IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 18-1329

TERRI ENDRESS

Petitioner-Appellee,

vs.

IOWA DEPARTMENT OF HUMAN SERVICES,

Respondent-Appellant.

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

APPELLEE/CROSS-APPELLANT'S FINAL REPLY BRIEF AND REQUEST FOR ORAL ARGUMENT

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BRIEF AND ARGUMENT

I: Reply to the Department's Section IV

Mrs. Endress is not sure what this section is intended to convey, but it appears to be an additional claim not covered in the Department's brief.

The Department states that the "… the possibility of recoupment for a terminated provider actually motivates providers to honestly evaluate their cases' merits in order to assess whether it is in their best interest to accept additional CCA monies while appealing an adverse action." Dept. Reply Brief at p. 38. There is a more accurate way to phrase this: *The Department is attempting to discourage appeals by illegally threatening indentured servitude should a person attempt to protect their rights pursuant to the Iowa Administrative Procedure Act.* Plus, how is a provider supposed to be discouraged from appealing if the warnings aren't clear enough to make providers aware of the stakes? *See* "Ruling on Petition for Judicial Review" at p. 15, App p. 503, "Suffice it to say that Petitioner did not receive adequate notice in this case," and at p. 20 (App. p. 508), pertaining to regulations,

"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."

The Department is fond of accusing Mrs. Endress' counsel of using half quotes, taken "… completely out of context," however declines to explain exactly how. Dept. Reply Brief at p. 39. At this point, however, it is not Mrs. Endress' arguments the Department must overcome, but those of the District Court. *See* generally, "Ruling on Petition for Judicial Review" App. p. 489.

The Department claims it has not been determined in the record what happens to recouped money and implies it is returned to the federal program and therefore the Department should not be held liable for wherever those funds end up. Dept. Reply Brief at p. 39.

Mrs. Endress did attempt to get this information in her "Interrogatory No. 7." Admin. R. 267, App. p. 283. The Department, in response, embraced its favorite line that, "Mr. Nelson has already said that she doesn't refute the fact that that number -- that 16,000 is an accurate number that she was paid. That means that's the only appealable issue here." Admin. R. p. 226, App. p. 242.

However, the representative for the Department did acknowledge during that discovery hearing that, "Any money that is recouped, whether

that's a federal dollar or a state dollar, goes right back into that [Child Care Development] fund and will continue to serve our families. That's all that money is used for. It doesn't go anywhere else." Admin. R. p. 225, App. p. 241. As the Department representative explained during that hearing, this Iowa Child Care Development Fund is designed to house federal block grant funds and the state's required contribution to the program. *Id.* What Mrs. Endress does not know is whether recoupment funds count toward the state's contribution for federal funding. Regardless, recoupment allows the state to receive at least double the services for the same dollar – a dollar which is stripped from the child care providers who have already *provided – not gratuitously earned* – those child care services.

II: Ms. Endress is entitled to Attorney Fees

There are several exceptions to an Iowa Code § 625.29 claim for legal fees which bar such an award, many of which the Department argued and were explicitly denied by the District Court.

The Department claims that the state was supported by substantial evidence, therefore the Court should not make an award. Reply at p. 42. The District Court found, "DHS' arguments are legally unsound and unsupported by substantial evidence." Ruling at p. 27, App. p. 515. The Department did not appeal this decision.

The Department claims that the role of the state, in this case, was to determine whether a beneficiary to was entitled to a monetary benefit. Dept. Reply Brief at p. 44. The District Court found that the Department was performing the opposite of an entitlement determination attempt rather, "… to recoup funds, rather than determine if they should be given out," and that "DHS was not engaged in a determination of eligibility or entitlement to a benefit." Ruling at p. 28, App. p. 516. The Department did not appeal this decision. Furthermore, since Mrs. Endress earned the money the Department is attempting to recoup, it cannot be considered an entitlement or benefit.

The Department claims that the Department was attempting to collect a judgment debt. The District Court found that "Judgement debt exists when a court has ruled on a debt and "reduced [it] to judgment … It does apply to this action now." Ruling at p. 29, App. p. 517. The Department did not appeal this decision.

The question remaining is whether the action by the Department was "primarily adjudicative."

Mrs. Endress has already addressed much of the argument presented by the Department in her cross-appeal argument regarding the district court finding (Endress' Brief at p. 58-66). To summarize:

(1) the Department did not primarily adjudicate the issue but rather merely or mostly preserved the issues raised for judicial review as Mrs. Endress is required by Iowa Code 17A.19 to exhaust her administrative remedies (Endress' Brief at p. 60);

(2) the Department's own rule explicitly states that its recoupment determination is not appealable – an argument that the Department has consistently stood by throughout this process. It does not follow that a Department can act primarily as an adjudicator when it states by its own rules that no adjudication on the matter of recoupment can be made (Endress' Brief at p. 61-62).

(3) Iowa Code 17A.19 creates additional due process requirements when the agency is a party to that action. Here, where the Department desires to maintain a source of funding, the Department has a real interest in keeping that source viable. To that end, the record shows that the Department was mostly involved with either protecting its revenue source or building a record to protect that revenue source on judicial review. The Department acted primarily as an advocate, not an adjudicator. (Endress' Brief at 63-64).

CONCLUSION

In this action, the Department advocated for its right to maintain this revenue stream. In this action, the Department acted as a strawman for the

purposes of exhausting administrative remedies. What the Department did not do was to principally settle or decide issues raised. The concerns of Mrs. Endress were not settled and decided by the Department but passed on to the district court for genuine disposition. Here, the Department only wanted to argue that the only issue Mrs. Endress had the right to appeal was whether the amount owed was correct and repeatedly claims any other argument was *forbidden by regulation*. If Iowa Code § 625.29 does not apply in this case, where the Department specifically claims the demand for recoupment is not appealable (capable of being adjudicated) then § 625.29 will be rendered meaningless.

Challenging agency actions is a costly venture. Few attorneys have experience with the Iowa Administrative Procedure Act and even fewer individuals can afford the two-part appeal process as required by the exhaustion of remedies, which involves litigating the matter for a proposed decision and a final decision (sometimes there is even an additional level of appeal at the agency level, e.g., from a university to the Board of Regents) and then to the district court. In this case, Mrs. Endress has filed four briefs (not including replies and resistances) all involving complex legal issues. The cost to Mrs. Endress to litigate these matters has certainly outstripped what she can hope to recover, exponentially in fact. This is what the agencies rely on – that

no person will have the means to fight and that the courts – admittedly overburdened and underfunded – will do what they can to keep these cases at the agency level. This is a dangerous precedent. If agencies are left to operate without any accountability, individuals like Mrs. Endress will be and are being exploited. The tenacity and boldness of the agency in its perceived unbridled authority is apparent in this record. Repeatedly the agency has stated essentially – *the DHS has the authority to regulate ourselves from beneath any accountability*. Such behavior will only get worse unless individuals are able to challenge agency authority – to be held accountable by the courts. The only way *most* individuals *can* have access to the courts is by providing a mechanism to fund such access. The Legislature has provided such a mechanism in Iowa Code § 625.29. Mrs. Endress encourages the Court to employ it.

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

1. This final reply brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1), because this final reply brief contains 1,452 words, excluding the parts of the page proof brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This final reply 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 reply brief has been prepared in proportionally spaced typeface using Microsoft Office Word 2018 in 14-point Times New Roman.

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REQUEST FOR ORAL ARGUMENT

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

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ATTORNEY COST CERTIFICATE

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

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CERTIFICATE OF SERVICE

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

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

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