IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 18-1329

TERRI ENDRESS

Petitioner-Appellee,

vs.

IOWA DEPARTMENT OF HUMAN SERVICES,

Respondent-Appellant.

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

APPELLEE'S FINAL BRIEF, CROSS-APPEAL AND REQUEST FOR ORAL ARGUMENT

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Iowa Code § 625.29

Iowa Admin. Code r. 441-110.9(1)(e)

Iowa Admin. Code r. 441-7.9(3)

ISSUE I. MRS. ENDRESS WAS DENIED DUE PROCESS

Brummer v. Iowa Dept. of Corrections, 661 N.W.2d 167, 171 (Iowa 2003)

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Iowa Code § 17A.11

Iowa Code §17A.18A

Iowa Code § 17A.12(2)

Iowa Code Chapter 237A

Iowa Admin. Code r. 441-170.9

Iowa Admin. Code r. 441-7.9(a)(1)

ISSUE II. THE DEPARTMENT DOES NOT HAVE THE AUTHORITY TO PROMULGATE RECOUPMENT RULES OR POLICIES.

Iowa Code section 17A.19(10)

ABC Disposal Sys., Inc. v. Dept. Of Nat. Resources, 681 N.W.2d 596, 601 (Iowa 2004)

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Branderhorst v. Iowa State Hwy. Commn. on Behalf of State, 202 N.W.2d 38, 41 (Iowa 1972)

Iowa Code § 17A.23(3)

ISSUE III. IF THIS COURT REVERSES THE DISTRICT COURT, THE DEPARTMENT WILL STILL BE UNJUSTLY ENRICHED

High Dev. Corp. v. Star of the W. Co., 772 N.W.2d 15 (Iowa App. 2009)

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ISSUE IV. THE DEPARTMENT'S "PUBLIC POLICY" STATEMENTS ARE UNFOUNDED OR NONSENSICAL

Iowa Code 17A.1(3)

Iowa Admin. Code r. 441-7.9(1)

ISSUE V. CROSS-APPEAL ARGUMENT- MRS. ENDRESS SHOULD BE AWARDED ATTORNEY FEES PURSUANT TO IOWA CODE § 625.29

Branstad v. State ex rel. Nat. Resource Commn., 871 N.W.2d 291, 294 (Iowa 2015)

Iowa Admin Code r. 441-7.9(7)

Iowa Code § 481A.151(2)

Iowa Code 17A.11(1)(a)

Iowa Code 17A.11(1)(b)

McCracken v. Iowa Dept of Human Services, 595 N.W.2d 779 (1999)

ROUTING STATEMENT

Pursuant to Iowa R. App. P. 6.1101(2)(a), This case should be retained by the Supreme Court because it presents substantial constitutional questions as to the validity of administrative rules that violate procedural due process of the Appellant and are unconstitutionally vague. Additionally, this case presents questions of first impression about the validity of these specific regulations pursuant to Iowa R. App. P. 6.1101(2)(c). Given that this case is about the State pilfering money *earned* by child care providers who provided child care services to vulnerable populations, this case also presents urgent

issues of broad public importance in accordance with Iowa R. App. P. 6.1101(d).

STATEMENT OF THE CASE

This case is about the right of the Iowa Department of Humans Services (Department) to promulgate or enforce a rule which allows the confiscation of all the money (recoupment) earned by a child care provider during an *appeal* of a "Notice of Decision." To be clear, the money the Department claims it can recoup is money the provider was paid for child care services rendered during the pendency of an appeal (from notice to final ruling in this case - $16,001.94) and recouped merely for appealing a decision adverse to her. The Department believes that the Iowa Code and administrative rules allows them to reclaim all money paid to a childcare provider during an appeal, thus making the child care provider an indentured servant to the State. The District Court ruled that the Department exceeded its authority and that those same rules are unconstitutionally vague and constitute other due process violations. Furthermore, because the Department's actions are so egregious and denied Mrs. Endress' fair process, she should be awarded attorney fees pursuant to Iowa Code § 625.29 (cross-appeal).

STATEMENT OF THE FACTS

The Appellant, Terri Endress (Mrs. Endress), has been providing childcare services for about a decade. Admin R. p. 102. App. p. 118. Mrs. Endress began as an unregistered child care provider, was encouraged by the Department to become a Category A provider registered with the Department and eventually became a registered child care Category B provider on May 24, 2012. Admin. R. p. 103-105. App. p. 119-121. This meant that no more than 12 children could be in her care at any one time. Iowa Admin. Code r. 441-110.9(1)(e).

The Child Care Assistance Program is a federal- and state-funded program designed to provide child care to families who could otherwise not afford it. Providers such as Mrs. Endress provide child care under the CCA Program as per Child Care Assistance Provider Agreements. *See*, e.g, Admin. R. p. 175-179. App. p. 191-195. Mrs. Endress filled out Child Care Assistance Provider Agreements every two years while enrolled in the Child Care Assistance Program. Admin. R. p. 175-179. App. p. 191-195. The "Child Care Assistance Provider Agreement" (Agreement) does not require a provider to pay back money received for services rendered during an appeal. *Id.* However, there is a "Repayment" requirement which states that, "… I understand that I may have to re-pay money received in error or as a result of fraudulent

billing.". Admin. R. p. 179. App. p. 195. The Agreement also states that the childcare provider has the status of an independent contractor. Admin. R. p. 179. App. p. 195.

On July 17, 2014, the DHS issued a Notice of Decision which stated that Mrs. Endress submitted claims for payment to which she was not entitled. Admin. R. p. 310. App. p. 326. The notice states in the boilerplate that, "You may keep your benefits until your appeal is final or through the end of your certification period if you file an appeal …. Any benefits you get while your appeal is being decided *may* have to be paid back if the Department's action is correct." *Id.* at p. 3. (emphasis added). Admin. R. p. 312. App. p. 328. The notice did not accuse Mrs. Endress of fraud. Mrs. Endress continued receiving payment for services rendered as a child care provider during her appeal of the alleged overpayment. Admin. R. p. 313. App. p. 329.

On July 31, 2014, the DHS provided Mrs. Endress notice that she had timely appealed the July 29, 2014, Notice of Decision. Admin R. p. 314. App. p. 330. Again, this notice stated, "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." Admin. R. p. 314 (emphasis added). App. p. 330.

A telephonic hearing was held on September 25, 2014, on the allegation that Mrs. Endress had overbilled the Department. Admin. R. p. 316. App. p. 332. In that Decision ALJ Martin Francis concluded that Mrs. Endress had made a billing error. Admin. R. p. 263. App. p. 279. It was specifically found that Mrs. Endress did not commit fraud. Admin. R. p. 264. App. p. 280. However, Judge Francis found that the decision of the DHS was supported by the evidence that she had ***mistakenly*** billed for more children in her care than allowed and terminated her Child Care Assistance Provider Agreement. Admin. R. p. 264. App. p. 280.

On November 10, 2014, Mrs. Endress requested an appeal to the director and on November 21, 2014, the director sustained the decision of ALJ Martin. Admin. R. p. 319-320. App. p. 335-336. Mrs. Endress did not attempt to renew or reapply for her Child Care Assistance Agreement at that time. Admin. R. p. 116-117. App. p. 132-133. No notice of "Notice of Child Care Assistance Overpayment" was sent to her at that time. Admin R. p. 118. App. p. 134. Mrs. Endress was never and has never been advised the amount she had mistakenly billed the Department. Mrs. Endress estimates that amount to be, at maximum, $623.28 and likely much less.

This $623.28 estimate was first calculated by Mrs. Endress during the agency appeal and used throughout these proceedings. Admin. R. p. 38. App.

p. 54. The Department never challenged this estimate; however, Mrs. Endress does not concede that it ever owed the Department $623.28, but rather only that this is the ***absolute most*** she could have overbilled the Department.

This concluded the 2014 proceedings.

In 2017, Mrs. Endress applied for a new Child Care Assistance Agreement and was accepted as a provider under that program. Admin. R. p. 117. App. p. 133.

On April 3, 2017, Mrs. Endress was sent a "Notice of Child Care Assistance Overpayment" which stated that she owed $16,0001.94 for the months of July 29, 2014 to November 23, 2014, the appeal period from the prior action in 2014. Admin. R. p. 376. App. p. 392. This 2017 Notice was the first time the Department attempted to collect on the *recoupment* (not the overbilling – the estimated maximum of $623.28 she mistakenly billed) it states the Department was owed in 2014.

The only improperly charged billings on the part of Mrs. Endress occurred in 2011-2013 according to the November 3, 2014, Proposed Decision. Admin. R. p. 165. App. p. 181. As described above, Mrs. Endress estimates the maximum accidental overcharge to be no more than $623.28, however she has never received any notice of what the Department claims she actually, mistakenly, overbilled the Department. Admin. R. p. 38. App. p. 54.

The April 3, 2017, "Notice of Child Care Assistance Overpayment" demanded repayment of $16,001.94 for the period of July 29, 2014 to November 23, 2014. Admin. R. 376. App. p. 392. From July 29, 2014 to November 23, 2014 is when Mrs. Endress continued to work with the knowledge and permission of the Department while her appeal was pending.

The "Notice of Child Care Assistance Overpayment" also claims that Mrs. Endress is being charged the $16,001.94 based on "A mistake made by a provider that caused DHS to pay the provider incorrectly for child care services." Admin. R. p. 376. App. p. 392. In fact, there was no overpayment identified nor any mistaken payment identified. She was paid only for child care services actually performed. The November 23, 2014, "Notice of Child Care Assistance Overpayment" specifically provides the right to appeal the decision. Admin. R. p. 377. App. p. 393.

Mrs. Endress appealed the April 3, 2017, "Notice of Child Care Assistance Overpayment" and a hearing was held on the matter on August 8, 2017. Admin. R. p. 62. App. p. 78.

The Department relied heavily on Iowa Admin. Code r. 441-7.9(3) during the hearing which states, "… excess assistance paid pending a hearing 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 hearing decision."

During the August 8, 2017, hearing the representative from the Department noted that Mrs. Endress did not contest the amount of the money that was paid to her during the appeal period and that "… the 16,000 is an accurate calculation, and it is the only appealable piece for this appeal …." Admin. R. p. 80. App. p. 96. Mrs. Endress did not argue the amount of money paid to her during the 2014 appeal. Admin. R. p. 207. App. p. 223.

The representative for the Department also stated that its "interpretation [is that] we're appealing [an] overpayment calculation," as opposed to any argument regarding authority or constitutional matters. Admin. R. p. 85. App. p. 101.

The representative for the Department stated, "I am prepared to talk about the overpayment appeal today, not the – all the laws and rules regarding the administrative rule process." Admin. R. p. 87. App. p. 103.

The representative for the Department stated during the hearing that, "Your Honor, this is outside of my scope, and outside the scope of the appeal. I'm prepared to talk about the overpayment calculation, which is our understanding the only appealable issue …," to which the ALJ responded, "… I need to let Mr. Nelson make a professional record that he needs to on issues

that could potentially be addressed in judicial review, even though I can't consider them." Admin. R. p. 88. App. p. 104.

During the examination of Mrs. Endress during the hearing the Department representative objected because, she didn't "… see how this is relevant to the overpayment." Admin. R. p. 123. App. p. 139.

On September 7, 2017, ALJ Amanda Atherton affirmed the decision of the Department. Admin. R. 32. App. p. 48. In that decision ALJ Atherton stated, "I am tasked with determining whether the Department complied with applicable rules, not whether those rules are valid …," and found them preserved for judicial review. Admin R. p. 32. App. p. 48. ALJ Atherton also stated she could not address Mrs. Endress' constitutional arguments for the same reason. Admin. R. p. 31. App. p. 47.

Mrs. Endress appealed to the Director of the Department and on October 20, 2017, the Director affirmed the ALJ's proposed decision in the "Final Decision." Admin. R. 1-3. App. p. 17-19. The Director found, "A Proposed Decision was issued stating the Department correctly computed and established a claim for overpaid child care assistance." Admin. R. at p. 1. App. p. 17. The Director again cited Iowa Admin. Code r. 441-7.9(3) which states, "This recovery is not an appealable issue." *Id.* The Director also specifically noted that agencies lack the authority to decide constitutional and due process

arguments, noting they were preserved for judicial review. *Id.* at p. 2. App. p. 18.

On November 15, 2017, Mrs. Endress filed her Petition for Judicial Review. App. p. 5. After both parties had an opportunity to file briefs, a hearing was held on the matter on May 4, 2018. See Petitioner's "Brief in Support of Judicial Review," (March 16, 2018) App. p. 410.

The District Court issued its "Ruling on Petition for Judicial Review" (Ruling) on July 12, 2018 and reversed the decision of the Department. App. p. 489. However, the District Court denied Mrs. Endress' requests for attorney fees pursuant to Iowa Code § 625.29. On July 27, 2018, Mrs. Endress filed a motion to expand or enlarge the District Court's decision on attorney fees. App. p. 520. *See also*, Petitioner's "Reply." App. p. 526. This motion was denied on August 6, 2018. App. p. 529.

On August 7, 2018, the Department appealed the District Court's July 12, 2018 Ruling. On August 8, 2018, Mrs. Endress filed a cross-appeal regarding the District Court's decision denying attorney's fees.

ISSUE I. MRS. ENDRESS WAS DENIED DUE PROCESS

Preservation of Error

Mrs. Endress agrees with the Department that this matter was preserved.

Standard of Review

Mrs. Endress disagrees with the Department. In cases where the Supreme Court is tasked with reviewing matters involving the constitutionality of agency action, the review is *de novo*. *Brummer v. Iowa Dept. of Corrections*, 661 N.W.2d 167, 171 (Iowa 2003).

Brief and Argument

A. Mrs. Endress has an interest in money she earned as a child care provider

The Department's first fallacy is that it describes the money paid to providers for rendering child care services as a "benefit." Dept. Brief p. 27. This implies that the money paid to providers is gratuitous welfare and thus justifies "recouping" when providers (as beneficiaries as the Department seems to contend) are not qualified to receive benefits.

Providers are not beneficiaries. The Department so much as admits this when it argues out of both sides of its mouth stating, "… the Provider is not the intended recipient of assistance …." Dept. Brief p. 29. The Department cannot have it both ways. A provider cannot receive a benefit but not be the intended beneficiary.

As the District Court appropriately describes, "[Mrs. Endress] is not claiming that her right to services (benefits) has been denied. [Mrs. Endress] is claiming that DHS is infringing *on her right to payment as a provider for*

rendering those services ….” Ruling on Petition for Judicial Review (Ruling) p.9 (July 12, 2018). App. p. 489. (Emphasis and parenthetical added).

Relying on *Perry v. Sindermann*, the Department declares, “A person’s interest in a government benefit is a property interest subject to due process protection only if the entitlement is supported by statute or rules.” Dept. Brief p. 27. This is absolutely ***not*** what *Perry v. Sindermann* states.

The Supreme Court in *Sindermann* states, “… ‘property’ denotes a broad range of interests that are secured by ‘existing rules or understandings.’ [citations omitted] A person's interest in a benefit is a ‘property’ interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit.” *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). The U.S. Supreme Court goes on to state that a written contract with explicit tenure provision is evidence of an entitlement and even implied contracts potentially confer a right.[1] *Id*. at p. 602.

[1] Even if Mrs. Endress is not found to have a statutory-created interest in the money she earned during the appeal, Mrs. Endress did request equitable relief in the form of unjust enrichment. The District Court declined this analysis however as a remedy at law existed. Should this Court dispose of all remedies at law in this matter, Mrs. Endress encourages this Court to find that an implied contract existed after July 29, 2014, (the effective date of the Notice of Decision Admin R. 314, App. p. 330) because Mrs. Endress continued *by Department’s invitation* to provide child care services on behalf of the Department.

Certainly, a child care provider who was *invited* by the Department to provide services and that provider did, in fact, provide those services has a property interest in the money she was paid to provide those services. Mrs. Endress isn't claiming a right to continued or potential employment, she is claiming the right to keep wages earned. *See also* Iowa Code Chapter 91A.

This is especially true as the District Court found that the Legislature did create a property interest in CCA provider income in Iowa Code § 237A.13(4) which states, "[t]he department *shall* remit payment to a provider within ten business days of receiving a bill or claim for services provided." Iowa Code § 237A.13(4). (Emphasis added). Ruling on Petition for Judicial Review p. 9. (July 12, 2018). App. p. 489.

The District Court also found that the Department's own rules create a mandate in that no "… license, registration, certification, approval or accreditation [shall] be revoked or other proposed adverse action be taken pending a final decision on appeal." *Id.*

While the Department states that a "… state agency's procedural rules cannot by themselves serve as the basis for constitutionally protected property interest," the cases cited by the Department again do not support such a statement. Dept. Brief p. 27.

In *Clemente v. US*, cited by the Department (*Id.*), the 9th US Court of Appeals reasoned that an Air Force regulation wasn't restrictive enough on decision making to create a property interest, as the base commander was given absolute discretion regarding the outcome of a review. *Clemente v. U.S.*, 766 F.2d 1358, 1365 (9th Cir. 1985). Similarly, in *Bills v. Henderson*, also cited by the Department (*Id.*), the Sixth Circuit reasoned that when determining whether a prison regulation created a constitutionally protected interest, the question hinged on whether the regulations in question limit a prison official's discretion regarding the forfeiture of benefits. *Bills v. Henderson*, 631 F.2d 1287, 1293 (6th Cir. 1980).

Here the Department rule creates a clear line limitation in that no "… license, registration, certification or approval or accreditation [shall] be revoked or other adverse action be taken pending a final decision on appeal." Iowa Admin. Code r. 441-7.9. This provision certainly limits the discretion of the Department and in turn creates an expectation with providers who enjoy a CCA certification that no action will be taken against a provider pending an appeal. In fact, the Department has no discretion pursuant to Rule 7.9 as written.

This is also in line with Iowa Admin. Code r. 441-7.9's enabling statute, Iowa Code Chapter 17A, which defines contested case as "… a proceeding …

in which the legal rights, duties or privileges of a party are required by Constitution or statute to be determined by an agency *after* an opportunity for an evidentiary hearing." Iowa Code § 17A.2(5). (Emphasis added). Not only does the Department's own rule eliminate its discretion in determining whether Mrs. Endress has an interest in her CCA agreement, but so does Iowa Code Chapter 17A.

The Department complains that the District Court's conclusion that a protected interest is created in a provider's right to get paid when the Legislature specifically denied such an entitlement to the families who enjoy the program is flawed. Dept. Brief p. 29.

Mrs. Endress disagrees.

The Child Care Assistance Program is a welfare program with limited funds. It makes sense that the Legislature would want the option to limit the entitlement to a fund which is both gratuitous (as to beneficiaries) and potentially limited financially.

However, it would be both unconstitutional and contrary to justice for the Legislature to limit the right *of providers of that welfare program* from being paid with CCA beneficiary funds (via the Department) as a provider *who is chosen* by the beneficiaries to provide child care services. If funds are available to the beneficiary, the beneficiary may choose with what provider to

spend them. If the beneficiary isn't getting benefits, the provider isn't getting paid. It is the beneficiaries who may potentially exhaust the fund. The provider depletes nothing.

No entitlement is created in beneficiaries because the statute acknowledges CCA funds might run out. Iowa Code § 237A.13. However, this does not mean that providers should not be paid for providing said services when the CCA fund is solvent. The Department has never claimed Mrs. Endress recoupment was based on a lack of CCA funds or that the beneficiaries who chose Mrs. Endress' child care services pending appeal in 2014 were ever deprived of their CCA funding for *any* reason, including CCA fund insolvency.

Regardless, the District Court found, the language of Iowa Code § 237A.13(4) and the Department's own regulation creates a requirement that CCA providers be paid. Ruling on Petition for Judicial Review p. 9. (July 12, 2018). App. p. 489.

Despite the Department's argument that "no provider rights are articulated [in Iowa Code § 237A.13]," that code section provision that "The department shall remit payment within 10 days …," demonstrates a clear Legislative intent that providers *shall* be paid. Iowa Code § 237A.13(4). That

same section requires the Department to establish rates which are competitive to incentivize providers to become registered. *Id.*

In short, provider rights are articulated in Iowa Code § 237A.13 and stated in such a manner by the Legislature to encourage that providers are both timely and competitively compensated for their work on behalf of the State.

It is also worth noting, again, that CCA providers do not deplete CCA funds, beneficiaries do. Funds are merely paid to the CCA providers for services rendered on behalf of CCA beneficiaries based on the beneficiary's choice of provider.

The District Court found that Iowa Code § 237A.13 requires the Department to pay providers for services provided. Ruling p. 9. App. p. 497. The District Court also found that the rule promulgated by the Department required that Mrs. Endress be paid as a provider, quoting Iowa Admin. Code r. 441-7.9 which states, "Assistance … shall not be suspended, reduced, restricted, or cancelled, nor shall a license, registration, certification, approval or accreditation be revoked or other proposed action be taken pending a final decision on appeal." Ruling p. 9. App. p. 497.

The Department attempts to avoid these statutes and regulations by stating that providers in Mrs. Endress' situation are not real providers, but only self-designated or "self-espousing providers". Dept. Brief. p. 23. This

brings the Department to the absurd conclusion that if Mrs. Endress is allowed to recover that any person could just start accepting CCA children and bill the department expecting payment without restriction or qualification. *Id.*

Only those persons who have been vetted and approved by the Department can possibly bill the CCA program. Nothing in this matter diminishes the right of the Department to perform record checks or other qualifying metrics from being performed. The focus of this case is solely about whether a provider who has been *approved by* the Department to provide child care services and was *allowed by* the Department to keep working pending an appeal, to keep the money she earned during that appeal.

The far more logical conclusion is that providers appealing a decision remain a provider as demanded by the Department's own rule that a registration shall not be revoked pending a final decision which aligns with the processes demanded in Iowa Code Chapter 17A. Iowa Admin. Code r. 441-7.9. If the Department is paying federal CCA funds to providers who are not *"real"* providers as it claims, the Department has far greater problems than trying to protect its business model of retroactively reframing services rendered by providers into regulated servitude.

The Department also claims that it should not have to pay these providers because they are not meeting the minimum requirements of the

CCA program. There is absolutely no claim whatsoever that the services provided July 17, 2014 to November 17, 2014 – the dates the appeal was pending – were performed in violation of any statute or regulation whatsoever. The only claim that the Department is making is that it (meaning a sole social worker and not a presiding officer as required by Iowa Code § 17A.11) terminated Mrs. Endress' agreement and therefore she could not have provided services per that agreement, even though the Department specifically invited Mrs. Endress that, "You may keep your benefits until an appeal is final …." Admin. R. p. 315. App. p. 330.

Furthermore, the Department's decision to "recoup" money already paid to a child care services provider – again, money paid to Mrs. Endress by choice of the *beneficiaries* of the program and with the approval and knowledge of the Department – does absolutely nothing to make those services rendered during the appeal period safer or somehow retroactively improve the quality of the child care. Recoupment only serves to line the coffers of the Department by depriving a beneficiary of their choice of provider and stealing from a person who provided a valuable and compliant service to the intended recipients of this government program.

If the Department wanted to shut down a CCA provider because it had legitimate safety concerns (i.e., did not meet minimum requirements) Iowa

Code §17A.18A provides the method to do this. However, shutting a provider down due to safety concerns would undermine the Department's true goal which is to lure a provider into a calculated scheme to exploit them into providing unpaid services. There is a high probability that when the Department applies for federal and state funding, they are taking credit for these "unreal" services and "recouped" monies.

B. The Department did not provide Mrs. Endress adequate notice.

The Department urges that the notice provided to Mrs. Endress stated, "… that if DHS did prevail …," then she would be subject to recoupment as she did not have a valid CCA provider agreement during the appeal period. The Department claims that the notice provided due process to the provider by notifying her that she was operating outside of a CCA agreement, and if she did lose her appeal, then this would constitute a billing error …." Dept. Brief at p. 34. This is a generous but wholly inaccurate summary of what the cited notice said. Admin. R. p. 310-312, App. p. 326-328.

The Notice states that, "You have submitted claims for payment for which you are not entitled." Admin. R. p. 310, App. p. 326. This "payment" refers to the estimated maximum of $623.28, (which was never claimed nor confirmed) Mrs. Endress was found to have accidently billed for prior to July 29, 2014; not the $16,001.94 the Department attempted to "recoup" from

CCA services she provided during her appeal period – July 29, 2014 to November 23, 2014. The Department could not have given Mrs. Endress notice of the $16,001.94 because she had not yet exercised her right to appeal.

The Notice does state that "This action means you are no longer eligible to receive CCA payments …." Admin. R. p. 310. App. p. 326. However, the boilerplate document assures, "You Have the Right to Appeal." Admin. R. p. 312. App. p. 328. This section goes onto state that "You may keep your benefits until an appeal is final …," and that "Any benefits you get while your appeal is being decided *may* have to be paid back if the Department's action is correct." *Id.* Again, Mrs. Endress believed this "payment" refers to the estimated maximum of $623.28, since that was payment referenced in the actual front page of the notice. Admin. R. p. 310. App. p. 326.

Nowhere does this notice state that Mrs. Endress will be "operating outside of a CCA agreement" if she appeals, nor does it state that any money Mrs. Endress earns during an appeal period, for actual services rendered, will be considered a billing error as the Department contends. Dept. Brief p. 34.

The Department argues "… when one document is used to convey appeal rights to different appellants, the language used to convey the general message may include synonyms, or slightly different phrasing, so the appeal right message may be effectively understood by a broader class of appellants."

Dept. Brief p. 41. This is a bold statement, one for which the Department cites no authority and a sentiment which would provide a dangerous precedent for what would appear to be *generalized* notice. In fact, generalized notice offends the notice requirements of Iowa Code 17A which required "A short and plain statement of the matters asserted" and "A reference to the particular sections of the statutes and rules involved" among other requirements. Iowa Code § 17A.12(2).

The District Court found that this simplified language in the notices which is intended to try to encapsulate notice to all potential recipients – whether parents or providers and perhaps others – is "impractically unspecific." Ruling p. 14. App. p. 502.

The District Court points specifically to the use of the word "benefit" citing that the agreement to which providers are bound refers to "fees," "payments" and "money received," and that the use of this different terminology is "fatal" to the claims of the Department. Ruling p. 14. App. p. 502.

The District Court also acknowledges that the phrase "may have to" pay back does not provide notice, "… that all money she *earned* during the pendency of the appeal would be required to be paid back to DHS …." Ruling p. 14. App. p. 502.

Furthermore, no sane person would expect, whether layman or attorney, that a person would be penalized for appealing a decision. Nor would a person expect that penalty to be the confiscation of money *earned* through labor. The very premise offends all notions of American due process (that one ought to not have to pay - much less be penalized - to appeal a decision adverse to them) and notions of equity (that one ought to be paid for their work). Because of the extraordinary nature of the confiscation, if the Department is going to give notice that they intend to violate one of these notions, it must do so clearly.

This unspecified, generalized notice that the Department appears to advocate simply does not allow providers sufficient warning (if any) for the action to be taken against them. In fact, Mrs. Endress would contend notice indicates the opposite – that a provider can simply appeal the decision adverse to them.

C. The recoupment rules are unconstitutionally vague

The District Court engages in an extensive analysis of the regulations that the Department contends allows for "recoupment" and concludes that, "… Petitioner could not divine (nor could any provider) what risks she was assuming from these contradictory rules." Ruling p. 19. App. p. 507.

The Department, in response engages in a cyclical argument which defies the due process the Department claims its rules are intended to promote.

The Department claims because a sole social worker unilaterally decided on July 17, 2014, that Mrs. Endress was in violation of a Department rule, that all of the child care services she provided on behalf of the Department at the Department's invitation thereafter, really did not occur because the Department ultimately found that she was, in fact, in violation of a Department rule four months later. Dept. Brief p. 53-54.

The Department claims:

- Mrs. Endress really didn't provide child care services after July 17, 2014. Dept. Brief p. 53.
- The Department really didn't pay Mrs. Endress for those services which did not really occur after July 17, 2014, but rather money in the exact amount Mrs. Endress billed was simply "provided" to her. *Id.* at p. 54.
- It was Mrs. Endress' "error" for accepting money she earned by providing services to the Department which the Department said she could continue to receive until the appeal was final. *Id.*
- To boot, Mrs. Endress was really in "error" for not *reporting* that she had been "provided" all this money to which she was not entitled even though no final disposition yet existed. *Id.*

The Department should be embarrassed by the level of deniability in which it is willing to engage to deprive this woman of her hard-earned money.

The Department encourages this Court to heed the use of the word *shall* - that is until that word becomes inconvenient to them. Dept. Brief p. 56.

For instance, Iowa Code § 237A.13(4) says "The department *shall* remit payment to a provider within ten business days of receiving a bill or claim for services provided," and that "… the department *shall* notify the provider of the error … before issuance of payment to the provider." While the Department claims its regulations are intended to mirror 237A.13(4) (Dept. Brief p. 56), recoupment flies in the very face of Iowa Code Chapter 237A's explicit demands that providers be paid. Furthermore, the Department confesses to violating this demand stating, "[Recoupment] is the one time where the DHS pays a provider who doesn't have an approved CCA agreement first …." Dept. Brief p. 64.

In fact, the crux of the District Court's finding that these regulations exist in "total ambiguity" relies on the Department's own rule which 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 (17A). (Emphasis added).

While Rule 170.9 states that all overpayments are subject to recoupment, the Department makes the fatal presumption that payments made to a provider for services rendered during an appeal constitutes an "overpayment" or an "excess." Iowa Admin. Code r. 441-170.9.

The District Court reasoned that because Rule 7.9 requires the DHS not to revoke Mrs. Endress' agreement until *after* a final decision is reached, i.e. after an appeal, that any assistance paid during the appeal thus was not "excess" or an "overpayment." Ruling p. 19. App. p. 507.

The Department's whole argument rests on its conclusion that Mrs. Endress did not have a valid CCA agreement during the appeal period. Dept. Brief p. 53. The District Court's finding rests, in part, on its conclusion that the Department's own rules (in addition to statute) *prevents* the Department from revoking Mrs. Endress' agreement until a final decision is made and thus Mrs. Endress' agreement could not have been invalidated. Ruling p. 19-20. App. p. 507-508.

The Department allowed Mrs. Endress to continue billing, so some sort of "agreement" must have existed during the appeal period.

In short, it is impossible by statue, regulation and the fact that the Department paid Mrs. Endress for services rendered, that Mrs. Endress did

not have a CCA agreement with the Department pending her appeal. Ruling p. 19-20. App. p. 507-508.

The Department complains that the District Court failed to look at these rules in their entirety, however, it is the Department that is asking this Court to ignore the subsection (Rule 7.9(a)(1)) behind the curtain. Dept. Brief p. 61. The interplay of these rules confounds even attorneys, much less persons with no legal training. As such, it does not provide fair notice that the Department intended to recoup *all* money *earned* by a provider pending an appeal.

As the District Court found, "… these rules allow for recoupment of all payment received during the pendency of an appeal, while also forbidding it …. Petitioner could not divine (nor could any provider) what risk she was assuming from these contradictory rules. It is impossible for DHS even to determine what recoupment options they have." Ruling p. 20. (July 12, 2018) App. p. 508. This Court should find accordingly.

ISSUE II. THE DEPARTMENT DOES NOT HAVE THE AUTHORITY TO PROMULGATE RECOUPMENT RULES OR POLICIES.

Preservation of Error

Mrs. Endress agrees with the Department that this matter was preserved.

Standard of Review

Mrs. Endress disagrees with the Department. This Court has said, "In reviewing the decision of the district court, we must apply the standards set

forth in Iowa Code § 17A.19(10) and determine whether our application of those standards produce the same results as reached by the district court. *ABC Disposal Sys., Inc. v. Dept. Of Nat. Resources*, 681 N.W.2d 596, 601 (Iowa 2004). In the case at bar, the District Court reviewed whether the Department had the authority to promulgate and enforce recoupment rules for errors at law. This should be the same standard used by the Supreme Court in reviewing the agency action.

Brief and Argument

As the District Court noted, agencies do not have any inherent power, rather their powers are derived from statutes. Ruling at p. 20, citing *Branderhorst* and *Brakke.* Rules that exceed a statutory grant are invalid. Ruling at p. 20-21, citing *Iowa Dept. of Soc. Servs. v. Blair*, 294 NW 2d 567 (Iowa 1980) App. p. 508-509.

In evaluating whether the agency exceeded it statutory grant in this case, the District Court first reviewed whether the Department was granted interpretive authority. Ruling p. 21. App. p. 509. Since Iowa Code Chapter 237A does not require any special expertise to interpret and because the Legislature did not expressly provide the DHS interpretive powers, the District Court concluded that the Legislature did not vest interpretative authority of Iowa Code § 237A in the Department. Ruling at p. 5, citing *Renda*

v. Iowa Civil Rights Comm'n, 784 NW.2d 8, 11-12 (Iowa 2010) App. p. 493. *See* also *Ramirez-Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 769 (Iowa 2016), also cited by the District Court, in which this Court said, "The fact the legislature has granted the commissioner authority to adopt and enforce rules necessary to the implementation of chapter 85 does not itself indicate the legislature has clearly vested the commissioner with authority to interpret it."

The Department disagrees, arguing that since Iowa Code § 237A states that the Department shall adopt rules "setting minimum standard to provide quality child care in the operation and maintenance of child care homes relating to the following … [] Administration," that the Department enjoys interpretive authority. Dept. Brief p. 50.

The Department also argues that since Iowa Code Chapter 17A also references the word "administration" to describe, "… regulation by the government in relation to the public …," that this further demonstrates that the legislature gave the Department a wide berth in "… developing and maintaining a program to distribute and regulate …," the CCA program. *Id.*

However, this Court has addressed a similar claim in *NextEra Energy Resources LLC*:

> The general assembly may have intended that the Board exercise sovereign authority in discharging its official function of effecting the purposes of chapter 476. However, the general assembly may also have intended that the Board ***merely***

> ***implement or <u>administer</u>*** the laws … without sovereign authority. Furthermore, ***the general assembly expressly subjected the Board to chapter 17A***, the Iowa Administrative Procedure Act, which specifically provides for "legislative oversight of powers and duties delegated to administrative agencies." Iowa Code § 17A.1(3). Therefore, because of the ambiguous definition of "govern" and the express reference to chapter 17A, we conclude under *Renda* that the general assembly did not delegate to the Board interpretive power with the binding force of law. *NextEra Energy Resources LLC v. Iowa Utilities Bd.*, 815 N.W.2d 30, 38 (Iowa 2012). (Emphasis added).

Clearly, the Legislature intended the Department to "merely implement or administer" Iowa Code Chapter 237A. This means that the District Court need not defer to the Department's interpretation of the statutory authority the Department claims authorizes recoupment.

The Department takes the "all or nothing" approach stating essentially that the Department must either be its own sovereign entity with unlimited power or it is only a tool to implement specifically what the Legislature demands. Dept. Brief p. 51.

The Department, once again, abandons all common sense, stating "… if every single thing that DHS is tasked with accomplishing in administering the state's child care programs was required to be specifically enumerated in the Iowa Code for DHS to have the authority to do its job … Iowa Code 237A would be a very voluminous chapter." Dept. Brief p. 51. This statement is completely opposed to case law and statute.

This Court has said, "… administrative agencies, do[ ] not possess common law or inherent powers, but only the powers which are conferred by statute." *Branderhorst v. Iowa State Hwy. Commn. on Behalf of State*, 202 N.W.2d 38, 41 (Iowa 1972).

Iowa Code § 17A.23(3) specifically 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 a statute, a grant of rulemaking authority shall be construed *narrowly*. (Emphasis added).

While the Department complains it needs a more flexible statute to "… adapt to the needs of the program," Mrs. Endress cannot believe that the Legislature would endorse or would have even endeavored to prescribe a policy which results in the DHS conning providers out of money they earned in providing child care services on its behalf. Furthermore, it is this type of "flexibility" which leads to, "unreasonable, arbitrary," and "capricious" abuses of discretion on the part of an agency. Iowa Code 17A.19(10)(n).

The District Court specifically found regarding Iowa Code Chapter 237 that:

> … There is no mention in the Code section providing DHS with the power to declare a billing error retroactively. In fact, the Chapter only contains instructions to pay, rather than to recover because of provider "error." This is particularly the case where [Mrs. Endress'] alleged "error" was pursuing the due process

> afforded her, and selecting the option to continue to provide services for DHS during that time, which DHS authorized and paid, finding no "error" in the bills. There is nothing in Iowa Code section 237A.13 that could reasonably support … provisions regarding recoupment. Ruling p. 22. App. p. 510.

The District Court specifically found regarding Iowa Code Chapter 17A that:

> … the Chapter does not have any provisions, anywhere, that mention – let alone allow – individuals being subject to reclamation of funds provided during the appeal. DHS has the authority to promulgate rules providing for appeals of agency decisions, but there is no authority for the recoupment rules …. Ruling p. 23. App. p. 511.

In total, the District Court found that "There is no language in the entirety of either Code Chapter that would allow DHS to create a method to claw back payments provided to child care providers for services rendered, or even discusses the possibility of it."[2] Ruling p. 22. App. p. 510.

The District Court provided an extensive analysis of the lack of authority of the Department to promulgate recoupment regulations, so much so that Mrs. Endress has little to add; except that since Iowa Code 237A.13(4) requires the Department pay a provider within ten days of receiving a bill or

[2] The Department claims the word "shall" in Iowa Code § 237A.13 "… indicate[s] that there are no circumstances under which recoupment is optional." Dept. Brief p. 64-65. Iowa Code § 237A.13 makes no mention of "recoupment" nor does any part of that statute reference taking money already paid to a provider during an appeal period. Iowa Code § 237A.13 certainly does not mandate "recoupment."

claim or notify a provider of an error, "… before an issuance of a payment;" and that Iowa Code 17A requires the "legal rights, duties or privileges or a party" be determined only "… after an opportunity for an evidentiary hearing," the recoupment rules are not only *not authorized* by statute *but exist in direct contradiction to law*.

ISSUE III. IF THIS COURT REVERSES THE DISTRICT COURT, THE DEPARTMENT WILL STILL BE UNJUSTLY ENRICHED

Preservation of Error

This matter was addressed by the District Court in its July 12, 2018, decision.

Standard of Review

Mrs. Endress disagrees with the Department. The standard of review for a District's Court equitable action is *de novo*. *High Dev. Corp. v. Star of the W. Co.*, 772 N.W.2d 15 (Iowa App. 2009).

Brief and Argument

The District Court found that there existed a contract, however that the contract did not establish a property right in the *majority* of the funds in question because of a provision allowing for the termination of the contract within ten days for breach. Ruling p. 11-12. App. p. 499-500. The Department does not appear to have appealed the District Court's finding that a contract existed.

The District Court also found, however, that Mrs. Endress' claim for unjust enrichment would not be barred for payment made after the contract had terminated. Ruling p. 25. App. p. 513. The District Court however, declined to exercise its equity jurisdiction since other remedies at law existed. Ruling p. 26. App. p. 514.

Should this Court find there is no basis in the other remedies at law articulated by the District Court, Mrs. Endress would request that her unjust enrichment be considered.

The doctrine of unjust enrichment is based on the principle that a party should not be permitted to be unjustly enriched at the expense of another or receive property or benefits without paying just compensation. *Credit Bureau Enters., Inc. v. Pelo,* 608 N.W.2d 20, 25 (Iowa 2000). Although it is referred to as a quasi-contract theory, it is equitable in nature, not contractual. *See Iowa Waste Sys., Inc. v. Buchanan County*, 617 N.W.2d 23, 29 (Iowa Ct.App.2000). It is contractual only in the sense that it is based on an obligation that the law creates to prevent unjust enrichment. *State, Dep't of Human Servs. ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 154 (Iowa 2001).

This Court has stated:

> In essence, these doctrines [including unjust enrichment] evolved from the most basic legal concept of preventing

> injustice. I Palmer, § 1.1, at 5. Thus, the idea of unjust enrichment is deeply engrained in our law and is widely applied. *Id*. at 2. It not only cuts across many areas of the law, such as contract and tort, "but it also occupies much territory that is its sole preserve." *State, Dept. of Human Services ex rel. Palmer v. Unisys Corp.*, 637 N.W.2d 142, 149 (Iowa 2001)

Unjust enrichment, "… may arise from contracts, torts, or other predicate wrongs, or it may also serve as independent grounds for restitution in the absence of mistake, wrongdoing, or breach of contract …. unjust enrichment is a broad principle with few limitations." *Id*. at 154, 155.

In the case at bar, Mrs. Endress was paid in 2014 for taking care of the children in her care for the period while her appeal was pending. In 2017, the Department has provided notice of its intention to collect that money. If Mrs. Endress is forced to pay back the Department for this period of time, four years later, for services she provided in compliance with all laws and regulations, this will constitute unjust enrichment to the benefit of the Department.

Mrs. Endress will have worked, cost free for the Department, for five months (July to November). Somehow, this five-months of regulation-compliant labor has turned the estimated *maximum* of $623.28 which might have been overcharged to Department, into a $16,001.94 debt.

The elements a plaintiff must prove to recover under unjust enrichment are that (1) the defendant was enriched by the receipt of a benefit; (2) the

enrichment was at the expense of the plaintiff; and (3) it is unjust to allow the defendant to retain the benefit under the circumstances. *Hunting Sols. Ltd. Liab. Co. v. Knight*, No. 16-0733, 2017 WL 2684337, at p. 2 (Iowa Ct. App. June 21, 2017).

In the case at bar, there can be no argument that the Department will be enriched if Mrs. Endress is required to pay this money back. The Department has stated that recouped money is placed into a fund that provides services under the Child Care Assistance Program. This means for every dollar recouped, it can provide twice the services, albeit at the expense of promoting a procedure which discourages good providers from protecting themselves and robbing those individuals of their hard-earned income.

Mrs. Endress on the other hand will be entirely deprived of five months of difficult work. Not only will Mrs. Endress be deprived of any profit she may have gained during that five months, but the overhead she takes out of those payments for staff, food, field trips and other incidentals will have to be taken out of her own pocket. Admin. R. 121-124. App. p. 137-140. As a result, Mrs. Endress will have lost out on much more than the $16,001.94 the Department claims they are entitled to take back. Admin. R. 122-124. App. p. 138-140.

Individuals, especially those who are providing important and difficult services on behalf of the government expect to be treated fairly. Individuals expect to truly be given a chance to prove their innocence before they are saddled with sanctions. Individuals in defending those privileges, expect t*o not have to pay for that opportunity.* Individuals do not expect to be placed in a position where they have two bad options – either shut down your business today or risk having to lose everything you earn over the course of the next few months. Most importantly, individuals expect that if they put in a day's – or in this case months' – work that they will be paid for it.

Mrs. Endress unintentionally overbilled the Department, at most, $623.28. She regrets that mistake. She would have happily paid back the department this amount, if asked. She never was. Instead, she was forced to defend herself and was required to pay a $16,000 penalty because of it - a penalty which is not reasonably related to any rule violation on her part but was levied only because she attempted to defend herself.

Mrs. Endress should not be forced to pay back the $16,001.94 she *earned* in 2014 for taking care of children on behalf of the State.

ISSUE IV. THE DEPARTMENT'S "PUBLIC POLICY" STATEMENTS ARE UNFOUNDED OR NONSENSICAL

Preservation of Error

There is no preservation of error on this issue as these are not decisions made by the District Court, however they are "issues" the Department inserts throughout its appeal brief.

Standard of Review

There is no standard of review. These arguments do not form the basis of the District Court's decision and the Department did not separately argue such matters but were rather inappropriately strewn throughout the Department's brief in attempt to invoke a potential response by the Court.

Brief and Argument

The Department's brief is strewn throughout with statements which are either subtle public policy arguments or otherwise *ad hominem* attacks. However, Mrs. Endress is concerned that they may raise substantive concerns. As such, Mrs. Endress will address these statements in this subsection as to not conflate the actual issues with these attempts by the Department to mislead this Court.

The Department claims that recoupment protects the "vulnerable population that CCA serves." Dept. Brief p. 66.

The beneficiary parents choose the provider to which their money goes, so any claim that providers are somehow depleting limited CCA funds during an appeal is simply not true. If a beneficiary parent were not allowed to "pay" their CCA funds to Mrs. Endress during her appeal, that money would necessarily have to go to another CCA-approved provider if the parent wished to continue to receive the benefits of the CCA program.

Furthermore, the Department has not claimed how recouping money paid to providers during an appeal *after the appeal is complete* somehow retroactively makes those services provided safer for children or somehow deprives the parents of child care services.

The Department explains that it allows providers to continuing billing after initial notice has been served because, "… this DHS practice provides a provider the ability to challenge a revocation, consider the chances of prevailing and decide whether to continue to claim CCA monies should the provider feel confident about prevailing on appeal." Dept. Brief p. 63-64.

Recoupment does not allow a provider to challenge a revocation. In fact, retrospectively attempting to collect money earned during an appeal deprives a provider of their due process. The District Court specifically found that the Department considered it an "error" when Mrs. Endress, "… was pursuing the due process afforded her …." Ruling p. 22. App. p. 510.

It is also worth noting that the recoupment money has nothing to do with the basis for the revocation – in Mrs. Endress' case, mistakenly billing the Department an estimated maximum of $623.28; but rather the money earned ($16,001.94) in compliance with all rules and regulations during the appeal required by Iowa Code Chapters 17A and 237A.

The Department also admits in this statement that it is forcing providers to take a risk in challenging the Department determination (made unilaterally by a social worker), essentially reducing the decision to appeal to "Do you feel lucky?" This policy and attitude flies in the face of Iowa Code Chapter 17A which is intended to "… increase the fairness of agencies in their conduct of contested case proceedings." Iowa Code 17A.1(3).

The Department explains that it allows providers to continuing billing because after initial notice is served because "it makes it more simple [sic] for everyone." Dept. Brief p. 63.

Obviously, recoupment makes nothing simpler. In fact, the Department allows providers to continue billing because it is required by Iowa Code Chapters 17A, 237A and the Department's own regulations. The simplest practice, in earnest, is to do what every court, agency and tribunal in this country has done since its inception and what Iowa Code § 17A and Iowa Admin. Code r. 441-7.9(1) demand, which is to allow a person who is facing

appeal a hearing and right to defend oneself before their interests are stripped from them.

The Department raises concerns that providers will attempt to bill for as many children as possible on an around the clock basis to maximize income. Dept. Brief p. 36.

If the Department, and more importantly the parents, are receiving child care services for the CCA money paid to providers, then Mrs. Endress does not see why this is a concern.

The Department states its regulations "… were not written with a focus on CCA providers, but rather on administering federal grant monies to eligible families." Dept. Brief p. 58.

Without providers receiving federal monies – either through the Department or directly from beneficiaries - there is no CCA program to benefit eligible families.

The Department claims that since "… the Provider is not the intended recipient of the assistance … for this reason, broad, general authority is provided to DHS with regard to administering the CCA provider program." Dept. Brief p. 29.

Mrs. Endress is not aware of any provision which creates broad and general authority to invent regulations outside the authority of the agency

against a class of persons affected by the regulation just because that class is not the intended beneficiary. In fact, "… administrative agencies, do[ ] not possess common law or inherent powers, but only the powers which are conferred by statute." *Branderhorst v. Iowa State Hwy. Commn. on Behalf of State*, 202 N.W.2d 38, 41 (Iowa 1972).

The Department claims that "... administrative appeals will be burdened with unmeritorious cases," and that "Many providers upon realizing they likely will lose their case, stop taking CCA payment and do private pay child care during their appeal period." Dept. Brief p.36, 58.

These are completely unsupported fact statements and Mrs. Endress suspects they are false assertions, particularly since the District Court found, "… Petitioner did not receive adequate notice in this case." Ruling p. 15. App. p. 503.

Again, the Department is admitting that it is advocating a policy that discourages appeals. This violates the Iowa Code Chapter 17A intent to "… increase the fairness of agencies in their conduct of contested case proceedings," and to make judicial review more accessible. Iowa Code 17A.1(3).

The Department claims it had "… no motivation … to encourage the Appellant to request CCA family benefits while simultaneously working to revoke her provider agreement." Dept. Brief p. 47.

If the recoupment provision is upheld, the Department will have received $16,000 of child care services for free. This is a clear motivation. Mrs. Endress also believes the Department likely uses recouped funds in its federal reporting.

The Department raises concerns that providers will stretch out cases and bad providers will be able to continue to provide child care. p. 37.

This statement is alarming for a number of reasons. By and large it is the Department that controls the length of the review. Indeed, there are no time limits on when the director of Department must issue a final decision. This means if the Department wished it could wait years to render a decision, thereby subjecting a provider to months of additional servitude created by recoupment.

In order to achieve the "… fairness of agencies in their conduct of contested case proceedings …," providers must be able to request continuances and pursue discovery where appropriate. Iowa Code § 17A.1(3). Administrative Law Judges and the Department Director have absolute discretion in allowing these motions. In fact, Mrs. Endress was denied

continued discovery in this case. Admin. R. p. 27, App. p. 43. The Department does not need to disincentivize providers from attempting to defend themselves or defending themselves fully and doing so offends Iowa Code Chapter 17A by discouraging providers from both defending themselves and from creating a record for judicial review. Iowa Code § 17A.1(3).

If the Department is genuinely concerned about the quality or safety of child care rendered, it has the power to immediately shut down a child care home. *See Iowa Code § 17A.178A* titled "Emergency adjudicative proceedings" which states that an agency may take immediate action, "… to prevent or avoid the immediate danger to the public health, safety or welfare …"

However, Iowa Code 17A.18A does not fit into the Department's business model because a provider who is not providing services is not subject to recoupment. It appears the Department believes it is better to deprive a provider of their due process and "make the most" out their CCA dollar through recoupment than protect the children the CCA is intended to assist.

The Department states that without recoupment, "... one must anticipate substantial negative outcomes from a fiscal responsibility standpoint." Dept. Brief p. 36. *The Department says that sometimes private interests must yield to the public good and that providers should "meet the*

minimum requirements for a CCA provider agreement," that meet "health standards" and "... who only request payments from the limited CCA budget for the actual care of children." Dept. Brief at p. 66-67. The Department also states that *"Here, the children were not receiving care that meets the minimum legal requirement."* Dept. Brief p. 69.

These are the clearest *ad hominem* attacks made by the Department.

The question is not about Mrs. Endress' guilt or innocence during the 2014 proceedings, especially in light of the fact that the Department could, at any time, shut down a provider's child care facility per Iowa Code § 17A.18A.

The question to be answered in this request for judicial review is whether in appealing that decision, should the Department be able to confiscate all the funds a provider earned during the appeal period – namely, July to November 2014. Ms. Endress did take care of children during that time. There has been no accusation that Mrs. Endress was in violation of any regulation or overbilled the Department during that period of appeal.

During the appeal period Mrs. Endress provided child care services to eligible beneficiaries of the CCA program. Those beneficiaries received the child care the program offers. Those beneficiaries chose Mrs. Endress to provide that care. If Mrs. Endress would not have been able to provide those

services, the beneficiaries would have chosen another qualified provider to provide child care services.

It is only because Mrs. Endress had an appeal pending that the Department could "recoup" these funds.

The "public good" to which the Department refers is solely its own attempt to double its money by exploiting the hard work of CCA providers who are only trying to defend themselves, preserve their businesses and accommodate CCA parents who depend on these child care providers.

The Department claims that if it is prevented from recouping that, "... the quality of child care in Iowa will deteriorate as revoked providers with no possibility of prevailing on appeal choose to give themselves an additional nine months to a year of CCA payments while their appeal moves through the system." Dept. Brief p. 68.

The appeal of Mrs. Endress, who was found only to have made a billing error of some undisclosed but very limited amount, took four months – beginning to end. Providers who are sent a "Notice of Decision" must post this decision at their child care center, giving parents notice and the right to find another provider if they are so inclined. Meanwhile, if the Department finds a serious safety risk, they can shut down a center per Iowa Code § 17A.18A.

Given all of these measures and options, if a provider does appeal and that appeal period does take even two years to conclude, services are still being provided to CCA beneficiaries and the Department is still able to pay providers to facilitate the CCA program. This argument makes no sense.

The Department claims that, "... administrative law judges will see a substantial increase in the number of appeals ... as providers attempt to delay final revocation disposition. Dept. Brief p. 68.

Again, if CCA benefits still reach the beneficiaries, then what does an increase in appeals matter? While ALJs and the courts may be remiss to see an increase in volume of appeals, this is not an appropriate basis on which to justify an unconstitutional and unauthorized confiscation by a government agency. Mrs. Endress doubts that recoupment has the far-reaching deterrence effect the Department claims it does. This is especially true since the District Court found, "… Petitioner did not receive adequate notice in this case," and Mrs. Endress is therefore not convinced providers are even aware of recoupment. Ruling p. 15. App. p. 503.

The Department also claims, "There will also be an increase in the need for Emergency Adjudicative Proceedings ... as providers who present serious risks to kids (and would not otherwise appeal) continue to provide

care and submit CCA billing knowing that there is no recoupment recourse when they eventually lose on appeal." Dept. Brief p. 68.

Mrs. Endress, as a child care provider, is aghast by this statement. Mrs. Endress has always believed that children, especially those who may be vulnerable, deserve quality care. *See* Admin R. p. 121-125. App. p. 137-141. If the Department is relying on its recoupment policy to deter "***serious risks to kids***," then the Department is engaging in behavior that is criminal. The undersigned is particularly concerned that the Department may overlook *serious risk* to lure providers into an appeal, knowing that those increased risk cases will be even more likely to result in a recoupment claim.

CONCLUSION

This case is not about whether Mrs. Endress billed the Department too much in 2014, or any alleged wrongdoings. This case is about whether a child care provider should be penalized – and penalized acutely - for appealing a decision adverse to her.

Recoupment does nothing to make child care more efficient, safer, nor does it equitably make the Department whole for any mistakes a provider might make. How does a maximum estimated billing error of $623.28 justify a government taking of $16,001.94? There simply is no way to reconcile this disparity.

The Department uses boilerplate documents – obviously used for beneficiaries and providers alike – which do not properly give notice of the egregious gamble a provider must make to pursue their statutory rights. While this may result from cavalier negligence on the part of the Department, the fact the Department never advised Mrs. Endress how much she actually overbilled the Department, but only billed her for the $16,001.94 she earned during the appeal, is outrageous. It may even indicate an intent to deceive. This creates confusion for the provider. Even in the Department's Brief on this matter, it is carefully drafted to make it appear the recoupment was somehow related to Mrs. Endress' billing errors rather than the $16,001.94 she earned while in compliance with all rules and regulations.

The District Court found that the Department did not give adequate notice of recoupment to Mrs. Endress, that regulations which allegedly allow for recoupment are contradictory and unconstitutionally vague and that the Legislature did not give the Department the authority to create rules that allow for it to seize all money earned by a provider during an appeal simply because that provider chose to appeal. While the District Court declined to address Mrs. Endress' unjust enrichment argument in lieu of other legal remedies, Mrs. Endress is certain that recoupment easily meets the criteria for such equitable relief.

It is unfortunate that the Department treats the individuals who jump through all the administrative hoops to provide childcare to needy children as if they are dirty thieves merely for trying to protect their rights and keep the money they earned. It is unfortunate that the Department seems more concerned about preserving avenues for revenue rather than administering programs such as CCA. Mrs. Endress will not allow herself to be exploited by a Department that apparently feels any means are justified to assure its continued existence, even slavery.

Mrs. Endress requests that this Court affirm the July 12, 2018, "Ruling on Petition for Judicial Review" and in lieu of such relief, or if otherwise deemed appropriate by the Court, find Mrs. Endress' was unjustly enriched.

ISSUE V. CROSS-APPEAL ARGUMENT- MRS. ENDRESS SHOULD BE AWARDED ATTORNEY FEES PURSUANT TO IOWA CODE § 625.29

Preservation for Review

As per Iowa Code § 625.29 Mrs. Endress requested attorney fees in her "Petition for Judicial Review" (Nov. 15, 2015). App. p. 5. On July 27, 2018 Mrs. Endress filed a "Request to Reconsider and Amend Finding on Denial of Attorney Fees Pursuant to Iowa Code § 625.29." App. p. 520. On August 8, 2018, Mrs. Endress filed a cross-appeal regarding the district court's decisions denying attorney's fees.

Standard of Review

"The standard of review [the Iowa Supreme Court] use[s] for cases involving a district court's interpretation of a statute is for correction of errors at law. [citation omitted] [This Court is] not bound by the district court's legal conclusions. [citation omitted]" *Branstad v. State ex rel. Nat. Resource Commn.*, 871 N.W.2d 291, 294 (Iowa 2015).

Cross-Appeal Brief and Argument

Iowa Code § 625.29 states in relevant part:

> … the court in a civil action brought by the state or an action for judicial review brought against the state pursuant to chapter 17A other than for a rulemaking decision, shall award fees and other expenses to the prevailing party unless the prevailing party is the state. However, the court shall not make an award under this section if it finds one of the following: … b. The state's role in the case was primarily adjudicative.

In the case at bar, the District Court found that the Department's role in this case was primarily adjudicative. Citing *Branstad v. State ex rel. National Res. Comm'n* the District Court stated:

> [I]f an agency's function principally or fundamentally concerns settling and deciding issues raised, its role is primarily adjudicative. ... As used in Branstad v. Natural Resource Commission, the term adjudication means "to settle finally (the rights and duties of the parties to a court case) on the merits of issues raised," to "enter on the records of a court (a final judgment, order, or decree of sentence). Ruling p. 27. App. p. 515.

The District Court further explained that, "Despite DHS's claims the existence of overpayment was 'non-appealable,' Petitioner was able to argue that her payments for services from July to November 2014 did not constitute overpayments." Ruling p. 28. App. p. 516.

The focus of the District Court's ruling is misguided. While the District Court bases its decision on what Mrs. Endress was "able to argue," the real test as to whether an agency's role is primary adjudicative is based what the agency did, not the prevailing party. According to case law, the question is whether agency settled, "… finally (the rights and duties of the parties to a court case) on the merits of issues raised." Ruling p. 27, citing *Branstad*. App. p. 515.

If the actions of the agency in this case are examined closely the rights and duties of the parties were not "settled" on the "merits raised" but rather sent on for judicial review. *Id.*

Administrative Law Judge Atherton stated in her Proposed Ruling, "I am tasked with determining whether the Department complied with the applicable rules, not whether those rules are valid. [Mrs. Endress'] arguments are grounds that can be raised on judicial review … I find they are preserved for that purpose *and decline to address them here.*" Admin. R. p. 31. App. p. 47. (Emphasis added). Judge Atherton's decision does not "… settle finally

(the rights and duties of the parties …) on the merits of the issues raised," but rather *preserves* them to be adjudicated at a later date.

The decision of the Director does go a bit further than the ALJ in stating that all the rules which form the basis of recoupment were properly adopted and thus valid. Admin. R. p. 1-2. App. p. 17-18. This statement however does not address the authority to promulgate rules or their constitutionality. The Director's decision too also acknowledges that, "As this review is conducted in conjunction with an administrative proceeding, the reviewer lacks jurisdiction over this matter. These issues are preserved for judicial review." Admin. R. p. 2. App. p. 18. Like Judge Atherton, the Director is also *primarily* preserving argument, rather than settling the rights and duties of the parties.

The Director's Decision also cites Iowa Admin. Code r. 441-7.9(7), which states: "This recovery is not an appealable issue." This was used by the Department at every stage in the proceeding. Admin. R. p. 1. App. p. 17. The Department, during the administrative hearing, argued that the calculation of the overpayment, "… is the only appealable piece for this appeal." Admin. R. p. 79-80, and again at Admin R. p. 84, 85, 87-88 and throughout the ALJ hearing. App p. 95-96 and 100,101,103-104.

The Department in its District Court brief gave special attention to Iowa Admin Code r. 441-7.9(7)'s limitation on appeals: It is particularly important to note the rest of this administrative rule: When the department action is sustained, excess assistance paid **pending a hearing decision shall be recovered to the date of the decision. This recovery is not an appealable issue.**" Dept of the Department of Human Services p. 21-22. (April 16, 2018). The Department goes on to state in that brief, "Petitioner's appeal is limited to contesting the 'computation of excess assistance," and does not include the right or ability to contest whether recovery of CCA assistance can be established." *Id.* at p. 22.

How can the Department claim its process was adjudicative, when its own rules bar an adjudication? The rule itself suggests recoupment is administrative in nature – simply a byproduct of the appeal process. According to the Department, there is no determination to be made, except how much is owed.

The only reason Mrs. Endress was likely granted an appeal was because her April 28, 2017 request was broad enough that argument as to the calculation of the recoupment might be raised. Admin. R. p. 389. App. p. 405. The representative of the Department was certainly not willing or prepared to discuss anything other than the calculation of the recoupment. *See* transcript

of the August 8, 2017, hearing in which the representative of the Department states, "Your Honor, this is outside of my scope, and outside the scope of the appeal. I'm prepared to talk about the overpayment calculation, which is our understanding the only appealable issue …" Admin. R. p. 88. App. p. 104.

The fact that the Department's regulation *explicitly bars appeals* separates the present case from the one in *Branstad*. In *Branstad* the statute and accompanying regulations which authorized departmental restitution, explicitly demanded that a person facing restitution receive a contested case proceeding. Iowa Code § 481A.151(2); *Branstad v. State ex rel. Nat. Resource Commn.*, 871 N.W.2d 291, 293 (Iowa 2015). In the present case, the Department argues (albeit inappropriately) and has explicitly regulated that recovery (recoupment) ***is not an appealable issue***. Iowa Admin. Code r. 441-7.9(7).

To be clear, Mrs. Endress never challenged the only "appealable" portion of Admin. Code r. 441-7.9(7) , i.e., the calculation of the recoupment:

> **ALJ Atherton:** You're saying [Mrs. Endress] doesn't argue with the amount calculated is that right?
> **Mr. Nelson:** Right.
>
> Admin. R. p. 207. App. p. 223.

There are other differences between the case bar and *Branstad.*

In *Branstad*, it was ultimately determined that Branstad did violate the restitution provision, but that the DNR miscalculated the penalty. *Branstad v. State ex rel. Nat. Resource Commn*., 871 N.W.2d 291, 293 (Iowa 2015). This left questions about whether Branstad was the prevailing party. This also left open questions of whether DNR had substantial evidence. *Branstad v. State ex rel. Nat. Resource Commn.*, 871 N.W.2d 291, 295 (Iowa 2015). In the case at bar, the District Court found that Mrs. Endress prevailed. Ruling at p. 26. App. p. 514. The District Court also found that the Department's case was not supported by substantial evidence. *Id.*

Furthermore, Mrs. Endress denies that the decision by Judge Atherton can be considered an "adjudication" by the agency.

Iowa Code 17A.11 requires that if an agency is a "real party in interest" to an action that an administrative law judge be made available as the "presiding officer." Iowa Code 17A.11(1)(a). This is opposed to 17A.11(1)(b) where the agency has discretion to preside over an adjudicative proceeding. The Legislature recognizes that in situations where agencies have a vested interest in the outcome – such as in this case involving the recoupment of thousands of dollars – the agency is made to advocate, not adjudicate.

Technically, Mrs. Endress could have attempted to appeal the, April 3, 2017, "Notice of Child Care Assistance Overpayment" directly to the District

Court based on the "non-appealable" nature of recoupment detailed in Iowa Admin. Code r. 441-7.9(7). However, Mrs. Endress is required to exhaust all remedies before requesting intervention from the District Court. Judge Atherton acknowledged this fact in the Proposed Decision, citing *McCracken v. Iowa Dept of Human Services*. Admin. R. p. 31. App. p. 47.

The problem with this procedural hurdle and its interplay with Iowa Code § 625.29 is that even when both the agency and the "prevailing party" are using the agency appeal system as a strawman to preserve a party's interests, it gives the false impression that adjudication was achieved. This creates a self-fulfilling quandary that renders Iowa Code § 625.29 toothless and insulates agencies from exposure by assuring that no average victim of agency misdeeds can afford the cost of the long and complicated appeals process. There must be an avenue for relief for those victimized by agencies.

CROSS-APPEAL CONCLUSION

The Department did not settle the rights and duties of the parties. In fact, both the ALJ and the Director waived Mrs. Endress on through to judicial review, each stating they didn't have the authority to address her concerns.

The Department has touted a regulation at every stage of the process that recoupment was not appealable. This is as good as the Department saying – *we will not adjudicate matters of recoupment*. While the Department likely

intended the "non-appealable" nature of Rule 7.9(7) to preclude any challenges to its recoupment authority, in this case, it served to pass the buck onto the district court.

The Legislature in passing Iowa Code § 625.29, obviously believed there were times when agencies would act outside the boundaries of their authority and in those cases the target of that agency action should be compensated.

In this case, the District Court found the Department regulations regarding recoupment to be unconstitutional and outside its authority. The District Court specifically labelled recoupment, "mission creep." Ruling p. 24. App. p. 512. The agency has attempted to prevent any appeal (i.e. adjudication) of recoupment and still believes it has the authority to impose indentured servitude on a provider while barring them from challenging that decision. Not only did the Department not adjudication the question of recoupment, it explicitly states that it will not. If there is any case where Iowa Code § 625.29 should apply, this is the one.

Mrs. Endress has spent tens of thousands of dollars to reverse this unauthorized and unconstitutional injustice and if the Department is not made to take heed of these providers' rights, it will be encouraged to expand this

scheme and continue its recoupment unhindered. Without having to pay legal fees, the Department will only have lost money which it has already spent.

Mrs. Endress is why Iowa Code § 625.29 exists.

Mrs. Endress respectfully requests this Court reverse the District Court's decision denying attorney fees pursuant to Iowa Code § 625.29.

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

1. This final brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1), because this final brief contains 12,957 words, excluding the parts of the page final brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This final brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f), because this final brief has been prepared in proportionally spaced typeface using Microsoft Office Word 2018 in 14-point Times New Roman.

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REQUEST FOR ORAL ARGUMENT

Mrs. Endress believes that the Court may benefit from being able to directly address any questions that may arise out the briefs and requests an oral argument for that purpose.

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ATTORNEY COST CERTIFICATE

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

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CERTIFICATE OF SERVICE

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

Tabitha Gardner
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on the 24th day of January 2019, in full compliance with the provisions of the Rules of Appellate Procedure.

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