

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

JESSICA MARIE BUNTEMEYER and JENNIFER LEE BUNTEMEYER,	CASE NO. CV 9041
Petitioners,	
v.	RULING ON APPLICATION FOR JUDICIAL REVIEW
IOWA DEPARTMENT OF PUBLIC HEALTH,	
Respondent.	

On October 26, 2012 the above-captioned matter came before the Court on Petitioner’s Petition for Judicial Review. The Petitioners were represented by their counsel, Sharon K. Malheiro, Camilla B. Taylor, Kenneth D. Upton, Jr., and Beth Littrell. The Respondent was represented by its counsel, Assistant Attorney General Heather L. Adams. After reviewing the court file, including the briefs filed by both parties and certified record, and the exhibits admitted into evidence, the Court now rules as follows:

BACKGROUND FACTS AND PROCEDURAL HISTORY

Petitioners Jessica and Jennifer Buntmeyer are a married lesbian couple.¹ (Exs. 4; 5). The Buntmeyers claim the Respondent Iowa Department of Public Health (“DPH”) improperly refused to register Jennifer on the Certificate of Fetal Death (“Certificate”) for Brayden Buntmeyer.

A Certificate is the official state record of a fetal death. (Ex. A ¶ 4). A Certificate contains many fields to record information about the stillborn child, including the child’s “mother” and “father.” (Cert. Rec. at 1). The only parental designations on a Certificate are the

¹ The Buntmeyers submitted a copy of their Certificate of Marriage to the Court, which states they married in Iowa on October 8, 2010. (Ex. 1). The Respondent agency made no factual finding regarding their marital status. However, the agency does not dispute the Buntmeyers are a married lesbian couple. (Resp. Br. at 15).

“mother” and “father” fields. (Cert. Rec. at 1). A Certificate asks for the several pieces of information about the “father:” full name, date of birth, state of birth, Hispanic background, race, education, and occupation and business/industry. (Cert. Rec. at 1).

DPH received Brayden’s Certificate the week of October 31, 2011. (Ex. A ¶ 14). According to the Certificate, Brayden was stillborn on October 21, 2011 at about 30 gestational weeks.² (Cert. Rec. at 1). When DPH received the Certificate, Jessica’s information was entered as the “mother,” and Jennifer’s information was entered as the “father.” (Cert. Rec. at 1; Ex. A ¶ 14). The Certificate also indicates Jessica was married. (Cert. Rec. at 1). DPH staff altered the Certificate to remove Jennifer’s name and information from the “father” field.³ (Cert. Rec. at 1; Ex. A ¶ 14). DPH staff then registered Brayden’s Certificate on November 3, 2011. (Cert. Rec. at 1). The registered Certificate, as well as a certified copy of the Certificate, lists Jessica as Brayden’s “mother,”⁴ but contains no information about Jennifer or Brayden’s “father.”⁵ (Cert. Rec. at 1, 2).

DPH did not issue a formal decision regarding Brayden’s Certificate. (Cert. Rec.). However, Jill France, the Bureau Chief for the Bureau of Health Statistics within DPH, submitted an affidavit to the Court explaining DPH procedure and its actions. (Ex. A). According to France’s affidavit, DPH maintains “accurate and complete records and statistics of all vital events in Iowa, including fetal deaths.” (Ex. A ¶ 4). DPH maintains vital records to (1) provide public access for vital event records, (2) monitor and educate about public health,

² The Buntmeyers submitted several exhibits providing factual background on Brayden. According to their affidavits, Brayden was conceived using in vitro fertilization with an egg that was collected from Jennifer and implanted in Jessica. (Exs. 4 ¶ 7; 5 ¶ 4). According to Jessica’s affidavit, the couple used an anonymous sperm donor to fertilize the egg. (Ex. 5 ¶ 4). DPH agrees Jessica is Brayden’s gestational mother. (Resp. Br. at 15).

³ By agency rule, DPH may correct “obvious errors” in vital records. IOWA ADMIN. CODE r. 641-102.2 (2012).

⁴ The Buntmeyers do not claim DPH erred by registering Jessica as the “mother” on Brayden’s Certificate.

⁵ According to Jennifer’s affidavit, the Buntmeyers requested a certified copy of Brayden’s Certificate so they would have an official record of Brayden as part of a memorial for him. (Ex. 4 ¶ 15). According to this affidavit, the couple learned DPH had removed Jennifer’s information when they received this certified copy. (Ex. 4 ¶ 16).

(3) disclose data to researchers, and (4) share data with other agencies as necessary. (Ex. A ¶ 5). DPH registers approximately 100,000 events each year, including about 200 Certificates. (Ex. A ¶¶ 3, 10).

According to France’s affidavit, DPH interprets the term “father” on a Certificate as the male parent of the child. (Ex. A ¶ 7). DPH staff redacted Jennifer’s name and information from Brayden’s Certificate “based on the biological fact that a woman cannot be the father of a child and that entry of a woman as a father of a stillborn child would result in an inaccurate certificate of fetal death for purposes of public health programming, statistics, and research.”⁶ (Ex. A ¶ 14). DPH’s general practice is to “accept the mother’s attestation as to the identity of the father.” (Ex. A ¶ 12). DPH does not typically verify information on a Certificate. (Ex. A ¶ 11). Instead, DPH expects that registrants follow their legal duty and provide accurate information. (Ex. A ¶ 11). Usually, a married mother identifies her husband as the “father” on a Certificate, but DPH does not require her to do so. (Ex. A ¶ 12). DPH policy allows registrants to leave the “father” field on a Certificate blank, although most registrants name a “father” whether the mother is married or unmarried.⁷ (Ex. A ¶¶ 8–9).

On February 28, 2012, the Buntmeyers filed this Petition for Judicial Review. The Buntmeyers argue DPH’s refusal to register the wife of a mother⁸ on a Certificate is (1) inconsistent with DPH’s prior practice, (2) based on an improper purpose, (3) based on an

⁶ A Certificate does not specify the parents’ gender other than the labels “mother” and “father.” (Cert. Rec. at 1). The record does not explain how DPH determined Jennifer is a woman, although France’s affidavit indicates staff acted “[u]pon review of” Brayden’s Certificate. (Ex. A ¶ 14). Presumably, staff realized Jennifer is a traditionally feminine name, and a person named Jennifer would likely be female.

⁷ DPH submitted a summary of the “father” information on Certificates registered between 2009 and 2011. (Ex. G). In this time, DPH registered 349 Certificates from married mothers, and all of these contained “father” information. In this same time, DPH registered 191 Certificates from unmarried mothers with “father” information, and 32 Certificates from unmarried mothers with no “father” information.

⁸ Throughout this Ruling, “mother” refers to the gestational mother.

erroneous interpretation of a provision of law, (4) in violation of a provision of law, and (5) unconstitutional.

STANDARD OF REVIEW

On judicial review of agency action, the district court functions in an appellate capacity to apply the standards set forth in IOWA CODE § 17A.19. *Iowa Planners Network v. Iowa State Commerce Comm'n*, 373 N.W.2d 106, 108 (Iowa 1985). The district court's review is limited to corrections of errors of law and is generally not de novo. *Harlan v. Iowa Dep't of Job Serv.*, 350 N.W.2d 192, 193 (Iowa 1984). The Court has no original authority to declare the rights of the parties. *Office of Consumer Advocate v. Iowa State Commerce Comm'n*, 432 N.W.2d 148, 156 (Iowa 1988). Nearly all disputes in the field of administrative law are won or lost at the agency level. *Iowa-Ill. Gas & Elec. Co. v. Iowa State Commerce Comm'n*, 412 N.W.2d 600, 604 (Iowa 1987). Judgment calls are to be left to the agency. *Burns v. Bd. of Nursing*, 495 N.W.2d 698, 699 (Iowa 1993).

The Court may affirm the agency decision or remand to the agency for further proceedings. IOWA CODE § 17A.19(10) (2011). The Court “shall reverse, modify, or grant other appropriate relief from agency action, equitable or legal and including declaratory relief, if it determines that substantial rights of the person seeking judicial relief have been prejudiced” for any of the grounds listed under the statute. *Id.* “The burden of demonstrating the required prejudice and the invalidity of agency action is on the party asserting invalidity.” *Id.* § 17A.19(8)(a).

ANALYSIS

A. DPH's Prior Practice

The Buntmeyers argue DPH's refusal to register a mother's wife on a Certificate is inconsistent with DPH's prior practice. *Id.* § 17A.19(10)(h). The Court must reverse, modify, or grant other appropriate relief from the challenged action if it was "inconsistent with the agency's prior practice or precedents, unless the agency has justified that inconsistency by stating credible reasons sufficient to indicate a fair and rational basis for the inconsistency." *Id.* This language "was intended to amplify review under the unreasonable, arbitrary, capricious, and abuse-of-discretion standards." *Finch v. Schneider Specialized Carriers, Inc.*, 700 N.W.2d 328, 332 (Iowa 2005). Agency decisions should not apply "rigid rules based solely on prior decisions," but should consistently reason and weigh "factors leading to a decision tailored to fit the particular facts of the case." *Anthon-Oto Cmty. Sch. Dist. v. PERB*, 404 N.W.2d 140, 144 (Iowa 1987) (citing *City of Davenport v. PERB*, 264 N.W.2d 307, 312 (Iowa 1978)).

DPH policy allows registration of up to two parents on a Certificate: one mother and one father. According to France's affidavit, the "father" on a Certificate must be male. The affidavit also states DPH has never knowingly registered a mother's wife as a parent on a Certificate. Since "father" is the only field to register a non-gestational parent on a Certificate, and DPH policy requires the "father" to be male, DPH's refusal to register a mother's wife on a Certificate is consistent with its policy. Therefore, DPH's refusal to register a mother's wife on a Certificate is not "inconsistent with the agency's prior practice." IOWA CODE § 17A.19(10)(h).

The Buntmeyers argue DPH policy requires the registration of the mother's spouse on a Certificate. DPH acknowledged it generally registers the mother's spouse as the "father." However, France's affidavit explicitly denies strict adherence to such a policy. The

Buntemeyers submitted no evidence showing DPH always registers the mother's spouse on a Certificate. Accordingly, the Buntemeyers cannot satisfy their burden to prove DPH always follows a policy of registering the mother's spouse on a Certificate. *See* IOWA CODE § 17A.19(8)(a).

B. Improper Purpose

The Buntemeyers argue DPH's refusal to register a mother's wife on a Certificate is the product of an improper purpose. IOWA CODE § 17A.19(10)(e). The Court must reverse, modify, or grant other appropriate relief from the challenged action if it was "[t]he product of decision making undertaken by persons who were improperly constituted as a decision-making body, were motivated by an improper purpose, or were subject to disqualification." *Id.* A petitioner must raise this issue before the agency to allow the agency to address it. *Berger v. Dep't of Transp.*, 679 N.W.2d 636, 641 (Iowa 2004) (citing *Council Bluffs Cmty. Sch. Dist. v. City of Council Bluffs*, 412 N.W.2d 171, 173 (Iowa 1987)).

The Buntemeyers did not raise the issue of improper purpose before DPH. By failing to raise the issue below, the Buntemeyers failed to preserve the issue of improper purpose on judicial review. *See id.*

Even if the Buntemeyers had preserved the issue for judicial review, they cannot prove an improper purpose. The Buntemeyers argue DPH's refusal to register a mother's wife on a Certificate shows DPH has improperly discriminated because it prefers biological parent-child relationships over other legal parent-child relationships, traditional family structures over non-traditional family structures, and conception via intercourse over conception via reproductive technologies. Regardless of any inferences the Buntemeyers may draw from DPH's policy, these inferences cannot satisfy the Buntemeyers' burden to show the DPH acted erroneously.

See IOWA CODE § 17A.19(8)(a). DPH argues biology drives its policy; a woman cannot biologically be the “father,” or male parent, of a child. By refusing to register a mother’s wife on a Certificate, DPH acted consistently with its stated purpose of registering only a male as the “father.” Therefore the Buntmeyers cannot prove DPH’s refusal to register a same-sex spouse on a Certificate is the product of an improper purpose. IOWA CODE § 17A.19(10)(e).

C. *Statutory Law*

The Buntmeyers argue DPH’s refusal to register a mother’s wife as a parent on a Certificate violates a provision of law. IOWA CODE § 17A.19(10)(b). The Court must reverse, modify, or grant other appropriate relief from the challenged action if it was “[b]eyond the authority delegated to the agency by any provision of law or in violation of any provision of law.” *Id.* A “provision of law” is “the whole or part of the Constitution of the United States of America or the Constitution of the State of Iowa, or of any federal or state statute, court rule, executive order of the governor, or agency rule.” IOWA CODE § 17A.2(10). Their argument in this section focuses on statutory law.

Similarly, the Buntmeyers argue DPH’s refusal to register a mother’s wife on a Certificate reflects a mistaken interpretation of law. IOWA CODE § 17A.19(10)(c), (l). Where a party alleges error in the agency’s statutory interpretation, the level of deference given to the agency depends on whether the legislature has vested in the agency the authority to interpret the statute at issue. *Renda v. Iowa Civil Rights Comm’n*, 784 N.W.2d 8, 10 (Iowa 2010).

Iowa law simply requires the filing and registration of a Certificate “for each fetal death which occurs in this state.” IOWA CODE § 144.29. The statute does not prescribe the content of a Certificate. *See id.* However, the Vital Statistics chapter of the IOWA CODE states “the forms of certificates . . . shall include *as a minimum* the items recommended by the federal agency

responsible for national vital statistics, subject to approval and modification by the department.” (emphasis added) *Id.* § 144.12. This “approval and modification” language indicates the legislature vested in DPH the authority to determine the content of a Certificate. *See id.*; *see also Renda*, 784 N.W.2d at 10–15. As such, the Court must give deference to the content of DPH’s Certificate, and may only disturb this content if it was “[b]ased upon an irrational, illogical, or wholly unjustifiable interpretation of a provision of law.” IOWA CODE § 17A.19(10)(I). A decision is “irrational” when it is not governed by or according to reason. *Sherwin-Williams Co. v. Iowa Dep’t of Revenue*, 789 N.W.2d 417, 432 (Iowa 2010). A decision is “illogical” when it is contrary to, or devoid of, logic. *Id.* A decision is “unjustifiable” when it has no foundation in fact or reason. *Id.*

A Certificate identifies the parents only as “mother” and “father.” The parties agree the term “mother” on a Certificate refers only to the gestational mother. *See* IOWA CODE § 144.1(7) (stating “fetal death” occurs prior to the stillborn child’s “complete expulsion or extraction from its mother”). To register the mother’s wife on a Certificate, DPH would either need to alter its definition of “father” to include any non-gestational parent, or modify the parental designations on a Certificate.

1. Definition of Father

DPH defines “father” as the “male parent,” which excludes women from registration as a “father.” The Vital Statistics chapter does not define “father” in general or in the context of a Certificate. *See generally* IOWA CODE § 144. A Certificate does not legally determine paternity, so other statutory determinations of paternity have no relevance to a Certificate. *See Callender v. Skiles*, 591 N.W.2d 182, 185 (Iowa 1999) (listing the methods of legally determining paternity); *see also Luff v. Hawkins*, 551 A.2d 437, 438 (Del. Super. Ct. 1988) (recognizing a

Certificate does not legally determine paternity). Absent a statutory definition of “father,” courts give “words their ordinary and common meaning.” *NextEra Energy Res. LLC v. Iowa Utils. Bd.*, 815 N.W.2d 30, 41 (Iowa 2012) (citing *State v. Stone*, 764 N.W.2d 545, 549 (Iowa 2009)).

In ordinary and common usage, a “father” is a man who fulfills any of several paternal roles, including a man who (1) provided sperm used to conceive the child; (2) holds the legally-recognized title of “father,” and (3) assumes paternal caretaking duties. See BLACK’S LAW DICTIONARY (9th ed. 2009), available at Westlaw BLACKS. When one man fulfills all paternal roles for a child, that child has only one father. See *id.* When more than one man fulfills the paternal roles for a child, however, that child has multiple fathers in the ordinary and common sense. See *id.* For example, one man is the child’s biological father, another man is the child’s legally-recognized father with no biological connection, and yet another man performs the paternal caretaking duties despite lacking any legal or biological connection to the child. See *id.*

When a stillborn child has multiple fathers, DPH does not specify which man registrants should identify as the “father” on a Certificate. According to France’s affidavit, DPH only defines “father” as the “male parent,” and DPH will accept the mother’s attestation without verification of any biological or legal relationship. (Ex. A). The Certificate form provides no definition of “father.” (Cert. Rec. 1). The Handbook that DPH provides for guidance in completing a Certificate, also provides no definition of “father” beyond stating the mother’s husband is generally the “father.” See NAT’L CTR. FOR HEALTH STATISTICS, DEP’T OF HEALTH & HUMAN SERVS., FUNERAL DIRECTORS’ HANDBOOK ON DEATH REGISTRATION AND FETAL DEATH REPORTING, at 38 (2003) [hereinafter HANDBOOK], reprinted in Ex. C, available at http://www.cdc.gov/nchs/data/misc/hb_fun.pdf.

Without further guidance, “father” must include the various men who would qualify as such under the ordinary and common definition of “father.” *See* BLACK’S LAW DICTIONARY. According to DPH policy, a “father” may have no biological relation to the child. For example, France’s affidavit states DPH generally accepts the mother’s husband as the “father” without verification of any biological connection. This policy is consistent the HANDBOOK, which simply declares the mother’s husband is generally the “father” without mentioning biology. *See* HANDBOOK, at 38. A mother’s husband is her child’s legally-recognized father, or “established father,” at birth. *See Callender*, 591 N.W.2d at 185. Accepting the established father as the “father” on a Certificate regardless of biology is consistent with the ordinary and common definition of “father.”⁹ *See* BLACK’S LAW DICTIONARY.

While a man fulfilling a limited paternal role may qualify as a “father” on a Certificate, the commonality across all accepted paternal relationships is the “father” must be male. This requirement that a “father” be male is consistent with the ordinary and common definition of “father” as a “male parent.” *See id.* Considering these accepted relationships and the ordinary and common meaning of “father,” DPH’s interpretation of “father” on a Certificate as the male parent is not “an irrational, illogical, or wholly unjustifiable interpretation of a provision of law.” IOWA CODE § 17A.19(10)(l). Similarly, DPH did not violate any law within the Vital Statistics chapter by interpreting “father” as the male parent on a Certificate. IOWA CODE § 17A.19(10)(b).

⁹ It is unclear how DPH would resolve a situation where multiple potential fathers seek registration on a Certificate. Such a controversy could arise, for example, if a Certificate names the biological father as the “father” and the established father applies to amend the Certificate. *See* IOWA ADMIN. CODE r. 641-102.1(2) (2012) (allowing amendment of a Certificate upon application “by the next of kin”).

2. Parental Designations

A Certificate designates the parents only as “mother” and “father.” A mother’s wife does not fit under either of these designations. To register the mother’s wife on a Certificate, DPH must modify these parental designations.

While the Iowa law provides considerable discretion to DPH in designing a Certificate, a Certificate must at least include “the items recommended by the federal agency responsible for national vital statistics.” IOWA CODE § 144.12. The parties agree the National Center for Health Statistics (“NCHS”) is the appropriate federal agency under Iowa Code § 144.12. (Pet. Br. at 26–27; Resp. Br. at 18). NCHS provides a Standard Report of Fetal Death to help states design their Certificates. *See* HANDBOOK, at app. D. This Standard Report uses the terms “mother” and “father” to refer to the parents of the stillborn child. *Id.* Similarly, DPH’s Certificate contains parental fields concerning only the “mother” and the “father.” (Cert. Rec. at 1). Considering the NCHS Standard Report asks only about the “mother” and “father,” DPH’s decision to designate the parents only as “mother” and “father” on a Certificate is not “an irrational, illogical, or wholly unjustifiable interpretation of a provision of law.” IOWA CODE § 17A.19(10)(1). Similarly, DPH did not violate any law within the Vital Statistics chapter by designating the parents only as “mother” and “father” on a Certificate. IOWA CODE § 17A.19(10)(b).

The Buntmeyers argue Iowa’s gender-neutral spousal presumption of parentage requires DPH to modify the parental designations on a Certificate. The Buntmeyers derive this spousal presumption of parentage from the presumption of paternity. Under the presumption of paternity, the law presumes the mother’s husband at conception or birth is the father of her child. *See Callender*, 591 N.W.2d at 185. According to the Buntmeyers, this presumption extends to same-sex spouses, and DPH must recognize the mother’s wife as a parent on a Certificate.

The Court notes Iowa’s appellate courts have not addressed whether such a gender-neutral spousal presumption of parentage exists. Assuming—without deciding—the Buntmeyers’ modified presumption of paternity exists, this presumption of parentage arises only when a party seeks a determination of parental rights and obligations in any of three statutory contexts. *See* IOWA CODE §§ 144.13(2) (Birth Certificates), 252A.3(4) (Support of Dependents), 598.31 (Dissolution of Marriage); *see also Callender*, 591 N.W.2d at 185. None of these statutes indicate their presumptions apply outside their respective contexts. *See* IOWA CODE §§ 144.13, 252A.3, 598.31. While one of these presumptions applies to Birth Certificates, nothing in the Vital Statistics chapter indicates any presumption of parentage applies to a Certificate. *See* IOWA CODE § 144.13; *see also generally* IOWA CODE § 144. The HANDBOOK instructs registrants to generally follow the presumption of paternity when identifying the “father” on a Certificate. *See* HANDBOOK, at 38. However, the HANDBOOK also instructs registrants to follow this presumption “in general,” and to apply state law in identifying the “father.” *See id.* Accordingly, no provision of law requires DPH to apply a presumption of parentage on a Certificate, and DPH is free to interpret “father” within the deference provided by IOWA CODE § 17A. DPH has done so to define “father” as the male parent. Since DPH establishes the definition of “father” on a Certificate, DPH’s refusal to follow any statutory presumption of parentage is not “an irrational, illogical, or wholly unjustifiable interpretation of a provision of law.” IOWA CODE § 17A.19(10)(l). Similarly, DPH did not violate any statutory provision by refusing to apply a statutory presumption of parentage on a Certificate. IOWA CODE § 17A.19(10)(b).

D. *Equal Protection*

As explained above, DPH's Certificate policy allows registration of a mother's husband, but prohibits registration of a mother's wife. The Buntmeyers argue this disparate treatment of same-sex wives and opposite-sex husbands violates the constitutional guarantee of equal protection. The Court must reverse, modify or grant other appropriate relief from the challenged action if it was "[u]nconstitutional on its face or as applied or is based upon a provision of law that is unconstitutional on its face or as applied." IOWA CODE § 17A.19(10)(a). Unlike most issues involving judicial review of agency action, the Court performs a *de novo* review when a party raises a constitutional issue. *See Office of Consumer Advocate v. Iowa State Commerce Comm'n*, 465 N.W.2d 280, 281 (Iowa 1991) (citation omitted).

Iowa's Constitution guarantees equal protection of the law. *Varnum v. Brien*, 763 N.W.2d 862, 878 (Iowa 2009) (citing IOWA CONST. art. I, § 6). "[T]he Equal Protection Clause 'is essentially a direction that all persons similarly situated should be treated alike.'" *Racing Ass'n of Cent. Iowa v. Fitzgerald*, 675 N.W.2d 1, 7 (Iowa 2004) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)).

Denying same-sex couples the benefits of marriage violates equal protection unless the state can justify its action under heightened scrutiny. *See Varnum*, 763 N.W.2d at 906–07. To satisfy equal protection, certain "statutory language must be interpreted and applied in a manner allowing gay and lesbian people full access to the institution of civil marriage." *Id.* at 907. The Buntmeyers argue the laws determining the content of a Certificate must also be interpreted and applied to allow registration of a mother's wife. Notably, the Buntmeyers do not ask DPH to register a mother's wife as a "father." Instead, the Buntmeyers ask DPH to modify the

Certificate form to allow registration of a mother's wife as a parent under equal protection in the same manner DPH currently registers a mother's husband.¹⁰

1. Similarly Situated

DPH initially argues a mother's wife is not similarly situated to a mother's husband for purposes of a Certificate. "The first step of an equal protection [analysis] is to identify the classes of similarly situated persons singled out for differential treatment. If people are not similarly situated, their dissimilar treatment does not violate equal protection." *Timberland Partners XXI, LLP v. Iowa Dep't of Revenue*, 757 N.W.2d 172, 175 (Iowa 2008) (citations and internal quotation marks omitted). People are not "similarly situated" merely because they share one identifying trait, nor must they be identical in every way to qualify as similarly situated. *Varnum*, 763 N.W.2d at 882–83 (citations omitted). A court must examine a law's purposes to determine "whether the law equally protects all people similarly situated with respect to those purposes." *Id.* at 883. For the purposes of marriage in general, same-sex couples are similarly situated to opposite-sex couples. *See id.* at 883–84.

DPH registers a mother's husband on a Certificate because he is a male parent. *See Callender*, 591 N.W.2d at 185 (noting a mother's husband is an established parent); *see also* BLACK'S LAW DICTIONARY (defining "father" and "parent" in the ordinary and common sense as a person fulfilling any of several roles). Both partners in a same-sex relationship can also qualify as parents, at least in the ordinary and common sense. *See Varnum*, 763 N.W.2d at 899–901. Therefore, a mother's wife is a female parent. *See id.* The precise legal consequences accompanying her parentage are undefined at this time. However, as explained above, a Certificate uses ordinary and common terms to define the non-gestational parent instead of any specialized legal definitions. For now, it is sufficient to state a mother's wife and a mother's

¹⁰ The Buntmeyers clarified their requested relief at oral arguments. (Dist. Ct. Oral Arg. Tr. at 2).

husband are both parents in the ordinary and common sense. *See id.* As parents, a mother's wife is identical to a mother's husband in every common and ordinary sense except for biology.

DPH argues the biological differences between a husband and wife are critical for the presumption of paternity. As explained above, DPH defines "father" on a Certificate independent of any statutory presumption of paternity. However, the purposes underlying the statutory presumptions of paternity are simply irrelevant here. The purposes of a Certificate are at issue here. The Court finds a Certificate serves two purposes. First, as the HANDBOOK explains, a Certificate provides statistical information about a stillbirth. *See HANDBOOK*, at 2. Second, a Certificate is a documentary record of a fetal death. *See IOWA CODE* § 144.29.

A Certificate's statistical purpose aids researchers in studying stillbirths. *See HANDBOOK*, at 2. Some of the statistics relate directly to the biological father's role in conceiving the child. *See id.* For example, the father's date of birth reveals the father's age, which is useful for studying issues such as "the association between congenital anomalies and children of older parents." *See id.* at 38. However, other statistics relate to the father's parental role regardless of a biological connection. *See id.* at 40–42. For example, questions about the father's "education" and "occupation and business/industry" relate to the father's socioeconomic status. *See id.* at 40. A father's socioeconomic status may be a factor of stillbirth independent of any biological connection to the child. *See id.* The Certificate also asks about the father's race, which may be useful for evaluating the effectiveness of pregnancy health programs among ethnic groups. *See id.* at 42. Therefore, only some of a Certificate's statistical purposes relate to biology, while other statistics relate to the father's parental role regardless of biology.

A Certificate's documentary purpose may have several uses for the parents. As DPH acknowledges, a Certificate may have commemorative value. (Resp. Br. at 14 n.2). As the

Buntemeyers argue, a Certificate may be important for insurance purposes. (Pet. Br. at 28 n.10). A Certificate may be admissible evidence. See FED. R. EVID. 803(9); IOWA R. EVID. 5.803(9); see, e.g., *Briscoe v. St. Luke's Med. Ctr.*, No. 74180, 1999 WL 304530 (Ohio Ct. App. May 13, 1999). A Certificate is also the basis for a newly-created Certificate of Birth Resulting in Stillbirth. See 2012 Iowa Acts Ch. 1022 (to be codified at IOWA CODE § 144.31A). None of these documentary uses have any relevant relationship to the father's biological connection to the child.

DPH's policy, which permits registration of non-biological fathers on Certificates, further demonstrates the limited role of biology in a Certificate. DPH generally registers a married mother's husband as the "father" on a Certificate. According to studies cited by DPH, a mother's husband is the biological father of her child in over 95% of children. (Resp. Br. at 43–44). While this is a high percentage, DPH admittedly registers non-biological fathers on some Certificates by registering the mother's husband as the "father." However, DPH usually accepts the mother's attestation as to the identity of the "father" without investigation of any biological or legal relation. A married mother need not identify her husband as the "father," and of course an unmarried mother has no husband to identify as the "father." As DPH acknowledged at oral arguments, mothers occasionally attest the "father" is someone other than the biological father. (Dist. Ct. Oral Arg. Tr. at 21–22). This is especially true when both the Certificate and the HANDBOOK do not define "father" as only the biological father. Moreover, even to the limited extent biology matters on a Certificate, a mother's wife may have a biological connection to the child through modern reproductive technology.¹¹

¹¹ For example, the Buntemeyers state that Brayden was conceived using an egg collected from Jennifer, the non-gestational mother. (Ex. 5 ¶ 4). Under such circumstances, the identity of both parents would be important for statistical purposes related to the documentation of stillbirths.

Therefore, biology is only minimally related to a Certificate's statistical purpose and is completely unrelated to a Certificate's documentary purpose. Accordingly, biology alone is an insufficient justification to disparate treatment of a mother's husband and a mother's wife on a Certificate. Since biology is the only relevant difference between a mother's husband and a mother's wife for purposes of a Certificate, a mother's husband and a mother's wife are similarly-situated as non-gestational parents. *See Varnum*, 763 N.W.2d at 882–83

2. Application of Equal Protection

In applying equal protection, courts provide deference according to the appropriate level of judicial scrutiny. *Id.* at 879. An undefined level of heightened scrutiny applies to claims of discrimination based on sexual orientation or gender, as the *Varnum* Court was not required to determine that issue. *Id.* at 896. Since DPH cannot justify its policy under any level of heightened scrutiny, the Court applies mere intermediate scrutiny.

To survive intermediate scrutiny, an agency's action "must be substantially related to an important governmental objective." *Id.* (quoting *Clark v. Jeter*, 486 U.S. 456, 461 (1988)). DPH argues its policy of refusing to register a mother's wife on a Certificate is substantially related to three important interests.

First, DPH claims its policy promotes accuracy on a Certificate. The registration and maintenance of accurate and complete vital records is an important governmental interest. *See* IOWA CODE § 144.5(4) (ordering the registrar "to accomplish complete, accurate reporting"). DPH argues registering a woman as a "father" would harm the accuracy of a Certificate. However, the Buntmeyers merely seek registration of a mother's wife as a gender-neutral parent on a Certificate. *See Varnum*, 763 N.W.2d at 899–901 (stating same-sex couples can be parents). DPH does not and cannot explain how omitting one parent on a Certificate improves accuracy.

Instead, DPH could achieve a more accurate and complete record by registering both parents on a Certificate regardless of gender. Therefore DPH's policy of refusing to register a mother's wife on a Certificate is not substantially related to accuracy.

Second, DPH argues its policy promotes efficiency. As explained above, a Certificate has a statistical purpose and a documentary purpose. For the documentary purpose, DPH does not explain how excluding a mother's wife promotes efficiency beyond reducing its overall workload. The burden to record a second parent on a Certificate should be identical whether the second parent is male or female. A mother's wife is similarly-situated to a "father," and mere efficiency cannot justify inclusion of one group and exclusion of another similarly-situated group. *See id.* at 903–04.

A Certificate's statistical purpose helps DPH report statistics to the federal government. DPH follows the federal Standard Form in designing a Certificate. DPH argues the Standard Form does not permit registration of a mother's wife on a Certificate, and registration of a mother's wife would decrease DPH's efficiency in reporting statistics. Assuming registration of a mother's wife would harm efficiency in reporting, this cannot qualify as an important interest. As explained above, a statistical aid is just one of a Certificate's purposes. Furthermore, DPH performs many duties besides reporting statistics. *See generally* IOWA CODE § 144. According to France's affidavit, Certificates comprise only about 200 of the 100,000 events DPH registers each year.¹² Therefore, any impact registering a mother's wife on a Certificate would have on statistical efficiency is too remote compared to DPH's other duties to qualify as an important governmental interest.

¹² It seems likely that only a small fraction of Certificates involve lesbian spouses, although the record does not address this.

Third, DPH argues that registration of a mother's wife on a Certificate muddies the legal determination of paternity. As explained above, a Certificate does not use any statutory presumption of paternity and does not legally determine paternity. Therefore, registering a same-sex wife on a Certificate is wholly unrelated to any governmental interest in determining paternity.

3. Remedy

DPH's policy of refusing to register a mother's wife on a Certificate is not substantially related to any important governmental objective. *See Varnum*, 763 N.W.2d at 879. DPH has unconstitutionally interfered with a same-sex wife's ability to receive the benefits of a Certificate. *See id.* at 907. Therefore DPH must modify the Certificate form to comply with equal protection. *See id.* DPH must also act consistently with its statutory duties. *See generally* IOWA CODE § 144. A categorical refusal to register a mother's wife on a Certificate violates equal protection. DPH is required to modify its Certificate so as to identify both petitioners here as parents.

ORDER

IT IS THEREFORE THE ORDERED that the Iowa Department of Public Health shall modify the form for a Certificate of Fetal Death to permit the registration of both petitioners here as a parents. The Department shall amend the parental information on Brayden Buntmeyer's Certificate of Fetal Death consistent with order.

IT IS FURTHER ORDERED that the court costs are taxed to the Respondent.

IT IS SO ORDERED this 12th day of December, 2012.

ROBERT A. HUTCHISON, DISTRICT JUDGE
FIFTH JUDICIAL DISTRICT OF IOWA

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