IN THE IOWA SUPREME COURT

NO. 18-0189

JULIE PFALTZGRAFF

Petitioner/Appellant,

vs.

IOWA DEPARTMENT OF HUMAN SERVICES

Respondent/Appellee.

APPEAL FOR THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY – HONORABLE SCOTT ROSENBERG, JUDGE

PETITIONER/APPELLANT'S REPLY BRIEF

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BRIEF AND ARGUMENT

Agency deference is not applicable

The Department states that this Court should review this matter with deference to evidentiary findings of the agency and District Court. Department Brief at p. 29-30. However, in this case there are no evidentiary findings. The questions of whether: (1) due process was granted, (2) the Department regulations are impermissibly vague, (3) the Department has the statutory authority to impose recoupment, and (4) Mrs. Pfaltzgraff is entitled to equitable relief were decided (or declined to be decided) on a purely legal basis. *See* Pfaltzgraff Brief at p. 22-23. Because the findings of the agency or District Court, when made, all hinge on legal findings, there is no evidence to weigh and thus this Court can appropriately review these matters without such deference.

Regarding the Department's statement concerning the application of unjust enrichment to the present matter (Dept. Brief at p. 70), Mrs. Pfaltzgraff more than covered the breadth of this equitable doctrine in her brief, at p. 59-60 and rests on those statements.

Adequate notice was not provided

The Department insists that the statement "… you may continue to receive benefits while your appeal is being decided; however, you may have

to pay back the Department if the Department's action to revoke was correct," should have given Mrs. Pfaltzgraff, as a reasonable person, or her attorney, pause. Dept. Brief at p. 26, 68. (Admin. R. p. 190 (Emphasis added) App. p. 196.)

This statement that "… you may have to pay back the Department …," which is buried in the boilerplate of the notice, *does not* say that all money earned by a childcare provider *shall* be paid back if the Department ultimately wins. (Admin. R. p. 190 (Emphasis added) App. p. 196.) This "notice" states that a person *may* have to pay back the Department. *Id.* If the Department intends that it *shall* recoup all money earned by a provider during an appeal, the Department should just state this intent.

Though the Department says that the administrative law judge "*indicated*" that Appellant could reapply for a CCA agreement. This is simply not true. The Department, i.e., social worker Chad Reckling, "determined" that Mrs. Pfaltzgraff was operating her child care in a manner which "… impairs the safety, health, or well-being of the children in care." (Admin. R. p. 218. App. p. 224.) Mrs. Pfaltzgraff provided "unrebutted evidence" to demonstrate she was not a "hazard or safety risk to children." (Admin. R. p. 228. App. p. 234.) The Judge stated, "The termination of Pfaltzgraff's child care assistance provider agreement is affirmed but modified to state that

Pfaltzgraff may reapply for an agreement at any time." *Id.* This language comes verbatim from Iowa Admin. Code r. 441-170.5(5) (App. p. 564) as opposed to the basis raised by the Department in its notice, Iowa Admin. Code r. 441-110.7 (App. p. 542), which states "Registration shall be denied or revoked if the department finds a hazard to the safety and well-being of a child" or Iowa Admin. Code r. 441–170.4(3) (App. p. 559). Thus, since the ALJ did not find Mrs. Pfaltzgraff guilty of being a "hazard to the safety and well-being of a child" as she was accused, in reality, the Department was not "correct" in its action. (Admin. R. p. 218, 228. App. p. 224, 234.)

The Department's putative warnings regarding recoupment also do not "provide a reference to the particular sections of the statutes and rules involved" as required by Iowa Code 17A.12(2)(c) (2018).

No reasonable person would expect the phrase, "… you may continue to receive benefits while your appeal is being decided; however, you may have to pay back the Department if the Department's action to revoke was correct," would mean a provider of child care services would *have to* pay the Department all money earned during an appeal. A reasonable person would expect that a provider may have to pay back the money they accidentally overbilled the Department – in this case an estimated maximum of $218.88,

not the $31,815.46 Mrs. Pfaltzgraff earned in compliance with all rules and regulations while her appeal was pending.

The Department complains that neither Mrs. Pfaltzgraff nor her attorney called the Department to get clarification about recoupment. Dept. Brief at p. 68. Mrs. Pfaltzgraff and her attorney can only reply that there was not sufficient warning to let either Mrs. Pfaltzgraff or her counsel know that the Department intended to take all of the money she earned during her appeal. Mrs. Pfaltzgraff and her counsel rationally concluded, as would any person who reviewed the phrase hidden in the boilerplate, that it was the money that she overbilled – the estimated $218.88 – that would have to be paid back. There was not even sufficient warning made to raise a concern, much less justify a phone call to clarify. Mrs. Pfaltzgraff and her counsel believed she may have to payback the money she overbilled – the estimated $218.88 – if the Department's action was correct.

The Department has incorrectly penalized Mrs. Pfaltzgraff as a beneficiary

The Department's argument presumes that Mrs. Pfaltzgraff "receive[d] benefits" at all. *See* Pfaltzgraff Brief at p. 45-46. The child care assistance payment is a benefit which extends to low-income parents with a need for childcare. It is those parents who *choose* to have their benefit go to childcare

providers. It is this benefit that is used to pay providers for services. Providers do not receive benefits.

The Department confirms throughout its brief that the CCA funds are, "… a benefit provided by the State of Iowa … to low-income families who meet certain eligibility requirements," that the CCA program was established to "… assist children in families who meet eligibility requirements …," and that "… the Appellant is clearly not the intended recipient of the benefits set out in Iowa Code section 237A.13 …." Dept. Brief at p. 24-25, 33, 34.

The fact that the Department denies Mrs. Pfaltzgraff is a beneficiary of the CCA program yet attempts to collect "benefits" received by her while her appeal was pending exposes the flaw in its recoupment efforts against child care service providers.

The Department is attempting to treat Mrs. Pfaltzgraff as a recipient of state aid instead of treating her like what she is – a contractor for services. **In other words, the Department is attempting to *regulate* its way out of a contractual duty to pay Mrs. Pfaltzgraff for her labor.**

Mrs. Pfaltzgraff does have a property interest in money she earned for her labor.

The Department relies *on Horsfield Materials, Inc. v. City of Dyersville* to show that denial of a government contract does not rise to the level of a

property interest. The case at bar is not about debarment, however it exemplifies the faults in the Department's recoupment policy.

In *Horsfield*, a potential materials provider for a government contract sued a city because he was prohibited from the contract bidding process. *Horsfield Materials, Inc. v. City of Dyersville, 834 N.W.2d 444, 455 (Iowa 2013)*. The Supreme Court reasoned that to allow Mr. Horsfield recovery – who again, was barred from ***bidding*** - would actually penalize taxpayers because any award would duplicate the public expense which was paid to the winning bidder. *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444, 453 (Iowa 2013).

In the case at bar, Mrs. Pfaltzgraff ***actually did the work***. She was not a potential provider. She was not barred from providing child care. She was not barred from receiving a child care contract. In fact, Mrs. Pfaltzgraff provided services to the Department at the Department's invitation and in compliance with all regulations. Mrs. Pfaltzgraff's claim in this appeal is not to the right to provide services as was the case in *Horsfield*, but rather Mrs. Pfaltzgraff's right to retain wages paid to her for services she already provided. This is the Department's attempt at *ex post facto* debarment.

For *Horsfield to* be applicable, the City of Dyersville would have had to have advised Mr. Horsfield he was not qualified to bid, but to go ahead and

procure materials any way. Then, once Mr. Horsfield had provided his services, the city would refuse pay on the basis that he was not qualified to bid. No court of law could legally justify such an outcome and no court should do so here. Mrs. Pfaltzgraff is entitled to be paid for services provided.

The Department concludes that "… the Appellant does not have a government contract, but rather, she merely agreed to abide by certain rules to allow for the streamlining of benefits payments from eligible families to her via DHS." Dept. Brief at p. 36.

Black's Law Dictionary defines contract as "An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law." (Black's Law Dictionary, Second Pocket Ed., at p. 139 (2001) App. p. 506.) Mrs. Pfaltzgraff's agreement to provide services (abide by certain rules) in exchange (to allow) for money (the streamlining of benefits payments from eligible families to her via DHS) constitutes a contract. Dept. Brief at p.36.

The Department states Mrs. Pfaltzgraff has no right to get paid for money she has earned and that a property interest must established by external sources such as policy or state law. Dept. Brief at p.32.

The Department's own rule states, "The department shall make payment for child care provided to an eligible family when the family reports

their choice of provider to the department ….” Iowa Admin. Code r. 441 - 170.4(7). The Legislature demands, “The department *shall* remit payment to a provider within ten business days of receiving a bill or claim for services provided.” Iowa Code § 237A.13 (2018)(emphasis added). In addition, there is the simple legal premise that one ought to get paid for one’s work. *Phillips Kiln Services, Ltd. v. Intern. Paper Co.*, C02-4005- MWB, 2002 WL 1712870, at 5 (N.D. Iowa June 3, 2002). Mrs. Pfaltzgraff is entitled to the money she earned providing child care services while her appeal was pending.

The Department does not have the authority to promulgate recoupment rules

The Department claims Iowa Code 237A (2018) provides the DHS with its authority to promulgate rules associated with child care and CCA, but does not cite any particular authority within that chapter to justify recoupment.

Iowa Code 237A (2018)states, “A license issued under this chapter shall be valid for twenty-four months form the date of issuance. A license shall remain valid unless it is revoked or suspended in accordance with the provisions of section 237A.8” Iowa Code Ann. § 237A.2(2)(b) (2018).

Iowa Code § 237A.8 (2018) states “The administrator, *after notice and opportunity for an evidentiary hearing* before the department of inspections

and appeals, may suspend or revoke a license or certificate of registration issued under this chapter …" Iowa Code § 237A.8 (2018) (Emphasis added).

The Legislature demands that the Department:

> *Subject to the provisions of chapter 17A*, the department shall adopt rules setting minimum standards to provide quality child care in the operation and maintenance of child care centers and registered child development homes, relating to all of the following:
> a. The number and qualifications of personnel necessary to assure the health, safety, and welfare of children in the facilities. Rules for facilities which are preschools shall be drawn so that any staff-to-children ratios which relate to the age of the children enrolled shall be based on the age of the majority of the children served by a particular class rather than on the age of the youngest child served.
> b. Physical facilities.
> c. The adequacy of activity programs and food services available to the children. The department shall not restrict the use of or apply nutritional standards to a lunch or other meal which is brought to the center, child development home, or child care home by a school-age child for the child's consumption.
> d. Policies established by the center for parental participation.
> e. Programs for education and in-service training of staff.
> f. Records kept by the facilities.
> g. Administration.
> h. Health, safety, and medical policies for children.
> Iowa Code Ann. § 237A.12 (2018) (Emphasis added).

None of these provisions authorize the Department to take such a drastic step as recouping CCA monies provided to qualified parents and paid on their behalf to a qualified provider. This is the only place in Iowa Code Chapter 237A the Legislature authorizes the Department to "adopt rules" and

that discretion is limited by this list. *See* Pfaltzgraff Brief at p. 41-43 and Iowa Code § 17A.23(3) (2018) which states:

> An agency shall have only that authority or discretion delegated to or conferred upon the agency by law and shall not expand or enlarge its authority or discretion beyond the powers delegated to or conferred upon the agency. Unless otherwise specifically provided in statute a grant of rulemaking authority shall be construed narrowly.

The only two sections of Iowa Code Chapter 237A which discuss "payments" (*not assistance*) to providers does not grant rule-making authority or discretion to the Department, but rather demands:

> The department shall set reimbursement rates as authorized by appropriations enacted for payment of the reimbursements. The department shall conduct a statewide reimbursement rate survey to compile information on each county and the survey shall be conducted at least every two years. The department shall set rates *in a manner so as to provide incentives* for an unregistered provider to become registered. Iowa Code Ann. § 237A.13(3) (2018) (Emphasis added)
>
> and,
>
> The department's billing and payment provisions for the program shall allow providers to elect either biweekly or monthly billing and payment for child care provided under the program. *The department shall remit payment to a provider within ten business days of receiving a bill or claim for services provided.* However, if the department determines that a bill has an error or omission, the department shall notify the provider of the error or omission and identify any correction needed ***before*** issuance of payment to the provider. The department shall provide the notice within five business days of receiving the billing from the provider and shall remit payment to the provider within ten business days of

> receiving the corrected billing. Iowa Code Ann. § 237A.13(4) (2018) (Emphasis added)

If anything, these provisions encourage the timely and fair compensation of CCA providers. Regardless, they certainly do not grant the Department the authority to create recoupment regulations. *See* Pfaltzgraff Brief at p. 43-45.

The Department even admits it violates Iowa Code § 237A.13(4) (2018) with its recoupment policy stating it is the "one time" the Department identifies a payment correction ***after*** issuance of payment to the provider instead of ***before*** payment is issued as required by statute. Dept. Brief at p. 53. Furthermore, Mrs. Pfaltzgraff denies that the money earned during the pendency of her appeal was "error" at all. *See* Pfaltzgraff Brief at p. 38.

Mrs. Pfaltzgraff does argue that the "notice" of recoupment buried in the boilerplate of the May 20, 2016, "Notice of Decision: Child Care" regarding an ultimately unfounded safety concern was not sufficient pursuant to Iowa Code Chapter 17A to notify Mrs. Pfaltzgraff of the October 31, 2016, "Notice of Child Care Assistance Overpayment" which was based solely on her decision to appeal. Pfaltzgraff Brief at p. 23. (Admin. R. at p. 218-220, 311. App. pp. 224-226.)

The Department's "claim" did not arise on May 20, 2016

While the Department is correct that the substantive issues of the May 20, 2016 "Notice of Decision: Child Care" were disposed of when Mrs. Pfaltzgraff did not seek judicial review in 2016; the Department cannot deny that the "Notice of Child Care Assistance Overpayment" is based on the duration of that appeal (May 20, 2016 to October 23, 2016). (Admin. R. 311-313. App. p. 317-319.)

When the Department states it has the authority to reach back and take all the money Mrs. Pfaltzgraff earned from the effective date of the May 20, 2016 "Notice of Decision: Child Care" onward, it is stating it had the right, on May 20, 2016, to deprive Mrs. Pfaltzgraff of her CCA agreement without proper notice or a hearing on the matter. *See* Dept. Brief at p. 61, which states, "A claim is established when the first notice of the debt is issued …." This statement is simply not true. Iowa Code 17A requires that the "legal rights, duties or privileges of a party" can only "… be determined by an agency *after* an opportunity for an evidentiary hearing." Iowa Code § 17A.2(5) (2018) (Emphasis added).

Even the Department's own rules defines "due process" as "… the right of a person affected by an agency decision to receive a notice of decision or notice of action and an opportunity to be heard at an appeal hearing and to present an effective defense." Iowa Admin. Code r. 441-7.1 (2017) (App.

p.508). The Department also states "Assistance … shall not be suspended, reduced, restricted, or canceled, nor shall a license, registration, certification, approval, or accreditation be revoked, or other proposed adverse action be taken pending a final decision on appeal …." Iowa Admin. Code r. 441-7.9(1)(a) (2017) (App. p.523).

On May 20, 2016, the date of the "Notice of Decision: Child Care" Mrs. Pfaltzgraff had not had a hearing. Thus, under Iowa statute and the Department's own rules, the Department had no right to revoke Mrs. Pfaltzgraff's CCA Agreement on May 20, 2016**. Because the Department had no right to revoke Mrs. Pfaltzgraff's CCA Agreement on May 20, 2016, the Department cannot reach back to confiscate money based on the Department's argument that Mrs. Pfaltzgraff was operating without an agreement because the Department was without the statutory or even its own regulatory authority to terminate Mrs. Pfaltzgraff's agreement on May 20, 2016, but rather only after a final decision on appeal.** Dept. Brief at p. 45; Iowa Admin. Code r. 441-7.9(1)(a) (2017) (App. p.523). *See* also Mrs. Pfaltzgraff's Brief at p. 24.

In her brief, Mrs. Pfaltzgraff advises the court that in actual emergency situations the Department can use Iowa Code § 17A.18A to immediately close a child care facility. Mrs. Pfaltzgraff does this to show that there is an

alternative method to immediately protect children's safety. When the Department acknowledges that its "… concerns did not rise to the level of an 'immediate danger' from the Department's perspective …," this confirms that emergency proceedings were not required and thus, due process *prior* to an adverse action was necessary. Iowa Code § 17A.12 (2018); Iowa Code § 17A.18A(2018). The problem the emergency proceedings in Iowa Code § 17A.18A present to the Department is that if a child care center is immediately closed, this prevents the Department from luring desperate and unknowing providers into servitude via recoupment.

Statute, regulation, common notions of due process and the pragmatic fact that Mrs. Pfaltzgraff's continued providing service require that Mrs. Pfaltzgraff did, in fact, have a CCA Agreement beyond May 20, 2016 (the date of the "Notice of Decision: Child Care).

However, even if, *arguendo*, Mrs. Pfaltzgraff was not required to be afforded due process prior to the termination of her CCA Agreement; Mrs. Pfaltzgraff was invited to and was subsequently paid for the child care services she provided the Department. This can only be interpreted as a stay of enforcement by the Department or possibly a "new limited plan" as described in Iowa Admin. Code r. 441-7.9(9) (2017) (App. p.525). To find otherwise would be to reduce the protections found in Iowa Code Chapter 17A to merely

the specter of due process and, even more problematic for the Department, to allow child care providers to offer child care services without the authority to do so. Note, Iowa Code 237A states that a denial of registration results in not being able to "operate or establish" a child development home, not the right to get paid for providing child care. Iowa Code 237A.3A(2) (2018). A person "prohibited from registration … shall not provide child care and is not eligible to receive public funds to do so." Iowa Admin. Code r. 441-170.4(3)(i)(1) (2017) (App. p.561). In this case, Mrs. Pfaltzgraff continued to provide and bill for child care services and was paid beyond May 20, 2016. By statute and regulation, Mrs. Pfaltzgraff have had to have been operating under a CCAP Agreement from May 20, 2016 to October 23, 2016.

This case exemplifies the importance of these due process rights because Mrs. Pfaltzgraff was initially accused, by a sole social worker, of impairing, "… the safety, health, or well-being the children in [her] care …," and was to be suspended for a year. Once given an opportunity to defend herself, Mrs. Pfaltzgraff was instead found to have made billing errors and could reapply to provide childcare "… at any time". (Admin. R. at p. 218, 228. App. p.224, 234.) Mrs. Pfaltzgraff, from her perspective, won. She was able to salvage her business. Yet, she still had to forfeit six months of labor – *solely because she decided to defend herself* - to avoid a year-long suspension. This

scenario is why Chapter 17A demands that a person only be penalized after they are given a chance to defend themselves and why the "notice" date – in this case May 20, 2016 - cannot be used to reach back and penalize a child care provider. This recoupment policy is punitive and outside the authority of the Department.

The Department's regulations are vague

The Department attempts to eliminate any rights for providers stating that the "…[o]nly intent of 441 IAC 170 was to "establish requirements for the payment of child care services … for children of low-income parents …." Dept. Brief at p. 48. However, this is exactly the purpose of this appeal - to establish the requirements for the payment of child care services.

The Department argues that because the definition of "Provider Error" includes the "Failure to report the receipt of a child care assistance payment in excess of that approved by the Department," that this includes payments made to a provider, at the Department's invitation, pending an appeal. Dept. Brief at p. 46; Iowa Admin. Code r. 441-170.1 (2017) (App. p.546).

No reasonable person would conclude that payments a provider worked for and earned in compliance with all rules and regulations would be "… in excess of …" what they should be entitled to receive. This is especially true since each payment was sent, "approved" and paid by the Department. *Id.*

Furthermore, Mrs. Pfaltzgraff worked for and received the money she earned during the pendency of the appeal. Why should Mrs. Pfaltzgraff be expected to "report" money paid to her by the Department when the Department had a full understanding of the context of the circumstances under which the money was paid? She shouldn't. Mrs. Pfaltzgraff did not commit "provider error." *See* Pfaltzgraff Brief at p. 38-39.

Furthermore, this same regulation – Iowa Admin. Code r. 441-170.1 - defines "overpayment" as "… any benefit or payment received in an amount greater than the amount the client or provider is entitled to receive." Iowa Admin. Code r. 441-170.1(2017) (App. p.546). As will be shown, these recoupment regulations refer to "overpayments" and monies "in excess of" none of which refer to money actually earned by a provider during an appeal but more rationally mean any money to which a provider is not entitled, such as an overbilling, which is this case was no more than $218.88. *See* Pfaltzgraff Brief at p. 31-36.

Iowa Admin Code r. 441-170.9(1) (2017)

The Department states that Iowa Admin. Code r. 441-170.9(1) (2017) (App. p.565) establishes the right to recoupment of payments made during an appeal. Dept. Brief at p. 49. The rule states:

> **170.9(1)** *Notification and appeals.* All clients or providers shall be notified as described at subrule 170.9(6), when it is

> determined that an *overpayment* exists. Notification shall include the amount, date and reason for the *overpayment*. The department shall provide additional information regarding the computation of the *overpayment* upon the client's or provider's request. The client or provider may appeal the computation of the *overpayment* and any action to recover the *overpayment* in accordance with 441—subrule 7.5(9). Iowa Admin. Code r. 441-170.9(1) (2017) (Emphasis added) (App. p.565).

This rule refers only to "overpayments." No reasonable person would conclude that money worked for and earned would constitute an overpayment. The only "overpayment" involved with this matter is the estimated maximum of $218.88 in mistaken charges for which Mrs. Pfaltzgraff was never billed, provided a computation of or even an amount owed (thus the estimate).

Iowa Admin Code r. 441-170.9(2) (2017)

The Department also states that subsection (2) of that rule establishes the right to recoupment of all money earned during the pendency of an appeal. That rule states:

> Determination of *overpayments.* All *overpayments* due to client, provider, or agency error or due to benefits or payments issued pending an appeal decision shall be recouped. *Overpayments* shall be computed as if the information had been acted upon timely." Iowa Admin. Code r. 441-170.9(2) (2017) (Emphasis added) (App. p.566).

Again, this rule states "…*overpayments* … due to … payment issued pending an appeal decision shall be recouped." *Id.* No reasonable person would expect money worked for and earned would be "… payment received

in an amount greater than the amount the client or provider is entitled to receive." (definition of "overpayment"). Iowa Admin. Code r. 441-170.1 (2017) (App. p.546).

Iowa Admin Code r. 441-170.9(3) (2017)

The Department also states that subsection (3) of this rule establishes the right to recoupment of all money earned during the pendency of an appeal. This rule states:

> *Benefits or payments issued pending appeal decision.* Recoupment of *overpayments* resulting from benefits or payments issued pending a decision on an appeal hearing shall not occur until after a final appeal decision is issued affirming the department. Iowa Admin. Code r. 441-170.9(3) (Emphasis added) (2017) (App. p.566).

The Department states that unless it is allowed to recoup all the money earned by a provider during an appeal, that this rule is rendered meaningless. Dept. Brief at p. 52. Just because a rule might otherwise be rendered meaningless, does not mean that it somehow creates the statutory authority to promulgate it. Even if, *arguendo*, this rule is authorized, this regulation, like the other 441-170.9 regulations, is limited to "overpayments."

Even if Mrs. Pfaltzgraff's interpretation is correct, the Department's conclusion that these provisions will be rendered meaningless as a result is wrong. The Department can still recoup benefits issued to the parent beneficiaries or providers who continued to receive payments in a manner not

allowed by the Department (i.e., fraud or billing for children not in that provider's care). In other words, the Department can still recoup from individuals who have actually received *overpayments*.

Iowa Admin. Code r. 441-7.9(7) (2017)

The Department also spends a significant amount of space relying on Iowa Admin. Code r. 441-7.9(7) (2017) (App. p.524) to justify recoupment. Rule 7.9(7) states:

> **7.9(7)** *Recovery of excess assistance paid pending a final decision on appeal*. Continued assistance is subject to recovery by the department if the department's action is affirmed, except as specified at subrule 7.9(9). When the department's action is sustained, *excess assistance* paid pending a final decision shall be recovered to the date of the decision. This recovery is not an appealable issue. However, appeals may be heard on the computation of *excess* assistance paid pending a final decision. Iowa Admin. Code r. 441-7.9(7) (2017) (Emphasis added) (App. p.524).

That the "recovery is not an appealable issue," is a direct violation of Iowa Code 17A which requires "legal rights, duties or privileges … to be determined by an agency after an opportunity for an evidentiary hearing." Iowa Code § 17A.2(5) (2018).

That "… excess assistance paid pending a final decision shall be recovered to the date of decision," does not adequately explain to the reader what decision assistance shall be recovered to. Even if this regulation does indicate the initial decision made solely by the social worker is to the point

back to which assistance is to be recovered, such a regulation is barred by Iowa Code Chapter 17A as it ignores notice and hearing requirements.

The regulation refers specifically to *"excess"* assistance – not "all assistance" or simply "assistance," but specifically "*excess assistance*." A reasonable person would not consider money paid in exchange for services "excess."

Furthermore, Mrs. Pfaltzgraff questions whether she receives "assistance," or rather a "payment." *See* definition of "overpayment," Iowa Admin. Code r. 441-170.1 (2017) (App. p.546) regarding "benefits or payments," and Iowa Admin. Code r. 441-170.9(3) (2017) (App. p.566) cited above which also refers to "benefits or payments."

In short, while these regulations state that "*overpayments*" or assistance which is "*excessive*" shall be recouped, there is no regulation which demands or even implies the recoupment of all money paid to a provider for providing child care services in compliance with all rules and regulations while an appeal is pending. These rules are at best vague, but Mrs. Pfaltzgraff believes these regulations state the opposite of what the Department suggests – that only actual "overpayments" are to be recovered - in this case, the estimated $218.88. *See* Pfaltzgraff Brief at p. 36-37.

Other Department mischaracterizations

The Department makes numerous false accusations and mischaracterizations about providers, like Mrs. Pfaltzgraff, who attempt to defend themselves in agency actions.

Providers do not deny parents' benefits during an appeal

The Department says that providers who appeal adverse CCAP decisions "deplete the families allotment for that billing" and that the CCAP, "… is not a bottomless well of monies." Dept. Brief at p. 73. The Department also states that it has an interest in having, "providers who only request payments from the limited CCA budget for the actual care of children." Dept. Brief at p. 55.

The CCA benefit runs to the parents who qualify for the program and they *choose* who provides their child's care. Iowa Admin. Code r. 441-170.4(3) (2017) (App. p.559). If Mrs. Pfaltzgraff had not been available to provide such services during the pendency of her appeal, those parents would have chosen a different provider to provide child care during that period. From May 20, 2016 to October 23, 2016, (the appeal period) the CCA parents received childcare services and the Department paid those parents their child care assistance fund allotment (via their choice of provider, Mrs. Pfaltzgraff).

Mrs. Pfaltzgraff did not deplete any CCA fund and actually provided child care.

Providers do not endanger children simply because they appeal a decision

The Department states that it has an interest in having providers who meet minimum health standards and that child care decreases when more children are cared for than allowed by law. Dept. Brief at p. 55, 73. The Department states that without recoupment, childcare will deteriorate. Not only was Mrs. Pfaltzgraff found to have made a billing error and was not and has not been accused of being out of compliance with any rules and regulations during the pendency of her appeal, but ***retroactively recouping money from a provider for child care services she provided in compliance with all rules and regulations does not somehow make the child care already provided safer***. The Department provides no evidence or even argument to indicate how confiscating money earned by a provider improves child care. Again, this is why Mrs. Pfaltzgraff refers to Iowa Code § 17A.18A to show there is a mechanism by which the Department can immediately protect the welfare of children. The Department just doesn't like the Iowa Code § 17A.18A mechanism because it doesn't allow for recoupment.

The Department states that not allowing the recoupment of providers will "… so significantly delay the effects of a CCA revocation that the law

will be, in many cases, completely worthless to protect CCA kids and their families." Dept. Brief at p. 72. Again, **recoupment does not somehow make child care already provided safer**. Furthermore, if the Department is interested in the immediate protection of children, Iowa Code § 17A.18A authorizes the Department to shut down a child care home prior to offering statutory due process. In the case at bar, however the Department acknowledged that Mrs. Pfaltzgraff's care did not "… rise to the level of an 'immediate danger' from the Department's perspective …." Dept. Brief at p. 39.

Providers are not given a "free ride" while on appeal

The Department warns that if recoupment is not allowed, "... provid[es] any revoked provider, no matter how egregiously she may have been violating the rules when revoked, with a 'free ride' to continue to watch children and bill without any recourse so long as she can manage to keep her appeal alive …" Dept. Brief at p. 51.

Taking care of children is one of the most difficult, stressful and important endeavors in which one can engage. Taking care of twelve children at one time requires planning and an investment – both in time and money. Despite the Department's attempt to characterize child care providers as

sitting back and receiving a paycheck, child care providers such as Mrs. Pfaltzgraff receive no "free ride."

In response to the Department's concerns about the length of the appeal, Mrs. Pfaltzgraff responds - *who cares*? The Department has the ability to shut down a child care provider immediately if they feel there is a potential safety issue. Iowa Code § 17A.18A (2018). The Department specifically said this was not one of those cases. Dept. Brief at p. 39. In the majority of the cases, such as this one, where the matter does "… not rise to the level of an 'immediate danger' …," the parents are receiving child care, the Department is able to provide the services and the providers are receiving payments under the CCAP as required by statute. All of this occurs during the pendency of the appeal. What does it matter if it takes two years to complete an appeal? A lengthy appeal is not likely to happen anyway as administrative law judges and the Department Director control the process.

Furthermore, Mrs. Pfaltzgraff does not understand why the Department believes "recourse" is necessary. Agencies are intended to protect the public, not punish individuals. If the objective of the Department is to recoup monies paid for services not actually rendered, demanding money paid for services actually provided during an appeal does not achieve that goal. Instead, the

Department could just request the money actually overbilled – in this case an estimated $218.88.

Recoupment is not an effective deterrence tool

The Department seems to imply that recoupment is about deterrence. However, if the Department really wanted to deter behavior it would make its warnings of recoupment crystal clear, and not hide them in the boilerplate of notices of other putative wrongs.

Recouping monies earned after the fact does not deter, but only punishes. Furthermore, the only behavior recoupment "deters" is providers seeking to defend themselves, a goal which the Department explicitly admits. *See* p. 52 of the Dept. Brief which states "This legal strategy … would also encourage revoked providers to bring meritless or very weak appeals …." This runs directly contrary to the purposes of Iowa Code Chapter 17A which is to "… increase the fairness of agencies in their conduct of contested case proceedings; and to simplify the process of judicial review of agency action as well as increase its ease and availability." Iowa Code § 17A.1(3) (2018).

The Department also warns that administrative law judges will have more work to do if recoupment isn't used to discourage appeals. Dept. Brief at p. 72. This argument is also offensive to Iowa Code Chapter 17A.

The Department states that this is one of those cases where "[t]he interest of the private litigants in agency action may need to ultimately yield to the greater public interest." Dept. Brief at p. 55. Fortunately, no such balancing act is necessary in this case. The parents – the beneficiaries of the CCAP – have received child care. This is the purpose of the CCAP. Mission accomplished. The public interest has been served. Mrs. Pfaltzgraff provided those services. She should be able to keep the money she was paid for providing them. The only interest the Department is attempting to satisfy with its recoupment policy is its own.

Legal Fees

Legal Fees Under § 625.29 The Department argues that its rules exist in a vacuum stating Iowa Admin. Code r. 441-7.10(7)(a)(3) (2017) (App. p.527) says the Department will not pay for costs. The Department says attorney fees are not recoverable absent a statute or provision in a contract. Iowa Code states that a person can seek legal fees - the answer to both of the Department's arguments is Iowa Code § 625.29. No administrative rule can deprive a party of a right specifically granted by statute and Iowa Admin. Code 441 r. 7.10(7)(a)(3) (2017) (App. p.527) does not limit the fees recoverable under Iowa Code §625.29. *See Schmitt v. Iowa Dept. of Soc. Services*, 263 N.W.2d 739, 745 (Iowa 1978) in which the Court states, "Rules

cannot be adopted that are at variance with statutory provisions, or that amend or nullify legislative intent."

The Department claims that its position is supported by substantial evidence and thus has no exposure to an Iowa Code §625.29 claim. Iowa Code §625.29(a). The claim in this case is that the Department has neither the authority – either under law or in equity – to enforce its recoupment provisions. There was no fact finding. These are strictly procedural and legal questions and if Mrs. Pfaltzgraff prevails on her claim, this provision will not apply as the Department will not have had the authority (or thus, the substantial evidence) to recoup the money in the first place.

The Department claims that its action was primarily adjudicative and thus has no exposure to an Iowa Code §625.29 claim. Iowa Code §625.29(b) (2018) . The Department claims it provided adequate notice of the recoupment hidden in the boilerplate of the first action in May of 2016, onward.

On October 31, 2016, the Department issued its "Notice of Child Care Assistance Overpayment." There was no hearing or adjudication on whether this obligation existed. It was created purely as an administrative function. In *Branstand v. State*, the Supreme Court, relying on *Remer*, stated that "[I]f an agency's function principally or fundamentally concerns settling and deciding issues raised, its role is primarily adjudicative." *Branstad v. State ex rel. Nat.*

Resource Commn., 871 N.W.2d 291, 296 (Iowa 2015). Here, the Department's actions do not fall within the sphere of adjudication. The Department did not attempt to weigh any evidence or make any fact-finding. The Department on October 31, 2016, simply stated Mrs. Pfaltzgraff had been overpaid and that the Department must be paid back. (Admin. R. at p. 311. App. p. 317.) While the Department entertained an appeal of the October 31, 2016, decision, the Department's role in that initial and primary decision was not adjudicative, but rather an automatic administrative decision based on the record of Pfaltzgraff's previous Department matter. There was no hearing before that October 31, 2016, decision was rendered.

That recoupment matters are not intended by the Department to be adjudicative is evidenced in Iowa Administrative Code r. 441 7.9(9) (2017) which states, "When the department's action is sustained, excess assistance paid pending a final decision shall be recovered to the date of the decision. *This recovery is not an appealable issue* …." Iowa Admin. Code r. 441 7.9(9) (2017) (Emphasis added) (App. p.525). The fact that recoupment is not appealable has been relied upon by the Department at every step in the process. Dept. Brief at p. 58-59.

The Department claims that its decision was a proceeding in which the State was to determine an eligibility to a monetary benefit and not subject to

an Iowa Code §625.29 claim. Iowa Code §625.29(d). Mrs. Pfaltzgraff is not a beneficiary of the CCA program. Dept. Brief at p. 34. Furthermore, any claim that Mrs. Pfaltzgraff was entitled to her CCA agreement was resolved in her former Department case. This case is about the right of Mrs. Pfaltzgraff to the money she earned while that former case was pending appeal. The unemployment benefits awarded in *Kent*, as cited by the Department, are a request for gratuitous assistance. In contrast, Mrs. Pfaltzgraff actually earned the money paid to her. Technically, it is the CCA parents' benefits which are paid to Mrs. Pfaltzgraff through the Department. Therefore, the recoupment demanded by the Department should not be considered an entitlement or benefit to Mrs. Pfaltzgraff for purposes of Iowa Code §625.29(d) (2018).

The Department claims that its decision was a proceeding in which the State was attempting to collect a judgment debt and not subject to an Iowa Code §625.29 claim. Iowa Code §625.29(g) (2018). In order to be a judgment debt, Mrs. Pfaltzgraff would have to have a court judgment against her. There is no such judgment here. This is an agency appeal – though the Department is attempting to *regulate* away its obligations under a government contract and *claims* there is a judgment. Regardless, the Department has provided no evidence that such a judgment has been entered in any court of law.

This case, if any, should be subject to an Iowa Code § 625.29 finding as the Department has created a non-appealable "recoupment" decision which is made based purely on whether a provider opts to defend herself. Furthermore, there is no rational basis (evidence) between the money recouped and any wrongdoing on the part of the providers.

If Mrs. Pfaltzgraff wins this appeal, the Department is likely to continue its recoupment policy because it only stands to lose recoupment money, e.g., money which has already been paid to providers for providing a service. The only way the Department will cease its recoupment policy is to be made aware that it will have to pay for the privilege in attorney fees. It is also important that providers and attorneys who might potentially defend such providers know that the huge expenditure required to fight such a predatory policy might be repaid.

If Mrs. Pfaltzgraff is successful on her appeal, the Department must pay legal fees in accordance with Iowa Code §625.29.

CONCLUSION

Mrs. Pfaltzgraff respectfully repeats her request that this Court reverse the decision of the District Court in this case and deny the recoupment sought in the October 31, 2016 "Notice of Child Care Assistance Overpayment," declare the recoupment provisions void as applicable to monies earned by child care service providers who continue to provide services during an appeal and award legal fees.

Respectfully Submitted,
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CERTIFICATION OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

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ATTORNEY COST CERTIFICATE

I hereby certify that the actual cost paid for printing the foregoing "Petitioner-Appellant's Reply Brief" was $0.00.

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CERTIFICATE OF SERVICE

I, Trent W. Nelson, attorney for Petitioner-Appellant, hereby certify that I mailed one (1) copy of "Petitioner-Appellant's Reply Brief" to the following attorney-of-record, by enclosing same in an envelope addressed to:

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on the 25th Day of May, 2018, in full compliance with the provisions of the Rules of Appellate Procedure.

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