IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 18-1329

TERRI ENDRESS

Petitioner,

vs.

IOWA DEPARTMENT OF HUMAN SERVICES,

Respondent.

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

PETITIONER'S RESISTANCE TO APPLICATION FOR FURTHER REVIEW

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

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

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Iowa Code § 237A.13

Iowa Admin. Code r. 441-7.9

Iowa Code § 237A.13(4)

Iowa Code § 237A.13 (8)

Iowa Code 237A.13(1)(a)(b)(d)-(f)

45 CFR 98

45 CFR 98.1(7).

45 CFR 98.15

45 CFR 98.56(2)

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Iowa Code § 625.29

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Iowa Code § 481A.151(2)

Iowa Code § 625.29(1)(d)

Iowa R. App. P. 6.1103(b)

STATEMENT OF THE CASE

This case involves the judicial review of the Iowa Department of Human Services (Department) recoupment policy which allows the Department to confiscate money earned by day care providers who contract with the state to provide child care and who had already rendered said services as part of a federal- and state-funded Child Care Assistance Program (CCAP). The Iowa Court of Appeals found that the actions of the Department violated the providers constitutional due process and the Department has asked this Court for further review. The Department also request the review of legal fees awarded.

STANDARD OF REVIEW

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

STATEMENT OF FACTS

The Appellant, Terri Endress (Mrs. Endress), has been providing childcare services for about a decade. App. p.118.

The Child Care Assistance Program is a federal- and state-funded program designed to provide child care to families who could otherwise not afford it. Providers such as Mrs. Endress provide child care under the CCA Program as per Child Care Assistance Provider Agreements. *See*, e.g, App. p.191-195. The Agreement states that the childcare provider has the status of an independent contractor. App. p.195.

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

On July 31, 2014, the DHS provided Mrs. Endress notice that she had timely appealed the Notice of Decision. App. p.330. Again, this notice stated, "You are therefore allowed to continue to receive child care assistance funding pending the outcome of your appeal. Any benefits you get while your

appeal is being decided *may* have to be paid back if the Department's action is correct." (emphasis added). App. p.330.

A telephonic hearing was held on September 25, 2014, on the allegation that Mrs. Endress had overbilled the Department. App. p.332. An ALJ found that the decision of the DHS was supported by the evidence that she had *mistakenly* billed for more children in her care than allowed and terminated her Child Care Assistance Provider Agreement. App. p.280.

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

This $623.28 estimate was first calculated by Mrs. Endress during the agency appeal and used throughout these proceedings. App. p.54. The Department never challenged this estimate; however, Mrs. Endress does not concede that she ever owed the Department $623.28, but rather only that this is the ***absolute most*** she could have overbilled the Department.

This concludes the facts pertinent to 2014.

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

On April 3, 2017, Mrs. Endress was sent a "Notice of Child Care Assistance Overpayment" which stated that she owed $16,0001.94 for the months of July 29, 2014, to November 23, 2014, the appeal period during which Mrs. Endress provided services during the prior action in 2014 App. p. 392. This 2017 Notice was the first time the Department attempted to collect on the recoupment.

The April 3, 2017, "Notice of Child Care Assistance Overpayment" demanded repayment of $16,001.94 for the period of July 29, 2014, to November 23, 2014. App. p. 392. From July 29, 2014, to November 23, 2014, is when Mrs. Endress continued to provide and be paid for child care services with the knowledge and approval of the Department while her appeal was pending.

The "Notice of Child Care Assistance Overpayment" also claims that Mrs. Endress is being charged the $16,001.94 based on "A mistake made by a provider that caused DHS to pay the provider incorrectly for child care services." App. p.392. In fact, there was no overpayment or any mistaken

payment identified. From July 29, 2014, to November 23, 2014, Mrs. Endress was paid only for child care services actually performed.

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

The Department relied heavily on Iowa Admin. Code r. 441-7.9(3) during the hearing which states, "… excess assistance paid pending a hearing decision shall be recovered to the date of the decision. This recovery is not an appealable issue. However, appeals may be heard on the computation of excess assistance paid pending a hearing decision."

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

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

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

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

On November 15, 2017, Mrs. Endress filed her Petition for Judicial Review. App. p. 5. The District Court issued its "Ruling on Petition for Judicial Review" (Ruling) on July 12, 2018, and reversed the decision of the Department. App. p. 489. The District Court denied Mrs. Endress' requests for attorney fees pursuant to Iowa Code § 625.29. On July 27, 2018, Mrs. Endress filed a motion to expand or enlarge the District Court's decision on

attorney fees. App. p. 520. *See also*, Petitioner's "Reply." App. p. 526. This motion was denied on August 6, 2018. App. p.529.

On August 7, 2018, the Department appealed the District Court's July 12, 2018 Ruling. On August 8, 2018, Mrs. Endress filed a cross-appeal regarding the District Court's decision denying attorney's fees. On June 19, 2019, the Court of Appeals issued a decision affirming the District Court's decision granting relief on judicial review and reversing the District Court's decision denying attorney's fees.

ARGUMENT

I. THE COURT GRANTED PROPER RELIEF

A. The Court properly identified a protected property interest

The Department cites authority in a box quote (Dept. Appl. at p.12) for the proposition that agency rules cannot create a constitutionally protected interest. The undersigned could not find that quote in any of the cases cited.

The court in *Perry v. Sindermann*, which is cited in the quote, states:

> We have made clear … [citation omitted] …that 'property' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings. [citation omitted]. A person's interest in a benefit is a 'property' interest for due process purposes if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit and that he may invoke at a hearing. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972).

In *Perry*, the US Supreme Court found that a teacher who claimed tenure ***did*** have a property interest in continued employment based on the policies and practices of his employer – a state college.

In *General Motors Corp v. Dept of Treasury*, a car manufacturer sued the federal government over a retroactive tax imposed by Congress. *Gen. Motors Corp. v. Dep't. of Treas.*, 803 N.W.2d 698, 711 (Mich. App. 2010). The "mere expectancy" (property interest) claimed in General Motors was a tax refund *in the wake of a court case* which deemed certain activities (employees' use of program vehicles) as exempted for tax purposes.

Similarly, in *Clemente v. US*, also cited by the Department, the 9th Circuit found that a discriminated-against member of the air force did not have an independent property interest *from a court order* requiring the plaintiff's complaint be processed fully. *Clemente v. U.S.*, 766 F.2d 1358, 1364 (9th Cir. 1985).

Unlike *Perry* or *Clemente*, Mrs. Endress is not relying on judicial action to claim a property interest, but rather state law, regulations, and fundamental notions of fairness.

In *Bills v. Henderson* the 6th Circuit considered whether a prisoner had a right to due process before being placed in segregation. *Bills v. Henderson*, 631 F.2d 1287, 1291 (6th Cir. 1980). Ultimately, the *Bills* Court found that

the practices and policies of the prison *did* create a protected interest for the Plaintiff. *Bills v. Henderson*, 631 F.2d 1287, 1294 (6th Cir. 1980).

None of these cases state that "A state agency's procedural rules cannot, by themselves, serve as the basis for a constitutionally protected property interest." App. at p. 12. In fact, the cases cited by the Department indicate the opposite. *Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Bills v. Henderson*, 631 F.2d 1287, 1294 (6th Cir. 1980); *See* also Ruling on Petition at Judicial Review (July 12, 2018) at p. 7, quoting *Stone Container Corp.* (Iowa 2003).

This Court has found that prisoners in Iowa have a right to the money accumulated in their prisoner trust accounts, whether collected from prison wages or outside sources. *Walters v. Grossheim*, 525 N.W.2d 830, 831 (Iowa 1994). The DHS is advocating that these child care providers have less interest in money earned by providing a service to the state than do convicted criminals.

In line with the case law, the Court of Appeals appropriately found that property interests are created by "Administrative rules, particularly those that limit discretion, are treated as law for [t]his purpose." Appeals Ruling, at pg. 4, (June 19, 2019) citing *Roth*.

Both courts reviewing this case found that Iowa Code § 237A.13, which states that, "[t]he department shall remit payment to a provider within ten

business days of receiving a bill or claim for services provided," creates a property interest.

The District Court concluded:

> As written, Iowa Code section 237A.13 mandates DHS to pay providers for services provided. Fulfilling this mandate, Administrative Rule 441-7.9(1) requires DHS to pay Petitioner for those services …. DHS has the statutorily created obligation to pay for services from providers during an appeal. Its own Administrative Rules enforce this requirement. Petitioner's registration, certification, or approval to provide child care under the CCA program could not be revoked and no adverse action taken pending the appeal. [citing Iowa Admin. Code r. 441-7.9] In the present action, Petitioner is contesting DHS's decision to recoup over sixteen thousand dollars of pay for the services rendered during the period her 2014 appeal was pending. Petitioner has a statutorily created property interest in the sixteen thousand dollars paid for those services provided. Ruling Pet. Jud. Rev. at p. 9.

Both the District Court and Court of Appeals found that the Legislature's use of the word "shall" in Iowa Code § 237A.13 imposed a duty on the agency that "… contains an explicit mandate and limits the DHS's exercise of official discretion as is required to create a property interest." Ruling (Court of Appeal) at p. 6 (June 19, 2019). The Court of Appeals also found that, "… the DHS's own regulations require that it pay for services provided pending a final decision on appeal from a proposed adverse action." *See* Iowa Admin. Code r. 441-7.9. [footnote] On this basis, both state law and

administrative regulation create a property interest in the payment made under the CCAP." Ruling (Court of Appeal) at p. 6 (June 19, 2019).

The Department and dissent appear to interpret the Legislature to have considered providers and beneficiaries as having the same status. Appl. at p. 15. Iowa Code 237A.13 clearly delineates "persons who are eligible for assistance" (to whom no entitlement is granted) from providers (who are to be paid only after notification of any errors). Iowa Code § 237A.13(4) and (8), respectively.

The Department contends that the second "or" in 237A.13(8) shows that the Legislature intended to include providers in limiting entitlement. Clearly, however, this statement is meant to read:

> 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** (1) due to an income level ***or*** (2) other eligibility circumstance addressed in this section. Iowa Code 237A.13(8). (Numerals and emphasis added).

In other words, 237A.13(8) second "or" is meant to deny an entitlement to persons who are *eligible for assistance* based on their income level ***and including*** any other criteria that may make a person *eligible for assistance* eligible for the program. *See* Iowa Code 237A.13(1)(a),(b)(d)-(f) for other assistance eligibility criteria. Contrary to the Department's claim, *this* is the straightforward reading of Iowa Code 237A.13(8). As the Court of Appeals

stated, "Once the DHS has exercised its discretion under section 237A.13(8) to determine which families qualify for CCAP benefits, the payment of any bills submitted by CCAP providers for childcare to those families is mandatory under section 237A.13(4)." Ruling at p. 7.

There is no part of Iowa Code 237A.13(8) which is rendered superfluous by the Court of Appeals interpretation of this subsection. The Department's seeming insistence that a grant of entitlement must be specifically granted and spelled out (e.g., 'it is the Legislature's intent that an entitlement be created') (Appl. at p. 18) also fails for all the reasons cited above.

The Department claims that it must have the discretion to recoup funds for childcare already provided to meet the federal government demands of safe, quality child care. Appl. at p. 22, citing 45 CFR 98. Though the Department has never explained how clawing back money for child care already provided retroactively makes children safer; regardless, nothing in this Federal Regulations section requires providers forfeit their earnings to accomplish these goals.

A review of 45 CFR 98 provides, in part, that the CCAP should be designed to, "… provide uninterrupted service to families and providers to the extent allowed under the statue, to support parental education, training and

employment and continuity of care that minimizes disruptions to children's learning and development" 45 CFR 98.1(7). Assuring that providers are adequately and efficiently compensated is a key component of the federal requirements to secure CCAP children quality care. *See* generally 45 CFR 98.15.

The Department's policy of discouraging appeals by threatening recoupment runs counter to the goal of fair compensation and continuity of care sought to be achieved by the program. Depriving a provider of their due process rights runs counter to 45 CFR 98.56(2) which states, "Funds shall be expended in accordance with applicable State and local laws …;" e.g., Iowa Code 17A and Iowa Code 237A.8, which states a registration may be revoked only after notice and opportunity for evidentiary hearing.

While both the dissent and the Department scoff that the DHS should be forced to pay a contractor for providing services to the government (Appl. at pg. 16), it is the undersigned's understanding that this is how commerce works and what providers expect.

The Department and the dissent's apparent fear that somehow this decision will force the Department to pay ***any*** unqualified person who makes a spontaneous claim for funds is *reductio ad absurdum*. Just as the law demands a CCAP provider be vetted prior to and during the operation of a

child care center (Iowa Code §§ 237A.2-5); the law demands the Department consider the provider's circumstances before taking that privilege away (Iowa Code §237A.8, 29, and Iowa Code Chapter 17A).

It should be noted that Mrs. Endress was accused of a safety violation (having too many children in her care). The ALJ found, rather, that Mrs. Endress had simply made a billing error. App. p. 183. Despite this early safety "concern," Mrs. Endress was invited by the Department to continue providing services. App. p. 328. If the Department was really concerned about child safety or the sanctity of the program it has the authority, under Iowa Code 17A.18A, to take emergency action (i.e., shut down a center) when there is "… an immediate danger to the public health, safety, or welfare requiring immediate agency action." The Department does not take emergency actions however because if a provider is prevented from working while an appeal is pending there are no earnings to recoup or labor to exploit. From every perspective, the Department's recoupment policy is a sham – confiscating money from providers who have already provided child care services does not retroactively make that care safer.

The Department attempts to argue that because beneficiaries may choose who they want to provide childcare, that this somehow extinguishes any expectation that a provider may have about getting paid for services

rendered. Appl. at p. 12. The Department's argument is neither ripe nor relevant. This judicial review is about the right to be paid for services *already rendered* to parents who *have already chosen* Mrs. Endress to provide those services.

Mrs. Endress was invited to continue providing childcare services pending her appeal. The parent/beneficiaries chose Mrs. Endress to provide childcare for their children. She provided said services. She was paid for said services. State law, Department regulations, the CCAP agreement and the most basic notions of fairness and equity demand that Mrs. Endress be able to retain the money she *earned* for rendering those services.

The Court of Appeals appropriately found that Mrs. Endress had a property interest in her right to retain the CCAP money she earned.

B. The Court properly found due process lacking

The notice sent to Mrs. Endress states:

> You have timely appealed the cancellation or denial of your CCA provider agreement. You are therefore allowed to continue to receive child care assistance funding pending the outcome of your appeal. Any benefits you get while your appeal is being decided may have to be paid back if the Department's action is correct. Ref. 17A, 441 IAC Chapter 7.9(1) …
>
> You may keep your benefits until an appeal is final … Any benefits you get while your appeal is being decided may have to be paid back if the Department's action is correct." App. p. 330-31.

These boilerplate statements and letters sent to both providers and beneficiaries do not provide adequate notice to providers.

The District Court found and the Court of Appeals agreed that the word "benefits" in context of the notice and other documents led Mrs. Endress, "… to believe that she was not receiving any benefits and the fees and payments she was receiving for services rendered to eligible parents were hers." Ruling at p. 9. *See* also Ruling on Pet. Jud. Review in which the Court concluded that providers don't receive benefits but, "DHS pays the provider for services rendered to parents who are eligible for 'benefits.' See Iowa Code § 237A.13 … This use of different terminology is fatal."

The Department attempts to define "benefit" to mean "payment" or "gift." Appl. at p. 25. However, Webster's Third New International Dictionary (2002) actually defines "benefit" more broadly as: "An act of kindness; good deed … something that guards, aids, or promotes well being; useful aid … PAYMENT, GIFT as: a. financial help in time of sickness, old age or unemployment …." Black's Law Dictionary definition of "benefit" is "Financial assistance that is received from an employer, insurance, or a public program (such as social security) in time of sickness, disability or unemployment." Black's Law Dictionary, Second Pocket Edition, at p. 65, West Group (2001).

This broader definition of "benefit" as a gratuity or provided assistance is the definition the District Court and Court of Appeals adopt. This is the appropriate interpretation especially given the context of the statutes, regulations and other pertinent documents in which it appears. The Department cannot deny that the CCAP (Child Care ***Assistance*** Program) is a public program intended to provide financial help and that the benefits it distributes via that program are meant as assistance, not compensation. The Department also cannot deny that Mrs. Endress *earned* the CCAP money she received; it was not simply given to her as a benefit.

The Department takes issue with the fact that the term "benefits" is also used on an online application to continue being paid by the Department. Appl. at p. 27. Again, these programs are directed to both providers *and* recipients; and even the undersigned understood these warnings to apply to any funds that were acquired inappropriately, such as the estimated $623.28 overbilled in this case; not the entire $16,001.94 Mrs. Endress *earned* while her appeal was pending.

C. Additional bases for consideration if further review is granted

The District Court also found that the recoupment provisions are constitutionally vague, concluding that:

> As written, these rules allow for recoupment of all payments received during the pendency of an appeal while also forbidding

> it …. Petitioner could not divine (nor could any provider) what risk she was assuming from these contradictory rules. It is impossible for DHS even to determine what recoupment options they have. Ruling on Pet. Jud. Review at p. 17-21, quote at p. 21.

The District Court also found that the Department's recoupment provisions were beyond the Department's authority to promulgate, stating: "There is no language in the entirety of either Code Chapter [237A or 17A] that would allow DHS to create a method to claw back payments provided to child care providers for services rendered, or even discusses the possibility of it." Ruling Pet. Jud. Rev. at p. 22.

Mrs. Endress also argued that the Department's recoupment provisions constitute unjust enrichment. Simply stated, the Department will be unjustly enriched if it is allowed to evade paying government contractors for services rendered. Even more simply stated, the government shouldn't be relegating citizens into indentured servitude.

The Court of Appeals did not consider these argument (granting relief on other grounds); however, if further review is granted on this matter, Mrs. Endress asks that these arguments be considered and affirmed.

II. THE COURT DID NOT ERR IN GRANTING LEGAL FEES

Since the Court of Appeals based its decision on legal fees primarily on the arguments made both cases, the undersigned will address both

cases/parties (Endress, No. 18-1329) and (Pfaltzgraff, No. 18-0189) in one argument section contained in each brief for the purpose of judicial economy.

Iowa Code § 625.29 states in relevant part:

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

The test as to whether an agency's role is adjudicative is whether the agency settled, "… finally (the rights and duties of the parties to a court case) on the merits of issues raised." *Endress*, District Court Ruling p. 27, citing *Branstad*. App. p. 515.

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

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

rights and duties of the parties …) on the merits of the issues raised," but rather *preserves* them to be adjudicated later. In both cases, the Department served *primarily* in preserving argument, rather than settling the rights and duties of the parties.

The Court of Appeals agreed stating that the challenge was not directed at the substantive basis for the agency action but rather, "DHS's promulgation of administrative rules concerning overpayment and the procedural due process it afforded…. Because the agency did not adjudicate the matter on appeal, its role was not primarily adjudicative." Ruling at p. 13.

The Department also routinely cited throughout the processes Iowa Admin. Code r. 441-7.9(7), which states: "This recovery is not an appealable issue." This was used by the Department at every stage in the proceeding. Endress App. p. 17. The Department, during the administrative hearing, argued that the calculation of the overpayment, "… is the only appealable piece for this appeal." and throughout the ALJ hearing. App p. 95-96 and 100,101,103-104.

How can the Department claim its process was adjudicative, when its own rules bar an adjudication? According to the Department, there is no determination to be made about *if* a provider is subject to recoupment, only how much is owed. This is as good as the Department saying – *we will not*

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

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

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

In *Branstad*, it was ultimately determined that Branstad did violate the restitution provision, but that the DNR miscalculated the penalty. *Branstad v. State ex rel. Nat. Resource Commn.*, 871 N.W.2d 291, 293 (Iowa 2015). This

left questions about whether Branstad was the prevailing party. This also left open questions of whether DNR had substantial evidence. *Branstad v. State ex rel. Nat. Resource Commn.*, 871 N.W.2d 291, 295 (Iowa 2015). In the case at bar, the provider clearly prevailed.

The Department cites *Colwell v. DHS* as a mirror to this case as it involved a dentist attempting to secure a monetary benefit from an insurer. Appl. at p. 33 (Endress), 36 (Pfaltzgraff). *Colwell* differs from the case at bar as Colwell was attempting to get the DHS to provide a hearing between two private parties. *Colwell v. Iowa Dept. of Human Services*, 923 N.W.2d 225, 238 (Iowa 2019), (Mar. 8, 2019). In *Colwell*, it was the dentist who sought the DHS's jurisdiction, not the agency seeking to impose its authority. *Id*.

In regard to the child care providers in the cases at bar they were not seeking the eligibility or entitlement to a monetary benefit, but rather arguing that it was neither constitutional or within the authority of the agency to confiscate money paid to them by the state for providing a service. Though the Court of Appeals did not address this issue; the District Court in *Endress* was quite clear in its finding that "DHS is performing the opposite action here. It is attempting to recoup funds, rather than determine if they should be given out. This does not fit within the purpose of Iowa Code section 625.29(1)(d).

DHS was not engaged in a determination of eligibility or entitlement to a benefit." Rul. Pet. for Jud. Rev. at p. 28. (CVCV005284).

Either provider could have attempted to appeal their respective "Notice of Child Care Assistance Overpayment" directly to the District Court based on the "non-appealable" nature of recoupment detailed in Iowa Admin. Code r. 441-7.9(7). However, in order to access judicial review, a person challenging an agency action is required to exhaust all agency remedies before requesting intervention from the District Court. In the *Endress* case, Judge Atherton acknowledged this fact in the Proposed Decision, citing *McCracken v. Iowa Dept of Human Services*. Admin. R. p. 31. App. p. 47.

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

The Legislature, in passing Iowa Code § 625.29, obviously believed there were times when agencies would act outside the boundaries of their authority and in those cases, the target of that agency action should be compensated. While the Department considers itself a guardian of the public trust – the question must be asked *who will watch the watchmen?* The answer must be the courts.

The Department groans that DHS and other agencies will, "… will 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 …." Appl. at 34 (Endress), 37 (Pfaltzgraff). The undersigned presumes by "substantially different fashion," the Department means agencies will have to start conducting business *constitutionally*. The undersigned encourages this. So should the courts.

The Department warns this "slippery slope" will cause a run on constitutional claims. Appl. at 34. The Department ignores, however, that to obtain attorney fees, a party must prevail. Iowa Code §625.29. A meritless constitutional claim will not prevail. If such a claim is not meritless, however; then Iowa Code § 625.29 encourages attorneys to take cases that might keep agencies within constitutional confines.

The stakes are often high in agency cases – careers, parental rights, and even, as in this case, money right out of citizens' pockets. When an agency sets its sights on someone, the road to relief is an arduous and expensive one. Tens of thousands of dollars and years of effort have been spent attempting to undo this wrong on the providers' side alone – more than the value of the "recoupment," and more than any normal individual can afford.

This is what the agencies are counting on. Here, an appeals process for agency contractors was contorted into a state-created scheme of financial servitude. This kind of exploitation must stop. The Department even admits its business model will change if the agencies might have to pay for their indiscretions.

In this case, the Court of Appeals found the agency action unconstitutional. The District Court in *Endress* specifically labeled recoupment, "mission creep." Ruling p. 24. App. p. 512. The agency has attempted to prevent any appeal (i.e., adjudication) of recoupment and still believes it has the authority to impose indentured servitude on a provider while barring them from challenging that decision. Not only did the Department not adjudicate the question of recoupment, it explicitly states that it will not. If there are any circumstances where Iowa Code § 625.29 should apply, it is these cases.

For all of these reasons and because the Department fails to demonstrate any of the grounds for further review under Rul. App. Pro. 6.1103(b); Ms. Endress requests that the Department application be denied.

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

1. This final brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1), because this final brief contains 5,574 words, excluding the parts of the page final brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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

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REQUEST FOR ORAL ARGUMENT

Mrs. Endress believes that the Court may benefit from being able to directly address any questions that may arise out the briefs and requests an oral argument if further review is granted.

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ATTORNEY COST CERTIFICATE

I hereby certify that the actual cost paid for printing the foregoing "Petitioner's Resistance to Application for Further Review" was $0.00.

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CERTIFICATE OF SERVICE

I, Trent W. Nelson, attorney for Petitioner, hereby certify the following attorney of record has been delivered a copy via EDMS on the 19th of July, 2019 and that one (1) copy of "Petitioner's Resistance to Application for Further Review" will be mailed to the following attorney-of-record, by enclosing same in an envelope addressed to:

Tabitha Gardner
Assistant Attorney General
Hoover State Office Building
1305 E. Walnut St., 2nd Floor
Des Moines, Iowa 50319

on the 22nd day of July 2019, in full compliance with the provisions of the Rules of Appellate Procedure.

Respectfully Submitted,
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