IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 18-0189

JULIE PFALTZGRAFF

Appellant,

vs.

IOWA DEPARTMENT OF HUMAN SERVICES,

Appellee.

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

APPELLEE'S BRIEF AND CONDITIONAL REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF SERVICE

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ROUTING STATEMENT

Pursuant to Iowa Rule of Appellate Procedure 6.1101(2), the State believes this case should be maintained in the Supreme Court as it involves an issue of first impression.

STATEMENT OF THE CASE

Nature of the Case

This is the appeal of a judicial review challenging a final administrative determination that the Department of Human Services correctly computed its claim for recoupment of overpaid Child Care Assistance (hereinafter "CCA") to the child care provider (hereinafter "Appellant").

Course of Proceedings and Nature of Facts

(Administrative Contextual History)

On May 6, 2016, the Department of Human Services (hereinafter 'DHS') revoked the Appellant's child development home registration and the CCA provider agreement with an effective date of May 20, 2016. App. 224-226, 228-229. An administrative hearing was held on June 21, 2016 to address those two issues. Local DHS worker Chad Reckling represented DHS pro se. The Appellant was represented by attorney Trent Nelson. App. 230-235. Administrative

Law Judge Karen Doland, after hearing the case, issued a decision reversing the registration revocation, but affirming the revocation of the CCA provider agreement, modifying only to allow for reapplication for a CCA agreement at any time (as opposed to having to wait 12 months to reapply). Id.

The Appellant requested review of the Administrative Law Judge's decision by the Director of DHS. On September 23, 2016, Director Palmer affirmed Administrative Law Judge Doland's determinations with regard to both issues. App. 236-237.

The Appellant did not appeal the Director's Final Decision, so it became the final disposition with regard to the child development home registration and CCA provider agreement revocations. (Overpayment Procedural History – Instant Appeal)

After the Director's Final Decision disposed of the revocation issues associated with the child care home registration and CCA provider agreement, a Notice of CCA Overpayment was issued on October 31, 2016. App. 314-322.

On November 1, 2016, the Appellant's registration renewal application was approved by DHS. A new CCA provider agreement application was also approved by DHS on this date. App. 212-213.

The Appellant has continued to operate a registered child development home since this November 2016 approval.

The Appellant appealed the Notice of CCA Overpayment on November 30, 2016. Hearing was held on January 20, 2017, and the administrative law judge affirmed the Department's recoupment determinations. The administrative law judge also addressed the Appellant's other hearing arguments, including:

> 1) Pfaltzgraff originally submitted an application for a new CCA agreement on September 2, 2016. The application was rejected by the Department. In doing so, the Department asserted that it could not consider a new application while the status of her previous CCA agreement was being considered on appeal. The Department could not cite any legal basis for this claim. However, it does not appear that Pfaltzgraff appealed that action and it is not properly before this administrative law judge for review.

App. 17. Additionally, the judge noted that the Appellant argued her due process rights were unfulfilled when the DHS did not adequately explain to her that any payment received during the pendency of the appeal was subject to recoupment. To this, the judge noted,

> Although the "fully panoply of due process rights is not necessary for an administrative hearing, "an agency must fulfill the basic elements. App. 18, citing Carr v. Iowa

> Employment Security Comm'n, 256 N.W.2d 211, 214 (Iowa 1977). Due process, at its most basic level, requires notice and an opportunity to defend. Id. citing Alfredo v. Iowa Racing and Gaming Comm'n, 555 N.W.2d 827, 833 (Iowa 1996). **The administrative regulations plainly state that benefits paid during an appeal are subject to recoupment**. Id. **More importantly, Pfaltzgraff was expressly warned** that should she request to receive continued payments on appeal, the Department may seek recoupment of those benefits.

App. 18-19 (emphasis added). Finally, the Appellant asked for attorney's fees and expenses, citing to Iowa Code section 625.29 for this request. Id. The administrative law judge noted "That code section does not apply to administrative proceedings. Even if she were to prevail in this matter, there is no legal authority for Pfaltzgraff to make such a demand." Id. App. 19.

The Appellant requested review of the administrative law judge's decision with the Director of DHS. On March 31, 2017, the Director affirmed the Proposed Decision, noting,

> The Department's rules clearly state that any benefits received in error pending the outcome of an appeal [are] subject to recovery. **When the Department's actions are affirmed, the establishment of the overpayment cannot be appealed. The Department can only grant a hearing on the computation of the overpayment.** The Department's

> rules expressly authorize the Department to seek recoupment of all overpaid CCA benefits.

App. 9 (emphasis added).

The Appellant appealed the DHS Director's Final Decision to the Polk County District Court for judicial review. Full briefing was done, and on November 3, 2017, oral arguments were also heard by District Court Judge Scott Rosenberg. On January 3, 2018, the district court affirmed the DHS Director's Decision. App. 491-503.

Statement of Facts

(Administrative Contextual History)

The Appellant operates an Iowa registered child development home which is subject to Iowa Code 237A. The Appellant also applied to participate in the CCA program as a provider whereby she agreed to abide by the rules as a provider who receives CCA monies on behalf of eligible families who choose to use the CCA program subsidies. See App. 16-19.

CCA is a benefit provided by the State of Iowa (who utilizes federal funding) to low-income families who meet certain eligibility requirements. Once an eligible family is approved to receive CCA monies, the family chooses one provider to receive their family's CCA allotments. DHS uses a CCA Provider Agreement to establish that a

provider agrees to request and utilize the monies set aside for this family's child care needs directly from DHS, rather than billing the parents directly for child care. By having the provider directly receive family CCA monies from the DHS (instead of DHS paying the family who then must pay their provider), the process for provider's receiving CCA payments from eligible families is expedited. See App. 18-19; 546-568.

On May 6, 2016, DHS revoked the Appellant of both her child development home registration and her CCA provider agreement. App. 16-17. The Appellant was sent a three-page notice. App. 224-226; 228-229. The notice included a full page of appeal FAQs, including: how to appeal the decision and how to receive benefits during appeals. Id. Specifically, the May 2016 notice indicates:

> **Can I continue to get benefits when my appeal is pending?**
>
> You may keep your benefits until an appeal is final or through the end of your certification period if you file an appeal:
>
> -within 10 calendar days of the date of a decision or
>
> -before the date a decision goes into effect.

> *Any benefits you get while your appeal is being decided may have to be paid back if the Department's action is correct.*

Id. (italics added).

If the Appellant did not read the notice, then her attorney must have as they took steps indicating they knew: 1) how to perfect an appeal with this specific agency, and 2) that they needed to appeal by the effective date on the notice for the Appellant to be able to bill for CCA monies during her appeal.

In addition to the official DHS notice, the local DHS worker sent a secondary letter also noticing the Appellant that if she chose to bill for CCA monies during the appeal, she may have to pay the CCA monies back if the CCA revocation was found to be correct. App. 106.

Finally, the Appellant chose to appeal her revocations online and through this process, she received a third recoupment notice. The electronic appeal request form required the Appellant to answer a series of questions, including the first question:

> "Do you want your benefits to continue during your appeal?
> _x_ yes ___ no
> **(You may have to pay them back, if you lose your appeal.)"**

App. 227 (emphasis added). The Appellant checked "yes" to this on her form and submitted it.

The administrative hearing was held on June 21, 2016 and the DHS was upheld on the CCA revocation, but reversed on the registration revocation. The administrative law judge indicated that the Appellant could reapply for a CCA agreement (the DHS' NOD had indicated that she had to wait 12 months to reapply after revocation). App. 230-235. The Appellant appealed the administrative law judge's determinations to the Director of DHS. On September 23, 2016, the DHS' Director affirmed the administrative law judge. App. 237-238.

Despite three notices in writing and ongoing conversation between DHS and the Appellant, there is no evidence in the administrative record, or in the documents provided at the Appellant's request post-hearing, that either the Appellant or her attorney asked any DHS agent to clarify the recoupment process if the Appellant did not win her CCA appeal.

On October 31, 2016, CCA accounting clerk Linda Brown completed her overpayment calculations associated with the Appellant's decision to continue to bill CCA after she was revoked of CCA in May of 2016. On November 17, 2016, the Appellant appealed the DHS' Notice of CCA Overpayment, and filed a brief asserting her position on appeal.

An administrative hearing was held on the overpayment matter on January 30, 2017. The administrative law judge affirmed the DHS' determinations. App. 16-20. The Appellant appealed to the Director of DHS who affirmed the administrative law judge. App. 7-10. The Appellant sought judicial review with Polk County District Court. App. 323. The district court affirmed the DHS' Director's determinations. App. 491-503. This is an appeal of the judicial review determinations.

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 functions 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 APPELLANT WAS PROVIDED WITH DUE PROCESS AS REQUIRED BY LAW.

PRESERVATION OF ERROR

The Appellant preserved error with respect to argument associated with procedural due process rights, but did not preserve error with respect to argument associated with any substantive due process rights.

Argument

Under the Fourteenth Amendment to the Federal Constitution and article I, section 9 of the Iowa Constitution, there are two types of due process violations: substantive and procedural. See State v. Hernandez-Lopez, 639 N.W.2d 226, 237 (Iowa 2002). The federal and state due process provisions are nearly identical, as is the analysis for each. See Id. If a state or federal court determines that substantive due process has not been violated, then the court will analyze procedural due process. Hernandez-Lopez, 639 N.W.2d at 237.

Procedural due process asks whether the government followed a fair process in taking the action. Id. Procedural due process is a flexible concept and different levels of procedure are required for different circumstances. See Matthews v. Eldridge, 424 U.S. 319,

334-335 (1976). To allege a procedural due process violation, Appellants must first establish that state action has deprived them of a protected property interest without due process of law. Keating v. Nebraska Pub. Power Dist., 660 F.3d 1014, 1017 (8th Cir. 2011).

In considering whether the DHS deprived a person of a protected property interest without due process of law, the court must first evaluate whether the person has a protected property interest. Id. "To have a property interest in a benefit, a person clearly must have more than an abstract need or desire and more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." Id.; Bd. of Regents of State Colleges v. Roth, 408 U.S.564, 577 (1972).

Property rights are "not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source, such as state law." Id. (farmers holding water permits to withdraw water from the Niobrara Watershed did not hold a property right to that water because it was limited by the constraints of the permit).

Similarly, in General Motors Corp. v. Dep't of Treasury, 803 N.W.2d 698, 702 (Mich. Ct. App. 2010), the Court held that the

manufacturer did not have a vested property right sufficient to raise a procedural due process claim. Id. 708-709. The manufacturer's claim for refund was based upon a "mere expectation that its claim might succeed in light of the [decision of the Michigan Supreme Court]." Id. at 709.

When Congress and subsequently, the Iowa legislature, enacted laws and rules associated with CCA, the Appellant (or any similarly situated child care provider) was not the intended recipient of a property interest. Iowa Code section 237A.13 sets out the purpose of the state's CCA program noting that the "program is established in the department to assist children in families who meet eligibility requirements and are described by any of the following..." Iowa Code § 237A.13(1) (2017); see also Iowa Code Ch. 239B referring to CCA program role in Iowa Family Investment Program.

Iowa Code section 237A.13(1) enumerates that children whose parents, guardians or custodians are seeking education or employment, are employed in a low income position, have an illness requiring temporary child care, have a need protective child care, or have an older special needs child, may be eligible for state CCA. Id. This section of chapter 237A goes on to discuss how CCA monies will

be allocated to eligible families based upon the "availability of funding appropriated for state CCA for a fiscal year". Iowa Code § 237A.13(7) (2017).

It is worth noting that the Code itself says, with regard to eligible families "[n]othing in this section shall be construed as or is intended as, or shall imply, a grant of entitlement for services to persons who are eligible for assistance due to an income level or other eligibility circumstance addressed in this section." Id. at § 237A.13(8). Iowa Code section 237A.13(8) therefore establishes the program's purpose and intended recipients, what families are eligible, the limits of funding for the program, and that even eligible families do not have an entitlement to assistance. As the Appellant is clearly not the intended recipient of the benefits set out in Iowa Code section 237A.13, she has no property interest in the benefits of the eligible families.

It is therefore incumbent upon the Appellant to establish that she did not merely have a unilateral expectation of payment. Here, the Appellant had an agreement to abide by the DHS' provisions associated with requesting monies from the allocated subsidy resources of eligible families. The DHS did not receive any benefit

from the arrangement of paying the Appellant rather than paying the eligible family. All benefits to this agreement ran to the Appellant, and perhaps to the eligible family who then didn't have to pay the Appellant themselves after receiving CCA monies.

DHS does contract with some types of providers, such as foster care service organizations, child care resource and referral agencies, and Medicaid service providers, but the parameters associated with those authorized roles and responsibilities are addressed in their respective codes and rules. While parties who contract with DHS may have privileges associated with their contract status that the Appellant does not enjoy, even those contracted parties do not generally have a constitutionally protected property interest under a government contract. See Horsfield Materials, Inc. v. City of Dyersville, 834 N.W.2d 444, 459 (Iowa 2013), reh'g denied (Aug. 6, 2013).

In the Horsfield opinion's dicta, the Iowa Supreme Court indicated that denial of a government contract could rise to the level of a property interest in particular circumstances: "A different question might be presented if we were talking about a broad or stigmatizing debarment by the federal government." Id.

None of these considerations are involved here. First, the Appellant does not have a government contract, but rather, she merely agreed to abide by certain rules to allow for the streamlining of benefits payments from eligible families to her via DHS. Additionally, even if this agreement were treated as a quasi-contractual situation, there is nothing "broad" or "stigmatizing" about the DHS demand for recoupment of monies provided to the Appellant during a period where she appealed the DHS revocation of her CCA agreement.

The Appellant accepted the risk when she chose to continue payments having been thrice noticed that if she lost on appeal, the DHS was able to recoup the CCA monies she requested from DHS during that time.

Just as there was nothing broad or stigmatizing about DHS' recoupment after it prevailed on appeal, there was nothing broad or stigmatizing about the DHS' handling of matters associated with the Appellant after the revocation appeal process. In fact, despite ongoing concerns with the Appellant, after a very brief period of reevaluation and inspection, DHS accepted a new CCA agreement from the Appellant.

The Appellant seems to feel that she has been slighted in some way because she was not automatically reapproved to receive CCA provider monies once the Proposed Decision noted she would reapply at "any time". The ability to reapply for any program (or other privileged status) does not equate to automatic or implicit approval into that program.

As the authorized regulatory agency, DHS had the discretion to deny Appellant's CCA application for a new CCA agreement, and ask that she demonstrate for a period of time that she could maintain accurate attendance records before she would be reapproved for an agreement to use the online CCA billing portal. Instead, the DHS gave the Appellant a second chance to demonstrate her ability to properly utilize the CCA billing system – while paying back the monies she owes for the time she chose to do care under appeal (though no repayments have been received to date). Therefore, there was no property interest established by the Appellant to the CCA monies of eligible families, nor was there any broad or stigmatizing debarment associated with any aspect of the DHS' process.

The Appellant has not proven that she had a constitutionally protected right to CCA payments. Accordingly, this Court need not

examine whether the process afforded the Appellant satisfied the demands of due process under the federal and state constitutions. The Appellant's due process claims must fail.

Even assuming arguendo that the Appellant has procedural due process rights, there is no indication that she has not been provided with ample notice and an opportunity for hearing to the extent allowable by law.

The Appellant asserts that the notices she was given were insufficient. She goes so far as to say that the notices indicate she may continue to get benefits without penalty, citing to three one-page letters in the administrative record from 2016. The first letter, dated May 6, 2016, was sent to the Appellant before it was determined later that day that the noncompliances were sufficient to revoke the registration and provider agreements. App. 194. This was merely a noncompliance letter sent out to report to the provider that her online billings were over the allowable limit of children. Because she was not subject to any adverse action with this regulatory letter, nothing in this letter was associated with rights during an adverse action. Id. The two other documents mentioned do not contain anything beyond a notice of the recoupment should the provider continue requesting

CCA monies under appeal but ultimately not prevail. App. 196-204. This Appellant has been provided with more than adequate notice of recoupment over the course of this case.

The Appellant argues that the Department had the authority under 17A.18A to do an emergency closure of the Appellant's child care home in May of 2016. Iowa Code 17A.18A does provide the Department with the ability to close a child care operation prior to a hearing where there is an "immediate danger to public health, safety, or welfare requiring immediate agency action." The Department is unsure why the Appellant asserts "that the Department under Iowa Code 17A.18[A] had the authority to shut down [the Appellant]'s business at that time" by utilizing an action that requires a showing of "immediate danger" in the Appellant's child care home. See AP brief, p. 23-24.

While the Department did have concerns with regard to whether minimum health and safety requirements were being met in the Appellant's home, those concerns did not rise to the level of an "immediate danger" from the Department's perspective. Only an extremely limited number of child care license and registration revocations require the use of Iowa Code 17A.18A. The Department

exercises great caution using its 17A.18A authority, and in situations such as the Appellant's, the Department prefers instead to work closely with the Appellant during the appeal process to assure these minimum requirements are met.

Had the Department chosen to immediately close this home under Iowa Code 17A.18A, the Appellant would have received an evidentiary hearing, probably within an expedited time frame, that would have addressed the same issues that were eventually considered at hearing in June 21 of 2016. The only difference between what occurred here, and what an emergency closure would have accomplished, is that a 17A.18A closure would have been forced the Appellant to close (no child care - private pay or CCA subsidized) during her appeal rather than providing her with the choice to close or stay open during the process.

With regard to the Appellant's assertion that she was not provided an opportunity for hearing, the Appellant does not seem to be referencing the CCA overpayment hearing that she had in January of 2017 where it was determined that the Department's recoupment actions were affirmed. App. 16-20. Rather, it appears the Appellant is discussing the determinations and hearing that took place in June

of 2016 with regard to the revocation of her child care registration and her CCA provider agreement. See Appellant's Brief, pp.15-18, #66-79; App. 230-235. The June 2016 issues were disposed of in September of 2016 when the Director of DHS affirmed the administrative law judge's determinations. No judicial review was sought of that decision, so the Director's decision became the final case disposition. While there are valid legal bases for the DHS' adverse and administrative actions, the fact is that no justiciable issue remains with regard to any of the arguments set forth in the Appellant's brief on this issue as the time for contesting the 2016 revocation and establishment matters have long since run. Id.

II. THE DEPARTMENT'S RECOUPMENT RULES CLEARLY DELINEATE THE CONSEQUENCES FOR A PROVIDER WHO CHOOSES TO CONTINUE BILLING FOR CHILD CARE SERVICES WHILE APPEALING A REVOKED CCA PROVIDER AGREEMENT.

PRESERVATION OF ERROR

The Appellant preserved error with respect to argument associated with procedural due process rights, but did not preserve error with respect to argument associated with any substantive due process rights.

Argument Overview

The DHS incorporates Issue I's argument to the extent that it overlaps with this argument.

The DHS' recoupment action does not violate the Appellant's substantive due process rights because there was rational basis for the legislation – providing assistance to families who meet certain eligibility requirements generally associated with low income and limited resources. See Iowa Code § 237A.13(1) (2017). It does not violate Appellant's procedural due process rights because (1) Appellant has previously and is now engaging in a process that allows her to challenge the agency's action; and (2) Appellant does not have a vested property right in CCA program payments.

A. 441 Iowa Administrative Code 170.9 and 7.9 are not constitutionally vague.

When considering whether a rule is unconstitutionally vague, "[a] presumption of constitutionality exists which must be overcome by negating every reasonable basis on which the [rule] must be sustained." Greenawalt v. Zoning Board of Adj. of City of Davenport, 345 N.W.2d 537, 545 (Iowa 1984)(quoting Incorporated City of Denison v. Clabaugh, 306 N.W. 2d 748, 751 (Iowa 1977). This principle certainly holds true in cases where an appellant has a

property interest at stake, as in Greenawalt, however, it has some application to the present case as well.

It is likewise a long-settled principle of statutory construction that when a statute is plain and its meaning clear, the court should not reach beyond the express terms of the statute. Garwick v. Iowa Dep't of Transp., 611 N.W.2d 286, 289 (Iowa 2000); see Iowa Dep't of Transp. v. Iowa Dist. Ct. for Woodbury County, 488 N.W.2d 174, 175 (Iowa 1992); State v. West, 446 N.W.2d 777, 778 (Iowa 1989). Only when the terms of a statute are ambiguous should the Court engage in an analysis of legislative intent by applying rules of statutory construction. See State v. Guzman-Juarez, 591 N.W.2d 1, 3 (Iowa 1999); Lockhart v. Cedar Rapids Community Sch. Dist., 577 N.W.2d 845, 847 (Iowa 1998).

Iowa Code Chapter 17A provides for agency rulemaking with regard to application of this chapter to various parties and agencies. Administrative rules associated directly with implementation of Iowa Code Chapter 17A are found at 441 Iowa Administrative Code 7. See 441 IAC 7 (2016). Iowa Code 237A provides the DHS with its authority to promulgate rules associated with child care and CCA.

Iowa Administrative Code 441 – 7.9 (17A) directly discusses the continuation of assistance pending a final decision on appeal. First, the rule discusses how an Appellant may continue to receive assistance by filing an appeal before the effective date of the intended action. Id. at 7.9(1). Then, the rule 7.9(7) discusses "Recovery of excess assistance paid pending a final decision on appeal." This rule notes, "Continued assistance is subject to recovery by the department if its action is affirmed, except as specified at subrule 7.9(9)." 441 IAC 7.9(7). 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**. However, appeals may be heard on the computation of excess assistance paid pending a hearing decision.

Id. (emphasis added).

This rule provides two points of clarity relevant to the instant appeal. First, the Appellant'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 can be established. Second, 441 IAC 7.9 provides clarity that once the department's action is sustained, excess assistance paid pending the final decision

shall be recovered to the date of the decision. Therefore, the Department properly requested for the Appellant to return the CCA monies paid to her during the period of May 20, 2016 to October 23, 2016.

After the Final Decision, the Appellant had the option to appeal to the district court, but the Final Decision was the trigger for her billing under the (revoked) CCA agreement to be concluded. See Iowa Code § 17A.19(5) (2015). The Appellant never sought district court judicial review of the CCA revocation.

The Appellant argues that the DHS used its authority to withhold wages. AP brief, p. 31. DHS does not have, nor has it ever had, an employer/employee relationship with the Appellant such that it would be paying "wages" to her. While the Appellant may feel like she "earned" the CCA monies she billed for during her status as a revoked CCA provider under appeal, the administrative law judge and then the DHS Director on review, found that the DHS appropriately revoked her CCA agreement in May of 2016.

In other words, because DHS' CCA agreement revocation was affirmed, the Appellant did not have a CCA provider agreement through which to bill DHS for CCA services during the appeal. A

provider who does not have a CCA provider agreement is not eligible to receive CCA monies. While it took an administrative final decision to exhaust the Appellant's challenges, the initial determination of CCA revocation was at that time found correct. To that end, the Appellant erred in billing for CCA services during her appeal. Once the Appellant lost her appeal of the CCA revocation (a prior administrative action), the Appellant should have reported to the DHS that she had been receiving CCA monies for services during the appeal and made a plan with the DHS to repay those monies.

1.) 441 Iowa Administrative Code 170.1 cannot and does not grant due process "entitlements," but rather sets out definitions to use in conjunction with the rules set forth in this chapter.

When the Appellant did not make CCA repayment arrangements with DHS after the final decision of the CCA revocation was issued, the DHS sent the Appellant a demand letter noting that recoupment was required for "provider error," or more specifically, under 441 IAC 170.1 "'Provider error' (3) Failure to report the receipt of a CCA payment in excess of that approved by the department". 441 IAC 170.1 (2017).

While the Appellant seems to argue that because the administrative rule defining "overpayments" uses the word "entitled"

in the definition that this somehow grants a provider of child care an entitlement to CCA monies even though she was not the party for which the CCA benefits were intended. This entitlement-granting argument does not hold weight.

In order to prevail on a procedural or administrative due process violation claim, the Appellant must demonstrate that she possessed a constitutionally protected liberty or property interest. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569-72, 92 S.Ct. 2701-2705-06, 2709, 33 L.Ed.2d 548 (1972). A person's interest in a government benefit is a property interest subject to due process protection only if the entitlement to the benefit is supported by statute or rules. Perry v. Sindermann, 408 U.S. 593, 599-601, 92 S.Ct. 2694, 2699, 33 L.Ed.2d 570 (1972). A state agency's procedural rules cannot, by themselves, serve as the basis for a constitutionally protected property interest. Clemente v. U.S., 766 F.2d 1358, 1364 (9th Cir. 1985); Bills v. Henderson, 631 F.2d 1287, 1298-99 (6th Cir. 1980).

Here, the only intent of 441 IAC 170 was to "establish requirements for the payment of child care services ... for children of low-income parents..." 441 IAC 170 Preamble (2017).

In 441 IAC 170.1 (the definition section), the word "entitled" conveys that where a client or provider should not have received CCA monies, an "overpayment" is any monies over and above what they should have received. More specific to this case, any CCA monies the Appellant accurately claimed for services prior to her revocation in May of 2016 would not be an overpayment, but any monies she claimed after revocation would be an overpayment. Pursuant to both the DHS initial revocation decision and later the final administrative decision affirming the initial adverse action, Appellant was not properly paid CCA assistance during the appeal and all payments made for that timeframe were overpayments.

2.) 441 Iowa Administrative Code 170.9 sets out the parameters, including the nondiscretionary sections, associated with agency administration of the CCA program's monetary payments.

While interpreting the language of administrative regulations, the principles of statutory interpretation apply. Messina v. Iowa Dep't of Job Service, 341 N.W.2d 52, 56 (Iowa 1983). Administrative rules must be interpreted in conjunction with their governing statutes to "harmonize them, using common sense and sound reason." Id. The most essential rule of interpretation is to give effect to the intent of the statute or regulation. Iowa Nat'l Industrial Loan Co. v. Iowa

Dep't of Revenue, 224 N.W.2d 437, 439 (Iowa 1974). In addition, where a statute or regulation uses the word "shall," that statute or regulation is generally considered to be mandatory. Id. at 441; see also Iowa Code § 4.1(30) ("[t]he word 'shall' imposes a duty").

Iowa Administrative Code 441-170 sets out the practical requirements regarding DHS payments for child care services with the intent of mirroring Iowa Code section 237A.13 and its goal to assist needy families who require child care services. DHS is also tasked with administering the billing and payment provisions for providers who choose to accept CCA monies for eligible families. See Iowa Code § 237A.13(4) (2017); 441 IAC 170.9 (2017).

Iowa Administrative Code 170.9(1) states:

> Notification and appeals. All clients or providers shall be notified as described at subrule 170.9(6), when it is determined that an overpayment exists. Notification shall include the amount, date and reason for the overpayment. The department shall provide additional information regarding the computation of the overpayment upon the client's or provider's request. The client or **provider may appeal the computation of the overpayment** and any action to recover the overpayment in accordance with 441-subrule 7.5(9).

(Emphasis added). At 170.9(2) determination of overpayments indicates:

> All overpayments due to client, provider or agency error or do to benefits or **payments issued pending an appeal decision shall be recouped**. Overpayments shall be computed as if the information had been acted upon timely.

(Emphasis added). This particular section addresses the situation where a provider chooses to continue to receive payments "pending an appeal decision." Therefore, even if the overpayment claim could not be acted on until the final decision, the overpayments shall be computed as if they had been acted upon timely.

Rule 170.9(2) comes in play in cases like this, but also in situations where a revoked provider requests CCA payments for a portion of time, but not for the entire length of their appeal. (Many providers, upon realizing they likely will lose their case, stop taking CCA payments and do private pay child care during their appeal period.). In those cases, even though the provider is no longer billing for CCA, the final DHS overpayment computations will not be done until final administrative decision issues. Pursuant to this, overpayment computations will be considered a timely demand even

where many months of appeal have occurred since the last actual provider billing.

Contrary to the Appellant's claims, 441 IAC 170.9(2) has nothing to do with protecting providers. The rule wasn't written with a focus on CCA providers, but rather on administering federal grant monies to eligible families. If anything, exactly the opposite of the Appellant's assertion is true. Rule 441-170.9(2) provides that DHS has no discretion and "shall" recoup monies paid pending an appeal decision.

To read the rule as the Appellant prefers effectively negates the majority of agency overpayments while also providing any revoked provider, no matter how egregiously she may have been violating rules when revoked, with a "free ride" to continue to watch children and bill without any recourse so long as she can manage to keep her appeal alive in the administrative process. To adopt the Appellant's interpretation would mean that any provider with common sense would bill as much and as often as possible during appeal, and ask for as many continuances as she could get - knowing that everything she billed while stalling, she would get to keep even if she eventually lost her appeal.

Applying the Appellant's interpretation, providers would not pursue appeals because they believed they would prevail, but rather they would appeal simply to stall the court's revocation affirmation (which then cuts off their ability to bill for CCA monies). This legal strategy not only substantially would interfere with the DHS' ability to meet the protective and regulatory goals of Iowa Code section 237A and the federal Child Care and Development Fund, but would also encourage revoked providers to bring meritless or very weak appeals simply to continue the CCA funding stream indefinitely (and with no agency recourse). Certainly, this is not the intent of an administrative rule designed solely to implement a subsidy base for children who are impoverished and in need of quality child care.

The DHS' position with regard to interpreting rule 170.9(2) is also easily seen in rule 170.9(3):

> **Benefits or payments issued pending appeal decision.**
>
> Recoupment of overpayments resulting from benefits or payments issued pending a decision on an appeal hearing **shall not occur until after a final decision is issued affirming the department**.

(Emphasis added). If one reads rule 170.9(2) as the Appellant prefers, one must also completely ignore 170.9(3) as it states directly

"recoupment of overpayments resulting from ... payments pending a decision on an appeal hearing". If Appellants weren't required to pay back monies issued pending a decision on a revocation, after losing their appeal, there would be no need for rule 170.9(3).

To clarify, where there is a provider error or omission, the department shall notify the provider of the error or omission and identify any correction needed before issuance of payment to the provider. See Iowa Code § 237A.13(4) (2017). However, in the case of an appeal of a CCA revocation, the DHS notifies the provider of the error or payment after the final administrative decision affirming the DHS' initial revocation decision. This is the process during appeal because it also provides the provider with the ability to challenge the revocation commensurate with Iowa Code Chapter 17A. See 441 IAC 170.9(3)-(6); Iowa Code Chapters 237A and 17A.

This is the one time where the DHS pays a provider who doesn't have an approved CCA agreement, and then must recoup when DHS revocation is affirmed at Final Decision (as opposed to not paying in the first place where an error occurs at billing). See id. The mandatory language "shall" in both Iowa Code section 237A.13 and rule 170.9 indicate that there are no circumstances under which

recoupment is optional where a CCA revocation is upheld and payments on appeal have therefore been given to an unapproved provider.

The Iowa Code and administrative rules set forth recoupment provisions for revoked providers to protect both the integrity of the appeal process, and also to allow for recoupment after final decision where the provider has been appropriately revoked.

Iowa Code Chapters 237A, 17A, and the corresponding administrative rules allow providers to continue to receive benefits on appeal while noticing them at the first notice of decision and the appeal offered, that if they lose their appeal, recoupment for CCA payments should be expected. This puts the provider, who ostensibly knows her case better than anyone, in the position to honestly evaluate the merits of her appeal and gauge the risk associated with continuing benefits against the risk of recoupment if she loses. These laws also protect both the DHS and the vulnerable population that CCA serves from providers who are not meeting the minimum standards associated with the program. As noted by the Grinnell College Court, this "means that the interest of private litigants in agency action may need to ultimately yield to the greater public

interest." Grinnell College v. Osborn, 751 N.W.2d 396, 403 (Iowa 2008).

Here, there is a substantial public interest in having providers who meet the minimum requirements for a CCA provider agreement (allowing for a certain level of care for the CCA children). This interest includes both having providers who meet minimum health standards, and having providers who only request payments from the limited CCA budget for the actual care of children. The Appellant has failed to provide evidence that it is in the greater public interest to allow her to keep monies she chose to take while appealing the revocation of her CCA provider agreement where it had been affirmed that DHS was correct to revoke her CCA agreement for failing to meet the minimum requirements.

3.) The Appellant was provided with an appeal process and hearing pursuant to 441 Iowa Administrative Code 7 as an "aggrieved person".

[The Appellant cites to 441 IAC 7.9(3), but it appears that the quote is from 441 IAC 7.9(7) (2017). The subrule noted in 441 IAC 7.9(7) should also be cited as 7.9(9). (AP's brief, p.34).]

441 Iowa Administrative Code 7 starts with a brief overview and establishes that an "aggrieved person" means a person against whom

the department has taken an adverse action. This includes a person who meets any of the conditions in rule 441 – 7.2 (17A). 441 IAC 7.1 (2017). Therefore, the Appellant meets the definition of an "aggrieved person".

Rule 7.2 notes the "Conditions of an aggrieved person. To be eligible for an appeal hearing, a person must meet the definition of an aggrieved person in rule 441- 7.1 (17A) and qualify on a program-specific basis." Id. at 7.2. Rule 7.2(1) sets out a list of financial assistance programs that meet the program-specific qualification, including the CCA program. Id. at 441 – 7.2(1). Rule 7.2(6) indicates "Providers can be an individual or an entity. Issues may include: (a) A license, certification, registration, approval or accreditation has been denied or revoked or has not been acted on in a timely manner."

441 IAC 7.5 indicates that "an aggrieved person who qualifies for an appeal as state in rule 441-7.2 (17A) may file an appeal." The Appellant falls within the group of persons this rule applies to as well. Continuing on, Rule 7.5(9) discusses appeals of CCA benefit overpayments:

> (a) Subject to the time limit ... A person's right to appeal the existence, computation, and amount of a CCA benefit overissuance or overpayment begins when the department

sends the first notice informing the person of the CCA overpayment. The notice shall be sent on a Form 470-4530, Notice of CCA Overpayment.

(b) ...

(c) A **program overpayment means CCA was received by or on behalf of a person in excess of that allowed by law, rules or regulations** for any given month or in excess of the dollar amount of assistance. Subrule 7.5(9) **relates to overpayments received by recipients and child care providers**. Either entity may be responsible for repayment.

(Emphasis added). See App. 314-319 for form sent to provider. The Appellant meets the criteria for a program that received overpayment as the September 2016 final decision affirmed the DHS' May 2016 revocation determination.

Rule 441 - 7.7 provides notice of intent to approve, deny, terminate, reduce or suspend assistance or deny reinstatement of assistance. This also applies to the Appellant, as noted in 441-7.7(1)(a)(b). Because of this rule, the Appellant was provided a hearing commensurate with rule 441 - 7.8.

Rule 7.9 was also applied to the Appellant to provide her with an opportunity to continue to bill the DHS and receive CCA payments during her appeal process. Rule 7.9(1) provides:

(a) Assistance, subject to paragraph 7.9(1)"b", shall not be suspended, reduced, restricted, or canceled, nor shall a license, registration, certification, approval, or accreditation be revoked or other proposed adverse action by taken pending a final decision on an appeal when:

(1) An appeal is filed before the effective date of the intended action; or
(2) ...
(3) ...

(b) Assistance shall be continued on the basis authorized immediately prior to the notice of adverse action, subject to paragraph 7.9(2)"c".

(1) The Appellant may ask to have Appellant's benefits continue on Form 470-0487 or 470-0487(S), Appeal and Request for Hearing....
(2) ...

See App. 227 for Appellant's submitted copy of Form 470-0487).

Rule 7.9(7) then discusses "Recovery of excess assistance paid pending a final decision on appeal." referring to the appeal set forth in the same section (see supra). Here, it sets out the parameters for recoupment after appeal, stating:

> **Continued assistance is subject to recovery by the department if the department's action is affirmed**, except as specified at subrule 7.9(9).
>
> When the department's action is sustained, excess assistance paid pending a final decision shall be recovered to the date of the decision. This recovery is not an appealable issue. However, appeals may be heard on the computation of the excess assistance paid pending a final decision.

(Emphasis added).

The provisions of Chapter 7 were clear enough for the Appellant when she availed herself of them to gain access to the appeal process through Form 470-4530, and when she indicated she wanted to continue to receive "benefits" during her appeal through Form 470-0487. The notices that discussed recoupment were the same notices that informed her how to appeal and then how to continue receiving CCA during her appeal.

The Appellant seems to agree that the first part of Chapter 7 applies to her. However, she is not as comfortable with the second part of the chapter. It is unclear what reasoning is employed to conclude that the first part of Chapter 7 applies to the Appellant (wherein she gains appeal rights and ongoing access to CCA monies), but the last part of Chapter 7 does not apply (as she has now lost her administrative case, and must pay back the CCA payments received during the appeal process.)

Assuming arguendo that the entire Chapter 7 was misapplied to the Appellant, the Appellant should not have been given the opportunity to appeal nor should she have been granted a hearing as an "aggrieved person" under Chapter 7. Without the opportunities

provided in Chapter 7, all CCA monies the Appellant claimed during the process of appeal pursuant to this section through the present time would have been provided without a basis under the law. Without Chapter 7, the underlying registration and CCA revocation appeals would have been abandoned for lack of administrative jurisdiction, and the DHS' original revocation decisions would stand uncontested.

B. Iowa administrative rules - and the multiple notices provided to the Appellant at the revocation notice, at the outset of the appeal, and during the course of the process - provided more than adequate notice of recoupment should the Appellant not prevail on her appeals.

As set forth in the administrative law judge's decision and the final decision of the DHS Director, the Appellant and her attorney were provided with at least three warnings about repayment of CCA monies if she lost her appeal. App. 7-10; 16-20. It is hard to imagine how one can be more noticed than this Appellant about the possibility of recoupment.

Iowa Administrative Code 441 - 170.1 defines "provider error" to mean or result from "... Failure to report the receipt of a CCA payment in excess of that approved by the department." 441 IAC 170.1 (2017). In the context of a revoked CCA provider who appeals

her CCA revocation but loses her appeal, once the final administrative decision affirms the DHS' CCA revocation, the provider must pay back the monies she has opted to request and accept while operating under revocation. See 441 IAC 170.1, 170.5, 170.9 (2017). Here, the Appellant received the appropriate notice which indicated that "A mistake by a provider that caused DHS to pay the provider incorrectly for child care services" caused an overpayment. Specifically, the notice indicated the error was "Your choice to continue benefits pending an appeal." App. 314.

A claim is established when the first notice of the debt is issued to the household on one of the following forms... l. Form 470-4530, Notice of CCA Overpayment. 441 IAC 11.2(2). "Debtor" shall mean a current or former recipient of public assistance that has been determined by the department to be responsible for the repayment of a particular debt. For CCA, "debtor" may include the current or former provider or current or former recipient of CCA. 441 IAC 11.1 (2017).

III. THE DEPARTMENT PROPERLY EXERCISED ITS AUTHORITY IN PROMULGATING RECOUPMENT RULES, AND THOSE RULES CLEARLY REFLECT THE INTENT AND PURPOSE OF THE ENABLING STATUTES.

Preservation of Error

The Appellant preserved error with respect to argument as set forth in the Appellant's cited issue, she preserved error with respect to associated procedural due process right assertions, but did not preserve error with respect any argument associated with substantive due process rights.

(To avoid redundancy, please see the DHS' analysis of the relevant sections of both Code and administrative law associated with the DHS' regulatory functions and authority as set forth in Argument I. That analysis applies to this argument as well.)

IV. THE DISTRICT COURT PROPERLY DISTINGUISHED THAT THE ONLY REAL ISSUE FOR JUDICIAL REVIEW WAS WHETHER OR NOT THE DHS RECOUPMENT COMPORTED WITH DUE PROCESS, AND THE OTHER ISSUES PRESENTED BY THE APPELLANT WERE NOT PRESERVED FOR APPEAL.

Preservation of Error

The Appellant did not preserve error with respect to her arguments that are not associated with due process rights.

Argument

As early as May 6, 2016, when DHS revoked the Appellant's CCA Provider Agreement, she was informed in writing of how to appeal the decision of DHS and further how to receive benefits during appeals. App. 498. The notice stated that the Appellant could continue to bill DHS under her old CCA Agreement until an appeal was final or through the end of her certification period, but that "any benefits you get while your appeal is being decided may have to be paid back if the Department's action is correct." App. 224; 499. Thus, the Appellant was warned that if she continued to bill under this old agreement, she might have to pay back the monies to DHS – if she lost her appeal. The Appellant also received a second letter from the local DHS social worker, Chad Reckling, informing her that

while her appeal is being decided she may continue to receive CCA provider payments but "you may have to pay back the Department if the Department's action to revoke was correct." App. 195.

In the Appellant's appeal and request for hearing submitted on May 10, 2016, she informed DHS that she wanted to continue to receive payments through her CCA agreement while she appealed the revocation. App. 227. Again, the warning was made to the Appellant that she may have to pay those monies back if she lost her appeal. App. 499.

The Appellant reapplied for a CCA agreement before her CCA appeal was finalized through the DHS Director Review, and then she tried to apply again (albeit with an incomplete registration application) after the Director's Final Decision - while she was still considering whether to seek judicial review. The DHS asked the Appellant to 1) finish one CCA agreement's revocation proceedings before starting applying for another agreement (as the DHS has no way to have one provider with two agreements in the system), and 2) when done appealing, to update her application packet (which was missing critical information) necessary to move forward with registration or a CCA agreement. The administrative court noted in

its March, 2017 decision that the Appellant did not appeal the DHS' refusal to process her CCA application during this period. Therefore that issue, if one assumes arguendo that it was both a final and an adverse agency action, was never appealed. For this reason, whatever appeal rights that might be argued to apply to this were not preserved for appeal.

After the final decision of the Appellant's (revocation) appeal was entered on September 23, 2016, the Appellant did not appeal further. Therefore, all matters associated with the registration and CCA revocations are final determinations.

An overpayment notice was then sent to the Appellant (dated October 31, 2016) indicating that an overpayment of $31,815.46 was made and that she was required to pay DHS back. App. 499. Once again, the notice of October 31, 2016, to the Appellant indicated her right to appeal, how to appeal, the time limitations and that someone might help her with her case, such as an attorney. App. 314. This notice of overpayment was timely appealed by the Appellant and it is uncontested that she received $31,815.46 from May 20, 2016 to October 23, 2016. Id.

In order for a child care provider to receive CCA payments, the provider must enter into a CCA Provider Agreement with DHS. Id. at 10. 441 IAC 170.9(2) allows for the recoupment of overpayments to a childcare provider for those payments issued pending an appeal decision. Id. The actual recoupment of the overpayments pending a decision on an appeal is not to occur until after a final appeal decision is issued affirming DHS. 441 IAC 170.9(3). Since the Appellant decided to continue to bill and receive payments from CCA during her appeal, she subjected herself knowingly to the possibility of a recoupment action pursuant to the administrative code. Id. 441 IAC 7.9 speaks specifically of the continuation of assistance pending a final decision on appeal.

441 IAC 7.9(7) provides for the recovery of excess assistance by DHS once the DHS' action is affirmed. As the district court noted, "Upon that event any excess assistance paid pending the final decision is to be recovered to the date of the decision." Id. 11. 441 IAC 7.9 goes on to state that: "The recovery is not an appealable issue. However, appeals may be heard on the computation of excess assistance paid pending a hearing decision." 441 IAC 7.9(7). For this reason, the district court correctly found that the Appellant's appeal

"is limited to contesting the computation of any excess assistance and not whether the DHS has the right to recover the excess assistance paid." Id. at 11. The final decision on the Appellant's initial appeal on September 23, 2016, which affirmed DHS action terminating the Appellant's Child Care Provider Assistance Agreement, was not timely appealed. Therefore, "the ruling was final and under Section 237A.13, the Code of Iowa, and the Iowa Administrative Code Rules Chapter 441, DHS was authorized to recoup the benefits paid to the Appellant. Id. at 11 (citing 441 IAC 7.9(7), 441 IAC 170.9).

V. THE DEPARTMENT CORRECTLY SOUGHT RECOUPMENT WHERE THE APPELLANT CLAIMED ELIGIBLE CCA FAMILY MONIES DURING APPEAL, AS WELL AS AFTER SHE LOST HER APPEAL.

Preservation of Error

The Appellant did not preserve error with respect to this issue.

Argument

DHS noticed the Appellant at least three times in writing that if she chose to continue to bill and request that payments of CCA family monies to be directed to her while operating under revocation, DHS had the right to recoup monies if she did not prevail. The Appellant was under no agreement or obligation, to any party, to continue to

avail herself of taxpayer monies set aside to assist impoverished families with getting quality child care.

To the extent that the Appellant did not understand the plain language of the notices and letters sent to her by DHS, she had the ability to 1) talk with her attorney about her concerns, or 2) ask for clarification directly from DHS about this rule when she called the DHS central office on an almost daily basis during the appeal process. There is no evidence in the DHS records that the Appellant, or her attorney, ever asked any DHS staff to clarify the recoupment notice language that appeared on multiple documents sent to her.

A reasonable and prudent businessperson engaged in a CCA payment appeal with a state agency would take heed of recoupment warning notices that she read on her online appeal form, on her notices of decision, and in any letters sent to her by agency staff. While the Appellant 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 Appellant was provided with 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). Unlike JCPenney, a for-profit retailer, there was no motivation for DHS to encourage the Appellant to request CCA family benefits while simultaneously working to revoke her provider agreement.

Despite the Appellant's references to her employer-employee type relationship with DHS, DHS has never employed the Appellant. Likewise, the Appellant was not an independent contractor for the DHS. However, assuming arguendo that contract law has some application to the instant case, the DHS asserts that unjust enrichment cannot be applied as a matter of law. Id. 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.

In the instant matter, the DHS distributed (family CCA) benefits directly to the Appellant pursuant to the provider agreement that had been in place prior to revocation. It was not unjust for the Appellant to receive these monies unless the DHS established on appeal that they were correct to revoke her CCA provider agreement. As in Smith, once a ground for invalidating that provider agreement was established by the administrative court and finally through the Director, then a basis for DHS recoupment of the payments submitted after revocation existed. Therefore, DHS correctly sought recoupment of the over $31,000 that the Appellant chose to voluntarily request and receive during her revocation appeal and after the DHS was affirmed on the revocation.

The Appellant contends that she should be paid for this time, even though she was repeatedly noticed of the risk of recoupment if she lost her appeals. She suggests that there is a DHS "windfall"

should DHS not be required to pay Appellants who are revoked of CCA provider agreements. The DHS contends that this argument actually is more true when applied to Appellants than to DHS as has been set forth in prior arguments with regard to the legal strategy providers could then employ of pushing forth weak appeals to continue CCA payments as long as possible.

A provider who is revoked of a CCA agreement is not meeting state requirements to receive payments for reasons either associated with their billing accuracy, overbilling, or health and safety issues. This provider fell into this category in the prior administrative actions that were finalized in 2016. 441 Iowa Administrative Code 170.5(5) allows for a revoked CCA provider to reapply at any time. The Appellant chose to appeal the administrative law judge's decision to the Director instead of simply reapplying. She lost her CCA appeal, but not her ability to reapply after the appeal was concluded. Once she was able to demonstrate that she had addressed the issues of appeal and met minimum health and safety requirements, she was approved.

The effect of adopting the Appellant's argument that every revoked provider who appeals should be able to request and keep all

CCA payments they submit for payment during appeal (even if they lose the CCA appeal) will have two long-term consequences. First, the quality of child care in Iowa 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) as providers attempt to delay final revocation disposition. There will also be an increase in the need for Emergency Adjudicative Proceedings (a separate, agency action for immediate closure pursuant to Iowa Code section 17A.18A) 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 recoupment recourse when they eventually lose on appeal. In short, adoption of the Appellant's recoupment argument 'if I watch kids, I should get paid no matter what' will so significantly delay the effects of a CCA revocation that the law will be, in many cases, completely worthless to protect CCA kids and their families.

Here, the children were not receiving care that meets the minimum legal requirements for CCA payments. One can certainly argue about whether this provider was watching more children than allowed by law, or simply billing CCA family monies for kids she wasn't watching. Either way, the CCA legal requirements of Iowa Code Chapter 237A and 441 IAC 170 have been proven through a prior administrative hearing process to have not been met, and that is not an issue under appeal.

Child care quality decreases when more children are cared for than what is currently allowed by Iowa law. Likewise, when a provider bills for children who are not actually receiving care, she depletes the families' allotment for care for that particular billing cycle even though the family does not receive anything for the money billed. See 441 IAC 170.4(7)(g). The Iowa CCA program does not have a bottomless well of monies available for distribution to needy families. Iowa Code section 237A.13(6)–(8) (2017) provides wait criteria for DHS to use when the CCA budget becomes so limited that DHS cannot meet the state's eligible family needs for child care services. Certainly, where the state program has limited budgetary resources and a statutory goal to provide quality care for the most

vulnerable 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 family monies.

VI. THE DEPARTMENT CORRECTLY ASKED THE APPELLANT TO COMPLETE HER CCA AGREEMENT APPEALS AND SUBMIT A COMPLETE APPLICATION PACKET BEFORE IT WOULD PROCESS THE CCA APPLICATIONS SHE SUBMITTED AT VARIOUS TIMES THROUGHOUT THE APPEAL PROCESS.

Preservation of Error

The Appellant did not preserve error with respect to this issue.

Argument

The DHS defers to its argument in Issue IV on this matter of the Appellant's interim applications.

VII. THE APPELLANT 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 Appellant preserved error with respect to this issue.

Argument

(Administrative process)

There is no legal provision for the Appellant to successfully request fees associated with her underlying administrative appeal. The Iowa Code that the Appellant 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 Appellant 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 Appellant 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 appeal of the 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 Appellant was eligible to receive unemployment assistance. In the instant case, the state action was the DHS attempt to determine the amount of money the Appellant

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 Appellant 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 Appellant appealed and received hearing with an impartial ALJ who agreed with the DHS CCA program determinations. The Appellant 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 Appellant is precluded from receiving attorney fees a1nd costs.

Here, the DHS' CCA program pays the monies to the Appellant and then seeks recoupment so the Appellant 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). 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.

CONCLUSION

WHEREFORE, the Appellee-Department respectfully requests that this Court affirm the district court decision, and deny all Appellant's 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 in the event the Appellant is granted oral argument, 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:

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DATED: June 7, 2018

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