IN THE SUPREME COURT OF IOWA

Supreme Court No. 18-0189

JULIE PFALTZGRAFF,

Plaintiff-Appellee,

vs.

IOWA DEPARTMENT OF HUMAN SERVICES,

Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
OF POLK COUNTY
THE HONORABLE SCOTT ROSENBERG, JUDGE

STATE-APPELLANT'S APPLICATION FOR FURTHER REVIEW

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QUESTIONS PRESENTED FOR REVIEW

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

A. The Court's Determination that Revoked Providers have Property Rights to Child Care Assistance Payments Conflicts with Applicable Code and Rules.

B. The Court Erred in Determining that the Provider Did Not Receive Due Process.

II. THE COURT ERRED IN GRANTING THE PROVIDER ATTORNEY FEES.

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STATEMENT SUPPORTING FURTHER REVIEW

The Court of Appeals held that the Appellee ("Provider") possessed a protected property interest in her child care assistance provider ("CCAP") billings and she was not provided the procedural due process associated with this interest. The Court of Appeals also ordered that the Provider should be awarded attorney fees for her recoupment appeal from the administrative hearing level through final order of this Court. The Department of Human Services ("DHS") asserts these rulings conflict with the Iowa Code.

BRIEF

STATEMENT OF THE CASE

Nature of the Case & Course of Proceedings.

This is the appeal of a judicial review challenging a final administrative determination that the DHS correctly computed its claim for recoupment of overpaid CCA to the child care Provider. The district court rule against the Provider on the recoupment issue and also denied the Provider's claim that she was also entitled to attorney fees. The Provider appealed the district court's determinations. The Court of Appeals ruled in favor of the Provider on the recoupment

issues as well as on the attorney fees. This application stems from those determinations.

Facts.

While there is no case law specific to CCA Recoupment, a very similar case is presently before this Court. See Endress v. Iowa Dep't of Human Svcs, 2019 WL 2524193 (June 19, 2019).

On May 6, 2016, the Department of Human Services (hereinafter 'DHS') revoked the Petitioner's child development home registration and the child care assistance program (hereinafter 'CCAP') provider agreement with an effective date of May 20, 2016. (A.R. 218-220). An administrative hearing was held on June 21, 2016 to address those two issues. Local DHS worker Chad Reckling represented DHS pro se. The Petitioner was represented by attorney Trent Nelson. (A.R. 224-229). Administrative Law Judge Karen Doland, after hearing the case, issued a decision wherein she reversed the registration revocation, but affirmed 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 Provider requested DHS Director review of the Administrative Law Judge's decision. On September 23, 2016, after reviewing the administrative record, the Proposed Decision, and the Provider's additional written arguments, Director Palmer affirmed Administrative Law Judge Doland's determinations with regard to both issues. (A.R. 230-232).

The Provider 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.

After the Director's Final Decision disposed of the revocation issues associated with the child care home registration and CCAP provider agreement, a Notice of Child Care Assistance Overpayment was issued on October 31, 2016. (A.R. 308-316).

On November 1, 2016, the Provider's registration renewal application was approved by DHS. A new CCAP provider agreement application was also approved by DHS on this date. (A.R. 206-207). The Provider has continued to operate a registered child development home since this November 2016 approval.

The Provider appealed the DHS' Notice of Child Care Assistance Overpayment on November 30, 2016. Hearing was held on

January 20, 2017. The Provider appeared with legal counsel Trent Nelson. The Department was represented by a DHS clerk from the Child Care Assistance Program division. (A.R. 10-13). The administrative law judge affirmed the Department's recoupment determinations. The administrative law judge also addressed the Provider's other hearing arguments, including:

> 1) Pfaltzgraff originally submitted an application for a new child care assistance 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 child care assistance 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.

(A.R. 11) Additionally, the judge noted that the Provider argued her due process rights were violated. 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. (A.R. 12 (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.

(A.R. 12-13)(emphasis added). Finally, the Provider asked for attorney fees and expenses, citing to Iowa Code 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. at A.R. 13.

The Provider 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 child care assistance benefits.

(A.R. 3)(emphasis added).

A more detailed fact pattern related to this case is available in the administrative record. In the interests of brevity, the DHS defers to this record for the details. (See A.R. 105-112)

STANDARD OF REVIEW

In Ghost Player v. Iowa Dept. of Econ. Dev., 906 N.W.2d 454 (Iowa 2018); 2018 WL 480365, the 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.

In a judicial review action on appeal, this Court applies the applicable standards of review under section 17A.19(1) to see if the Court reaches the same conclusions as the district court. See Colwell v. Iowa Dep't of Human Servs., 923 N.W.2d 225, 238 (Iowa 2019), reh'g denied (Mar. 8, 2019).

ARGUMENT

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

A. The Court's Determination that Revoked Providers have Property Rights to Child Care Assistance Payments Conflicts with Applicable Code and Rules.

The Court of Appeals' majority opinion acknowledges that the Provider must demonstrate that she has a protected property interest in order to claim violation of her procedural due process rights. See Bowers v. Polk Cty. Bd. of Supervisors, 638 N.W.2d 682, 691 (Iowa 2002). "Stated simply, 'a State creates a protected liberty interest by placing substantive limitations on official discretion.'" Ky. Dep't of Corr. v. Thompson, 490 U.S. 454, 462 (1989)(quoting Olim v. Wakinekona, 461 U.S. 238, 249 (1983)).

In order to determine whether a person has been deprived of a protected property interest without due process of law, the court must 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 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.)

In General Motors Corp. v. Dep't of Treasury, 803 N.W.2d 698, 702 (Mich. Ct. App. 2010), the Court found no 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.

> 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)(emphasis added). 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).

In the instant matter, no applicable statute or rule bestows a property interest upon child care providers who voluntarily elect to accept eligible CCAP family payments. The Provider had no reasonable expectation of a property interest in the CCAP monies associated with the particular eligible families in her care. At any time, an eligible family could have re-designated their allotted CCAP distributions to a different child care provider. This Provider would not have any recourse with regard to a family's redistribution request whether she was operating as an approved or a revoked provider.

Iowa Code section 237A.13 sets out the purpose of the state's CCAP 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 CCAP role in Iowa Family Investment Program.

Iowa Code section 237A.13(1) sets out that children whose parents, guardians or custodians are seeking education or employment, are employed in low-income positions, have an illness requiring temporary child care, have a need for protective child care, or have an older special needs child, may be eligible for state CCAP. Id.

This section of chapter 237A also notes that CCAP monies will be allocated to eligible families based upon the "availability of funding appropriated for state CCAP for a fiscal year". Iowa Code § 237A.13(7) (2017).

Iowa Code section 237A.13(8) establishes the program's purpose and intended recipients, what families are eligible for the program, and the funding limits of the program. This section also specifically indicates that even eligible families do not have an entitlement to assistance. A brief review of Iowa Code 237A.13 makes it clear that the Provider is not the intended recipient of the assistance under this section. For this reason, broad, general authority is provided to DHS for administration of the CCA provider program, including specific authority to distribute eligible family CCAP monies to approved providers, on behalf of those families.

Iowa Code 237A.13(4) was codified in an effort to assure approved CCAP providers that they would not have to wait long periods of time between billing and receiving payments for their child care services. The Court of Appeals erroneously concluded that, since Iowa Code 237A.13(4) incorporates language aimed at eliminating

significant delays in payment distributions, all "providers" regardless of their status with DHS have a per se right to payment. App. 24-25.

While Iowa Code 237A does not define "provider," the chapter does impose many requirements on parties who perform child care. See e.g., Iowa Code 237A.3A (providing registration requirements for child development homes), 237A.3B (prohibiting smoking), 237A.5 (providing requirements for home providers, their household members, and any personnel).

Chief Judge Vogel, who dissented in both Endress v. Iowa Dep't of Human Services and the instant matter, incorporated her Endress dissent into the Pfaltzgraff Court of Appeals' opinion. See Court of Appeals opinion (dissent), page 6. As Chief Judge Vogel notes in her Endress (incorporated) dissent,

> DHS, tasked with administering chapter 237A, must have the ability to identify the providers who comply with these requirements and therefore qualify a "providers" eligible to receive CCAP monies. Furthermore, a qualified "providers" is not entitled to receive any CCAP monies because DHS may decide which persons are eligible for child care assistance from CCAP. See id. 237A.13(1) ("A state child care assistance program is established in the department to assist children in families who meet eligibility guidelines and are described by any of the following circumstances…."). Even when eligibility is met, it does not rise to the level of an "entitlement" to the qualifying children or families. See id. 237A.13(8)

> ("Nothing 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."; see also id 237A.13(7) (establishing a waiting list for qualified families to receive child care assistance).

Endress Court of Appeals' opinion (dissent), page 15.

The language and punctuation of Iowa Code 237A.13(7) (2017) also merits additional consideration: "Nothing 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." (emphasis added).

The Court of Appeals apparently reads this sentence to indicate that entitlement is not granted to one group: "persons who are eligible for assistance", specifically those persons (ie. families and children) needing assistance "due to income level or other eligibility circumstance addressed in this section". However, reading 237A.13(7)(2017) this way ignores the other group of persons addressed within this section, the providers. This reading also ignores the other circumstances for which families might need CCAP (other

than income). See also Endress v. Iowa Dep't of Human Svcs, 2019 WL 2524193 (June 19, 2019).

It is difficult to imagine that the Iowa legislature, after enumerating in 237A.13(4) particular provisions related to providers, would forget to consider providers just lines later when addressing the issue of entitlement in 237A.13(7).

If one reads 237A.13(7) giving consideration to the word "or", it becomes clear that providers do not possess an entitlement. Rather, the legislature included providers under the last portion of the sentence "other eligibility circumstance addressed in this section". "Other eligibility circumstance addressed in this section" encompasses every other situation set forth in Iowa Code 237A.13 by which a person or persons might perceive that they had an entitlement, or property interest, to CCAP monies. Rather than setting out each and every "other" eligible circumstance set forth in 237A.13, the legislature simply indicated "other" circumstances addressed in "this section". As CCAP providers and their submitted billings are discussed in Iowa Code 237A.13(4) in "this section", they too fit within the "other eligibility circumstance addressed in this section" language set forth in Iowa Code 237A.13(7) (2017).

This straightforward reading of 237A.13(7)(2017) also eliminates the frustration of trying to reconcile why 237A, a code chapter established to assist needy families with child care, would specifically state that those needy families have no entitlement to CCAP monies but "providers", an undefined group of persons, are entitled to the monies set aside for those vulnerable families. It is a basic rule of statutory construction that we must "give effect, if possible, to every clause and word of a statute." TLC Home Health Care, L.L.C. v. Iowa Dep't of Human Servs., 638 N.W.2d 708, 713 (Iowa 2002); see United States v. Menasche, 348 U.S. 528, 538–39, 75 S.Ct. 513, 520, 99 L.Ed. 615, 624 (1955) (citing Inhabitants of the Township of Montclair v. Ramsdell, 107 U.S. 147, 153, 2 S.Ct. 391, 395, 27 L.Ed. 431, 433 (1883)). In doing so, the courts assume "that no part of an act is intended to be superfluous." Id.

Certainly, had the legislature wanted to grant entitlements for CCA-accepting providers, section 237A.13 would have been the appropriate place to do it. Yet no provider property rights are articulated here. The courts do

> not consider what the legislature 'should or might have said' when it constructed a statute. Iowa R.App. P. 6.904(3)(m); Marcus v. Young, 538 N.W.2d 285, 289 (Iowa 1995). In determining legislative intent, we may

> also look to the maxim "expressio unius est exclusio alterius," meaning expression of one thing is the exclusion of another. Marcus, 538 N.W.2d at 289. It is an established rule of statutory construction that "legislative intent is expressed by omission as well as by inclusion, and the express mention of one thing implies the exclusion of others not so mentioned." Id.

Homan v. Branstad, 887 N.W.2d 153, 166 (Iowa 2016).

When 237A is read in its entirety, it becomes clear that the "providers" mentioned in 237A.13 are the same category of providers that are mentioned in 237A.5, 237A.25(3)(b) and (c), 237A.26(7)(b) (2018). Consistent, contextual reading of the term "provider" throughout the chapter is critical to understanding who the legislature was referring to when it chose to use this term. A "provider" in 237A.13 must be a person providing child care who has successfully completed the approval process for the CCAP, including record checks and other screenings. See Iowa Code 237A.5, 237A.25(3)(b) and (c), 237A.26(7)(b) (2018).

Iowa Code 237A sets out extensive requirements for persons or facilities that want to be considered registered or licensed providers in the state of Iowa. Iowa Code 237A.5 supplies the requirements for child care providers in terms of background checks. Iowa Code 237A.5(2) defines who a "Person subject to a record check" includes, and (2)(d)

specifically sets out that this definition attaches when "[t]he person has applied for or receives public funding for providing child care." This minimum requirement applies for all types of subsidized child care providers, and requires that the person be either in the process of applying to become a provider who accepts CCA payments, or they are currently a provider under the CCAP program. In this case, the Provider did not fit into either category of 237A.5(2)(d) after DHS revoked her CCAP agreement in 2014 as she no longer held a valid CCAP agreement.

Iowa Code 237A.13(4) was established to eliminate delays in provider CCAP distributions for providers operating under this chapter. While 'provider' is not specifically defined as a person who has a valid CCAP provider agreement, subsection (4) sets within the same code section that delineates the requirements to become a CCAP provider. Clearly, when "provider" is mentioned in 237A.13(4), it is referring to a provider approved to participate and provide services to CCAP families under valid CCAP provider agreement.

Chief Judge Vogel recognized this, noting in Endress, "The majority finds section 237A.13 should be read to create obligations to "providers" and therefore does not afford DHS discretion once

providers submit their claims to DHS; however, the majority overlooks DHS's discretion not only in identifying qualifying children or families but also in approving the providers who may receive child care assistance monies. Endress v. Iowa Dep't of Human Svcs, 2019 WL 2524193 (June 19, 2019) (dissent), page 15.

When one reads the definition of "provider" in subsection (4) in an overbroad way to include any provider, regardless of whether the provider has a valid CCA provider agreement, one effectively makes a substantial portion of Iowa Code 237A.13 unenforceable. If any self-identifying provider could be paid for child care claims and demand that DHS pay their claims within ten days, there would be absolutely no motivation for anyone to ever apply to be a provider with a CCAP Provider Agreement. Likewise, there would be no way to limit the definition of 'provider' to those persons approved and operating in compliance with the companion code and rule sections, such as Iowa Code 237A.5 (record check provisions).

The Court of Appeals indicates that while DHS has discretion concerning families it provides CCAPP benefits for, "this discretion does not extend to the payments made to CCAPP providers." Endress v. Iowa Dep't of Human Svcs, 2019 WL 2524193 (June 19, 2019). p.7.

Perhaps the most concerning sentence in the Court of Appeals' Endress majority opinion is, "Once the DHS has exercised its discretion under section 237A.13(8) to determine which families qualify for CCAPP benefits, the payment of any bills submitted by CCAP providers for childcare to those families is mandatory under section 237A.13(4)." Id. (emphasis added). This statement not only uses the word "any" referencing billings, but also does not define "CCAP provider" or distinguish between an approved provider, a denied or expired provider, and a revoked one.

If the majority's "nondiscretionary" determination is applied, then any unscrupulous active provider or appealing revoked provider can literally bill the CCAP for any CCA subsidy amount so long as they indicate they are billing for a qualified CCAP family. If DHS is without regulatory authority to administer the CCAP program, then DHS cannot perform its statutory obligations to ensure tax-payor funded child care is sufficiently safe.

When the federal government established the Child Care and Development Block Grant (CCDBG) Act of 2014, it set forth guidelines to ensure that the taxpayer funded child care subsidies would be expended in a way to further policy goals of safe, quality child

care. DHS must have enforcement authority to satisfy these federal requirements. See Iowa Code 237A (2017), 45 CFR 98 (2014).

Chief Judge Vogel's Endress dissent also expresses this concern. She notes,

> The majority also points to DHS rules that the majority says require DHS to pay providers unconditionally for services rendered pending an appeal. See Iowa Admin. Code r.441-7.9. However, these rules only require DHS to pay amounts actually owed. Endress had merely elected to receive CCAP monies after her CCAP provider agreement had been cancelled and during her appeal period. Her expectation – subject to a disclaimer or warning that "[a]ny benefits you get while your appeal is being decided may have to be paid back if the Department's action is correct" – is insufficient to create a protected property interest in tentative claims for these monies.

Endress v. Iowa Dep't of Human Svcs, 2019 WL 2524193 (June 19, 2019)(dissent), page 16.

B. The Court Erred in Determining that the Provider Did Not Receive Due Process.

When the DHS revoked this Provider's CCAP agreement, the agency noticed the Provider of the action. App. 218-223. This notice indicated the Provider could choose whether to continue to bill for CCA care during her appeal, or to provide child care to privately paying parents during the appeal period. Id. The DHS recognized that the

Provider would be in the best position to evaluate her chances of prevailing on appeal. However, it also noticed her that if DHS prevailed on the appeal (i.e. the revocation of the CCAP agreement was correct), then she would be subject to recoupment of the CCAP monies she billed during her appeal as she did not have a valid CCAP provider agreement after her revocation.

This notice provided due process to the Provider by notifying her that she was operating outside of a CCAP agreement, and that if she lost her appeal, the decision to bill during this period would constitute a billing error as per Iowa Code 237A.13(4). The Notice of Decision stated on the first page, directly under the basis for revocation, "**You do not qualify as a CCA provider.** Your CCA provider **agreement is terminated** as of the effective date listed above" App. 218 (emphasis added).

The Provider's notice informed her that her CCAP provider agreement would be cancelled effective May 20, 2016. App. 218. The notice, like that in Endress, also informed her she may appeal and "keep your benefits until an appeal is final," but "[a]ny benefits you get while your appeal is being decided may have to be paid back if the Department's action is correct." Endress v. Iowa Dep't of Human Svcs,

2019 WL 2524193 (June 19, 2019)(dissent), page 16. Additionally, the notice provided phone numbers for Iowa Legal Aid if she "ha[s] trouble understanding this notice." Id.

On May 20, 2016, the DHS sent the Provider another "Notice of Decision," which began with this paragraph:

> You have timely appealed the revocation or denial of your child development home registration. You are therefore allowed to continue to operate as a **revoked child development home pending resolution of the appeal.**

App. 222 (emphasis added). It should be noted that the paragraph (supra) was under the heading "Action Taken" and was the first paragraph of the Notice to this Provider. This notice that she was still revoked was not "boilerplate" language buried in a long standardized document of rights.

In addition to all the other notices, the provider was also provided with a copy of the "You Have a Right to Appeal" document with this Notice as well. App. 223. The "You Have the Right to Appeal" document stated "You may keep your benefits until an appeal is final…" and then later, "Any benefits you get while your appeal is being decided may have to be paid back if the Department's action is correct." App. 223.

As the Endress majority observes, "Notice must be reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Meyer v. Jones, 696 N.W.2d 611, 614 (Iowa 2005)(citation omitted). The majority faults the use of the word "benefit" in the notice, finding DHS providers "benefits" to families and "payments" to providers under CCAP. However, as Chief Judge Vogel notes in her Endress dissent, "nothing in Iowa Code chapter 237A, the relevant administrative rules, or the provider agreement defines "benefit" or otherwise requires such a narrow reading of the term." Endress v. Iowa Dep't of Human Svcs, 2019 WL 2524193 (June 19, 2019) (dissent), page 17.

The dictionary defines "benefit" to include a "payment" or "gift." See Webster's Third New International Dictionary 204 (unabr. Ed. 2002); see also Lauridsen v. City of Okoboji Bd. of Adjustment, 554 N.W.2d 542, 544 (Iowa 1996) ("The dictionary is consulted to give words their plain and ordinary meaning in the absence of a legislative definition.") Endress v. Iowa Dep't of Human Svcs, 2019 WL 2524193 (June 19, 2019) (dissent), p17.

Chief Judge Vogel noted in Endress,

> Applying this plain and ordinary definition, monies from DHS to providers for their participation in the

> child care assistance program can fairly be termed "benefits." This definition is clear from the context of the notices – especially the July 31, 2017 notice that advises Endress she "may continue to receive child care assistance funding pending the outcome of your appeal" but warns in the next sentence "[a]ny benefits you get while your appeal is being decided may have to be paid back if the Department's action is correct." Even if she were uncertain about her obligations if she lost her appeal, the notice provides DHS contact information for more information and it directs her to third-party legal assistance.

Endress v. Iowa Dep't of Human Svcs, 2019 WL 2524193 (June 19, 2019)(dissent), p.17.

While the language is admittedly not perfect, the notice need only be "reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" to satisfy constitutional due process. See Lauridsen v. City of Okoboji Bd. of Adjustment, 554 N.W.2d 542, 544 (Iowa 1996). As the Endress dissent noted, "As a business owner tasked with caring for children, it is reasonable to expect Endress to understand the plain language of the notice when it discusses "benefits" or directs her to help if she cannot understand." Endress v. Iowa Dep't of Human Svcs, 2019 WL 2524193 (June 19, 2019) (dissent), p.18.

The Provider asserted on appeal that she did not consider this secondary "You Have a Right to Appeal" document to apply to her as it

used the word "benefits" when discussing repayment if she did not prevail on appeal. However, the Provider certainly understood the term "benefits" meant that she would continue to be paid during her appeal when she filed her online appeal. As part of her online appeal request, she was directly asked to answer yes or no whether she wanted her "Benefits" to continue and she typed "Yes". App. 221. Whatever confusion this Provider had with respect to the particular word "benefits" apparently resolved itself at some point between May 6, 2016, and when she appealed online on May 10, 2016 – roughly four days after the revocation was issued. (See App. 218-221).

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 Provider to request CCAP family benefits while simultaneously working to maintain revocation of her CCAP provider agreement.

The Provider was also given more than adequate opportunity to be heard on the issues. First, the Provider was given an evidentiary

hearing on merits of the revocation before an administrative law judge. Then, in September of 2016, she was afforded more opportunity when the Director of DHS reviewed and affirmed the administrative law judge's determinations (DHS prevailed). No judicial review was sought so the Director's decision became the final case disposition. Finally, the Provider was given a hearing on the instant issue of recoupment calculations in January of 2017. This evidentiary determination was also reviewed and affirmed by the Director of DHS after additional briefing by the Provider. App. 10-13. It is hard to imagine how this Provider could have been given any more opportunity to be heard on this issue.

II. THE COURT ERRED IN GRANTING THE PROVIDER ATTORNEY FEES.

Iowa Code § 625.29 sets forth several exceptions to allowances for attorney fees. When an exception applies to a particular case, it bars a fee award. The DHS argued exceptions related to 625.29(1)(b), (d), and (f) at the lower court levels. The exceptions associated with (d) and (f) were explicitly denied by the District Court and the Court of Appeals. However, while the district court found 625.29(1)(b) to apply directly to this case, the Court of Appeals also found (b) inapplicable.

The first applicable exception is "the state's role in the case was primarily adjudicative." Colwell v. Iowa Dep't of Human Servs., 923 N.W.2d 225, 238 (Iowa 2019), reh'g denied (Mar. 8, 2019); §625.29(1)(*b*). While the statute does not define the term "primarily adjudicative", this Court determined that "if an agency's function principally or fundamentally concerns settling and deciding issues raised, its role is primarily adjudicative." Id.; Remer v. Bd. of Med. Exam's, 576 N.W.2d 598, 601 (Iowa 1998). "When a court determines whether the state's role is primarily adjudicative in the context of this statute, it must look at the state's role in the case currently in front of it, and not the state's role in other, similar cases, or the state's role generally." Branstad v. State ex rel. Nat. Res. Comm'n, 871 N.W.2d 291, 296 (Iowa 2015).

In Colwell, a dentist requested DHS to adjudicate a dispute between him and Delta Dental. Had DHS accepted the appeal, DHS would have decided the dispute. The only reason DHS did not adjudicate the dispute between Colwell and Delta Dental was that DHS determined it had no subject matter jurisdiction over the dispute.

It is a fundamental principle of our jurisprudence that a court has the inherent power to decide if it has subject matter jurisdiction over a matter. As this Court stated,

> Every court has inherent power to determine whether it has jurisdiction over the subject matter of the proceedings before it. It makes no difference how the question comes to its attention. Once raised, the question must be disposed of, no matter in what manner of form or stage presented. The court on its own motion will examine grounds of its jurisdiction before proceeding further.

Carmichael v. Iowa State Highway Comm'n, 156 N.W.2d 332, 340 (Iowa 1968).

In Colwell v. Iowa Dep't of Human Servs., Colwell filed for a state fair hearing to determine if Delta Dental should pay his claims. In other words, DHS was deciding if Delta Dental followed the appropriate rules, laws, or guidelines when it denied Colwell's claims. However, before reaching the merits of the dispute, the agency determined it did not have subject matter jurisdiction to hear the case. Had DHS heard the dispute and Colwell prevailed, he could not ask for fees against DHS as the adjudicator. Therefore, he should not be entitled to fees when DHS determined it had no jurisdiction to hear the appeal. Colwell v. Iowa Dep't of Human Servs., 923 N.W.2d 225, 238 (Iowa 2019), reh'g denied (Mar. 8, 2019).

In the instant matter, the district court determined that DHS' role was primarily adjudicative because its primary role was to adjudicate whether the Provider received CCAP overpayments and in what amount. The district court also found the attorney fee claim comparable to that made and rejected in Branstad. Court of Appeals opinion, page 4; Endress v. Iowa Dep't of Human Svcs, 2019 WL 2524193 (June 19, 2019).

In the context of this case, "adjudicate" means "to settle finally (the rights and duties of the parties to a court case)." Branstad v. State ex rel. Nat. Res. Comm'n, 871 N.W.2d 291, 291 (Iowa 2015)(quoting Webster's Third New International Dictionary 27).

As the Endress district court noted in its order:

> That is what happened. DHS provided Petitioner a contested hearing, with a meaningful opportunity to present evidence. Greenwood Manor, 641 N.W.2d at 834 (A contested case E-FILED 2018 JUL 12 3:30 PM POLK - CLERK OF DISTRICT COURT 28 entitles parties affected by the agency action to an adversarial hearing with the presentation of evidence and arguments and the opportunity to cross-examine witnesses and introduce rebuttal evidence). Despite DHS's claim that the existence of overpayments was "non-appealable", Petitioner was able to argue that her payments for services from July to November 2014 did not constitute overpayments. While the initial steps in the present action involved DHS staff investigating and determining whether Petitioner had received an overpayment, the primary action in

> the case was to adjudicate the value of that overpayment. This case is similar to Branstad, where some of the initial acts by Natural Resource Commission included investigative work, the restitution requested by the agency was found to be in error, and the ultimate act was to engage in a contested adjudicative process, with an ALJ and opportunity to present evidence. Branstad, 871 N.W.2d at 296. DHS was primarily engaged in adjudication.

Endress v. Iowa Dep't of Human Services, District Court Ruling, 7/12/18, p.28.

Chief Judge Vogel, in her Endress dissent, noted:

> The majority attempt to put teeth into Justice Carter's concern over an expansive interpretation of "primarily adjudicative." See Remer v. Bd. of Med. Exam'rs, 576 N.W.2d 598, 604 (Iowa 1998) (Carter, J., concurring specially). However, our supreme court has already commented on Justice Carter's concern, noting the legislature has rejected language that would have increased the court's ability to award attorney fees in judicial review of agency action. Branstad, 871 N.W.2d at 297. Because this case presents a typical administrative issue of what amount, if any, one party owes to another, I do not believe DHS's actions here differ from the definition of "primarily adjudicative" in Branstad, 871 N.W.2d at 296.

Endress v. Iowa Dep't of Human Svcs, 2019 WL 2524193 (June 19, 2019)(dissent), page 19.

The DHS agrees that, to the extent that the DHS's actions here are very similar to the agency actions of Branstad, the DHS's actions

are also "primarily adjudicative" and as such, no attorney fees should not be granted to the Provider pursuant to Iowa Code 625.29(1)(b).

We also find a second exception applies. It provides,

> 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.

Iowa Code § 625.29(1)(*d*). In Colwell v. Iowa Dep't of Human Servs., Colwell asked DHS to determine the monetary benefit to which he was entitled under the Dental Wellness Program. This clearly fits under section 625.29(1)(*d*)'s exception. Colwell v. Iowa Dep't of Human Servs., 923 N.W.2d 225, 238 (Iowa 2019), reh'g denied (Mar. 8, 2019).

This Court in Colwell found DHS was not liable for any of Colwell's attorney fees under Iowa Code section 625.29(1). Given that the issues before the Court on Colwell reflect the issues in the instant matter, DHS should not be liable for the Provider's attorney fees under Iowa Code section 625.29(1).

CONCLUSION

There are two important issues here. One involves an agency's ability to recoup monies provided on appeal to a private provider, and the other involves attorney fees.

The Court of Appeals stifling of the DHS's ability to recoup CCAP monies distributed to revoked providers during appeals will have a significant effect on how the agency administers CCAP program going forward. The Court of Appeals ruling requiring DHS to pay "any" billings submitted by a revoked provider creates an untenable situation as it allows revoked providers (that DHS found to not meet minimum state standards) to effectively have unfettered ability to bill and collect the CCAP welfare program's limited resources without fear of recoupment should they do not prevail on appeal.

DHS and many other state agencies will likewise be required to conduct business in a substantially different fashion should this Court find that Iowa Code 625.29 allows for attorney fees to be granted in administrative appeals where the private party simply asserts a constitutional issue along with its other defenses and appeals. A favorable ruling for the Provider on attorney fees will create a slippery slope where appellants in administrative appeals, judicial reviews, and

all subsequent appeal venues can collect attorney fees simply by including in their administrative appeals challenges to the constitutionality of all rules, Code, and notice provisions set forth in the agency notices of action.

WHEREFORE, the undersigned prays this Honorable Court accept further review of these issues, and reverse the Court of Appeal's determinations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On the 9th day of July, 2019, the State served the foregoing Application for Further Review on all other parties to this appeal via EDMS:

/s/ Tabitha J. Gardner
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Assistant Attorney General

CERTIFICATE OF COMPLIANCE

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

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DATED: July 9, 2019

/s/ Tabitha Gardner
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