

At a Term of the Family Court of  
the State of New York, held in  
and for the County of New York at  
60 Lafayette Street  
on February 21, 2007.

PRESENT:  
HON. SHELDON M. RAND  
Judicial Hearing Officer

---

In the Matter of

BRIAN L., also known as MARIAH L.

Docket No.: K-1154/96

-against-

ADMINISTRATION FOR CHILDREN'S SERVICES

---

**RAND, J.H.O.**

On January 18, 2006, this Court granted petitioner's motion seeking an order directing the Administration for Children's Services ("ACS") to arrange for petitioner Brian L., known as Mariah L., (D.O.B. 4/27/86) to undergo sex reassignment surgery ("SRS"). By order of the Appellate Division, First Department dated August 24, 2006, the Court's order was reversed and the matter was remanded to the appellant agency to articulate a clear statement of the reasons for the Commissioner's decision to deny sexual reassignment surgery to the subject child, a then twenty-year old pre-operative male-to-female transsexual. The Appellate Court stated that this surgery is the generally recognized, successful treatment for gender identity disorder ("GID") and that, at best, ACS's position was speculative. ACS was ordered to articulate its basis or rationale for the denial and once the Commissioner did so, the Court was directed to determine whether a fact-finding hearing was warranted. Because the Appellate Division recognized SRS as the appropriate treatment for GID, this Court therefore need not address the misdirected and unsubstantiated claims of the Commissioner that the surgery ("SRS") is controversial, risky and experimental.

In response to the Appellate Division's remand, ACS supplemented the record before the Court by filing an affidavit signed by Rachel Pratt, Assistant Commissioner of the Division of Family Permanency for the Administration for Children's Services ("Pratt Affidavit") and a Memorandum of Law dated December 20, 2006. On or about January 22, 2006, Mariah's Law Guardian filed a motion seeking summary judgment for petitioner and an order directing ACS to arrange and pay for Mariah's sex reassignment surgery. The Law Guardian argues that despite the opportunity granted to ACS to supplement the record in order to articulate a factual basis for its position, ACS has failed to present any new information thereby obviating the need for any fact-finding hearing. ACS filed a cross-motion seeking summary judgment in respondent's favor on February 13, 2007.

At this juncture of the Family Court decision, the Court denies both motions for summary judgment and decides, as per the Appellate Division's directive, that there is no need to hold a fact-finding hearing. In this matter, it is uncontested that Mariah self-identifies as a heterosexual female and has done so from a young age. She reports a lifelong cross-gender identification which is intense, stable and enduring. She is a transsexual child growing into a transsexual adult whose ability to fully interact in the world is impaired because she is biologically male. She is not capable of changing or controlling her feminine qualities. Her gender expression makes her vulnerable to prejudice and to violence. Like many transgendered adolescents, Mariah has postponed fundamental life activities including working and pursuing a career until she can engage in them in her preferred gender. Sexual reassignment surgery would reduce the risks she currently faces in a society that genders bathrooms, locker rooms, dormitories, fitting rooms and

Docket No.: K-1154/96

public benefit programs and services. If Mariah undergoes surgery, she can expect reduced anxiety and defensiveness at the fear of being "found out", increased comfort in social and sexual situations, increased acceptance by friends, employers and sexual partners, increased personal comfort with her own body and the right to change her name and gender on official documents to the extent allowed by law. We must also take into consideration that this surgery ("SRS") is a monumental decision made by the child; Mariah is ready both mentally and physically for this procedure which will require that she be monitored for the rest of her life.

The Commissioner of the Administration for Children's Services nevertheless argues that sex reassignment surgery is not medically necessary because it is risky, controversial and experimental and is not a covered procedure under Medicaid. With respect to Mariah in particular, the Commissioner argues that she is not psychologically prepared to undergo such a life-altering process because she has not been compliant with psychotherapy in the past and does not have stable housing and employment. The Commissioner urges that a careful reading of their experts' reports supports this determination. The Commissioner submits that because delaying the surgery for six months would not make the procedure any more dangerous, the procedure does not meet the definition of medical necessity under the Social Services Law. Under these circumstances, ACS argues that the Court must not substitute its own judgment as to the medical necessity of the procedure because the construction given statutes and regulations by an agency responsible for their administration, if not irrational or unreasonable, should be upheld. Howard v. Wyman, 28 N.Y.2d 434 (1971).

Petitioner responds that all of the experts whom ACS has retained to evaluate Mariah

Docket No.: K-1154/96

have agreed that sex reassignment surgery is the recognized treatment for Mariah's disorder, that the procedure is medically necessary for her and that she meets all of the eligibility and readiness criteria for the surgery. In reaching their conclusions, petitioner argues, the experts fully considered Mariah's emotional and psychiatric history and concluded that many of Mariah's problems are due to the lack of harmony between her identity and her physical body and would be significantly improved by the surgery.

The only issue to be resolved by this Court is whether the Commissioner's decision that sex reassignment surgery is not medically necessary under the relevant statutory and case law is irrational or unreasonable. The Court determines that the Commissioner's unsupported denial of coverage for SRS reflects inadequate solicitude for this young woman's diagnosed condition, the treatment prescribed by her physicians and the accumulated knowledge of the medical community [Pinneke v. Preisser, 623 F.2d 546, 549 (8<sup>th</sup> Cir. 1980)] and is therefore irrational and unreasonable.

The Commissioner's argument that the Court of Appeals ruling in Matter of Denise R and Lavine, 39 N.Y.2d 279 (1976) stands for the proposition that the Commissioner can not be ordered to pay for sex reassignment surgery under any circumstance is unavailing. In Denise R., the Court of Appeals found that there was no consensus among the physicians who had evaluated an individual petitioner that the procedure was medically necessary. The Court held that the Commissioner of Social Services had properly relied on a medical opinion adduced at a hearing that the procedure was not medically necessary for that petitioner and that it was not the proper province of the Court to substitute judgment when an administrator adopts one of several.

Docket No.: K-1154/96

reasonable opinions.

In the instant matter, Mariah has been evaluated by experienced physicians and mental health practitioners with a specialty in transgenderism all of whom agree that the procedure is medically necessary for her particular needs. Dr. Katherine Rachlin, a psychologist who is a specialist in GID found after meeting with Mariah that "it is necessary both for her emotional well being and her physical safety that [Mariah] appears fully female. ... [G]ender conforming surgery/vaginoplasty and labiaplasty is appropriate and necessary." Dr. Rachlin concluded that there were no psychiatric contraindications to proceeding with the surgery, that Mariah seems capable of making good decisions for herself regarding gender transition and that she is an appropriate candidate for SRS. Dr. Rachlin opined that "to deny her this surgery could compromise her mental health as well as her physical safety."

Dr. C. Christine Wheeler, a psychologist and degreed sexologist specializing in the diagnosis of GID, evaluated Mariah over the course of twenty-three hours and reviewed her medical history. Dr. Wheeler states that doing nothing to treat a patient with GID "can only have disastrous consequences." Dr. Wheeler continues that suppression and repression cause depression and are always immobilizing and sometime fatal. Dr. Wheeler submits that Mariah's ability to live her life productively and in a personally secure and stable way has been significantly impaired by her transgender condition and other diagnoses. Dr. Wheeler ultimately concludes that "without any questions whatsoever, sex reassignment surgery is medically necessary for Mariah." Furthermore, according to Dr. Wheeler, Mariah is a "fully prepared surgical candidate for SRS, she meets all eligibility and readiness criteria according to the

Docket No.: K-1154/96

medical guidelines.”

Dr. David Kreditor, a psychiatrist, evaluated Mariah in order to assess her ability to consent to the procedure and the necessity for such surgery. Dr. Kreditor confirmed Mariah's diagnosis of GID, found that she has good judgment and insight into her emotional problems and opined that rejecting Mariah as a surgical candidate would exacerbate existing emotional and behavioral problems and hinder future personal and professional growth. Dr. Michael Bartalos, Mariah's primary care physician who has been treating her with large doses of female hormones, paid for and approved by ACS since she was thirteen years old, states that surgery is the "next needed step."

The Commissioner, who arranged to have Mariah evaluated by all of the above practitioners, has not presented any medical or psychological expert to dispute these determinations that SRS is medically necessary for Mariah. In the face of the unanimous opinion of the experts who have personally evaluated Mariah, the Commissioner has instead rendered an independent determination that SRS is not medically necessary because Mariah "sounds far from ready for such life-altering surgery" (Pratt Affidavit at ¶ 38, emphasis added). Far from supplementing a position described by the Appellate Division as "speculative at best," the Commissioner has substituted his own forecast that after surgery Mariah will continue to behave "in an indecisive, unstable and self-defeating manner" (Pratt Affidavit at ¶16) for the medical opinions of experts in the complex field of GID that she is fully prepared to undergo surgery.

The Commissioner's determination that SRS is not medically necessary is not entitled to deference because the determination of whether a given treatment is medically necessary can be

Docket No.: K-1154/96

determined only be a qualified medical professional. The Court finds that the Commissioner's conclusion is based on archaic law and out-of-date medical diagnosis and technologies. In addition, to put Mariah through additional psychiatric and psychological testing, thereby further delaying the surgery, would be cruel. Reading much of the current literature on SRS, male to female ("MTF") and female to male ("FTM"), bring this Court to conclude that the surgery is irreversible and that the pre-operative and post-operative procedure is a major, life-altering decision and that one's determined goal and desire should be respected. Mariah should be treated in order that she may go on with her life and be in a body which blends with the gender with which she identifies. This error of nature need not go uncorrected in the 21<sup>st</sup> century when medical technology has taken giant steps from the previous, outdated opinions of GID and SRS.

It is clear from reading the most recent federal cases on the subject of GID and SRS that not only is it recognized as a serious psychological, psychiatric and medical problem (see DSM IV, ICD-10) but that it must be addressed without unreasonable delay. Courts have repeatedly held that treatment of a psychiatric or psychological condition may present a " 'serious medical need' ... There is no reason to treat transsexualism differently than any other psychiatric disorder." Merriwether v. Faulkner, 821 F.2d 408, 411-413 (7<sup>th</sup> Cir. 1987); *see*, Wolfe v. Horn, 130 F. Supp.2d 648, 652 (E.D.Pa 2001) ("Courts have consistently considered transsexualism a 'serious medical need' for purposes of the Eighth Amendment."); *see also* Cuoco v. Moritsugu, 222 F.3d 99, 106 (2d Cir.2000) (assuming for purposes of appeal that transsexualism is a serious medical need); Brown v. Coombe, No. 96-CV 476, 1996 WL 507118 at 3 (N.D.N.Y. Sept. 5, 1996) ("In a particular prisoner, gender dysphoria may be a serious medical need."); White v.

Docket No.: K-1154/96

Farrier, 849 F.2d 322, 325 (8<sup>th</sup> Cir. 1988). The Commissioner's argument that petitioner has failed to demonstrate that a delay in performing the surgery would substantially increase the medical risk associated with the intervention as required by Social Services Law § 365-a (5) (b) is without merit. The provisions of Social Services Law § 365-a defining the scope of "medical assistance" which may be provided to needy persons must be interpreted and enforced in a reasonable and humane manner in accordance with its manifest intent and purpose. Lagowski v. Whalen, 270 A.D.2d 827, 706 N.Y.S.2d 283 (4<sup>th</sup> Dep't., 2000) . Medical assistance is not restricted to purely physical problems. Denise R. v. Lavine , 47 A.D.2d 747, 364 N.Y.S.2d 557 (2<sup>nd</sup> Dept., 1975), *reversed on other grounds* 39 N.Y.2d 279 (1976) This provision of the Social Services Law, in § 365 -a (5) (c) provides that medical assistance for needy persons shall also include surgical benefits, including deferrable surgical procedures, based on the likelihood that the deferral of such procedures for six months or more may jeopardize life or essential function, or cause severe pain.<sup>1</sup> As explained *supra*, the daily psychic pain suffered by petitioner coupled with her inability to progress in life in a body that does not match with her self-concept certainly meets the requirement of this subsection .

The Commissioner has a non-delegable statutory duty to provide all necessary medical care and treatment for children placed in the care of ACS by order of the Family Court pursuant to Social Service Law § 383 (2). The Commissioner, as a child's custodian, may consent to medical treatment, Social Services Law § 398 (2) (b) (6) (c), and is obligated to provide

---

<sup>1</sup>Social Services Law § 365 - (5) (c) restricts Medicaid coverage for deferrable surgery to procedures specified by the state commissioner of health.; however, Mariah's health coverage as a foster child is not limited to Medicaid . 18 NYCRR 441.22.

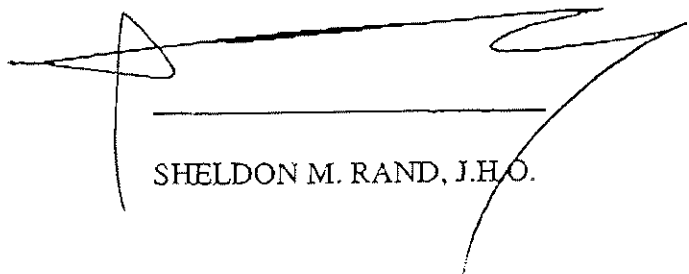
Docket No.: K-1154/96

necessary medical or surgical care. 18 NYCRR 441.22 (a). Although it is a court of limited jurisdiction, the Legislature has granted the Family Court jurisdiction to determine issues pertaining to a child's welfare consistent with the comprehensive services plan associated with foster care placement and the Court may order a social services official such as the Commissioner to provide a child placed in care with authorized services. Matter of Arlene L., 187 Misc. 2d 356 at 358, 722 N.Y.S.2d 712 at 713 citing Family Court Act §§ 255, 1015-a. In this case, the relevant statutes require that the Commissioner provide necessary medical and surgical care for a child placed in foster care, that the Commissioner pay for the same from public funds if necessary, and that the Court may compel the Commissioner to provide such medical care. Matter of Arlene L., *supra*; Social Services Law §398 (6)](c); 2 (b); 18 NYCRR 441.22.

It is the conclusion of this Court based on all of the facts presented that petitioner's application for SRS is necessary and shall be granted.

So ordered.

ENTER:



SHELDON M. RAND, J.H.O.