

No. A06-0246

STATE OF MINNESOTA

IN COURT OF APPEALS

Shaina Shagalow, Appellant

v.

State of Minnesota, Department of Human Services, Respondent

**RESPONDENT'S BRIEF, APPENDIX,
SUPPLEMENTAL RECORD, AND ADDENDUM**

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LEGAL ISSUES

- I. Did the Commissioner of Human Services correctly determine that Medicaid funds could not be used for Appellant to attend the Midreshet Darkanyu Program in Israel?

Decision below:

Hennepin County District Court affirmed the Commissioner's order.

Apposite Authority:

Minn. Stat. § 256B.092
42 C.F.R. § 441.302

- II. Does a refusal to allow Medicaid funds to be used to pay for a year-long program in Israel designed for developmentally disabled Orthodox Jewish women violate the federal Free Exercise Clause or Minnesota's Freedom of Conscience Clause when such refusal does not diminish the recipient's eligibility or the level of funding available to the recipient for services provided in Minnesota?

Decision below:

Hennepin County District Court concluded that Appellant's rights under the federal and Minnesota constitutions were not violated.

Apposite Authority:

Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872, 110 S. Ct. 1595 (1990)

Lyng v. Northwest Indian Cemetary Protective Ass'n, 485 U.S. 439, 108 S.Ct. 1319 (1988)

State v. Hershberger, 462 N.W.2d 393 (Minn. 1990) ("*Hershberger II*")

Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857 (Minn. 1992)

STATEMENT OF THE CASE

This is an appeal from an order of the Commissioner of Human Services concluding that Appellant's request to use Medicaid funds for the year-long Midreshet Darkaynu Program in Israel was properly denied.

On April 26, 2004, Hennepin County sent Shaina Shagalow written notice of its denial of her request — made by her parents Joseph and Hannah Shagalow, acting as her guardians — to use Medicaid funds to pay for her attendance at the Midreshet Darkaynu program, which is intended for 18-24 year old Orthodox Jewish women with developmental disabilities. RSR2¹; *see also* Hearing Exhibit (“Hrg. Ex.”) 1 (copy of notice letter attached to appeal letter). On May 3, 2004, the Shagalows, through counsel, requested an administrative fair hearing to appeal the denial. *Id.* This hearing took place on May 25, 2004 before Minnesota Department of Human Services appeals referee J. Philip Peterson. RSR1. Referee Peterson took testimony and documentary evidence and the record was closed.² RSR2. On July 26, 2004, Referee Peterson issued recommended findings of fact, conclusions of law, and order affirming the County's denial. On July 27, 2004, the Commissioner, acting through the Chief Appeals Referee, adopted the recommended findings, conclusions, and order. RSR13.

¹ Citations to the parts of the record reproduced by the parties are designated with the following abbreviations: “A” for Appellant's Appendix, “RA” for Respondent's Appendix, and “RSR” for Respondent's Supplemental Record.

² Appellant was allowed to submit a notarized affidavit of Dr. Lichtman on May 28, 2004 in place of an unsigned copy of the affidavit submitted at the hearing. *See* Hrg. Ex. 25. No other factual submissions have been recognized by Referee Peterson or the district court.

On August 5, 2004, Appellant appealed this final agency decision to Hennepin County District Court. *See* Minn. Stat. § 256.045, subd. 7 (2004) (providing for appeal of these matters to district court). The Commissioner of Human Services, representing both county and state interests, responded to the appeal. The Honorable Richard S. Scherer considered the parties' memoranda and heard oral argument on September 21, 2005. A77. On December 15, 2005, the court issued an order affirming the agency decision. A77-82. Appellant served and filed her notice of appeal to this Court on February 1, 2006. RA61.

MEDICAID BACKGROUND

I. FEDERAL MEDICAID.

Minnesota participates in the federal Medicaid program through its "Medical Assistance" program. *See generally* Minn. Stat. ch. 256B (2004). Medicaid is a publicly funded program that pays for needed medical care for people whose income and resources are insufficient to meet the cost of the required care.³ *See* 42 U.S.C. §§ 1396 – 1396v (2000); *Atkins v. Rivera*, 477 U.S. 154, 156, 106 S.Ct. 2456, 2458 (1986) (citation omitted). As a program, Medicaid "do[es] not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs." *Alexander v. Choate*, 469 U.S. 287, 303, 105 S.Ct. 712, 721 (1985). Rather, the benefit of Medicaid is a particular "package of services" that generally assures receipt of necessary medical care through those services. *Id.* Thus, a Medicaid recipient has no entitlement to services

³ The federal government's matching rate for home and community-based services in Minnesota is currently 50%.

beyond those offered by a state program, even though the particular recipient may believe those services are inadequate for her health needs.

To participate in Medicaid, states must submit a "State Plan" to the federal agency that oversees Medicaid, the Centers for Medicare & Medicaid Services ("CMS"), for approval. *See* 42 U.S.C. § 1396a. The State Plan is the basis for a state's administration of Medicaid. 42 U.S.C. § 1396(2). Federal law specifies the minimum coverage that must be provided in State Plans. 42 U.S.C. § 1396a. Once a state elects to participate in Medicaid it must also comply with all federal statutes, regulations, agency interpretations, and state-federal agreements to continue to receive federal funds.

II. FEDERAL MEDICAID WAIVER PROGRAM.

In addition to state plan services, states may seek approval from the federal agency to develop separate and voluntary programs that "waive" some state plan requirements. *See* 42 U.S.C. § 1396n(b); 42 C.F.R. § 430.25. In 1981, Congress authorized the Secretary of Health and Human Services to waive certain Medicaid statutory requirements so that states could offer home and community-based services as an alternative to institutionalization. *See* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357. The purpose of these Medicaid waivers is to provide the flexibility to "permit a State to implement innovative programs or activities on a time-limited basis and subject to specific safeguards for the protection of the recipient and the program." 42 C.F.R. § 430.25(b).

Under a home and community-based services waiver, CMS may waive requirements for "statewideness" and comparability of services between different

populations, as well as certain income and resources rules. 42 U.S.C. § 1396n(3); 42 C.F.R. § 430.25(d)(2). Home and community-based waiver services remain subject to the requirement that the state provide specific safeguards for recipients and the program. 42 C.F.R. § 441.302(a). Specifically, the state must provide adequate assurances to CMS that “necessary safeguards have been taken to protect the health and welfare of the recipients of the services . . . includ[ing] — 1) Adequate standards for all types of providers that provide services under the waiver; [and] 2) Assurance that the standards of any State licensure or certification requirements are met for services or for individuals furnishing services that are provided under the waiver . . .” *Id.* States must also “assure financial accountability for funds expended for home and community-based services.” 42 C.F.R. § 441.302(b).

CMS directly monitors waiver programs under an approved waiver plan. 42 U.S.C. § 1396n(f)(1). Federal law states that the “Secretary [of HHS] shall monitor the implementation of waivers granted under this section to assure that the requirements for such waiver are being met” *Id.* State law incorporates these requirements, stating that the federal requirements governing home and community-based services to persons with mental retardation include “services and limitations included in the federally approved application for home and community-based services [a.k.a. the “waiver”] for persons with mental retardation or related conditions and subsequent amendments.” Minn. Stat. § 256B.092, subd. 4 (2004). *See also* Minn. Stat. § 256B.49, subd. 19 (requiring the commissioner to take “necessary safeguards to protect the health and welfare of individuals provided services under the waiver.”) State law prevents the

Commissioner from paying for services that do not satisfy federal requirements. Minn. Stat. § 256B.092, subd. 4. The remedy for non-compliance with terms of the approved waiver is for CMS to terminate the waiver program or to withhold federal matching funds. 42 U.S.C. § 1396n(f)(1); 42 C.F.R. § 441.302.

III. MINNESOTA'S MR/RC WAIVER PROGRAM.

Minnesota has received authority from CMS to operate a waiver to provide home and community-based services to persons with mental retardation or related conditions as an alternative to placement in intermediate care facilities for those with mental retardation ("ICF/MRs"). *See* A34-76, RA27-52 (excerpts of MR/RC waiver). The terms of the approved waiver establish the parameters of covered services and ensure that the health and welfare needs of the recipients are being met. *See* 42 U.S.C. § 1396n(c)(2)(A); 42 C.F.R. § 441.302(a).

Minnesota's waiver-covered services include case management, respite care and habilitation services. Respondent's Mem. of Law, Affidavit of Michelle A. Long (hereinafter "Long Aff."), Ex. A at 4, 5.⁴ Waiver recipients may choose to receive several services, including habilitation, through the consumer-directed community

⁴ Habilitation services are defined as "health and social services directed toward increasing and maintaining the physical, intellectual, emotional, and social functioning of persons with mental retardation and related conditions . . . [including] therapeutic activities; assistance, training, supervision, and monitoring in the areas of self-care, sensory and motor development, interpersonal skills, communication, socialization, reduction or elimination of maladaptive behavior, community living and mobility, health care, leisure and recreation, money management, and household chores. Minn. R. 9525.1800, subp. 13a. Habilitation services provided under the waiver include residential and day habilitation, prevocational services and supported employment services. Long Aff., Ex. A at 4.

supports (“CDCS”) option of the federally approved waiver. RA32, 48. Under this option, recipients and/or their representatives have the flexibility to hire and manage and fire their own service providers. RA32. The services provided under this option are set forth in a community support plan developed by the recipient and approved by the local social services agency. RA33. While the CDCS option provides more flexibility compared to traditional case management in which a case manager is responsible for arranging services and providers, the services provided through CDCS must still comply with specific service descriptions and provider standards. RA48. CDCS services must also conform with the waiver’s assurances regarding quality, health and welfare and fiscal accountability. *See Long Aff.* 6-7.

A. Provider Qualifications.

In accordance with federal requirements governing health and safety Minnesota has assured CMS that it will ensure “adequate standards for all types of providers that furnish services under the waiver.” *Id.* at 6. The state specifically has agreed to:

- a) Ensure that “standards of any State licensure or certification requirements are met for services or for individuals furnishing services provided under the waiver.” *Id.* at 7.
- b) Ensure providers will “meet the certification or licensing requirements in state law related to the service.” *Id.* at 104.
- c) Ensure background studies of licensed providers as required by the Human Services Licensing Act. *Id.* at 53.
- d) Ensure that providers comply with standards governing the reporting of maltreatment of vulnerable adults as required by the Vulnerable Adults Act. *See id.* at 53.

e) Set forth provider qualifications in compliance with state standards in the community support plan. *See id.* at 42, 52-3.

B. Ongoing Monitoring Requirements.

The Department has also assured CMS that it will conduct monitoring activities to protect the health and welfare of recipients receiving CDCS services. Specifically, it will:

- a) "Evaluate that the consumer's health and safety needs are expected to be met given the plan of care including provider training and standards."
- b) "Monitor and evaluate the implementation of the community support plan, including health and safety, satisfaction, and the adequacy of the current plan and the possible need for revisions (this includes taking action, when required to address suspected or alleged abuse, neglect, or exploitation of a consumer as a mandated reporter according to the maltreatment of minors or vulnerable adults acts)."
- c) "Investigate reports related to vulnerability or misuse of public funds."
- d) "Contract with providers and monitor provider performance."
- e) "Have a system for consumers to contact the local agency on a 24-hour basis in case of a service emergency or crisis."

RA50-51.

C. Fiscal Accountability.

To ensure accountability in the expenditure of public funds, the Department has assured CMS that it will "monitor the maintenance of financial records, and the management of the budget and services." *Id.* at 8, 107. Consistent with this assurance of fiscal accountability, the Department requires CDCS service providers to enter a written agreement with a Medicaid enrolled financial sector support entity ("FE") to receive

payment for their services. RA42. An FE acts as an intermediary between the recipient and the provider to assist in payroll and other financial support duties. RA44. It is the FE's responsibility to ensure compliance with Internal Revenue Service requirements in processing employee and employer deductions. The FE must also maintain records of all CDCS expenditures to create "a clear audit trail" "including time records of people paid to provide supports and receipts for any goods purchased." RA45. Finally, the waiver also provides assurance to CMS that the Department will take action to "investigate reports related to . . . misuse of public funds." RA45.

STATEMENT OF THE FACTS

Shaina Shagalow ("Appellant") is a young woman, who is mildly developmentally delayed, and has a developmental cognitive disorder and attention deficit hyperactivity disorder. Hearing Exhibit ("Hrg. Ex.") 21 at 1. When her parents sought to be appointed as her guardians in March 2004, Hennepin County probate court found that she read at about a 6th grade level, occasionally "needs reminders to take care of her daily grooming tasks," and "would be extremely vulnerable if left alone in the community" because she is friendly and trusting of strangers. *Id.* Appellant depends on others for such things as scheduling doctors appointments and making informed medical and other life decisions. *Id.*

Appellant has been raised in the Orthodox Jewish religion and her belief system is centered around the requirements of Jewish Orthodoxy. RSR3. Until recently, Appellant attended an all-female school, because separation of the genders is a part of the Orthodox belief system. *Id.* After Appellant graduated from high school, the Shagalows asked

Hennepin County to approve the use of Medicaid funding for Appellant to attend a year-long, residential program in Israel specifically designed to accommodate disabled Orthodox Jewish women. *Id.*

The program, Midreshet Darkanyu, was established specifically for religiously observant Jewish girls in the United States and Canada with mental retardation or developmental disabilities. RSR23. According to its founder and director, Midreshet Darkaynu “allows girls to go to Israel who otherwise could not because they couldn’t get into a regular seminary.” RSR15. Designed to be “a home away from home,” the program provides assistance with daily living activities and interpersonal communication. RSR 23-24.⁵ While at Midreshet Darkaynu, girls participate in job-training through visiting various job sites and learning about different jobs. RSR24.⁶ These activities take place three days a week. RSR27. Two days a week, the program participants engage in volunteer work in the community including food preparation and working with various age groups such as the elderly and young children. RSR27. Also, three times a month, the girls attend a history class to develop an understanding and appreciation for cultural

⁵ Appellant’s request for CDCS funding is only for the direct service component of the program (totaling \$15,000). Appellant’s parents will pay for transportation and room and board. RSR45.

⁶ Although Midreshet Darkaynu’s director stated that the primary goal of job-related activities was working on communication skills and learning about the community, RSR 24, the programs website identified “vocational training” as “[a] major focus of Midreshet Darkaynu’s skills-training.” The website also stated that “Our morning schedule revolves around prevocational skills training as well as placement in a work setting.” RSR19. The information on the program website has apparently remained largely unchanged. *Compare* RSR 19-22 with <http://www.lind.org.il/darkaynu.htm> (last visited April 3, 2006).

and historical sites that the program visits. RSR24. Another program component is an evening socialization activity centered around joint study with girls from an adjacent academic undergraduate program. *Id.* Midreshet Darkaynu's director described the goal of her program as "the social emotional development of the girls, their self-care and communication needs, greater independence, and integration to the best of their abilities in mainstream life." RSR 25.

While at least part of Midreshet Darkaynu's programming appears to provide habilitation services, Appellant could receive habilitation services from many different providers without leaving Minnesota. RSR4. According to Appellant, however, established programs offered in Minnesota would not be provided in the religious context of Jewish Orthodoxy. Appellant, moreover, asserts that other programs would be socially isolating for her. *Id.*

The Shagalows explained at the administrative hearing that they believe the demand for habilitation services specifically designed for Orthodox Jewish women is low in Minnesota because the Orthodox Jewish community is very small. RSR5. They further contended that if Appellant remains in Minnesota she will suffer a lack of connectedness, discomfort around the opposite sex, and the loss of her peers who are leaving the area. *Id.*

As an alternative to the Midreshet Darkaynu option, Appellant and her parents were able to prepare a budget for her 2004-2005 resource allocation.⁷ RSR30. This budget included staffing apparently to provide in-home habilitation services and attending an eight-week summer camp (as a form of caregiver respite). RSR30-33. The county approved these items. RSR28. Although her parents stated that they did not believe this alternative plan was adequate for Appellant, they did not identify any obstacles to making full use of her budget allocation. RSR36.

At the administrative hearing, the Department explained that waiver services in Israel cannot be funded because Minnesota does not pay for Medicaid recipients to receive services from providers outside of the country, with a limited exception for some services provided in Canada. *See* Hearing Transcript (hereinafter "Tr.") at 11-13. The exception permits Minnesota residents who live in northern Minnesota close to the Canadian border to receive services from Canadian providers within the recipient's local trade area. *Id.*⁸ The Department explained that Medicaid coverage for services provided in Canada is specifically authorized by Minnesota Statutes section 256B.25, which requires that providers be licensed by a state or Canadian province to receive Medicaid payment. *Id.* The Department is not aware of any circumstances where MR/RC waiver

⁷ Under the CDCS option, recipients have an annual budget determined by an average daily funding amount based on their level of need. *See* RSR30, 34. Appellant's resource allocation for 2004-2005 was \$27,623.20. RSR30.

⁸ "Local trade area" means the geographic area surrounding a person's residence, including portions of state other than Minnesota, which is commonly used by other people in the same area to obtain similar necessary goods and services. Minn. R. 9505.0175, subp. 22. Effective April 1, 2005, no MR/RC waiver services will be paid for if provided outside of the United States. RA55.

recipients have received services from providers outside the country. Tr. at 17-8. The Department further testified that the program in Israel apparently includes educational and vocational services, which are not eligible for funding under the waiver. Tr. at 82; *see also* Long Aff., Ex. A at 4. Finally, the Department testified that it was not possible to comply with the federally mandated quality and monitoring requirements designed to protect a recipient's health and safety for a residential program in Israel. *See* Tr. at 20, 21, 83.

On July 26, 2004, a Department referee issued an order recommending that Appellant's request for funding for the Israel program be denied. The referee agreed that the residential program in Israel could "best serve" Appellant's needs "in an atmosphere that encompasses her holistic, faith beliefs as a young woman of the Orthodox Jewish tradition." RSR 12-13. The referee further found that the Israel program included "educational, vocational [and] pre-vocational" services. RSR11.⁹ The referee further found that, although no law explicitly addresses the issue, neither federal nor state law indicate an intent to fund services provided outside the United States and outside the recipient's local trade area. RSR12. The referee also agreed that it would not be possible to monitor services or ensure Appellant's health and safety for the residential program in Israel. *Id.* Accordingly, the referee recommended that the County decision to deny

⁹ The referee did not specifically delineate which services would fall within the parameters of covered waiver services. In the event that the Court were to reverse the Department's decision, this case should be remanded to the Department for a determination of which components of the program are eligible for Medicaid payment. *See* RSR45 (listing fee for "Direct Services" as \$15,000 with no further itemization).

funding for this program be affirmed. The Commissioner of Human Services' representative adopted the referee's recommendations in an order dated July 27, 2004.

Appellant appealed to Hennepin County District Court, claiming the Commissioner's decision was unsupported by the evidence at the hearing, violated the Americans with Disabilities Act, and violated her right to her religion under that state and federal constitutions. A10-28. Although Appellant included numerous references to facts not in the record and not in the public domain, *e.g.*, A22-26 (regarding local agency monitoring and the Shagalow's suggested alternative), the court did not add them to the record which had been closed after the agency hearing. *See* A79 ¶¶ 5 and 6. On December 15, 2005, the court issued an order affirming the denial of Shagalow's request. A77-82. Having reviewed the complete record, the court concluded there was sufficient evidence to support the Commissioner's decision and order. A80 ¶ 9. The court next concluded that "requiring the Department to pay for services in far-away countries would place an unreasonable requirement on the agency to adequately monitor the program" and that denying Appellant's request did not violate the Americans with Disabilities Act. A81 ¶ 12. The court also rejected Appellant's constitutional claims. The court concluded that "Appellant has in no way been denied public benefits by the Department. She had only been denied requested benefits for programs outside the United States, which would also be denied to anyone else regardless of race, religion or other questionable reasons." A81 ¶ 15.

SCOPE OF REVIEW

This Court has jurisdiction over this matter under Minn. Stat. § 256.045, subd. 9 (2004), and evaluates the Department's decision in light of the record presented to the Department. *In re Kindt*, 542 N.W.2d 391, 398 (Minn. Ct. App. 1996). The scope the Court's review of the Department's decision is defined by Minn. Stat. § 14.69 (2004). *Mammenga v. State Dep't of Human Servs.*, 442 N.W.2d 786, 789 (Minn. 1989). The Court may affirm or reverse the Department's decision or "remand the case for further proceedings." Minn. Stat. § 14.69.

In an appeal like this one, the burden is on the party challenging an administrative decision to prove that the case should be reversed on one of the six grounds set out in section 14.69. *Markwardt v. State Water Res. Bd.*, 254 N.W.2d 371, 374 (Minn. 1977); *Johnson v. Minn. Dept. of Human Servs.*, 565 N.W.2d 453, 457 (Minn. Ct. App. 1997). Thus, the party challenging the Department's decision must show that it is one of the following:

- a) In violation of constitutional provisions;
- b) In excess of the statutory authority or jurisdiction of the agency;
- c) Made upon unlawful procedure;
- d) Affected by other error of law;
- e) Unsupported by substantial evidence in view of the entire record as submitted; or
- f) Arbitrary or capricious.

Minn. Stat. § 14.69. On appeal to this Court, Appellant focuses on her contention that denial of CDCS funding for the Midreshet Darkaynu program violates her rights under the Free Exercise Clause of the United States Constitution and the Minnesota Constitution's Freedom of Conscience Clause. *See* RA65, A1. Because the terms of the

waiver are incorporated into statute by reference, *see* Minn. Stat. § 256B.092, subds. 4(a) and (5) (2004), the traditional presumption of constitutionality for statutes and the requirement that challengers prove unconstitutionality by demonstrating a constitutional infirmity beyond a reasonable doubt, *Murphy v. Murphy*, 574 N.W.2d 77, 79 (Minn. Ct. App. 1998), should apply here.

SUMMARY OF ARGUMENT

The Commissioner's correctly affirmed Hennepin County's denial of CDCS funding for Appellant to attend the Midreshet Darkaynu program in Israel. First, No federal or state law requires that such funding be available and, as of April 1, 2005, Minnesota's home and community-based services waiver expressly prohibits funding for services outside of the country. Second, the Commissioner correctly determined that the waiver's health and safety requirements cannot be satisfied when a service is provided in a distant country. Third, denying funding for the Midreshet Darkaynu program does not violate the Americans with Disabilities Act because Minnesota does not fund such programming for any other individuals and requiring such funding would fundamentally alter the nature of Minnesota's waiver services.

Denying funding to attend the Midreshet Darkaynu program does not violate Appellant's federal or state constitutional rights. The federal Free Exercise Clause is inapplicable to regulations that are neutral toward religion and that are generally applicable. The narrow exception to this for unemployment compensation cases is not relevant to Appellant's claims. As a threshold matter under both state and federal constitutions, Appellant fails to demonstrate that she has suffered a cognizable burden on

her exercise of religion or freedom of conscience. The record establishes that she has not been denied the benefits she is entitled, only that she insists on using those benefits to participate in an ineligible program. Even if such a burden were demonstrated, Minnesota's compelling interests in the health and welfare of waiver recipients justifies that burden. Appellant's suggested less restrictive alternative for meeting those compelling interests must be rejected as unsupported by the record and an impermissible attempt to delegate county and state responsibilities to private individuals.

ARGUMENT

I. THE COMMISSIONER CORRECTLY DENIED MEDICAID PAYMENT FOR THE MIDRESHET DARKAYNU PROGRAM BECAUSE SUCH DENIAL IS CONSISTENT WITH GOVERNING LAW.

A. Neither Federal Law Nor Federal Agency Directives Require States To Cover Medicaid Services Provided Outside Of The United States.

The Department's decision should be affirmed because it comports with federal laws governing Medicaid and Minnesota's MR/RC waiver. Federal law does not require states to cover Medicaid services provided outside of the United States.¹⁰ Rather, federal law requires that the state's Medicaid plan "pay for services furnished in another State" only in the following limited circumstances:

¹⁰ Admittedly, there is no explicit federal prohibition on the provision of Medicaid services outside the country. The Department reimburses for Medicaid services out of the country only for individuals residing near the Canadian border. This policy reflects a decision by the Minnesota Legislature to recognize licensure of providers by Canada for purposes of receiving Medicaid payments. Canada is the only foreign country for which the legislature has specifically recognized the adequacy of provider licensure standards. See Minn. Stat. § 256B.25. Effective April 1, 2005, however, the MR/RC waiver prohibits payment for waiver services provided outside of the United States. RA55.

- 1) when medical services are needed because of a medical emergency;
- 2) when medical services are needed and the recipient's health would be endangered if he were required to travel to his state of residence; or
- 3) when the State determines that the needed medical services are more readily available "in the other State;" or
- 4) when "[i]t is general practice for recipients in a particular locality to use medical resources in another State."

See 42 C.F.R. § 431.52(b).

In each of the above-listed circumstances, the federal regulation speaks in terms of services provided in another *state*, and not services provided in another country. To facilitate services to recipients in the above circumstances, federal law requires cooperation "among States." 42 C.F.R. § 431.52(c).

Medicaid is a state-based program, varying among the states and intended to "enabl[e] each *State*, as far as practicable under conditions *in such State*," to furnish medical assistance. 42 U.S.C. § 1396 (emphasis added). The statutory framework of Medicaid is premised on each state being the locus of delivery of services. See, e.g., 42 U.S.C. § 1396a(a)(1) and 42 C.F.R. § 431.50 (*statewide* operation); and 42 U.S.C. § 1396a(a)(9) (requiring that *state* agencies establish and maintain health and other standards for institutions in which recipients receive care). This state-focused framework is consistent with Medicaid's function of providing medical assistance to those with insufficient resources to pay for necessary medical care through state-developed programs. 42 U.S.C. § 1396(1).

The language of CMS directives to the states concerning the provision of MR/RC waiver services out-of-state also suggests that states are not required to pay for waiver

services in foreign countries. With respect to MR/RC waiver services provided out of state, CMS has directed that “any standards applicable to the provision of the service in the State in which the service is furnished must be met, as well as those standards set forth in the approved waiver. If one State were to pay for a service furnished in another, the provider must be qualified under the standards in the waiver, and the service must also meet any applicable requirements in the State in which it is provided.” Hrg. Ex. 15, Olmstead Update No. 3 at 9.

Similarly, with respect to monitoring obligations, CMS has directed that the “State operating the waiver remains responsible for the assurance of the health and welfare of the beneficiary. Oversight may be performed directly by the home State or by the host State in which services are actually received. If it is done by the host State, there *must* be an interstate compact or agreement setting forth the responsibilities of each party.” *Id.* (emphasis added).

Conspicuously absent from federal regulation or directives is any discussion of providing services in foreign countries. The federal regulation and directives requiring cooperation among states in providing and monitoring waiver services across state boundaries makes sense in the context of a system of Medicaid-participating states who undertake reciprocal obligations to cover services provided to their recipients in other states. The rationale of these directives is not transferable, however, to services provided in far away foreign countries outside the reciprocal obligations of the Medicaid program.

Finally, CMS recently approved an amendment to Minnesota’s waiver that clarifies that out-of-country services will be excluded under the waiver. RA55-59.

Under the amendment, the Department clarifies that services provided outside of Minnesota will not be covered except for certain circumstances when “the provider is located within the individual’s local trade area in North Dakota, South Dakota, Iowa or Wisconsin” or when “the individual is temporarily traveling outside of Minnesota, but *within the United States.*” *Id.* (emphasis added). This amendment is effective as of April 2005. RA60.¹¹

B. The Commissioner Correctly Determined That The County Could Not Satisfy Its Obligations Under The Federally Approved Waiver To Ensure Quality And The Health And Safety Of The Recipient For Services Provided In Israel.

As set forth above in this brief’s background section, to obtain federal approval of its waiver program Minnesota was required to provide adequate assurance to CMS that the recipients’ health and welfare will be protected. The Department accordingly assured CMS that the standards of any State licensure or certification requirements will be met for services or for individuals furnishing services, and assured CMS that it will monitor services and follow up when problems arise. Long Aff. Ex. A at 8-9. The Commissioner correctly found that the State could not satisfy these health and safety assurances for services provided through a program in Israel. RSR 12-13.

¹¹ If a MR/RC service is provided outside of the United States, there will be no federal matching funds because it will not satisfy the conditions of the amended waiver (which is the only authority for federal financial participation).

- 1. The Midreshet Darkaynu program may not receive funding through the MR/RC waiver unless properly licensed by the Minnesota Department Of Human Services.**

Minnesota law requires that residential programs such as Midreshet Darkaynu, which provide twenty-four hour care, supervision, food, lodging, habilitation or treatment outside the person's home, be licensed by the Minnesota Department of Human Services. *See* Minn. Stat. § 245A.03, subd. 1; § 245A.02, subd. 14.¹² The licensure process includes mandatory background studies by the Department of the provider and of all individuals who provide direct contact services. *See* Minn. Stat. § 245C.03, subd. 1; *see also* § 245A.04, subd. 1; § 245A.65. Midreshet Darkaynu is a residential program providing twenty-four hour care, including habilitation, outside of Appellant's home. *See* RSR15-27. As such, it is not eligible for Medicaid payments under the MR/RC waiver unless it is licensed by the Department. While the Minnesota Legislature has specifically recognized Canadian licensure as adequate to satisfy standards for Medicaid payment, the legislature has not afforded similar recognition to the licensure standards of any other country. *See* Minn. Stat. § 256B.25.

- 2. Specifically, Midreshet Darkaynu is ineligible for CDCS payments because it is a residential program.**

Moreover, even if Midreshet Darkaynu were licensed, people living in residential programs are *not eligible* to receive their MR/RC waiver services using the CDCS option

¹² State law provides an exclusion from the licensure requirement for CDCS services provided by an individual who is the direct payee for the services but only if the individual providing services is not otherwise under the control of a residential program. *See* Minn. Stat. § 245A.03, subd. 2. This exclusion, however, does not appear to apply to Midreshet Darkaynu.

of the waiver.¹³ Rather, the CDCS option is specifically structured to provide services to individuals who are not already receiving services through such residential programs. The provisions of the federally approved waiver that govern the CDCS option do not permit individuals who are living in residential programs to elect the consumer directed support option of the waiver. The CDCS option of the waiver specifically excludes services provided to individuals living in licensed settings as “unallowable expenditures.” RA52; *see also* RA33 (“People living in licensed foster care settings, settings licensed by DHS or MDH, or registered as a housing with services establishment with MDH are not eligible for CDCS.”)¹⁴ CDCS funds therefore may not be used to pay for the Midreshet Darkaynu program.

3. The State cannot adequately monitor the provision of services to Appellant in Israel.

Appellant suggests on appeal that the Commissioner erred when he found that the County could not adequately assure quality, health and safety. Appellant argues that the County’s monitoring obligations could be more than adequately satisfied by an on-site visit to the program in Israel and reporting by either Appellant’s father or by a licensed Minnesota social worker. Appellant’s suggested monitoring arrangement should be rejected because it does not satisfy the County’s and the State’s obligations under the terms of the federally approved waiver.

¹³ Although the CDCS option is not available, individuals living in licensed residential programs may still be eligible to receive services through the MR/RC waiver.

¹⁴ The CDCS option may not be used to avoid licensure requirements that would otherwise apply to a particular provider or program. *See* Tr. at 19-20.

First, Appellant attributes to the CDCS waiver option greater flexibility than actually exists. While it is true that the purpose of the waiver is to grant states flexibility to adapt their programs to meet the needs of particular groups of recipients, that flexibility is not without bounds. The states' flexibility is subject to "specific safeguards for the protection of recipients and the program" set forth in the waiver. 42 C.F.R. § 430.25(b). That flexibility is not unlimited as Appellant appears to argue.

Second, Appellant's proposed arrangement misunderstands the required *county* monitoring under the federally approved waiver. RA50-51. While the county may in part rely upon the recipient or the recipient's representative to report problems as they arise, CDCS does not grant to the consumer flexibility to *direct* these most basic health, welfare and financial accountability functions.

Under the CDCS option, the recipient has flexibility in directing certain aspects of case management including developing the community support plan, selecting service providers, providing staff training and monitoring the provision of services under the plan. These activities are referred to as flexible direct support functions. As such, they are flexible in terms of *who* provides them. *See* RA50. The consumer may purchase these flexible case management services from the county or private providers, or the consumer may elect to have someone else provide them without pay. *Id.*

In contrast to the flexible direct support functions, however, the responsibility of monitoring health, welfare, and fiscal accountability may not be directed by the consumer. Rather, these responsibilities are specifically designated as required county case management functions in the waiver. *Id.* These activities are directed by the county

agency and are not included in a consumer's CDCS budget. *Id.* While the county may elect to provide these activities through a contract employee, the responsibility for conducting these activities remains with the county agency.

Third, Appellant's suggestion also fails to take into account Minnesota's obligation to follow up on any concerns and to take action to investigate reports of maltreatment of the recipient or misuse of public funds. According to CMS' policy guidance to states, Minnesota remains responsible for ensuring quality, health, and safety for services provided out of state. Hrg. Ex. 15, Olmstead Update No. 3 at 9. Specifically, the waiver requires that the county "tak[e] action, when required to address suspected abuse, neglect, or exploitation of a consumer as a mandated reporter according to the maltreatment of minors or vulnerable adults acts." RA51. Minnesota similarly assures CMS that the county will "investigate reports related to vulnerability or misuse of public funds." *Id.* It is clear, however, that Hennepin County would lack authority to conduct investigations or take other actions to protect the recipient or the program in the event of maltreatment or misuse of funds in Israel.¹⁵ In light of the County's, and ultimately the State's responsibility to ensure that the non-flexible monitoring functions are performed, it would not be reasonable to require Minnesota to agree to pay for a recipient to receive services from providers in a foreign country in which the laws are unknown, and where the State lacks any authority to take action should problems arise. The Commissioner's

¹⁵ While CMS has indicated that states may enter into compacts with other states to allow the states to take over monitoring requirements for services provided there, Hrg. Ex. 15, Olmstead Update No. 3 at 9, there are no such agreements between Minnesota and any other state, much less Israel. RSR7-8, ¶ 20.

finding that health and safety cannot be adequately monitored in Israel should therefore be affirmed.

C. The Agency's Decision To Withhold Authorization For Waiver Services In Israel Does Not Implicate The Americans With Disabilities Act.

Appellant argues that under the Minnesota Federal District Court opinion issued in *Masterman v. Goodno*, No. Civ. 03-2939, 2004 WL 51271 (D. Minn. Jan. 8, 2004), Minnesota is required to fund services for Appellant in Israel, because to do otherwise would violate the ADA's Title II integration mandate. A11-13.

Title II of the ADA states, in part, that "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by such entity." 42 U.S.C. § 12132. To establish a violation of Title II of the ADA, the Appellant must show 1) she is a "qualified individual with a disability"; 2) she was "excluded from participation in or denied the benefits of a public entity's services, programs or activities, or was otherwise discriminated against by the entity"; and 3) "that such exclusion, denial of benefits, or other discrimination was by reason of her disability." *Layton v. Elder*, 143 F.3d 469, 472 (8th Cir. 1998).

The United States Attorney General has promulgated regulations pursuant to Title II, providing that "[a] public entity shall administer services, programs and activities in the most integrated setting appropriate to the needs of qualified individuals with disabilities." 28 C.F.R. § 35.130(d). The "most integrated setting appropriate" means "a setting that enables individuals with disabilities to interact with nondisabled persons to

the fullest extent possible.” *Olmstead v. Zimring*, 527 U.S. 581, 593, 199 S. Ct. 2176, 2183 (1999) (citing 28 C.F.R pt. 35, App. A at 450).

Appellant’s ADA claim fails because, in seeking to expand covered services to Israel, she asks that the Court order the State to fund particular levels of benefits or particular standards of care for medical services that are not provided to anyone else. The proposition that states must provide a particular level of benefits was explicitly rejected by the United States Supreme Court in *Olmstead v. Zimring*, 527 U.S. at 603, n. 14, 119 S. Ct. at 2188. In *Olmstead*, the Court clarified that, rather than dictating a specific level of services, the ADA requires that states “adhere to the ADA’s nondiscrimination requirement with regard to the services they in fact provide.” *Id.* It does not require states to provide a level of services to disabled persons that it provides to no one else. *See Rodriguez v. City of New York*, 197 F.3d 611, 616 (2d Cir. 1999) *cert. denied*, 531 U.S. 864 (Oct. 2, 2000). The Department does not provide funding for *anyone* to receive Medicaid services from providers in foreign countries outside the recipient’s local trade area. Indeed, after the MR/RC waiver amendment, the Department cannot pay for MR/RC services, including CDCS services, provided outside of the United States, with only limited exceptions not applicable here. RA55-56. The Appellant does not cite any authority holding that to administer programs in an integrated setting a state must expand its menu of covered services to allow disabled individuals to receive services from providers in foreign countries.

States are not required by the ADA to make accommodations at the expense of their obligations under other federal laws. Here, the Commissioner specifically found

that Minnesota could not accommodate Appellant by funding waiver services in Israel in a manner that would comply with its obligations under federal law to ensure the health and safety of recipients of waiver services. The ADA requires only that public entities “make *reasonable* modifications in policies, practices or procedures when the modifications are necessary to avoid discrimination on the basis of disability.” 28 C.F.R. § 35.130(b)(7). The general integration mandate of the ADA does not trump the specific federal requirements for home and community-based waiver programs. *See Arc v. Braddock*, 403 F.3d 641, 644 (9th Cir. 2005).

Indeed, requiring Minnesota to relax its compliance with health and safety assurances under the federally approved waiver would constitute a fundamental alteration to Minnesota’s program. Such a result is neither required nor intended under the ADA. *See* 28 C.F.R. § 35.130(b)(7) (providing that a state is not required to make modifications that “would fundamentally alter the nature of the service, program, or activity”). *Olmstead*, 527 U.S. at 603, 119 S. Ct. at 2189.

This case is factually distinguishable from the cases that Appellant relies on to establish her ADA claim. Unlike the plaintiffs in *Olmstead*, Appellant has not been denied funding to receive community-based services. *See* A81 ¶ 15 (concluding “Appellant has in no way been denied public benefits by the Department.”). Nor has her level of funding under her community services plan been cut off or even reduced, as Plaintiffs had alleged in *Masterman v. Goodno*, 2004 WL 51271, at *11, *12. Appellant has suffered no reduction in funding to receive services in the community where she resides. *See* RSR28. The court’s concern in *Masterman*, that threatened reductions to the

plaintiffs' waiver budgets would force plaintiffs to choose between receiving services that were inadequate to protect their health and safety or entering an institution, is also not present here. *See id.* Rather, the Commissioner's decision denying authorization of funds for services in Israel is directly related to concerns about assuring health and safety.

The record does not show that withholding authorization for services in Israel leaves Appellant with *no choice* but to receive care in an institution. Significantly, no witness provided testimony that Appellant would face institutionalization in the absence of funding for the program in Israel. The referee found that while the program in Israel "would be the optimal program for a young Jewish woman of the Orthodox persuasion," there would be alternative services available for her to continue receiving community-based services in Minnesota. *See* RSR4 ¶ 10; RA10 ¶ 3. These findings are supported by substantial evidence in the record and should be affirmed. *See* Hrg. Ex. 24 (Barry Garfinkel Aff., acknowledging that "there are various programs within the State of Minnesota that could provide certain components of the full range of services offered by" the program in Israel but concluding that the Israel program is "uniquely and ideally suited for Shaina's needs."); *see also* Tr. 53-4 (testimony of Lisa Burnstein, discussing alternative services available in Minnesota, and giving her opinion that the alternatives would be socially isolating due to the small number of Orthodox Jewish women residing in her Minnesota community). Appellant's ability to receive funding for community-based services remains intact. Appellant's ADA claim should therefore be rejected.

II. DENIAL OF CDCS FUNDING TO ATTEND THE MIDRESHET DARKAYNU PROGRAM DOES NOT VIOLATE APPELLANT'S FEDERAL AND STATE CONSTITUTIONAL RIGHTS TO FREE EXERCISE OF RELIGION AND FREEDOM OF CONSCIENCE.

Apparently Appellant's primary argument on appeal to this Court is that withholding funding for services in Israel violates her right to the free exercise of her religion under the federal constitution and to freedom of conscience under the Minnesota Constitution. App. Br. 6-14, RA65. The premise of Appellant's argument is that denial of funding for Midreshet Darkaynu forces her "to choose between violating the precepts of her religion and forfeiting benefits on the one hand, or abandoning the religious precepts in order to accept government benefits to which she is otherwise entitled." A17; *see also* App. Br. at 2, RA65. The specific religious precepts that Appellant claims she will be forced to violate unless she attends Midreshet Darkaynu involve Sabbath and holiday observances, gender segregation, and food preparation and consumption. App. Br. at 2 n.1.

As an initial matter, the record does not clearly substantiate Appellant's assertion that she faces a coerced choice between adhering to her beliefs and receiving CDCS benefits. Testimony at the hearing only described one particular Minnesota-based program as purportedly incompatible in some respects with Appellant's religious practices. *See* Tr. 48-49. There is no evidence that Minnesota providers are unwilling to adapt their services to accommodate Appellant's practices. Also, 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. Her 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.*¹⁶

Against this absence of evidence supporting Appellant’s blanket claim that she is being forced to choose between receiving any public benefit and adhering to religious precepts is substantial evidence that she has received CDCS services without having to alter or violate her religious practices. For example, Appellant’s father testified that “her life [is] so much more enriched over the last year, that she has the CDCS services. . . . It’s worked out beautifully for her.” Tr. 63. Indeed, her father credits CDCS with making possible various socialization activities for Appellant. *Id.* In addition, Appellant’s alternative budget was approved, demonstrating that she has not been forced to choose between public benefits and her religious practices. RSR 28. Moreover, Appellant does not explain how the year-long Midreshet Darkaynu program will permanently end the social isolation her mother claims will occur without the program. In light of this record, it 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.

¹⁶ Apparently, local community resources exist that may provide assistance to Appellant in developing services that accommodate her religious practices or provide socialization opportunities. *See, e.g.*, <http://www.jfcsmpls.org/Services/services.html> (describing Jewish community service programs such as the “Caring Connections” for adults, a community inclusion program, and a young adult service program).

A. Refusing To Subsidize Appellant's Participation In The Midreshet Darkaynu Program Does Not Violate The Free Exercise Clause.

1. Denying funding for the Midreshet Darkaynu Program does not coerce or compel Appellant to alter or violate her religious beliefs and practices.

The First Amendment's Free Exercise Clause states that "Congress shall make no law prohibiting the free exercise [of religion]." U.S. Const., amend. I. The Free Exercise Clause recognizes a person's freedom to choose his own religious practice "free of any compulsion from the state." *Sch. Dist of Abington Twp., Pennsylvania v. Schempp*, 374 U.S. 203, 222, 83 S.Ct. 1560, 1571 (1963). "The Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can extract from the government." *Bowen v. Roy*, 476 U.S. 693, 699, 106 S.Ct. 2147, 2152 (1986) (quoting *Sherbert v. Verner*, 374 U.S. 398, 412, 83 S.Ct. 1790, 798 (1963) (Douglas, J., concurring)). Thus, "it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." *Abington*, 374 U.S. at 223, 83 S.Ct. at 1572.

Here, Appellant fails to show that the denial of her request to subsidize her participation in the year-abroad program at Midreshet Darkaynu coerces her into altering, abandoning, or violating her religious beliefs and practices. The premise of her claim of coercion is that she must choose between receiving a public benefit, i.e., the CDCS option of the MR/RC Medicaid waiver, and adhering to her religious beliefs. This premise, however, is flawed because it ignores that Appellant has not, and will not, be denied eligibility because she chooses to adhere to her beliefs. *Cf. Locke v. Davey*, 540

U.S. 712, 721 n. 4, 124 S.Ct. 1307, 1313 n. 4 (2004) (noting that state scholarship recipients, though unable to use scholarships to pursue devotional degrees, could still use their scholarships for nonreligious education and thus were not required to choose between their beliefs and receiving a government benefit). Nor is Appellant penalized for her choice. Her CDCS resource budget has not been reduced by her adherence to religious practices. At most, the incidental effect of the MR/RC requirements that are the basis for the denial is to indirectly make it more expensive for her to attend in her ideal program. This difficulty, however, is not caused by any affirmative government action with an inherent tendency to coerce her to act contrary to her beliefs. Rather, the MR/RC requirements reflect the legitimate governmental administration and supervision of a social welfare program. There is no constitutional principle that supports Appellant's position. *See Lyng v. Northwest Indian Cemetary Protective Ass'n*, 485 U.S. 439, 450-52 108 S.Ct. 1319 (1988); *Bowen*, 476 U.S. at 699, 106 S.Ct. at 2152.

2. United States Supreme Court Free Exercise Clause jurisprudence does not require Appellant to be exempted from the religiously neutral and generally applicable requirements of the MR/RC waiver.

In support of her Free Exercise Clause argument, Appellant relies on three United States Supreme Court decisions involving unemployment compensation. A17-18, App. Br. at 10 (*citing Hobbie v. Unemployment Appeals Comm'n of Florida*, 480 U.S. 136, 107 S.Ct. 1046 (1987); *Thomas v. Review Bd. of the Indiana Employment Sec. Div.*, 450 U.S. 707, 101 S. Ct. 1425 (1981); and *Sherbert v. Verner*, 374 U.S. 398, 83 S. Ct.

1790 (1963)).¹⁷ *Sherbert, Thomas, and Hobbie* all involved the denial of state unemployment compensation benefits to individuals who were terminated from or left employment that imposed conditions which violated their religious convictions. *Sherbert* and *Hobbie* were each dismissed from employment after they refused to work on their day of Sabbath. *Sherbert*, 374 U.S. at 401-02, 83 S. Ct. at 1792; *Hobbie*, 480 U.S. at 138, 107 S.Ct. at 1047-48. *Thomas* left his employment when his employer required that he work directly in the production of weapons in violation of his religious beliefs. *Thomas*, 450 U.S. at 708, 101 S. Ct. at 1428. The individuals in these cases applied for state unemployment benefits. Their states conditioned eligibility for benefits on an applicant's acceptance of work unless the applicant had good cause to decline. After conducting individualized administrative hearings on good cause, each state denied benefits based upon a finding that the individuals' stated religious objections did not establish good cause or was actually misconduct. In each case, the Supreme Court reversed the state decision, holding that conditioning the receipt of unemployment compensation benefits on the violation of religious beliefs imposed a burden on religious freedom that could only be justified by showing that it was the least restrictive means of achieving a compelling state interest. *See Thomas*, 450 U.S. at 718, 101 S. Ct. at 1432, and *Sherbert*,

¹⁷ Appellant also cites the Eighth Circuit Court of Appeals decision in *Children's Healthcare v. Min De Parle*, 212 F.3d 1084 (8th Cir. 2000), but this case did not involve the evaluation of a free exercise claim. Rather, *Children's Healthcare* addressed an Establishment Clause challenge to a statutory exception to recognize religious objections. In upholding the statute, the Court did not hold or find that a statutory exemption was required by the Free Exercise Clause. *See* 212 F.3d at 1094. Instead, the Court merely used *Sherbert* as "as starting point for determining when a government-imposed burden is sufficient to warrant permissive accommodation." *Id.* (emphasis added).

374 U.S. at 407, 83 S. Ct. at 1795. *Hobbie*, 480 U.S. at 144, 107 S.Ct. at 1051. Both *Thomas* and *Hobbie* relied upon *Sherbert* for their holdings.

Appellant's reliance on *Sherbert*, *Thomas*, and *Hobbie* is unwarranted. The holdings in the *Sherbert* line of cases were subsequently limited by the Supreme Court's decision in *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 110 S. Ct. 1595 (1990). Prior to *Smith*, the Court applied strict scrutiny when reviewing laws, including religiously neutral laws, that substantially burdened the free exercise of religion. In *Smith*, however, the Supreme Court modified the standard for evaluating free exercise claims and distinguished the *Sherbert* line of cases.¹⁸

The *Smith* Court held that the Free Exercise Clause did not prohibit Oregon from criminalizing the religious use of peyote or from relying on this criminalized status as grounds for denying unemployment compensation to individuals terminated from their jobs because of misconduct based on peyote use. *Id.* at 890, 110 S. Ct. at 1606. The Court specifically declined to apply strict scrutiny when reviewing the state law and stated that the right of free exercise "does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes' (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879, 110 S. Ct. 1595. This principle has also been recognized as applying to *all* instances of facially neutral laws and regulations. *See Church of the Lukumi Babalu Aye*,

¹⁸ Appellant's reference to the federal Religious Freedom Restoration Act's reestablishment of the pre-*Smith* compelling interest test, App. Br. at 11, fails to acknowledge that the Supreme Court struck down that act as it applied to the states in 1997. *City of Boerne v. Flores*, 521 U.S. 507 (1997).

Inc. v. Hialeah, 508 U.S. 520, 533, 113 S. Ct. 2217, 2226 (1993) (“[O]ur cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice.”); see also *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. ___, 126 S.Ct. 1211, 1216 (2006) (discussing *Smith*’s rejection of *Sherbert*).

In declining to apply the strict scrutiny of *Sherbert* in *Smith*, the Supreme Court noted that it had “never invalidated any governmental action on the basis of the *Sherbert* test except in the denial of unemployment compensation.” *Smith*, 494 U.S. at 883, 110 S. Ct. at 1602. The Court further indicated that there would be only limited circumstances in which *Sherbert* may still apply, as that line of cases was “developed in a context that lent itself to individualized governmental assessment of the reasons for the relevant conduct.” *Id.* at 884, 110 S. Ct. 1603. Accordingly, the only exception left open for strict scrutiny after *Smith* is in cases “where the State has in place a system of individualized exemptions.” *Id.* In such circumstances, “the government may not refuse to extend that system to cases of ‘religious hardship’ without compelling reason.” *Id.*¹⁹

¹⁹ Although this *Sherbert* line of cases has frequently been invoked by plaintiffs outside of the unemployment compensation context, such attempts to expand it to other areas have been rejected. See, e.g., *Gary S. v. Manchester Sch. Dist.*, 374 F.3d 15, 18-19 (1st Cir. 2004) (rejecting argument that absence of comparable special education services for Catholic school student forced parents to choose between exercising religious beliefs and accepting public benefits); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058, 1065 (6th Cir. 1987) (rejecting argument that religiously objectional textbook contents forced parents to choose between their religious beliefs and the benefit of free public education).

Here, however, there is no system for individualized determination of whether services may be provided in foreign countries. The record shows that the Department's policy of limiting the expenditure of Medicaid dollars to the United States and portions of Canada within the local trade area is a neutral policy of general applicability. The policy applies to all Medical Assistance recipients and is not subject to individualized exemptions. Nor is there any basis for granting individualized hardship exemptions from the policy, as the policy reflects the unwaivable federal requirement that Minnesota monitor the health and welfare of recipients and the financial accountability of program funds pursuant to its federally approved waiver plan.

Additionally, as stated earlier in this brief, the Department has not denied public benefits to Appellant as was the key element in the *Sherbert* line of cases. Appellant has not been deemed ineligible to receive community-based services. *See* RSR28. Her waiver service budget has not been reduced. *Id.* And she has not been denied a benefit that would otherwise be available to her or any other Medicaid recipient. The Department simply does not cover services that are provided outside the United States or the recipient's local trade area for *anyone*. *See* RA55-56. CDCS payment is also not allowed for a residential program like Midreshet Darkaynu. *See supra*, notes 12 and 13 and accompanying text. The decision not to fund a system of benefits abroad does not offend free exercise principles. *See Locke v. Davey*, 540 U.S. 712, 720-21, 124 S. Ct. 1307, 1313-14 (2004) (holding that the State of Washington's decision not to fund devotional theology instruction did not violate the Free Exercise Clause as the state could chose not to fund a distinct category of instruction); *Lyng*, 485 U.S. at 449, 108 S.Ct. at

1325 (concluding that government action that does not coerce individuals into violating beliefs or penalize religious activity does not violate the Free Exercise Clause even though the action indirectly affected the ability to practice religion):

B. The Denial Of CDCS Funding For The Midreshet Darkaynu Program Does Not Violate the Minnesota Constitution's Protection From Infringement Of Or Interference With Appellant's Freedom Of Conscience.

- 1. The test for evaluating claims under the Minnesota Constitution's Freedom of Conscience Clause requires Appellant to demonstrate a burden on her exercise of religion.**

The Minnesota Constitution provides that:

The right of every man to worship God according to the dictates of his own conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference be given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state.

Minn. const. art. I § 16. Appellant asserts that denial of her request to use CDCS funds to attend Midreshet Darkaynu violates the freedom of conscience guaranteed to her under the state constitution. App. Br. 6-10. Appellant relies upon *State v. Hershberger*, 462 N.W.2d 393 (Minn. 1990) ("*Hershberger II*"), as the basis for her Minnesota constitutional analysis. App. Br. 6-10.

In *Hershberger II*, Amish defendants in southeastern Minnesota moved for dismissal of the traffic citations they received for noncompliance with a state statute requiring them to display a slow-moving vehicle ("SMV") symbol on their horse-drawn

buggies. *State v. Hershberger*, 444 N.W.2d 282, 284 (Minn. 1989) (“*Hershberger I*”). The defendants asserted that the enforcement of the statute against them infringed their right to freely exercise their religious beliefs. *Id.* A central tenet of their religion was that they remain separate from the modern world, which they asserted would be violated by display of the “loud” colors and “worldly symbols” of the SMV symbol. *Id.* The Minnesota Supreme Court, citing *Thomas v. Review Board*, used the compelling interest test found in the *Sherbert* line of cases to analyze the claim. *Id.* at 285. The court held that the defendant’s rights under the federal constitution had been violated but declined to decide whether their rights under the Minnesota Constitution were also violated. *Id.* at 289.

The United States Supreme Court granted certiorari, then vacated and remanded *Hershberger I* for reconsideration in light of its recent decision in *Smith*. *Minnesota v. Hershberger*, 494 U.S. 901, 110 S. Ct. 1918 (1990). On remand, the Minnesota Supreme Court observed that the Freedom of Conscience Clause of the Minnesota constitution provided greater protection for religious liberties against governmental action than the federal Free Exercise clause after the *Smith* decision. *Hershberger II*, 462 N.W.2d at 397. Having already concluded that the potential of criminal sanctions — including fines and jail time — for violating the SMV statute “substantially infringe[d]” upon their religious rights, *Hershberger I*, 444 N.W.2d at 287, and rejecting the state’s request to reconsider the finding that the defendants held a sincere religious belief, *Hershberger II*, 462 N.W.2d at 396, the court went on to examine the state’s claim that public safety required denying a religious exemption from the SMV statute. *Id.* at 397-98. The court

stated that “To infringe upon religious freedoms . . . the state must demonstrate that public safety cannot be achieved through reasonable alternative means.” *Id.* at 399. The court noted that it had already concluded in *Hershberger I* that the alternative to displaying the SMV-symbol proposed by the defendants — use of reflective tape and a lighted red lantern — effectively achieved public safety goals. *Id.* Because the state had failed to prove that the defendant’s alternative could not accommodate both religious freedom and public safety, the court held that enforcement of the SMV statute violated the state constitution. *Id.*

After *Hershberger II*, Minnesota courts have consistently used a four-step inquiry to evaluate claims of violations of the Freedom of Conscience clause:

- 1) whether the objector’s belief is sincerely held;
- 2) whether the state regulation burdens the exercise of religious beliefs;
- 3) whether the state interest in the regulation is overriding or compelling; and,
- 4) whether the state regulation uses the least restrictive means.

Hill-Murray Fed’n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 865 (Minn. 1992); see also *Odenthal v. Minn. Conf. of Seventh-Day Adventists*, 649 N.W.2d 426, 442 (Minn. 2002) (same).

Although Appellant has a sincere religious belief in adhering to the dictates of Orthodox Judaism, she has not satisfied the threshold requirement of demonstrating that the denial of CDCS funding for Midreshet Darkanyu program itself burdens her exercise of those beliefs. Even if she did demonstrate such a burden, Minnesota has an overriding and compelling interest in protecting the health and welfare of waiver service recipients

by ensuring that monitoring and licensing safeguards are in place. This interest justifies any indirect burden on Appellant's freedom of conscience from the facially neutral rules and requirements that are the basis for denying her request for CDCS funding. Moreover, Appellant's claim that there is a less restrictive alternative is unavailing.

2. Appellant fails to demonstrate that her freedom of conscience is infringed by denial of funding for Midreshet Darkaynu.

Appellant puts great emphasis on a passage from *Hershberger II* suggesting that all she must do is prove she has a sincerely held belief and then the burden shifts to the state to prove a compelling interest. App. Br. at 8. In doing so, Appellant misrepresents the correct sequence for analyzing her claim and, moreover, fails to satisfy her burden of demonstrating a substantial burden on her exercise of religion. Appellant merely asserts, without substantiating, that her religious practice is burdened by the County's denial of CDCS funding for attending Midreshet Darkaynu. Appellant's failure to meet her burden requires that this Court hold that there has been no violation of her constitutional rights without having to look to the alternative monitoring proposal first offered by Appellant at the district court and, therefore, not part of the record under review.

Following *Hershberger II*, a challenged state law or action must *first* be shown to burden an individual's sincerely held religious belief before a compelling or overriding state interest needs to be considered. See *Hill-Murray*, 487 N.W.2d at 865-66; *State ex. rel. McClure v. Sports and Health Club*, 370 N.W.2d 844, 851 (Minn. 1985); see also *Kirt v. Humphrey*, No. C1-96-2614, 1997 WL 561249 at *3 (Minn. Ct. App. Sept. 9, 1997) (stating that "only if a burden is proven does it become necessary to consider

whether the governmental interest served is compelling or whether the state had adopted the least burdensome method of achieving its goal.” (internal quotation marks and citation omitted) (a copy of this unpublished decision is included in Respondent’s addendum materials). For example, in *In re Rothenberg*, 676 N.W.2d 283 (Minn. 2004), the Minnesota Supreme Court rejected a freedom of conscience claim when the individual failed to show that he had no choice but to violate his freedom of conscience by attending certain continuing legal education courses, the content of which violated his beliefs, out of the hundreds that were offered. *Id.* at 294.

The kinds of actions that Minnesota courts have recognized as constitutionally cognizable burdens on religious freedom are of a markedly different nature from Appellant’s claims. Some examples from the cases illustrate this difference. The likelihood of criminal fines and incarceration for refusing to comply with a law based on religious beliefs represents a substantial infringement on a person’s freedom of consciousness. *Hershberger I*, 444 N.W.2d at 287. A court’s inquiry into a church’s religiously-based discharge of an employee constituted a burden because doing so could compel the church “to conform its religious beliefs with the government’s or the majority culture’s beliefs.” *Geraci v. Eckankar*, 526 N.W.2d 391, 399 (Minn. Ct. App. 1995). Similarly, a court’s inquiry into church pension fund investments that have been made as an expression of sincerely held beliefs was held to burden the exercise of religion by questioning the doctrinal basis of investment decisions. *Basich v. Bd. of Pensions, Evangelical Lutheran Church in America (ELCA)*, 540 N.W.2d 82, 87 (Minn. Ct. App. 1995). Finally, an order that a father pay a child support obligation “that he will be

unable to pay without taking a secular job will impose on his exercise of religious beliefs or cause him to risk penalties for nonpayment of support” creates a substantial free exercise burden because it compels the believer to risk significant penalties for adhering to his beliefs. *Murphy v. Murphy*, 574 N.W.2d 77, 81 (Minn. Ct. App. 1998). Appellant does not face criminal sanctions, reductions in her CDCS benefit, or any other penalty if she does not receive CDCS funding to attend Midreshet Darkaynu.

In contrast, Minnesota courts have concluded that complying with religiously neutral laws and regulations does not cause a cognizable burden implicating the Freedom of Conscience Clause. For example, the Minnesota Supreme Court held that applying the Minnesota Labor Relations Act to require a religious high school to recognize and negotiate conditions of employment with a teacher’s union did not burden the school’s religious autonomy. *Hill-Murray*, 487 N.W.2d at 866. Such application was not a burden because the school retained “the power to hire employees who meet [the school’s] religious expectations, to require compliance with religious doctrine, and to remove any person who fails to follow the religious standards set forth.” *Id.* Here, Appellant and her parents retain similar powers under the CDCS option to hire providers who will accommodate her religious practices.

In another example, a panel of this Court held that a statute prohibiting automobile sales on Sundays was not a burden on one who observed Sabbath on Saturdays because the statute “[did] not prohibit or make unlawful any religious practice of [the individual] nor has it forced him to change his religious beliefs or practices in any way” or require him “to do anything abhorrent to his religious beliefs or to violate principles of his

theology” although it did put him at an economic disadvantage vis-à-vis other dealers who did not observe the Sabbath on Saturdays. *Kirt*, 1997 WL 561249 at *5.²⁰

Here, Appellant merely asserts that her freedom of conscience is burdened by a purportedly coercive choice between receiving a government benefit and violating her religious beliefs. App. Br. at 2. As discussed earlier, however, the record does not support this assertion. First, denying Appellant the use of CDCS funds to pay for the Midreshet Darkaynu program does not deny her the CDCS benefit itself. Second, Appellant’s alternative CDCS resource budget for 2004-2005 was approved. RSR28. Although Appellant’s mother offered her opinion that this alternative was not really adequate, the approved budget demonstrates that Appellant was able to identify medically necessary services qualifying for CDCS payment. Referee Peterson acknowledged that Midreshet Darkaynu appears to be an optimal program for Appellant. RSR10. There is no requirement, however, that Medicaid fund whatever services are precisely tailored to an individual’s needs. *Alexander v. Choate*, 469 U.S. 287, 303, 105 S. Ct. 712, 721 (1985).

Appellant’s failure to demonstrate that the waiver requirements force her to actually alter her religious beliefs or to violate religious precepts, as a result she has not satisfied the test for a Freedom of Conscience claim under the Minnesota Constitution.

²⁰ This brief’s discussion of burdens, coercion, and compulsion discussed in the context of the Free Exercise Clause must also be considered in evaluating Appellant’s Freedom of Conscience claim because Minnesota’s test under that provision is largely an incorporation of pre-*Smith* federal Free Exercise Clause principles. See *Hershberger II*, 462 N.W.2d at 398.

Appellant's arguments attempt to convert a constitutional *protection from* state "infringement," "interference," or "control" into her religious practice, Minn. const. art I § 16, into an *obligation to facilitate* her exercise of religion. Appellant offers no authority for such a radical reorientation of the Minnesota Constitution.

3. Minnesota has an overriding compelling interest in assuring the health and welfare of the recipients of waiver services.

Assuming *arguendo* that the denial of funding for Appellant to attend Midreshet Darkaynu results in a substantial burden on her religious rights, Minnesota has a compelling and overriding interest in protecting the health and welfare of waiver service recipients. *See* Minn. const. art I § 16 (liberty of conscience cannot be used to justify practices inconsistent with peace or safety). Appellant and other adult waiver recipients should be considered vulnerable adults for which monitoring of their health and safety is an essential responsibility of county social service agencies. *See also* Minn. Stat. § 626.557, subd. 1 (2004) (stating Minnesota's policy in favor of a system for investigating reports of abuse and maltreatment of vulnerable adults). Appellant herself is under guardianship because a court has determined that "she would be extremely vulnerable if left alone in the community." Hrg. Ex. 21 at 1. The licensing, monitoring, and other safety requirements of the waiver are clearly justified.

4. The waiver requirement for monitoring and licensing are the least restrictive means of satisfying the state's compelling interests.

The generally applicable licensing and monitoring requirements that are the basis for denying Appellant's request are the least restrictive means of effectively meeting the

compelling interest of protecting recipients' health and welfare. Appellant suggested in her district court memorandum that private individuals can perform county monitoring functions. A.18, 22-23. Unlike in *Hershberger II*, there is no factual record to support her proposed alternative. The record also does not support her district court assertions that her proposal would provide greater monitoring and protection than what counties current do. A22. Furthermore, this Court's review is of the record as it was presented to the administrative agency and Appellant offered no such proposal at the administrative hearing. It is inappropriate for this Court to consider Appellant's proposed alternative on the limited record before it. *See Murphy*, 574 N.W.2d at 82-83 (holding that the inadequacy of the record for evaluation of the least restrictive alternative element of constitutional test compelled remand).

Appellant's proposal is further flawed in that it seeks to allow private individuals to take over monitoring and licensing authority or exercise a degree of unprecedented control over the internal operation of county and state government. There is no constitutional basis for using the Freedom of Conscience Clause "to require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family." *Bowen*, 476 U.S. at 699, 106 S.Ct. at 2152 (emphasis in original); *accord Lyng*, 485 U.S. at 450, 108 S.Ct. at 1326.

CONCLUSION

This Court should, as did the district court, affirm the Commissioner's order. The County correctly denied Appellant's request to fund her participation in a year-long residential program in Israel. The CDCS option does not allow funds to be used for

residential programs such as Midreshet Darkaynu. The Commissioner's determination that the County could not adequately assure Appellant's health and safety as required under the federally approved waiver is supported by law and by substantial evidence in the record. The Commissioner's decision does not violate the ADA as Appellant remains eligible for community-based services in Minnesota and has not been denied any benefit that the Department provides to any other individual. The Commissioner's decision does not violate the Free Exercise Clause as it reflects the application of neutral laws of general application that are necessary to protect Medicaid recipient's health and welfare and the integrity of the program. Finally, the decision does not coerce or compel Appellant to alter or violate her religious beliefs and therefore satisfies state and federal constitutional protections of religious belief and practice. For the foregoing reasons, the Commissioner's decision should be affirmed.

Dated: 4/3/2006

Respectfully submitted,

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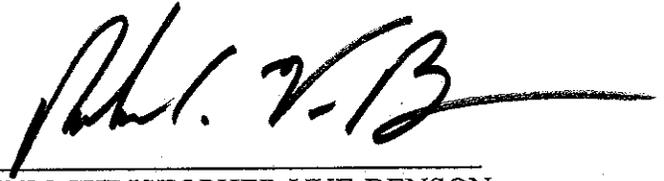
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CERTIFICATE OF COMPLIANCE

WITH MINN. R. CIV. APP. P. 132.01, Subd. 3

The undersigned certifies that the Brief submitted herein contains 12,459 words and complies with the type/volume limitations of the Minnesota Rules of Appellate Procedure 132. This Brief was prepared using a proportional spaced font size of 13 pt. The word count is stated in reliance on Microsoft Word 2002, the word processing system used to prepare this Brief.

A handwritten signature in black ink, appearing to read "R. C. V. B.", with a long horizontal line extending to the right from the end of the signature.

ROBIN CHRISTOPHER VUE-BENSON

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).