IN THE IOWA SUPREME COURT

NO. 18-0189

JULIE PFALTZGRAFF

Petitioner/Appellant,

vs.

IOWA DEPARTMENT OF HUMAN SERVICES

Respondent/Appellee.

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

PETITIONER'S RESISTANCE TO APPLICATION FOR FURTHER REVIEW

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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 daycare 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.

STANDARD OF REVIEW

Mrs. Pfaltzgraff 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). Deference to the agency is not even possible because the Department *is without the authority*

to decide constitutional issues. *Shell Oil Co. v. Bair*, 417 N.W.2d 425, 430 (Iowa 1987).

STATEMENT OF FACTS

Petitioner, Julie Pfaltzgraff (Mrs. Pfaltzgraff), is a registered child care provider in Burlington, Iowa, who is and was prior to May 6, 2016, eligible to provide services under the Child Care Assistance Program (CCAP), a state- and federally-funded program that pays eligible child care providers for child care services provided to low-income parents.

On May 6, 2016, Mrs. Pfaltzgraff was notified by the Iowa Department of Human Services (Department) that her child care registration was revoked and that her CCAP Agreement with the Department was terminated (effective May 20, 2016) because her billing statements showed she had exceeded the maximum capacity for children in her care on March 22, 2016, March 23, 2016, and April 7, 2016. App. pp. 234, 200. The notice stated, "The provider operates in a manner the Department determines impairs the safety, health, or well-being of the children in care." App. p. 234.

The May 6, 2016, notice also stated on a page entitled "You Have the Right to Appeal," that "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. 226. (emphasis added.)

Mrs. Pfaltzgraff appealed the May 6, 2016, "Notice" on May 10, 2016, and requested that she be able to continue providing services. App. p. 227.

On June 21, 2016, a telephone hearing was held. App. p. 198. In a "Proposed Decision" rendered July 29, 2016, ALJ Karen Doland found that "This case appears to focus on Pfaltzgraff's inaccurate billing records more than an actual 'hazard' or 'safety' risk to children." App. p. 202. Judge Doland reversed the revocation of Mrs. Pfaltzgraff's child care registration for one year that had been imposed upon her. *Id.* Judge Doland did, however, rely on Iowa Admin. Code r. 441-170.5(1) (2017) which states that the Department and affirmed the termination of Mrs. Pfaltzgraff's CCAP Agreement.

Though the Department never requested a refund nor provided Mrs. Pfaltzgraff an amount it claims Mrs. Pfaltzgraff mistakenly overcharged the Department as a result of the billing inaccuracies; Mrs. Pfaltzgraff estimated the amount overcharged to be, *at most*, $218.88. App. p. 11.[1]

A page titled "Appeal Rights" was sent attached to the July 29, 2016, "Proposed Ruling" which stated, "If you are getting benefits while the appeal

[1] Mrs. Pfaltzgraff in no way concedes that she owes $218.88, but rather made this liberal estimate as to what she might owe as a result of her billing errors. App. p. 11. The actual amount owed is likely much less.

is pending, you will continue to get them until the Director issues a Final Decision." App. p. 204.

Mrs. Pfaltzgraff appealed the July 29, 2016, "Proposed Ruling" to the Director of the Department for a "Final Ruling" on the matter. App. p. 236. On September 23, 2016, the Director of the Department rendered his final decision affirming the "Proposed Ruling." App. p. 236. Mrs. Pfaltzgraff did not appeal this decision.

Mrs. Pfaltzgraff received a "Notice of Child Care Assistance Overpayment" dated October 31, 2016, demanding $31,815.46 for the period of May 20, 2016, to October 23, 2016. App. p. 209. The basis for the $31,815.46, according to the Notice is due to, "A mistake by a provider that caused DHS to pay the provider incorrectly for child care services." *Id.* The $31,815.46 represents the money Mrs. Pfaltzgraff *earned* from providing child care to persons receiving CCAP assistance while her appeal was pending. App. p. 222. This "recoupment" occurred, despite the fact that the Department advised Mrs. Pfaltzgraff she was authorized to continue providing services as she had prior to the May 6, 2016, "Notice of Decision." App. pp. 204, 226.

On November 17, 2016, Mrs. Pfaltzgraff appealed the October 31, 2016, "Notice of Child Care Assistance Overpayment." (Admin. R. p. 307; App. p. 313.)

A hearing was held on the "Notice of Child Care Assistance Overpayment" on January 30, 2017. App. p. 65. A "Proposed Decision" was issued on March 3, 2017, denying Mrs. Pfaltzgraff relief. App. p. 16. Mrs. Pfaltzgraff appealed the "Proposed Decision" on March 10, 2017. App. p. 14. The Director issued his "Final Decision" on March 31, 2017, affirming the "Proposed Decision. App. p. 7.

On April 27, 2017, Mrs. Pfaltzgraff filed her "Petition for Judicial Review" with the District Court appealing the Department's October 31, 2016, "Notice of Child Care Assistance Overpayment," the March 3, 2017, "Proposed Decision" and the March 31, 2017, "Final Decision." App. p. 323.

A hearing was held on November 3, 2017, and the District Court issued its "Findings of Fact, Conclusions of Law, Ruling and Order" on January 3, 2018, affirming the decision of the Department. (Findings of Fact, Conclusions of Law, Ruling and Order, (Jan. 3, 2018) (Ruling) App. p. 468.)

Mrs. Pfaltzgraff filed a request for an enlarged or expanded ruling in accordance with Iowa R. Civ. P. 1.904(2) which was denied on January 24. 2018. (App. pp. 481 and 487.)

Mrs. Pfaltzgraff appealed the January 3, 2018, and January 24, 2018, decision by the District Court on January 30, 2018. App. p. 489. On June 19, 2019, the Court of Appeals issued a decision reversing the District Court's decision and granted attorney's fees pursuant to Iowa Code § 625.29.

ARGUMENT

This "Argument" sections mirrors that of the Court of Appeals and the Department in this matter and repeats the arguments made in *Endress v. IDHS*, Supreme Court No. 18-1329, amending only references to the parties, briefs, and appendix where applicable.

I. THE COURT GRANTED PROPER RELIEF

A. The Court properly identified a protected property interest

The Department cites authority in a box quote (Appl. at p. 14) 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 fact, in *Perry*, the US Supreme Court found that a teacher who claimed tenure had 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 the US Congress and enforced by the Internal Revenue Service. *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. Pfaltzgraff 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." Dept. Appl. at p. 14. 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 (Endress v. DHS, Case No. CVCV055284) (July 12, 2018) reviewing the same issues at p. 7, quoting *Stone Container Corp.* (Iowa 2003).

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." Court of Appeals Ruling, *Endress v. DHS*, Case No. CVCV055284 (referred to by the Court of Appeals in this case) at pg. 4, (June 19, 2019) citing *Roth*.

The Court of Appeals 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 in *Endress* reviewing the same issues 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.(CVCV055284) at p. 9.

The 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, *Endress* (Court of Appeal) at p. 6 (June 19, 2019). The Court of Appeals in *Endress* 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, *Endress* (Court of Appeal) at p. 6 (June 19, 2019).

The Department and the 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 the intention of the Legislature to deny providers an entitlement. Dept. Appl. at p. 16-17. Clearly, however, this statement is meant to be 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, section 237A.13(8)'s 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 other than income. Contrary to the Department's claim, *this* is the straightforward reading of Iowa Code § 237A.13(8). As the Court of Appeals concluded, "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).” *Endress*, 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. 20) also fails for all the reasons and case law 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. 25, citing 45 CFR 98.

Though the Department has never explained how clawing back money for child care already rendered somehow retrospectively makes children safer; regardless, nothing in this Federal Regulations section requires providers forfeit their earnings to (putatively) 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 statute, 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 Chapter17A 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 at the idea that the DHS should be forced to pay a contractor for providing services to the government (Appl. at pg. 17-18), 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 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. Pfaltzgraff was accused of a safety violation (having too many children in her care). The ALJ found, rather, that Mrs. Pfaltzgraff had simply made a billing error. App. p. 202. Despite this early safety "concern," Mrs. Pfaltzgraff was invited by the Department to continue providing services. App. p. 226-27. 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 (close 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.

This Court has found that prisoners 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 Department is advocating that these child care providers have less

interest in money earned by providing a service to the state than do convicted criminals.

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. 16. 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 *already chose* Mrs. Pfaltzgraff to render those services.

Mrs. Pfaltzgraff was invited to continue providing childcare services pending her appeal. The parents/beneficiaries chose Mrs. Pfaltzgraff 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. Pfaltzgraff be able to retain the money she earned for rendering those services.

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

B. The Court properly found the notice defective

The notice sent to Mrs. Pfaltzgraff states:

> 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. 219.

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

The District Court in *Endress* found, and the Court of Appeals agreed that the word "benefits" in context of the notice and other documents could lead providers, "… 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 (referencing *Endress*). *See* also Ruling on Pet. Jud. Review in *Endress* (CVCV055284) 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 pg. 65, West Group (2001).

This broader definition of “benefit” as a gratuity or provided assistance is the definition the Court of Appeals adopts in this case. 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 and has not denied that Mrs. Pfaltzgraff *earned* the CCAP money she received; it was not simply given to her – not a “benefit.”

The Department takes issue with the fact that the word benefits is also used on an online application to continue being paid by the Department. Appl. at p. 29-30. Again, these documents and computer systems 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

$218.88 overbilled in this case; not the entire $31,815.46 Mrs. Pfaltzgraff *earned* while her appeal was pending.

The District Court in *Endress* also took issue with the Department's argument that providers commit an "error" when they agreed to continue providing child care services at the invitation of the Department. The district court in *Endress*, commented the Department, "strains credulity to construe DHS's own policy of allowing a provider to continue to receive payment during an appeal as an 'error.'" *Endress* Ruling on Pet. Jud. Review at p. 14 (CVCV055284).

C. Additional bases for consideration if further review is granted

The District Court in *Endress* 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 Court of Appeals did not address this finding (granting relief on other grounds); however, if further review is granted on this matter, Mrs. Pfaltzgraff asks that this finding by the District Court be considered and affirmed by the Supreme Court. (Preserved for review by Mrs. Pfaltzgraff in her "Final Brief and Request for Oral Argument" at p.28-41(May 29, 2018).)

The District Court in *Endress* 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 (CVCV055284). The Court of Appeals did not address this finding (granting relief on other grounds).; however, if further review is granted on this matter, Mrs. Pfaltzgraff asks that this finding by the District Court in *Endress* be considered and affirmed by the Supreme Court. (Preserved for review at in her "Final Brief and Request for Oral Argument" at p.41-54 (May 29, 2018) and based on Iowa Code Chapter 17A at p. 54-58).

Mrs. Pfaltzgraff also argued that the Department's recoupment provisions constitute unjust enrichment. Simply stated, the Department will be unjustly enriched if it is allowed to claw back payments to government contractors for services rendered. More simply stated, the government shouldn't be relegating citizens into indentured servitude. Both the Court of Appeals and the District Court declined to consider this argument (granting relief on other grounds); however, if further review is granted on this matter, Mrs. Pfaltzgraff asks that this argument be considered and approved.

(Preserved for review in her "Final Brief and Request for Oral Argument" at p. 58-67 (May 29, 2018)).

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

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.*" Admin. R. p. 31. 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."

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." *Endress* 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 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 providers prevailed in the Court of Appeals.

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), reh'g denied (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 case 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 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*. Endress 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.

The Department groans that DHS and other agencies, "… 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 still 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 to keep agencies within constitutional confines. This too should be encouraged.

The stakes are often high in agency cases – careers, parental rights, and as in this case, money right out of a 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. This means the goal of Iowa Code § 625.29 will be met.

In this case, the Court of Appeals found the agency action unconstitutional. The District Court in *Endress*, specifically labeled recoupment, "mission creep." Endress 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. Pfaltzgraff requests that the Department application be denied.

Respectfully Submitted,
/s/ Trent W. Nelson

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CERTIFICATION OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

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

This brief has been prepared in a proportionally spaced typeface using 14-point Times New Roman and contains 5,581 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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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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REQUEST FOR ORAL ARGUMENT

Mrs. Pfaltzgraff 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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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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