IN THE IOWA DISTRICT COURT FOR POLK COUNTY

AIDEN VASQUEZ, Petitioner, vs. **IOWA DEPARTMENT OF HUMAN SERVICES**, Respondent.	**Case No. CVCV061729** **RULING ON MOTION TO DISMISS**

I. INTRODUCTION

NOW on the 9th day of June, 2021, the above captioned matter came on for hearing. The hearing was held via Zoom and was reported. Attorneys Seth Horvath, F. Thomas Hecht, Shefali Aurora, and Rita Bettis Austen appeared for the Petitioner. Attorney Samuel Langholz appeared for the Respondent. Before the Court is a Motion to Dismiss filed on May 13, 2021 by the Respondent, the Iowa Department of Human Services. Petitioner Aiden Vasquez (hereinafter, "Vasquez") filed his Resistance on May 24, 2021. Respondent filed its Reply Brief on June 3, 2021.

After hearing the arguments of counsel and reviewing the court file, including the briefs filed by both parties, the Court now enters the following Ruling on Respondent's Motion to Dismiss.

II. FACTUAL/PROCEDURAL BACKGROUND

Petitioner Vasquez is a transgender man who was diagnosed with gender dysphoria in 2016. Pet. ¶¶ 14–15. "Gender dysphoria" is the medical diagnosis for the feeling of incongruence between one's gender identity and birth-assigned sex, previously known as "gender-identity

disorder" or "transsexualism." *See* AR 801, ¶ 12. Throughout 2016, Vasquez began hormone therapy, underwent a double mastectomy, socially transitioned to presenting as male through using male pronouns, legally changed his name, and amended his driver's license, social security card, and birth certificate to reflect his male gender identity. Pet'r's Br. on Judicial Review pp. 19–20. Dr. Nicole Nisly, Vasquez's primary-care physician since May 2016, stated in August of 2020 that "[g]ender affirming bottom surgery is medically necessary to treat [Mr. Vasquez's] gender dysphoria . . . ." *Id.* at pp. 20–21 (alteration in original). Additionally, four clinical psychologists assessed Vasquez in August and September of 2020 and unanimously recommended gender reassignment/phalloplasty surgery. *Id.* at pp. 21–22.

Vasquez is a participant in Iowa Medicaid and his assigned managed-care organization ("MCO") is Amerigroup of Iowa Inc. (hereinafter, "Amerigroup"). Pet. ¶¶ 8, 21–22. On August 14 and 17, 2020, Vasquez submitted requests to Amerigroup through his physician, seeking Medicaid coverage for expenses related to an office visit and for a subsequent phalloplasty operation to treat his gender dysphoria. *Id.* at ¶¶ 23–24. On August 19 and 28, 2020, Amerigroup denied Vasquez's requests for preapproval for the phalloplasty and office visit, respectively. *Id.* at ¶¶ 25–26. In its letter to Vasquez regarding coverage for the phalloplasty, Amerigroup stated that "[g]ender surgery is not a covered benefit in Iowa" and it cannot pay for the surgery based on Iowa Administrative Code rule 441-78.1(4). Pet'r's Ex. 6. In its letter to Vasquez regarding coverage for the office visit, Amerigroup stated that it "cannot approve an office visit by a provider that is outside of [Vasquez's] plan." Pet'r's Ex. 7. Furthermore, Amerigroup noted that Vasquez's request for surgery by this provider was not approved and thus concluded that Vasquez did not "need an office visit to be evaluated for a procedure that was not approved." *Id.* Amerigroup cited Iowa Administrative Code rules 441-78.1 and 79.9 as the basis for this decision. *Id.*

Vasquez initiated an appeal from Amerigroup's decisions on October 14, 2020, which Amerigroup denied on November 3 and 6, 2020. Pet. ¶¶ 27–29. Again, Amerigroup indicated that it denied coverage for Vasquez's phalloplasty because pursuant to Iowa Administrative Code rule 441.78.1(4), gender reassignment surgery is not a covered benefit in Iowa. Pet'r's Ex. 11. Furthermore, Amerigroup upheld its denial of Vazquez's request for coverage for his office visit because the doctor was outside of his plan and the office visit was to consider a type of surgery that "is not covered under the program" and "all related services and supplies are also not covered." Pet'r's Ex. 12.

Vasquez then sought further review through an appeal of Amerigroup's decisions to the Iowa Department of Human Services (hereinafter, "DHS") on January 10, 2021. Pet. ¶ 30. An administrative law judge ("ALJ") for the Iowa Department of Inspections and Appeals ("IDIA") issued a proposed decision on March 2, 2021 affirming Amerigroup's decisions. *Id.* at ¶¶ 9, 31; Pet'r's Ex. 13. Vasquez subsequently appealed the ALJ's proposal to the Director of DHS on March 11, and on March 25, the Director adopted the ALJ's recommendation, affirming Amerigroup's denial of Medicaid coverage. Pet. ¶¶ 9, 32–33; Pet'r's Ex. 14. Vasquez asserts that he has thus exhausted all administrative remedies and has been adversely affected by DHS's final agency action. Pet. ¶ 34.

On April 22, 2021, Vasquez filed a petition for judicial review under Iowa Code section 17A.19, alleging that DHS's decision should be vacated based on the following seven claims: (1) violation of equal protection; (2) gender-identity and sex discrimination; (3) discriminatory animus against transgender people; (4) violation of the Iowa Constitution's single-subject rule; (5) violation of the Iowa Constitution's title rule; (6) disproportionate negative impact on private rights; and (7) there was an unreasonable, arbitrary, and capricious decision. Pet. ¶¶ 155–245. On

May 13, 2021, Respondent filed the present Motion to Dismiss, seeking dismissal of Counts II through V, as well as Petitioner's requests for relief. Mot. to Dismiss ¶¶ 4–7.

Specifically, Petitioner names Count II as "Iowa APA, Sections 17A.19(10)(a) & (b), Gender-Identity and Sex Discrimination Under Section 216.7(1)(a) of the ICRA based on Division XX's Facial and As-Applied Violation of the Iowa Constitution's Equal-Protection Guarantee." Count III in the Petition is titled by Petitioner as "Iowa APA, Sections 17A.19(10)(a) & (b), Gender-Identity and Sex Discrimination Under Section 216.7(1)(a) of the ICRA based on Division XX's Violation of the Iowa Constitution's Equal-Protection Guarantee Through Discriminatory Animus Against Transgender People." DHS argues that Counts II and III must be dismissed because they improperly attempt to bootstrap an equal protection constitutional challenge to an amendment to the Iowa Civil Rights Act into this contested case proceeding that was not brought under that Act or based on that provision of law. Mot. to Dismiss ¶ 4.

Count IV brought by the Petitioner alleges issues with Iowa APA, sections 17A.19(10)(a) and (b), Gender-Identity and Sex Discrimination Under Section 216.7(1)(a) of the ICRA based on Division XX's Violation of the Iowa Constitution's Single-Subject Rule. Count V is titled "Iowa APA, Sections 17A.19(10)(a) & (b), Gender-Identity and Sex Discrimination Under Section 216.7(1)(a) of the ICRA Based on Division XX's Violation of the Iowa Constitution's Title Rule." Respondent maintains that Counts IV and V must be dismissed because any alleged single-subject or title violations under the Iowa Constitution were cured by the codification of the Iowa Civil Rights Act amendment prior to the initiation of this proceeding. *Id.* at ¶ 5.

The Department requests dismissal of Vasquez's request for attorney fees. *Id.* at ¶ 6. The Department also asks for dismissal of Vasquez's requested declaratory and injunctive relief—

except for reversal of the Department's final decision and related incidental relief in this contested case. *Id.* at ¶ 7. Additional facts necessary for the Ruling are set forth below.

III. LEGAL STANDARDS

A. Motion to Dismiss

"The purpose of a motion to dismiss is to test the legal sufficiency of the petition." *Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2014) (internal citation omitted). In deciding a motion to dismiss, "the petition is assessed in the light most favorable to the plaintiffs, and all doubts and ambiguities are resolved in the plaintiffs' favor." *Southard v. Visa U.S.A. Inc.*, 734 N.W.2d 192, 194 (Iowa 2007).[1] Furthermore, a "court considers all well-pleaded facts to be true." *U.S. Bank v. Barbour*, 770 N.W.2d 350, 353 (Iowa 2009). *See also Southard*, 734 N.W.2d at 194 ("Well-pled facts in the pleading assailed are deemed admitted."). However, a court does not accept as true a petition's legal conclusions. *Shumate*, 846 N.W.2d at 507.

"A motion to dismiss is sustainable only when it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts that could be proved in support of the claims asserted." *Haupt v. Miller*, 514 N.W.2d 905, 911 (Iowa 1994).[2] Iowa courts traditionally recognize that this is a very high bar and, as such, "[n]early every case will survive a motion to dismiss under [Iowa's] notice pleading" standard. *Barbour*, 770 N.W.2d at 353. *See also Cutler v. Klass, Whicher & Mishne*, 473 N.W.2d 178, 181 (Iowa 1991) (remarking that both the filing and sustaining of motions to dismiss "are poor ideas" and that courts typically disfavor motions to dismiss). Thus, a

[1] *See also Ritz v. Wapello Cnty. Bd. of Supervisors*, 595 N.W.2d 786, 789 (Iowa 1999) ("Allegations in the petition are viewed in a light most favorable to the plaintiff and facts not alleged cannot be relied on to aid a motion to dismiss . . . .").

[2] *See also Barbour*, 770 N.W.2d at 353 ("A court should grant a motion to dismiss only if the petition 'on its face shows no right of recovery under any state of facts.'") (quoting *Ritz*, 595 N.W.2d at 789); *Hawkeye Foodservice Distrib., Inc. v. Iowa Educators Corp.*, 812 N.W.2d 600, 609 (Iowa 2012) (same).

respondent "undertakes a heavy burden in filing a motion to dismiss." *Cole v. Taylor*, 301 N.W.2d 766, 767 (Iowa 1981).

B. Judicial Review

The Iowa Administrative Procedure Act codifies a court's judicial review of agency action in Iowa Code section 17A.19. Pursuant to this section, a district court has the power to "affirm the agency action or remand to the agency for further proceedings." Iowa Code § 17A.19(10). Additionally, "[t]he court shall reverse, modify, or grant other appropriate relief from agency action . . . if it determines that substantial rights of the person seeking judicial relief have been prejudiced because the agency action" falls within any of the categories enumerated in subsection ten, paragraphs "a" through "n." *Id.* Motions to dismiss are a proper way to determine whether particular counts or requests for relief are properly within "the judicial review jurisdiction of the district court." *Black v. Univ. of Iowa*, 362 N.W.2d 459, 465 (Iowa 1985).

IV. ANALYSIS

In its motion, Respondent asserts that the Court must dismiss the following: (1) Counts II and III of Petitioner's Petition, (2) Counts IV and V of Petitioner's Petition, (3) Petitioner's request for attorney's fees, and (4) Petitioner's requested declaratory and injunctive relief. To aid in this Motion to Dismiss analysis, the Court first provides a brief summary of the case law and legislative history of Medicaid coverage for gender-affirming surgery in Iowa before addressing each claim.

A. History of Medicaid Coverage for Gender-Affirming Surgery in Iowa

In *Pinneke v. Preisser*, a transgender woman sought relief from the Iowa Department of Social Services' ("DSS") denial of Medicaid funding, which was based solely on the State of Iowa Medicaid program's specific exclusion of coverage for sex reassignment surgery. 623 F.2d 546, 546–47 (8th Cir. 1980). Although not explicitly written into the statute, the Iowa legislature and

judiciary operated under "an irrebuttable presumption that treatment of transsexualism by alteration of healthy tissue" could not be considered "medically necessary," but was rather more in the nature of cosmetic surgery. *Id.* at 548 n. 2. The Eighth Circuit found that Iowa's informal policy of "excluding the only available treatment known at this stage" for gender dysphoria from Medicaid coverage was "an arbitrary denial of benefits based solely on the 'diagnosis, type of illness, or condition'" and thus in violation of regulations set forth by the federal Department of Health, Education, and Welfare. *Id.* at 549 (quoting 42 C.F.R. § 440.230(c) (1979)).

The *Pinneke* court additionally concluded that Iowa's unwritten policy was not consistent with the objectives of the Medicaid statute, which included Congress's intent that "medical judgments . . . play a primary role in the determination of medical necessity." *Id.* The court noted that DSS "established an irrebuttable presumption that the procedure of sex reassignment surgery [could] never be medically necessary when the surgery [was] a treatment for transsexualism and remove[d] healthy, undamaged organs and tissue." *Id.* The United States Supreme Court emphasized the importance of a professional medical judgment in these cases, and Iowa's approach did not adequately consider "the applicant's diagnosed condition, the treatment prescribed by the applicant's physicians, and the accumulated knowledge of the medical community." *Id.* (citing *Beal v. Doe*, 432 U.S. 438, 445 n. 9 (1977)).

In 1993, the Department (now referred to as DHS rather than DSS) contracted with the Iowa Foundation for Medical Care[3] (hereinafter, "the Foundation") to provide a review and recommendation regarding Medicaid coverage for treatment of disorders such as gender identity disorder. *Smith v. Rasmussen*, 249 F.3d 755, 760 (8th Cir. 2001). After conducting a review of

[3] "The Foundation is a federally designated medical peer review organization that, among other things, monitors the quality of care and the appropriateness of certain medical procedures for payment under Medicare and Medicaid programs." *Smith*, 249 F.3d at 760.

current medical literature and contacting various organizations, the Foundation provided a final recommendation for DHS "that, given the lack of consensus in the medical community and the availability of other treatment options, [DHS] should not fund sex reassignment surgery." *Id.* After publishing a notice of intended action and soliciting public comment, a proposed regulation prohibiting coverage was considered at a public meeting of DHS's policy-making body and then reviewed by the administrative rules committee of the Iowa legislature. *Id.* at 760–61.

The regulatory exclusion was adopted as Iowa Administrative Code rule 441-78.1(4) (hereinafter referred to as "the Regulation"). The Regulation states, in relevant part, that "[c]osmetic, reconstructive, or plastic surgery performed in connection with certain conditions is specifically excluded." Iowa Admin. Code r. 441-78.1(4)(b). Among the list of these conditions is "[p]rocedures related to transsexualism, hermaphroditism, gender identity disorders, or body dysmorphic disorders." *Id.* at r. 441-78.1(4)(b)(2).

In 2001, the Eighth Circuit considered the legality of the Regulation adopted post-*Pinneke*. *Rasmussen*, 249 F.3d at 759. The *Rasmussen* court ultimately concluded that unlike in *Pinneke*, DHS "promulgated the regulation through a rulemaking process that involved professional medical judgment and the consideration of the current state of medical knowledge." *Id.* at 761. Therefore, the court could not say that the procedures were problematic, unreasonable, or inadequate. *Id.* Furthermore, the *Rasmussen* court determined it could not conclude that the Regulation was unreasonable, arbitrary, or inconsistent with the Medicaid Act. *Id.* Rather, the court stated that DHS's "research demonstrated the evolving nature of the diagnosis and treatment of gender identity disorder and the disagreement regarding the efficacy of sex reassignment surgery." *Id.* Additionally, the court found it important that the testimony of the petitioner's primary treating physician, who was a specialist in gender identity disorder, generally supported the conclusion that

sex reassignment surgery may be medically necessary in some cases, but also "noted that the efficacy of the surgery ha[d] been questioned within the medical community." *Id.* at 756–57, 761.

In 2019, the Iowa Supreme Court revisited the legality of the Regulation after the Iowa legislature amended the Iowa Civil Rights Act ("ICRA") in 2007 to add "gender identity" to the list of protected characteristics. *Good v. Iowa Dep't of Human Servs.*, 924 N.W.2d 853, 856 (Iowa 2019) (citing Iowa Code § 216.7(1)(a) (2009)). The question before the court was whether, in light of this amendment, the language of the Regulation regarding the prohibition of Medicaid coverage for surgical procedures related to "gender identity disorders" violated the ICRA or the Iowa Constitution. *Id.*

The *Good* court concluded that the ICRA's addition of "gender identity" to the list of protected groups "encompasses transgender individuals – especially those who have gender dysphoria – because discrimination against these individuals is based on the nonconformity between the gender identity and biological sex." *Id.* at 862. The court also noted that this new prohibition against denying Medicaid coverage for the two plaintiffs' gender-affirming surgical procedures extended to the director and staff of DHS, as well as DHS's agents, the MCOs. *Id.*

Furthermore, the court rejected DHS's argument that the Regulation was "nondiscriminatory because its exclusion of coverage for gender-affirming surgical procedures encompasses the broader category of 'cosmetic, reconstructive, or plastic surgery' that is 'performed primarily for psychological purposes.'" *Id.* (quoting Iowa Admin. Code r. 441-78.1(4)). The court found the record did not support this position, as "DHS expressly denied [the plaintiffs'] coverage for their surgical procedures because they were 'related to transsexualism . . . [or] gender identity disorders' and 'for the purpose of sex reassignment.'" *Id.* (quoting Iowa Admin. r. 441-78.1(4)(b)).

Moreover, the court found it telling that the Regulation *did* authorize payment for some cosmetic, reconstructive, and plastic surgeries that serve psychological purposes (*e.g.,* rule 441-78.1(4)(a)'s inclusion of "[r]evision of disfiguring and extensive scars resulting from neoplastic surgery" and "[c]orrection of a congenital anomaly") but prohibited coverage for these same procedures merely if an individual was transgender. *Id.* Based on these conclusions, the *Good* court ultimately found that through its amendment of the ICRA, the legislature "specifically made it clear that individuals cannot be discriminated against on the basis of gender identity . . . ." *Id.* at 863. Therefore, the Court struck down the Regulation.

The Iowa Supreme Court's decision in *Good* was filed on March 8, 2019. In direct response to *Good*, the Iowa legislature signed Division XX into law on May 3, 2019. Division XX amended the ICRA's protection against unfair and discriminatory practices in public accommodations by adding a provision expressly stating that "[t]his section shall not require any state or local government or tax-supported district to provide for sex reassignment surgery or any other cosmetic, reconstructive, or plastic surgery procedure related to transsexualism, hermaphroditism, gender identity disorder, or body dysmorphic disorder." Iowa Code § 216.7(3).

This history now brings us to the point where Petitioner has filed a 40-page, seven count Petition for Judicial Review of Agency Action under Iowa Code section 17A.19 for denial of his request for Medicaid coverage for gender-affirming surgery. Respondent acknowledges that Vasquez may properly challenge the constitutionality of the Department's decision denying Vasquez's Medicaid preauthorization request as was done in Count I. Petition ¶¶ 155–71. It further recognizes that Mr. Vasquez can legally argue that the decision was unreasonable, arbitrary, and capricious and that the impact on private rights is grossly disproportionate of any public benefit. But, Respondent asserts that Counts II–V should be dismissed as those counts are not proper in a

judicial review proceeding. The Court will now turn to whether any of the Petitioner's Counts should be dismissed as a matter of law under Iowa Rule of Civil Procedure 1.421.

B. Counts II and III

Respondent first argues that Counts II and III of Petitioner's Petition "improperly attempt to bootstrap an equal protection constitutional challenge to an amendment to the [ICRA] . . . that was not brought under that Act or based on that provision of law." Mot. to Dismiss ¶ 4.

In Counts II and III, Petitioner seeks judicial review of his Medicaid request proceeding under section 17A.19(10)(a), alleging that his substantial rights have been prejudiced because the agency action was "[u]nconstitutional on its face or as applied or [was] based upon a provision of law that is unconstitutional on its face or as applied." Iowa Code § 17A.19(10)(a). Specifically, Petitioner argues that DHS's decision in his Medicaid case violated the Iowa Constitution because Division XX violates the equal-protection guarantee in two ways: (1) it facially discriminates against transgender Iowans based on gender identity and (2) its enactment was motivated by animus toward transgender people. Pet. ¶¶ 176, 190.

Respondent asserts that Petitioner cannot allege the unconstitutionality of Division XX in this case because DHS's decision was not based on that amendment. Resp't's Br. in Supp. of Mot. to Dismiss p. 8 (hereinafter, "Resp't's Br."). Rather, as a Medicaid contested case, DHS applied and based its decision upon the Medicaid administrative rules, not any statutory mandate. *Id.* Furthermore, Division XX did not authorize or prompt the administrative rule on which DHS *did* base its decision because the rule was adopted more than two decades prior to the amendment. *Id.* at 8–9. Therefore, as DHS did not, in any way, base its decision on Division XX, it cannot serve as a basis for relief in the present case under section 17A.19(10)(a). *Id.* at 9.

In response, Petitioner asserts that Respondent's argument "fails to acknowledge that, but for the enactment of Division XX, which amended ICRA, DHS's denial of coverage would have violated the version of ICRA that existed before Division XX was unconstitutionally signed into law." Pet'r's Resistance to Mot. to Dismiss p. 9 (hereinafter, "Pet'r's Resistance"). In other words, DHS was able to deny Vasquez's request for coverage based on the Regulation's prohibition of Medicaid coverage for gender-affirming surgery only because Division XX reinstated the Regulation. *Id.* at 9–10. Therefore, the two provisions – Division XX and the Regulation – are interdependent; the Regulation would no longer be in effect without Division XX. *Id.* In this way, Petitioner argues that DHS's decision *was* based on Division XX.

There is no question that DHS based its decision to deny Vasquez Medicaid coverage upon the Regulation. The ALJ's proposed order, which was adopted by the Director as the final decision, states that rules 441-78.1(4)(b)(2) and (c) support DHS's decision to deny payment for Vasquez's requested phalloplasty and all medical appointments related to the surgery:

> Applicable administrative regulations governing surgeries for gender dysphoria specify, "[s]urgeries for the purpose of sex reassignment are excluded from [Medicaid] coverage." Iowa Admin. Code r. 441-78.1(4). In addition, Iowa regulations specifically exclude "[p]rocedures related to . . . gender identity disorders . . . ." 441-78.1(4)(b)(2). "When it is determined that a cosmetic, reconstructive, or plastic surgery procedure does not qualify for coverage under the program, all related services and supplies, including any institutional costs, are also excluded." 441-78(4)(c).

Pet'r's Ex. 13, p. 4 (alterations in original).

However, it is less clear whether DHS's decision was "based upon" Division XX for the purposes of section 17A.19(10)(a). In the proposed order, the ALJ discusses how Division XX was signed into law post-*Good* and amended a portion of the ICRA, specifying that "there is no longer a requirement for 'any state or local government unit or tax-supported district to provide for sex reassignment surgery or any surgical procedure related to transsexualism or gender identity

disorder.'" Pet'r's Ex. 13, p. 5 (quoting Iowa Code § 216.7(3) (2020)). The ALJ acknowledged Vasquez's arguments that Division XX "violates the Iowa Constitution by exempting state and local government units from anti-discrimination provisions of the" ICRA. *Id.* However, the ALJ also noted that the Iowa legislature's changes to the ICRA through enactment of Division XX prevented the ALJ from relying on *Good* and this matter instead "hinge[d] on Vasquez's constitutional arguments." *Id.*

Courts "do not give any deference to the agency with respect to the constitutionality of a statute or administrative rule because it is entirely within the province of the judiciary to determine the constitutionality of legislation enacted by other branches of government." *NextEra Energy Res. LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 44 (Iowa 2012) (citing Iowa Code § 17A.19(11)(b)). Nevertheless, parties are "required to raise constitutional issues at the agency level, even though the agency lacks the authority to decide the issues, in order to preserve the[m] . . . for judicial review." *Endress v. Iowa Dep't of Human Servs.*, 944 N.W.2d 71, 83 (Iowa 2020) (citing *McCracken v. Iowa Dep't of Human Servs.*, 595 N.W.2d 779, 785 (Iowa 1999)).[4]

Based on these rules, the ALJ noted that Vasquez successfully preserved his constitutional arguments that the Regulation and Division XX violate the Iowa Constitution's equal protection guarantee through gender-identity and sex discrimination.[5] Pet'r's Ex. 13, p. 5. The ALJ then correctly stated that these claims must be resolved by the court, which includes determining whether Amerigroup properly denied Vasquez's request for Medicaid coverage of physician services and gender-affirming surgery. *Id.* Therefore, the ALJ's proposed order concluded that

[4] *See also Soo Line R.R. v. Iowa Dep't of Transp.*, 521 N.W.2d 685, 688 (Iowa 1994) (stating that "[c]onstitutional issues must be raised at the agency level to be preserved for judicial review . . . despite the agency's lack of authority to decide constitutional questions").

[5] Additionally, the ALJ stated that Vasquez preserved his arguments that Division XX violated the Iowa Constitution in the way it was passed and in its discriminatory treatment of individuals receiving Medicaid. Pet'r's Ex. 13, p. 5.

"[w]ith no basis to address the constitutional challenges, [Amerigroup's] decision must be affirmed." *Id.*

Additionally, Respondent asserts that Petitioner is incorrect in arguing that because Division XX is unconstitutional, the pre-2019 ICRA remains in effect and DHS thus violated its prohibition on gender identity discrimination. Resp't's Br. p. 9. *See* Iowa Code § 17A.19(10)(b) (allowing the court to reverse, modify, or grant other appropriate relief when the agency action is "in violation of any provision of law"). However, as previously argued, Respondent contends that the constitutionality of Division XX is outside the scope of this judicial review action. Therefore, Respondent asserts that unlike in *Good*, DHS's decision did not violate the ICRA because as currently enacted, the ICRA does not require approval of Vasquez's preauthorization requests. Resp't's Br. p. 9.

Finally, Respondent contends that any claim that DHS's decision violates the ICRA is precluded because Petitioner did not first file a complaint with the Iowa Civil Rights Commission ("ICRC"). Resp't's Br. p. 9. Pursuant to Iowa Code section 216.16, "[a] person claiming to be aggrieved by an unfair or discriminatory practice must initially seek an administrative relief by filing a complaint with the commission . . . ." Iowa Code § 216.16(1). The statute specifically notes that "[t]his provision also applies to persons claiming to be aggrieved by an unfair or discriminatory practice committed by the state or an agency . . . notwithstanding the terms of . . . chapter 17A." *Id.*

Petitioner first asserts that this argument is not properly before the Court because Respondent did not assert or consider it in the proceedings and thus forfeited the argument. Pet'r's Resistance p. 10 (citing Admin. R. at pp. 760–64, 925). Next, Petitioner argues that the Administrative Procedure Act's ("APA's") judicial review procedures govern this case, not those

of the ICRA. *Id.* In support, Petitioner contends that the Iowa Supreme Court's decision in *Hollinrake* establishes that when a discrimination claim is directed at the *substance* of an agency regulation rather than at a "discretionary individual" decision *applying* the regulation, review of the regulation is governed by the provisions of the APA. *Id.* at p. 11 (citing *Hollinrake v. Monroe Cnty.*, 433 N.W.2d 696, 699 (Iowa 1988)).

The *Hollinrake* court "recognize[d] that the procedures and remedies provided the district court in judicial review of agency action differ substantially from those authorized in a civil rights action." 433 N.W.2d at 697–98. Furthermore, section 17A.19 clearly states that "[e]xcept as expressly provided otherwise by another statute referring to [17A.19] by name, the judicial review provisions of this chapter shall be the exclusive means by which a person or party who is aggrieved or adversely affected by agency action may seek judicial review of such agency action." Iowa Code § 17A.19; *Hollinrake*, 433 N.W.2d at 698. However, the *Hollinrake* court referred to one of its earlier cases in which it "recognized that all challenges to agency action are not necessarily exclusively within the agency." 433 N.W.2d at 699 (citing *Jew v. Univ. of Iowa*, 398 N.W.2d 861 (Iowa 1987)). In *Jew*, the court concluded that the exclusivity of section 17A.19's judicial review procedures "must necessarily vary, based on the context of the transaction." 398 N.W.2d at 864.

Nevertheless, the *Hollinrake* court distinguished *Jew* from its instant case, finding that *Jew* dealt with a discretionary individual employment decision and "had little connection with the mandate of the agency or its governing body." *Hollinrake*, 433 N.W.2d at 699 (citing *Jew*, 398 N.W.2d at 865). By contrast, the *Hollinrake* "plaintiff's only complaint [was] based on the substance of the rule." *Id.* "Unlike the complaint in *Jew* grounded on the agency's employment termination practices, [Hollinrake's] challenge [was] directed at the agency's action in carrying

out its statutory duty to enact a rule." *Id.* Therefore, the *Hollinrake* court concluded that the action was subject to the exclusivity of section 17A.19's judicial review provision. *Id.*

In the present case, Petitioner's challenge of the Regulation and Division XX is more similar to the challenge in *Hollinrake* than in *Jew*. However, as Respondent points out, section 216.16 expressly states that its procedural requirement of filing a complaint with the commission "also applies to persons claiming to be aggrieved by an unfair or discriminatory practice committed by the state or an agency . . . notwithstanding the terms of the Iowa administrative procedure Act, chapter 17A." Iowa Code § 216.16(1). This addition to the statute is in keeping with section 17A.19's direction that its judicial review provisions are the exclusive means by which a party may seek judicial review of agency action "[e]xcept as expressly provided otherwise by another statute referring to [17A.19] by name . . . ." Iowa Code § 17A.19.

The Court concludes that for the purposes of Petitioner's constitutional claims under sections 17A.19(10)(a) and (b), DHS's decision was "based on" Division XX and Division XX is within the scope of this judicial review action. However, to the extent Petitioner's claims in Counts II and III are brought under Iowa Code chapter 216, those claims are hereby dismissed. As set forth in detail above, the language of chapters 216 and 17A, as well as the Iowa Supreme Court's holding in *Hollinrake*, are all in agreement that in order to bring these claims under chapter 216, Petitioner was required to first file a complaint with the Iowa Civil Rights Commission, which Mr. Vasquez did not do. Petitioner cannot now attempt to bootstrap chapter 216 claims onto his chapter 17A claims. Therefore, Respondent's Motion to Dismiss is denied as to the constitutional claims brought under chapter 17A in Counts II and III but granted to the extent that Petitioner asserts any claims under chapter 216. The Court concludes no claims under chapter 216 can go forward because of the failure to file a timely complaint with the Iowa Civil Rights Commission.

C. Counts IV and V

In Counts IV and V of his Petition, Petitioner argues that Division XX violated the Iowa Constitution's single-subject rule and title rule. Pet. ¶¶ 204, 225. Respondent asserts that Counts IV and V must be dismissed because codification of Division XX cured any alleged single-subject or title violations under the Iowa Constitution prior to the initiation of this proceeding. Mot. to Dismiss ¶ 5. Article III, section 29 of the Iowa Constitution contains both the single-subject and title rules, stating that "[e]very act shall embrace but one subject, and matters properly connected therewith; which subject shall be expressed in the title." Iowa Code § 29. The law also provides that "if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be expressed in the title." *Id.*

First, Petitioner argues that Division XX violates the single-subject rule because it was included as part of the General Assembly's annual Health and Human Services ("HHS") Appropriations Bill in 2019, but Division XX was not merely a funding restriction on DHS appropriation. Pet. ¶¶ 206–07. Rather, Petitioner asserts "Division XX was a new, substantive third subsection to the section of the ICRA otherwise ensuring protections against nondiscrimination in public accommodations," and "[t]he subject matter of . . . the annual HHS Appropriations Bill . . . had nothing to do with the subject matter of Division XX . . . ." *Id.* at ¶¶ 208–09.

Second, Petitioner contends that Division XX similarly violates the title rule. The title of the 2019 HHS Appropriations Bill read as follows: "An Act relating to appropriations for health and human services and veterans and including other related provisions and appropriations, providing penalties, and including effective date and retroactive and other applicability date provisions." *Id.* at ¶ 227 (citing 2019 Iowa Acts, House File 766, p. 1, available at https://www.legis.iowa.gov/docs/publications/LGI/88/HF766.pdf). Petitioner argues this title

does not refer to the ICRA at all and certainly does not provide notice that Division XX would create an exception to the ICRA's prohibition on gender-identity discrimination in public accommodations. *Id.* at ¶ 228. Petitioner also asserts that "[t]here was no reasonable basis for legislators or citizens to expect that a substantive amendment to ICRA's nondiscrimination protections for transgender Iowans in public accommodations, in place since 2007, would be amended through annual appropriations legislation." *Id.* at ¶ 229.

However, Respondent argues that the Court must dismiss Counts IV and V because these alleged violations of the single-subject and title rules were cured by codification of Division XX prior to initiation of the present proceeding. The Iowa Supreme Court "has held on multiple occasions 'that codification of legislation cures any defect in subject matter or title.'" *Quaker Oats Co. v. Main*, 779 N.W.2d 494 (Table), 2010 WL 200420, at *3 (Iowa Ct. App. Jan. 22, 2010) (citing *Iowa Dep't of Transp. v. Iowa Dist. Ct.*, 586 N.W.2d 374, 376 (Iowa 1998); *accord State v. Kolbet*, 638 N.W.2d 653, 661 (Iowa 2001); *State v. McCright*, 569 N.W.2d 605, 607 (Iowa 1997); *Tabor v. State*, 519 N.W.2d 378, 380 (Iowa 1994)).

This rule was first adopted in *State v. Mabry*, in which the court noted that a number of states with single-subject and title rules "have held that codification of the challenged legislation cures a constitutional defect in title or subject matter." 460 N.W.2d 472, 475 (Iowa 1990). The court determined that this rule was fair to all parties because it "strikes a balance between the salutary purposes of the single-subject rule and the importance of upholding the constitutionality of new legislation." *Id.* Since *Mabry*, the Iowa Supreme Court has consistently ruled in cases challenging new amendments that their codification eliminates the constitutional defects and such a challenge is only valid when it is raised prior to codification. *Giles v. State*, 511 N.W.2d 622, 626 (Iowa 1994). *See also State v. Kolbet*, 638 N.W.2d 653, 661 (Iowa 2001) (concluding that a

constitutional challenge to the statute was untimely because the act was codified prior to the party's challenge); *State v. Taylor*, 557 N.W.2d 523, 526 (Iowa 1996) (reasserting that "[o]nce a bill is codified, any constitutional defect relating to title or subject matter is cured").

Furthermore, "*Mabry* clearly provides the timeframe within which a challenge under article III, section 29 may be made." *Quaker Oats Co.*, 2010 WL 200420, at *3. The relevant window of time to bring single-subject and title challenges is "measured from the date legislation is passed until such legislation is codified." *Mabry*, 460 N.W.2d at 475. "During this window of time, the legislation may be challenged as violative of article III, section 29 of the Iowa Constitution." *Id.* However, "[a]bsent a successful challenge during this period of time, the new legislation, if it is otherwise constitutional, becomes valid law." *Id.* This rule holds firm even though the manner in which "the new legislation was passed may have violated article III, section 29" and a plaintiff would have been successful on the merits. *Id.*

For the consideration of the instant, pending case, Division XX was enacted on May 3, 2019. 2019 Iowa Acts ch. 85, § 93; Pet. ¶ 7. Division XX was subsequently codified by January 13, 2020 as Iowa Code section 216.7(3), thereby closing the window of time for article III, section 29 challenges. Petitioner did not bring these challenges against Division XX until April 22, 2021 when he filed his Petition. Furthermore, even if the relevant date for purposes of the window of time was August 14, 2020 when Vasquez first began the administrative process by requesting Medicaid preapproval rather than when the Petition was filed, this date is still well outside the narrow, yet required timeframe.

By contrast, Petitioner argues that his single-subject and title challenges are within the window of time and thus valid because Respondent disregards a critical fact: "Vasquez's challenges were initiated *before* Division XX was codified and have been pending at all relevant

times, either in court or in agency proceedings, since they were first asserted." Pet'r's Resistance p. 15 (emphasis added). After Division XX was enacted, Vasquez and two other plaintiffs challenged its constitutionality in a lawsuit filed on May 31, 2019. *Id.* at 15–16; Pet. ¶¶ 70–71. The court ultimately held that because Vasquez and the other plaintiffs had not yet requested Medicaid preauthorization for gender-affirming surgery at the time their lawsuit was filed, the controversy over Division XX's constitutionality was not ripe for adjudication. Pet. ¶ 71 (citing *Covington v. Reynolds ex rel. State of Iowa et al.,* 949 N.W.2d 663 (Table), 2020 WL 4514691, at *3 (Iowa Ct. App. Aug. 5, 2020)).

Petitioner therefore argues that the administrative proceedings initiated by Vasquez after his lawsuit "were a judicially mandated continuation of that lawsuit, necessitated by the Court of Appeals' ruling that Mr. Vasquez had to request Medicaid preauthorization for his gender-affirming surgery before challenging Division XX's constitutionality . . . ." Pet'r's Resistance pp. 16–17. In opposition, Respondent asserts that this "continuation argument" fails as a matter of law because preserving an article III, section 29 claim by lodging a challenge within the window of time requires satisfaction of two prerequisites. Resp't's Reply p. 4. First, the challenge must be presented to a court before the amendment's codification. *Kolbet*, 638 N.W.2d at 661. Respondent notes that an agency is not a court. Second, it must be a "successful" challenge. *Mabry*, 460 N.W.2d at 475. Respondent asserts that Vasquez's prior lawsuit meets the first criterion, but not the second. Resp't's Reply p. 4.

The Iowa Supreme Court does acknowledge that it is a "narrow window of time to assert" these challenges. *Godfrey v. State*, 752 N.W.2d 413, 424 (Iowa 2008). The court has also recognized that these "limitations mean[] that the window of opportunity for challenging a statute on this ground is entirely fortuitous because persons are not motivated to challenge a statute until

they are placed in a position in which the statute adversely affects them." *Kolbet*, 638 N.W.2d at 661. Regardless, the court concluded "this is an inescapable conclusion of the *Mabry* doctrine" and has done nothing to revisit or amend the timeframe. *Id.* The *Mabry* court was very clear that "an article III, section 29 challenge is barred even though future litigants may claim they were in no position to make such a challenge before the codification." 460 N.W.2d at 475.

Based on the foregoing discussion and the Iowa Supreme Court's consistent reaffirmation of the *Mabry* doctrine, this Court concludes that Petitioner did not file within the required timeframe for an article III, section 29 challenge. Furthermore, after consideration of the arguments, the Court is not persuaded by Petitioner's continuation argument and thus disagrees that the relevant date is when Petitioner challenged Division XX's constitutionality in a previous case on May 31, 2019. Whether the appropriate date is August 14, 2020 (when Vasquez first began the administrative process) or April 22, 2021 (when Vasquez filed the Petition in this case), neither fell within the required window of time before Division XX's codification on January 13, 2020. Therefore, the Court grants Respondent's motion as to Petitioner's claims of violation of the single-subject and title rules and hereby dismisses Counts IV and V.

D. Requested Relief

We are early in the litigation and the Court has concerns examining the legal sufficiency all of Petitioner's relief requested this early in the proceedings. Respondent argues that Petitioner's request for attorney fees is improper because DHS's action was primarily adjudicative and arose from a proceeding in which the role of DHS was to determine Vasquez's entitlement to a monetary benefit (or its equivalent). Mot. to Dismiss ¶ 6. In response, Petitioner initially asserts that Respondent's argument is premature, as "[a]ttorney's fees are not adjudicated until after a case is decided on the merits and a prevailing party has filed a fee application." Pet'r's Resistance p. 18.

More specifically, Petitioner contends that arguments regarding the ability to request attorney fees are improper at the motion-to-dismiss stage because to survive a motion to dismiss, Iowa's notice-pleading standard only requires that a plaintiff "give notice of the incident giving rise to the claim and the general nature of the claim." *Id.* (quoting Iowa R. Civ. P. 1.402(2)(a)). Nevertheless, Petitioner argues that Respondent's arguments should also be rejected on the merits.

Under Iowa Code section 625.29(1), a court may award attorney fees to a party that prevails in "an action for judicial review brought against the state pursuant to chapter 17A." However, the statute sets forth eight exceptions to this general rule. Iowa Code § 625.29(1)(a)–(h). Respondent argues that the exceptions in subsections (b) and (d) apply to the present case. Resp't's Br. pp. 13–14. First, Respondent asserts that the court may not award Petitioner attorney fees because "[t]he action arose from a proceeding in which the role of the state was to determine the eligibility or entitlement of an individual to a monetary benefit or its equivalent . . . ." *Id.* at p. 14 (quoting Iowa Code § 625.29(1)(d)). In support, Respondent contends that the Iowa Court of Appeals determined in *Good* that a request for Medicaid preauthorization for services to treat gender dysphoria fell within this exception. *Id.* (citing *Good v. Iowa Dep't of Human Servs.*, 2019 WL 5424960 (Iowa Ct. App. Oct. 23, 2019)).

By contrast, Petitioner argues that this exception does not apply because Medicaid is not "a monetary benefit or its equivalent," but rather a nonmonetary, non-fungible, non-discretionary benefit available for the sole purpose of acquiring medical treatment. Pet'r's Resistance p. 27. In support, Petitioner points to federal law's definition of Medicaid as "medical assistance provided under a state plan approved under Title XIX." *Id.* (quoting 42 C.F.R. § 400.200).

Second, Respondent argues that Petitioner cannot recover attorney fees if he prevails because "[t]he state's role in the case was primarily adjudicative." Resp't's Br. p. 14 (quoting Iowa

Code § 625.29(1)(b)). The Iowa Supreme Court has addressed the meaning of "primarily adjudicative" within the context of section 625.29(1), explaining "that if an agency's function principally or fundamentally concerns settling and deciding issues raised, its role is primarily adjudicative." *Endress*, 944 N.W.2d at 82 (quoting *Remer v. Bd. of Med. Exam'rs*, 576 N.W.2d 598, 601 (Iowa 1998) (en banc)). Additionally, the role of the agency is viewed in the present case, not as the agency's role in general. *Id.*

The court in *Endress* was not persuaded by the petitioner's argument that DHS's role was primarily to preserve arguments. *Id.* at 83. Rather, the court stated that "preserving an issue for judicial review because the agency lacks authority to decide the issue does not automatically brand the agency action as nonadjudicative." *Id.* "If DHS determines it lacks jurisdiction to hear a dispute it could otherwise adjudicate, a prevailing party cannot ask for section 625.29(1) attorney fees against DHS as the adjudicator." *Id.* (citing *Colwell v. Iowa Dep't of Human Servs.*, 923 N.W.2d 225, 238 (Iowa 2019)).

Finally, Respondent argues that all of Petitioner's requested declaratory and injunctive relief (except for reversal of DHS's final decision and related incidental relief) must be dismissed because Petitioner seeks relief that is unavailable in this judicial review of a contested case proceeding. Resp't's Br. p. 15. Additionally, Respondent asserts that Petitioner failed to exhaust his administrative remedies. Mot. to Dismiss ¶ 7.

The Court declines to address the merits of Respondent's arguments at this time. Rather, it concludes it is procedurally premature to dismiss Petitioner's requests for relief at the motion-to-dismiss stage while there are other claims remaining. Therefore, the Court denies Respondent's Motion to Dismiss as to Petitioner's requested relief. The Court will surely revisit these arguments while evaluating this case on the merits and considering the remaining, pending arguments.

V. CONCLUSION

Based on the foregoing discussion, the Court concludes the following:

(1) Respondent's motion as to Counts II and III with regard to Petitioner's chapter 17A constitutional claims is denied. However, to the extent Petitioner is alleging any claims pursuant to Iowa Code chapter 216, such claims are dismissed;

(2) Petitioner did not challenge Division XX's constitutionality under the single-subject and title rules within the required timeframe and as such, the Court hereby dismisses Counts IV and V;

(3) Dismissal of Petitioner's requested relief is premature and improper at this stage while there are remaining claims to be considered.

Accordingly, Respondent's Motion to Dismiss is **GRANTED** in part and **DENIED** in part.

State of Iowa Courts

Case Number	**Case Title**
CVCV061729	AIDEN VASQUEZ V IOWA DEPARTMENT OF HUMAN SERVICES
Type:	OTHER ORDER

So Ordered

William P. Kelly, District Court Judge,
Fifth Judicial District of Iowa

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