

CASE NO. A06-246

STATE OF MINNESOTA

IN COURT OF APPEALS

SHAINA SHAGALOW,

Appellant,

v.

**STATE OF MINNESOTA, DEPARTMENT OF
HUMAN SERVICES,**

Respondent.

APPELLANT'S REPLY BRIEF

SHAPIRO GORDON LLC

Corey L. Gordon, Atty. Reg. #125726
340 Parkdale Plaza
1660 South Highway 100
Minneapolis, Minnesota 55416-1533
(952) 541-1000
Attorneys for Appellant

**MIKE HATCH, ATTORNEY GENERAL
STATE OF MINNESOTA**

Erika Schneller Sullivan, Atty. Reg. #0288056
445 Minnesota Street
Suite 900
St. Paul, Minnesota 55101-2127
(651) 296-1427
Attorneys for Respondent

I. INTRODUCTION

In its response brief, the State has been unencumbered by the factual record, choosing instead to distort or ignore the established facts in an effort to avoid the uncontroverted conflict between the State's denial of benefits and the appellant's free exercise of religion.

As John Adams noted long ago, facts are a stubborn thing. While the State may feel at liberty to ignore the record and argue based on its own erroneous recitation of facts, this Court cannot. See Minn.Stat. §14.68.¹

Perhaps the State's most offensive argument is that appellant "merely asserts, without substantiating, that her religious practice is burdened by the County's denial of CDCS funding for attending Midreshet Darkaynu." Respondent's Brief at p. 40. The State's callous and baseless argument forces appellant and this Court to once again examine the detailed and voluminous factual record, including extensive and completely uncontroverted testimony from several lay and expert witnesses, on Jewish religious laws and their impact of the State's position. In essence, the State's argument is this: the appellant hasn't convinced the State that her practice of orthodox Judaism as the State thinks it is free to define is, in the State's opinion, burdened by the programs available in Minnesota and the State simply doesn't care if a mentally retarded Jewish citizen is forced to choose between receiving funding for medically necessary services to which

¹ The State could have, if it chose, applied to this Court for leave to present additional evidence pursuant to Minn.Stat. § 14.67. It did not, and cannot now in the guise of "argument" bring in purported factual assertions appearing nowhere in the record. Moreover, and more importantly, it cannot make believe that the record doesn't exist, ignore established facts, or assert controversy where the factual record contains none.

she is otherwise entitled and her sincerely held religious beliefs. This argument is profoundly repugnant, not only to the state and federal constitutions, but to the most fundamental principles upon which this country was founded.

To avoid this indefensible position, the State faced two choices: concede that its actions in denying funding were wrong and violated appellant's constitutional rights to the free exercise of her religion (and actually undertake its mandatory obligations to seek a lesser restrictive alternative that accommodates the State's legitimate interests and appellant's religious beliefs), or argue, without any factual basis and indeed completely contrary to the factual record, that appellant can receive the medically necessary services in Minnesota and adhere to the State's interpretation of what her religious beliefs are. Unfortunately, the State has chosen the latter course.

II. FACTUAL RECORD

A detailed discussion of the critical—and completely uncontroverted—facts established at the administrative proceeding through sworn testimony of live witnesses, as well as sworn affidavits submitted by appellant and accepted by the administrative law judge, is set forth in appellant's original trial court memorandum in the appendix to her brief at pp. A4-A9. Each assertion therein contains a citation, either to the Commissioner's Findings of Fact which themselves cite to the record, or specific citations to the record itself. It is this factual record upon which this appeal is based.

The crux of the issue is whether, now that the appellant is an adult, there are resources available in Minnesota to provide medically necessary services for which she is entitled to funding but which do not force her to violate the laws of Judaism. The state

asserts that the appellant “provided no evidence that it was impossible for her to use her CDCS resource budget unless it included payment for the Midreshet Darkaynu program.”

Respondent’s Brief at p. 29. On this crucial point, the state purports to summarize the entire record thusly:

[Appellant’s] mother merely gave the opinion that the alternative plan developed by her parents and Appellant that used her entire CDCS benefit to purchase services locally was “not really” adequate. Tr. 75 Her mother, however, did not explain why this alternative was inadequate except by claiming that Appellant would be socially isolated.

Id. at pp. 29-30.²

It is impossible to imagine how the State, whose representatives attended a lengthy hearing before an administrative law judge and whose attorneys have access to the entire transcript of the hearings and the submitted exhibits, could make this fatuous and utterly false assertion in good faith.³

² It is significant to note that appellant was able to attend elementary, middle, and high schools run by the orthodox Jewish community in St. Louis Park. While attending these schools, she received supplemental services funded by the CDCS program. Her graduation from Minnesota’s only all-girls orthodox Jewish high school and her entry into young adulthood is what prompted the search for appropriate resources to fill the void left by primary and secondary orthodox Jewish schools. Because of this, appellant’s parents, with the assistance of a licensed special education teacher, unsuccessfully explored a myriad of options to provide necessary services consistent with appellant’s religious obligations. Thus, the State’s argument that appellant has, in the past, “received CDCS services without having to alter or violate her religious practices”, Respondent’s Brief p. 30, is disingenuous at best. By attending an orthodox Jewish all-girls high school and receiving supplemental services through CDCS, appellant was able to receive individualized services necessary to address specific issues while still participating fully and interacting with her peers on a day-to-day basis that helped develop her socialization skills, avoid social isolation, and practice her religious beliefs without any impediment. The fact that CDCS-funded services were used in the past to supplement her full-time schooling does not mean that those same supplementary activities are sufficient to meet appellant’s needs now that there is no full-time school program to supplement.

³ Apparently feeling that the rules simply don’t apply to the State of Minnesota, it cites a URL address for a website for its assertion that “local community resources exist that may provide assistance to Appellant in developing services that accommodate her religious practices or provide socialization opportunities.” Respondent’s Brief at p. 30, fn 16. No such assertion was ever made during the administrative proceedings, or even during argument in district court. Indeed, the state simply chose to sit back and ignore the sworn evidence proffered by the appellant during the administrative proceedings demonstrating the complete absence of appropriate programs in Minnesota—and indeed in the United States or Canada—that provide the services that appellant’s psychiatrist opined were medically necessary that would not force her to violate Jewish law. While it would have been helpful and appropriate if the state had ever evidenced the slightest interest in exploring the availability of appropriate resources

While the factual record is detailed and extensive on the central issues of appellant's needs, her religious obligations, and the lack of suitable non-institutional programs that can accommodate both, and are summarized in greater detail at appendix pp. A4-A9 with specific citations to the record, appellant will—once again—review the uncontroverted and sworn testimony adduced during the administrative process that constitutes the factual record upon which this Court's decision must be based. To assist this Court, this evidence is compared, in columnar form, to the State's rebuttal evidence.

in the community that could possibly accommodate the appellant's religious obligations before this appeal, it has never made any attempt to do so. For the state's lawyer now, in an appellate brief, to cite to purported information on a website neither in the record or even previously mentioned, and to then argue that it demonstrates that "resources exist" that "may provide" assistance to the appellant while accommodating her religious beliefs, is demeaning to the administrative process, ignorant of both appellant's needs and Jewish law, inadmissible, and flat-out wrong.

Sworn Evidence Presented by Appellant
in the Record:

1. Barry Garfinkel, M.D., appellant's treating psychiatrist and a licensed physician in the state of Minnesota, testified that:

A) he is familiar with the requirements attendant to the strict observation of orthodox Judaism and potential limitations on and impediments to delivery of services to orthodox Jews with disabilities that these religious obligations can oppose;

B) he provides treatment to a number of disabled orthodox Jews;

C) he is familiar with the treatment options in Minnesota, as well as the United States and Canada, for orthodox Jews with disabilities;

D) services provided by the Midreshet Darkaynu program are precisely what appellant needs and she would derive substantial benefit from participation in the program;

E) if the appellant does not participate in the Midreshet Darkaynu program or a comparable program that provides a full range of services offered by it, the appellant is at a significant risk of needing chronic, supervised care;

F) appellant's participation in the Midreshet Darkaynu will enable her to avoid the need for institutional care, and would be of great assistance to permitting her to function semi-independently within her own community;

State of Minnesota's Contrary
Evidence in the Record:

A) None.

B) None.

C) None.

D) None.

E) None.

F) None.

G) there are no programs in Minnesota that provide services similar to the Midreshet Darkaynu program in a setting consistent with appellant's religious obligations;

G) None.

H) appellant would have to violate her religious beliefs to participate fully in any programs offered in Minnesota that offer components of the full range of services offered by the Darkaynu program;

H) None.

I) there is no program in the United States that provides a structured housing component as well as the full range of services offered by the Midreshet Darkaynu program to disabled orthodox Jews;

I) None.

J) the Midreshet Darkaynu is the only alternative to provide the medically necessary care for appellant consistent with her religious obligations.

J) None.

2. Jeffrey Lichtmann Ed.D. is the National Director of YACHAD, the National Jewish Council for Disabilities (N.J.C.D.), and head of the Orthodox Jewish Union, O.J.U. He is familiar with and knowledgeable of the services available throughout the United States and Canada for Jews with disabilities. Dr. Lichtmann has spent extensive time in Israel and is familiar with the activities and operations of the Midreshet Darkaynu program, and categorically testified that there is no program in the United States or Canada that provides the services offered by the Midreshet Darkaynu program.

2. None.

3. Rabbi Moishe Lief, a spiritual leader of the Minneapolis orthodox Jewish community, testified extensively as to the requirements and obligations of Jewish law. Rabbi Lief's detailed testimony demonstrates that these religious obligations are far more detailed, complex, and comprehensive than just Sabbath and holiday observances, gender segregation, and food preparation and consumption, three of several examples offered by Rabbi Lief in his extensive testimony that the State now identifies as the only "specific religious precepts that Appellant claims she will be forced to violate...." Respondent's Brief p. 29.⁴

3. None

4. Rabbi Lief testified that the appellant would not be able to function in a program that did not integrate the comprehensive orthodox Jewish belief system with life learning experiences, and that the Midreshet Darkaynu program integrates the sacred and secular in a life context meaningful to the appellant in a way that will allow her to achieve full integration into her community and mainstream life as a young Jewish woman.

4. None

5. Lisa Bernstein, a Minnesota-licensed Special Education teacher, testified that she had explored possible alternative options for appellant in Minnesota following her graduation from the only orthodox Jewish high school for girls in Minnesota. Ms. Bernstein testified that she did explore and visit options for

5. None

⁴ For example, Rabbi Lief testified that a Jew is obligated to put on the right shoe first, then the left shoe, then tie the left shoe, then tie the right shoe. Tr., p. 41. He noted that it would take an hour to explain, but reiterated that there are "many, many such laws that we have specific training [in] and it's all part of Judaism...[and its] tens of thousands of concepts, customs, laws that are integrated in the way that [observant Jews] experience life..." Rabbi Lief also testified, briefly, about Jewish laws of family purity, tr. pp. 42-43, a crucial factor in the inability of appellant to participate in programs in Minnesota without violating Jewish law.

appellant. Although some of the things that these programs were doing “were wonderful things,” she articulated at length why these programs were not adequate to meet the appellant’s needs and avoid social isolation unless appellant violated her religious law. Tr. pp. 47-56.⁵

6. In order for appellant to receive medically necessary services in the state of Minnesota, she would have to violate her religious beliefs. If she follows her religious obligations, services that are medically necessary for her and for which she is entitled to funding through the CDCS program do not exist in Minnesota, in the United States, or Canada, but these services are provided by the Midreshet Darkaynu program. Tr. pp. 32-57; Exh. 20, Exh. 24, Exh. 25.

6. None.

This, then, is the record upon which the State argues that “[i]t is impossible for Appellant to prove beyond a reasonable doubt that conforming to the waiver program requirements will violate her constitutional rights to be free from government interference with her religious beliefs and practices.” Respondent’s Brief, p. 30.

Aside from the novel proposition that one asserting that state action in a given instance interferes with a constitutionally-protected right must prove so “beyond a

⁵ It was during this testimony that the state made its singular attempt to discuss possible alternatives for the appellant. The Assistant Hennepin County Attorney asked Ms. Bernstein if, for example, someone could come to appellant’s home and teach her cooking. Ms. Bernstein’s response is revealing of both the inadequacy of the state’s “suggestion” as well as its breathtaking insensitivity: “I think that you know if you do this, you are taking her out of the community. You’re taking her away from this group of girls that she knows...she’s eighteen years old. I mean why should she have to live like that? Why shouldn’t she be with other people her own age? Girls who are doing fun activities and going places and being part of it. Why shouldn’t she have that? Because she is developmentally delayed?” Tr. p. 53. Undaunted, the State pressed on. Couldn’t the orthodox Jewish community provide a program for all its developmentally disabled young female adults? The responsive testimony demonstrated the ludicrousness of this proposal, given the tiny orthodox Jewish community in Minneapolis (about 200) and the lack of individuals with both the knowledge of orthodox Jewish laws and the requisite training and experience to work with developmentally disabled individuals. See Tr. pp. 54-59.

reasonable doubt,” a standard for which the State not surprisingly provides no citation or authority, the record—the **real** record—actually satisfied this standard. The unrebutted, uncontroverted, detailed and voluminous factual record demonstrates conclusively that the appellant has been presented with a conundrum by the State of Minnesota: receive medically necessary services for which she is entitled to CDCS funding and violate the most fundamental believes, laws, and obligations of Judaism, or forgo the medically necessary services.

Until now, no one has ever attempted to challenge the existence of this conundrum.⁶ Because this conundrum so clearly violates the Minnesota and Federal constitutional guarantees of religious freedom, and because the State is now finally faced with having to respond to this argument and this argument alone, the State now lamely and without citation argues that appellant has to prove the existence of the conundrum “beyond a reasonable doubt,” and by disregarding and distorting the record, argues that she has not.

What is truly beyond a reasonable doubt is that the State is wrong.

III. OTHER ARGUMENTS

As anticipated, the State has, once again, attempted its “kitchen sink” approach to coming up with something, anything, to justify its improper decision. See Appellant’s

⁶ It is significant that the State never argued and the district court made no finding that alternatives were available to the appellant to provide medically necessary services to her without forcing her to violate her religious obligations. Rather, the trial court found that obtaining services in “far away countries would place an unreasonable requirement on the agency to adequately monitor the program, as it is required by law.” Trial Court Order, A81 at ¶12. The trial court did not find that appellant did not face this conundrum, nor did the State so argue until now. Rather, because of the State’s obligation to “monitor” CDCS programs (without any specific manner or method of “monitoring”), and because its decision to limit Medicaid funding to programs in the United States and Canada was a law that was “neutral and of general applicability,” Trial Court Order A81 at ¶13, the Trial Court summarily concluded that the State’s decision not to provide CDCS funding did not violate appellant’s constitutional rights. *Id.* at ¶14.

Brief at p. 5, fn 3. Virtually all of the State's arguments were rejected by the administrative law judge and Commissioner, and ultimately all arguments were rejected by the trial court except the State's asserted interest in public safety. Not surprisingly, the State has made no effort whatsoever to articulate why it cannot discharge its obligations for public safety if appellant attends the Midreshet Darkaynu program, nor has the State made any legitimate and admissible effort to demonstrate the existence of lesser restrictive alternatives.

A mere assertion of an interest in public safety is not a shibboleth that the state can waive and before which the state and federal constitutional guarantees of religious freedom must bow. Indeed, the opposite is true: non-penal laws that force an individual to choose between government benefits and the free exercise of religion must accommodate the constitutional mandates, either through lesser restrictive alternatives, or a demonstration that public safety cannot be adequately achieved through any lesser restrictive alternative. Even if the State had raised any other valid argument in addition to its legitimate interest in public safety, any such argument would also be subject these same constitutional limitations and requirements.

IV. CONCLUSION

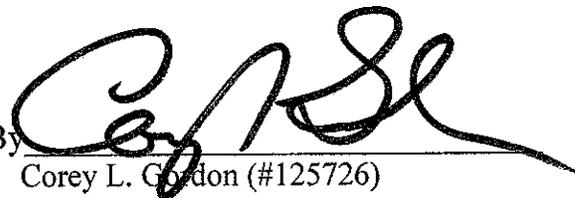
The record is uncontroverted and clear: the appellant is faced with a choice of accepting Medical Assistance benefits for medically necessary services to which she is entitled, and being forced to violate her religious beliefs, or to forgo those medically necessary services. This choice is repugnant to the state and federal constitutions, and the

State's legitimate interest in public safety does not obviate the State's need to demonstrate that public safety cannot be achieved in any other manner or that there is no lesser restrictive alternative. Appellant herself has already demonstrated the existence of a lesser restrictive alternative that adequately addresses the State's interest in public safety (and, indeed, goes far beyond the State's normal activities in this regard in the CDCS program), and, therefore, the Commissioner's decision to deny funding under these circumstances is violative of the state and federal constitutions and must be overturned.

Dated: 4/14/06

SHAPIRO GORDON LLC

By



Corey L. Gordon (#125726)
1660 Highway 100 South, Suite 340
Minneapolis, MN 55416
(952)-541-1000
Attorneys for Appellant