IN THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY

MIKA COVINGTON, AIDEN DELATHOWER, and ONE IOWA, INC., Petitioners, v. KIM REYNOLDS ex rel. STATE OF IOWA and IOWA DEPARTMENT OF HUMAN SERVICES, Respondents.	Case No.: EQCE084567 ORDER: Ruling on Petitioners' Motion for Temporary Injunction & Respondents' Motion to Dismiss

On July 9, 2019, this matter came before the Court for a hearing on Petitioners' Application for Temporary Injunction and Respondents' Motion to Dismiss. Petitioners appeared by and through attorneys Rita Bettis Austen and Shefali Aurora. Respondent appeared by and through attorneys Jeffrey S. Thompson and Thomas J. Ogden. The Court, having examined the file, heard the evidence presented, and being otherwise fully advised in the premises, now enters the following order:

I. INTRODUCTION

A. HISTORICAL BACKGROUND

On June 6, 2018, the Iowa District Court in and for Polk County issued its ruling in case number CVCV054956. Those matters came before the Court on petitions for judicial review pursuant to Section 17A.19(1) of the Iowa Administrative Procedure Act, which permits District Court review of final agency actions.

The District Court found that on January 27, 2017, Dr. Brad A. Erickson, M.D., of the University of Iowa Hospitals and Clinics requested Medicaid preapproval for the expenses of an orchiectomy from AmeriHealth on behalf of Petitioner Good. Dr. Erickson stated, "[t]his procedure is [a] medically-necessary treatment of Ms. Good's gender dysphoria." AmeriHealth denied the request, citing the regulation's exclusion of surgeries for the purpose of sex reassignment. Petitioner Good initiated an internal appeal of AmeriHealth's denial of coverage to the Iowa Department of Health Services (DHS). 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 Petitioner Good's statutory and constitutional challenges to the Regulation were properly within the court's jurisdiction thereby preserving the challenge for judicial review. Petitioner Good appealed the ALJ decision to the Director of DHS. The Director adopted the ALJ's decision and concluded the agency lacked jurisdiction to rule on Good's challenges to the Regulation.

On September 21, 2017, Good filed a petition for judicial review with the Iowa District Court. Petitioner Good argued the Regulation violated the Iowa Civil Rights Act's (ICRA) prohibitions against sex and gender identity discrimination as well as the Equal Protection Clause of the Iowa Constitution. Petitioner Good further alleged DHS's continued application of the Regulation created a disproportionate negative impact on private rights and was arbitrary and capricious.

As it related to Petitioner Beal, on June 8, 2017, Dr. Loren Schechter, M.D., submitted a Medicaid preapproval request with Amerigroup seeking to perform a vaginoplasty, penectomy, bilateral orchiectomy, clitoroplasty, urethroplasty, labiaplasty, and perineoplasty. Amerigroup denied the request, citing the Regulation. Petitioner Beal initiated an internal appeal. Amerigroup denied the appeal. Petitioner Beal appealed to DHS.

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

The District Court consolidated the Petitions for Judicial Review, and on June 6, 2018, issued its ruling reversing the decisions from the Director of DHS. The Court addressed four issues: 1) whether the Regulation violates the ICRA's prohibitions on sex and gender-identity discrimination; 2) whether the Regulation violates the equal protection provisions of the Iowa Constitution; 3) whether DHS's decision will result in a disproportionate negative impact on private rights; and 4) whether the agency decision was arbitrary and capricious.

In a forty-three (43) page opinion, the District Court found: 1) 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; 2) after applying heightened scrutiny based on gender identity exclusion, denying 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; 3) the negative impact on the rights of transgender Medicaid recipients disproportionately outweighs any sort of public interest served; and 4) the decision was made without regard to the law and facts and was, therefore, unreasonable, arbitrary, and capricious.[1]

On July 3, 2018, DHS appealed. The Iowa Supreme Court affirmed the District Court's Ruling on March 8, 2019. Through a unanimous ruling, the Court found the regulation at issue discriminated against transgender Medicaid recipients in Iowa pursuant to the ICRA. The Court stated, "[a]fter the DHS amended the rule to bar Medicaid coverage for gender-affirming surgery, *the legislature specifically made it clear that individuals cannot be discriminated against on the basis of gender identity under the ICRA*. *See* 2007 Iowa Acts ch. 191, §§ 5, 6 (codified at Iowa Code § 216.7(1)(*a*) (2009))." In an exercise of judicial restraint, the Court did not address the constitutional issues decided by the District Court and raised on appeal.

On April 27, 2019, the Iowa legislature amended the annual Health and Human Services Appropriations bill, House File 766, with the Division. Division XX, in full, provides:

DIVISION XX

PROVISION OF CERTAIN SURGERIES OR PROCEDURES ——
EXEMPTION FROM REQUIRED ACCOMMODATIONS OR SERVICES

Sec. 93. Section 216.7, Code 2019, is amended by adding the following new subsection:

[1] *EerieAnna Good and Carol Beal*, Case No.,CVCV054956 and CVCV055470 (consolidated), Ruling on Pets. for Judicial Review, (Iowa Dist. Ct. June 6, 2018).

> NEW SUBSECTION. 3. This section shall not require any state or local government unit 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.
>
> Sec. 94. EFFECTIVE DATE. This division of this Act, being deemed of immediate importance, takes effect upon enactment.

The Division, therefore, added a new subsection to section 216.7 of the ICRA. That section is as follows:

> 216.7 Unfair practices — accommodations or services.
>
> 1. It shall be an unfair or discriminatory practice for any owner, lessee, sublessee, proprietor, manager, or superintendent of any public accommodation or any agent or employee thereof:
>   a. To refuse or deny to any person because of race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability the accommodations, advantages, facilities, services, or privileges thereof, or otherwise to discriminate against any person because of race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability in the furnishing of such accommodations, advantages, facilities, services, or privileges;
>   b. To directly or indirectly advertise or in any other manner indicate or publicize that the patronage of persons of any particular race, creed, color, sex, sexual orientation, gender identity, national origin, religion, or disability is unwelcome, objectionable, not acceptable, or not solicited.
> 2. This section shall not apply to:
>   a. Any bona fide religious institution with respect to any qualifications the institution may impose based on religion, sexual orientation, or gender identity when such qualifications are related to a bona fide religious purpose;
>   b. The rental or leasing to transient individuals of less than six rooms within a single housing accommodation by the occupant or owner of such housing accommodation if the occupant or owner or members of that person's family reside therein.
> 3. <u>This section shall not require any state or local government unit or tax supported district to provide for sex reassignment surgery or any other cosmetic, reconstructive, or plastic surgery procedure related to</u>

> transsexualism, hermaphroditism, gender identity disorder, or body dysmorphic disorder. [underline added for emphasis]

The Governor signed the Division into law on May 3, 2019.

B. PROCEDURAL BACKGROUND

The Petition and supporting brief for Declaratory and Injunctive Relief was filed in Polk County District Court on May 31, 2019. After brief consultation with the parties, the Court entered a scheduling order on June 14, 2019.

On June 26, 2019, Respondents filed a Motion to Dismiss along with their Resistance to Petitioners' request for injunctive relief. On July 2, 2019, Petitioners filed a reply to Respondents' resistance. The following day, Petitioners filed a motion seeking an extension of the deadline to file a Resistance to Respondents' Motion to Dismiss. Because of limited judicial resources, the Court ordered the parties to present argument on both the Motion for Injunctive Relief as well as the Motion to Dismiss at one hearing. Petitioners formally resisted Respondents' Motion to Dismiss on July 8, 2019. The Court heard arguments on July 9, 2019.

II. APPLICABLE STANDARDS

A. TEMPORARY INJUNCTIONS

Temporary injunctions are "extraordinary remed[ies] to be granted with caution and only when clearly required."[2] They are designed to be a "'preventative remedy to maintain the status quo of the parties prior to final judgment and to protect the subject of the litigation.'"[3] Pursuant to Iowa Rule of Civil Procedure 1.1502, there are only three instances in which a temporary injunction may be granted:

1. When the petition, supported by affidavit, shows the plaintiff is entitled to relief which includes restraining the commission or continuance of some act which would greatly or irreparably injure the plaintiff.
2. Where, during the litigation, it appears that a party is doing, procuring

[2] *Rokusek v. Jensen*, 548 N.W.2d 570, 573 (Iowa 1996).

[3] *Lewis Invs., Inc. v. City of Iowa City*, 703 N.W.2d 180, 184 (Iowa 2005) (quoting *Kleman v. Charles City Police Dep't*, 373 N.W.2d 90, 95 (Iowa 1985)).

> or suffering to be done, or threatens or is about to do, an act violating the other party's right respecting the subject of the action and tending to make the judgment ineffectual.
>
> 3. In any case specially authorized by statute.[4]

Petitioners bring this Application under subsection one. Consequently, the Court must consider the following: (1) Petitioners' "likelihood or probability of success on the merits of [its] underlying claims";[5] (2) without the issuance of an injunction, whether substantial injury will result and no adequate legal remedy is available;[6] (3) the hardship to Defendant if enjoined versus the hardship to Petitioners if no injunction is issued.[7] Ultimately, however, the "basis for injunctive relief . . . has always been irreparable injury and the inadequacy of legal remedies."[8]

B. MOTIONS TO DISMISS

Motions to dismiss are not ordinarily favored by Iowa's appellate courts.[9] The issue on a motion to dismiss is the plaintiff's "right of access to the district court, not the merit of [his or her] allegations."[10] Therefore, a court should grant a motion to dismiss only if on its face the petition shows no right of recovery under any state of facts.[11]

III. DISCUSSION

Petitioners seek temporary injunctive relief pursuant to Iowa Rule of Civil Procedure 1.1502. In support of the motion, Petitioners claim Division XX violates: 1) the Equal Protection Clause of the Iowa Constitution; 2) the Iowa Constitution's "single-

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[4] *See also MAX 100 L.C. v. Iowa Realty Co.*, Inc., 621 N.W.2d 178, 181 (Iowa 2001); *PIC USA v. North Carolina Farm P'ship*, 672 N.W.2d 718, 723 (Iowa 2003).

[5] *Lewis Invs., Inc. v. City of Iowa City*, 703 N.W.2d 180, 184 (Iowa 2005).

[6] *In re Estate of Hurt*, 681 N.W.2d 591, 595 (Iowa 2004).

[7] *Max 100 L.C.*, 621 N.W.2d at 181 (quoting *Kleman*, 373 N.W.2d at 96).

[8] *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

[9] *See Cutler v. Klass, Whicher & Mishne,* 473 N.W.2d 178, 181 (Iowa 1991) (noting that both the filing and the sustaining of motions to dismiss are "poor ideas").

[10] *Magers-Fionof v. State,* 555 N.W.2d 672, 674 (Iowa 1996).

[11] See *Trobaugh v. Sondag*, 668 N.W.2d 577, 580 (Iowa 2003); *see also Newton v. City of Grundy*, 70 N.W. 2d 162, 165 (Iowa 1955) (holding motions to dismiss are limited to the failure to state any claim in which *any* relief can be granted); *see also* I.R. Civ. P 1.421(1)(f).

subject rule; and 3) the Iowa Constitution's inalienable-rights clause.

Respondents argue that injunctive relief is not appropriate for three reasons. First, Petitioners have not established they are likely to succeed on the merits of their constitutional claims; second, Petitioners have an adequate remedy at law; and third, the dispute is not ripe for judicial consideration. Respondents' second and third contentions were the basis for the Motion to Dismiss.

A. ADEQUATE REMEDY AT LAW

In this action, Petitioners seek to continue the journey started in *Good*. Ultimately, Petitioners seek a ruling unequivocally stating that the DHS regulations at issue in *Good* are unconstitutional – an issue the Supreme Court did not address. However, Petitioners frame the issue as a facial challenge to the Division, which, according to Petitioners, restated the "discriminatory Regulation that was struck down in *Good*." Petitioners contend that to file a new administrative challenge to the Regulation itself would be "nonsensical." As the argument goes, exhaustion of one or more of the administrative remedies proposed by the State is not required and would be an exercise in futility, since an administrative review cannot invalidate a statute.

Invalidation of the Division, however, would not be the goal of an administrative appeal. The Division is nothing more than a statutory clarification of the ICRA. Statutory text may express legislative intent by omission as well as inclusion, so courts and administrative bodies "may not expand or alter the language of a statute in a way that is not evident from the legislature's word choice within the statute."[12] The actual text of the Division does not prevent the Iowa Medicaid program from covering sex reassignment surgery or any other surgical procedure, if the program so chooses. Therefore, while Petitioners may frame the issue as one that solely involves a facial challenge to the Division, thereby rendering the administrative process futile, the real goal of this Petition for Injunctive Relief is constitutional invalidation of the Regulations themselves. Stated differently, the Division is not the framework DHS utilizes in determining which

[12] *Vance v. Iowa District Court for Floyd County*, 907 N.W.2d 473, 477-478 (Iowa 2018) (internal citations omitted).

Medicaid benefits, if any, recipients should receive – the regulations are. As a result, the process must start at the administrative level, just as it did in *Good*.

In *Good*, the petitioners sought judicial review after they had exhausted all of their intra-agency appeals. Because the administrative process was complete before the matter came to District Court, the court had a complete factual record from which to work. That factual record served as the cornerstone for many, if not most, of the District Court's conclusions of law. In *Good*, a full factual record was developed at the agency level regarding the nature and type of medical procedures the petitioners sought as well as the medical support behind each. That fact is critical because the Regulation does not actually prohibit coverage for all psychologically-motivated surgeries, nor does it limit coverage for surgeries performed out of medical necessity.

In *Good*, the Court had the ability to assess DHS's cost savings argument based on the factual record presented. Although the Court concluded there was "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," the Court also acknowledged that general cost savings is a legitimate government interest under a rational basis constitutional standard.[13] As Respondents note, while Courts are not unsympathetic to the plight of an indigent individual who desires a medical procedure not covered under a government program, the Constitution does not provide judicial remedies for every social and economic ill.[14] However, in this case, a full factual record from which the Court can assess Respondents' cost savings argument and, thereby, engage in a full constitutional analysis does not yet exist.

A full factual record was also developed in *Good* concerning the science surrounding the procedures the petitioners were seeking. In *Good*, DHS argued 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

[13] *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.")

[14] *Maher v. Roe,* 432 U.S. 464, 479, 97 S. Ct. 2376, 2385, 53 L. Ed. 2d 484 (1977) (quoting *Lindsey v. Normet,* 405 U.S. 56, 74, 92 S.Ct. 862, 874 (1972)).

surgery." To this point, the District Court found:

> *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.

The District Court's assessment on this point is particularly salient. Unquestionably, Petitioners make compelling arguments concerning the science and treatment related to gender dysphoria. As in *Good*, Respondents offer virtually no resistance to those arguments. It is precisely because those arguments are compelling and because DHS has not reviewed or studied the language of the Regulation since its original adoption in 1995 that the statute allows for interested persons, such as the Petitioners here, to request the adoption, amendment, or repeal of a rule.[15] To the extent the regulations are no longer tenable, or as the District Court noted in *Good*, to the extent the regulations have "not kept pace with law and medicine," then under the current state of Iowa law, administrative agencies are usually "permitted to correct their own errors before resort is had to the courts."[16]

The Court acknowledges the administrative process can be time consuming.[17] Such inconvenience does not, however, "affect the adequacy of the remedy" Petitioners can obtain by participating in the process.[18] Nor does such participation constitute "irreparable injury" of such a "substantial dimension" as to excuse these petitioners from that administrative process.[19] As such, DHS should be given a full opportunity to amend or repeal its rules related to treatment for gender dysphoria before those issues are presented to the District Court.

B. IRREPARABLE HARM

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[15] Iowa Code § 17A.7(1).

[16] *N. River Ins. Co. v. Iowa Div. of Ins.*, 501 N.W.2d 542, 545(Iowa 1993).

[17] *See Richards v. Iowa State Commerce Comm'n*, 270 N.W.2d 616, 621 (Iowa 1978).

[18] *Id.*

[19] *Riley v. Boxa*, 542 N.W.2d 519, 522 (Iowa 1996).

Though Petitioners' affidavits certainly detail the distress their gender dysphoria has caused them historically, distress is not tantamount to irreparable harm. Moreover, after studying Petitioners' respective affidavits, Petitioners seem to be advocating for a *possibility* of irreparable harm standard, as opposed to whether it is likely for them to suffer irreparable harm. "Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief."[20]

C. SUCCESS ON THE MERITS

The vast majority of Petitioners' arguments for injunctive relief relate to the "success of merits" prong, and specifically, the constitutionality of the Division and the corresponding regulations. Petitioners raised substantially similar constitutional challenges as were raised in *Good*. While the District Court's ruling in *Good* was thorough and informative, this Court is not bound by that Court's conclusions of law. More importantly, Petitioners here are not in the same position as the petitioners were in *Good*. While success on the merits is a factor to be considered by the Court in deciding whether to grant injunctive relief, "basis for injunctive relief . . . has always been irreparable injury and the inadequacy of legal remedies."[21] Therefore, because the Court finds that Petitioners have adequate legal remedies and Petitioners have not demonstrated irreparable harm, the Court need not address Petitioners' "success on the merits" claim.

D. RIPENESS FOR JUDICIAL ADJUDICATION

Petitioners' claims are not yet ripe for adjudication. The basic rationale for the ripeness doctrine is:

> to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative

[20] *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 23, 129 S.Ct. 365, 376, 172 L.Ed.2d 249, 260 (2008) (citations omitted).
[21] *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982).

> policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.[22]

In keeping with this rationale, the *Abbott* Court, in keeping with this rationale, pointedly noted that "injunctive and declaratory judgment remedies are discretionary, and courts traditionally have been reluctant to apply them to administrative determinations unless these arise in the context of a controversy 'ripe' for judicial resolution."[23]

When considering a ripeness issue, a court must generally address two factors. The first inquiry is whether the relevant issues are sufficiently focused to permit judicial resolution without further factual development. Second, whether the parties would suffer hardship by the postponement of judicial action.[24] In this case, the answer to both questions is no.

First, and as discussed above, the administrative process has not yet commenced. Petitioners have not requested Medicaid pre-authorization. As a result, a Managed Care Organization has not evaluated a request. There have been no notices of decision issued on the requested services. At this point, the contentions between the parties are purely "abstract." Moreover, Petitioners have failed to demonstrate in what "concrete ways" they have been affected by the Regulations or a DHS decision - since the Division was enacted.

Second, and as previously discussed, Petitioners' affidavits are compelling. Petitioners' respective medical professionals have clearly indicated both Petitioners suffer from gender dysphoria. Those professionals have also described, in their respective opinions, the only effective course of treatment. Additionally, those professionals describe the potential effects (i.e. anxiety and depression) on those individuals who suffer from long-term gender dysphoria. What the medical professionals have not established is the *dire* need for treatment and the *likelihood* of irreparable harm, if Petitioners do not receive that treatment *immediately*.

Consequently, the Court finds that this matter is not yet ripe for adjudication.

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[22] *Abbott Labs. v. Gardner,* 387 U.S. 136, 148–49, 87 S.Ct. 1507, 1516, 18 L.Ed.2d 681, 691 (1967).

[23] *Id.* at 148, 87 S.Ct. at 1516, 18 L.Ed.2d at 691.

[24] S*ee Abbott,* 387 U.S. at 149, 87 S.Ct. at 1515, 18 L.Ed.2d at 691.

E. ONE IOWA STANDING

Finally, Respondent contends One Iowa does not have standing to participate in this lawsuit. This Court agrees. One Iowa's claim to standing rests almost entirely on its stated mission: advance, empower, and improve the lives of LGBTQ Iowans statewide.

Under the current state of Iowa law, in order to establish standing, the complaining party must (1) have a specific personal or legal interest in the litigation and (2) be injuriously affected.[25] While One Iowa may have a legal interest in the ligation, it has failed to demonstrate how it has been injuriously affected. One Iowa's direct organizational standing argument is flawed because the argument rests almost entirely on its stated mission, which is so broad that it encompasses every component of an LBGTQ member's life, therefore making it impossible to discern the injury it has suffered from an injury to the population in general.[26] One Iowa's representational standing is also flawed because the relief requested requires the participation of individual members in the lawsuit. One Iowa claims nothing more than the general vindication of the public interest in seeing that the legislature acts in conformity with the constitution. "This is an admirable interest, but not one that is alone sufficient to establish the personal injury required for standing."[27]

ORDER

IT IS THEREFORE ORDERED Petitioners' Motion for Injunctive Relief should be and is hereby DENIED.

IT IS FURTHER ORDERED Respondents' Motion to Dismiss should be and is hereby GRANTED.

Costs assessed to Petitioners.

So Ordered.

[25] *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 475 (Iowa 2004).

[26] *See Godfrey v. State*, 752 N.W.2d 413, 420 (Iowa 2008)(citations omitted).

[27] *Id*. at 424.

State of Iowa Courts

Type: OTHER ORDER

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EQCE084567	MIKA COVINGTON ET AL V KIM REYNOLDS ET AL

So Ordered

David Porter, District Court Judge,
Fifth Judicial District of Iowa