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

APPELLANT'S FINAL BRIEF AND CONDITIONAL REQUEST FOR ORAL ARGUMENT

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ROUTING STATEMENT

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

STATEMENT OF THE CASE

Nature of the Case

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

Course of Proceedings and Nature of Facts

This appeal arises out of a judicial review challenge to a final administrative determination that the Department of Human Services (hereinafter "DHS") correctly computed its recoupment claim for overpaid Child Care Assistance (hereinafter "CCA") to a child care provider (hereinafter "Provider"). While there is no case law specific to CCA Recoupment, a very similar case regarding CCA is presently before this Court. See Pfaltzgraff v. Iowa Dep't of Human Svcs, _____ WL _____ (_____ 2018); Polk County District

Court, CVCV054004 (Jan. 3, 2018).

In May of 2012, the Provider applied for DHS' child development home registration and, at the same time, applied for DHS' permission to accept CCA payments for children who received CCA subsidy benefits. App. 278. The Provider was approved to participate with both programs.

On July 17, 2014, the DHS cancelled the Provider's CCA provider agreement for submission of claims for payment for which she was not entitled. App. 279. The Provider appealed on July 22, 2014. Id. On September 25, 2014, a hearing was held before the Department of Inspections and Appeals. App. 278-280. The DHS' cancellation was affirmed. Id. The Provider appealed. The administrative law judge's ruling was affirmed by the DHS Director on November 17, 2014. App. 45, 337. The Provider did not appeal the CCA issue to the district court. Shortly after this, the Provider voluntarily relinquished her DHS' child development home registration.

In March of 2017, the Provider reapplied for a CCA provider agreement, and she was approved by DHS. App. 45. DHS noted that the Provider was residing at a different address in 2017 compared to

what DHS had on file from her prior 2014 registration. See App. 255, 392. In evaluating the Petitioner's 2017 application, the DHS also noticed that the Provider had not made any payments toward her 2014 overpayment balance so the case was referred to establish a repayment schedule. App. 342-345.

A Notice of Child Care Assistance Overpayment was issued on April 3, 2017. App. 325, 392-393. The Provider appealed. An administrative hearing was held on August 8, 2017 and the DHS' overpayment determination was affirmed. The Provider appealed to the Director of DHS. App. 17-19. On October 20, 2017, the Director adopted the proposed decision. Id. The Provider sought judicial review. On July 12, 2018, the DHS' determinations were reversed by the district court. App. 489-518.

STATEMENT OF FACTS

(Administrative Contextual History)

The Provider has been involved in child care in Iowa since at least 2011. In July of 2011, DHS received a complaint that the Provider was providing child care (as a nonregistered provider) to more children than was allowed by law. App. 278. In May of 2012, the Provider applied to become a registered provider which would

allow her to have more children than she had been allowed as a nonregistered provider. See Id.; Iowa Code 237A. The Provider also applied to participate in the Child Care Assistance ("CCA") Program as a provider. Id.

Despite being permitted a larger number of children as a registered provider, the Provider still had two over-numbers child care complaints directed to DHS in January and September of 2013. App. 278.

The Provider's CCA billings stretching into June of 2014 revealed that there were several times that the Provider self-reported (ie. billed for CCA) for more children than allowed by law. App. 279. On July 17, 2014, the DHS issued a notice of decision cancelling the Provider's CCA Provider Agreement for submitting claims for payments for which she was not entitled. Id.; see App. 181-182. The Provider filed an appeal on July 22, 2014. Id.

On September 25, 2014, a hearing was held before the Department of Inspections and Appeals. The certified issue was "Whether the Department correctly cancelled the [Provider]'s child care provider agreement for repeatedly submitting claims for payment to which the [Provider] was not entitled." App. 278. The

Provider argued at hearing that her billing errors were simply mistakes that were not intentionally inaccurate or overbilled. The administrative law judge's order notes, "it was pointed out to the Provider that she is the one that is most familiar with her business to be able to root out the children's parent's work schedule changes to show honest mistakes from that or to trace who of her employees might have made mistaken filings." App. 280. The DHS' CCA cancellation decision was sustained as the "Department has presented sufficient evidence to demonstrate that the [Provider] repeatedly made billings for children in excess of the numbers allowed for her care at any one time." Id. The Provider appealed. The administrative law judge's ruling was affirmed by the Director of DHS on November 17, 2014. App. 45, 337. The Provider did not appeal the CCA issue to the district court and shortly after the Director's November 2014 decision, the Provider voluntarily relinquished her child development home registration.

(Overpayment Procedural History – The Instant Appeal)

In March of 2017, the Provider again approached DHS seeking a CCA Provider Agreement, and she was approved. App. 45. DHS noted that the Provider resided at a different address in 2017 than

during her prior child care involvement with DHS in 2014. See App. 255, 392. When the Provider reapproached DHS in 2017 to reapply for a CCA agreement, the DHS recognized that she had not made payments toward her 2014 overpayment balance so the DHS CCA unit referred the case for establishment of a repayment schedule. App. 342-345.

A Notice of CCA Overpayment was issued on April 3, 2017. App. 325, 392-393. The Provider appealed. An administrative hearing was held on August 8, 2017. App. 42. The Provider was present and represented by her current attorney. The DHS represented itself pro se. Id. There was one certified issue on appeal: "Whether the Department correctly computed and established a claim for overpaid child care assistance." App. 44.

At hearing, it was conceded that there was a two-dollar debt computation error such that the overpayment was to be $16, 003.94 for the period of care at issue (July 29, 2014 through November 23, 2014). App. 45. The administrative law judge considered several arguments set forth by the Provider at hearing.

The administrative law judge found that the DHS did not err in establishing or calculating the overpayment. Specifically, the ALJ

noted,

> [Provider] ultimately lost her [Child Care Assistance Provider Agreement appeal – in 2014] when the Department issued a final decision affirming the cancellation of her agreement. Thus, the [Provider] did not have a Child Care Assistance Provider Agreement in effect during the appeal period. As a result, she was not entitled to receive the $16,003.94 the Department paid to her for child care during that time. Therefore, this amount was an overpayment the Department was required to recoup. [Provider] did not dispute the amount was correctly calculated.

App. 47. The administrative law judge declined to address the Provider's constitutional and state law challenges. The judge did note that "[t]he [Provider] also makes some arguments ostensibly grounded in contract law. …. These arguments essentially rehash [Provider]'s arguments discussed above – that the rule is invalid and that her due process rights were violated by lack of notice – made under the guise of contract law rather than administrative and constitutional law, respectively. … I decline to address them for the same reasons stated above." App. 48. Finally, the judge considered the Provider's argument of unjust enrichment, noting "Unjust enrichment is an equitable doctrine used to recover funds in a civil action. [cite omitted] Provider cites no authority, and I have not seen

one, for the proposition that the doctrine can be wielded as a defense in an administrative action. Thus, I reject the argument." App. 48.

The Provider appealed the administrative law judge's proposed decision to the Director of DHS. App. 17-19. On October 20, 2017, the Director issued a final decision adopting the proposed decision. Id.

The Provider appealed to the district court. The district court ultimately reversed the administrative hearing findings favoring the DHS, but also ruled against the Provider's request for attorney's fees.

ARGUMENT

STANDARD OF REVIEW

In Ghost Player v. Iowa Dept. of Econ. Dev., ____ N.W.2d ____ (2018); 2018 WL 480365, this Court articulated that when reviewing an agency decision that forms the basis of a petition for judicial review, this Court will apply the standards set forth in the judicial review provision of the Iowa Administrative Procedures Act to determine if this Court reaches the same result as the district court. Id. at 2018 WL 480365 at*8.

To the extent that this Court is being asked to consider issues brought under the Iowa Administrative Procedures Act, the district

court functioned in an appellate capacity to correct legal error committed by the agency. Iowa Code § 17A.19(8) (1997); Consumer Advocate v. Iowa State Commerce Comm'n, 465 N.W.2d 280, 281 (Iowa 1991). A court's review of agency action is severely circumscribed. Burns v. Iowa Bd. of Nursing, 495 N.W.2d 698, 699 (Iowa 1993). The administrative process presupposes that judgment calls are to be left to the agency. Nearly all disputes are won or lost there. Id.; Leonard v. Iowa State Bd. of Ed., 471 N.W.2d 815, 816 (Iowa 1991).

In deciding whether the agency decision in this matter was correct, this Court should consider whether the agency's findings are supported by substantial evidence in the record as a whole. Iowa Code § 17A.19(8)(f); Hy-Vee Food Stores v. Iowa Civil Rights Comm'n, 453 N.W.2d 512, 515 (Iowa 1990) (citations omitted). In Mercy Health Ctr., A Div. of Sisters of Mercy Health Corp. v. State Health Facilities Council, 360 N.W.2d 808 (Iowa 1985), the Court stated the following at pages 811-812: "Evidence is substantial if a reasonable person would find it adequate to reach the given conclusion, even if a reviewing court might draw a contrary inference." [citation].

The Iowa Administrative Act 17A.19(10)(m) provides that,

> The court may affirm the agency action or remand to the agency for further proceedings. The court shall reverse, modify, or grant other appropriate relief from agency action, equitable or legal and including declaratory relief, it if determines that substantial rights of the person seeking judicial relief have been prejudiced because the agency action is … [b]ased upon an irrational, illogical, or wholly unjustifiable application of law to fact that has clearly been vested by a provision of law in the discretion of the agency.

Iowa Code §17A.19(10)(m) (2011). Weight of evidence remains within the agency's exclusive domain. Under these circumstances, great care must be taken by the reviewing court to avoid moving from the prescribed limited review into one that is de novo. Burns v. Iowa Bd. of Nursing, 495 N.W.2d 698, 699 (Iowa 1993).

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

PRESERVATION OF ERROR

The DHS preserved error with respect to argument associated with due process rights at the administrative and judicial review levels.

Under the Fourteenth Amendment to the Federal Constitution and article I, section 9 of the Iowa Constitution, there are two types of

due process violations: substantive and procedural. See State v. Hernandez-Lopez, 639 N.W.2d 226, 237 (Iowa 2002). The federal and state due process provisions are nearly identical, as is the analysis for each. See id. If a state or federal court determines that substantive due process has not been violated, then the court will analyze procedural due process. Hernandez-Lopez, 639 N.W.2d at 237.

Procedural due process asks whether the government followed a fair process in taking the action. Id. Procedural due process is a flexible concept and different levels of procedure are required for different circumstances. See Matthews v. Eldridge, 424 U.S. 319, 334-335 (1976). To allege a procedural due process violation, a party must first establish that state action has deprived them of a protected property interest without due process of law. Keating v. Nebraska Pub. Power Dist., 660 F.3d 1014, 1017 (8th Cir. 2011).

A. For a child care provider to have a property right in a benefit, there must be a legitimate claim of entitlement to the benefit, and not simply an expectation by the provider of it.

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

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

Similarly, in General Motors Corp. v. Dep't of Treasury, 803 N.W.2d 698, 702 (Mich. Ct. App. 2010), the Court held that the manufacturer did not have a vested property right sufficient to raise a procedural due process claim. Id. 708-709. The manufacturer's

claim for refund was based upon a "mere expectation that its claim might succeed in light of the [decision of the Michigan Supreme Court]." Id. at 709.

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 family CCA payments.

Iowa Code section 237A.13 sets out the purpose of the state's CCA program noting that the "program is established in the department to assist children in families who meet eligibility requirements and are described by any of the following…". Iowa Code § 237A.13(1) (2017); see also Iowa Code Ch. 239B referring to CCA program role in Iowa Family Investment Program.

Just as Iowa Code 234 provides direction for the Iowa Food Assistance Program related to the Program administration for recipients (as opposed to making its primary directives about grocery stores who accept the food stamps), Iowa Code 237A.13 primarily provides direction related to the families who receive CCA benefits (as opposed to making its primary directives about providers who accept family CCA monies for child care).

Iowa Code section 237A.13(1) enumerates 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 CCA. Id. This section of chapter 237A also notes that CCA monies will be allocated to eligible families based upon the "availability of funding appropriated for state CCA for a fiscal year". Iowa Code § 237A.13(7) (2017).

It is worth noting that the Iowa Code 237A says, with regard to eligible families "[n]othing in this section shall be construed as, or is intended as, or shall imply, a grant of entitlement for services to persons who are eligible for assistance due to an income level or other

eligibility circumstance addressed in this section." Id. at § 237A.13(8).

Iowa Code section 237A.13(8) 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, and for this reason, broad, general authority is provided to DHS with regard to administering the CCA provider program.

The district court erroneously concluded that since Iowa Code 237A.13(4) incorporates language, aimed at eliminating significant delays in payment distributions, that providers themselves must therefore have a "right to payment" based upon their self-designation as "providers". App. 24-25. Such a broad reading of this narrow directive was never the intention of the legislature who drafted this section simply to assure that CCA participants' accounts were timely reconciled once bills were submitted to DHS.

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. It is hard to imagine why the same legislature that specifically stated that CCA eligible families have no entitlements could somehow forget to include specific language to grant entitlements to providers, had that had been their intention. Clearly, the legislature never intended to grant entitlements or property rights to providers, even those providers who possessed a valid CCA provider agreement at the time they were making claims for payments to DHS.

The legislature provides guidelines for DHS with regard to implementation of the CCA program. The guidelines included requirements for DHS to:

- conduct background record checks on persons applying for or receiving public funding for providing child care (even including people living in homes where public funding for child care was being received),
- research appropriate CCA reimbursement rates, and

- insure CCA payments were made timely to eligible CCA providers.

See Iowa Code 237A.5, 237A.13 (2014).

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 CCA program, 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.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 CCA program. In this case, the Provider here did not fit into either category of 237A.5(2)(d) after DHS revoked her CCA agreement in 2014 as she no longer held a valid CCA program agreement.

Iowa Code 237A.13(4), a subsection that discusses billing and payment provisions for the CCA program states, "[t]he department shall remit payment to a provider within ten business days of receiving a bill or claim for services provided." While 'provider' is not specifically defined as a person who actually has a valid CCA provider agreement, subsection (4) falls within the same section of code that sets forth all of the requirements to be a CCA provider. Clearly, when "provider" is mentioned in 237A.13(4), it was intended that the "provider" was a person who was part of the DHS' CCA provider program and was providing services to CCA families under a valid CCA provider agreement.

When one reads the definition of "provider" in subsection (4) in an overbroad way to include <u>any</u> 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 CCA Provider Agreement. Likewise, there would be no way to limit the definition of 'provider' even to those who comply with the companion code and rule sections, such as Iowa Code 237A.5 (record check provisions).

When the federal government established the Child Care and Development Block Grant (CCDBG) Act of 2014, and attached specific parameters and goals that were required for States to be eligible to receive CCDBG grant monies, it is nearly impossible to imagine that this was vague, self-espousing "provider" definition would have been what the U.S. Department of Health and Human Services had in mind when it set forth its minimum requirements for care and family subsidies within this Act. See Iowa Code 237A, 45 CFR 98 (2014).

B. The Provider was given adequate notice of the DHS' revocation of her CCA agreement and her appeal rights, as well as being provided with an opportunity to be heard on the issue.

When the DHS revoked this Provider's CCA provider agreement, the agency noticed the Provider of the action. App. 326-328. This notice also indicated that 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 was in the best position to evaluate her chances of prevailing on appeal but it also noticed her that if DHS did prevail (i.e. the revocation of the CCA agreement was correct), then she would be subject to recoupment of the CCA monies as she did not have a valid CCA provider agreement during the appeal period. This notice provided due process to the provider by notifying her that she was operating outside of a CCA agreement, and if she did lose her appeal, then this would constitute a billing error as per Iowa Code 237A.13(4).

Had this Provider been operating with a valid CCA Provider Agreement, then Iowa Code 237A.13(4) would have applied to her with respect to getting timely payments upon submission of a CCA billing. However, this Provider did not have a valid CCA provider agreement after the DHS revocation, so while she was still allowed to bill with the understanding that DHS would recoup the monies should the agency prevail on appeal, the billing timeframes of 237A.13(4) do not apply to her as she was not a "provider" under 237A.

The district court decided that the DHS and the Provider had a contract. However, the court also determined that the contract and attached property interest did not apply after the original DHS' revocation occurred (except during the ten-day notice period provided on the revocation decision) in July of 2014. App. 27. According to the district court, "this property interest does not apply to any payments received over ten days from when Petitioner received her Notice of Decision on July 17, 2014." The district court reasoned that the "Petitioner's CCA Provider Agreement contained a provision allowing DHS to cancel the Agreement with ten day's notice if Petitioner violated any of the terms of the Agreement." App. 27-28. According to the district court, while there was no CCA provider agreement during the appeal period, there were still other statutory property rights to cover this timeframe.

The district court's overbroad interpretation of 237A.13 does not provide either a common sense or fiscally responsible approach for the administration of an agency program with limited funds and resources. When one eliminates DHS' ability to oversee the administration of CCA provider payments, including recouping from revoked providers who bill while appealing but lose their appeals,

then one must anticipate substantial negative outcomes from a fiscal responsibility standpoint.

Additionally, the reasonable result of reading Iowa Code 237A.13(4) to require that any provider who bills shall be paid is that appellant-providers will become very diligent about billing for as many children as possible on a 24/7 basis so as to maximize the rush of CCA payments they receive – that are effectively guaranteed to be received "within ten days."

Finally, there would be no concern about recoupment with the district court's interpretation. With this interpretation, once you bill for child care and receive your money within 10 days, and you cannot be made to repay the CCA monies, even if you ultimately lose your appeal.

The judicial effect of such an anticipated upturn in appealed revocations will be an administrative appeals system that becomes burdened with unmeritorious cases. Truly deficient providers, who previously would never have considered appealing their revocations as they understood how poor their chances of prevailing would be, would now decide to appeal, since there was no risk that they would ever have to pay back any CCA monies that they received during an

appeal, that they might be able to stretch out for six months, to a year, if they asked for enough continuances.

With more seriously deficient providers choosing to appeal cases they would otherwise have abandoned, one can also expect a reduction in the quality of child care available to the poorest of Iowa's children - in all types of child care facilities – from licensed centers to child care homes. When a government subsidy program must encourage deficient providers to do child care in this way, one can expect poor outcomes for these children and their families both short term and long term.

The district court found that the Provider's CCA provider agreement was correctly cancelled, because as it noted "this [contractual] property interest does not apply to any payments received over ten days from when [Provider] received her [n]otice" of revocation if the provider violated any terms of the agreement. App. 27. Then, the district court distinguishes that these contract rights separate of other Provider property rights. It is difficult to reconcile the court's determination that there was no contract after DHS' revocation plus ten days, but there remained some property rights

such that 441 IAC 7.9 would not allow DHS to revoke or take other proposed adverse actions pending a final decision on appeal. App. 25.

DHS does contract with some outside agencies and persons, such as foster care service organizations, child care resource and referral agencies, and Medicaid service providers. While parties who contract with DHS may have privileges associated with their contract status that this Provider does not enjoy, even those contracted parties do not generally have a constitutionally protected property interest under a government contract. See Horsfield Materials, Inc. v. City of Dyersville, 834 N.W.2d 444, 459 (Iowa 2013), reh'g denied (Aug. 6, 2013).

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

None of these considerations are involved here. First, the Provider merely agreed to abide by certain general parameters that all CCA-accepting providers agree to so as to allow for the streamlining of CCA payments from eligible families to her via DHS. Additionally,

even if this agreement were treated as a quasi-contractual situation, there is nothing "broad" or "stigmatizing" about the DHS demand for recoupment of monies paid to the Provider during a period where she appealed the DHS revocation of her CCA agreement.

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

Just as there was nothing broad or stigmatizing about DHS' recoupment after it prevailed on appeal, there was nothing broad or stigmatizing about the DHS' handling of this case with the Provider after the revocation appeal process. In fact, despite continued concerns with this Provider, after a very brief period of reevaluation and inspection, DHS approved a new CCA application from her.

As the authorized regulatory agency, DHS had the discretion to deny Provider's CCA application for a new CCA agreement, and to ask that she demonstrate for a period of time that she could maintain accurate attendance records before she would be reapproved to use the DHS online CCA billing portal. Instead, the DHS gave the Provider a second chance to demonstrate her ability to properly

utilize the CCA billing system – while paying back the monies she owed for the time she chose to do care under appeal. There was no property interest established by the Provider to the CCA monies of eligible families, nor was there any broad or stigmatizing debarment associated with any aspect of the DHS' process.

Viewing this in a slightly different light with the focus on family choice, the Provider had no expectation of a property interest in the CCA monies associated with the particular eligible families in her care. At any time, an eligible family can re-designate their allotted CCA distributions to a different child care provider. This Provider would not have any recourse with regard to a family's redistribution request.

The Provider has not established a property interest or any other constitutionally protected right to CCA monies paid to her on behalf of the families. Accordingly, this Court need not examine whether the process afforded the Provider satisfied the demands of due process under the federal and state constitutions. The Provider's due process claims must fail.

Even assuming arguendo that the Provider has procedural due process rights, she was provided with more than adequate notice and an opportunity for hearing to the extent allowable by law.

The Provider was given sufficient notice of her rights and choices related to her CCA revocation and subsequent appeal. As part of the Provider's Notice of Revocation Decision, a summary page discussing her appeal rights and the general appellate process was provided. App. 328. While the secondary pages of this packet, or the appeals rights' portion, are included with several different DHS' adverse action notifications, there is no ambiguity regarding language as it applies to this Provider. Certainly, when one document is used to convey appeal rights to different appellants, the language used to convey the general message may include synonyms, or slightly different phrasing, so the appeal rights message may be effectively understood by a broader class of appellants.

The district court order states, "It is telling that DHS has since [2013] modified its CCA Provider Agreement contracts to state that "any payments may be recouped." App. 31. While it is true that the CCA provider agreement was modified in 2015, the modifications were due to the addition of four additional numbered points on the

Agreement. Those new portions were added to reflect the significant changes made to 441 IAC 170.9 as it related to termination of CCA provider agreements and recoupment during that year. Most significantly, this 2015 change provided DHS with the ability to terminate a provider's participation in the CCA program for up to 36 months. The entire Billing and Payment portion of the CCA Provider Agreement was redrafted to be consistent with these law changes. The rule changes that occurred during this timeframe are easily noticed when one compares 441 IAC 170.9 (2013) to 441 IAC 170.9 (2015). (See 441 IAC 170.9 (2013) and (2015)).

The CCA Provider Agreement that was modified in 2015 is also designed to be the initial application that a provider fills out to request consideration to participate in the CCA provider program. The district court gives a lot of attention to this document, but this was just an agency program's application. (See App. 30-31. One would not expect a participant in a governmental program to rely on their initial application to learn all about their (potential) appeal rights just in case an adverse action cancelling their agreement occurs someday. Rather, it would be expected that, should a revocation occur, such a participant would refer to the Notice of Decision sent to

her at the time of revocation or review the second Notice mailed to her after the revocation appeal is properly submitted online by the provider.

The Notice of Decision that was sent to the Provider when her CCA provider agreement was revoked stated on the first page, directly under the basis for revocation, "This action means **you are no longer eligible to receive CCA payments**, it does not change your status as a child development home or licensed center." App. 326 (emphasis added). This Notice also states,

> If you do not agree with this decision, **you may discuss the decision and your situation with the agency staff**, **obtain an explanation of the action** and present information to show that the action is incorrect. This conference does not in any way diminish your right to a hearing described on the back of this notice. You may speak for yourself or be represented by legal counsel.... **If you have trouble understanding this notice, you may call Iowa Legal Aid 1-800-532-1275....**

App. 326-327 (emphasis added). So, the Notice itself encouraged the Provider to discuss the decision and ask for additional explanation from DHS' staff. Further, it not only provided that she might obtain legal representation, but provided the phone number for Iowa Legal Aid if she didn't understand the Notice and its implications. Id.

This Provider's Notice of Decision also came with secondary pages that specifically discussed her appeal rights. 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. 328.

The Provider asserted on appeal that she simply did not consider this secondary 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. 329. Whatever confusion this Provider had with respect to the particular word "benefits" apparently resolved itself at some point between July 17, 2014 and when she appealed online on July 22, 2014 – roughly five days after the revocation was issued. (See App. 326-329. On her online appeal form, the Provider also listed the specific name of an Iowa Legal Aid attorney who was representing her, which

demonstrates that the Provider had, in fact, sought out legal advice regarding her situation. App. 329.

On July 31, 2014, the Provider was sent a one-page acknowledgment notice from the DHS. This notice, written specifically to her as a CCA Provider stated, "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**." App. 330 (emphasis added). It should be noted that this message (above) was placed under the header "Action Taken" and was the first paragraph written on the Notice to this Provider, not some "boilerplate" language set in the middle of a standardized document of rights. However, the provider was also provided with a copy of the "You Have a Right to Appeal" document with this Notice as well. App. 331.

Clearly, this Provider was given more than sufficient notice of the recoupment risk if she continued to request CCA payments during her appeal and she lost. In addition to hard copy documents that conveyed this message repeatedly to the Provider, the Provider was

also encouraged to contact the DHS' staff if she wanted to discuss her case or needed additional explanation. Finally, in its general "You Have the Right to Appeal" letter toward the bottom, the DHS gave the Provider contact information for Iowa Legal Aid so she could seek legal advice on her appeal and get any questions she had answered. We can appreciate from her online appeal form that she read this document as she listed the name of an Iowa Legal Aid attorney as her legal representative at that time. App. 326-331. Clearly, the DHS afforded this Provider more than adequate due process. She was noticed of the adverse action, her appeal rights, her option to seek legal counsel, her ability to get additional explanation about her case with agency staff, and her choice with regard to whether to continue to receive family CCA benefits' payments during her appeal.

As in Bass v. JC Penney, 880 N.W.2d 751, 764 (Iowa 2016), DHS' written disclosures were "not complicated or confusing and did not involve tricky or clever stratagems or fine print designed to mislead." Bass v. JC Penney, 880 N.W.2d 751, 764 (Iowa 2016). Unlike JCPenney, a for-profit retailer, there was no motivation for DHS to encourage the Appellant to request CCA family benefits while simultaneously working to revoke her provider agreement.

The Provider was also provided 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 September of 2017. This evidentiary determination was also reviewed and affirmed by the Director of DHS after additional briefing by the Provider. App. 17-19. It is hard to imagine how this Provider could have been given any more opportunity to be heard on this issue.

II. IOWA CODE 237A AND 17A PROVIDED DHS AUTHORITY TO DRAFT IOWA ADMINISTRATIVE CODE 441-170.9 AND 441-7.9 AND THOSE RULES ARE SUFFICIENTLY CLEAR

PRESERVATION OF ERROR

The DHS preserved error with respect this argument in the administrative forum, as well as at the district court judicial review.

Argument Overview

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

A. 441 IAC 170 and 441 IAC 7 are easily understood as written and not vague.

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

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

B. Iowa Code 237A provides DHS with legislative authority to establish, within the context of its child care program, a system for administering the federal CCBDG monies to eligible Iowans in an efficient and fiscally sound manner.

Iowa Code Chapter 17A's purpose is "[t]o provide legislative oversight of powers and duties delegated to administrative agencies; …." Iowa Code 17A.1(3)(2018). "In accomplishing its objectives, the intention of this chapter is to strike a fair balance between these purposes and the need for efficient, economical and effective government administration." Iowa Code

17A.1(4)(2018)(emphasis added). Administrative rules associated directly with implementation of Iowa Code Chapter 17A are found at 441 Iowa Administrative Code 7. See 441 IAC 7 (2016).

Iowa Code 237A provides the DHS with its authority to promulgate rules associated with child care and CCA. Iowa Code 237A.12 indicates that "[s]ubject to the provisions of chapter 17A, the department shall adopt rules setting minimum standards to provide quality child care in the operation and maintenance of child care centers and registered child development homes, relating to the following: . . (g.) Administration." Iowa Code 237A.12(1)(g) (2018)(emphasis added). The same word, "administration" that is used in Iowa Code 17A to describe regulation by the government in relation to the public is used in Iowa Code 237A as well. In short, the legislature delegated to DHS the authority to administer programming to set "minimum standards to provide quality child care" in Iowa. Part of that "administration" must include developing and maintaining a program to distribute and regulate the federal monies provided to assist needy families in obtaining quality child care for their children while the family members work or educate themselves.

If one reads Iowa Code 237A as the district court does, (requiring every administrative task that DHS does must be specifically delegated by the legislature), then no child care provider in Iowa would have a CCA provider agreement as the authority to engage in this specific agreement is not mentioned in 237A at all.

On a larger scale, if every single thing that DHS is tasked with accomplishing in administering the state's child care programs was required to be specifically enumerated in the Iowa Code for DHS to have the authority to do its job of administering quality child care regulation in Iowa, then Iowa Code 237A would be a very voluminous chapter.

Taken to its logical conclusion, the district court's approach would require over-prescriptive statutes in order to delegate necessary implementation authority to the agencies charged with such implementation. Administrative rules are a more flexible tool to further articulate program procedures. As issues arise, administrative rules can adapt to the needs of the program.

C. 441 IAC 170 and 441 IAC 7 are not only constitutionally sound, but they are also complementary chapters that provide clarity and practical application to Iowa Code 237A.

Iowa Administrative Code 441 – 7.9 (17A) directly discusses the continuation of assistance pending a final decision on appeal. First, the rule discusses how an appellant may continue to receive assistance by filing an appeal before the effective date of the intended action. Id. at 7.9(1). Then, the rule 7.9(7) discusses "Recovery of excess assistance paid pending a final decision on appeal." This rule notes, "Continued assistance is subject to recovery by the department if its action is affirmed, except as specified at subrule 7.9(9)." 441 IAC 7.9(7). It is particularly important to note the rest of this administrative rule:

> When the department action is sustained, excess assistance paid **pending a hearing decision shall be recovered to the date of the decision. This recovery is not an appealable issue**. However, appeals may be heard on the computation of excess assistance paid pending a hearing decision.

Id. (emphasis added).

This rule provides two points of clarity relevant to the instant appeal. First, the Provider's appeal is limited to contesting the "computation of excess assistance", and does not include the right or

ability to contest whether recovery of CCA can be established. Second, 441 IAC 7.9 provides clarity that once the department's action is sustained, excess assistance paid pending the final decision shall be recovered to the date of the decision. Therefore, the Department properly requested for the Provider to return the CCA monies paid to her during the period of May 20, 2016 to October 23, 2016 after it was confirmed that she did not possess a valid CCA Provider Agreement during that timeframe.

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

Because DHS' revocation of the Provider's CCA agreement was affirmed, the Provider did not have a CCA provider agreement through which to bill DHS for CCA services during the appeal. Any provider who lacks a CCA provider agreement is ineligible to receive CCA monies whether they previously held an agreement, or never applied at all. While it took an administrative final decision to exhaust the Provider's challenges, the original DHS' CCA agreement

revocation was found to be correct. To that end, the Provider erred in billing for CCA services during her appeal.

After the final decision affirmed the DHS' revocation determination, the Appellant did not make arrangements with DHS to repay the CCA monies she chose to bill for during her appeal. The DHS sent the Appellant a demand letter noting that recoupment was required for "provider error," or more specifically, under 441 IAC 170.1 "'Provider error' (3) Failure to report the receipt of a CCA payment in excess of that approved by the department". 441 IAC 170.1 (2017). This is the category label attached to recoupments that arise from a provider continuing to engage in the CCA program after their agreement has been invalidated, but while they are engaged in an appeal.

The DHS never "approved" the post-revocation payments. DHS simply provided the monies as the Provider claimed them knowing that the Provider was aware, having been properly noticed of recoupment risks, that if she didn't prevail on her appeal, the DHS would recoup the monies she was claiming.

Here, the only intent of 441 IAC 170 was to "establish requirements for the payment of child care services … for children of

low-income parents…" 441 IAC 170 Preamble (2017). Which provider eventually receives a given families' CCA subsidy election was not the focus of this administrative rule chapter. However, Iowa Code 237A provides for the "Administration" of the CCA Program and all other ancillary programming when it states, "the department shall adopt rules setting minimum standards to provide quality child care in the operation and maintenance of child care centers and registered child development homes, relating to the following: .. . (g.) Administration." Iowa Code 237A.12(1)(g) (2018)(emphasis added). For this reason, there are portions of 441 IAC 170 that do apply to child care providers, CCA monies, and recoupment.

In 441 IAC 170.1 (the definition section), the word "entitled" conveys that where a client or provider should not have received CCA monies, an "overpayment" is any monies over and above what they should have received. More specific to this case, any CCA monies the Provider accurately claimed for services prior to her revocation in May of 2016 would not be an overpayment, but any monies she claimed after revocation would be an overpayment. The Provider was paid CCA assistance monies in excess of her CCA provider agreement as her agreement was invalidated by the DHS' revocation, but the

Provider made the choice to continue to bill the CCA program during the appeal period.

When interpreting the language of administrative regulations, the principles of statutory interpretation apply. Messina v. Iowa Dep't of Job Service, 341 N.W.2d 52, 56 (Iowa 1983). Administrative rules must be interpreted in conjunction with their governing statutes to "harmonize them, using common sense and sound reason." Id. The most essential rule of interpretation is to give effect to the intent of the statute or regulation. Iowa Nat'l Industrial Loan Co. v. Iowa Dep't of Revenue, 224 N.W.2d 437, 439 (Iowa 1974). In addition, where a statute or regulation uses the word "shall," that statute or regulation is generally considered to be mandatory. Id. at 441; see also Iowa Code § 4.1(30) ("[t]he word 'shall' imposes a duty").

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

Iowa Administrative Code 170.9(1) states:

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

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

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

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

Rule 170.9(2) comes into play in cases like this, but also in situations where a revoked provider requests CCA payments for a

portion of time, but not for the entire length of their appeal. (Many providers, upon realizing they likely will lose their case, stop taking CCA payments and do private pay child care during their appeal period.) In those cases, even though the provider is no longer billing for CCA, the final DHS overpayment computations will not be done until final administrative decision issues. Pursuant to this, overpayment computations will be considered a timely demand even where many months of appeal have occurred since the last actual provider billing.

441 IAC 170.9(2) was not written with a focus on CCA providers, but rather on administering federal grant monies to eligible families. Rule 441-170.9(2) provides that DHS has no discretion and "shall" recoup monies paid pending an appeal decision.

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

> (a)Subject to the time limit ... A person's right to appeal the existence, computation, and

amount of a CCA benefit overissuance or overpayment begins when the department sends the first notice informing the person of the CCA overpayment. The notice shall be sent on a Form 470-4530, Notice of CCA Overpayment.

(b) ...

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

(Emphasis added). (See App. 324-329 for form sent to provider). The Provider meets the criteria for a program that received overpayment as the September 2016 final decision affirmed the DHS' May 2016 revocation determination.

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

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

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

(2) ...
(3) ...

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

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

(See App. 237 for Provider's submitted copy of Form 470-0487). Rule 7.9(7) then discusses "Recovery of excess assistance paid pending a final decision on appeal." referring to the appeal set forth in the same section (see supra). Here, it sets out the parameters for recoupment after appeal, stating:

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

(Emphasis added).

The district court believed that rule 441-170 was in conflict with rule 441-7.9. The order notes, "Because Rule 441-7.9(1) entitles [Provider] to receive payments during appeal, those payments are not

greater than what [Provider] is entitled to receive. As such, it is not an "overpayment"."

This is an erroneous conclusion as it fails to consider all of rule 7.9, specifically, 7.9(7) which sets forth the process for recovery of excess assistance paid pending a final decision on appeal. Rule 7.9(7) states,

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

441 IAC 7.9(7) (2018). Rules 441-170 and 441-7 complement one another with 441-170 being more specifically written for the child care programs.

In similar fashion, the DHS respectfully disagrees with the district court's conclusion regarding rule 441-7.5 and its relationship to rules 441-170 and 441-7.9. 441 IAC 7.5(9) discusses appeals of child care assistance benefit overpayments. Rule 7.5(9)(c) states,

> A program overpayment means child care assistance was received by or on behalf of a

> person in excess of that allowed by law, rules or regulations for any given month or in excess of the dollar amount of assistance. Subrule 7.5(9) relates to overpayments received by recipients and child care providers. Either entity may be responsible for repayment.

441 IAC 7.5(9) (2018). Rule 441-7.5(9) reinforces Rules 170 and 7.9 as it reiterates some of the same recoupment direction while also noting that overpayments include monies received by child care providers, who may be responsible for repayment as well, in particular situations. While 441 IAC 7 is more broadly drafted, everything noted at both 7.9 and 7.5 as it relates to child care providers is consistent with both rule 170, as well as with Iowa Code 237A and 17A.

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

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

(Emphasis added). One must reads rule 170.9(2) in conjunction with rule 170.9(3) which states "recoupment of overpayments resulting

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

To clarify, while Iowa Code 237A.13(4) states that where there is a provider error or omission, the department shall notify the provider of the error or omission and identify any correction needed before issuance of payment to the provider, this code section must be read in context with the rest of the chapter. When this section is read contextually, it becomes clear that "provider" referred to in this section as throughout the chapter is a CCA provider who has met the program eligibility requirements, not a person who is making claims for payment without a valid CCA provider agreement. See Iowa Code §§ 237A.5, 237A.13(4), 237A.25(3)(b) and (c), 237A.26(7)(b). (2017).

DHS adheres to the same basic process for the revoked provider as it does for the approved provider who simply has made an error or omission in billing. There are two reasons for this similar practice: first, because it makes it more simple for everyone, DHS attempts to use a similar practice with revoked providers who bill as they do with providers who have a valid CCA provider agreement as set forth in

237A.13(4), and second, this DHS' practice provides a provider the ability to challenge a revocation, consider the chances of prevailing, and decide whether to continue to claim CCA monies should the provider feel confident about prevailing on appeal. See 441 IAC 170.9(3)-(6); Iowa Code Chapters 237A and 17A.

Where a previously-accepted CCA provider appeals the CCA revocation, the DHS notifies the provider of the error or payment after the final administrative decision affirming the DHS' initial revocation decision. This is the one time where the DHS pays a provider who doesn't have an approved CCA agreement first, and then must recoup if the DHS revocation is affirmed at Final Decision (as opposed to not paying in the first place where an error occurs at billing). See id. Again, this is not in conflict with Iowa Code 237A.13(4) as that code section was written for providers who held valid CCA agreements, not other providers who for one reason or another, did not possess a CCA provider agreement when billing.

DHS has no discretion with regard to recoupment after final decision where a provider has billed CCA without having a CCA provider agreement (ie. provider lost her appeal). The mandatory language "shall" in both Iowa Code section 237A.13 and rule 170.9

indicate that there are no circumstances under which recoupment is optional where a CCA revocation is upheld and payments on appeal have therefore been given to a provider who did not possess a valid CCA provider agreement when billing.

The Iowa Code and administrative rules set forth recoupment provisions for revoked providers to protect both the integrity of the appeal process, and also to allow for recoupment after final decision where the provider has chosen to continue to claim CCA monies, but the CCA provider revocation if affirmed on appeal.

III. THE INTENT OF IOWA CODE 237A TO PROVIDE QUALITY CARE AND PROTECTION FOR CHILDREN, AND THE INTENT OF 17A TO BALANCE THE PUBLIC AND GOVERNMENT INTERESTS, WERE FURTHERED WHERE DHS DRAFTED CHILD CARE RULES AND ADMINISTERED THE CCA PROGRAM.

Iowa Code Chapters 237A, 17A, and the corresponding administrative rules allow providers to continue to make claims for CCA payments while appealing their revocations. DHS notices revoked providers at the outset of an adverse action of their appeal rights and options. A notice of decision setting forth all relevant information and rights is sent to the provider, and the appeal offered.

When the provider chooses to appeal, additional information and options are provided online. App. 329 (printable appeal page of online appeal program). Once the appeal is completed, DHS sends another notice to the provider which again sets forth all her rights, her current revoked status along with a statement regarding continued CCA payments and possible recoupment should the provider lose their appeal. This puts the provider, who ostensibly knows her case better than anyone, in the position to honestly evaluate the merits of her appeal and gauge the risk associated with continuing to claim CCA monies against the risk of recoupment if she loses.

These laws also protect both the DHS and the vulnerable population that CCA serves from providers who have been established to not be meeting the minimum standards associated with the program. There is a give and take associated with balancing the interests of providers with the interests of CCA families. As noted by the Grinnell College Court, this "means that the interest of private litigants in agency action may need to ultimately yield to the greater public interest." Grinnell College v. Osborn, 751 N.W.2d 396, 403 (Iowa 2008).

There is a substantial public interest in having providers who meet the minimum requirements for a CCA provider agreement (allowing for a certain level of care for the CCA eligible children). This interest includes having who providers meet minimum health standards, and having providers who only request payments from the limited CCA budget for the actual care of children.

At judicial review, the Provider contended that she should be paid for the time she claimed payments for care, even though she was repeatedly noticed of the risk of recoupment if she lost her appeals. She suggested that an inequity would result if DHS is not be required to pay providers who are revoked of CCA provider agreements while they appeal through the administrative system. The DHS contends that this argument actually is more true when applied to providers. Revoked providers who have no risk of recoupment if their appeal fails, would have the ability and temptation to initiate even hopeless appeals to continue CCA payments as long as possible so as to continue to claim CCA payments.

A provider who is revoked of a CCA agreement is not meeting state requirements to receive payments for reasons either associated with their billing accuracy, overbilling, or health and safety issues.

This Provider fell into this category in the prior administrative actions that were finalized in 2016. 441 Iowa Administrative Code 170.5(5) allows for a revoked CCA provider to reapply at any time. Once this Provider was able to demonstrate that she had addressed the issues of appeal and met minimum health and safety requirements, she was again approved in 2017.

If one adopts the district court's argument associated with paying revoked providers but not recouping if they lose will have two long-term consequences. First, the quality of child care in Iowa will deteriorate as revoked providers with no possibility of prevailing on appeal choose to appeal simply to give themselves an additional nine months to a year of CCA payments while their appeal moves through the system. Second, administrative law judges will see a substantial increase in the number of appeals (as well as the number of provider-initiated continuance requests) as providers attempt to delay final revocation disposition. There will also be an increase in the need for Emergency Adjudicative Proceedings (a separate agency action for immediate closure pursuant to Iowa Code section 17A.18A) as providers who present serious risks to kids (and would not otherwise appeal) continue to provide care and submit CCA billings knowing

that there is no recoupment recourse when they eventually lose on appeal. In short, adoption of the recoupment theory 'if the provider watches kids, they should get paid no matter what' will so significantly delay the effects of a CCA revocation that the ability to protect CCA kids and their families will be significantly undermined.

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

Child care quality decreases when more children are cared for than is allowed for under Iowa law. Likewise, when a provider bills for children who are not actually receiving care, she depletes the families' allotment for care for that particular billing cycle even though the family does not receive anything for the money billed. See 441 IAC 170.4(7)(g). The Iowa CCA program is not a bottomless well of monies. There are limits to what is available each year to fund this

program. Iowa Code section 237A.13(6)–(8) (2017) provides wait criteria for DHS to use when the CCA budget becomes so limited that DHS cannot meet the state's eligible family needs for child care services. Certainly, where the state program has limited budgetary resources and a statutory goal to provide quality care for the most vulnerable Iowa kids, there is a substantial government and public interest in having only providers who meet the minimal standards for a CCA agreement seeking the family monies.

CONCLUSION

WHEREFORE, the Appellant respectfully requests that this Court reverse the district court decision, reestablish the administrative law judge and the Director of DHS' determinations, and deny all the Provider's cross-claims as set forth on appeal.

REQUEST FOR NONORAL SUBMISSION

The State believes the written briefs, judicial review oral argument, and administrative record are sufficient to advance the arguments of the parties in this case and the Court can fully and fairly resolve the issue without oral argument. However, notice is hereby given that if oral argument is granted, counsel for the State also desires to be heard.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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DATED: January 18, 2019

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