**IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION**

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| **MELINDA FISHER, SHANNON G. by and through her guardian, BRANDON R. by and through his guardian, MARTY M. by and through his guardian, MISTY M. by and through her guardian, and NEAL SIEGEL,**<br><br>**on behalf of themselves and all others similarly situated,**<br><br>**PLAINTIFFS,**<br><br>**vs.**<br><br>**KIM REYNOLDS, in her official capacity of Governor of Iowa; JERRY FOXHOVEN In his official capacity as Director of the Iowa Department of Human Services,**<br><br>**DEFENDANTS.** | **No. 17-cv-0208**<br><br>**BRIEF IN SUPPORT OF MOTION TO DISMISS** |

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## FACTUAL BACKGROUND

Medicaid is an entitlement program for families and individuals with limited resources, most often low-income people who meet other eligibility criteria. The program is jointly funded by the participating state and the federal government. Medicaid is a payor of last resort. The budgeting process allocates the Department of Human Services with an appropriation. The Department must maintain all of its core services within the appropriation granted by the legislature and approved by the Governor. Operating the Medicaid program is one of several vital DHS programs providing services and support to the people of Iowa. If Medicaid exceeds its appropriation, and the Department does not receive a supplemental appropriation to cover the growth in the Medicaid program, the Department has been required to fund Medicaid services by reducing other Department benefits and services. Iowa is required, as is every other state that participates in the Medicaid program, to establish a plan that outlines the State's eligibility requirements, benefits and their scope, and the reimbursement methodology, along with other details.

In April 2016, the State of Iowa entered into risk-based contracts with three managed care organizations ("MCOs") to administer Iowa's Medicaid program. The federal Centers for Medicare and Medicaid Services ("CMS") approved of the transition to managed care, and indeed, promoted privatization of state Medicaid programs.

Under both fee for service and the managed care program, Iowa Medicaid operates Home and Community Based Services Waivers ("waivers") – specific

arrays of services designed to meet the needs of a targeted group of Medicaid members. The waivers under § 1915(c) of the Social Security Act were amended when managed care was implemented. Docket 15-3 (waiver application). CMS requires states to operate their waivers within cost neutral parameters. Member benefits must be managed to an average aggregate cost. Iowa does this, in part, through waiver caps established in administrative rules. Waivers must operate within cost neutrality parameters and manage member benefits to an average aggregate cap. Iowa Medicaid waiver caps are set forth in several administrative rules. 441 Iowa Admin. Code r. 83.2(2) (health and disability waiver); 441 Iowa Admin. Code r. 83.22(2) (elderly waiver); 441 Iowa Admin. Code r. 83.42(2) (AIDS/HIV); 441 Iowa Admin. Code r. 102(2) (physical disability waiver); 441 Iowa Admin. Code r. 83.82(2) (brain injury waiver); 441 Iowa Admin. Code r. 83.112(6) (children's mental health waiver); 441 Iowa Admin. Code r. 83.61(2) (intellectual disabilities waiver). To receive benefits above the waiver caps, a Medicaid member must receive an "exception to policy" pursuant to Iowa Code § 17A.9A to exceed the benefits provided by the administrative rules.

Ms. Fisher and her fellow Plaintiffs raised a number of complaints in their recently filed Amended Complaint. In doing so, the Plaintiffs have alleged that the Department of Human Services failed to provide adequate notice of the denial to exceptions to their HCBS waivers; that the Plaintiffs were denied due process because of the lack of non-arbitrary standards; that the Plaintiffs were denied reasonable promptness in services; and that the Defendants neglected

to consider the *Olmstead* standard and thereby violated the American with Disabilities Act as well as the Rehabilitation Act.

**ARGUMENT**

The defendants move to dismiss on the basis of failure to state a claim for which relief can be granted. Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 1937, 1949 (2009) (*quoting Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is "plausible on its face" when the allegations allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged, which is more than "a sheer possibility" that the defendant acted unlawfully. *Id.* A plaintiff merely alleging facts that are "consistent with" liability is insufficient. *Id.* In considering whether a complaint meets the plausibility standard, the court must accept all factual allegations as true; however, the court "is not bound to accept as true a legal conclusion couched as a factual allegation." *Carton v. General Motor Acceptance Corp.*, 611 F.3d 451, 454 (8th Cir. 2010) (*citing McAdams v. McCord*, 584 F.3d 1111, 1113 (8th Cir. 2009)). Speculative, conclusory, or nonspecific allegations are insufficient. *Cooper v. Schriro*, 189 F.3d 781, 784-85 (8th Cir. 1999). Although the facts may considered in a light most favorable to the complainant, the court need not accept conclusory allegations or legal conclusions as truth. *Hanten v. Sch. Dist. Of Riverview Gardens*, 183 F.3d 799, 805 (8th Cir.1999); *Westcott v. City of Omaha*, 901 F.2d 1488, 1488 (8th Cir. 1990).

**A. DUE PROCESS**

The Plaintiffs raise a due process assertion based on their alleged deprivation of a property interest in the exceptions to waivers and the unascertainable, arbitrary standards by which the denial or granting of exceptions is determined. "Analysis of either a procedural or substantive due process claim must begin with an examination of the interest allegedly violated, [t]he possession of a protected life, liberty, or property interest is . . .a condition precedent to any due process claim." *Singleton v. Cecil*, 176 F.3d 419, 421-22 (8th Cir. 1999)(internal quotations and citation omitted). There can be no violation in the absence of such an interest. *Dohse v. Potter*, No.8:04CV355, 2008 WL 281572 at *8 (D. Neb. 2008).

The Plaintiffs do not have a property interest in exceptions to waiver caps. *See McGuire v. Indep. Sch. Dist. No.833*, No.15-3885, __ F.3d __, 2017 WL 3122019 (8th Cir. 2017). Because exceptions to the waivers have a definite end date and require reapplication at the conclusion of the period allotted to the exception, any property interest that the Plaintiffs have in the exceptions end when the time period allotted ends, and any future interest is nothing more than a "mere expectancy not subject to due process protection." *See Christopher v. Windom Area Sch. Bd.*, 781 N.W.2d 904, 911 (Minn. Ct. App. 2010).

"To have a constitutionally cognizable property interest in a right or a benefit, a person must have 'a legitimate claim of entitlement to it.'" *Austell v. Sprenger*, 690 F.3d 929, 935 (8th Cir. 2012) (quoting *Bd. Of Regents v. Roth*, 408

U.S. 564, 577 (1972)). The Plaintiffs have no entitlement to the renewal of their previously granted exceptions to waivers. Their property benefit and entitlement end at the waiver cap, which is what the department is statutorily mandated to provide and which was not denied to any of the Plaintiffs. Exceptions to policy do not and cannot rise to the level of an entitlement because they are not mandated by law, and are subject to the agency's "sole discretion." Iowa Code § 17A.9A. "Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law….'" *Cleveland Bd. Of Educ. Loudermill*, 470 U.S. 532, 538 (1985) (alteration in original) (quoting *Roth*, 408 U.S. at 577).

Courts have created a standard to determine what constitutes a property interest eligible for due process claims.

> We have held that a state statute or policy can create a constitutionally protected property interest, first, when it contains particularized substantive standards that guide a decision makers and, second, when it limits the decision maker's discretion by using mandatory language (both requirements are necessary). *See Jennings v. Lombardi*, 70 F.3d 994, 995-96 (8th Cir. 1995). Statutes or policies that are only procedural, or that grant to a decision maker ***discretionary authority*** in their implementation, in contrast, ***do not create protected property interests***. *Id.* at 996.

*Dunham*, 195 F.3d at 1009 (emphasis added). On the one hand, the Plaintiffs argue that the standards that guide the department as decision makers are arbitrary and unascertainable, which would fail the first part of the test. However, paradoxically, the Plaintiffs also argue that they have a

legitimate property interest in the services provided via the exceptions to waivers.

Whether the particularized substantive standards exist is moot because the test is clear on the second issue, -- the level of discretion granted to the decision makers. The authority to grant the exceptions to waivers is within the *sole discretion* of the department and, thereby, there is no limit to that authority with the use of mandatory language. Iowa Code 17A.9A. In order for the Plaintiffs to show that they have a legitimate claim of entitlement to the exception to policy, they must be able to show that the standard for granting exceptions does not leave "considerable discretion" in the hands of the department. *McGuire*, 2017 WL 3122019 at *8 (citing *McDonald v. City of Saint Paul*, 679 F.3d 698, 705 (8th Cir. 2012)).

**B. NOTICE**

The Plaintiffs allege that they were denied due process because they were never given proper notice.

> A person has notice of a fact or condition if that person (1) has actual knowledge of it; (2) has received information about it; (3) has reason to know about it; (4) knows about a related fact; or (5) is considered as having been able to ascertain it by checking an official filing or recording. *Notice*, Black's Law Dictionary (10th ed. 2014). Notice, however, must satisfy due process in order to not deprive a party of an opportunity to be heard. *Espinosa*, 559 U.S. at 270–71, 130 S.Ct. 1367. "Due process requires notice 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.' " *Id.* at 272, 130 S.Ct. 1367 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). Actual notice, however, is a question of fact rather than a question of law. *Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 384 (5th Cir. 2000). Actual notice is

> defined as "notice given directly to, or received personally by, a party." *Actual Notice*, Black's Law Dictionary (10th ed. 2014). As actual notice is not the due process standard, if a creditor receives actual notice then due process is "more than satisfied." *Espinosa*, 559 U.S. at 272, 130 S.Ct. 1367.

*In re Shank*, 569 B.R. 238, 251 (Bankr. S.D. Tex. 2017). In the matter of Plaintiff Melinda Fisher, she was aware that her application for an exception had been denied prior to the mailed letter arriving at her residence because Ms. Fisher's case manager had informed and she had already started the appeals process. (Amended Complaint, p.31). Ms. Fisher had actual notice of the denial to the exception and was not denied due process as a result. The highly factual nature of notice as applied to each of the individual Plaintiffs lends credence to the Defendants' argument that class certification in this case is inappropriate.

Whether the Plaintiffs received actual notice *after* the MCOs had denied their applications for exceptions is the incorrect standard by which to measure whether the Plaintiffs were allotted due process. The Plaintiffs each had notice and knowledge of the dimensions of their property interest in the exception when they were initially granted because the exceptions included an end date. Docket 15-14 (Fisher Affidavit). By including an end date, the Plaintiffs were notified about when their property interest in the exception would expire. *See McGhee v. Miller*, 680 F.2d 1220, 1221 (8th Cir. 1982) (stating that the employer was not required to give further notice of their refusal to renew the McGhee's employment when the time period of his previous employment had concluded).

The case managers repeatedly apply for exceptions close to the end-date of the prior exception, indicating that the exceptions are temporary in nature

and that there is no assumption that they would continue beyond the point of the last day listed when the exception is granted. *See Malone v. Des Moines Area Comm. College*, No.4:04-CV-40103, 2005 WL 290008 (S.D. Iowa 2005) (asserting that the temporary nature of the Plaintiff's employment should have served as sufficient notice to the employee that he has no reasonable expectation in continued employment). There is no automatic right of renewal in the waivers or their exceptions. Iowa Code §17A.3.

**C. Reasonable Promptness**

Plaintiffs correctly assert that they are entitled to reasonable promptness in the receipt of services under the Medicaid program if they are deemed eligible for the receipt of those services pursuant to Title XIX of the Social Security Act, 42 U.S.C. §1396a(a)(8). This does not guarantee the Plaintiffs services for which they have been deemed ineligible or guarantee that the individual is entitled to exceptions of policy above the state's cap on waiver services. Additionally, although waiver services have the reasonable promptness requirement, the *exceptions* to that service do not.

Plaintiffs may allege a violation on 42 U.S.C. § 1983 for failure to provide Medicaid Waiver services with reasonable promptness. *Guggenberger v. Minnesota*, 198 F.Supp3d 973, 1007 (D. Minn. 2016); *Lewis v. N.M. Dept. of Health*, 275 F.Supp.2d 1319, 1332-33 (D.N.M. 2013). Applying the three part test found in *Blessing v. Freestone*, to determine if reasonable promptness is an applicable standard the court needs to consider whether the service is: "(1) intended to benefit 'eligible individuals'; (2) not so 'vague and amorphous' that

is cannot be judicially enforced; and (3) mandatorily imposed upon participating states." 520 U.S. 329 (1997); *Guggenberger*, 198 F.Supp.3d at 1007. The exceptions to policy fail on the first part of the test because there are no eligibility requirements for individuals to receive an exception to the waiver cap; instead, the statute vests complete discretion with the department to issue any variances they deem appropriate as long as the factors enumerated in the statute are met. Iowa Code §17A.9A. Second, the court must determine whether providing a service with reasonable promptness "was not so 'vague and amorphous' that its enforcement would strain judicial competence." 520 U.S. at 340-41). To task the judicial system with anticipating the manner in which the agency would apply its sole discretion to grant exceptions to policy would create a burden that would go unmet. The mere existence of exceptions to waiver does not impose an unambiguous binding obligation on the state.

Even if the exceptions to policy carried with it a requirement to provide services with reasonable promptness, the Defendants have met that requirement because there was no lapse in services alleged by any of the Plaintiffs, only a decrease to the waiver cap. In cases that have dealt with the statutory requirement for reasonable promptness in services have a distinguishable factual basis in which the Plaintiffs have primarily alleged that the State failed to grant the Plaintiffs waivers for which they were eligible or that they were on the waiting list and were not promptly receiving eligible services. *Guggenberger*, 198 F.Supp.3d at 1007; *Bertrand v. Maram*, 495 F.3d 452 (7th Cir. 2007).

**D. Americans with Disabilities Act and Rehabilitation Act**

Counts four and five of the Plaintiffs' complaint allege discrimination under the Americans with Disabilities Act ("ADA") and Section 504 of the Rehabilitation Act. In cases that do not involve an alleged failure to provide reasonable accommodations, the Plaintiffs would have had to allege facts that showed ill-intent by the Department in their decision making and provided facts supporting disparate treatment. *See Lowery v. Hazelwood Sch. Dist.*, 244 F.3d 654, 659 (8th Cir. 2001). However, when the alleged discrimination is based on a failure to provide reasonable accommodations, the Plaintiffs need to allege that the offending party failed to satisfy an affirmative duty, regardless of discriminatory intent. *Peebles v. Potter*, 354 F.3d 761, 767 (8th Cir. 2004).

The Defendants had an affirmative duty to provide waiver benefits to eligible individuals, which was a duty they performed and none of the facts alleged in the Complaint state to the contrary. Furthermore, the Defendants had an affirmative duty to accept and review applications for the exceptions to policy. This, too, was done. Nothing in the Amended Complaint states that the Plaintiffs' applications were not reviewed, only that they were denied. The Defendants do not have an affirmative duty to *grant* exceptions to policy.

States are required to make "reasonable modifications" to avoid discrimination on the basis of disability, but are not required to take measures that fundamentally alter the nature of the State's Medicaid program. *Olmstead v. L.C.*, 527 U.S. 581 (1999); 28 C.F.R. § 35.130(d); 28 C.F.R. § 35.130(b)(7). The court "must consider, in view of the resources available to the State, not only

the cost of providing community-based care to the litigants, but also the range of services the State provides others with mental disabilities and the State's obligation to mete out those services equitably." *Id.* at 597.

Federal law requires waiver programs to remain cost-neutral; Medicaid services need to be cost-effective to ensure benefits are received by as many people as need the services. *See* Iowa Admin. Code r. 441-81(preamble). Iowa is subject to the same cost neutrality that any other state in the program. *Lankford v. Sherman*, 451 F.3d 496, 509-10 (8th Cir. 2006) (holding Supremacy Clause preempts conflicting state law that impedes Congress's goal for the Medicaid program). "[T]he State has great discretion in developing its waiver programs, including setting eligibility requirements and limitations for waiver services." *Lewis v. New Mexico Dep't of Health*, 275 F. Supp. 2d 1319, 1345 (D.N.M. 2003) (adjudicating challenge to unspent waiver funds).

To manage to an average aggregate cap, any one Medicaid member *cannot* have an entitlement to exceed the cap, even if the Member receives, for a time, the benefit of the exception and greater support. The State must balance the needs of all of the persons served on the waiver to the federally mandated point of cost neutrality. Considering an exception to policy as an individual entitlement would destroy cost neutrality and fundamentally alters the nature of the program. *See Olmstead*, 527 U.S. at 604 ("Sensibly construed, the fundamental-alteration component of the reasonable-modifications regulation would allow the State to show that, in the allocation of available resources, immediate relief for the plaintiffs would be inequitable, given the responsibility

the State has undertaken for the care and treatment of a large and diverse population of persons with mental disabilities."). An exception to policy is an available benefit, but not an entitlement. Iowa's flexibility under the waiver is a key tool in serving Iowans with disabilities in the community.

Plaintiffs fail to take into account the cost neutrality requirement for the waiver program. They fail to allege that it was not a determinative factor in the decision to deny these Plaintiffs their exceptions to policy. In alleging that the denials had a discriminatory effect on these individuals, the Plaintiffs ignore the third prong of *Olmstead*, which requires the court to consider whether "the placement can be reasonably accommodated, taking into account the resources available to the State and the need of others with disabilities." *Olmstead*, 527 U.S. at 607.

**E. Personal Responsibility**

A Plaintiff may bring a section 1983 claim only against those individuals actually responsible for the constitutional deprivation. *Doyle v. Camelot Care Centers*, 305 F.3d 605, 614-615 (7th Cir. 2002); *Delefont v. Beckelman*, 264 F. Supp. 650, 656, (N.D. Ill 2003). Defendants are only liable for actions for which each is directly responsible. *Madewell v. Roberts*, 909 F.2d 1203, 1208 (8th Cir. 1990). A general responsibility for supervising operations is insufficient to establish the personal involvement necessary to support liability. *Keeper v. King*, 130 F.3d 1309, 1314 (8th Cir. 1997). In bringing a 1983 claim a Plaintiff may not rely on the doctrine of respondeat superior, but must allege personal involvement in the wrongdoing. Plaintiffs admit that it was not the direct

action of any of the named Defendants but the Defendants *agents*' actions at issue. Plaintiffs frame their claims as against the Governor of Iowa and the Director of the Department of Human Services, knowing that Medicaid transitioned to managed care in April 2016. The State's role is now as contract manager, rather than directly implementing the Medicaid program as it did before managed care.

**F. Sovereign Immunity**

The Eleventh Amendment bars suits against officials of the State. *Hafer v. Melo*, 502 U.S. 21, 25 (1991) ("[T]he Eleventh Amendment bars suits in federal court 'by private parties seeking to impose a liability which must be paid from public funds in the state treasury.'" (quoting *Edelman v. Jordan*, 415 U.S. 651, 663 (1974)). The claims against the defendants in their official capacities are claims against the State of Iowa. *Leventhal v. Schaffer*, No. 07-cv-4059, 2008 WL 111301 *4 (N.D. Iowa Jan. 8, 2008). "When a state is directly sued in federal court, it must be dismissed from litigation upon its assertion of Eleventh Amendment immunity. . .." *Barnes v. Missouri*, 960 F.2d 63, 64 (8th Cir. 1992). Plaintiffs framed their lawsuit as "official capacity" claims[1], which avoid the application of sovereign immunity precisely because they are injunctive (and non-monetary) in nature. *See Ex parte Young,* 209 U.S. 123 (1908). "This standard allows courts to order prospective relief, as well as measures ancillary

[1] "[A] suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself." *Will v. Michigan Dep't of State Police,* 491 U.S. 58, 71 (1989) (internal citations omitted).

to appropriate prospective relief." *Frew v. Hawkins,* 540 U.S. 431, 437 (2004). Despite this attempt to avoid the protections of immunity, the Governor is not an appropriate defendant because she is not in a position to grant injunctive, prospective relief. Further, the real issue here is that Plaintiffs want to receive exceptions to policy to be served in the community. Funding services is a draw on the treasury, and does not properly avoid the protections the sovereign state of Iowa has against being haled into federal court.

> The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or Citizens or Subjects of any Foreign State." This Court has drawn upon principles of sovereign immunity to construe the Amendment to "establish that 'an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state.' " *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 100, . . . (1984). . . . The Eleventh Amendment bar to suit is not absolute. . . . Congress may abrogate the States' sovereign immunity.

*Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 304-07 (1990). State sovereign immunity is a fundamental aspect of the sovereignty that the states enjoyed before the ratification of the Constitution and the Eleventh Amendment, and it was preserved intact by the Constitution. *Alden v. Maine,* 527 U.S. 706, 713 (1999). The Supreme Court explained,

> Our opinion in *Atascadero* should have left no doubt that we will conclude Congress intended to abrogate sovereign immunity only if its intention is 'unmistakably clear in the language of the statute.' *Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 242 (1985). Lest *Atascadero* be thought to contain any ambiguity, we affirm today that in this area of the law, evidence of congressional intent must be both unequivocal and textual.

*Dellmuth v. Muth*, 491 U.S. 223, 230 (1989).

The Supreme Court recognized two circumstances in which an individual may sue a State, only one of which is applicable. "Congress may abrogate the states' immunity by authorizing such a suit in the exercise of its power to enforce the Fourteenth Amendment—an Amendment enacted after the Eleventh Amendment and **specifically designed to alter the federal-state balance**." *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670 (1999) (citing *Fitzpatrick v. Bitzer,* 427 U.S. 445 (1976)) (emphasis supplied). The second and inapplicable mechanism to abrogate immunity is by State consent. Eleventh Amendment immunity is not abrogated by 42 U.S.C. § 1983. *See, e.g., Graves v. Stone*, 25 F. App'x 488, 490 (8th Cir. 2002).

A. Governor Reynolds

The Single State Agency charged with administration of the Medicaid program is the Department of Human Services. 42 C.F.R. § 431.10. The Governor is not in a position to directly control the implementation of the Medicaid program. Certainly she will act through guidance to the Department, but any separate liability for the Governor is inappropriate and unnecessary. *Kobe v. Haley*, No. 15-1419, 666 Fed. Appx. 281 (4th Cir. Dec. 15, 2016). In *Kobe*, the Fourth Circuit held that because the administration of Medicaid was assigned to a single State agency, any claims against the Governor were too attenuated to be proper under *Ex Parte Young*. The same is true in this matter.

B. Real Issue is Services

Although the Plaintiffs frame their Amended Complaint in terms of notice and due process, the real issue is whether the Plaintiffs will continue to receive exceptions to policy. A request for services under Medicaid is a draw on the State's treasury.

In *Ford Motor Co. v. Department of Treasury*, 323 U.S. 459 (1945), the Court said:

> (W)hen the action is in essence one for the recovery of money from the state, the state is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officials are nominal defendants. (internal citations omitted). Thus the rule has evolved that a suit by private parties seeking to impose a liability which must be paid from public funds in the state treasury is barred by the Eleventh Amendment. *Great Northern Life Insurance Co. v. Read*, 322 US. 47 (1944); *Kennecott Copper Corp. v. State Tax Comm'n*, 327 U.S. 573 (1946).

*Edelman v. Jordan*, 415 U.S. 651, 663 (1974). The Supreme Court does not "read *Ex Parte Young* or subsequent holdings of this Court to indicate that any form of relief may be awarded against a state officer, no matter how closely it may in practice resemble a money judgment payable out of the state treasury, so long as the relief may be labeled 'equitable' in nature." *Edelman* 415 U.S. at 665-67. Equitable allocations may be barred by the Eleventh Amendment. *Id.* Eleventh Amendment immunity represents a real limitation on a federal court's authority. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 2170-71 (1997). The *Ex Parte Young* exception to Eleventh Amendment Immunity applies only when the official is commanded to do nothing more than refrain from violating federal law; it does not spare from immunity an order that would expend itself

on the public treasury. *Virginia Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 254-55 (2011).

*Ex Parte Young* also prohibits an order requiring specific performance of a state contract. *Id.* (citing *Edelman*, 415 U.S. at 666; *In re Ayers*, 123 U.S. 443 (1887)). The State of Iowa has elected to provide Medicaid services by contracting with national MCOs. That decision is fully within the State's discretion to make. This lawsuit not only offends the State's ability to manage the Medicaid program, but relief sought could interfere with the contractual relationship between the State of Iowa and its MCO partners.

The State of Iowa has special sovereign interest in the implementation of its Medicaid program, which is an executive branch function. *See Union Elec. Co. v. Mo. Dep't of Conservation*, 366 F.3d 655, 658 (8th Cir.2004) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281 (1997)). The State of Iowa also has special sovereign interests in maintaining spending within the legislatively appropriated budgets. The legislature's task of balancing the many worthy requests against the available resources is a difficult task, and one uniquely suited to elected officials. Those elected are directly accountable to the people of Iowa for their funding decisions.

Besides, the Supreme Court recently determined the Medicaid Act's complexity and broad, nonspecific enabling charge demonstrate Congressional intent that the program be administered by executive branch Departments. *Armstrong v. Exceptional Child Ctr, Inc.*, 135 S. Ct. 1378, 1385 (2015) (holding the sheer complexity associated with enforcing § 30(A) coupled with the

express provision of an administrative remedy, § 1396c, shows that the Medicaid Act precludes private enforcement of § 30(A) in the courts). "Explicitly conferring enforcement of this judgment-laden standard upon the Secretary alone establishes, we think, that Congress 'wanted to make the agency remedy that it provided exclusive,' thereby achieving 'the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decision making,' and avoiding 'the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action.'" *Id., citing Gonzaga Univ. v. Doe,* 536 U.S. 273, 292 (2002) (BREYER, J., concurring in judgment).

**CONCLUSION**

The Defendants respectfully move to dismiss this matter for failure to state a claim. The exceptions to policy at issue are purely creatures of State Administrative Rule, which according to the Iowa Code, the DHS Director has sole authority and discretion to waive. Exceptions allowing a person on the waiver to receive more than the average aggregate cap are a benefit, but not a property right. The Plaintiffs each receive notice of the termination of the benefit at the time the benefit is conferred – exceptions have a definite time limit. More importantly, the relief requested does not fit within the Ex Parte Young exception to haling a state sovereign into federal court. The Governor is not charged with administering Iowa's Medicaid program – by statute, the DHS is the single state agency responsible for Iowa Medicaid. And although the

Plaintiffs frame their claim as one for prospective injunctive relief, at its core, the claim is one for services which is a draw on the State's treasury. The executive branch has a special sovereign interest in the implementation of the State's Medicaid program. The legislative branch has a special sovereign interest in ensuring the program operates within the limits of the appropriation granted it. Because the Medicaid program requires relative judgment on service allocation to meet the average aggregate cap within the waiver, it is uniquely suited to the executive branch to administer.

**WHEREFORE**, the Defendants respectfully moved that this claim be **DISMISSED**, costs taxed to Plaintiffs, that the filing fee be assessed to Plaintiffs, and for any further relief appropriate under the circumstances.

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I certify that the attached was filed via CM/ECF on August 18, 2017. /s/ Gretchen Kraemer

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