

# Child's sex change operation bandied about in NY Court

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A family court does not have the authority to compel New York City's Administration for Children's Services to pay for a foster child's sex-change operation, an appellate court has ruled.

In an unsigned, unanimous opinion, the Appellate Division, 1st Department, held in *In re Brian L.*, 1407, that while Social Services Law §398(6)(c) requires the agency to provide "necessary medical and surgical care" to all children under its aegis, regardless of whether or not they receive Medicaid, Family Court does not have the power to order that a child receive certain care.

"Since such an order would denigrate from ACS' statutory authority," the panel reversed a 2007 Family Court order directing that Brian L. receive the sex reassignment surgery that two medical doctors, along with mental health professionals, had deemed medically necessary.

Brian L., also known as Mariah L., was born a biological male but was diagnosed with "gender identity disorder" as a teen.

According to the opinion, the American Psychiatric Association defines the disorder as "a disjunction between an individual's sexual organs and sexual identity."

Following the diagnosis, Brian L., whom the court refers to "using feminine pronouns," started to receive hormone therapy and mental health treatment for her disorder.

In December 2005, through her law guardian, Brian L. moved Family Court to force the city agency to provide her with sex reassignment surgery. Two medical doctors, a psychotherapist and a psychologist all submitted written reports in favor of her bid to have the reassignment surgery.

According to the decision, the psychologist, a specialist in gender identity disorder, stated that under the Harry Benjamin International Gender Dysphoria Association's standards of care, Brian L. was a candidate who was not only ready for the surgery but needed it for her emotional well being. Another doctor said that in the absence of surgery, Brian L.'s anxiety and borderline personality disorder would "deteriorate."

In 2006, after New York County Judicial Hearing Officer Sheldon M. Rand granted Brian L.'s motion, the 1st Department reversed and remanded the proceeding so the child welfare agency could supply "a clear statement of the reasons for denial of this surgery."

The agency then provided the court with testimony from an assistant commissioner who maintained that Brian L. had "not demonstrated the kind of serious, thoughtful, and committed approach" to the surgery, but rather acted in an "indecisive, unstable and self-defeating" manner.

In February 2007, Rand rejected this argument and granted summary judgment in favor of Brian L. The appellate court reversed.

Although Brian L. turned 21 in 2006 and was no longer in foster care, the appeals court noted that the child welfare agency did not argue that the proceeding "has been rendered moot by those events."

The panel agreed that Social Services Law §398(6)(c), which obligates the agency to use public funds to pay for "necessary medical or surgical care in a suitable hospital ... or other institution" entitles foster children who receive Medicaid to receive the same scope of care as non-Medicaid recipients.

However, although the law does not "create two tiers of health care for children under ACS' care," the Family Court order that the agency pay for the surgery encroached on the statutory authority of the agency and its commissioner, the panel held.

Section 255 of the Family Court Act permits the court to "order any agency or other institution to render such information, assistance, and cooperation as shall be within its legal authority concerning a child who is or shall be under its care," the court noted.

Citing the Court of Appeal's decision in *Matter of Lorie C.*, 49 NY2d 161 (1980), the panel concluded that the "power to order 'assistance and cooperation' cannot be read as permitting an order which denigrates from that officer's statutory authority, any more than it can be read as expanding such an official's authority into areas not granted by statute."

In *Lorie C.*, the court held that the Family Court did not have the power to put a plan into effect that allocated responsibilities between the court's probation department and the local social services agency relating to juvenile delinquents and foster homes.

The panel also rejected Brian L.'s claim that 18 NYCRR 441.22 requires the child welfare agency to pay for the operation.

While §441.22(g) of the statute requires the agency to provide "follow-up care as determined by the child's physician" during a medical exam, this does not encompass Brian L.'s surgery, which was recommended by a psychologist after the teenager indicated an interest in a sex change, the panel wrote.

The court noted that its decision did not go to the question of whether the agency's refusal to arrange for Brian L.'s surgery constituted an "arbitrary and capricious" decision. In the absence of an Article 78 proceeding, the court held it had no authority to "review an administrative determination of ACS."

The panel, which consisted of Justices Richard T. Andrias, David Friedman, John W. Sweeny Jr. and James M. McGuire, heard arguments in the case on June 6, 2007. Julian Kalkstein, senior counsel in the Legal Department, which represented the Administration for Children's Services, said the city was "pleased" with the ruling.