLUHACEK: It's the gauntlet today-- gambit? Good afternoon, Senator Morfeld and members of the Judiciary Committee. Once again, my name is Zach Pluhacek; that's Z-a-c-h P-l-u-h-a-c-e-k. I'm Senator Lathrop's legislative aide. He is still opening on a bill in the Appropriations Committee, but hopefully he will be here soon. I'm here today to introduce LB1029 on his behalf. LB1029 is another small bill that was brought to Senator Lathrop by the Court Administrator's Office. This one doesn't relate to electronic filing but, rather, how we maintain records once they're filed. Under current law, microfilm is the only option for official preservation duplicates of original court records. This bill would allow those duplicates to be maintained in other formats. It also makes some small cleanup changes to two sections of statute dealing with this subject. Again, I believe a representative from the courts will be testifying. I think it's Ms. Prenda again, so she can probably speak to this in more detail and any-- answer any questions you might have. Thank you.

MORFELD: Thank you, Mr. Pluhacek. Proponent testimony? Welcome.

AMY PRENDA: Thank you. Members of the Judiciary Committee, I am Amy Prenda, A-m-y P-r-e-n-d-a, and I am the deputy administrator for court services under the Administrative Office of Courts and Probation,

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testifying in support of LB1029. The O-- AOCF did ask Senator Lathrop to introduce this legislation. This bill expands how the court record is preserved to include formats other than just microfilm, as long as the format conforms to the State Records Management Act and the Record Management Division's definition for durable medium. The Supreme Court's case management system JUSTICE, the elec-- electronic document storage meets the definition as a durable medium and will give courts other options for preserving court records beyond just microfilming or maintaining paper copies. If this legislation were passed, then the courts and the clerk's office have the potential to save money if they would choose to no longer convert court records to microfilm or save and store paper files. Thank you, and I would be happy to answer any questions you may have.

MORFELD: Thank you, Ms. Prenda. Any questions? OK, seeing none, thank you. Next, proponent testimony. Welcome back, Mr. Hruza.

TIM HRUZA: Good afternoon, members of the Judiciary Committee. My name is Tim Hruza, last name spelled H-r-u-z-a, appearing today on behalf of the Nebraska State Bar Association. Again, as with the-- the previous bill, we appreciate the court's efforts to ensure streamlined and more updated means of administering our courts and ensuring that they're available to the public as necessary. I'd be happy to answer any questions you have, but we asked for your-- the committee's support of the bill and that you advanced it to General File.

MORFELD: Thank you. Any questions for Mr. Hruza? OK. Seeing none--

TIM HRUZA: Thank you.

MORFELD: Thank you. Any other proponent testimony? Any testimony in the opp-- in opposition? Any testimony in the neutral capacity? OK. Seeing none, we also have no letters for this bill and we'll move on then to LB1030.

ZACH PLUHACEK: Good afternoon, members of the Judiciary Committee. Once again, my name is Zach Pluhacek, Z-a-c-h P-l-u-h-a-c-e-k. I'm again introducing a bill on behalf of Senator Lathrop today-- now we're going on to LB1030. This is another proposal on behalf of the court administrators. This one seeks to extend the amount of time allowed for courts to remit forfeited recognizance-- recog-- knew I was going to mess that up-- recognizances-- I apologize. I'm not an attorney-- fines or costs to the county treasurer. The current time limit is within ten days of receiving the funds. The new requirement would be 30 days. Again, I think Ms. Prenda should be speaking after

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me and I believe she can answer any questions you might have. Thank you.

MORFELD: Thank you, Mr. Pluhacek. And for the record, I passed the bar exam and I can't say that word either, so. OK. Any-- any proponent testimony? Welcome back, Ms. Prenda.

AMY PRENDA: Thank you. Members of the Judiciary Committee, my name is Amy Prenda, A-m-y P-r-e-n-d-a, and I am the deputy administrator for court services under the Administrative Office of Courts and Probation, testifying in support of LB1030. The AOCF asked Senator Lathrop to introduce this legislation. Because-- because the courts currently financially reconcile on a monthly basis, this bill would align the statute with what current court practice is. Thank you, and I'd be happy to answer any questions you may have.

MORFELD: Thank you, Ms. Prenda. Any questions? OK. Seeing none, any other proponent testimony? Any opponent testimony? Anyone in the neutral capacity? There are no letters for LB1030, and then we will move on to LB1032.

ZACH PLUHACEK: Good afternoon once again, Sen-- Senator Morfeld and members of the Judiciary Committee. I'm Zach Pluhacek, Z-a-c-h P-l-u-h-a-c-e-k. I am the legislative aide for Senator Lathrop. I'm here today to introduce LB1032 on his behalf. This is the final Court Administrator bill of the day. The changes in this bill eliminate a potential conflict with Section 25-914, where we have an order being defined as excluding a judgment, so this just clarifies that. Again, Ms. Prenda, I believe, is speaking after me and should be able to answer any questions you might have and go into more specifics. With that, I ask for your support of LB1032.

MORFELD: Thank you, Mr. Pluhacek. Proponent testimony on LB1032?

AMY PRENDA: Members of the Judiciary Committee, my name is Amy Prenda A-m-y P-r-e-n-d-a. I am the deputy administrator for court services under the Administrative Office of Courts and Probation, testifying in support of LB1032. The AOCF did ask Senator Lathrop to introduce this legislation to clarify a change that was made by LB193 in 2018, which had some unintended consequences. While we often use the term "order" as a generic term when describing how a court provides written direction in the parties in a case, in civil procedure, the term "civil judgment" and the term "order" are two very distinct terms. However, LB193 did not distinguish between the two terms and, instead, LB193 has created a conflict between the definition of order as

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defined in Section 25-914 and judgment as defined in 25-1301. As amended by LB193 in 2018, Section 25-1301 now provides a rendition of a judgment is when a court signs an order. However, Section 25-914 specifically provides a judgment cannot be an order. LB1032 clarifies a judgment and an order are mutually exclusive terms that should not be used interchangeably. In sum, LB1032 reinstates the civil procedure process for civil cases by, one, distinguishing a civil judgment from an order for appeal purposes. I'd like to think of this as two buckets, and the first bucket where all the judgments go this, the-- and the second bucket is where all the orders go, In the first bucket, all judgments are final and can be appealed. In the second bucket, we have orders. Some of those orders are not final and cannot be appealed, and some of those orders are final and can be appealed. Number two, the bill clarifies that ren-- clarifies that rendition of the judgment is the last written document by the court stating all the review granted or denied to the parties. This single written document is what can be appealed. And thirdly, it reinstates language stricken by be LB9-- LB193 so that parties will again receive notice of both civil judgments and final orders entered by the court. Thank you, and I would be happy to answer any questions you may have.

MORFELD: Thank you, Ms. Prenda. Any questions? OK, seeing none, thank you.

AMY PRENDA: Thank you.

MORFELD: Any other proponent testimony? Anybody testifying in opposition? Anyone testifying in the neutral capacity? There are no letters for LB1032, and that ends our hearing on LB1032. Let the record show that we've had the most efficient Judiciary Committee hearing in the history of Judiciary Committee. But we do-- we are going to take a quick break because Senator Lathrop would like to introduce the next two bills. I don't think that's a statement about Mr. Pluhacek, but I think he wants to introduce those. And so we'll take a quick break, so we'll just be standing at ease, and then once he comes back we'll begin again. So don't go too far. Thank you.

[BREAK]

MORFELD: Are we ready? OK. We're going to get started again. Senator Lathrop is still presenting in another committee. We'll get started on LB1027. Mr. Pluhacek, welcome back.

ZACH PLUHACEK: Thank you, Senator Morfeld. Good afternoon. And, members of the Judiciary Committee, my name is Zach Pluhacek, Z-a-c-h

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P-l-u-h-a-c-e-k. I am legislative aide for Senator Lathrop, who represents District 12. He really wanted to be here to present on this bill. It's important to him, but-- as are the other ones. But he is still stuck in a committee hearing on another bill. This is LB1027. Senator Lathrop's goal with this bill is to establish an affordable process for plaintiffs to pursue monetary relief in state court when the amount they're seeking is relatively low. He could provide you with a better example of what he's talking about, but basically LB1027 would create a new option for plaintiffs who are seeking money judgments that are less than or equal to the county court jurisdictional amount; that's currently \$53,000. Under this process, which would be initiated by the plaintiff, discovery by both sides is limited and must be completed no later than 60 days before trial. The limitations include a cap of ten requests for production of documents, ten interrogatories, and ten requests for admission per side. Each side is also limited to one deposition of each party, depositions of no more than two nonparties, and a single retained expert. The court has discretion to modify any of these limitations upon a showing of good cause. There are also limitations on the length of the trial itself, on the timing of certain motions, and on authenticity and hearsay objections to the admission of documents. The other major component of this process is that we would allow an official report from a treating healthcare provider to be used in lieu of a deposition or in-court testimony. I believe all of you are aware of how difficult and costly it can be to secure witness testimony from healthcare providers. All of these limitations should make this process much more accessible and, in Senator Lathrop's view, much fairer for plaintiffs in Nebraska courts. It gives both sides an opportunity to fully state their argument while preventing people from being, quote unquote, priced out of litigation. Senator Lathrop would be happy to explain the bill in further detail or answer any questions you might have. And with that, I ask for your support of LB1027.

MORFELD: Thank you, Mr. Pluhacek. Do you have somebody testifying behind you that can answer some questions?

ZACH PLUHACEK: Yeah, we'll have somebody from the trial attorneys who should be able to answer questions, I believe, so.

MORFELD: OK. Thank you very much.

ZACH PLUHACEK: Thank you.

MORFELD: We'll move on to proponent testimony for LB1027. Welcome.

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MATT KNOWLES: Good afternoon, Senator Morfeld, members of the committee. Thank you for your time today. My name is Matt Knowles, M-a-t-t K-n-o-w-l-e-s. I'm an attorney at Knowles Law Firm in Omaha. I'm also a member of the Nebraska Association of Trial Attorneys, and I'm here today to testify in support of LB1027. When our organization was first made aware that this could become a possibility because of something similar that existed in the state of Iowa, it caught my interest and enthusiasm, and the reason why is because over the past three, four, five years-- I've been an attorney for 12, but over the last few years I've seen a disturbing trend, and the disturbing trend is this. A person calls. They have a legitimate, meritorious claim. And for me to get a judgment for them that they are well entitled to, me procuring the testimony for that is going to cost more than the judgment they're looking to get. And so the problem is, is that I have to explain that it's just economically impractical. I would like to help you. And in effect, what that's done is that's denied citizens access to the court. It's-- it's led to me having to tell people I can't help you with your cause of action because you'll end up owing money instead of getting money, even though you're-- you should be owed money. And-- and it has affected a denial of access to the courts. And so that's why I'm here enthusiastically in support of LB1027. As I mentioned a reference, the state of Iowa did pass legislation similar, not the same but with the same intents and purposes as LB1027. They passed it in 2015. I've handed out something from a manual or a guide that talks about it because, as I was trying to summarize or figure out how to summarize this best, I came across a quote from the late chief justice of the Iowa Supreme Court, Chief Justice Mark Cady, and his quote regarding this system implemented in Iowa was this: The court believes the provisions of the ECA rule will significantly reduce litigation time and cost while increasing access to justice. That one-sentence quote sums this up perfectly. There's three things in there: reduce litigation time, so get things to trial quicker. Trials can only last two days under this bill. There's only a limited number of witnesses, so get cases tried quicker, get judges that don't have trials that stretch on for days and days. The second thing is to reduce cost, and that leads directly to the third thing, which is increasing access to justice, because if we reduce the cost I don't have to say no to people that have claims that they are legally entitled to pursue but simply can't because there's an economic barrier in place that doesn't need to exist. In Iowa, the trial attorneys, plaintiffs attorneys, defense attorneys, and the judiciary all were supportive of this. All of them, I think, are very happy with the system, from what we've heard from the chief justice's office of the Iowa Supreme Court. With that, I offer the Nebraska Association of

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Trial Attorneys' support for this bill, and I'm happy to answer any questions the committee may have.

MORFELD: Thank you very much. Any questions? Senator DeBoer.

DeBOER: Is there any concern that there will be a sort of rush of nuisance law claim-- nuisance claims made under this particular provision?

MATT KNOWLES: That's-- that's a very good concern. And we reached out, our organization did, to the Iowa Supreme Court's office and asked them if they kept statistics. And the response we received from the assistant counsel to the chief justice was that since 2015, there's been, I believe, 1,600 cases, so in five years 1,600 cases that have opted for this process, because they could file these. These are causes of action that exist anyways.

DeBOER: Sure.

MATT KNOWLES: This is just a streamlined process--

DeBOER: Right.

MATT KNOWLES: --so 1,600 cases over five years, about 300 cases a year. Their opinion, from-- again, from the Iowa Supreme Court, is that those cases would have been filed or pursued anyways. This just gave those litigants the ability to reduce the cost of litigation and to more expeditiously move a case along to-- to get a case progression going. And I think that makes perfect sense because there's deadlines, as you will read in the bill, where these things can't stretch on forever. So in theory, some of my civil cases should-- should end sooner than they are now, and that-- that's going to remove cases from the docket quicker. I think it's a net zero, if anything. But it may be a plus in that I-- I will use this procedure on every county court case I file. I cannot think of an example-- I can't think of an example why I wouldn't, and I think that will get cases off judges' dockets quicker.

DeBOER: And the-- the primary savings comes from the streamlined discovery process? Is that correct?

MATT KNOWLES: That is correct, yes. It's limited-- traditionally, for the Nebraska court rules of discovery, you can ask, I believe, 25 interrogatories. This cuts it down to ten, and that significantly reduces-- I mean, there is not a case where I can't get something answered within ten questions anyways. And so when you're getting 25

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questions, a lot of them are things that are just creating work and going down paths that don't exist. This kind of cuts to the chase of things. And it just says, look, let's get the basics out there, let's do this within time periods that are reasonable but quicker, and let's get the case tried in two days.

DeBOER: So you said that the-- the Iowa court said that there would not be or there were not, they felt, cases that would not otherwise have been filed?

MATT KNOWLES: Correct.

DeBOER: So does this really provide an additional avenue for folks if they would already be filing them or does it just provide a cost savings to those who are filing the low-dollar claims?

MATT KNOWLES: Well, the most-- the way it affects citizens the most is that-- is really in this being able to use testimony from physicians and not having to call them to testify live at trial or by video deposition. So, for instance, if I have somebody who says, hey, I was injured in an accident, my ER bill is \$2,000, that's all there was but I can't get anyone to pay it, well, it's going to cost \$1,500 to take the doctor's deposition, and so there isn't much left. And I don't-- I don't want to leave them with a bill and have everyone benefit besides the person who was injured. So I can't take the case on, but they need a recourse. The recourse is provided in this bill. It's-- it provides for a form where you can get that expert witness testimony in a cost-effective means. And I can't tell you-- I'm not sure if I will accept more cases or not, but I do know that people-- similar to the needs that exist for small claims court, this will help people with cases that-- that are not large cases. They may not even need an attorney, but it will make them feasible to pursue for these people because the forms will be standardized to have the physicians fill out. So I do think it provides an avenue that-- that does not exist that will allow more citizens access to the court system.

DeBOER: Is there currently some sort of-- other than that physician piece, is there some sort of abbreviated discovery motion that would be available? Because it says that you have to show good cause and the court will have to-- to decide on that. So is there some other motion that could be made currently under the current system that would allow you to have an abbreviated discovery process?

MATT KNOWLES: Well, and-- and the answer to that in county court, at least from my experience in Douglas County, is, no, there isn't. When

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you file a complaint and someone files an answer, if it's-- if the defendant requests a jury trial, the court sets it for trial somewhat soon after the answer is filed, which doesn't make-- there's no way we could try the case within the amount of time. So everybody continues their case the first time around. And-- and that's usually maybe a-- it's-- to the next judge's jury panel, that might be six months away, so there's this huge delay then where I could send out discovery and I'll get the responses back in 30 days, but I'm not going to get a trial date for six more months because I had to continue it because they set the trial so fast. There is no way I can speed that up. There's no motion I can make to say, hey, we're done with discovery so get us on the docket quicker; at least in Douglas County, that's my experience. Now in district court, which this wouldn't affect, you can have a scheduling order which, you know, would set deadlines such as this. But, no, to answer your question directly, no, there isn't-- there isn't currently a process I'm aware of that would allow for responses any quicker than we can get them now.

DeBOER: OK. Thank you.

MORFELD: Any other questions? OK. Thank you very much for your testimony.

MATT KNOWLES: Thank you very much.

MORFELD: Other proponent testimony on LB1027? OK, moving on to opponent testimony, any opponent testimony on LB1027? OK. Seeing none, neutral testimony on LB1027. OK. That ends the hearing on LB1027. There are no letters. And then we will move on to the next hearing, LB1137. Welcome back, Mr. Pluhacek.

ZACH PLUHACEK: Good afternoon, Senator Morfeld and members of the Judiciary Committee. My name is Zach Pluhacek, Z-a-c-h P-l-u-h-a-c-e-k. I am introducing LB1137 on behalf of Senator Lathrop, the senator from District 12 and the Chairman of this committee most days. [LAUGH] We also have an amendment, AM2294, which I believe is being distributed to the committee and also to folks from HHS. Senator Lathrop brought LB1137 to an-- to address an issue that was brought to his attention by a friend, Phil Gray, who is also here. Phil is a father and advocate for individuals with intellectual disabilities, and when Phil contacted our office last fall, his concern was that families who rely on state assistance to help care for their loved ones, when the state makes decisions that adversely impact their benefits, many of those families lack the resources to really do anything about it, even if the state's decision is contrary to state

or federal law, as has been the case in the recent past. The avenues for these families to appeal are cost prohibitive and insufficient. I believe, including Phil, there are individuals speaking after me who can provide some specific examples, but in some instances we've seen a single change in policy impact 100 individuals or more. These are-- some of them have been written about in the newspaper as well. So all these people basically receive a letter in the mail that says they're losing their benefits or they're getting less than they were before, and they're told, if they want to appeal, they can go through the states fair hearing process. That process involves contesting the decision in front of a hearing officer who in this case happens to be employed by the Department of Health and Human Services. That is the same agency that made the questionable policy change in the first place. And hopefully this family has already hired an attorney because that attorney would inform them that if they want to appeal beyond the fair hearing process to district court, all the district court can really do is review the evidence and decision from the administrative hearing, so they'd better establish that record in front of the agency during the agency appeal. And even if they win at the district court level, that decision applies only to their case, not the 100-plus other people who were impacted by the same action by, in this case, the Department of Health and Human Services. So as you can imagine, this ends up being very costly and complicated for people who need public assistance and who are in the process of losing that assistance. What we tried to do with LB1137 is set up a process by which these individuals, if a judge determines their cases were the result of a common decision or action on the part of the department, they can be certified as a class and appealed directly to the Lancaster County District Court. That removes the cases from the administrative process. We also have that amendment that I-- that was passed out, AM2294, which has been distributed. That makes some clarifying changes to the bill and allows for individuals to opt out of that class if they choose and remain in the administrative process or not appeal at all. Our hope is that we have found a way to save money and time for both the individuals contesting these decisions and for the state itself. We also want to ensure that when the department takes an action that is in error, that all individuals who are impacted by that error receive the necessary relief. I also want to state that it's not Senator Lathrop intent, nor is it his expectation, that this will result in a significant number of class action cases being taken up by the district court. This does not replace the administrative fair hearing process for situations where an individual wants to challenge a decision based on their specific financial circumstances. This is intended as a remedy for groups of individuals

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who are similarly impacted by a departmental change in policy or practice that has broad impact. There is also at least one attorney speaking after me with Nebraska Appleseed who has direct experience with some of these types of cases, so he can probably answer some of the questions that you have about that. And with that, thank you for your support of LB1137.

MORFELD: OK. You said that there will be an attorney that will talk to specific aspects? OK.

ZACH PLUHACEK: Yes. Thank you.

MORFELD: We'll wait for their testimony. Any proponents on LB1137? Welcome back.

EDISON McDONALD: Hi. Edison McDonald, E-d-i-s-o-n M-c-D-o-n-a-l-d, representing The Arc of Nebraska. We advocate for people with intellectual and developmental disabilities. I'm here today in support of LB1137, and we want to thank Senator Lathrop and his staff for bringing this bill forward. Our families face many adverse notices that place their families into precarious situations. We take a great many calls where an individual, parent, or provider who has received notice only a few days from, or after sometimes, when they are still allowed to appeal some of these adverse Medicaid decisions. This places a lot of stress on the family, as they almost need a lawyer to even understand what it says. Following that, this process includes many barriers to vital supports. Frequently, this letter goes to the wrong person. The notice will, in an unclear fashion, say that they have lost benefits and reference a general section of the statute, however, not the particular line or how they failed to meet these requirements. Then they have to research, contact, interview, and hire an attorney to help file an appeal. The other option is that they appeal without an attorney. Because the notice is unclear of whether you can have an attorney or not, many families end up taking this path. When you file without an attorney, frequently, the documents that are needed to be in the record for action in the courts are not included. The notice also attempts to scare off families by saying that they could make them pay back all of the fees during their services. This can run in amounts above \$10,000 a month for some families, depending upon how long your appeal process is stalled, leaving a family in dread and limbo for a long time. One key issue that prevents us from truly understanding some of the accessibility of these programs is the complex and state-weighted status of departmental hearings and adverse notices. This frequently plays a role in removing people from waivers or preventing them from receiving

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access. Over the last two years, we have had two significant cases where this has come up, in particular dealing with the aged and disabled waiver, where we had a large number of children who were removed from Medicaid waivers, and then also dealing with share of cost. You'll hear from parents later who will talk about some of these cases. Ultimately, what this bill aims to do is to go and ensure that in those giant decisions that instead of having to go to CMS, instead of everybody having to go and hire an individual attorney, instead, you're looking at a smaller sort of targeted action and you're able to ultimately, I would argue, save staff time from the department because you're dealing with fewer cases. I know at least from the time that I spent talking with the department about some of these issues, there's a lot of hours in there that they could save. So with that, I would urge your support of LB1137, and I hope that you will consider supporting this fantastic bill.

MORFELD: Thank you, Mr. McDonald. Questions for Mr. McDonald? Senator Brandt.

BRANDT: Thank you, Chairman Morfeld. Thank you, Mr. McDonald, for testifying today. You mentioned the aged and disabled waiver. And this past summer, I had a number of parents with small children with disabilities absolutely panicked that HHS was threatening them with removing this waiver.

EDISON McDONALD: Yes.

BRANDT: Could you explain to me how that worked and how it was resolved?

EDISON McDONALD: Yeah. So basically what happened, there-- there were a variety of court cases that led to the department changing their regulations. And then in January of 2019, people began to receive those notices that their child had been removed. Frequently, this would be for things such as basically a change, what's called the activities of daily living, so then for children who, you know, would be judged able to eat because they could go and lift a fork halfway up, but not all the way up, to their mouth. And so that was where these determination lines were drawn, increasing the number of activities of daily living. This issue isn't fully resolved yet. The department has gone and taken action to go and use federal money follows the person's funds to transfer some of those children from the aged and disabled waiver to the developmental disability waiver. Some cases we've worked with and they've been able to see their benefits returned. But there are a lot of cases that still aren't, and there's

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a lot of holes in the system still, and there are a lot of families who are still facing that consideration of legal action.

BRANDT: So then this legislation would not actually remedy that situation. It would just allow those individuals to band together as a class to bring suit against the party. Is that correct?

EDISON McDONALD: Yes. Yes.

BRANDT: OK, thank you.

MORFELD: Any other questions? OK. Seeing none, thank you, Mr. McDonald. More proponent testimony? Welcome.

DEBBIE SALOMON: Thank you. Good afternoon, Senators. My name is Debbie, D-e-b-b-i-e, Salomon, S-a-l-o-m-o-n, and I have two adult daughters with intellectual and developmental disabilities. I've served on several state committees and stakeholder groups over the last 26 years. They've included the Special Ed Advisory Co--Committee, Nebraska Developmental Disabilities Council, the Developmental Disabilities Advisory Council, and I'm a past president of The Arc of Nebraska. Nebraska's Medicaid system started to assess a share of cost to people with developmental disabilities who are in competitive employment. My daughter Lisa was assessed this share of costs due to her father's death as she was put on SSDA and is now considered a DAC, or a disabled adult child. Lisa worked ten hours a week and what was assessed would have put-- which was about \$220 upwards to \$300-- Lisa-- it would have put Lisa's budget in negative numbers. The court system would have frowned on this due to Lisa's guardianship and all the other reasons you don't overdraw a bank account. If she was capable of working 30 to 40-- 40 hours a week, I wouldn't have appealed. I did appeal this decision and lost our hearing with the state of Nebraska's hearing officer. I then filed in district court and the judge ruled in our favor. This ruling was not made a precedent for all disabled adult children, and the Medicaid Division changed the definition of DAC, or disabled adult children, after our case so they didn't have to make this a precedent statewide. Nebraska Medicaid removed the 1619(B) Social Security piece of the federal definition. Federal law supersedes state law in all instances. You cannot go below federal regulation with state regulations. By going to district court, I had to raise the funds, as my hearing cost \$1,100. When they rule-- ruled in district court, it cost me well over \$6,000. People who have children with disabilities, no matter the age, rarely have any extra funds to go to court. It puts families behind the eight ball to advocate for their children when things are wrong.

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Attorney fees should be reimbursed if a family wins a hearing or a court case. I can't afford to go further, nor can I raise the money to go to federal court to ensure others benefit from our case decision and to fight the new Nebraska Medicaid definition of disabled adult child. Families should also have the right to file class action suits. This bill would provide that right. There is right and there is wrong. The new definition is wrong. Making families have to choose not to advocate for their child due to cost is wrong. I fully support this bill after what my family went through these last 18 months. Thank you.

MORFELD: Thank you for testifying today, Ms. Salomon. Any questions? OK. Thank you for sharing your story.

DEBBIE SALOMON: Thank you.

MORFELD: Next proponent testimony.

PHILIP GRAY: Good afternoon.

MORFELD: Good afternoon.

PHILIP GRAY: My name's Phil Gray. I think you heard my name earlier with Zach. I don't think I deserve that much credit. But anyway, it's P-h-i-l-i-p G-r-a-y. I'm here to support LB1137. I'm not going to follow my testimony for time constraints, but I have been involved in this activity for a long time and I do have some technical knowledge that's not really generally around because I worked for the Social Security Administration for 40 years. And so I'm really familiar with entitlement rules, due process rules, and appeal rules. The current appeal system used by the state is so weighted against individuals with IDD as to actually deny us equal access because of the cost and the reno-- requirements really to have an attorney. While I wasn't involved in Ms. Salomon's case, I'm the-- one of the founders of the parents group in Omaha and our parents group felt this is a precedent case and so we raised money to help her with this. The-- the cost was quite significant and we raised some of that money. We supported her case because it was clearly precedential. The state is still imposing share of cost on people in her situation and the judge said that's not correct, federal rules and state rules preclude that from happening. The state then, after they lost this case, refused to make it precedential and rewrote NA-- the NAC 477, Chapter 22, and made that whole issue more unclear, although federal rules did not change. This bill will allow us to establish a class addressing these system issues at a one-time basis and require the community-- will not require the

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community to raise funds at such an exorbitant level over and over and over again. This bill, I believe, also will prevent frivolous lawsuits because both the courts and competent attorneys will be involved and will not allow frivolous or one-off cases. It just wouldn't be usable. This will also protect our community from going-- going broke when we-- when filing a precedent case, since under the current system we have to pay the entire cost of appeals, court cases, hearings, sending the-- the transcripts to the court. We pay every fee; the state pays nothing. As I said earlier, it's no secret. Our community cannot financially support these in-- individual efforts. We do not have the ability. In-- in closing, I understand the state may object to this bill because it has potential financial impact. I'd point out that both the state and the individual-- I would point out that both the state and the individual with the same-- have the same interest in seeing that individuals with IDD receive correct support and entitlement services to maintain their health and well-being. The state also has a vested interest in following their own rules and federal statutes that control Medicaid entitlement and reimbursement. I think it's safe to say that if they do so, the courts will not find against them and these types of cases will be rather significantly reduced and there would be really hardly any impact on federal budgets. Thank you.

MORFELD: Thank you for your testimony, Mr. Gray. Any questions? OK. Senator Brandt.

BRANDT: So. Oh, I--

PHILIP GRAY: Sorry, sir.

BRANDT: No, I-- thank you for testifying today. Does this get back to threatening them to pay back the fees? I mean, is that a large part of this argument?

PHILIP GRAY: No, that-- that's actually not part of this argument at all. This argument, the-- the fee issue is a com-- really, a completely separate-- it's a federal statute also that says if you get a notice of change and you file an appeal within ten days of that notice, then-- then the change cannot take place until the hearing's done. But if you lose the hearing, you're still-- you would be subject to reimburse any payments made that were found to be un-- inappropriate. That's a separate issue. This issue simply says, in Ms. Salomon's case, they're-- the state is still imposing their share of cost on people today that they imposed on Ms. Salomon's daughter. The court said you can't do that, you are not allowed to do that based on

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federal and state statutes, so-- but they're still imposing it because they refuse to make it a precedent case. The other thing they did, which was really kind of interesting, they rewrote Section 477, Chapter 22, of the Nebraska Administrative Code, and it's actually Section .005.02K, and in that rewrite, they removed all references to the federal law that the judge used to rule on this decision to find for the plaintiff. That federal law is still in effect. The state just doesn't list it anymore in the NAC, which then means, if you're going to court, you're going to have a much more difficult time, you know, proving your case because the judge will now have to look to federal law instead of state NAC rules to make that decision. This-- this bill simply allows us to bundle all of the cases for every-- I don't know how many people are involved in this. We don't have those statistics. But there are a lot. The state encourages folks to good, supportive employment and go to work. Not everybody in our community can do that. My son is not able to go to work at a-- at a-- at a supported employment job. But we can put all those cases together and now we don't have to-- we could get one ruling that everybody has to acknowledge and agree to. The current system is we get one ruling and then we have to get another. There's no precedent. And-- and the cost of the case was actually much more than Debbie said and we had to raise a lot of money to help, you know, to fund this. So I-- I think this rule is really helpful. And I also don't think, once it's in place, that it'll be used very often because there will be a big incentive to not to-- not to, you know, get outside the rails.

BRANDT: All right. Thank you.

PHILIP GRAY: Yes.

MORFELD: Any other questions?

PHILIP GRAY: I'm sorry.

MORFELD: No, you're fine. Thank you, Mr. Gray.

PHILIP GRAY: Thank you.

MORFELD: Other proponent testimony. Good afternoon.

JULIA KEOWN: My name was Julia Keown, J-u-l-i-a K-e-o-w-n. I come to you as a public servant and a mother of a special needs child. That child is Gavin. He is medically complex. He's a medical mystery to the over 20 professionals and medical experts on his healthcare team. No one can tell us why he vomits when he tries to eat with his mouth and why he's not responding to the evidence-based therapies that are

designed to resolve such issues for him and other children. Gavin is effectively 100 percent dependent on his gastrostomy button and accompanying tube feedings. Without these, he would die. Having a disabled kid is challenging. The special care requires a lot of extra time and training to take care of higher-needs children when compared to a typical child of the same age. I know because we have twins and the other one is typically developing. There are extra costs for out-of-pocket medical equipment-- for us, it's around \$2,000 a month-- provider visits and therapies, which have been running approximately \$2,500 per month on top of the DME cost, durable medical equipment. But all of this, quote unquote, extra stuff is not the worst part. You talk to any parent of a special needs or disabled child, and they will, without hesitation, tell you that the worst part of having a kiddo who has special needs is having to deal with the system. And just for a case in point, I've had to put a huge, huge part of our lives at home on hold for the last year to deal with the appeals to DHHS for our son's benefits. Following the rollout on December 18, I believe, of 2018, of new regulations for the children's eligibility for the aged and disabled waiver, our son was stripped not only of his disability benefits but the disability determination itself in February of 2019. This happened despite the medical experts that are actually involved in his care providing opinions that he'd be found eligible for Medicaid. In the months following our denial, I spent so much time and energy focused on the DHHS appeal that would normally have been spent toward my son's needs that he lost a tremendous amount of weight. This was an already precarious situation for him, given that he starved himself nearly to death in the past and, ironically, he lost so much weight during that time that his new BMI would have automatically qualified him for the A&D waiver. What is happening is that those who are, quote unquote, not severely disabled are experiencing these denials of services and falling through the cracks. Currently, each one of these families is being forced to individually navigate a bloated, inept, and inconsistent system to fight for life-saving benefits for our children. That means being on the phone for hours at a time, being transferred from department to department to finally find the right person. And even when you do find the right person, you don't necessarily know what ask-- what questions to ask to get the answers that you actually need. Fighting on behalf of your child means taking the time from work or sleeping less to complete hours of paperwork required to file the right forms at the right time for appeals. I personally had to switch from night shift to day shift to do mine. By the way, this notebook is paperwork for my appeal. It doesn't even include any of my son's medical records. It also means a huge amount of stress to an already Mount Everest-sized stress load. A

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few weeks ago, following medical advice from my physician, I had to have a paralyzing toxin injected into my jaw muscles because I've been grinding my teeth to a bloody pulp from the stress. Fighting on behalf of your child takes finances for legal services. This often means choosing between these life-saving medications and treatments for your child or being able to afford a lawyer. Which one are you going to choose? When one per-- when you are one person against an entire system, it's often the only option to cut your losses and move on, accepting that doing so means that your child will suffer. Multiply this times every family experiencing this. We are already pushed to our limits, doing the best we can for our kiddos. And I have attached a timeline of our particular story and appeals process. Note that it is already a year-long process with no end in sight. Voting on this bill and voting for it will mean that families who are already prone to the isolation that comes along with having a disabled child will not have to fight individually. I cannot express to you enough how important it is for our children and families. Thank you for your support.

MORFELD: Thank you very much for your time, and thank you for telling your story.

JULIA KEOWN: Yeah.

MORFELD: It's important that we hear it. And I'm sorry everything you've gone through. Any questions? OK. Thank you. Next proponent testimony. Welcome.

ROBBIE McEWEN: Thank you, Senator Morfeld. Members of the Judiciary Committee, my name is Robbie McEwen, R-o-b-b-i-e M-c-E-w-e-n, and I'm the legal director at Nebraska Appleseed. Nebraska Appleseed is a nonprofit organization that fights for justice and opportunity for all Nebraskans. And on behalf Appleseed, I'm here to testify in support of LB1137. Currently, as we've heard today, there's not a practical, clear, or effective mechanism that exists for Nebraskans receiving public assistance to challenge a uniform or sweeping decision made by DHHS that their assistance be modified or terminated entirely. While the fair hearing process might be adequate for some individuals challenging factual-- factually specific determinations made by HHS, it's not an adequate way to challenge their determinations when there's federal or state laws implicated as it relates to a variety of cases. As an individual applicant or recip-- recipient of public assistance that is not an attorney, individuals might feel that they have no recourse when DHHS legal informs them that a federal or state law mandates that their assistance be denied or terminated or modified

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in some way. Moreover, recipients of public assistance don't have the resources generally to hire an attorney to appeal a negative agency determination to district court and would find navigating such an appeal process pro se very challenging. I think the best way to explain our experience in this process is to use one of the cases highlighted in the string set of the multiple cases that Appleseed has brought in which DHHS has unlawfully terminated hundreds, and in some cases thousands, of individuals' benefits simultaneously, is the Davio v. DHHS case. In this case, a single mother named Jennifer Davio was unable-- unable to comply with her Employment First contract under the ADC program, and she was unable to locate a childcare provider near her home and, as such, she was sanctioned under the ADC program in 2007. At that time, DHHS had promulgated a regulation tying the ADC program to Medicaid. This regulation was clearly unconstitutional and violated our state separation-of-powers doctrine. However, fortunately for Ms. Davio, she secured counsel-- Nebraska Appleseed-- to analyze her claims and represent her interests in an APA fair hearing and then later in district court and then later in the Nebraska Supreme Court. Finally, after three years of litigation, Ms. Davio was successful in restoring her individual Medicaid eligibility and was entitled to receive retroactive reimbursement because the APA provides a sovereign-- waiver of sovereign immunity. However, unfortunately, counsel for Ms. Davio was not successful in certifying a class of the 400 other people who were sim-- simultaneously terminated from the Medicaid program and were not able to secure those rights. Simply put, DHHS saved a lot of money over three years, denying 400 people Medicaid by promulgating an unconstitutional regulation, and the-- the cost at the end of it was they had to reimburse one person for the constitutional injury that they caused and they had to comply with the law prospectively. So I see that I'm running low on time. We would just like to say-- thank Senator Lathrop for introducing this bill and the Judiciary Committee for your work on this issue. Nebraska Appleseed has a long history in litigating these types of cases in the public interest, and we'd be happy to answer any questions that the committee has.

MORFELD: Thank you, Mr. McEwen. Any questions? I do have one. How much-- and maybe you-- maybe you had a had it in here. I was reading through the statute a little bit. Based on the denial of the person that Appleseed represented, how much were they-- were they award-- how much money did the department save, were they awarded, and how did-- how did that work? What was the relief like?

ROBBIE McEWEN: it would be-- so when there's retroactive reimbursement under the APA, so Ms. Davio's case, for example, she was denied

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Medicaid in 2007, and so between 2007 and 2010, the three years it took us to litigate the case, every time that she went to the doctor, she should have been-- had those bills paid by Medicaid. So at the end of that case, we'd have to submit all of her medical bills to the department for retroactive reimbursement to Medicaid. The 399 other individuals who had that simultaneously happen to them, they did not get that reimbursement at the end.

MORFELD: But you don't have that number or can't share it, how much-- how much did she get retroactively reimbursed?

ROBBIE McEWEN: I don't-- I don't have that off the top--

MORFELD: OK, just curious, because I'd times that by 399, so.

ROBBIE McEWEN: It would be--

MORFELD: OK.

ROBBIE McEWEN: It would be significant, Senator.

MORFELD: Certainly. OK. Thank you. Any other questions? OK. Seeing none, thank you, Mr. McEwen.

ROBBIE McEWEN: Thank you.

MORFELD: Any other proponent testimony? Any testimony in opposition? Welcome.

BO BOTELHO: Good afternoon. Good after-- good afternoon, Senator Morfeld and members of the Judiciary Committee. My name is Bo Botelho, B-o B-o-t-e-l-h-o. I am chief operating officer and general counsel for Department of Health and Human Services.

MORFELD: Mr. Botelho, if you could just speak up just a little bit, the audio in here is not always great.

BO BOTELHO: Sorry.

MORFELD: Yeah, no worries.

BO BOTELHO: I'll preface my testimony. I am testifying in opposition, but I met with Senator Lathrop in his office on Monday, I believe. We're not in opposition to the class action or the creation of a class. It's just how we go about to do it and we're-- and we're committed to working with Senator Lathrop to figure out a way to do that so that we meet our federal timelines, which is what allows

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federal funding to continue on through the process. I am here to testify in opposition to LB1137. This bill would allow people challenging an adverse agency determination regarding public assistance to file suit in district court, requesting class certification any time before the agency issues a final decision in their case. It would also allow anyone impacted by similar agency decisions within the past two years to join the class, regardless of whether they have exhausted their administrative remedies. LB1137 would violate Article II of Nebraska Constitution, which bars persons in one branch of government from exercising a power properly belonging to either of the others, the available courts to allow the district court to exercise, any additional authority that a hearing officer, the department or any other department official would possess in a contested case, along with their own inherent authority. However, this would put courts in a position of making the agency's decisions, not just reviewing them upon administrative record, and, as such, runs afoul of separation-of-powers principles. LB1137 would also make the state noncompliant with a number of federal requirements-- I've provided those requirements to Senator Lathrop-- which could mean that benefits must be paid out of State General Funds, not federal funds. For example, all DHHS public assistance programs are federally required to hold an appeal and enter a decision within 90 days or less. However, the bill does not prescribe any timeframes. In district court, proceedings may take more than 90 days. Similarly, all DHHS public assistance programs persons are federally required to appeal an adverse decision within 90 days. The bill, however, would give persons up to two years to join a class action. There are additional conflicts with federal requirements, that hearing officials may be state employees, benefits case-- benefits seized upon denial, and households be able to waive continuation of benefits. Federal requirements already permit group hearings when state or federal laws, regulations, or policies are at issue and no individual facts are disputed. Thank you.

MORFELD: Thank you, Mr. Botelho. Questions from the committee? Senator DeBoer.

DeBOER: You said that there you're required to enter a decision within 90 days or less, but it seems like I've heard from my constituents and others that that isn't currently happening. Have you been-- do you have any numbers on what percentage of cases you are actually entering final decisions within 90 days?

BO BOTELHO: We do, and I'm-- I'm not aware of an instance where-- so there's three timelines under the federal programs. The first ten days

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are crucial from an adverse action. If the appeal or the request for appeal happens by the individual in the first ten days, then benefits will continue throughout the whole process. So that first ten days is important. After that, depending on the program, if it's ADC, SNAP, or Medicaid, there's a timeframe that they have to appeal the action even beyond the ten days. But their benefits will cease after-- after the ten days. Their federal programs won't allow funds to be continued to utilize for those benefits. Then, from the date of the hearing, there's a time period for the state-- I think Medicaid is the 90 days-- that we have to have a decision from the date of the hearing rendered to the beneficiary.

DeBOER: How would this be any different than an individual case with respect to those kinds of 90-day deadlines? So if I have an individual case, as opposed to a class, and I bring a lawsuit saying I was wrongfully not given my benefits-- I don't know what the actual cause of action would be called but denied my benefits-- how would that be different than a class?

BO BOTELHO: It wouldn't, as long as the members of a class fit within our timeframes. So--

DeBOER: I'm not-- I'm not following. Sorry. Give me more information.

BO BOTELHO: So if-- the bill as written allows the class to go back two years, so it would just seem like if someone was adversely impacted by the agency two years ago, that they can be brought up in this class, but their benefits would have already been terminated. The-- the-- the time for the appeal starts from the time of the adverse action of the agency.

DeBOER: Right. Where's the port-- part that says-- do you know where it is in here that says-- OK, definition of all persons impacted by the actions within two years prior to the filing. OK, I see-- I think I see now the arguments you're making anyway. OK. Thank you.

MORFELD: Senator Brandt.

BRANDT: Thank you, Chairman Morfeld. Thank you, Mr. Botelho, for testifying today. In your testimony, you said LB1137 would violate Article II of the Nebraska Constitution. Is that your opinion or you have an Attorney General's Opinion that says that?

BO BOTELHO: That's my opinion, Senator.

BRANDT: That's your opinion? OK. Thank you.

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MORFELD: Thank you, Senator Brandt. So if I heard you right at the beginning, you're not necessarily opposed to some kind of law that would allow for a class to be created and to be litigated. But the issue is, is with some of the-- the mechanics following federal--

BO BOTELHO: Correct.

MORFELD: --APA? OK. And so how would that get past your Article II constitutional concerns?

BO BOTELHO: There's-- there's one sentence in the bill that I think that can be struck, and that may have been already done in the amendment. I don't--

MORFELD: OK.

BO BOTELHO: It looks like it-- that issue is already resolved in the amendment that was-- that was put forward today.

MORFELD: OK.

BO BOTELHO: It-- it's only a line that says that the court would have all the authority of the agency, basically acting on behalf of the agency--

MORFELD: OK.

BO BOTELHO: --as opposed to reviewing the agency's--

MORFELD: OK.

BO BOTELHO: --action.

MORFELD: OK. OK, thank you. Any other questions for Mr. Botelho? Thank you, sir. Any other opposition testimony? Anybody wishing to testify in the neutral capacity? OK. Seeing none, we have a letter of support from Sauna Dahlgren with Easterseals Nebraska on LB1137, and that ends our hearing for LB1137 and our hearings for today. Thank you.