IN THE IOWA DISTRICT COURT FOR POLK COUNTY

EERIEANNA GOOD, **Petitioner,** v. **IOWA DEPARTMENT OF HUMAN SERVICES,** **Respondent.**	**CASE NO. CVCV054956** **RESPONDENT'S BRIEF IN SUPPORT OF ITS MOTION TO DISMISS**

Respondent, the Iowa Department of Human Services ("DHS"), pursuant to Iowa R. Civ. P. 1.421(1)(f), hereby submits the following Brief in Support of its Motion for Dismiss for Failure to State a Claim and states as follows:

I. INTRODUCTION

Iowa Admin. Code r. 441-78.1(4)"b" prohibits coverage for certain surgical operations performed related to "transsexualism," "gender identity disorder," and "sex reassignment" under Iowa's Medical Assistance Program ("Medicaid"). Petitioner's Petition for Judicial Review (the "Petition") alleges that Petitioner is a Medicaid member under managed care with AmeriHealth Caritas Iowa ("AmeriHealth"). Petitioner alleges that AmeriHealth denied Petitioner's claim for gender reassignment surgery as treatment for Petitioner's gender dysphoria pursuant to Iowa Admin. Code r. 441-78.1(4)"b".

At the heart of Petitioner's action is a claim challenging a state regulation that has already been determined to be reasonable and consistent with federal law by the Eighth Circuit Court of Appeals. For reasons discussed more thoroughly below, the Eight Circuit's holding in *Smith v. Rasmussen*, 249 F.3d 755 (8th Cir. 2001), should be followed here, as it reflects a dispositive holding pertaining to the same issues Petitioner now raises. Similarly, Petitioner fails to state a claim under

the Iowa Civil Rights Act ("ICRA"), as neither DHS nor the Medicaid program are "public accommodations" so as to fall within the purview of the ICRA.

II. STANDARD OF REVIEW

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. *Ostrem v. Prideco Secure Loan Fund, L.P.*, 841 N.W.2d 882, 891 (Iowa 2014). A motion to dismiss admits the well-pleaded facts in the petition, but not the legal conclusions. *Kingsway Cathedral v. Iowa Dep't of Transp.*, 711 N.W.2d 6, 8 (Iowa 2006); *Shumate v. Drake Univ.*, 846 N.W.2d 503, 507 (Iowa 2014). The purpose of a motion to dismiss is to "test the legal sufficiency of the petition." *Shumate*, 846 N.W.2d at 507. A motion to dismiss may be granted when the petition's allegations, taken as true, fail to state a claim upon which relief may be granted. *Mueller v. Wellmark, Inc.*, 818 N.W.2d 244, 253 (Iowa 2012).

III. ARGUMENT

Medicaid is a cooperative federal-state aid program that helps states provide medical assistance to the poor. *Lankford v. Sherman*, 451 F.3d 496, 504 (8th Cir. 2006); *see* Iowa Code § 249A.2(3), (6), (7), (10). Participation in Medicaid is voluntary, but those states that elect to participate must follow the federal government's statutory and regulatory framework; however, outside of these requirements, Medicaid "gives participating States significant flexibility in defining many facets of their systems." *Geston v. Anderson*, 729 F.3d 1077, 1079 (8th Cir. 2013).

While Medicaid's statutory and regulatory scheme "create[s] a presumption in favor of the medical judgment of the attending physician in determining the medical necessity of treatment," Medicaid was also designed to "provide the largest number of necessary medical services to the greatest number of needy people." *Smith v. Rasmussen*, 249 F.3d 755, 759 (8th Cir. 2001) (*quoting Weaver v. Reagan*, 886 F.2d 194, 200 (8th Cir. 1989), *and Ellis v. Patterson*, 859 F.2d 52, 55 (8th Cir. 1988)). As a result, the Medicaid Act "confers broad discretion on the States to adopt standards for

determining the extent of medical assistance, requiring only that such standards be 'reasonable' and 'consistent with the objectives' of the Act." *Id.* (*quoting Beal v. Doe*, 432 U.S. 438, 444, 97 S. Ct. 2366 at 2371 (1977)). "'Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs,' as long as the care and services that the states provide 'are provided in the best interests of the recipients.'" *Id.* at 761 (*quoting Alexander v. Choate*, 469 U.S. 287, 303, 105 S. Ct. 712, 721 (1985)).

A. The Eighth Circuit's Ruling in *Smith v. Rasmussen* Preempts Petitioner's Action.

Petitioner's claims of constitutional violations, arbitrary and capricious rulemaking, and other violations of rights have already been adjudicated by the Eighth Circuit Court of Appeals in favor of DHS in *Smith v. Rasmussen*, 249 F.3d 755 (8th Cir. 2001). The Petition appropriately recognizes that DHS's policy of not covering gender reassignment surgery has been litigated by the courts on two other, previous occasions. However, only one case, *Rasmussen*, is directly applicable to Plaintiff's claims here.

The Eighth Circuit's first consideration of DHS's policy in *Pinneke v. Preisser*, 623 F.2d 546 (8th Cir. 1980), is inapplicable because of DHS's subsequent rulemaking process. In *Pinneke*, the court considered whether DHS's unwritten policy of categorically refusing coverage for gender reassignment surgery was consistent with the objectives of the Medicaid statute or arbitrary. *Id.* at 549-550. The court ultimately concluded that such categorical refusal, "[w]ithout any formal rulemaking proceedings or hearings," was improper. *Id.*

Twenty-one years later, however, the Eighth Circuit considered the same question again; however, as in this case, the State's categorical refusal to cover gender reassignment surgery arose from Iowa Admin. Code r. 441-78.1(4)"b". *Rasmussen*, 249 F.3d at 756-62. Factually, *Rasmussen* follows closely with Petitioner's own claims. In *Rasmussen*, the plaintiff's primary treating psychiatrist had determined that sex reassignment surgery was medically necessary treatment for the plaintiff's

"gender identity disorder." *Id.* at 756-57. As a result, the plaintiff sought payment from Iowa Medicaid for his final surgical procedure: a phalloplasty. *Id.* at 757.

Distinguishing *Pinneke* based on DHS's subsequent rulemaking, the court in *Rasmussen* quickly found that, as a matter of law, "the State's prohibition on funding of sex reassignment surgery is both reasonable and consistent with the Medicaid Act." *Id.* at 761. In arriving at this conclusion, the Eighth Circuit exclusively considered the process and evidence presented to the State during the rulemaking process eight years earlier. The court noted that the State commissioned a review and recommendation for coverage of treatment of gender identity disorder from the Iowa Foundation for Medical Care, considered the fiscal impact of coverage, conducted a study of gender reassignment surgery coverage in Medicaid across the states, considered the existing coverage of alternative treatment options, and engaged in the State's rulemaking process, complete with public input. *Id.* at 760-61. Although Petitioner frames the issue as one hinged around recently-developed medical literature regarding the medical necessity and non-experimental status of gender reassignment surgery, the court in *Rasmussen* noted that the evidence before DHS "revealed that the surgery can be appropriate and medically necessary for some people and that the procedure was not considered experimental." *Id.* at 760. Nonetheless, the court found that based on the evidence before DHS *at the time the rule was made*, "we cannot conclude as a substantive matter that the Department's regulation is unreasonable, arbitrary, or inconsistent with the Act, which is designed to provide 'necessary medical services to the greatest number of needy people,' in a reasonable manner." *Id.* at 761 (*quoting Ellis*, 859 F.2d at 55).

Three of Petitioner's claims are properly resolved in light of *Rasmussen* as a matter of law: claim three under Iowa's Equal Protection Clause; claim four for the rule causing a disproportionate negative impact on petitioner's private rights; and claim five for an unreasonable, arbitrary, and capricious rule. For the following reasons, *Rasmussen* compels dismissal.

First, under Petitioner's claim under Iowa's Equal Protection Clause, although resolution of federal constitutional issues do not bind determinations of the State's Constitution, it is well established that "[g]enerally, [Supreme Court of Iowa] view[s] the federal and state equal protection clauses as 'identical in scope, import, and purpose.'" *Varnum v. Brien*, 763 N.W.2d 862, 878 n.6 (Iowa 2009). As a result, although Iowa courts do not follow federal precedent "blindly," such precedent is "instructive in interpreting the Iowa Constitution." *Id.* The court's holding in *Rasmussen* should guide this Court's analysis as to whether Petitioner has pled a claim under Iowa's Equal Protection Clause.

By finding Iowa Admin. Code r. 441-78.1(4)"b" both "reasonable" and "consistent with the Medicaid Act," the court in *Rasmussen* found that regulation to be constitutional. For Iowa Admin. Code r. 441-78.1(4)"b" to be "consistent" with the Medicaid Act, the court must have found it to be consistent with the federal constitution. To conclude otherwise would erroneously assume that the Medicaid Act itself is inconsistent with the federal constitution. Similarly, Petitioner incorrectly assumes that a regulation may be characterized as both "constitutional" and "reasonable" contemporaneously. The Court should not so find now.

Furthermore, the court in *Rasmussen*'s determination of reasonableness goes to the heart of the legal substance of Petitioner's Equal Protection claim. Transgender men and women do not fall within a quasi-suspect or suspect class under either the Iowa Constitution or the United States Constitution. Absent such a classification, the appropriate analysis is a rational basis review of the regulation. *See Varnum*, 763 N.W.2d at 879 (standard requires plaintiff to "negate every reasonable basis upon which the classification may be sustained.") (internal citation omitted). The court in *Rasmussen*'s finding of reasonableness for the disputed rule clearly undercuts Petitioner's attempt to conclude otherwise.

Second, with regard to Petitioner's fourth claim, Petitioner fails to state an independent right upon which there is a disproportionate negative impact, instead stating only that Petitioner "has a

right to be treated in accordance with the provisions of the ICRA and the Iowa Constitution." (Pet. at ¶ 148). Thus, to the extent Iowa Admin. Code r. 441-78.1(4)"b" is determined to be consistent with ICRA and with the Iowa Constitution, Petitioner's fourth claim must also be dismissed.

Finally, Petitioner's final claim of unreasonable, arbitrary, and capricious decisionmaking by DHS is directly discredited by the court in *Rasmussen*. Petitioner attempts to shift the required analysis from whether the enactment of the disputed rule was a decision made unreasonably, arbitrary, or capriciously *at the time it was enacted* to a post hoc analysis. Federal precedent pertaining to the comparable Administrative Procedure Act makes clear the proper analysis is of the agency's decision at the time such decision is made. *See* 5 U.S.C. § 706(2)(A); *Van Hollen, Jr. v. Fed. Election Comm'n*, 811 F.3d 486, 495 (D.C. Cir. 2016) (reviewing court evaluates "the agency's rationale at the time of decision.") (*quoting Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 533, 110 S. Ct. 2668 (1990)). Petitioner makes no citation to authority to support this theory, and such a claim contradicts the plain language of the Iowa Administrative Procedure Act, which also provides that the appropriate analysis pertains to the agency *action*. No action has been alleged with regard to the disputed provisions of Iowa Admin. Code r. 441-78.1(4)"b" since its enactment in 1994; an action that was previously found by the Eighth Circuit to be "reasonable." *Rasmussen*, 249 F.3d at 761.

Indeed, relevant to all the dismissal of all three claims, the only significant difference from Petitioner's claim and that of the plaintiff in *Rasmussen* is the passage of time. As other courts have held in identical circumstances, the mere passage of time is insufficient to render a rule prohibiting coverage of gender reassignment surgery unreasonable. *See Ravenwood v. Daines*, No. 06-cv-6355-CJS, 2009 WL 2163105, at *13 (W.D.N.Y. July 17, 2009) (legislature's failure to review prohibition of gender reassignment surgeries since 1998 was "not a sufficient reason to find the law" failed under an Equal Protection analysis).

B. Neither DHS Nor Medicaid Is A "Public Accommodation."

Petitioner's first two claims rely, and fail, on the same grounds: namely, that Iowa Medicaid is a "public accommodation" so as to fall within the purview of Iowa Code § 216.7. That provision of the ICRA provides that it shall be unlawful for "any owner, lessee, sublessee, proprietor, manager, or superintendent of any public accommodation or any agent or employee thereof" to refuse or deny the benefits or services of such an accommodation on certain bases, including gender identity. In turn, Iowa Code § 216.2(13)"a" generally defines a "public accommodation" as consisting of "every place, establishment, or facility," that is open to the public. The ICRA also defines public accommodations as additionally including "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." Iowa Code § 216.2(13)"b". For no less than four reasons, Iowa Medicaid cannot be considered a "public accommodation" under the ICRA.

First, context makes clear that entitlements, like Medicaid, do not fall within the intent of the statute. Medicaid is doubtlessly not a "district," "place, establishment, or facility." Instead, Medicaid is a cooperative federal-state aid program that helps states provide medical assistance to the poor. *Lankford*, 451 F.3d at 504. Thus, to fall within the definition of a "public accommodation" under Iowa Code § 216.2(13), this Court must find that Iowa Medicaid was intended to be included in the definition of a "state . . . government unit," an undefined term. Nonetheless, context makes clear that Iowa Medicaid is not such a "state government unit"; the term "unit," as used throughout the ICRA, clearly refers to physical locations. *See* Iowa Code §§ 216.2(4) ("dwelling units" and "ground floor units"), 216.12(1)"d"(1) (dwellings as "unit[s]"); *State ex rel. Claypool v. Evans*, 757 N.W.2d 166 (Iowa 2008) (units in reference to housing).

Second, the language of Iowa Code § 216.7(1) makes clear that Iowa Medicaid was not intended to fall within the scope of that provision. As Iowa Medicaid is not a location, it has no

"owner, lessee, sublessee, proprietor, manager, or superintendent . . ." *Id.* Although it does have agents and employees, the preceding list makes clear that Iowa Code § 216.7 arises in the context of businesses and other locales.

Third, as with constitutional questions, it is "generally true that 'Iowa courts have traditionally looked to federal law for guidance in interpreting' the Iowa Civil Rights Act." *Pippen v. State*, 854 N.W.2d 1, 18 (Iowa 2014). The relevant statute under the federal Civil Rights Act similarly makes clear that its application is limited to businesses and other facilities. 42 U.S.C. § 2000a ("Each of the following *establishments* which serves the public is a *place* of public accommodation within the meaning of this subchapter….") (emphasis added).

Finally, even if all of the above were not true, and the ICRA was intended to include aid programs, Iowa Medicaid would not be a "public accommodation" for the mere fact that it does not offer services to the public writ large. It is a well-settled principle of law that Medicaid's services are only open to a limited population of needy individuals. *See* Iowa Admin. Code r. 441-75.1 (outlining basic eligibility categories and requirements); *In re Estate of Melby*, 841 N.W.2d 867, 875 (Iowa 2014) ("The Medicaid program 'was designed to serve individuals and families lacking adequate funds for basic health services, and it was designed to be a payer of last resort.'"). Furthermore, not only are applications and thorough reviews contemplated for Medicaid eligibility, but numerous other processes, rules, exclusions, and other criteria govern eligibility. *See generally* Iowa Admin. Code ch. 441-76; 42 C.F.R. § 435.2 *et seq.* As a result, any attempt to characterize Iowa Medicaid as an entitlement providing services to (or open to) the general public suffers from a fundamental misunderstanding of Medicaid's functioning.

IV. CONCLUSION

The Eighth Circuit's holding in *Smith v. Rasmussen* has been left undisturbed for over 16 years and requires this Court to follow its lead. Although Petitioner's claim for Equal Protection falls

under the Iowa Constitution, *Rasmussen*'s conclusions make clear that Iowa Admin. Code r. 441-78.1(4)"b" did not suffer from a lack of constitutionality under the federal constitution; a conclusion that this Court would be well-supported in following here. Similarly, Petitioner cannot claim that DHS's decisionmaking was unreasonable, arbitrary, or capricious without directly contradicting the Eighth Circuit's long-established precedent. Finally, Petitioner's claims under the Iowa Civil Rights Act improperly attempt to fit a square peg in a round hole by characterizing Iowa Medicaid as a "public accommodation" to fall within the parameters of that Act. Petitioner's attempt to resurrect an issue that has been well-settled for over a decade and a half is insufficient to state a valid claim before this Court.

Therefore, for all those reasons stated above and all other reasons, Respondent prays this Court enter an order GRANTING its Motion to Dismiss Petitioner's Petition for Judicial Review in full.

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Original electronically filed via EDMS.

Electronically served on parties of record.

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon each of the persons identified as receiving a copy by delivery in the following manner on this 9th day of October, 2017:

☐ U.S. Mail ☐ Hand Delivery
☒ ECF System Participant (Electronic Service)

Signature: /s/Cindy Jacobe