UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

CODY FLACK and SARA ANN MAKENZIE, Plaintiffs, v. WISCONSIN DEPARTMENT OF HEALTH SERVICES and LINDA SEEMEYER, in her official capacity as Secretary of the Wisconsin Department of Health Services, Defendants.	Case No. 3:18-cv-00309-wmc Judge William Conley

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

It is now beyond dispute that gender dysphoria is a serious medical condition often requiring medical treatment. *See Mitchell v. Kallas*, No. 16-3350, 2018 WL 3359113 (7th Cir. July 10, 2018). Indeed, Defendants (the "State") agree that "[u]ntreated gender dysphoria can result in psychological distress." Stip. Findings of Fact [Dkt. No. 51] ¶ 51. Yet the State also concedes that it has denied coverage to Plaintiffs based on the Challenged Exclusion with *no* consideration of their individual, documented medical needs. *Id.* ¶¶ 38, 42, 55. By actively enforcing the policy, the State is failing to "treat[] gender dysphoria with the same urgency and care as it would any other serious medical condition," *Mitchell*, at *7. It is exposing Plaintiffs to continuing and worsening harms as a result and, for the reasons below, the State's purported justifications for and defenses of the Challenged Exclusion have no merit.

I. The State's defenses are largely premised on the flawed opinions of an "expert" who is unqualified to testify on the medical necessity of gender dysphoria treatments.

Much of the State's opposition is based on the opinions of one putative expert in another case—Lawrence Mayer. The State, relying on Mayer's views, posits that "there is inadequate evidence" that surgeries "actually treat" gender dysphoria and suggests the State therefore has some "public health" interest in categorically denying this care regardless of individual medical necessity. Defs' Opp. Br. 15, 36-38 [Dkt. No. 53] ("Opp. Br."). Mayer's analysis is deeply flawed and unlikely to meet the requirements of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), which the Court should consider when weighing his testimony at this stage.[1]

Mayer's assertion that inadequate research exists to show that the surgeries Plaintiffs seek are safe and effective is refuted by all of Plaintiffs' experts, the prevailing medical consensus,

[1] While the Court may consider evidence at the preliminary injunction stage that may be inadmissible at trial, *see Dexia Credit Local v. Rogan*, 602 F.3d 879, 885 (7th Cir. 2010), the Court should still "conduct its *Daubert* analysis in tandem with its assessment of the evidence's weight." *A.A. v. Raymond*, No. 2:13-cv-01167, 2013 WL 3816565, *4 (E.D. Cal. July 22, 2013) (collecting cases).

and the prevailing standards of care. Pls' Br. in Support of Mot. for Prelim. Inj. 4-5 [Dkt. No. 19] ("Pls' Br."). Because the State simply recycled Mayer's report from *Boyden*, the report obviously fails to address Plaintiffs' individual needs or the evidence Plaintiffs have submitted in *this* case.[2]

Mayer himself concedes that he is not qualified to provide expert testimony regarding the issues presented in this case. Although Mayer refers to himself as a "research physician," Roth Decl. Ex. 1000 (Mayer Report ¶ 1), he in fact has never practiced, nor been licensed to practice, medicine. Roth Decl. Ex. 1002 (Mayer Dep. 7:5-6, 12:8-17). (The State refers to him as a "psychiatrist," Opp. Br. at 37, which is false.) Mayer readily admits that he is unqualified to offer clinical opinions about medical necessity, is "not an expert regarding the clinical treatment of gender dysphoria," and is unqualified to assess the efficacy of surgeries. Mayer Dep. 14:17-15:9, 22:19-23, 23:3-19, 32:17-22, 64:1-65:8, 153:14-17. And his only publications on gender dysphoria are two non-peer-reviewed articles in *The New Atlantis*, a conservative think tank's magazine. Mayer Dep. 19:22-25, 134:18-135:4; *see also* Decl. of J. Wardenski Ex. 1.

Even if Mayer were qualified to provide expert testimony here, his testimony does not actually support the State's defenses to its categorical coverage ban. Namely, he does not dispute that hormone therapy and gender confirming surgeries are appropriate and medically necessary treatments for gender dysphoria for some people. Mayer Dep. 72:8-19, 85:17-86:4.

In short, Mayer provides no reliable or meaningful justification for the Challenged Exclusion. The Court should accordingly assign little to no weight to his opinions.

II. The State has failed to rebut Plaintiffs' showing of likely irreparable harm.

Defendants argue that because Plaintiffs cannot prove that they *will* imminently attempt suicide or engage in self-harm, they fail to show a sufficient likelihood of irreparable harm to

[2] If the State formally designates Mayer as an expert, Plaintiffs anticipate making a *Daubert* challenge to his testimony at that time.

warrant a preliminary injunction. Opp. Br. at 13. This grossly exaggerates Plaintiffs' burden and disregards the ongoing, worsening harms to Plaintiffs from their continued inability to obtain surgical care. As the Seventh Circuit held in *Whitaker*, the moving party must show that irreparable harm is likely, *not* "that the harm be certain to occur before a court may grant relief on the merits." *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034, 1045 (7th Cir. 2017).

Plaintiffs easily clear this threshold burden in several ways. As the State concedes, the deprivation of Plaintiffs' Fourteenth Amendment rights, without more, is sufficient to establish irreparable harm. Opp. Br. at 19. Because Plaintiffs are likely to succeed on their equal protection claims, *see* Pls' Br. 34-40, the Court's analysis could stop there. But Plaintiffs have demonstrated other harms that independently establish the threshold harm.

Indeed, courts recognize (and the State acknowledges) that delayed or denied health care is itself irreparable harm. *See Bontrager v. Ind. Family & Soc. Servs. Admin.*, 697 F.3d 604, 608 (7th Cir. 2012); *Koss v. Norwood*, 305 F. Supp. 3d 897, 922 (N.D. Ill. 2018); *Doctors Nursing & Rehab. Ctr. v. Norwood*, 2017 WL 3838031, at *9 (N.D. Ill. Sept. 1, 2017) ("What is needed is a showing that plaintiffs face irreparable harm if forced to wait for post-trial relief."). The State tries to distinguish these cases by arguing that "there is no proven medical benefit to the procedures for which Plaintiffs seek Medicaid coverage," citing Mayer's unreliable opinions in support. But this conclusion can only be reached by wholly ignoring the standards of care and medical consensus that surgeries are necessary and effective treatments for gender dysphoria.[3]

Plaintiffs have plainly demonstrated that *they* are at substantial risk of ongoing and worsening psychological distress—including exacerbated symptoms of gender dysphoria,

[3] Last month, a court struck down Iowa's similar Medicaid exclusion, finding that the policy was based on "outdated medical evidence" and "the current medical consensus no longer supports the conclusion that gender affirming surgery is not therapeutic." *Good v. Iowa Dep't of Human Servs.*, CVCV054956., slip op. 20, 28 (Iowa Dist. Ct. June 6, 2018) (attached as Ex. A).

depression, anxiety, and increased suicidal ideation—resulting from their ongoing inability to obtain surgical care. Pls' Br. at 16-20; Decl. of S. Budge ¶¶ 70-73 [Dkt. No. 24]; Supp. Decl. of S. Budge ¶¶ 7-14. The Seventh Circuit has recognized these as harms sufficient to justify a preliminary injunction. *Whitaker*, 858 F.3d at 1044-46. The State suggests that Plaintiffs must be actively suicidal or about to engage in self-harm to show irreparable harm. Opp. Br. 16-17; Decl. of C. Schmidt ¶¶ 16-17 [Dkt. No. 56]. This would essentially demand that a movant meet the elements of Wisconsin's civil commitment statute, Wis. Stat. Ann. § 51.20, to be entitled to a preliminary injunction. There is no support in controlling case law for that absurd proposition. Rather, the *risks* to Plaintiffs' health and well-being are sufficient to show irreparable harm.

The State's expert, Chester Schmidt, offers no opinion on the medical necessity or benefits of surgical treatments for gender dysphoria, nor does he attempt to refute the unanimous opinions of Plaintiffs' treating providers that they will benefit from surgery and be harmed by a continued inability to access it.[4] Rather, he bases his opinion solely on a perceived technicality: that no "current mental status exam" was reflected in Plaintiffs' medical records. Schmidt Decl. ¶ 9. However, Plaintiffs' expert, Stephanie Budge, did conduct a mental status exam of both Plaintiffs during her clinical evaluations of them this spring. Budge Supp. Decl. ¶ 2-4. Mr. Flack's therapy records also reflect routine mental status exams. *Id.* ¶ 6. Schmidt suggests that neither Plaintiff is "so destabilized" that self-harm is imminent. Again, courts do not demand such a draconian showing for an injunction to issue. Other errors in Schmidt's declaration—including that Mr. Flack has "no prior evidence of self-harm," Schmidt Decl. ¶ 12, despite considerable evidence to the contrary, Budge Supp. Decl. ¶ 9—undermine his overall credibility.

[4] Ms. Makenzie has now obtained letters of support for surgery from her therapist and a second mental health provider who evaluated her in June. *See* Supp. Decl. of S. Makenzie ¶¶ 4-5.

Finally, the State discounts the distress its policy causes to Plaintiffs by baldly asserting, without support, that the policy "does not stigmatize Plaintiffs." Opp. Br. 18. To the contrary, as well-documented in the record, both Mr. Flack and Ms. Makenzie experience ongoing stigma in the form of mistreatment, fears of being in public, and heightened anxiety and distress about being misgendered, as a result of being unable to live fully in accordance with their gender identities. Budge Decl. ¶¶ 44-47, 59-64; Flack Decl. ¶ 14-16, 29-31; Makenzie Decl. ¶ 23-24, 36.

III. The State misconstrues the scope of prohibited discrimination "on the basis of sex."

The State urges the Court to disregard controlling case law and narrowly construe Section 1557's prohibitions on discrimination "on the basis of sex" to exclude protections against gender identity discrimination. The State's argument that the Court should apply a narrow conception of "sex" has been squarely rejected by the Supreme Court. *See Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 78-79 (1998); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989). Accordingly, Title IX and Title VII's prohibitions encompass gender-based discrimination (including based on gender identity). *Whitaker*, 858 F.3d at 1047-48; *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 345 (7th Cir. 2017). And the Seventh Circuit has already rejected the argument that "Congress does not view Title IX as applying to transgender status claims," Opp. Br. 43, because it has not passed legislation expressly banning gender identity discrimination. *Whitaker*, 858 F.3d at 1049 ("Congressional inaction is not determinative.") (citing *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)); *accord Hively*, 853 F.3d at 344 (Congress can and does "use both a belt and suspenders to achieve its objectives").[5]

[5] Indeed, many members of Congress, including the sponsors of legislation that would expressly prohibit gender identity discrimination, consider existing sex discrimination statutes to already contain such protections. *See* Br. of 196 Members of Congress as Amicus Curiae in Support of Respondent, *Gloucester Cty. Sch. Bd. v. G.G.*, *vacated and remanded* (U.S. Mar. 6, 2017) (No. 16-273) [Wardenski Decl. Ex. 2]; Ltr. from 40 U.S. Senators to Sec'y J. King, May 2, 2016 [Wardenski Decl. Ex. 3].

The State misstates the holdings of *Whitaker* and *Hively* in an attempt to limit the application of those decisions here. Both decisions command a broad application of the sex-stereotyping doctrine to include discrimination and differential treatment against an individual or group for not conforming to societal gender norms—in *Whitaker*, for being transgender, and in *Hively*, for not being heterosexual. *Whitaker*, 858 F.3d at 1048-49; *Hively*, 853 F.3d at 346. The Challenged Exclusion specifically disfavors transgender people by denying them health care related to their gender identity. And because the policy cannot be discussed or understood without reference to sex, it is *per se* sex discrimination. Pls' Br. 22-26.

IV. The State's other defenses to Plaintiffs' Section 1557 claim are meritless.

The State's contention that no private right of action exists under Section 1557 is at odds with the language of the statute itself and the interpretation of every federal court to consider the question. *See* Pls' Br. 22; *see also Edmo v. Idaho Dep't of Corr.*, No. 1:17-cv-00151, 2018 WL 2745898, at *8-9 (D. Idaho June 7, 2018). Even if Congress had not expressly incorporated the enforcement mechanisms of Title IX and the other spending clause statutes, the Court could nevertheless conclude that Congress intended to imply a private right of action in Section 1557 by including the "rights-creating" language that exists in each of those incorporated statutes. *See Alexander v. Sandoval*, 532 U.S. 275, 288 (2001); *Edmo*, 2018 WL 2745898, at *8.

The State's contention that interpreting Section 1557 to cover discrimination against transgender people would violate the Spending Clause "since Wisconsin could have had no idea that this interpretation would someday prevail when it chose to accept federal Medicaid funding" is nonsensical. Section 1557 was enacted in 2010, by which time federal courts had interpreted various sex discrimination laws to apply to transgender plaintiffs' discrimination claims. *See Whitaker*, 858 F.3d at 1048-49 (collecting cases). Yet Wisconsin has continued to accept billions in Medicaid funds every year and thus has continuously agreed to comply with Section 1557.

V. The State's justifications for the Challenged Exclusion fail any level of scrutiny.

Intermediate scrutiny of the Challenged Exclusion is appropriate for reasons already briefed. Pls' Br. 34-39. The rationales for the policy proffered by the State—cost savings and a "public health" interest in not "encouraging Medicaid beneficiaries to undergo these unproven treatments," Opp. Br. 37—are neither substantially nor rationally advanced by the exclusion.

With respect to costs, Medicaid exists to cover health care costs. Categorically excluding coverage for transgender health care—while considering individual medical need for every other condition—is not rational. The State has not attempted to estimate the size of the affected Medicaid population or undertaken any Medicaid-specific cost impact analysis, Opp. Br. 10-11. Counsel's "arithmetic" to estimate costs savings based on an unrelated analysis of the state employee health plan, *id.* at 11, should be given no weight. Medicaid reimbursement rates are much lower than the payment rates in standard insurance plans; thus, current Medicaid rates for Plaintiffs' surgeries for the treatment of other diagnoses are a more appropriate benchmark.[6] Moreover, the State fails to account for the federal contribution to its Medicaid expenses, which would more than halve any cost impact on the State itself from covering gender dysphoria treatments. Pls' Br. 6, 39.

Because the "public health" rationale wholly relies on Lawrence Mayer's faulty opinions, Opp. Br. 36-38, the State cannot show that the policy has any valid relation to that interest.

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For the reasons stated herein and in Plaintiffs' opening brief, the Court should preliminarily enjoin the State's enforcement of the Challenged Exclusion against Plaintiffs.

[6] For example, the published reimbursement rates for Mr. Flack's surgeries, mastectomy and chest reconstruction, are $976.68 and $561.86, respectively [Wardenski Dec. Ex. 4].

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Respectfully submitted,

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EXHIBIT

A

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IN THE IOWA DISTRICT COURT FOR POLK COUNTY

EERIEANNA GOOD, Petitioner, v. IOWA DEPARTMENT OF HUMAN SERVICES, Respondent.	CVCV054956 CVCV055470 (consolidated)
CAROL BEAL, Petitioner, v. IOWA DEPARTMENT OF HUMAN SERVICES, Respondent.	RULING ON PETITIONS FOR JUDICIAL REVIEW

On March 29, 2018, the consolidated petitions for judicial review of Petitioners EerieAnna Good and Carol Beal came on for hearing. Petitioners appeared through their attorneys, Rita Bettis and Seth Horvath. Respondent, Iowa Department of Human Services, is appeared through Assistant Attorneys General John McCormally and Matthew Gillespie. After reviewing the entire record and hearing the arguments of counsel, the Court enters the following Ruling:

INTRODUCTION

Petitioners are both Iowa Medicaid beneficiaries diagnosed with Gender Dysphoria. Medicaid is a cooperative federal-state program designed to financially assist states in furnishing medical care and services to individuals who would otherwise be unable to afford them. The

State of Iowa's Medicaid program ("Iowa Medicaid") is partially privatized. Recipients are divided among various private managed care organizations ("MCOs"), operating under the Iowa Department of Human Services ("DHS"). The MCOs evaluate the coverage requests of their respective recipients. In this case, Petitioners both sought Medicaid coverage of surgical procedures related to their Gender Dysphoria. The MCOs denied coverage by Iowa Medicaid. The MCOs relied on Iowa Administrative Code rule 441-78.1(4) (the "Regulation") prohibiting Medicaid coverage for gender affirming surgeries. In the administrative appeal process, DHS upheld the denial of coverage of gender affirming surgery to treat Petitioners' Gender Dysphoria.

I. BACKGROUND FACTS

A. Gender Dysphoria and the Standards of Care

Petitioners EerieAnna Good and Carol Beal (collectively "Petitioners") entered into the record at their administrative hearings the Affidavit of Randi Ettner In Support of Appeal.[1] Dr. Randi Ettner, Ph.D., is a specialist in the field of Gender Dysphoria. She is one of the foremost experts in the United States and throughout the world.

Dr. Ettner provided expert opinions regarding Gender Dysphoria and its treatment and "whether the *Iowa Foundation for Medical Care,* 'Definition, Diagnosis, and Treatment of Gender Dysphoria: A Literature Review of the Iowa Department of Human Services' (Dec. 1993) (*"Iowa Foundation Report"*), the *Human Service Department*, Notice of Intended Action, ARC 5220A (Iowa Admin. Bull. Nov. 9, 1994) (*"DHS Rulemaking Notice"*) and the *Human Services Department*, Adopted and Filed; ARC 5345A (Iowa Admin. Bull. Jan. 4, 1995) ('*DHS Rule Adoption Notice'*) [concerning adoption of the Regulation] accurately reflects the current

[1] Good Admin. Rec., at 248-260.

scientific and medical standards of care and evidence-based clinical best-practices for the treatment of Gender Dysphoria."[2]

Dr. Ettner opines that Gender Dysphoria is a "serious medical condition codified in the International Classification of Diseases (10th revision; World Health Organization) and the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders – 5th edition. [DSM-V]" [3] Gender Dysphoria is "characterized by a strong and persistent incongruence between one's experienced and/or expressed gender identity and sex assignment at birth, resulting in clinically significant distress or impairment of functioning." [4]

According to Dr. Ettner, "Gender Dysphoria is not to be confused with Body Dysmorphic Disorder." Unlike Gender Dysphoria, Body Dysmorphic Disorder is a distorted perception that a particular aspect of one's physical appearance is flawed, like a person's nose, causing one to feel deformed. "Surgery is not therapeutic for individuals with Body Dysmorphic Disorder." Instead, "Gender Dysphoria is based upon a realistic perception that one's body does not align with one's gender identity." [5] Dr. Ettner states that surgery is therapeutic for some individuals suffering from Gender Dysphoria. [6]

Dr. Ettner offers a key opinion as it relates the issues of this case. Contrary to DHS's claim that Gender Dysphoria is a psychological disorder and that gender affirming surgery is merely elective cosmetic surgery, Dr. Ettner states, "Current scientific research strongly suggests that gender identity is innate or fixed at an early age and has a strong biological basis. Because it is biologically based, gender identity cannot be altered." Psychoanalysis, faith healing, exorcism, electroshock and other forms of reparative therapy are "harmful." Without treatment, individuals

[2] *Id.* at 248 (emphasis in original).
[3] *Id.* at 250.
[4] *Id.*
[5] *Id.*
[6] *Id.* at 251.

suffering from Gender Dysphoria experience anxiety, depression, mental health issues and suicidality at a higher rate than individuals who do not suffer from Gender Dysphoria.[7] This biological component is key to the distinction between Gender Dysphoria and purely psychological disorders.

Dr. Ettner states the standard of care for treating Gender Dysphoria is set forth in the World Professional Association for Transgender Health's ("WPATH") Standards for the Health of Transsexual, Transgender, and Gender-Nonconforming People[8] (the "Standards").[9] The Standards are recognized as authoritative by the American Medical Association, the American Psychiatric Association, and the American Psychological Association. The Standards are universally accepted, evidence-based, best-practice medical protocols for the treatment of Gender Dysphoria.[10] Surgery is medically necessary for some transgender individuals suffering from Gender Dysphoria. But for individuals seeking treatment for Gender Dysphoria, there are other therapeutic options and only a subset requires surgical intervention.[11] Complications are rare. [12] Surgeries for Gender Dysphoria are not experimental or investigational as these same surgeries are routinely performed for other conditions.[13]

There is consensus among mainstream medical professionals regarding the appropriateness and medical necessity of surgical care for Gender Dysphoria. Dr. Ettner opines,

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[7] Good Admin. Rec., at 255.
[8] *Id.* at 254.
[9] *See* WPATH, *The Standards of Care for the Health of Transsexual, Transgender, and Gender Nonconforming People* (7th Ed.), *available at* https://www.wpath.org/media/cms/Documents/Web%20Transfer/SOC/Standards%20of%20Care%20V7%20-%202011%20WPATH.pdf.
[10] The Standards are so well recognized that federal courts have utilized them in analyzing claims against prisons for cruel and unusual punishment under the Eighth Amendment. *See, e.g., Rosati v. Igbinoso*, 791 F.3d 1037, 1039-40 (9th Cir. 2015); *De'lonta v. Johnson*, 708 F.3d 520, 522-26 (4th Cir. 2013) ("The Standards of Care, published by [WPATH], are the generally accepted protocols for the treatment of [Gender Identity Disorder]."); *Soneeya v. Spencer*, 851 F. Supp. 2d 228, 231-32 (D. Mass. 2012) ("The course of treatment for Gender Identity Disorder generally followed in the community is governed by the 'Standards of Care' promulgated by [WPATH].").
[11] Good Admin. Rec., at 251.
[12] *Id.* at 253.
[13] *Id.* at 258.

"Surgery is the only effective treatment for severely gender dysphoric patients. Only reconstruction of the primary and/or secondary sex characteristics can create body congruence and eliminate anatomical dysphoria." [14]

Dr. Ettner concludes the findings and recommendations of the Iowa Foundation Report, DHS Rulemaking Notice, and DHS Rule Adoption Notice concerning the Regulation, "are not reasonably supported by scientific or clinical evidence, or standards of professional practice, and fail to take into account the robust body of research that surgery relieves or eliminates Gender Dysphoria." "There is now abundant evidence that refutes the *Iowa Foundation Report*, the *DHS Rulemaking Notice*, and *DHS Rule Adoption Notice* and establishes the safety, efficacy, and necessity of gender affirming surgery to treat intractable Gender Dysphoria."[15]

At the administrative hearings, the MCOs introduced the Human Services Department Notice of Intended Action regarding the amendment to the rules excluding Medicaid coverage for sex reassignment surgery and for surgical treatment of Body Dysmorphic Disorder. [16] But the agency chose not to offer any updated medical evidence to rebut Dr. Ettner's opinions concerning the current consensus regarding the medical necessity of gender affirming surgery for some patients suffering from Gender Dysphoria. DHS did not rebut the medical evidence that gender affirming surgery is medically necessary treatment for Good and Beal presented by their doctors and medical professionals.

B. Summary of the Regulation

Under the Iowa Administrative Code, DHS enacted a series of regulations governing, in part, Iowa Medicaid benefits. The Regulation specifically addresses what cosmetic surgical procedures will not be covered by Iowa Medicaid benefits. The Regulation states, in pertinent

[14] *Id*.
[15] *Id.* at 259.
[16] *Id.*at 211-216.

part, that "[s]urgeries for the purpose of sex reassignment are not considered as restoring bodily function and are excluded from coverage."[17] The Regulation provides, "[c]osmetic, reconstructive, or plastic surgery performed in connection with certain conditions is specifically excluded [from coverage]."[18] Among these conditions are:

> (2) Procedures related to *transsexualism, hermaphroditism, gender identity disorders, or body dysmorphic disorders*.
> (3) Cosmetic, reconstructive, or plastic surgery procedures performed primarily for psychological reasons or as a result of the aging process.
> (4) Breast augmentation mammoplasty, surgical insertion of prosthetic testicles, penile implant procedures, and *surgeries for the purpose of sex reassignment*.[19]

DHS added the language regarding transsexualism and sex reassignment surgeries in 1994, following the Eighth Circuit's 1980 decision in *Pinneke v. Preisser*, which held that sex reassignment was an effective treatment for transsexualism and thus fit within Medicaid's coverage of "medically necessary" treatments.[20] In 1991, after *Pinneke v. Preisser*, a Medicaid coverage claim resulted in DHS determining that the then-language of the Regulation required coverage of sex reassignment surgeries.[21] As a result, DHS worked with the Iowa Foundation for Medical Care to analyze whether DHS should continue Medicaid coverage for Gender Dysphoria treatments. Following the Iowa Foundation Report, DHS recommended a rulemaking process. In 1995, DHS adopted the current language of the Regulation. Since the adoption of the Regulation in 1995, DHS has not commissioned any updates or new studies on the subject of transsexualism and sex reassignment surgeries.

[17] Iowa Admin. Code r. 441-78.1(4).
[18] Iowa Admin. Code r. 441-78.1(4)(b).
[19] *Id.* (emphasis added).
[20] 623 F.2d 546, 549-50 (8th Cir. 1980).
[21] Good Admin. Record, at 213.

C. EerieAnna Good

Petitioner EerieAnna Good ("Good") is a 27-year old transgender woman. Good was assigned the male sex at birth. Good has recognized her female gender identity since the age of seven. In 2013, Good was officially diagnosed with Gender Dysphoria, though she has presented herself as female full-time and used female pronouns since 2010. In 2014, Good began hormone therapy, and, in 2016, legally changed her name, birth certificate, driver's license, and social security card to reflect her gender identity. Good's Gender Dysphoria causes her deep depression and anxiety. In order to better present herself as female, Good wears a tight girdle and "tucks" her male genitalia for up to 12 hours each day, causing extreme physical pain and discomfort.

Good first began the process of seeking Medicaid coverage for sex reassignment surgery in early 2017. Throughout 2017, several medical professionals assessed Good's case and determined sex reassignment was medically necessary to treat her Gender Dysphoria.[22] Good is a Medicaid recipient managed by MCO AmeriHealth.

D. Carol Beal

Petitioner Carol Beal ("Beal") is a 42-year old transgender woman. Beal was assigned the male sex at birth. Beal has known her female gender identity since age five. She was first diagnosed with Gender Dysphoria in 1989, and has lived as a female full-time since age ten. In 1989, Beal also began hormone therapy. Beal legally changed her name, birth certificate, driver's license, and social security card in 2014.

Like Good, Beal's Gender Dysphoria causes her great anxiety and depression. In June 2017, Beal began seeking Medicaid coverage for sex reassignment surgery from her MCO,

[22] Specifically, Good received assessments from: Dr. Katherine Imborek, Good's primary-care physician; Jacob Priest, PhD, of the University of Iowa's LGBTQ Clinic; Armeda Wojciak, PhD, of the Couple and Family Therapy Program of the UoI LGBTQ Clinic; and Dr. Bradley Erickson, her surgeon.

Amerigroup. Also like Good, all of Beal's health care providers have concluded that sex reassignment is medically necessary to treat her Gender Dysphoria.[23]

II. PROCEDURAL HISTORY

A. Good

On January 27, 2017, Dr. Brad A. Erickson, MD of the University of Iowa Hospitals and Clinics filed a request for Medicaid preapproval for the expenses of an orchiectomy from AmeriHealth on behalf of Good. Dr. Erickson stated "this procedure is medically necessary treatment of Ms. Good's gender dysphoria."[24] AmeriHealth denied the request, citing the Regulation's exclusion of surgeries for the purpose of sex reassignment. Good then initiated an internal appeal, providing assessments from Dr. Imborek, Dr. Priest, Dr. Wojciak, and Dr. Erickson, as well as her own affidavit, an affidavit from Dr. Ettner, and a legal memorandum explaining that the Regulation violated the Iowa Civil Rights Act and the equal protection clause of the Iowa Constitution. MCO AmeriHealth denied Good's appeal.

Good appealed AmeriHealth's denial to DHS, submitting the same supporting material. The administrative law judge ("ALJ"), having noted that the request was for determination of the medical necessity of Good's requested procedures, affirmed AmeriHealth's decision citing the Regulation. The ALJ found Good's statutory and constitutional challenges to the Regulation were more properly within the courts' jurisdiction and preserved the challenges for judicial review. Good appealed the ALJ decision to the Director of DHS. The Director adopted the ALJ's decision and concluded that the agency lacked jurisdiction to rule on Good's challenges to the Regulation.

[23] Beal was assessed by Dr. Priest; Dr. Wojciak, Elizabeth Graf, PA-C, who has been administering Beal's hormone treatment since February 2017; and Dr. Loren Schechter, her surgeon.
[24] Good Admin. Record, at 41.

On September 21, 2017, Good filed her petition for judicial review with this Court. In her petition, Good claims the Regulation violates the ICRA's prohibitions against sex and gender identity discrimination and the Equal Protection Clause of the Iowa Constitution. Good further alleges that DHS's continued application of the Regulation creates a disproportionate negative impact on private rights and is arbitrary and capricious.

On October 9, 2017, DHS filed a pre-answer Motion to Dismiss in Good's case, for failure to state a claim upon which relief can be granted. The Court denied the motion on November 27, 2017.

B. Beal

On behalf of Beal, Dr. Loren Schechter, MD filed a Medicaid preapproval request with MCO Amerigroup on June 8, 2017, seeking to perform a vaginoplasty, penectomy, bilateral orchiectomy, clitoroplasty, urethroplasty, labiaplasty, and perineoplasty. Dr. Beal states this "gender-affirming surgery is medically necessary and clinically appropriate treatment for Ms. Beal's gender dysphoria."[25] Amerigroup denied the request citing the Regulation. Beal initiated an internal appeal, providing assessments from her health care providers, her own affidavit, an affidavit from Dr. Ettner and other medical providers, and a legal memorandum containing the same arguments as Good's memorandum. Amerigroup denied the appeal. Good appealed to DHS.

The ALJ affirmed Amerigroup's decision based on the Regulation and preserved Beal's legal challenges to the Regulation for judicial review. The Director of DHS affirmed this decision also preserving Beal's challenges for judicial review. Beal filed her petition for judicial review on December 15, 2017 raising the same arguments as Good. DHS filed a Motion to

[25] Beal Admin. Record, at 69, 71.

Dismiss on January 5, 2018. The Court consolidated Beal's case with Good's case on January 26, 2018 and denied DHS's Motion to Dismiss Beal's case.

STANDARD OF REVIEW

Iowa Code Chapter 17A governs the judicial review of agency action. The district court acts in an appellate capacity and reviews agency action to correct errors at law.[26] The Court "may grant relief if the agency action has prejudiced the substantial rights of the petitioner, and the agency action meets one of the enumerated criteria contained in section 17A.19(10)(a) through (n)."[27] "The burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity."[28] Where an agency has been "clearly vested" with a fact-finding function, the appropriate "standard of review [on appeal] depends on the aspect of the agency's decision that forms the basis of the petition for judicial review" – that is, whether it involves an issue of (1) findings of fact, (2) interpretation of law, or (3) application of law to fact.[29] The role of the Court in judicial review is not to re-litigate every fact and issue, but rather to ensure that the agency's decision was legally valid.

The Court may reverse an agency action if the action is "in violation of any provision of law."[30] If the challenge is to an agency's interpretation of the law, the level of deference afforded will depend on whether the agency had been "clearly vested" with the authority to interpret the law.[31] If the agency has been so "clearly vested," the court reviews the agency's interpretation under the abuse of discretion standard. If the agency has not been so "clearly vested," the court is

[26] *Bearinger v. Iowa Dept. of Transp.*, 844 N.W.2d 104, 105 (Iowa 2014); *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 219 (Iowa 2006).
[27] *Burton v. Hilltop Care Cntr.*, 813 N.W.2d 250, 256 (Iowa 2012) (quoting *Evercom Sys., Inc., v. Iowa Utilities Bd.*, 805 N.W.2d 758, 762 (Iowa 2011)).
[28] Iowa Code §17A.19(8)(a).
[29] *Burton*, 813 N.W.2d at 256.
[30] Iowa Code § 17A.19(10(b).
[31] *Burton*, 813 N.W.2d at 256.

not bound by the agency's interpretation and must reverse the interpretation if it is erroneous.[32] DHS has not been "clearly vested" with the discretion to interpret the pertinent statutes and administrative rules. Therefore DHS is not afforded deference.[33]

The Court reviews *de novo* claims that an administrative action violates equal protection under Article I, section 6 of the Iowa Constitution. [34]

Iowa Code section 17A.19(10)(i), (j), and (n) are each a type of unreasonable, arbitrary, and capricious agency action.[35] The Court will overturn an agency's decision if it is "taken without regard to the law or facts of the case."[36] "Agency action is unreasonable if the agency acted in the face of evidence as to which there is no room for difference of opinion among reasonable minds . . . or not based on substantial evidence."[37]

ANALYSIS

The MCOs offered no dispute of Petitioners' factual claims at the administrative hearings. Instead, the agency denied their requests solely on the basis of the Regulation. Thus, the dispute at hand is grounded in the legitimacy of the Regulation, and DHS's decisions stemming from it.

To that point, Petitioners have raise four claims against the Regulation and DHS's denial of Iowa Medicaid coverage for their sex reassignment surgeries: (1) that the Regulation violates the ICRA's prohibitions on sex and gender-identity discrimination; (2) that the Regulation violates the equal protection provisions of the Iowa Constitution; (3) that DHS's decision will

[32] *Id.*
[33] *Eyecare v. Dep't of Human Serv.*, 770 N.W.2d 832, 835-36 (Iowa 2009).
[34] *Tyler v. Iowa Dep't of Revenue*, 904 N.W.2d 162, 166 (Iowa 2017).
[35] *Zieckler v. Ampride*, 743 N.W.2d 530, 532-33 (Iowa 2007).
[36] *Dico, Inc., v. Iowa Emp't. Appeal Bd.*, 576 N.W.2d 352, 355 (Iowa 1998).
[37] *Doe v. Iowa Bd. of Med. Exam'rs*, 733 N.W.2d 705, 707 (Iowa 2007) (internal quotations omitted).

result in a disproportionate negative impact on private rights; and (4) that the decision was arbitrary and capricious.

Beyond its substantive dispute of Petitioners' claims, DHS argues that, should the Court find in favor of Plaintiffs, the Court should limit its ruling as will be discussed below.

I. WHETHER THE REGULATION VIOLATES THE IOWA CIVIL RIGHTS ACT

Under the Iowa Administrative Code, the Court may reverse an agency action if the action is "in violation of any provision of law."[38] Petitioners claim the Regulation violates the ICRA's prohibitions on sex and gender identity discrimination by public accommodations. The ICRA states, in relevant part:

> It shall be an unfair or discriminatory practice for any . . . manager . . . of any public accommodation or any agent or employee thereof . . . [t]o refuse or deny any person because of . . *sex* . . . *[or] gender identity* . . . in the furnishings of such accommodations, advantages, facilities, services, or privileges.[39]

While DHS does not dispute that the ICRA clearly protects transgender individuals from discrimination by public accommodations, it argues that the ICRA does not apply to DHS decisions regarding Iowa Medicaid benefits. Further, it argues that the Regulation does not in fact discriminate against transgender Medicaid recipients because it denies all surgical procedures conducted for primarily psychological benefit.

A. Whether the ICRA Applies to DHS Decision Regarding Iowa Medicaid Benefits

i. Public Accommodation under the ICRA

Petitioners rest their ICRA claims on Iowa Code § 216.7, which addresses discrimination by public accommodations. The ICRA defines public accommodation, in relevant part, as:

> . . . any place, establishment, or facility that caters or offers services, facilities, or goods to the nonmembers [of any organization or association utilizing the place]

[38] Iowa Code § 17A.19(10(b).
[39] Iowa Code § 216.7(1)(a)(emphasis added).

> gratuitously . . . if the accommodation receives governmental support or subsidy.[40]

The statute goes on to state that public accommodation includes,

> . . . includes each state and local *government unit* or tax-supported district of whatever kind, nature, or class that offers services, facilities, benefits, grants or goods to the public, gratuitously or otherwise.[41]

The ICRA does not define "government unit." Since DHS is not clearly vested with the authority to interpret the terms of the ICRA, its interpretation is not given deferential treatment. Instead, the Court must apply the principles of statutory interpretation.

Absent a statutory definition or an established legal meaning, the Court "give[s] words their ordinary and common meaning by considering the context within which they are used . . ."[42] DHS argues that, within the context of the remaining definition of "public accommodation," the term "government unit" should be viewed as solely a physical place, establishment, or facility. DHS correctly notes that "[w]hen the same word or term is used in different statutory sections that are similar in purpose, they will be given a consistent meaning."[43] DHS points to the usage of "unit" in the ICRA's definition of a "covered multifamily dwelling," referencing buildings "consisting of four or more dwelling *units*," and "ground floor *units of a building* consistent of four or more dwelling *units*."[44] DHS also points to a pamphlet published by the Iowa Civil Rights Commission, listing some examples of government units that qualify as public accommodations: "Police Departments, Schools, Mass Transit, Libraries, etc.").[45]

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[40] Iowa Code § 216.2(13)(a).
[41] Iowa Code § 216.2(13)(b) (emphasis added).
[42] *State v. Romer*, 832 N.W.2d 169, 176 (Iowa 2013) (quoting *In re Estate of Bockwoldt*, 814 N.W.2d 215, 223 (Iowa 2012)) (internal quotation marks omitted).
[43] *State v. Richardson*, 890 N.W.2d 609, 619 (Iowa 2017).
[44] Iowa Code § 216.2(4).
[45] Iowa Civil Rights Commission, "Sexual Orientation & Gender Identity: A Public Accommodations Provider's Guide to Iowa Law," *available at* https://icrc.iowa.gov/sites/default/files/publications/2018/SOGI_Public_Accommodation_May18.pdf (last visited May 21, 2018).

However, the Court does not find this argument convincing. Though there is scant case law in Iowa using the term "government unit," there is repeated usage of the term in the English language. Black's Law Dictionary defines "governmental unit" as "[a] subdivision, *agency*, department, county, parish, municipality, or other unit of the government of a country or a state."[46] This fits with the common usage of "unit," as defined by the Merriam-Webster Dictionary – "a single thing, person, or group that is a constituent of a whole" or "a piece or complex of apparatus serving to perform one particular function."[47] Additionally, the Iowa Supreme Court has applied this usage of "governmental unit" in other cases.[48]

Applied to the context of the ICRA, this usage does not conflict with other uses of "unit" in ICRA, generally referring to subdivisions of whatever entity or structure is being discussed. In that regard, the Court does not view the ICRA's usage of "unit" as rigidly as DHS proposes. Rather, "governmental unit" appears to be qualified by its immediate context with its more general usage simply being "a subdivision or part of a whole." This would also comport with the legislature's express command that the ICRA be interpreted "broadly to effectuate its purposes."[49]

Therefore, the Court concludes the term "government unit," as used in the ICRA's definition of a "public accommodation," includes state and local government agencies.[50]

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[46] *Governmental Unit*, Black's Law Dictionary (10th ed. 2014).
[47] *Unit*, Merriam-Webster Dictionary, *available at* http://www.merriam-webster.com/dictionary/unit (last visited May 21, 2018).
[48] *See, e.g., Warford v. Des Moines Metro. Transit Auth.*, 381 N.W.2d 622, 624 (Iowa 1986) ("Iowa Code section 613A.1(1) anticipates that a 'municipality' will be some *unit* of local government . . ."); *Wilson v. Nepstad*, 282 N.W.2d 664, 668 (Iowa 1979) (referring to a city as a "governmental unit"); *Goreham v. Des Moines Metro. Area Solid Waste Agency*, 179 N.W.2d 449, 455 (Iowa 1970) (discussing the ability for "public agencies or governmental units" to cooperate together on areas where they can also act independently); *see also* 3 Ia. Prac., Methods of Practice § 45:1 (2017) (using "governmental unit" as synonymous with "governmental unit").
[49] Iowa Code § 216.18(1).
[50] This is consistent with this Court's November 27, 2017 Order denying DHS's Motion to Dismiss.

ii. Applying the Definition of Public Accommodation to DHS Decisions Regarding Iowa Medicaid

With the definition of public accommodation determined, the Court now applies that definition to the present case. DHS misconstrues Petitioners' claims. DHS argues it is inappropriate to consider Iowa Medicaid to be a public accommodation. However, as Petitioners point out, they are arguing that *DHS* is the public accommodation; not Iowa Medicaid. Iowa Medicaid is the *service* or *benefit* offered by DHS to Medicaid recipients gratuitously or otherwise that classifies DHS as a public accommodation.[51] DHS is the governmental unit tasked with implementing and overseeing Iowa Medicaid services provided by MCOs. Thus, the Court concludes that DHS is a public accommodation. The decisions of DHS as well as those of its agent-MCOs regarding Iowa Medicaid fall under the purview of the anti-discrimination provisions of the ICRA.

B. Whether the Regulation Violates the ICRA's Prohibitions on Sex and Gender-Identity Discrimination

Having determined the ICRA provisions regarding discrimination by a public accommodation apply to the Iowa Medicaid coverage decisions of DHS, the Court now addresses whether the Regulation upon which the Good and Beal decisions were based violates the prohibition against sex or gender identity discrimination of the IRCA.

i. Whether Sex Discrimination Includes Discrimination Against Transgender Individuals.

Petitioners argue the Regulation constitutes sex discrimination in violation of the IRCA. DHS responds the ICRA's prohibition on sex discrimination does not include discrimination against transgender individuals. DHS contends to hold otherwise would make the ICRA's inclusion of "gender identity" in the list of prohibited bases from discrimination redundant. DHS

[51] Iowa Code § 216.2(13)(b).

correctly states that Iowa courts work to avoid statutory interpretations that lead to redundancies in the statute.[52] DHS also cites *Sommers v. Iowa Civil Rights Commission*, in which the Iowa Supreme Court held that the legislature did not intend sex discrimination to include "transsexuals."[53] The Supreme Court based this determination largely on a wide range of federal cases at the time considering the issue under the federal Civil Rights Act of 1965.[54]

Petitioners argue that *Sommers* is essentially dead law, decided prior to the legislature's 2007 amendment to the ICRA adding "gender identity" to § 216.7, and is based upon federal case law that has since been "eviscerated" in the federal courts.[55] While Petitioners' argument is compelling, the Court is mindful of the Iowa Supreme Court's admonition against district courts overturning Supreme Court precedent.[56] Regardless of whether this Court believes that *Sommers* has been eroded by subsequent developments in federal case law, this Court is bound by its precedent until the Iowa Supreme Court holds otherwise. Thus, the Court does not find that

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[52] *In re Estate of Melby*, 841 N.W.2d 867, 879 (Iowa 2014).
[53] 337 N.W.2d 470, 474 (Iowa 1983).
[54] *Id.*
[55] *See Tovar v. Essentia Health*, 857 F.3d 771, 775 (8th Cir. 2017) (". . . we assume for purposes of appeal that the prohibition on sex based discrimination under Title VII . . . encompasses protection for transgender individuals."); *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034, 1048 (7th Cir. 2017) ("By definition a transgender individual does not conform to the sex-based stereotypes of the sex that he or she was assigned at birth."); *Glenn v. Brumby*, 663 F.3d 1312, 1316-17 (11th Cir. 2011) ("A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes . . . [D]iscrimination against a transgender individual because of her gender-nonconformity is sex discrimination."); *Barnes v. City of Cincinnati*, 401 F.3d 729, 736-37 (6th Cir. 2005); (". . . Barnes established that he was a member of a protected class by alleging discrimination against the City for his failure to conform to sex stereotypes."); *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) ("Sex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity."); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213, 215-16 (1st Cir. 2000) (noting that refusal to grant a loan to a man because he dresses like a woman could be grounds for a sex discrimination claim); *Schwenk v. Hartford*, 204 F.3d 1187, 1200-1203 (9th Cir. 2000) (holding that the Gender-Motivated Violence Act applies to individuals targeted because of their transsexuality, because transsexuality is an element of gender, as it is defined by a failure to conform with gender stereotypes).
[56] *State v. Eichler*, 83 N.W.2d 576, 578 (Iowa 1957) ("Yet it is the prerogative of this court to determine the law, and we think that generally the trial courts are under a duty to follow it as expressed by the courts of last resort, as they understand it, even though they may disagree. If our previous holdings are to be overruled, we should ordinarily prefer to do it ourselves.").

ICRA's prohibition against sex discrimination includes discrimination against transgender individuals.

Yet, this is not fully dispositive of Petitioners' ICRA claim, as they also raise the prohibition against gender identity discrimination. Clearly, gender identity discrimination includes protections for transgender individuals. Discrimination against transgender individuals is inherently based on the fact that a transgender individual's gender identity does not match the gender they were assigned at birth. Thus, the Court must still determine whether the Regulation constitutes discrimination against transgender individuals under the ICRA.

ii. Whether the Regulation is Discriminatory Against Transgender Individuals

Petitioners argue the Regulation is facially discriminatory against transgender individuals because it "den[ies] Medicaid-eligible individuals coverage for medically necessary treatment solely because they are transgender since transgender people are the only individuals who seek surgery related to 'transsexualism' or 'gender identity disorders' as set forth [in the Regulation]."[57] Petitioners also point to several forms of cosmetic surgery that are covered under the Regulation, such as congenital anomaly corrective surgery, reconstructive surgery "following an accidental injury," scar removal "resulting from neoplastic surgery," and breast reduction, even if those surgeries are primarily for psychological purposes.[58] Further, Petitioners discuss the Regulation's express characterization of sex reassignment surgeries as "not considered as restoring bodily function," even when the same procedures are covered when unrelated to the treatment of Gender Dysphoria.[59]

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[57] Pet. Brief, at 29.

[58] Iowa Admin. Code r. 441-78.1(4)(a); IOWA DEP'T OF HUMAN SERV., *Iowa Wellness Plan Benefits Coverage List*, at 2 (June 29, 2015), *available at* https://dhs.iowa.gov/sites/default/files/IWP%20Benefits%20Coverage%20List_Rev062915.pdf (last visited May 21, 2018) (listing "non-cosmetic reconstructive surgery," breast reduction, and "congenital abnormalities correction" under a list of covered services without any listed exclusions or limitations).

[59] Iowa Admin. Code r. 441-78.1(4). Petitioners list a number of other conditions for which the same, if not similar,

DHS contends the singling out of sex reassignment surgery in the Regulation, along with any other cosmetic surgery related to "transsexualism," is merely a specified example of the broader category of "cosmetic, reconstructive, and plastic surgeries" excluded from coverage under the Regulation.[60] According to DHS, the Regulation "treats everyone the same by excluding coverage for surgery for the purposes of treating psychological conditions for everyone alike."[61] DHS argues transgender Iowa Medicaid recipients are fully covered for any non-psychologically based medically necessary surgical procedure just as any non-transgender recipient. This argument is premised on DHS's conclusion that Gender Dysphoria is a primarily psychological condition. To support this conclusion, DHS points to Petitioners' petitions for judicial review,[62] as well as the WPATH Standards of Care which state that in some individuals, the distress resulting from Gender Dysphoria "meets criteria for a formal diagnosis that *might be classified* as a mental disorder."[63]

Relying primarily upon the opinions of Dr. Ettner, Petitioners dispute DHS' characterization of Gender Dysphoria as a mental disorder, arguing that the medical consensus currently holds the condition has a strong biological component and is in many ways an immutable trait, unlike, for example, Body Dysmorphic Disorder. Good and Beal state that the "prevailing theory . . . has become that gender identity evolves as a result of the interaction of the

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surgical procedures as those Petitioners request coverage for would be covered under the Regulation, such as "testicular cancer, pain, and torsion; postoncologic reconstruction; posttraumatic reconstruction; postinfection reconstruction; and reconstruction of congenital defects or anomalies." Pet. Brief, at 29-30.

[60] The Court will note that DHS raises these arguments, not in the context of Petitioners' ICRA claims, but rather Petitioners' equal protection claim.

[61] DHS Brief, at 36.

[62] In which they state that "[g]ender dysphoria is a serious medical condition codified in the Diagnostic and Statistical Manual for Mental Disorders, Fifth Edition . . . and the International Statistical Classification of Diseases and Related Health Problems, Tenth Edition." Good Pet., at ¶ 52; Beal Pet., at ¶ 52.

[63] WPATH, *The Standards of Care*, at 5 (emphasis added).

developing brain and sex hormones."[64] Because of this, the Standards no longer require "psychotherapy" as a prerequisite for treating Gender Dysphoria.

Petitioners also argue the primary purpose behind sex reassignment surgery is not psychological, but rather meant to "prevent social dysfunction, physical pain, and even death [due to suicide]."[65] The biological component and associated physical pain and dysfunction differentiate sex reassignment surgery from elective cosmetic surgery. In this way, according to Petitioners, medical experts have rejected the "myth" that sex reassignment surgery is purely "cosmetic" or "experimental" in terms of its efficacy in treating Gender Dysphoria. Yet, despite this current medical consensus, unrefuted by any evidence provided by DHS, the Regulation still expressly singles out sex reassignment surgery and other cosmetic surgeries related to "transsexualism" as excluded from coverage.

The discriminatory nature of this express exclusion is illustrated by the history behind the exclusionary language. As previously discussed, the language of the Regulation expressly excluding sex reassignment surgery and other surgeries related to "transsexualism" was added in 1995 in response to the Eighth Circuit finding that DHS was otherwise required to cover such procedures. This was also after DHS had received Medicaid claims for sex reassignment surgery in 1991 that DHS ultimately concluded it was required to cover.[66] The language of the Regulation was added for the express purpose of denying coverage for sex reassignment surgery. Thus, through the Regulation, DHS is excluding Iowa Medicaid coverage for surgical treatment

[64] Pet. Reply, at 14
[65] *Id.* An example of this is Good, who suffers daily discomfort and pain by "tucking" and wearing a tight girdle to better conform her appearance to society's expectations for her gender identity.
[66] Good Admin. Record, at 213.

of Gender Dysphoria purely on the basis that it is treatment of Gender Dysphoria of transgender individuals.[67]

At the time the Regulation was adopted more than two decades ago, the IRCA did not prohibit discrimination on the basis of gender identity. It does now. At the time the Regulation was adopted, the medical consensus supported the notion that sex reassignment surgery was cosmetic surgery for a psychological condition akin to Body Dysmorphic Disorder. However, as Dr. Ettner's affidavit demonstrates, unlike Body Dysmorphic Disorder, Gender Dysphoria has a biological component and the current medical consensus no longer supports the conclusion that gender affirming surgery is not therapeutic. Medical thinking and Iowa law has changed. The Regulation has not kept pace with law and medicine.

Therefore, the Court concludes DHS's arguments are not persuasive. Petitioners proved that in the face of unrefuted medical evidence in the record, as well as the history of the Regulation itself, the exclusion of coverage for sex reassignment surgery and other surgeries related to the treatment of Gender Dysphoria in the Regulation constitutes gender identity discrimination prohibited by the ICRA.[68]

II. WHETHER THE REGULATION VIOLATES EQUAL PROTECTION UNDER THE IOWA CONSTITUTION

The Court may also reverse an agency action if the action is "[u]nconstitutional on its face or as applied or is based upon a provision of law that is unconstitutional on its face or as applied."[69] Petitioners claim the Regulation violates the equal protection guarantees of the Iowa Constitution. The Iowa Constitution states, in pertinent part, that "[a]ll men and women, by

[67] At the time, the Regulation's amendment was justified as preventing the use of resources for a "procedure that is as controversial within the medical community . . ."
[68] *See Doe v. Regional Sch. Unit 26,* 86 A.3d 600, 604-07 (Me. 2014)(School prohibiting transgender student from using the girls communal bathroom violated Maine Human Rights Act prohibition against discrimination by public accommodation on the basis of sexual orientation.).
[69] *Iowa Code § 17A.19(10)(a).*

nature, are free and equal"[70] and that the legislature "shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens."[71] The Court reviews constitutional issues *de novo*.[72]

The Equal Protection Clause of the Iowa Constitution requires that "laws treat alike all people who are similarly situated with respect to the legitimate purpose of the law."[73] This is a narrow threshold requirement, meaning that if the plaintiff cannot show that they are similarly situated as another class of citizens with respect to the law in question, the Court need not address the merits of the disparate treatment.[74] If the Court does find that the plaintiffs are similarly situated, then the Court must determine the proper level of scrutiny to analyze whether the law in question passes constitutional muster.[75]

A. Whether Transgender and Non-transgender Medicaid Recipients are Similarly Suited for Equal Protection Purposes

Petitioners' first threshold is to demonstrate that under the Regulation, transgender and non-transgender individuals are similarly situated. In order to determine whether that is the case, the Court must identify and consider the purpose of the Regulation, and more broadly, the purpose of Iowa Medicaid.

The Iowa Supreme Court has previously stated that the "Medicaid program was designed to serve individuals and families lacking adequate funds for basic health services . . ."[76] The Regulation was intended to exclude coverage for sex reassignment for Medicaid recipients who are transsexual. In light of this purpose, transgender individuals who are Medicaid recipients

[70] Iowa Const., art. I, § 1.
[71] Iowa Const., art. I, § 6.
[72] *Soo Line R. Co. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 688 (Iowa 1994).
[73] *Varnum v. Brien*, 763 N.W.2d 862, 882 (Iowa 2009) (quoting *Racing Ass'n of Central Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004) (*RACI*)) (internal quotation marks omitted).
[74] *Id.*
[75] *Id.* at 885-86.
[76] *In re Estate of Melby*, 841 N.W.2d 867, 875 (Iowa 2014).

because they lack funding for basic health services are similarly situated to non-transgender Medicaid recipients in essentially every way except their transgender status. Additionally, the Court notes that DHS does not dispute that transgender and non-transgender Medicaid recipients are similarly situated.[77]

Therefore, the Court concludes that transgender and non-transgender Medicaid recipients are similarly situated for the purposes of the Medicaid program and the Regulation.

B. Level of Scrutiny to be Applied

Having determined that Petitioners satisfied the initial threshold issue, the Court must next determine what level of scrutiny to apply to the Regulation. In constitutional law, the courts have applied three different levels of scrutiny. The highest standard is strict scrutiny, applied in equal protection cases involving either race, alienage, or nationality.[78] Under strict scrutiny, the State bears the burden of proving that the classification in the law is "narrowly tailored to serve a compelling state interest."[79] The next level of scrutiny is intermediate or "heightened" scrutiny, where the party seeking to uphold the challenged statute or regulation must show that the classification is "substantially related to a sufficiently important governmental interest."[80] Heightened scrutiny generally applies in cases involving a "quasi-suspect" classification, such as gender, sexual orientation, or illegitimacy.[81] Finally, absent either a suspect or quasi-suspect classification, the Court will apply a rational basis test, in which the plaintiff must negate every reasonable basis for the classification that might support disparate treatment.[82]

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[77] DHS Brief, at 34 ("Although transgender and non-transgender Medicaid recipients may be similarly situated . . .").
[78] *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985); *Varnum*, 763 N.W.2d at 886.
[79] *In re S.A.J.B.*, 679 N.W.2d 645, 649 (Iowa 2004).
[80] *Cleburne Living Ctr.*, 473 U.S. at 441; *Varnum*, 763 N.W.2d at 880.
[81] *Varnum*, 763 N.W.2d at 880, 895-96; *Sherman v. Pella Corp.*, 576 N.W.2d 312, 317 (Iowa 1998).
[82] *Horsfield Materials, Inc. v. City of Dyersville*, 834 N.W.2d 444, 458 (Iowa 2013); *Bierkamp v. Rogers*, 293 N.W.2d 577, 579-80 (Iowa 1980); *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1983).

The Iowa Supreme Court case has not determined what level of scrutiny is appropriate in equal protection cases involving discrimination against transgender individuals. This is an issue of first impression. DHS argues that "[i]n the absence of Iowa case law, the Court should apply rational basis scrutiny to the regulation at issue."[83] However, rather than simply defaulting to the lowest level of scrutiny, the Iowa Supreme Court utilizes a four-factor test in order to determine the appropriate level of scrutiny.[84] These factors include:

> (1) the history of invidious discrimination against the class burdened by the legislation; (2) whether the characteristics that distinguish the class indicate a typical class member's ability to contribute to society; (3) whether the distinguishing characteristic is "immutable" or beyond the class members' control; and (4) the political power of the subject class.[85]

The Iowa Supreme Court has made clear that these are not elements, but rather guiding factors.[86] Though no single factor is dispositive, the Supreme Court has noted that the first two factors "have always been present when heightened scrutiny has been applied," with the second two factors serving as supplemental guidance.[87]

i. History of Invidious Discrimination

Petitioners draw comparisons to the Supreme Court's application of the factors in *Varnum v. Brien*, arguing that the discrimination faced by individuals on the basis of sexual orientation is analogous to that faced by individuals on the basis of gender identity. In *Varnum*, the history of discrimination against homosexual individuals was not disputed.[88] Nevertheless, the Supreme Court specifically highlighted the addition of sexual orientation as a protected class in the ICRA, the Iowa Anti-Bullying and Anti-Harassment Act, and within the criminal statutes

[83] DHS Brief, at 29.
[84] *Varnum*, 763 N.W.2d at 887.
[85] *Id.* at 887-88.
[86] *Id.* at 888 (likening its use of the factors to the use by the U.S. Supreme Court).
[87] *Id.* (even going so far as to say that those factors "could be considered as prerequisites to concluding a group is a suspect or quasi-suspect class.").
[88] *Id.* at 889 (the Court also pointed to studies documenting discrimination and crimes against homosexual individuals).

regarding hate crimes as indicative of the legislature's recognition of "the need to remedy historical sexual-orientation-based discrimination."[89]

Petitioners point to virtually identical evidence on the part of transgender individuals, namely studies documenting the history of gender-identity-based discrimination, as well as the inclusion of gender identity as a protected class within ICRA and the anti-bullying laws. DHS offers no real response to this point, instead resting solely on its assertion that a lack of case law declaring gender identity as a quasi-suspect class is dispositive. As a result, the Court finds that this factor leans strongly in favor of finding gender identity to be a quasi-suspect class, akin to sexual orientation.

ii. Gender Identity and the Ability to Contribute to Society

Under this factor, the Court examines whether the distinct characteristic of the class has any bearing on an individual member's ability to contribute to society. "Heightened scrutiny is applied when the classification bears no relationship to the person's ability to contribute to society."[90] In *Varnum*, the Supreme Court noted a number of extra-jurisdictional cases failed to find that sexual orientation was at all related to an individual's ability to contribute to society, as well as Iowa legislation that expressly declared "as public policy . . . that sexual orientation is not relevant to a person's ability to contribute to society . . ."[91] Petitioners again point to the inclusion of gender identity in ICRA as indicative that gender identity is unrelated to a person's ability to contribute.[92] Absent any refutation by DHS, the Court agrees.

[89] *Id.*
[90] *Id.*
[91] *Id.* at 890-91
[92] Good Admin Rec 255.

iii. Immutability of Gender Identity

The third factor examines the immutability of the distinct characteristic, under the general principle that disparate treatment against someone for a trait or characteristic that is out of their power is less likely to be valid. A trait is consider immutable if it exists "solely by accident of birth" or "when the person with the trait has no ability to change it."[93] However, the trait need only be "so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change [it]."[94] Here, Petitioners have provided evidence indicating that a person's gender identity is developed early in childhood, has a strong biological basis, cannot be altered, and is not subject to change through outside influence.[95] Additionally, DHS does not refute this issue. Thus, the Court finds this factor weighs in favor of finding gender identity to be a quasi-suspect class.

iv. Political Powerlessness

The final factor examines the relative political power of the class. The *Varnum* Court noted that the U.S. Supreme Court has not offered a clear definition of the bounds of this factor, however the Iowa Supreme Court determined that the "touchstone of the analysis should be whether the group lacks sufficient political strength to bring a prompt end to the prejudice and discrimination through traditional political means."[96] As Petitioners point out in their brief, the Regulation itself has been revised multiple times over the years without any change to its prohibition on sex reassignment surgeries. In this regard, this factor weighs in favor of finding transgender individuals to be a quasi-suspect class, given their clear inability to reverse this

[93] *Varnum*, 763 N.W.2d at 892 (quoting *Frontiero v. Richardson*, 441 U.S. 677, 686 (1973) (Brennan, J., plurality); citing *Regents of Univ. of California v. Bakke*, 438 U.S. 265, 360 (1978)).
[94] *Id.* at 893 (quoting *Kerrigan v. Comm. Of Pub. Health*, 957 A.2d 407 (Conn. 2008)).
[95] Good Admin Rec 255.
[96] *Id.* at 894 (quoting *Kerrigan*, 957 A.2d at 444) (internal quotation marks omitted).

legislative burden through traditional political means. At the very least, this factor does not weigh against applying heightened scrutiny to the Regulation.

As a result, the Court concludes that all four factors clearly point towards finding gender identity to be a quasi-suspect class. Therefore, it is appropriate to apply heightened scrutiny to the Regulation.[97]

C. Whether the Regulation Withstands Heightened Scrutiny

As previously stated, under a heightened scrutiny review, it is DHS's burden to show that the Regulation is substantially related to the achievement of an important governmental interest. The U.S. Supreme Court has stated that this justification must be "exceedingly persuasive."[98] Thus, the issue is whether there is "exceedingly persuasive" reasons for denying Iowa Medicaid coverage for medically necessary surgeries purely on the basis that they are "related to transsexualism."[99]

DHS does not address this issue under the lens of heightened scrutiny.[100] However, in the context of a rational basis analysis, DHS provides four arguments for the Regulation's exclusion of sex reassignment surgery and other surgeries related to the treatment of Gender Dysphoria. First, DHS argues the Regulation's exclusion is related to the legitimate government interest of "conserving limited state resources."[101] On these grounds, DHS argues that transgender Iowa Medicaid recipients are denied coverage for surgical treatment for their Gender Dysphoria "due

[97] Petitioners also point to a number of other courts that have found heightened scrutiny to apply in cases involving gender identity discrimination. *See, e.g., Doe I v. Trump*, 2017 WL 4873042 (D.D.C. Oct. 30, 2017); *Evancho v. Pine-Richland Sch. Dist.*, 2017 WL 770619 (W.D. Pa. Feb. 27, 2017); *Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ.*, 208 F. Supp. 3d 850 (S.D. Ohio 2016); *Adkins v. City of New York*, 143 F. Supp. 3d 134 (S.D.N.Y. 2015); *Norsworthy v. Beard*, 87 F. Supp. 3d 1104 (N.D. Cal. 2015); *Marlett v. Harrington*, 2015 WL 6123613 (E.D. Cal. 2015); *but see c.f.*, *Johnston v. Univ. of Pittsburgh of Comm. Sys. of Higher Educ.*, 97 F. Supp. 3d 657 (W.D. Pa. 2015).
[98] *U.S. v. Virginia*, 518 U.S. 515, 532-33 (1996).
[99] Iowa Admin. Code r. 441-78.1(4).
[100] This is because DHS argues that the Court should apply rational basis scrutiny instead.
[101] DHS Brief, at 30 (citing *Guttman v. Khalsa*, 669 F.3d 1101, 1123 (10th Cir. 2012) ("Costs are especially relevant when the state's actions are subject *only to rational basis review*, given that conserving scarce resources may be a rational basis for state action.") (emphasis added)).

to the excessive costs of the procedure."[102] DHS discusses the complicated nature of sex reassignment – namely that it often requires more than one procedure, and, as with any surgery, risks complications which would also have to be covered. However, the Iowa Supreme Court rejected of a similar argument in the context of excluding same-sex couples from civil marriage.[103] The cost argument is equally unpersuasive in excluding benefits for transgender Medicaid recipients. Further, as previously discussed, the Regulation allows coverage for the same, if not similar, surgical procedures, provided they are performed for purposes outside of Gender Dysphoria treatment. Therefore, Court finds excluding coverage for procedures performed for treating Gender Dysphoria is not substantially related to achieving an important government interest.

Second, DHS argues the Regulation was drafted to reflect the "evolving nature of the diagnosis and treatment of gender identity disorder and the disagreement regarding the efficacy of sex reassignment surgery."[104] This argument relies heavily on the Eighth Circuit's holding in *Smith v. Rasmussen*, which found that the Regulation was "both reasonable and consistent with the Medicaid Act."[105] This Court has already addressed the applicability of *Smith.*[106] In *Smith,* the Eighth Circuit considered the reasonableness of the Regulation in the context of a 42 U.S.C. § 1983 action. *Smith* did not involve a challenge to the Regulation under the Equal Protection Clause of the Iowa Constitution or the ICRA. *Smith* was decided before the 2007 amendment to the ICRA prohibiting gender identity discrimination. *Smith* did not consider or decide challenges to the Regulation or the application of the Regulation to the facts under the Iowa

[102] *Id.* at 31.
[103] *Varnum*, 763 N.W.2d 902-04 (rejecting a cost-savings justification as insufficient to protect the exclusion of same-sex couples from civil marriage under an intermediate scrutiny review).
[104] *Smith v. Rasmussen*, 249 F.3d 755, 761 (8th Cir. 2001).
[105] *Id.*
[106] *See* Order Denying Resp. Motion to Dismiss (Nov. 27, 2017).

Administrative Procedure Act ("IAPA"). The medical facts alleged in Good and Beals' petitions are not the same as the facts considered by the Court in *Smith*. The *Smith* Court did not have the benefit of Dr. Ettner's opinions concerning the current medical consensus. *Smith* is not dispositive.

Based upon the medical evidence presented in this record, the Court finds that the medical consensus has shifted since the exclusion of sex reassignment was first added to the Regulation back in 1995. Notably, despite this evolution within the medical community, DHS has not reviewed or studied the language regarding sex reassignment surgery in the Regulation since its original adoption. This weighs heavily against DHS's position. Finally, even assuming DHS's description of the drafting of the Regulation was accurate, that does not justify enforcement of the Regulation today. The outdated medical evidence that formed the basis for the adoption of the Regulation does not permanently validate it. As Petitioners proved, the medical consensus now holds that sex reassignment surgery is sometimes medically necessary and addresses far more than just the psychological aspects of Gender Dysphoria. It is the standard of care for the treatment of the biological components of Gender Dysphoria. Therefore, the Court does not find DHS' argument persuasive.

Third, DHS argues the "relationship between the [Regulation] and the legitimate purposes identified . . . are not arbitrary."[107] This is because, according to DHS, there is a "clear and substantial financial impact on the Medicaid program."[108] Yet, as Petitioners point out, there is no evidence within the record regarding the costs of the requested procedures, nor a comparison of those costs and the costs of like procedures that are covered under the Regulation. Transgender individuals are a small minority of the population of Medicaid recipients.

[107] DHS Brief, at 34.
[108] *Id.*

Transgender individuals who qualify for surgery are only a subset of transgender Medicaid beneficiaries. There are no cost projections concerning the surgical treatment of the Gender Dysphoria among this discreet subset of Medicaid recipients Absent this evidence, the Court cannot find that there is a "substantial financial impact" on Iowa Medicaid from the exclusion of sex reassignment and Gender Dysphoria surgical treatment. Additionally, this is essentially the same cost-savings argument, simply from a different angle. The Iowa Supreme Court rejected this kind of conservation of resources argument concerning same-sex marriage in *Varnum.*[109] The Court finds it equally unpersuasive as a justification for the denial of medical benefits to transgender Medicaid recipients for medically necessary gender affirming surgery.

Finally, DHS argues the Regulation is not discriminatory, at least in intent. The Court has already addressed this argument regarding Petitioners' ICRA claim. The Regulation clearly discriminates against transgender Medicaid recipients on the basis of gender identity by excluding coverage for medically necessary gender affirming surgery as treatment for the biological components of Gender Dysphoria while covering the same surgical procedures for other biological as well as psychological conditions of non-transgender individuals. The same logic carries over to an equal protection analysis. Thus, the Court rejects this argument as well.

As previously noted, the Regulation has not kept pace with law and medicine. The social and political environment surrounding transgender issues is evolving as well. But "judicial decision-making in the context of constitutional issues can involve the 'process of adapting law to a volatile social-political environment.'"[110] In this context, DHS has failed to provide an "exceedingly persuasive" justification for how the disparate treatment of transgender individuals

[109] *Varnum*, 763 N.W.2d at 863 ("Excluding any group from civil marriages—African-Americans, illegitimates, aliens, even red-haired individuals—would conserve state resources in an equally 'rational' way. Yet, such classifications so obviously offend our society's sense of equality that courts have not hesitated to provide added protections against such inequalities.").
[110] *Id.,* 763 N.W.2d at 881 (quoting 2 John W. Strong, *McCormick on Evidence* §328, at 370 (5th ed. 1999)).

in need of sex reassignment surgeries under the Regulation is substantially related to an important governmental interest. Thus, the Court concludes the gender identity based exclusion of medically necessary gender affirming surgery and other therapeutic surgeries performed as treatment for Gender Dysphoria does not further in a substantial way an important governmental objective. Therefore, the Regulation does not satisfy heightened or intermediate scrutiny.[111]

D. Whether the Regulation Withstands Rational Basis Review

Even if heightened scrutiny does not apply, the Regulation does not withstand rational basis review under the Iowa Constitution. Under the rational basis test, the statute or regulation in question is presumed constitutional unless the challenging party can negate every reasonable basis for the classification that might support disparate treatment.[112] This is a very deferential standard.[113] However, while legislative classifications need not be perfect, "there is a point beyond which the State cannot go without violating the Equal Protection Clause. The State . . . may not resort to a classification that is palpably arbitrary."[114] Under the deferential standard of rational basis review, a statute or regulation satisfies the requirements of equal protection, "so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decisionmaker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational."[115] Although the rational basis test is

[111] *See Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011)(Discrimination against transgender individuals because of gender-nonconformity does not satisfy heightened scrutiny and is sex discrimination in violation of the Equal Protection Clause of the United States Constitution.); *see also Beatie v. Beatie,* 333 P.3d 754, 760 (Ariz. 2014)(Refusal to grant dissolution of marriage to transgender individual who obtained valid amended birth certificate would run afoul of the Equal Protection Clause of the United States Constitution.).
[112] *Horsfield Materials, Inc.*, 834 N.W.2d at 458.
[113] *Varnum*, 763 N.W.2d at 879.
[114] *LSCP, LLLP v. Kay-Decker*, 861 N.W.2d 846, 857 (Iowa 2015) (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527 (1959)) (internal quotation marks omitted).
[115] *Varnum*, 763 N.W.2d at 879; *Fitzgerald v. Racing Ass'n of Cent. Iowa*, 539 U.S. 103, 107 (2003).

"deferential to legislative judgment, 'it is not a toothless one' in Iowa"[116] [T]he deference built into the rational basis test is not dispositive because this court engages in a meaningful review of all legislation challenged on equal protection grounds by applying the rational basis test to the facts of each case."[117] "This is the heart of judicial review."[118]

The Iowa Supreme Court has developed a three-part framework to determine if the rational basis test is satisfied under Article I, § 6 of the Iowa Constitution. First, the Court must determine whether there is a valid, "realistically conceivable" purpose for the classification that serves a government interest.[119] In order to be "realistically conceivable," the regulation cannot be "so overinclusive and underinclusive as to be irrational."[120] If a classification involves "extreme degrees" of overinclusion or underinclusion, in relation to any particular goal, it cannot reasonably be said to further that goal.[121]

Second, the Court must decide whether the identified reason for the classification has any basis in fact.[122] In order to discern a "basis in fact," the Court will undertake some examination of the credibility of the asserted factual basis for the challenged classification. Actual proof of an asserted justification is not necessary, but the Court will not simply accept it at face value. The Court must examine it to determine whether it is credible as opposed to specious.[123]

Third, the Court evaluates whether the relationship between the classifications and its purpose "is so weak that the classification must be viewed as arbitrary."[124] The relationship of

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[116] *Id.* (quoting *RACI* v. Fitzgerald, 675 N.W.2d 1, 7 (Iowa 2004).
[117] *Id*., n 7 (citing *Bierkamp*, 293 N.W.2d at 581)).
[118] *King v. State*, 818 N.W.2d 1, 79 (Iowa 2012)(Appel, J. dissenting).
[119] *Residential and Agric. Advisory Comm., LLC v. Dyersville City Council*, 888 N.W.2d 24, 50 (Iowa 2016); *McQuistion v. City of Clinton*, 872 N.W.2d 817, 831 (Iowa 2015).
[120] *Residential and Agric. Advisory Comm.*, 888 N.W.2d at 50.
[121] *LSCP, LLLP*, 861 N.W.2d at 861.
[122] *Residential and Agric. Advisory Comm.*, 888 N.W.2d at 50.
[123] *LSCP, LLLP*, 861 N.W.2d at 860; *Quest Corp. v. Iowa State Bd. of Tax Review*, 829 N.W.2d 550, 560 (Iowa 2013); *RACI*, 675 N.W.2d at 7, n.3 (differentiating between "credible" and "specious").
[124] *Residential and Agric. Advisory Comm.*, 888 N.W.2d at 50 (quoting *RACI*, 675 N.W.2d at 8) (internal quotation

the classification to its goal must not be so attenuated as to render the decision arbitrary or irrational. The Court examines the legitimacy of the end to be achieved and then scrutinizes the means used to achieve that end.[125]

DHS offers two arguments for why the Regulation passes rational basis review. First, DHS argues that the Regulation "serves the purpose of conserving limited state resources."[126] At the outset, this argument is problematic, as DHS frames it around the Regulation's broader categorical exclusion of "psychologically-motivated surgeries," rather than the specific issue of sex reassignment surgeries.[127] DHS provides no indication as to the actual costs of sex reassignment procedures, nor any comparison to the costs associated with coverage for the very same procedures in cases unrelated to Gender Dysphoria treatment. While the Court agrees that cost savings is a legitimate government interest, the classification created by the Regulation is achieves this goal through an extreme degree of underinclusiveness. As the Court has already noted, the Regulation does not actually prohibit coverage for all psychologically motivated surgeries, nor does it limit coverage for surgeries performed out of medical necessity.[128]

DHS offers no persuasive justification for this disparate treatment. While actual proof of specific cost savings is not required, there must be some realistically conceivable, fact based, plausible reason to believe that denying coverage to the subset of transgender Medicaid recipients who can establish a medical necessity for gender affirming surgery is unaffordable. The Court is not convinced that singling out transgender individuals for cost saving in this way is

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marks omitted).

[125] *RACI*, 675 N.W.2d at 8; *LSCP, LLLP*, 861 N.W.2d at 859 ("A citizen's guarantee of equal protection is violated if desirable legislative goals are achieved . . . through wholly arbitrary classification or otherwise invidious discrimination.").

[126] DHS Brief, at 30.

[127] *Id.* at 31.

[128] *See* IOWA DEP'T OF HUMAN SERV., *Iowa Wellness Plan Benefits Coverage List*, at 2 (June 29, 2015), *available at* https://dhs.iowa.gov/sites/default/files/IWP%20Benefits%20Coverage%20List_Rev062915.pdf (last visited May 21, 2018) (listing "non-cosmetic reconstructive surgery," breast reduction, and "congenital abnormalities correction" under a list of covered services without any listed exclusions or limitations).

rational.[129] Justifying a discriminatory classification without at least some credible rationale is the epitome of an arbitrary classification. This is akin to the tenuous justification offered by the State in *Racing Ass'n of Central Iowa v. Fitzgerald*, in which the Iowa Supreme Court rejected a financial benefits argument for disparate tax treatment between excursion boats and racing tracks.[130] A financial benefit to the State resulting from discrimination against transgender individuals in Iowa Medicaid based upon their status as transgender is palpably arbitrary.

DHS's second argument is that the Regulation reflects the evolving nature of the diagnosis and treatment of Gender Dysphoria. While that may have been true at the time the exclusionary language was adopted in 1995, DHS offers no evidence to counter the overwhelming weight of the evidence introduced by the Petitioners establishing that this is not the case today some two decades later. Petitioners' have provided ample medical evidence establishing the current medical consensus regarding the diagnosis of Gender Dysphoria and how, in some cases, sex reassignment surgery can be medically necessary to treat the condition. DHS cannot rely on outdated medical evidence as a timeless justification for the Regulation. In order to pass rational basis review, the Regulation must be realistically conceivable, have a basis in fact, and not be so weak that the classification must be viewed as arbitrary. The evidence in the record demonstrates that, even assuming there was once a justification for the classification as reflected by the Iowa Foundation Report and the rulemaking process, the medical consensus no longer supports it. Thus, this argument fails as well.

Therefore, the Court concludes Petitioners negated every reasonable basis for the classification that might support disparate treatment. The Regulation's exclusion of surgical treatment for Gender Dysphoria does not pass under rational basis review.

[129] *RACI*, 675 N.W.2d at 7, n.3.
[130] *RACI*, 675 N.W.2d at 13-15.

Accordingly, the Court concludes under either heightened scrutiny or the rational basis test, the DHS decision to exclude coverage for medically necessary sex reassignment surgery for Good and Beal based solely on the Regulation violated the Equal Protection Clause of the Iowa Constitution on its face and as applied.[131]

III. WHETHER DHS'S DECISION WILL RESULT IN A DISPROPORTIONATE NEGATIVE IMPACT ON PRIVATE RIGHTS

Petitioners assert the third basis for the Court to reverse DHS's decision is Iowa Code § 17A.19(10)(k), which states that the Court can reverse an agency action when the action is "[n]ot required by law and its negative impact on the private rights affected is so grossly disproportionate to the benefits accruing to the public interest from that action that it must necessarily be deemed to lack any foundation in rational agency policy."

Petitioners argue this claim is fairly simply. First, they point out that a regulation that is either unlawful or unconstitutional is clearly "not required" by law. Second, they argue that, by "categorically prohibiting [transgender individuals] from receiving Medicaid coverage for medically necessary surgical treatment of gender dysphoria," the Regulation clearly causes a negative impact on the private rights of transgender Medicaid recipients. And finally, they argue that there is no public interest served by denying Medicaid coverage for these requested procedures on the basis of their connection to Gender Dysphoria.

DHS offers no rebuttal argument on this issue, hoping instead the Court will agree with DHS on Petitioners' ICRA and equal protection claims. While the Court recognized there is at least some public interest served by denying Iowa Medicaid coverage for sex reassignment surgery based on cost-savings in some amount, the Court agrees with Petitioners that the

[131] Iowa Const., art. 1, § 6.

negative impact on the rights of transgender Medicaid recipients disproportionately outweighs any sort of public interest served.[132]

IV. WHETHER DHS'S DECISION WAS ARBITRARY AND CAPRICIOUS

Finally, Petitioners contend DHS's denial of Medicaid coverage must be reversed because it was arbitrary and capricious. Under the IAPA, the Court may reverse an agency decision if the "substantial rights of the person seeking judicial relief have been prejudiced because the agency action is . . . unreasonable, arbitrary, capricious, or an abuse of discretion."[133] An agency action or decision is arbitrary and capricious when it is made "without regard to the law or facts."[134] In this regard, the agency "cannot act unconstitutionally [or] in violation of a statutory mandate . . ."[135]

Petitioners specifically cite DHS's decision to continue enforcing the Regulation's exclusion of sex reassignment surgery from Iowa Medicaid coverage as the agency action they are challenging, as opposed to the enactment of the Regulation. They argue this constituted an arbitrary and capricious decision for three reasons: (1) that the exclusion violates ICRA's prohibition against gender identity discrimination; (2) that the exclusion violates the Iowa Constitution's equal protection guarantees; and (3) that the exclusion runs contrary to medical evidence showing that the requested procedures were medically necessary and in line with the established standards of care for Petitioners' condition.

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[132] *See Zieckler v. Ampride*, 743 N.W.2d 530, 533 (Iowa 2007) (finding that an agency rule mandating dismissal of an intra-agency appeal as a sanction against failing to reimburse the non-appealing party for the costs of a hearing transcript within thirty days held a disproportionate negative impact on the private rights of individuals).
[133] Iowa Code § 17A.19(10)(n).
[134] *Doe v. Iowa Bd. of Med. Exam'rs*, 733 N.W.2d 705, 707 (Iowa 2007) (quoting *Greenwood Manor v. Iowa Dep't of Pub. Health*, 641 N.W.2d 823, 831 (Iowa 2002)) (internal quotation marks omitted).
[135] *Stephenson v. Furnas Elec. Co.*, 522 N.W.2d 828, 831 (Iowa 1994) (citing *Churchill Truck Lines, Inc. v. Transp. Regulation Bd.*, 274 N.W.2d 295, 299 (Iowa 1979)).

Again, DHS relies on the holding of the Court in *Smith* that the Regulation was not unreasonable or arbitrary[136] But *Smith* was decided upon a different factual record and a different procedural posture. Again, the Court does not find *Smith* to be persuasive.

DHS argues an "agency action cannot be unreasonable, arbitrary, or capricious when the agency acts out of legal obligation."[137] DHS is correct that "[a]dministrative regulations have the force and effect of a statute."[138] The Court generally affords great deference to agency adoption of rules, as part of an agency's broad delegation of authority.[139] However, as just mentioned, Petitioners challenge is specifically towards DHS's continued *enforcement* of the Regulation's exclusion.

As Petitioners correctly point out, "[w]hen a statute directly conflicts with a[n administrative] rule, the statute controls."[140] In *Exceptional Persons, Inc. v. Iowa Department of Human Services*, DHS in fact successfully defended its decision to not apply a 2009 rule that it determined was in conflict with the Iowa Code.[141] Petitioners argue that DHS was obligated to do the same with the Regulation here. Instead DHS continued to apply the exclusion of the Regulation to Good and Beal. And despite the general practice of Iowa administrative agencies to conduct regular reviews of their administrative rules to ensure conformity to the Iowa Code and Constitution, DHS never removed the exclusionary language from the Regulation.[142] While the Court understands that DHS is in some respect obligated to enforce the administrative rules as previously adopted, it also owes an obligation to ensure those rules conform to the statutes

[136] *Smith v. Rasmussen*, 249 F.3d at 761.
[137] DHS Brief, at 28 (citing *Soo Line R.R. Co.*, 521 N.W.2d at 688-89).
[138] *Jasper v. H. Nizam, Inc.*, 764 N.W.2d 751, 764 (Iowa 2009).
[139] *Dico, Inc. v. Iowa Emp. Appeal Bd.*, 576 N.W.2d 352, 355 (Iowa 1998); Iowa Code § 249A.4 (authorizing the director of the Department of Human Services with the power to "make rules, establish policies, and prescribe procedures" to implement Iowa Medicaid).
[140] *Exceptional Persons, Inc. v. Iowa Dep't of Human Serv.*, 878 N.W.2d 247, 252 (Iowa 2016).
[141] *Id.*
[142] Petitioners note that DHS conducted reviews of the Regulation in 2010, 2012, 2013, 2015, and 2016.

like the ICRA and the Iowa Constitution which trump any prior administrative rule. DHS also has an obligation to keep up with the medical science. DHS failed to do so when it denied coverage to Good and Beal for medically necessary gender affirming surgery. This decision was made without regard to the law and facts. The agency acted in the face of evidence upon which there is no room for difference of opinion among reasonable minds. The exclusion of coverage was unreasonable, arbitrary and capricious.

V. DHS'S REQUESTS FOR THE COURT TO LIMIT ITS RULING

In the event the Court finds in favor of Petitioners on the merits of the Regulation, DHS argues the Court should limit its ruling in several respects. First, DHS argues that the Court should remand the case for a rehearing on the medical necessity of Petitioners' requested procedures. Second, it requests that the Court not invalidate the entirety of the Regulation, but only the challenged provisions. Third, DHS requests that this Court defer implementation of the ruling to DHS and the MCOs, granting them "an appropriate amount of time" to develop criteria for evaluating Medicaid requests for sex reassignment procedures.

A. Whether the Court Should Remand the Cases to DHS for Further Review

DHS argues that case law supports remanding Good and Beal's cases back to the agency for rehearing on the medical necessity of their requested procedures.[143] As previously noted, neither DHS nor Petitioners' respective MCOs directly addressed the issue of the medical necessity of Petitioners' requested surgeries, instead ruling that, as a matter of law, the Regulation categorically excludes coverage for such procedures. Because of this, DHS argues

[143] *Taylor v. Iowa Dep't of Job Serv.*, 362 N.W.2d 534, 537 (Iowa 1985) ("Because the court on judicial review of agency action has no original authority to make findings of fact and declare the parties' rights, the court should remand for further specific findings when the agency's ruling does not clearly disclose a sound factual and legal basis for its decision.") (citing *Brown v. Public Emp. Relations Bd.*, 345 N.W.2d 88, 93-94 (Iowa 1984); *Public Emp. Relations Bd. v. Stohr*, 279 N.W.2d 286, 290-92 (Iowa 1979)).

that it would be inappropriate for Petitioners' surgeries to be covered without first undergoing the "appropriate review typically applied to requests for prior approval of procedures."[144]

Petitioners argue that such a remand would unjustly further the delay of their treatment. Specifically, Petitioners argue that DHS and the MCOs already had ample opportunity to challenge and evaluate the medical merits of Petitioners' requests, yet elected to solely rest on legal arguments.[145] Further, Petitioners point out that, at all stages in the underlying agency process, the issue of medical necessity was present. In both cases, the ALJ described the evidence presented by Petitioners, and made indications that the evidence was at least considered. It just was not the basis for the denials of coverage. In that regard, Petitioners argue that DHS and their MCOs have effectively conceded the factual issue of medical necessity in these cases.[146] Because of this, Petitioners contend that it would be highly unjust to allow DHS to now go back and "look for additional or other reasons that it did not assert in denying Petitioners' claims."[147] Petitioners also argue that such a request runs contrary to how agency appeals of Medicaid decisions operate. When DHS reverses a denial of coverage by a MCO, the MCO "must authorize or provide the disputed services promptly and as expeditiously as the enrollee's health condition requires . . ."[148]

While DHS correctly states the general approach the Court takes with reversals of agency decisions, Petitioners present a highly persuasive argument. DHS had ample opportunity to lay out all of the evidence supporting denial Petitioners' requests on the basis of medical necessity.

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[144] DHS Brief, at 38.
[145] ". . . Petitioners are transgender Iowans who submitted actual claims for medical care to DHS for prior authorization, which *is* the agency's mechanism to determine medical necessity, and the agency had the opportunity to cross-examine Petitioners' witnesses, develop whatever record it desired regarding Petitioners' specific medical claims, or otherwise base its denial on medical necessity." Pet. Reply, at 38 n.3.
[146] In fact, in Beal's case, the ALJ specifically asked counsel for DHS and the MCO whether they had any objections to the administrative record as it stood, to which counsel stated they did not. Beal Admin. Record, at 124:5).
[147] Pet. Brief, at 43.
[148] 42 C.F.R. § 438.424(a); Iowa Admin. Bulletin ARC 3652C, at 1 (implementing 42 C.F.R. § 438.424).

It chose not to. DHS should not have the opportunity to mend its hold by re-litigating the medical necessity of gender affirming surgery for Gender Dysphoria when it had the opportunity to do so at the administrative hearings and chose to pass.[149] Parties, including administrative agencies, are not afforded endless bites at the apple.[150] Absent a good cause showing for why DHS or the MCOs were somehow unable to present contrary medical evidence to challenge that provided by Petitioners, the Court sees no reason to remand these cases for rehearing on the issue of medical necessity. To do so would force Petitioners to endure further delay of treatment the trial of an evidentiary issue DHS already had a chance to address but simply chose not to.

Therefore, the Court rejects DHS's request for remand for further hearings.

B. Whether the Court Should Issue a Narrow Ruling

DHS also argues that the Court should limit its ruling to the specific language of the Regulation that Petitioners challenge, but otherwise leave the Regulation untouched. Additionally, DHS requests that the Court make clear that its ruling does not overturn the Regulation's general exclusion of "psychologically-motivated surgeries," for fear that a broader ruling would effectively open the floodgates for similar litigation across state agencies.[151]

For their part, Petitioners argue that DHS's arguments are both a mischaracterization of what Petitioners are requesting, as well as filled with irrelevant concerns dealing with separate bodies of constitutional law unrelated to the present matters. Petitioners hold that they are not asking the Court to rule that Iowa Medicaid be required to fund any and all requests for sex reassignment surgeries. Rather, Petitioners are simply requesting that they be treated as any non-

[149] *State v. Duncan*, 710 N.W.2d 34, 43 (Iowa 2006) (quoting *Snouffer & Ford v. City of Tipton,* 150 Iowa 73, 84-85, 129 N.W. 345, 350 (1911)).
[150] *Arnevik v. Univ. of Minnesota Bd. of Regents*, 642 N.W.2d 315, 319 (Iowa 2002) (discussing claim preclusion).
[151] Specifically, DHS expresses concern that the Court's ruling could have implications in, for example, Iowa Department of Corrections cases involving transgender inmates.

transgender Medicaid recipient and receive coverage for medically necessary treatment for their Gender Dysphoria.

In light of Petitioners' clarification of their request, the concerns put forward by DHS appear unfounded or moot. The Court does not believe that ruling in favor of Petitioners will suddenly require a free-for-all situation with Iowa Medicaid, nor necessarily carry wider impact on other agencies such as the Iowa Department of Corrections. Petitioners correctly point out that such cases are governed under a separate body of constitutional law than that presented here. As such, the Court finds DHS's request moot.

C. Whether the Court Should Defer Implementation of the Ruling to DHS and the MCOs

Finally, DHS requests that the Court afford the agency and the MCOs "appropriate time" to develop criteria for evaluating the merits of preapproval requests for sex reassignment procedures. DHS claims that this will "ensure that the Department's practices are in keeping with current medical standards" as well as "increase the likelihood that these procedures are being appropriately prescribed."[152]

Petitioners object to this request, arguing it will simply result in further indefinite delay to their treatment and is based upon a "speculative" outcome. The Court is also perplexed by this request. DHS does not explain why the medical necessity of requests for sex reassignment surgeries could not simply be evaluated under the same criteria as other requested surgeries or treatment of non-transgender individuals. Petitioners have provided clear medical documentation outlining the medical necessity of their requested procedures. Thus, the Court sees no reason why DHS and the MCOs need an additional and indefinite period of time to

[152] DHS Brief, at 39.

develop *new* and *separate* criteria for evaluating requests by transgender individuals as opposed to simply applying the existing criteria.

The Regulation violates the IRCA and the Iowa Constitution. New criteria based upon gender identity would be equally suspect.[153] As a result, the Court rejects DHS's request for additional time to develop criteria for evaluating sex reassignment surgery requests.

ORDER

IT IS THEREFORE ORDERED, Petitioners' Petitions for Judicial Review should be and are hereby GRANTED.

IT IS FURTHER ORDERED, the Appeal Decisions of the Iowa Department of Human Services should be and are hereby REVERSED.

IT IS FURTHER ORDERED, the language of Iowa Administrative Code rule 441-78.1(4) pertaining to the exclusion of coverage for sex reassignment surgery in connection to the treatment of transsexualism should be and is hereby held to violate the Iowa Civil Rights Act and the Equal Protection Clause of the Iowa Constitution. The language of the Regulation excluding coverage for sex reassignment surgery for transsexualism shall be stricken from the Regulation and the remaining language must be interpreted and applied in a manner allowing transgender individuals coverage under Iowa Medicaid for medically necessary gender affirming surgery for the treatment of Gender Dysphoria.[154]

IT IS FURTHER ORDERED, these cases are hereby remanded to the Iowa Department of Human Services for approval of the Iowa Medicaid preapproval requests of the Petitioners in a manner consistent with this opinion.

[153] *Varnum*, 763 N.W.2d at 906.
[154] *See Id.*, 763 N.W.2d at 907.

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IT IS FURTHER ORDERED, that if Petitioners seek an award of attorney fees, Petitioners shall submit their Request for Attorney fees within thirty (30) days of the date of this order.

Costs assessed to the Respondent Iowa Department of Human Services.

So ordered.

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State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV054956	EERIEANNA GOOD VS IOWA DEPARTMENT OF HUMAN SERVICES

So Ordered

Arthur E. Gamble, Chief District Judge,
Fifth Judicial District of Iowa

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