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IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 18-1329

TERRI ENDRESS

Provider-Appellee,

vs.

IOWA DEPARTMENT OF HUMAN SERVICES,

Respondent-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE KAREN ROMANO, JUDGE

APPELLANT'S FINAL REPLY /CROSS-APPELLEE'S RESPONSE BRIEF AND CONDITIONAL REQUEST FOR ORAL ARGUMENT

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CROSS-APPEAL

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ARGUMENT

STANDARD OF REVIEW

In Ghost Player v. Iowa Dept. of Econ. Dev., ___ N.W.2d ___ (2018); 2018 WL 480365, this Court articulated that when reviewing an agency decision that forms the basis of a petition for judicial review, this Court will apply the standards set forth in the judicial review provision of the Iowa Administrative Procedures Act to determine if this Court reaches the same result as the district court. Id. at 2018 WL 480365 at*8.

To the extent that this Court is being asked to consider issues brought under the Iowa Administrative Procedures Act, the district court functioned in an appellate capacity to correct legal error committed by the agency. Iowa Code § 17A.19(8) (1997); Consumer Advocate v. Iowa State Commerce Comm'n, 465 N.W.2d 280, 281 (Iowa 1991). A court's review of agency action is severely circumscribed. Burns v. Iowa Bd. of Nursing, 495 N.W.2d 698, 699 (Iowa 1993). The administrative process presupposes that judgment calls are to be left to the agency. Nearly all disputes are won or lost there. Id.; Leonard v. Iowa State Bd. of Ed., 471 N.W.2d 815, 816 (Iowa 1991).

In deciding whether the agency decision in this matter was correct, this Court should consider whether the agency's findings are supported by substantial evidence in the record as a whole. Iowa Code § 17A.19(8)(f); Hy-Vee Food Stores v. Iowa Civil Rights Comm'n, 453 N.W.2d 512, 515 (Iowa 1990) (citations omitted). In Mercy Health Ctr., A Div. of Sisters of Mercy Health Corp. v. State Health Facilities Council, 360 N.W.2d 808 (Iowa 1985), the Court stated the following at pages 811-812: "Evidence is substantial if a reasonable person would find it adequate to reach the given conclusion, even if a reviewing court might draw a contrary inference." [citation].

The Iowa Administrative Act 17A.19(10)(m) provides that,

> The court may affirm the agency action or remand to the agency for further proceedings. The court shall reverse, modify, or grant other appropriate relief from agency action, equitable or legal and including declaratory relief, it if determines that substantial rights of the person seeking judicial relief have been prejudiced because the agency action is … [b]ased upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency.

Iowa Code §17A.19(10)(m) (2011). Weight of evidence remains within the agency's exclusive domain. Under these circumstances, great care must be taken by the reviewing court to avoid moving from the

prescribed limited review into one that is de novo. Burns v. Iowa Bd. of Nursing, 495 N.W.2d 698, 699 (Iowa 1993).

I. THE DHS AFFORDED THE PROVIDER ALL DUE PROCESS RIGHTS REQUIRED BY LAW.

PRESERVATION OF ERROR

The parties agree that error was preserved with respect to argument.

A. For a child care provider to have a property right in a benefit, there must be a legitimate claim of entitlement to the benefit, and not simply an expectation by the provider of it.

In Perry v. Sindermann, 408 U.S. 593 (1972), the U.S. Supreme Court reviews a case where a non-tenured teacher was not renewed for employment. The school where this teacher had been employed did not operate on a tenure system of retention, but instead provided its teachers with a Faculty Guide that stated, "... College wishes the faculty member to feel that he has permanent tenure as long as his teaching services are satisfactory ...." Id. At 600. So, while the school did not offer tenure per se, it did offer a guidebook that indicated that it wanted its staff to feel that they had "permanent tenure" so long as their work remained satisfactory. Id.

In Perry, the U.S. Supreme Court disagreed with the lower court holding "insofar as it held that a mere subjective 'expectancy' is protected by procedural due process." Id. at 603. While the Court agreed that the respondent must be given an opportunity to prove the legitimacy of his claim of such entitlement in light of 'the policies and practices of the institution through a hearing process, the Court also noted, "[p]roof of such a property interest would not, of course, entitle him to reinstatement". Id.

Property interests are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). Certain attributes of 'property' interests protected by procedural due process emerge from these decisions. Id. To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. Id. He must, instead, have a legitimate claim of entitlement to it. Id.

The instant Provider repeatedly asserts that she was "invited" by the Department to provide child care services. It is a gross overstatement to say one is "invited by the Department to provide

services" simply because the Provider initially sent in a form requesting approval to bill for Child Care Assistance (hereinafter 'CCA') monies on behalf of DHS-eligible CCA families. Perhaps this Provider perceived an invitation tacit in the Department's boilerplate mailed acceptance of the Provider's CCA provider application.

Regardless of what this Provider may have initially perceived when applying and being accepted for CCA billing, it remains quite incredible that the Provider, after revocation of her CCA provider agreement due to mis-billing, still perceived that on appeal and without a CCA provider agreement, she was again "invited" by the Department simply because the Department allowed her to evaluate her appeal merits and determine if she wanted to continue to bill the CCA program during the pendency of her revocation appeal.

The constitutional protections associated with property rights do not extend to tenuous interests that may vanish even without legal interference. See 16B Am. Jur. 2d *Constitutional Law* § 633 (11/2018 update). Licenses and permits generally are not considered property in any constitutional sense. Id.

In a case such as this, if the alleged property interest is the ability to bill for CCA payments for families who chose to use this provider,

that interest is tenuous at best for at least two reasons. First, absent any legal interference, families can change providers at any time and take their CCA billings with them. Second, the Iowa Code allows for prioritizing CCA allocations to families based upon state agency budgetary restrictions to the extent that waiting lists may be established. Iowa Code 237A.13(7) (2017). Clearly, either of these situations could significantly impact a provider's ability to maintain any interest in billing for CCA payments. Clearly, either of these situations could occur absent any legal interference, such as an agency revocation, for the provider's interest in CCA payments to literally vanish overnight.

Procedural requirements ordinarily do not transform a unilateral expectation into a protected due process property interest in a government benefit; only if procedural requirements amount to a significant, substantive restriction on decision making do they give rise to a protected property interest. See Burch v. Smathers, 990 F. Supp. 2d 1063 (D. Idaho 2014). "[A] constitutional entitlement cannot be created – as if by estoppel – merely because a wholly and expressly discretionary state privilege has been granted generously in the past."

Conn. Bd. Of Pardons v. Dumschat, 452 U.S. 458, 465 (1981); see also U.S.C.A. Const. Amend. 14.

Simply because the Department was not wait-listing CCA families at the time of this appeal, and the Provider found CCA-eligible families to utilize her services during her revocation appeal, does not mean that a discretionary state privilege of accepting CCA monies for families suddenly becomes an entitlement. Ironically, if entitlement to such CCA payments were found for this Provider, she would have a property interest in the benefit monies of CCA families where those very families do not have a property interest. Certainly, when the legislature established the CCA program, they did not expect to grant property rights to providers who accepted monies on behalf of families who were eligible for welfare.

B. The Provider was given adequate notice of the DHS' revocation of her CCA agreement and her appeal rights, as well as being provided with an opportunity to be heard on the issue.

The Department relies substantially on its argument as set forth in the original briefing on this sub-issue. A chronological review of the record, Department notices provided, and Provider responses to those notices provides the best evidence of the parties'

understandings and intentions in this case. See App. 17-19, 30-48, 324-395.

The Provider argued repeatedly throughout this case that she did not receive adequate notice of the possibility of having to repay the CCA monies she claimed pending the Director's final decision. This argument is made again in the Provider's brief. It is telling, however, that while the Provider quotes the statement at the top of her CCA termination notice, "This action means you are no longer eligible to receive CCA payments….", four sentences later in the brief the Provider asserts, "Nowhere does this notice state that Mrs. Endress will be "operating outside of a CCA agreement" if she appeals…." Provider's brief, p 29. (emphasis added).

It is unclear what the Department could have written at the top of this Provider's 2014 notice of decision to alert her that she no longer had a CCA agreement, if she does not understand the Department's "short and plain statement of the matters asserted" that she quotes and then subsequently asserts she never received, in her own briefed argument. Id.

Likewise, the Provider argues that a personalized appeal rights statement is necessary for an agency to convey general appeal rights

information. Iowa Code 17A requires that notice should be "a short and plain statement of the matters asserted", and the Provider's notice provided this short, plain statement.

The Provider's real argument appears to be with the companion "You Have the Right to Appeal" document that was included with the termination notice, not the notice of decision itself. App. 326-329. Even if one considers this companion document to be part of the actual revocation notice, the Provider provides no legal support for the position that a document must be hand-tailored to a specific case or party for it to meet Iowa Code 17A notice requirements.

Here, the Provider received a personalized notice of termination and at the top of that notice it stated "you are no longer eligible to receive CCA payments." Despite this "short and plain statement" that was clearly set forth on the notice, the Provider apparently did not take this to mean that she was no longer operating as an eligible CCA provider.

It is unclear how providing a more personalized appeal rights letter along with this termination notice would have been any more successful as a communication tool here. Certainly, the Provider read the companion "You Have the Right to Appeal" letter as she followed

every step and recommendation set forth in that document, including seeking out legal counsel. Ironically, the Provider understands all notice statements that benefit her while becoming equally confused wherever statements do not favor her preferences. See App. 312-313. [The Provider adds a section "c" to Issue I of her brief that was not part of the Appellant-Department's appeal brief. To the extent that Provider Issue I(c) overlaps with the argument the Department sets out in its Issue II, the Department responds therein. To the extent that the argument has already been briefed by the Department, the Department will defer to its previously briefed arguments.]

II. IOWA CODE 237A AND 17A PROVIDED DHS AUTHORITY TO DRAFT IOWA ADMINISTRATIVE CODE 441-170.9 AND 441-7.9 AND THOSE RULES ARE SUFFICIENTLY CLEAR

PRESERVATION OF ERROR

The DHS preserved error with respect this argument in the administrative forum, as well as at the district court judicial review.

Argument Overview

The Provider discusses payment remittance in her brief. (Provider brief, p 32-34). Unfortunately, there are several half-quotes attributed to the Department, including some quotes taken so out of context that they are from other briefed arguments entirely. The

Department will not address each of these individually but rather defers to its original brief for its position of the applicability of the law to this case.

The Provider's contention that the Department "confesses" to a violation is inaccurate. (Provider brief p 32). Just on its face, the parenthetical "[Recoupment]" is a misrepresentative subject substitution for this partial quote from the Department's brief. Additionally, the Provider's addition of the word "recoupment" to its partial quote from the Department's brief doesn't make sense in this context. The Department does not call payments it makes to providers on appeal "recoupment".

The Provider asserts that the Department argues that it has "interpretative authority", that it takes an "all or nothing" approach, and that the Department asserts it must be a sovereign entity or else it is simply a "tool". Provider brief, p. 37. The Provider asserts that "the Department complains it needs a more flexible statute to '...adapt to the needs of the program." Provider brief, p. 38. None of these half-quotes and spliced Provider assertions reflect the Department's position. Id.

The Department does wants to be clear it never asserted that it has interpretative authority. There is a substantial difference between interpretative authority and a statutory duty to administer a program. The Department asserts and has previously briefed, that the agency does have the duty to administer the CCA program both within the context of Iowa Code 237A as it relates to Iowa child care programming, and also in its role as the representative state agency tasked with administration of the federal Child Care and Development Block Grant of 2014 (hereinafter "CCDBG") for the state of Iowa. See Iowa Code 237A; 45 C.F.R. 98 (2014).

The Provider offers numerous speculations about the Department's administration of the CCA program, as well as much conjecture related to the Department's relationship with the U.S. Department of Health and Human Services as it relates to the CCDBG program. Nothing in the record supports the Provider's speculations and conjecture. Therefore, the Department will not muddy the record providing new evidence supportive of procedures by which state and federal programs collaborate to address repayment of the federal program monies associated with terminated providers.

III. IT IS THE PROVIDER WHO WILL BE UNJUSTLY ENRICHED IF SHE IS ALLOWED TO SET ASIDE THE RECOUPMENT WHERE SHE BILLED AND VOLUNTARILY COLLECTED OVER $16,000 OF CCA FAMILY MONIES AFTER MUTIPLE NOTICES THAT IF SHE LOST HER APPEAL, DHS HAD THE RIGHT TO RECOUP THOSE CCA PAYMENTS.

PRESERVATION OF ERROR

The Provider argues an issue in her brief that was not part of the Appellant-Department's appeal. See Provider brief, 11/27/18; Department brief, 10/17/18; Department Notice of Appeal, 8/2/18. The Department appealed the district court's ruling on August 2, 2018. DHS Notice of Appeal, 8/2/18.

The Provider filed a cross-appeal on August 7, 2018. This cross appeal indicates, "…Provider appeals the July 23, 2018, and August 6, 2018, decision by the Honorable Judge Karen Romano denying a claim for legal fees under Iowa Code 625.29." Id. The Provider's cross-appeal therefore, by virtue of her own assertions, is limited to challenging the district court's ruling denying her claim for attorney's fees under Iowa Code 625.29. The Provider did not preserve error for any other issues on appeal as she did not appeal any other aspect of the orders. The time for appealing the district court's rulings of July

and August is past. Therefore, this issue has not been properly preserved or timely noticed for appeal.

ARGUMENT

Assuming arguendo that there was preservation and notice of this issue, the Department offers the following argument.

The Provider was aware when she applied initially for a CCA Provider Agreement that DHS had the authority, upon noncompliance determination, to provide a ten-day notice and terminate her CCA agreement. See App. 195. On July 17, 2014, the Provider received notice of her CCA Agreement termination when DHS sent a Notice of Decision outlining the basis for termination of her agreement. App. 326-328. This document also set out the requisite 10-day revocation “effective date”, provided appeal options including how to appeal the CCA termination decision, and provided a warning of recoupment “if the Department’s action is correct.” Id. at App. 328.

On July 22, 2014, the Provider appealed. At this point, she knew she was operating without a CCA agreement. Id. at App. 195, 326-328. On July 31, 2014, DHS sent the Provider an appeal acknowledgment notice. App. 330-331. The very first section of this

notice states, "You have timely appealed the cancellation or denial of your CCA provider agreement. You are therefore allowed to continue to receive child care assistance funding pending the outcome of your appeal. Any benefits you get while your appeal is being decided may have to be paid back if the Department's action is correct." App. 330.

The notice's second page set forth (again) that the Provider might continue to receive payment on appeal, but (again) warned of recoupment "if the Department's action is correct". App. 331. This second page is identical to the one that the Provider received with her July 17, 2014 CCA termination notice.

Clearly, on multiple occasions, the Provider received written notice that if she chose to continue to bill DHS for payments of CCA family monies while operating as an ineligible provider under revocation, DHS had the right to recoup monies if she lost her appeal. During this appeal, the Provider was not coerced, encouraged, or otherwise obliged to continue to avail herself of taxpayer monies set aside to assist impoverished families with getting quality child care.

To the extent that the Provider did not understand the plain language of the written notices sent to her by DHS, she had the ability to talk with an attorney about her concerns, or ask for clarification

directly from DHS (either her field worker or the centralized registration unit) about this rule. Nothing in the record indicates that the Provider ever requested clarification about, or expressed confusion regarding, the recoupment notice language that appeared on multiple documents sent to her by DHS.

A reasonable and prudent businessperson engaged in a CCA payment appeal with a state agency takes heed of multiple recoupment warning notices. While the Provider acted as a reasonable and prudent businessperson in retaining private legal counsel to defend her position on appeal, she did not employ the same competence where it appeared – at least temporarily – to benefit her to collect CCA monies during the appeal process.

The Provider was given more than adequate notice of the recoupment risk associated with continuing to request CCA family payments while pursuing an appeal of her CCA revocation. As in Bass v. JC Penney, 880 N.W.2d 751, 764 (Iowa 2016), DHS' written disclosures were "not complicated or confusing and did not involve tricky or clever stratagems or fine print designed to mislead." Bass v. JC Penney, 880 N.W.2d 751, 764 (Iowa 2016). And unlike a for-profit retailer like JC Penney, no motivation exists for a state agency like

DHS to encourage revoked providers to request CCA family benefits while simultaneously working to maintain the revocation on appeal.

The DHS did not solicit or in any way seek out the Provider to provide child care services to a particular family or population. Instead, the Provider sought payment of CCA monies directly from DHS for services she was providing to private citizens who were eligible for state assistance. While there was a definite benefit to providers in receiving families' CCA monies directly from DHS (i.e., providers do have to wait to get the CCA monies from individual families after the families are paid by DHS), there was no real benefit to DHS in distributing the family CCA monies directly to the Provider (instead of the families themselves).

In the instant matter, the DHS initially paid (multiple families' CCA) benefits directly to the Provider pursuant to the provider's agreement that she would abide by the CCA program requirements. Even after revocation occurred, the Provider received CCA monies because she asserted on her appeal form that she wanted to receive them during the appeal process.

As in Smith v. Harrison, 325 N.W.2d 92 (Iowa 1982), once a ground for invalidating that provider agreement is established by the

administrative court and finally through the Director, there is a basis for DHS payment recoupment of the Provider's billings after the revocation. Therefore, DHS correctly sought recoupment of the over $16,000 that the Provider chose to voluntarily bill and receive during her revocation appeal after the DHS' revocation was affirmed.

The only reason a provider is revoked of a CCA agreement in Iowa is because she is not meeting state requirements to receive CCA payments for reasons either associated with billing accuracy, overbilling, or health and safety issues. The Provider fell into this category as established by the agency and administrative actions that were finalized in 2014. App. 324-340.

441 Iowa Administrative Code 170.5(5) allows for a revoked CCA provider to simply reapply at any time. Nothing precluded this provider from reapplying for CCA immediately after the administrative hearing. See App. 326-327. Instead, the Provider exercised her right to further appeal to the DHS Director while continuing to bill DHS for CCA monies during this secondary appeal. That was her choice and she had every right to make this calculated determination.

The Provider also made the calculated choice to continue billing DHS for CCA monies during this secondary appeal even though she was fully aware that she had already lost her case with the administrative law judge.

After her 2014 revocation appeal loss with the DHS Director, the Provider did not reapply for a CCA Provider Agreement until 2017. The record does not provide information on what transpired between the final Director's decision of 2014 and 2017, except that the record does show that the Provider moved to a new residence at some point. App. 40, 332. In 2017, once the Provider demonstrated that she addressed the issues of the 2014 appeal and met minimum health and safety requirements, she was again approved to receive CCA monies as a provider.

The Provider contends that she should be paid for the care she provided after revocation even though she did not have a CCA provider agreement, and even though she was noticed of the recoupment risk should she lose her CCA appeal. She suggests that there would be a DHS "windfall" should DHS not be required to pay CCA monies to revoked, ineligible child care providers. This argument

actually has more validity when applied to CCA-revoked Providers than when applied to DHS.

If DHS were not allowed to recoup when it prevailed on its appeals, as a legal or financial strategy, providers would be rewarded for pursuing even the weakest of appeals and continuing to receive CCA payments for as long as possible. Adopting the Provider's argument would mean that every revoked provider who appeals can request and keep all CCA payments they bill for payment during appeal (even if they lose the CCA appeal). Adopting this argument would have two devastating long-term consequences.

First, the quality of Iowa child care will deteriorate as revoked providers with no possibility of prevailing on appeal choose to appeal anyway simply to give themselves an additional nine months to a year of CCA payments while their appeal moves through the system.

Second, administrative law judges will see a substantial increase in the number of appeals (as well as the number of continuance requests for each appeal) as providers attempt to delay final revocation disposition for as long as possible. This will cause an increase in the number of 237A district court injunctions and also 17A administrative emergency adjudicative proceedings (for immediate

child care closures) as providers who present serious risks to kids (and would not otherwise appeal) continue to provide care and submit CCA billings knowing that there is no DHS recoupment recourse when they eventually lose on appeal.

In short, adoption of the Provider's recoupment argument 'if I watch the kids, I should get paid for them - no matter what' will so significantly delay the processing of CCA revocation and appeals that Iowa Code 237A will be, in many cases, completely worthless in protecting CCA kids.

In this case, because Provider was an ineligible provider, the children were not receiving care that met the federal and state legal requirements for CCA. One can argue about whether this provider was watching too many kids or simply billing CCA family monies for kids she wasn't watching, but either way, the legal requirements of Iowa Code Chapter 237A and 441 IAC 170 for having a CCA Provider Agreement were established in hearing to have not been met, and that is not an issue under appeal.

The Provider asserts that State, Dept. of Human Services, ex rel., Palmer v. Unisys Corp., 637 N.W.2d 142 (Iowa 2001) provides for a claim of unjust enrichment in the instant matter. The Unisys case

involved a third-party claim of unjust enrichment where the State of Iowa sued Unisys and a subsidiary corporation for breach of contract and breach of implied warranty in connection with Unisys' management of the state and federal Medicaid program.

In Unisys, the third party argued that overpayments it received from Unisys were not at the expense of Unisys because Unisys is independently liable to the State under the breach of its own contract. The third party asserted this independent liability precluded any claim for unjust enrichment. Id. at 155. The Iowa Supreme Court agreed, noting that Unisys may be liable to the State for overpayments independent of any responsibility of the third party.

While this three-party Medicaid-related contract case is not particularly on point to the instant matter, it does provide an example of how unjust enrichment applies to parties with contracts and how the State is still able to recover where payments to the contractor were inappropriate. See id at 150-151.

Assuming arguendo that contract law does apply to the instant case, the DHS asserts that unjust enrichment cannot be applied as a matter of law. Smith v. Harrison, 325 N.W.2d at 94; Johnson v. Dodgen, 451 N.W.2d 168, 175 (Iowa 1990). The doctrine of unjust

enrichment is a doctrine of restitution. See Smith v. Harrison, 325 N.W.2d 92, 94 (Iowa 1982).

The Smith Court, while considering unjust enrichment associated with a conservator and a farm lease, delineated that "[a]ny benefits received by [the obligor] were received pursuant to the lease. It was not unjust for him to receive them unless the lease should be set aside. Thus a ground for invalidating the lease must be established before a basis for restitution exists." Smith v. Harrison, 325 N.W.2d at 94 (emphasis added). The same logic that was applied in Smith applies to recoupments where the Department prevails on the issue of termination of a CCA agreement.

In EAD Control Systems, LLC v. Besser Co., USA, 2012 WL 2357572 (not reported in F.Supp.2d) (2012), the Court considered the analysis of State, Dept. of Human Services, ex rel., Palmer v. Unisys Corp., 637 N.W.2d 142 (Iowa 2001), and then borrowed from the Illinois Court of Appeal's "exceptionally well-articulated explanation, as Illinois shares Iowa's rule that an express contract bars an implied contract as to the same subject matter" noting:

> When parties enter into a contract they assume certain risks with an expectation of a return. Sometimes, their expectations are not realized, but they discover that under the

> contract they have assumed the risk of having those expectations defeated. As a result, they have no remedy under the contract for restoring their expectations. In desperation, they turn to quasi-contract for recovery. This the law will not allow. Quasi-contract is not a means for shifting a risk one has assumed under contract.

Id. (quoting Indus. Lift Truck Serv. Corp. v. Mitsubishi Int'l Corp., 432 N.E.2d 999, 1002 (Ill.App.Ct.1982)).

Therefore, should this Court find that this Provider correctly asserts she had a contract with DHS for CCA payments, then the Provider's claim of unjust enrichment is barred because unjust enrichment is not a mechanism "for shifting a risk one has assumed under contract." Id. at 6.

When a provider bills for children who are not actually receiving care, she depletes the families' allotment for care for that billing cycle even though the family does not receive any care for the billing. See 441 IAC 170.4(7)(g). The CCA program is not a bottomless well of CCA monies to distribute to families. In fact, Iowa Code section 237A.13(6)-(8) (2017) provides the criteria for the DHS to use when the CCA budget becomes so limited that it cannot meet the state's eligible family needs for child care services.

Certainly, where the state CCA program has limited budgetary resources and a statutory goal to provide quality care for the most vulnerable of Iowa kids, there is a substantial government and public interest in having only providers who meet the minimal standards for a CCA agreement seeking the CCA family monies.

IV. THE INTENT OF IOWA CODE 237A TO PROVIDE QUALITY CARE AND PROTECTION FOR CHILDREN, AND THE INTENT OF 17A TO BALANCE THE PUBLIC AND GOVERNMENT INTERESTS, WERE FURTHERED WHERE DHS DRAFTED CHILD CARE RULES AND ADMINISTERED THE CCA PROGRAM.

PRESERVATION OF ERROR

The Department preserved error on this issue. At the administrative level, the Department preserved the right to present additional argument relevant to challenges to the Department's rules and policies. App. 51. At the judicial review level, the Provider first briefed all matters and set forth the enumerated issues that she wished to challenge in the district court. While the Respondent-Department did not set forth the numbered challenges the parties briefed at the judicial review level, the Department did provide its public policy arguments in its judicial review brief in responsive fashion to the issues that the Provider set forth for appeal. Judicial Review Brief of the Department of Human Services, 4/16/18, App. 42, 44, 53-57.

The Appellant-Department did note, upon reviewing its page proof brief that the Preservation of Error block that had been set forth at the beginning of this issue was missing from the Appellant's filed page proof brief. It appears the Preservation of Error block was inadvertently cut during editing of the final document. For this reason, the Appellant-Department asserts its preservation of error position to clarify its position.

ARGUMENT

The Provider argues that "recoupment does not allow a provider to challenge a revocation." Provider brief p.46. The Department contends that the possibility of recoupment for a terminated provider actually motivates providers to honestly evaluate their cases' merits in order to assess whether it is in their best interests to accept additional CCA monies while appealing an adverse action.

The Provider sprinkles numerous partial quotes from the Department's brief into her argument. Many of these quotes are taken out completely of context, and many of the Provider's one-sentence arguments are taken from different portions of the brief. See e.g. Provider's brief p. 48. Rather than confuse the issues further, the

Department defers to its original brief for accurate representations of the Department's position on the issues.

While the Department is not interested in muddying the record with facts not in the record, the Provider repeatedly asserts that if the Department prevails on the recoupment issue, the Department received $16,000 of free child care. See e.g. Provider brief p. 50. This and similar assertions are not supported by the record.

Whether the Department keeps recouped money or returns it to the federal CCBDG program after appeals affirm revocations is not set forth in the record. To the extent this has not been addressed at the lower court and is not relevant to this appeal, the Department disagrees with the Provider's argument without providing evidence outside the record.

<u>APPELLEE'S CROSS APPEAL – APPELLANT RESPONSE</u>

I. THE PROVIDER IS NOT ENTITLED TO ATTORNEY'S FEES UNDER IOWA CODE SECTION 625.29 AT EITHER THE ADMINISTRATIVE OR THE JUDICIAL REVIEW LEVEL.

PRESERVATION OF ERROR

The Provider did not preserve error with respect to this issue at the administrative level. <u>See</u> App. 17-19, 42-48.

(Administrative process)

There is no legal provision for the Provider to successfully request fees associated with her underlying administrative appeal. The Iowa Code that the Provider cited does not provide authority for payment of attorney's fees in the instant matter. 441 IAC 7.10(7)(a)(3), the administrative rule that sets out details of practice for Iowa Code Chapter 17A, provides clear direction on this matter. 441 IAC 7.10(7)(a)(3) indicates that while the Provider may choose to be "represented by others, including an attorney, subject to federal law and state statute" the department "will not pay for the cost of legal representation."

(Judicial review)

Iowa Code section 625.29 sets forth the requirements to meet eligibility for attorney fees in a civil action. In this case, the Provider does not meet the requirements to receive attorney fees. Iowa Code section 625.29(1) sets out that the court "**shall not** make an award under this section if it finds **one** of the following:

> **a. The position of the state was supported by substantial evidence.**
>
> b. The state's role in the case was **primarily adjudicative**.
>
> c. ...
>
> d. The action arose from a proceeding in which the role of the state was to **determine the eligibility** or entitlement **of an individual to a monetary benefit or its equivalent** or to adjudicate a dispute or issue between private parties or to establish or fix a rate.
>
> e. ...
>
> f. The **proceeding involved** eminent domain, foreclosure, **collection of judgment debts**, or was a proceeding in which the state was a nominal party.

(Emphasis added).

To the extent that this Court finds that the DHS' position in this judicial review is supported by substantial evidence, the DHS asserts

that Iowa Code section 625.29(1)(a) would be applicable. Additionally, the DHS argues that attorney fee exceptions of Iowa Code sections 625.29(1)(b), (d) and (f) also apply to this matter.

In Kent v. Employment Appeal Bd., the Iowa Supreme Court held that Iowa Code section 625.29(1)(d) precluded an award of attorney fees and expenses where the state's role was to determine eligibility. Kent v. Employment Appeal Bd., 498 N.W.2d 687, 688-89 (Iowa 1993); see Iowa Code § 625.29(1)(d) (2017). In Kent, the state action was an attempt to determine whether the Provider was eligible to receive unemployment assistance.

In the instant case, the state action was the DHS attempt to determine the amount of money the Provider was eligible to retain (of monies claimed during the appeal process) after losing her appeal.

Attorney fees are generally not recoverable as damages in the absence of a statute or a provision in a written contract. McNabb v. Osmundson, 315 N.W.2d 9, 15 (Iowa 1982); Suss v. Schammel, 375 N.W.2d 252, 256 (Iowa 1985). The statutory authorization must be express and "'must come clearly within the terms of the statute.'" Botsko v. Davenport Civil Rights Comm'n, 774 N.W.2d 841, 845

(2009). Under Iowa Code section 625.29(1)(d), therefore, the Provider is precluded from receiving attorney fees and costs.

In Branstad v. Iowa, the Iowa Supreme Court considered the issue of attorney's fees in the context of the state's role being "primarily adjudicative." Branstad v. Iowa, 871 N.W.2d 291(Iowa 2015); see Iowa Code § 625. 29(1)(b) (2017). In Branstad, restitution was investigated by the state agency (DNR biologist), then heard by an "impartial ALJ" who made the initial decision, and finally the DNR Commission made the "final decision." See id. at 292, 296, 297.

In Branstad, the Court held that the state's role was "primarily adjudicative" for the purposes of the statutory exception to the award of attorney's fees as the "Code clearly anticipates that the DNR will act as an investigatory body and the Commission will take the final agency action if the DNR's restitution assessment is appealed." Id. at 295.

In the instant matter, the DHS CCA centralized program staff investigated the payment issue after the prior administrative revocation actions concluded, and found that recoupment was appropriate. The Provider appealed and received hearing with an

impartial ALJ who agreed with the DHS CCA program determinations.

The Provider appealed to the Director of DHS, and the Director after weighing the evidence, considering the defenses, and determining the rights and duties of the parties, held that the DHS CCA program and the ALJ correctly assessed the recoupment issue. See id. at 297. Under Iowa Code section 625.29(1)(b), therefore, the Provider is precluded from receiving attorney fees and costs.

Where the DHS' CCA program pays the monies to the Provider and then seeks recoupment, the Provider meets the definition of "debtor" as set forth in 441-11 as well, and as such the DHS asserts that this case also meets the criteria of Iowa Code section 625.29(1)(f) as this particular action is really a debt collection appeal. As noted by Iowa Code section 625.29(1), if any one of the exceptions apply to the case, then attorney fees and expenses are not allowable.

For these reasons, the Appellant maintains that the Provider is not entitled to attorney's fees.

CONCLUSION

WHEREFORE, the Appellant respectfully requests that this Court reverse the district court decision, reestablish the administrative

law judge and the Director of DHS' determinations, and deny all the Provider's cross-claims as set forth on appeal.

REQUEST FOR NONORAL SUBMISSION

The State believes the written briefs, judicial review oral argument, and administrative record are sufficient to advance the arguments of the parties in this case and the Court can fully and fairly resolve the issue without oral argument. However, notice is hereby given that if oral argument is granted, counsel for the State also desires to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

- This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Georgia font, size 14 and contains **6,311** words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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