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

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, **on behalf of themselves and all others similarly situated,** **PLAINTIFFS,** **vs.** **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,** **DEFENDANTS.**	**No. 17-cv-0208** **REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS**

Defendants submit the following Reply Brief in Support of their Motion to Dismiss:

I. The Right to Request Exceptions to Policy Does Not Equate to a Right to Receive Such an Exception.

Exceptions to policy are subject to the department's "sole discretion." Iowa Code § 17A.9A. Both the governing statute and the State's Waiver Application illustrate that requesting parties are only granted the right to *request* exceptions to policy – not a right to be granted such exceptions. *See id.*; (Doc. 15-3, at 22, 200-201) ("If there is a need…the participant has the right to *request* an exception to policy.") (emphasis added). The Plaintiffs do not deny that they were able to request exceptions and in so doing, the State complied

with federal requirements. *Compare* CMS, 1915(c) Technical Guide at 133 (expounding provisions that required a description of the conditions under which limit "may" be adjusted), *with* Iowa Code 17A.9A(2) (describing considerations which, if met, allow an agency to grant an exception to policy in its sole discretion), *and* Iowa Admin. Code r. 441-1.8(2) (same). This distinction is critical. Because recipients are only vested with the right to *request*, not receive, exceptions to policy, Plaintiffs' Due Process claim cannot be sustained. In the absence of both "particularized substantive standards that guide a decision maker" *and* "mandatory language" that "limits the decision maker's discretion," no constitutionally protected property interest can be upheld. *McGuire v. Indep. School Dist. No. 833*, No. 15-3885, --- F.3d ---, 2017 WL 3122019, at *3 (8th Cir. July 24, 2017). Further, the cap rate set in administrative rule is the equivalent of what Medicaid would pay for institutional care. By acknowledging they exceed the cap rate and require an exception to policy to be served, Plaintiffs admit they cannot be served at a cost neutral level.[1]

II. Notice of Termination Given at the Time of Granting Temporary Exceptions to Policy Satisfies Due Process.

Whereas the absence of a cognizable property interest precludes Plaintiffs' Due Process claims, Plaintiffs also fail to address the substance of the notice issue. Exceptions to policy granted to Plaintiffs specifically provided that exceptions were temporary, and would expire at a date certain. *See, e.g.,*

[1] Further, the Department has the right to disenroll a Medicaid member from the waiver for exceeding the waiver cap. See, e.g., 441 IAC 83.8(2).

(Doc. 8, ¶ 156). As a result, the Plaintiffs had actual notice, in addition to any other notice later received, of the natural expiration of their exceptions to policy. *See* Iowa Code § 17A.9A(3) ("If a temporary waiver or variance is granted, there is no automatic right to renewal.").

By statute, exceptions to policy are waivers of law that, unlike services, are temporally limited by their very nature. Iowa Code § 17A.9A(3). Exceptions to policy do not entitle a recipient to services; rather, exceptions to policy merely make it *feasible* for a recipient to receive services beyond the regulatory cap. Therefore, the fact Plaintiffs requested additional exceptions to policy has no bearing on the fact adequate notice was provided as to the natural expiration of their previous exceptions to policy. Indeed, the very fact that Plaintiffs *did* reapply for their exceptions to policy underscores their notice of its temporary nature.

III. The State Cannot Be Required To Provide Exceptions to Policy Under the Reasonable Promptness Standard.

Plaintiffs' claim that Defendants' obligation "to consider making an exception," means exceptions are "integral part[s] of the Defendants' scheme for allocating HCBS" such as to warrant enforcement via the reasonable promptness provision of the Medicaid Act. (Doc. 28 at 13). Nowhere in their Complaint do Plaintiffs allege that Defendants failed to *consider* Plaintiffs' exceptions to policy, which Plaintiffs recognize is Defendants' only obligation. (Doc. 28 at 13). Similarly, Plaintiffs have not alleged that Defendants have failed to provide those Medicaid services to which Plaintiffs are entitled up to the

limits proscribed by law. As a result, there are no services to which Plaintiffs are *entitled* that have not been provided with reasonable promptness.

Notably, Plaintiffs do not contest that the exception process would not be subject to the reasonable promptness standard as stated by the Supreme Court in *Blessing v. Freestone*, 520 U.S. 329 (1997). The analysis previously stated by Defendants is applicable.

IV. Plaintiffs' Claims Seek Money Damages.

Plaintiffs cite several cases to support the proposition that merely because an equitable claim has an adverse impact on a state treasury, such is insufficient to fall outside the exceptions of *Ex Parte Young*. This is not a question before this Court. Unlike the cases cited by Plaintiff, the issue is not an incidental monetary cost to the state, but rather the direct disbursement of funds to or for the benefit of Plaintiffs. *Compare Antrican v. Odom*, 290 F.3d 178, 185 (4th Cir. 2002) (case cited by Plaintiffs discussing reimbursement rates to providers), *with Durnan v. Delaware*, No. 14-470, --- F. Supp. 3d ---, 2017 WL 1102771, at *6 (D. Del. Mar. 24, 2017) ("Plaintiffs further stated that they would obtain 'a large amount in monetary damages' if the Court were to award prospective declaratory relief. As such, Plaintiffs' request 'would be little different than a ... direct federal court award of money damages against' the State of Delaware and would also amount to 'an impermissible end run around [the Supreme Court's] Eleventh Amendment jurisprudence.'") (*quoting Mills v. Maine*, 118 F.3d 37, 55 (1st Cir. 1997)).

V. Governor Reynolds Has Not Waived Immunity.

Plaintiffs allege the Governor "decided unilaterally to deliver Medicaid services through private managed care plans in Iowa." Br. at 19. This is a facially implausible assertion given that Governor Reynolds only recently became Governor and the Plaintiffs allege managed care began in April, 2016. Plaintiffs have not addressed the single state agency requirement in federal law which was addressed in *Kobe v. Haley*, 666 F. App'x 281, 300 (4th Cir. 2016). Plaintiff's suggestion that acceptance of federal funds under the Rehabilitation Act is a waiver of Eleventh Amendment immunity is limited to claims made under the Rehab Act. The case cited by Plaintiff supports Defendants' position that broad supervisory powers alone are insufficient to subject the Governor to liability under all but the Rehab Act claims. *Ball by Burba v. Kaisch*, No. 2: 16-cv-00282, 2017 WL 1102688 (S.D. Ohio Mar. 23, 2017). The allegations under the Rehab Act are too imprecise to support a claim against the Governor under *Twombly*. Plaintiffs allege, at paragraph 228, that "The Defendants policy of denying, terminating, and reducing HCBS to Plaintiffs without a reasonable modification" violates the Rehabilitation Act. The Governor is not the person completing any of the alleged infringing actions of "denying, terminating or reducing HCBS." The Plaintiffs themselves filed the contract with the MCOs in this matter. It is the MCOs, not the Governor, who make service authorization decisions. Even if immunity does not stand against a Rehab Act claim, the allegations do not support retaining the Governor as a defendant in this matter.

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I certify that the attached was filed via CM/ECF on September 8, 2017. /s/ Gretchen Kraemer

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