

NO. A13-0986

State of Minnesota
In Court of Appeals

Denise Walker and Brian Walker, wife and husband,
on behalf of themselves and other Minnesota taxpayers,

Appellants,

vs.

Lucinda Jesson, in her official capacity as
Commissioner, Minnesota Department of Human Services,

Respondent.

APPELLANTS' BRIEF, ADDENDUM AND APPENDIX

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Statement of the Issues

- I. Does the complaint set forth a legally sufficient claim for relief by Minnesota taxpayers to stop ultra vires expenditures by the State when it alleges facts that the State of Minnesota is paying for abortions that are not “therapeutic” under *Doe v. Gomez*, 542 N.W.2d 17, 32 (Minn. 1995)?

Defendant-Respondent, Commissioner of the Minnesota Department of Human Services (“Commissioner” or “DHS”) raised this issue in the district court by bringing a Rule 12.02(e) motion to dismiss. Appendix (“App.”) 28.

The district court ruled that there is “nothing in the record which would justify the Court in making a finding that DHS is illegally expending funds for non-therapeutic abortions.” Addendum (“Add.”) 4.

Apposite Authority:

Minn. Const., art. XI, § 1

Doe v. Gomez, 542 N.W.2d 17 (Minn. 1995)

Bahr v. Capella Univ., 788 N.W.2d 76 (Minn. 2010)

McKee v. Likins, 261 N.W.2d 566 (Minn. 1977)

- II. Does the state constitutional right of privacy announced in *Doe v. Gomez* prohibit the State of Minnesota from inquiring or investigating whether a reimbursement request by an abortion provider was for performing an abortion that was “therapeutic” under *Doe v. Gomez*, when there is strong evidence that a significant majority of such abortions have been performed only for elective, non-therapeutic reasons?

The Commissioner raised this issue in the district court in its Rule 12.02(e) motion to dismiss. App. 32.

The district court ruled that the “decision to rely upon a physician’s decision that a patient is seeking an abortion for legitimate therapeutic reasons is neither illegal nor unreasonable.” Add. 5.

Apposite Authority:

Minn. Const., art. XI, § 1

Doe v. Gomez, 542 N.W.2d 17 (Minn. 1995)

Hebert v. City of Fifty Lakes, 744 N.W.2d 226 (Minn. 2008)

Minn. Stat. § 256B.04, subd. 13

Statement of the Case

This matter is on appeal from Ramsey County District Court, Hon. Kathleen Gearin. Appellants, plaintiffs below, are Minnesota taxpayers who filed this action alleging that the Department of Human Services is using public funds to pay for elective, non-therapeutic abortions performed on indigent women. Appellants allege that these expenditures violate Article XI, Section 1,¹ of the Minnesota Constitution, and seek declaratory and injunctive relief to restrain DHS from continuing this practice.

DHS brought a motion to dismiss the Complaint under Minn.R.Civ.P. 12.02(e). The district court granted DHS' motion by its May 2, 2013 Order and Memorandum, finding that:

as a matter of law all of the allegations in the complaint, including those supported by the attachments to the complaint, do not justify the Court in granting the requested relief. There is nothing in the complaint which would justify the Court in making a finding that DHS is illegally expending public funds for non-therapeutic abortions.

Add. 4.

¹ Article XI, Section 1 states that "No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law."

Statement of Facts

Prior to the Minnesota Supreme Court's holding in *Doe v. Gomez*, 542 N.W.2d 17 (Minn. 1995), Minnesota law provided medical assistance to indigent women for abortions that were medically necessary to prevent the death of the mother, or for pregnancies resulting from sexual assault or incest.² In *Doe v. Gomez*, the Court ordered that "the State cannot refuse to provide abortions to MA/GAMC-eligible women when the procedure is necessary for therapeutic reasons." *Doe v. Gomez*, 542 N.W.2d 17, 32 (Minn. 1995)(emphasis added).

Notwithstanding this significant expansion of public funding, the Minnesota Supreme Court emphatically rejected claims that its decision would result in public funding for all abortions performed on indigent women: "[T]his court's decision will not permit any woman eligible for medical assistance to obtain an abortion 'on demand.'" *Id.*

² Minn. Stat. 256B.0625 subd. 16, titled "Abortion services," was specifically enjoined by the Gomez injunction. The test of that statute is as follows:

Medical assistance covers abortion services, but only if one of the following conditions is met:

(a) The abortion is a medical necessity. "Medical necessity" means (1) the signed written statement of two physicians indicating the abortion is medically necessary to prevent the death of the mother, and (2) the patient has given her consent to the abortion in writing, unless the patient is physically or legally incapable of providing informed consent to the procedure, in which case consent will be given as otherwise provided by law.

(b) The pregnancy is the result of criminal sexual conduct as defined in section 609.342, clauses (c), (d), (e)(i), and (f), and the incident is reported within 48 hours after the incident occurs to a valid law enforcement agency for investigation, unless the victim is physically unable to report the criminal sexual conduct, in which case the report shall be made within 49 hours after the victim becomes physically able to report the criminal sexual conduct; or

(c) The pregnancy is the result of incest, but only if the incident and relative are reported to a valid law enforcement agency for investigation prior to the abortion.

The majority was clear that the opinion did not authorize public funding for elective, non-therapeutic abortions. *Id.*

Ultimately this case is about whether government officials are adhering to the explicit limitation on public funding of abortion contained in *Gomez*. That issue, however, is not yet before this Court. Instead, the issue before this Court at this time is whether the Appellants' Complaint contains sufficient factual allegations to permit the taxpayers of Minnesota to investigate the practice of public officials and enforce the Minnesota Supreme Court's limitation of abortion funding.

Appellants allege that DHS is in violation of the *Gomez* injunction because it is funding elective, non-therapeutic abortions on indigent women. This factual allegation is based on abortion data collected from abortion providers and reported by another state agency, the Minnesota Department of Health ("MDH"). These statistics show that the number of abortions paid for by the Commissioner of DHS significantly exceeds the numbers of abortions reported to MDH as therapeutic. The MDH data is collected from the very same abortion providers who seek reimbursement for these same abortions from DHS.

MDH's collection of abortion data is mandated by statute.³ Each abortion is reported by the provider on an MDH form titled "Report of Induced Abortion." App. 20-23. MDH aggregates and de-identifies the data from these individual reports, and issues an annual report titled "Induced Abortions in Minnesota January – December [Year]:

³ Minn. Stat. §§ 145.4131 et seq.

Report to the Legislature.” App. 5 at ¶ 21.

The “Report of Induced Abortion” form requires the abortion providers to state whether the abortion is being paid for by public assistance. See question #19 at App. 21. The form also includes a question (#21) regarding “Specific Reason for the Abortion.” *Id.* The form includes both therapeutic reasons and non-therapeutic reasons. Therapeutic reasons include reasons such as “Emotional health is at stake” and “Physical health is at stake.” App. 6 at ¶¶ 25-26. Non-therapeutic reasons include such reasons such as “Economic reasons” and “Does not want children at this time.” *Id.* ¶ 27.

According to MDH, 174,805 abortions were performed in Minnesota from January 1999 through December 2011. Of this total, 47,095 of these abortions (or 27%) were paid for by “Public Assistance.” App. 6 at ¶ 28. Of the 47,095 abortions paid by Public Assistance during this 13-year period, no more than 10,044 abortions were performed for reasons that could broadly qualify as therapeutic under *Gomez*. App. 7 at ¶ 30.

The logical inference that flows from the MDH abortion data is that the Commissioner of DHS has paid for at least 37,051 abortions performed on indigent women for elective, non-therapeutic reasons (47,095 publicly funded abortions minus 10,044 therapeutic reasons) during that 13-year period. Less than 22% of the abortions paid for with public funds during this time period were therapeutic abortions authorized by the *Gomez* injunction. App. 7 at ¶ 32. Thus, DHS has been expending public funds *ultra vires*, without appropriation, in violation of Article XI, Section 1, of the Minnesota Constitution by paying for over 37,000 elective, non-therapeutic abortions performed on

indigent women from 1999 through 2011. App. 8 at ¶ 34.

DHS requires that abortion providers submit a “Medical Necessity Statement” in order to receive reimbursement for an abortion from public funds. App. 8 at ¶¶ 35-36, and App. 25. The Medical Necessity Statement requires the provider to identify the reason for the abortion by selecting from one of six listed reasons. *Id.*

According to data obtained from DHS (not MDH), from 2006 through 2010, Minnesota taxpayers paid for 19,295 abortions for income-qualified women. App. 9 at ¶ 37. The reason listed for 99.7% of these abortions was “Abortion is being done for other health reasons.” *Id.*, ¶ 38. The Department of Health data for the same five-year period indicates that only 15% of these publicly funded abortions were performed for all therapeutic reasons combined. *Id.*, ¶¶ 37-39. “DHS makes no independent review of whether an abortion that has been submitted to DHS for public funding was performed for a therapeutic reason.” App. 11 at ¶ 51.

The significant discrepancy between the DHS and MDH data indicates that “abortion providers are vastly overstating the number of publicly funded abortions being performed for ‘other health reasons’...” when abortion providers are seeking reimbursement for these procedures. App. 9 at ¶ 40. Therefore, most of abortions the State has paid for with public funds since at least 1999 have been performed for elective, non-therapeutic reasons and in violation of the *Gomez* injunction.” *Id.*

Argument

Because the district court granted the Commissioner's Rule 12.02(e) motion to dismiss, "the question before this court is whether the complaint sets forth a legally sufficient claim for relief." *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008).

I. The Complaint sets forth a legally sufficient claim for relief by state taxpayers to enjoin ultra vires expenditures by the State.

Appellants allege that DHS is spending public money for elective, non-therapeutic abortions for indigent women, in violation of the *Gomez* injunction and without any authorizing appropriation. In order to state a claim for relief, the Complaint must plead an "unlawful use of public funds." *McKee v. Likins*, 261 N.W.2d 566, 571 (Minn. 1977)(stating that "right of a taxpayer to maintain an action in the courts to restrain the unlawful use of public funds cannot be denied").⁴

The court reviews the legal sufficiency of the Complaint *de novo*. *Hebert*, 744 N.W.2d at 229. In its review of the district court's Order, the "court must consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party." *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003). A "pleading will be dismissed only if it appears to a certainty that no facts, which could be introduced consistent with the

⁴ *Accord Olson v State*, 742 N.W.2d 681, 684-85 (Minn.App. 2007)(stating that the "line is drawn where a taxpayer seeks to challenge what the taxpayer perceives to be an illegal expenditure or waste of tax monies.")

pleading, exist which would support granting the relief demanded.” *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010).

The court reviews the legal sufficiency of the Complaint *de novo*. *Hebert v. City of Fifty Lakes*, 744 N.W.2d at 229 (Minn. 2008).

The Complaint states a legally sufficient claim for relief because it alleges that the Commissioner has been expending public funds to pay for elective, non-therapeutic abortions, which is an unlawful use of public funds. The Complaint goes beyond simply alleging an unlawful use of public funds by presenting the detailed factual basis for this allegation. Specifically, the Complaint alleges that DHS paid for over 37,000 elective, non-therapeutic abortions from 1999 through 2011, the last year for which such data was available when the Complaint was filed. For purposes of this appeal, the Court must accept this factual allegation as true. DHS has spent millions of dollars in public funds to pay for elective abortions.

DHS does not have authority to use public funds to pay for elective, non-therapeutic abortions. There is no statute authorizing such payments, and the *Gomez* injunction is limited to therapeutic abortions.⁵ The Complaint states a legally sufficient claim of an “unlawful use of public funds” by alleging that DHS has paid for thousands of elective, non-therapeutic abortions.

⁵ “[W]e hold that the State cannot refuse to provide abortions to MA/GAMC-eligible women when the procedure is necessary for therapeutic reasons.” *Gomez*, 542 N.W.2d at 32. “[T]his court’s decision will not permit any woman eligible for medical assistance to obtain an abortion ‘on demand.’” *Id.*

There is a fact dispute between the MDH data and the DHS data. The MDH data is based on the Report of Induced Abortion, and the DHS data is based on the Medical Necessity Statement. Both forms, however, are submitted by the same providers regarding the same abortion procedures.

The significant discrepancy between the DHS and MDH data supports the inference that abortion providers, who stand to reap pecuniary gain from the procedure, are vastly overstating the number of abortions performed for “other health reasons.” The Medical Necessity Statement, which providers submit to DHS in order to get paid, is a less credible source of data on whether an abortion has been performed for a therapeutic reason than is the MDH’s Report of Induced Abortion. The latter is not tied to any financial interest. This distinction is further underscored by the fact that abortion providers select “other health reason” on 99.7% of the DHS forms.

DHS makes no independent review of whether an abortion that has been submitted to DHS for public funding was performed for a therapeutic reason. App. 9 at ¶ 40 and 11 at ¶ 51. Appellants allege that DHS’s duty to review medical necessity is inherent in the Constitutional limit on the Commissioner’s authority. DHS only has authority to use public funds “in pursuance of an appropriation by law.” Minn. Const., Art. XI, Sec. 1.

The only “appropriation”⁶ authorizing the Commissioner to pay for abortions is found in the holding in *Gomez* that “the State cannot refuse to provide abortions to

⁶ There is another issue here that was not litigated below but which must be acknowledged. The Legislature has never passed legislation enacting the *Gomez* injunction. These payments are being made because of what has become, in effect, a

[income]-eligible women when the procedure is necessary for therapeutic reasons.” 542 N.W.2d at 32. DHS does not have authority to pay for elective, non-therapeutic abortions.

The duty of DHS to independently verify medical necessity is also based on the general statutory duty incumbent upon DHS to “prevent the waste and unnecessary spending of public money.” App. 1 (citing Minn. Stat. § 245.03, subd. 2.)⁷ It is also based on the specific statutory direction, set out below, requiring that direct providers abstain from determining the medical necessity of procedures in which they themselves have participated. Minn. Stat. § 256B.04, subd. 13.

DHS asserts that it has no duty to review the medical necessity of publicly funded abortions. The district court agreed, ruling that “[t]here is nothing in the complaint which would justify the Court in making a finding that DHS is illegally expending public funds for non-therapeutic abortions. ... Every abortion expenditure for women on public assistance made by the Department of Human Services was supported by a medical necessity statement.” Add. 4.

The district court resolved factual disputes and construed inferences in favor of DHS, the moving party, when it should have accepted Appellants’ statements in the Complaint as true and construed all reasonable inferences in their favor as the non-

judicial appropriation. The power to make appropriations, however, is a power reserved to the legislative branch under Art. III, Sec. 1 and Art. XI Sec. 1 of the Minnesota Constitution.

⁷ It is the duty of the Commissioner of the Minnesota Department of Human Services to “prevent the waste or unnecessary spending of public money.”

moving party. The Department of Health data demonstrates that DHS is spending taxpayer funds on elective abortions. The district court ignored this fact, or chose to resolve this factual inconsistency in favor of DHS.

DHS has failed to prevent the ultra vires use of public funds to pay for elective, non-therapeutic abortions. The DHS process has resulted in the State of Minnesota spending millions of dollars in public funds to pay for over 37,000 elective abortions since 1999. DHS' reliance on a flawed process cannot ratify payments for elective abortions because DHS does not have the authority under *Gomez* to pay for such abortions. Any such payment is ultra vires.

The district court's conclusion that the DHS procedure "may not be perfect" is a tacit acknowledgement that Appellants have stated a claim against DHS for the unlawful disbursement of public funds to pay for elective, non-therapeutic abortions. The reasonable inference to be drawn from the conflicting data is that DHS is unlawfully using public funds to pay for unauthorized abortions. The motion to dismiss was improperly granted because it does not "appear[] to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Bahr*, 788 N.W.2d at 80.

II. The right of privacy announced in *Doe v. Gomez* does not prohibit the State of Minnesota from inquiring or investigating whether a reimbursement request by an abortion provider is for performing an abortion that is “therapeutic” under *Doe v. Gomez*.

For purposes of this appeal, it is an uncontested fact that DHS is using public funds to pay for elective abortions performed on indigent women. There is no authorization for such expenditures. *Gomez*, 542 N.W.2d at 32 (“This court’s decision will not permit any woman eligible for medical assistance to obtain an abortion ‘on demand’”). It is also an uncontested fact that DHS does not have a process for reviewing the medical necessity of publicly funded abortions.

The district court decided that the Appellants “disagree with the Commissioner’s method of making sure that the *Gomez* decision is carried out in Minnesota.” App. 5. But the Appellants do not even know what that “method” is, only that DHS does not have a process for reviewing medical necessity. The only facts in the record regarding any DHS procedure are that DHS requires that abortion providers submit a Medical Necessity Statement, and that that DHS does not have a process for reviewing the medical necessity of publicly funded abortions. App. 5 at ¶ 20 and 8 at ¶ 35.

The district court ruled that, as a matter of law, Appellants cannot challenge whether DHS is expending public funds to pay for elective abortions because any inquiry into medical necessity would run afoul of dicta from the Minnesota Supreme Court in *Gomez* that “the difficult decision whether to obtain a therapeutic abortion will not be made by the government, but will be left to the woman and her doctor.” *Gomez*, 524 N.W.2d at 32. The district court based its grant of the motion to dismiss in significant

part on its determination that DHS' reliance on the abortion provider's decision is "neither illegal or unreasonable." Add. 5.

The standard of review regarding this issue is *de novo*. *Hebert*, 744 N.W.2d at 229 (court reviews legal sufficiency of Complaint *de novo*).

The Court's statement about this "difficult decision" must be put in the context of the holding in *Gomez* "that the State cannot refuse to provide abortions to MA/GAMC-eligible women when the procedure is necessary for therapeutic reasons." 524 N.W.2d at 32. The Court clarified that its "decision will not permit any woman eligible for medical assistance to obtain an abortion 'on demand.'" *Id.* There is a state constitutional right for public funding of therapeutic abortions for indigent women, but not for all abortions sought by women who qualify for medical assistance.

The district court made no effort to reconcile its reasoning with the direction from the Court in *Gomez* that its injunction "will not permit any woman eligible for medical assistance to obtain an abortion 'on demand.'" *Id.* The State of Minnesota has paid, and continues to pay, millions of dollars in public funds for elective, non-therapeutic abortions. These are expenditures that *Gomez* specifically stated are not permitted under its ruling. Yet the district court found, as a matter of law, that *Gomez* requires DHS to keep making these illegal expenditures.

These are not issues that ought be resolved on a motion to dismiss. It is "the primary objective of the law to dispose of cases on the merits." *Firoved v. General Motors Corp.*, 152 N.W.2d 364, 368 (Minn. 1967). Appellants base their claim on the

fact that the State of Minnesota has paid for tens of thousands of elective abortions performed on indigent women. On its face, this is a Constitutional violation because these expenditures are payments of funds “out of the treasury of this state” without “an appropriation by law.” Minn. Const. Art. XI, Sec. 1.

But the district court ruled that such admitted illegal expenditures are protected from scrutiny by the right of privacy. The district court’s ruling does not square with the *Gomez* direction that the Court “will not permit ... abortion ‘on demand’” for indigent women.

Further, *Gomez* did not invalidate the Commissioner’s statutory mandate regarding determinations of medical necessity. DHS has a statutory duty to independently review “whether medical care to be provided to eligible recipients is medically necessary.” Minn. Stat. § 256B.04, subd. 13. That statute, titled “Medical necessity review,” provides in relevant part:

Each person appointed by the commissioner to participate in decisions whether medical care to be provided to eligible recipients is medically necessary shall abstain from participation in those cases in which the appointee ... has issued treatment orders in the care of the patient or participated in the formulation or execution of the patient's treatment plan

(Emphasis added).

There is a fundamental problem with the DHS Medical Necessity Statement. DHS delegates the determination of medical necessity to the abortion provider, someone who “has issued treatment orders in the care of the patient or participated in the formulation or execution of the patient's treatment plan.” By statute, that person must abstain from any

decisions on whether medical care is medically necessary. “DHS defers to the representations of the abortion providers, who have a pecuniary interest in performing the procedure, in order to determine whether an induced abortion may be paid for with public funds.” App. 5 at ¶ 20. This delegation of the medical necessity determination is illegal under Minn. Stat. § 256B.04, subd. 13.

In *Gomez*, the Court “emphasize[d] that our decision is limited to ... the narrow statutory provisions at issue in this case.” 542 N.W.2d at 32. Those statutes were specifically identified by the Court.⁸ *Gomez* did not enjoin the general statutory requirement incumbent upon the Commissioner to “prevent waste and unnecessary spending” nor did *Gomez* enjoin the specific statutory limitation requiring independent determinations of medical necessity.

Conclusion

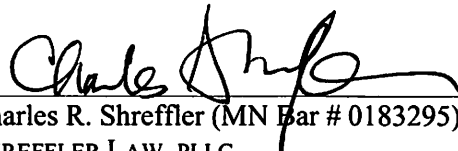
The district court applied the right to privacy more broadly than *Gomez* allows. The Commissioner’s undisputed violation of its own enabling statutes establishes that the challenged expenditures are illegal. The district court also resolved factual disputes and drew inferences in favor of the moving party. Appellants have pled substantive issues, both factual and legal, which should be addressed on their merits, not disposed of on the pleadings.

⁸ “These provisions represent the origins of the statutory scheme now challenged by the plaintiffs and have remained largely unchanged since first enacted. See Minn.Stat. §§ 256B.011, 256B.02, 256B.0625, subd. 16, 256B.40, 261.28, and 393.07, subd. 11 (1994).” 542 N.W.2d at 23.

In summary, the Appellants have stated a legally sufficient claim that the Commissioner is disbursing public funds for elective abortions without an authorizing appropriation, in violation of Article XI, Section 1 of the Minnesota Constitution. They respectfully request that the Court reverse the district court's dismissal under Rule 12.02(e) and remand this matter.

Dated: September 11, 2013

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Charles R. Shreffler", written over a horizontal line.

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Order & Memorandum (May 2, 2013)	Add. 1

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT
Case Type: Other Civil

Denise Walker and Brian Walker, wife and
husband, on behalf of themselves and other
Minnesota taxpayers,

Court File No. 62-CV-12-9027
Judge Kathleen R. Gearin

Plaintiffs,

v.

ORDER

Lucinda Jesson, in her official capacity as
Commissioner, Minnesota Department of
Human Services,

Defendant,

and

Pro-Choice Resources,

Applicant for
Intervention.


The above-entitled matter came on for hearing before the undersigned on February 28, 2013 pursuant to a motion to dismiss filed by the defendant. Appearances were as noted in the record.

Based upon the files, records, proceedings herein, the Court makes the following Order:

1. Defendant's motion to dismiss is granted and Plaintiff's complaint is dismissed in its entirety, with prejudice, and on the merits.
2. Let judgment be entered accordingly.

Dated: 5-2-13

BY THE COURT



Honorable Kathleen R. Gearin
Judge of District Court

MEMORANDUM

The Plaintiffs in this lawsuit are Minnesota residents who pay taxes to the State of Minnesota. They brought this action on behalf of themselves and other Minnesota taxpayers. Defendant Jesson is the present Commissioner of the Minnesota Department of Human Services and is being sued in her official capacity. As Commissioner, she is charged with the oversight of Department of Human Services disbursements of government funds. This includes funds that are disbursed for health care for indigent individuals, including women who are receiving public assistance for medical care. This lawsuit involves disbursements of funds for abortions. In order to understand the reasons for the lawsuit, it is necessary to briefly go into Minnesota's legislative and appellate court history regarding this type of public funding.

In 1978, the Minnesota Legislature enacted Section 256B.011 declaring that:

“Between normal childbirth and abortion it is the policy of the State of Minnesota that normal childbirth is to be given preference, encouragement, and support by law and by state action, it being in the best interests of the well-being and common good of Minnesota citizens.”

In that same year, the legislature also enacted provisions that limited the availability of public funds for abortion services. Under Minnesota Statute § 256B.0625, subd. 16, medical assistance funds can be used only if one of the following conditions is met:

1. The abortion is a medical necessity.
2. The pregnancy is the result of criminal sexual conduct.
3. The pregnancy is the result of incest.

These conditions also apply to funding under the General Assistance Medical Care program (GAMC) and the County Poor Relief programs.

Not surprisingly, this statute was challenged in a lawsuit filed by women physicians, financial aid organizations, and providers of abortion and counseling services. The Plaintiff sought declaratory

and injunctive relief against state and counties on the basis that the statutory provisions unconstitutionally restricted use of public medical assistance and general assistance funds for therapeutic abortion services. The Minnesota Supreme Court ruled in the case of *Women of State of Minnesota by Doe v. Gomez*, 542 N.W.2d 17 (1995), that medical assistance and general assistance statutes permitting the use of public funds for childbirth-related medical services, but prohibiting similar use of public funds for medical services related to therapeutic abortions, impermissibly infringed on a woman's fundamental right of privacy under the Minnesota Constitution.

The Supreme Court held that the relevant inquiry in that case was whether, having elected to participate in a medical assistance program, the state may selectively exclude from such benefits otherwise eligible persons, solely because they make constitutionally protected health care decisions with which the state disagrees. It held that the challenged legislation infringed on a woman's decision-making process by offering money to women for health care services necessary to carry the pregnancy to term, while banning health care funding for women who chose therapeutic abortions.

In this case, the plaintiffs correctly point out in their complaint that the Court's decision was not meant to permit any woman eligible for medical assistance to obtain an abortion "on demand". Plaintiffs correctly quote the Supreme Court opinion as holding that under the Minnesota Constitution's guaranteed right to privacy, "The difficult decision whether to obtain a therapeutic abortion will not be made by the government, but will be left to the woman and her doctor." *Gomez*, 542 N.W.2d 17 at 32.

While the Plaintiffs' lawsuit, if successful, would have a significant impact on an indigent woman's ability to obtain an abortion except in very narrow circumstances, they are requesting the Court to grant relief because of what they assert is an illegal expenditure of public funds in violation of Article XI, Section I, of the Minnesota Constitution. This Article states that, "No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law." Plaintiffs also cite Minnesota Statute § 245.03, subd. 2, which states that it is the duty of the Commissioner of the

Minnesota Department of Human Services to “prevent the waste or unnecessary spending of public money.”

In its Prayer for Relief, the Plaintiffs request that the Court declare that DHS expended public funds for non-therapeutic abortions without an authorizing appropriation. It further requests that the Court issue preliminary and permanent injunctive relief requiring DHS to eliminate such expenditures and directing DHS to cease all public expenditures for abortions until DHS can demonstrate that public funds will no longer be expended for non-therapeutic abortions. Next, it requests that the Court order an accounting to ascertain the amounts paid to providers for reimbursement of non-therapeutic abortions and ordering DHS to seek repayment of such unlawful payments from each provider. Finally, the Plaintiffs request that the Court dissolve the *Gomez* injunction because it is proven to be unworkable in practice. In addition, Plaintiffs seek attorney’s fees.

By granting the Plaintiffs’ motion, the Court finds that as a matter of law all of the allegations in the complaint, including those supported by the attachments to the complaint, do not justify the Court in granting the requested relief. There is nothing in the complaint which would justify the Court in making a finding that DHS is illegally expending public funds for non-therapeutic abortions. Under *Gomez*, DHS is constitutionally required to cover therapeutic abortions for women eligible for public assistance. Every abortion expenditure for women on public assistance made by the Department of Human Services was supported by a medical necessity statement. The Plaintiffs argue that when you compare the abortion statistics kept by DHS since 1999 and the abortion statistics for publicly-funded abortions kept by the Minnesota Department of Health since 1999, a fact-finder would conclude that thousands of non-therapeutic abortions are being paid for by the Department of Human Services public assistance programs.

What the Plaintiffs are really asking for is that the Department of Human Services do a better job of monitoring the medical necessity statement signed by a woman’s doctor. Rather than undertaking

medical reviews to determine whether the medical necessity forms are accurate, the Department of Human Services relies upon the decision of the doctor to sign the form in order to determine whether an induced abortion may be paid for with public funds. Put another way, the Plaintiffs assert that because in the Minnesota Department of Health forms the abortion providers have checked non-therapeutic reasons such as “economic”, the same providers are not being accurate or honest when filling out the medical necessity forms.

The Plaintiffs argue that this medical necessity statement has failed to provide “sufficient assurance” that no public funds have been expended without appropriation. Their argument seems to be that the payments are illegal because the Commissioners did not set up a system that required further investigation before payment of the abortion claim were approved. This constitutes a complaint about the system that the Department of Human Services set up in order to follow the *Gomez* ruling. They question the effectiveness of the present requirements in order to have a payment approved. They disagree with the Commissioner’s method of making sure that the *Gomez* decision is carried out in Minnesota.

Under the Minnesota Constitution’s guaranteed right to privacy, “the difficult decision whether to obtain a therapeutic abortion will not be made by the government, but will be left to the woman and her doctor.” *Id.* The decision to rely upon a physician’s decision that a patient is seeking an abortion for legitimate therapeutic reasons is neither illegal or unreasonable.

It would also illegal for a court to order the Department of Human Services to conduct an accounting to ascertain the amounts paid to providers and to order the Department of Human Services to seek repayment of unlawful payments from each such provider. Much of the relief sought by the Plaintiff would require the Court to become excessively involved in the operations and policies of the Department of Human Services. The remedies that they seek would force this judicial branch to interfere with the executive branch’s duty to implement both case law and legislatively enacted statutes.

The procedure set up by DHS in the exercise of its discretion may not be perfect, but it does ensure that the woman's right to privacy in consulting with her doctor about a difficult decision is protected.

K.G.

A handwritten signature in black ink, appearing to be the initials 'K.G.' written in a cursive style.

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STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT
Case Type: Other Civil

Denise Walker and Brian Walker, wife and
husband, on behalf of themselves and other
Minnesota taxpayers,

Court File No.
Assigned Judge:

Plaintiffs,

v.

COMPLAINT

Lucinda Jesson, in her official capacity as
Commissioner, Minnesota Department of
Human Services,

Defendant.

For their Complaint, plaintiffs state and allege as follows:

INTRODUCTION

1. This lawsuit seeks declaratory and injunctive relief to prevent the Department of Human Services, State of Minnesota (hereinafter “DHS”) from using public funds to pay for non-therapeutic abortions performed on indigent women.

2. Article XI, Section I of the Minnesota Constitution states that “No money shall be paid out of the treasury of this state except in pursuance of an appropriation by law.”

3. Minn. Stat. § 245.03, subd. 2, states that it is the duty of the Commissioner of the Minnesota Department of Human Services to “prevent the waste or unnecessary spending of public money.”

4. In 1995, the Minnesota Supreme Court ruled that “the State cannot refuse to provide abortions to MA¹/GAMC²-eligible women when the procedure is necessary for therapeutic reasons.” *Doe v. Gomez*, 542 N.W.2d 17, 32 (Minn. 1995)(emphasis added).³

5. The Court’s decision in *Doe v. Gomez* (“*Gomez*”) authorizes DHS to appropriate funds for the purpose of providing therapeutic abortions for indigent women. *Gomez*, however, does not authorize DHS to pay for non-therapeutic abortions. The Court noted that:

this court's decision will not permit any woman eligible for medical assistance to obtain an abortion “on demand.” Rather, under our interpretation of the Minnesota Constitution's guaranteed right to privacy, the difficult decision whether to obtain a therapeutic abortion will not be made by the government, but will be left to the woman and her doctor.

Gomez, 542 N.W.2d at 32.

6. Plaintiffs allege that DHS is funding non-therapeutic abortions on indigent women, in violation of the *Gomez* injunction and without any authorizing appropriation. As set out below, this allegation is based on data obtained from DHS and the Minnesota Department of Health (“MDH”), including data detailing the justifications cited for abortions paid for with public funds.

7. Plaintiffs allege, therefore, that DHS is violating Article XI, Section I of the Minnesota Constitution and Minn. Stat. § 245.03, subd.2, by paying for services, specifically non-therapeutic abortions for indigent women, without an appropriation by law. Plaintiffs seek relief on behalf of all similarly situated Minnesota taxpayers from Defendant’s waste and unauthorized expenditure of state funds.

¹ Medical Assistance.

² General Assistance Medical Care.

³ *See also Gomez*, 542 N.W.2d at 19 (emphasis added):

Our decision is only based upon this court's determination that a pregnant woman, who is eligible for medical assistance and is considering an abortion for therapeutic reasons, cannot be coerced into choosing childbirth over abortion by a legislated funding policy.

PARTIES

8. Plaintiff Denise Walker is a resident of Minnesota who pays taxes to the State of Minnesota. Plaintiff Brian Walker is a resident of Minnesota who pays taxes to the State of Minnesota. Denise Walker and Brian Walker are wife and husband.

9. Plaintiffs bring this action on behalf of themselves and other Minnesota taxpayers similarly situated.

10. Defendant Lucinda Jesson (the “Commissioner”) is being sued in her official capacity as Commissioner of the Minnesota Department of Human Services. The Commissioner is charged with the oversight of DHS disbursements of governmental funds for, among other things, health care for indigent individuals.

JURISDICTION AND VENUE

11. This action is brought under Article XI, Section I of the Constitution of the State of Minnesota. Plaintiffs are Minnesota taxpayers seeking to restrain the unlawful disbursement of public funds, and bring this action on behalf of other Minnesota taxpayers similarly situated.

12. Venue is proper in this district under Minn. Stat. §§ 542.03 and 542.09.

FACTS

13. Minnesota Statutes delineate limitations on the public funding of abortions. Minn. Stat. §§ 256B.011, 256B.02, 256B.0625, subd. 16, 256B.40, 261.28, and 393.07, subd. 11.

14. In 1995, the Minnesota Supreme Court ruled that certain of these statutory limitations were unconstitutional, holding “that the State cannot refuse to provide abortions to MA/GAMC-eligible women when the procedure is necessary for therapeutic reasons.” *Gomez*, 542 N.W.2d at 32.

15. *Gomez* extended the public funding of abortions performed on indigent women to include therapeutic abortions, but did not change the status of non-therapeutic abortions as not qualified for public funding.

16. DHS expends public funds for abortions through MA/GAMC⁴ and MinnesotaCare. DHS operates Minnesota Health Care Programs (MHCP). MHCP includes MA, codified at Minn. Stat. ch. 256B, County Relief of Poor, codified at Minn. Stat. ch. 261, and MinnesotaCare, codified at Minn. Stat. ch. 256L.

17. These two programs, MA and MinnesotaCare (collectively referred to herein as “Public Assistance”) have, after *Gomez*, separate criteria for abortion coverage.

18. According to the DHS Provider Manual (the “Manual”), “Payment for induced abortions and abortion-related services provided to MA and GAMC recipients is available under the following conditions:

- The woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by, or arising from the pregnancy itself that would, as certified by a physician, place the woman in danger of death unless the abortion is performed
- Pregnancy resulted from rape
- Pregnancy resulted from incest
- Abortion is being done for other health/therapeutic reasons.

19. According to the Office of the Legislative Auditor’s Report #03-07, titled “Controlling Improper Payments in the Medical Assistance Program,” the DHS undertakes medical reviews to determine the medical necessity of “a sample of inpatient hospital services.” A true and correct copy of Report #03-07, pages 33-35, is attached hereto as Exhibit A and incorporated herein by reference.

⁴ General Assistance Medical Care (GAMC) was terminated effective March 1, 2011 by the State of Minnesota’s Medicaid expansion in conjunction with Governor Dayton’s Executive Order 11-01 and the Federal Patient Protection and Affordable Care Act, Pub. L. No. 111-148.

20. Since the vast majority of abortions are performed in outpatient facilities, it appears that DHS does not have a process for reviewing the medical necessity of publicly funded abortions. On information and belief, DHS defers to the representations of the abortion providers, who have a direct pecuniary interest, in order to determine whether an induced abortion may be paid for with public funds.

21. The Minnesota Department of Health (“MDH”) collects abortion data. Minn. Stat. §§ 145.4131 et seq. From the individual reports it collects, MDH issues annually the “Induced Abortions in Minnesota January – December [Year]: Report to the Legislature,” (the “Official Report”). Currently available public statistics date from October 1998 through December 2011.

22. MDH compiles its Official Reports from data contained in the “Report of Induced Abortion” (the “MDH Form”), a form submitted to MDH by abortion providers for each abortion performed in Minnesota. A true and correct copy of a blank MDH Form is attached hereto as Exhibit B and incorporated herein by reference.

23. As required by Minn. Stat. § 145.4131, the MDH Form lists nine possible reasons for each abortion. The MDH Form instructs the abortion provider to check all reasons that apply. More than one reason may be selected. The statutorily designated reasons are listed at section 21, “Specific Reason for the Abortion,” of the MDH Form. *See* Ex. B at 2. Those specific reasons are:

- Pregnancy was a result of rape,
- Pregnancy was a result of incest,
- Economic reasons,
- Does not want children at this time,
- Emotional health is at stake,
- Physical health is at stake,
- Will suffer substantial and irreversible impairment of a major bodily function if the pregnancy continues,
- Pregnancy resulted in fetal anomalies,
- Unknown or the woman refused to answer.

24. Based on the authority of the injunction issued by the Court in *Gomez*, DHS is authorized to expend public funds only for therapeutic abortions performed on indigent women.

25. The MDH Form includes reasons that are both therapeutic and non-therapeutic.

26. Plaintiffs allege that abortions performed for the following reasons, as listed on the MDH Form, could conceivably qualify as therapeutic within the scope of the *Gomez* injunction:

- Pregnancy was a result of rape,
- Pregnancy was a result of incest,
- Emotional health is at stake,
- Physical health is at stake,
- Will suffer substantial and irreversible impairment of a major bodily function if the pregnancy continues, and
- Pregnancy resulted in fetal anomalies.

27. Plaintiffs allege that abortions performed for the following reasons, as listed on the MDH Form, do **not** qualify as therapeutic within the scope of the *Gomez* injunction:

- Economic reasons,
- Does not want children at this time,
- Unknown or the woman refused to answer,
- Other stated reason.

28. According to the MDH Official Reports, 174,805 abortions were performed in Minnesota from January 1999 through December 2011. The MDH Official Reports indicate that, for the same time period, 47,095 of these abortions (or 26.9%) were paid for by “Public Assistance.”

29. Plaintiff’s counsel submitted an information request to MDH under the Minnesota Government Data Practices Act seeking the reasons listed for those abortions paid for by Public Assistance. In response to that request, MDH produced a spreadsheet titled “Induced Abortion in Minnesota, 1999 – 2011: Reason for Abortion*⁵ where the procedure was paid for by Public

⁵ *More than one reason may be selected by an individual patient.

Assistance.” A true and correct copy of this spreadsheet is attached hereto as Exhibit C and incorporated herein by reference.

30. Of the 47,095 abortions paid by Public Assistance from January 1999 through December 2011, at most 10,044 abortions were performed for reasons that could qualify as therapeutic under *Gomez*.⁶ Specifically:

Reason	Number
Pregnancy was a result of rape	389
Pregnancy was a result of incest	58
Emotional health is at stake	5,136
Physical health is at stake	3,922
Will suffer substantial and irreversible impairment of a major bodily function if the pregnancy continues	163
Pregnancy resulted in fetal anomalies	376
Total	10,044

See Exhibit C.

31. Because more than one reason may be selected by a provider completing the MDH Form, the number of actual therapeutic abortions may be overstated by the MDH data.

32. During that thirteen-year period, DHS paid for at least 37,051 abortions performed on indigent women for **non-therapeutic** reasons (47,095 publicly funded abortions minus 10,044 putatively therapeutic reasons). Less than 22% of the abortions paid for with public funds during this time period were authorized by the *Gomez* injunction.

33. According to the MDH data, for that same thirteen-year period (1999 thru 2011), the following non-therapeutic reasons were recorded for publicly funded abortions:

⁶ Plaintiffs do not concede that all of these reasons qualify as therapeutic under the meaning of term as used in *Gomez*.

Reason	Number
Economic reasons	14,085
Does not want children at this time	24,556
Unknown or the woman refused to answer	10,412
Other stated reason	9,287
Total	58,340

34. DHS has been expending public funds *ultra vires*, without appropriation, in violation of Article XI, Section I, of the Minnesota Constitution by paying for over 37,000 non-therapeutic abortions performed on indigent women from 1999 through 2011.

35. The MDH Form is not the only state form that abortion providers are required to submit. DHS requires that abortion providers submit a “Medical Necessity Statement” in order to receive payment for these abortions from Public Assistance. A true and correct copy of a blank Medical Necessity Statement is attached hereto as Exhibit D and incorporated herein by reference.

36. The Medical Necessity Statement lists the following qualifying reasons for a publicly-funded abortion:

1. The woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless the abortion is performed.
2. Pregnancy resulted from rape.
3. Pregnancy resulted from incest.
4. Abortion is being done for other health reasons.
5. Abortion is being done to prevent substantial and irreversible impairment of a major bodily function.
6. Continuation of the pregnancy would endanger the woman’s life.

37. According to data provided by DHS, from 2006 through 2010, Minnesota taxpayers paid for 19,295 abortions for income-qualified women:

Year	Number
2006	3,937
2007	3,914
2008	3,754
2009	3,933
2010	3,757
Total	19,295

A true and correct copy of this Report is attached hereto as Exhibit E and incorporated herein by reference.

38. Of these taxpayer-funded abortions over that five-year period, the reason listed for 19,226 of these abortions (99.7%) was #4 “Abortion is being done for other health reasons.”

39. The MDH data for the same five-year period indicates that 19,625 abortions were paid by Public Assistance, but only 3,007 (15.3%) of these publicly funded abortions were performed for reasons that could qualify as therapeutic under *Gomez*.

40. On information and belief, abortion providers are vastly overstating the number of publicly funded abortions being performed for “other health reasons,” a situation which has been compounded by DHS’ lack of meaningful review of the medical necessity of the abortions for which it has been paying. As a result, the majority of abortions that have been paid for with public funds since at least 1999 have been performed for non-therapeutic reasons and in violation of the *Gomez* injunction.

41. Despite the Court’s holding in *Gomez* that “this court's decision will not permit any woman eligible for medical assistance to obtain an abortion ‘on demand,’” that is precisely what has occurred, and continues to occur, in practice.

42. On information and belief, Minnesota spends approximately \$1.5 million annually to fund abortions for indigent women.

43. Plaintiffs, as taxpayers, are aggrieved by this wasteful and excessive government spending.

44. Not only does DHS pay for too many abortions for indigent women, but also a disproportionate number of these abortions are performed on African American women.

45. According to 2010 U.S. Census data, African Americans comprise 5.4% of the total state population.

46. According to the MDH compilation of abortion data, from 1999 through 2011, Public Assistance paid for 19,152 abortions performed on African American women. Just over forty percent (40%) of publicly funded abortions were performed on African American women. A true and correct copy of this report is attached hereto as Exhibit F and incorporated herein by reference.

47. Plaintiffs, who are African Americans, are especially aggrieved that the effect of this *ultra vires* spending is to disproportionately inhibit the growth of the African American population in this state.

COUNT I

EXPENDING FUNDS WITHOUT APPROPRIATION

48. Plaintiffs reiterate the allegations contained in the above paragraphs as if fully set forth herein.

49. The State of Minnesota has never appropriated funds to cover non-therapeutic abortions.

50. Abortion funding for any reason other than a therapeutic reason falls outside the scope of the *Gomez* injunction. Any expenditure of public funds for a non-therapeutic abortion has

been made in violation of the *Gomez* injunction, and without an appropriation, in violation of Article XI, Section I of the Minnesota Constitution and Minn. Stat. §245.03, subd. 2(1).

51. On information and belief, DHS makes no independent review of whether an abortion that has been submitted to DHS for public funding was performed for a therapeutic reason.

52. From 1999 through 2011, DHS has expended public funds to pay for over 37,000 non-therapeutic abortions, without any authorizing appropriation. DHS has expended approximately \$14.9 million in public funds *ultra vires* for such abortions, in violation of Article XI, Section I of the Minnesota Constitution and Minn. Stat. § 245.03, subd. 2(1).

53. Plaintiffs are entitled to declaratory relief under Minn. Stat. §§ 555.01 et seq. to halt these unconstitutional expenditures.

54. Plaintiffs are entitled to preliminary and permanent injunctive relief requiring DHS to correct and eliminate the unconstitutional expenditure of public funds for non-therapeutic abortions.

COUNT II

DECLARATORY JUDGMENT

55. Plaintiffs reiterate the allegations contained in the above paragraphs as if fully set forth herein.

56. In 1978, the State of Minnesota acted to limit public funding of abortion to certain narrow reasons. Minn. Stat. § 256B.0625, subd. 16. The Supreme Court in *Gomez* broadened the definition of “therapeutic,” and required DHS to pay for therapeutic abortions for indigent women, enjoining the operation of § 245B.0625 to the extent it conflicted with the Court’s holding.

57. The *Gomez* decision has proven unworkable in practice. The distinction between therapeutic abortions, that must be paid for with public funds, and non-therapeutic abortions, which are not authorized for public funding, is too difficult to apply. Its demonstrable effect is that tens of thousands of non-therapeutic abortions have been paid for by Public Assistance.

58. Plaintiffs are entitled to declaratory relief under Minn. Stat. §§ 555.01 et seq. to prevent this unconstitutional expenditure of State funds.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for relief against Defendant and respectfully request of the Court the following:

- A. Enter declaratory judgment establishing that the DHS has expended public funds for non-therapeutic abortions without an authorizing appropriation, in violation of Article XI, Section I of the Minnesota Constitution;
- B. Issue preliminary and permanent injunctive relief requiring DHS to correct and eliminate the unconstitutional expenditure of public funds for non-therapeutic abortions;
- C. Issue preliminary and permanent injunctive relief directing DHS to cease all public expenditures for abortions until DHS can demonstrate that public funds no longer will be expended for non-therapeutic abortions;
- D. Direct DHS to conduct an accounting to ascertain the amounts paid to providers for reimbursement of non-therapeutic abortions, and further directing DHS to seek repayment of such unlawful payments from each such provider;
- E. Dissolve the *Gomez* injunction because it has proven to be unworkable in practice;
- F. Award Plaintiffs their attorney fees and costs; and
- G. Award such other relief as the Court deems just and equitable.

Dated: November 27, 2012



s/Charles R Shreffler
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ACKNOWLEDGMENT

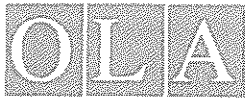
The undersigned hereby acknowledges that costs, disbursements, and reasonable attorney and witness fees may be awarded, pursuant to Minn. Stat. § 549.211, to the party against whom the allegations in this pleading are asserted.

Dated: November 27, 2012



s/Charles R Shreffler
Charles R. Shreffler, #183295
Counsel for Plaintiffs

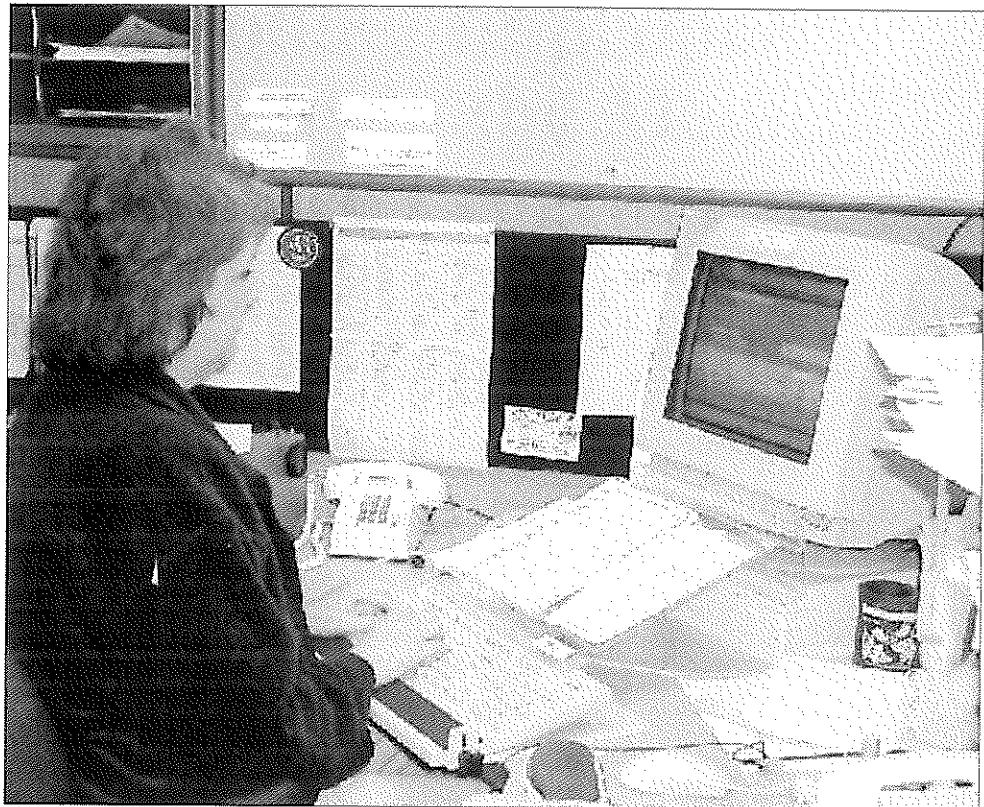
Report # 03-07



OFFICE OF THE LEGISLATIVE AUDITOR
STATE OF MINNESOTA

EVALUATION REPORT

Controlling Improper Payments in the Medical Assistance Program



AUGUST 2003

PROGRAM EVALUATION DIVISION
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Exhibit A

APP 14



OFFICE OF THE LEGISLATIVE AUDITOR
State of Minnesota • James Nobles, Legislative Auditor

August 20, 2003

Members
Legislative Audit Commission

The Medical Assistance (MA) program provides health care coverage to low income Minnesotans and costs over \$4 billion annually, with the state and federal government splitting the cost. Given the size of this program and national concerns about fraud, abuse, and other improper payments in health care programs, the Legislative Audit Commission directed the Office of the Legislative Auditor to evaluate Minnesota's payment control strategy for MA. We began the evaluation in January of 2003.

While we found that Minnesota's approach to controlling improper MA payments is reasonable, the state's effort needs more focus, commitment, and coordination. Specifically, the Department of Human Services (DHS) should increase its efforts to (1) assess the size and nature of the improper payment problem in Minnesota, (2) evaluate how well its payment controls are working, and (3) coordinate its payment control activities. Our report provides a range of recommendations and options for improving the state's control efforts.

This report was researched and written by John Patterson (project manager), Valerie Bombach, and Dan Jacobson. We received the full cooperation of the Department of Human Services and the Attorney General's Office, the two state agencies responsible for controlling improper MA payments.

Sincerely,

/s/ James Nobles

James Nobles
Legislative Auditor

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Provider Training and Assistance

If providers understand MA policies and billing requirements, they are less likely to make billing mistakes. Consequently, Minnesota has an extensive program for training and assisting providers. As mentioned in Chapter 1, DHS' call-in help-desk took 236,854 telephone calls from providers in fiscal year 2002. In addition, DHS provides formal training sessions for providers throughout the state on various policies and billing procedures. In fiscal year 2002, DHS carried out 117 of these sessions with 2,080 providers attending.

DHS has been proactive in trying to address providers' billing questions and concerns.

In addition, DHS' provider training and assistance section has been proactive in providing useful information to providers. As mentioned earlier, the help-desk supervisor conducts a weekly training session for which he brings in people from different parts of DHS' health care system to update his staff on various policy and billing issues. Furthermore, the provider training unit conducts periodic focus groups of providers to proactively identify and address their concerns and questions.

Nevertheless, the director of the DHS' Performance Measurement and Quality Improvement Division told us that the department's provider training program could be improved. For instance, she said DHS should focus the training not only on how to complete and submit accurate claims but also on each provider's legal responsibility to thoroughly document its services and appropriately retain records. As mentioned earlier, the Office of the Inspector General of the U.S. Department of Health and Human Services released an audit in 2002 that revealed the need for this type of training. In the audit, the Office of the Inspector General reviewed 100 payments that DHS made for personal care services, and the Office of the Inspector General disqualified 33 of these payments largely because the agencies providing the services did not adequately document the services or retain appropriate records.³³

Medical Reviews

Although DHS primarily uses medical reviews to control costs, they can also serve as a tool to prevent and detect fraud, abuse, and other types of improper activities, such as ordering excessive diagnostic tests or unnecessary hospital stays. However, because medical reviews can be subjective and are intertwined with the quality of medical care, establishing that a service is improper can sometimes be very difficult.

As described in Chapter 1, DHS contracts with Care Delivery Management Inc. (CDMI) to perform medical reviews, which determine the medical necessity, appropriateness, and quality of certain fee-for-service benefits. In addition, DHS' pharmacy services section performs its own reviews of prescriptions. Excluding some retrospective reviews, all these reviews are done before DHS pays the claim and, in some cases, before the service is provided.

³³ Office of the Inspector General, *Audit of Medicaid Costs Claimed for Personal Care Services by the Minnesota Department of Human Services*.

CONTROLLING IMPROPER PAYMENTS IN THE MEDICAL ASSISTANCE PROGRAM

When we compared Minnesota’s medical review practices with those recommended in the payment control literature, we found that Minnesota has a strong framework, as shown in Table 2.3. For example:

- In fiscal year 2003, CDMI performed 19,000 inpatient hospital authorizations and about 8,000 concurrent and retrospective reviews of inpatient hospital services, which represented about 40 percent of the services provided.³⁴
- DHS’ pharmacy services section oversees and monitors the use of all pharmacy-related services through a system of computerized edits that verifies the appropriateness of prescriptions before they are filled. When a pharmacist is filling a prescription for an MA recipient, the pharmacist logs onto DHS’ system and enters the prescription information. The computerized edits then compare the prescription with the recipient’s benefit limits and other policy parameters—for example, prescription quantities and refill limits.

DHS conducts several important medical review procedures.

Table 2.3: Important Medical Review Procedures

Procedure	Minnesota Procedure
General Medical Reviews	
Carry out special authorizations for services that are outside of the standard benefits package	Yes
Carry out concurrent reviews that evaluate the appropriateness of services while they are being provided	Yes, for a sample of inpatient hospital services
Carry out retrospective reviews that evaluate the appropriateness of services after they provided	Yes, for a sample of inpatient hospital services
Make available to staff consultation services offered by medical professionals	Yes
Pharmaceutical Reviews	
Review the utilization of pharmaceuticals, which includes, among other things, identifying (1) pharmacists whose practices deviate from accepted medical standards, and (2) recipients who display drug-seeking behavior	Yes
Have a pharmacy benefits manager	Yes
Have a computerized edit system that checks the appropriateness of prescriptions while they are being filled	Yes, but system allows pharmacists to override some edits

SOURCES: We compiled these practices from several sources, including: Office of the Inspector General, U.S. Department of Health and Human Services, *Medicaid: Proactive Safeguards* (Chicago, IL: July 2000); Malcolm K. Sparrow, *Controlling Fraud and Abuse in Medicaid: Innovations and Obstacles* (A report from the Executive Seminars on Fraud and Abuse in Medicaid, sponsored by the Health Care Financing Administration) (Washington, DC: September 1999); and U.S. General Accounting Office, *Medicare: Program Activities Expanded, but Results Difficult to Measure* (Washington, DC: August 1999).

³⁴ These figures include reviews for services provided under the state’s General Assistance Medical Care and Minnesota Children With Special Health Needs programs.

- National studies recommend that Medicaid agencies have access to medical experts to help determine whether provider activities may constitute fraud, and CDMI provides medical consultation services upon request to DHS, although CDMI receives only a few of these requests annually.
- Finally, in at least one respect, Minnesota's practices exceed those found in some other states. In a recent review of eight states, the Office of the Inspector General of the U.S. Department of Health and Human Services found that only one state (Pennsylvania) conducted concurrent reviews of any kind, and its reviews were limited to mental health facility care.³⁵

Medical reviews should be used selectively and in a cost-effective manner to prevent improper payments. For example, many states have indicated that requiring second opinions for medical procedures has not proven to be cost-effective and have abandoned this practice.³⁶

Claims Processing

DHS has a high regard for the ability of its computerized claims processing system to identify and catch improper claims before they are paid. In general terms, the system makes sure that (1) the provider and recipient of the services are enrolled in the program, (2) the claim does not duplicate or conflict with other claims, and (3) the services are appropriately authorized and within the recipient's benefit limits. The system has roughly 1,000 computerized checks, which are referred to as "edits."

While DHS does not have a current review or assessment demonstrating that its system is better than those used by other states and health insurers, the department points to complements that it has received.³⁷ For example, according to the supervisor of the claims processing section and the state's Medicaid director, some private insurers and companies that process Medicare claims in Minnesota say that DHS' claims processing edits are superior to their edits. In addition, DHS' staff report that when they attend national conferences, staff from other states praise DHS' edit system.

Even if the department's edit system is better than many others, we identified some claims processing practices recommended by payment control experts that Minnesota is not always following. Table 2.4 lists several state-of-the-art claims processing practices and indicates whether Minnesota follows them. Once again, we are not implying that DHS should adopt each of these practices; rather, the practices in Table 2.4 present an opportunity for the department to improve its prevention efforts. For example:

According to DHS, its claims processing "edits" have been praised by health insurance companies and other states.

³⁵ Office of the Inspector General, *Medicaid: Claims Processing Safeguards*, 10.

³⁶ Office of the Inspector General, *Medicaid: Proactive Safeguards*, 14.

³⁷ The claims processing edits are a part of the state's Medicaid Management Information System (MMIS). According to DHS, Minnesota received the highest score in the country (99.8) on its last *Federal Systems Performance Review*, which occurred back in 1997. DHS staff characterized the federal review as a "mini-recertification" of the state's MMIS. However, DHS was unable to provide us with a copy of this review.

REPORT OF INDUCED ABORTION

1. Facility Reporting Code <input style="width: 20px; height: 20px;" type="text"/> <input style="width: 20px; height: 20px;" type="text"/> <input style="width: 20px; height: 20px;" type="text"/> <input style="width: 20px; height: 20px;" type="text"/>	2. Physician Reporting Code <input style="width: 20px; height: 20px;" type="text"/> <input style="width: 20px; height: 20px;" type="text"/> <input style="width: 20px; height: 20px;" type="text"/> <input style="width: 20px; height: 20px;" type="text"/>	3. Medical Specialty of the Physician Performing the Induced Abortion <input type="checkbox"/> Obstetrics & Gynecology <input type="checkbox"/> General/Family Practice <input type="checkbox"/> Emergency Medicine <input type="checkbox"/> Other (Specify) _____	
4. Type of Admission <input type="checkbox"/> Clinic <input type="checkbox"/> Outpatient hospital <input type="checkbox"/> Inpatient hospital <input type="checkbox"/> Ambulatory surgery <input type="checkbox"/> Other (Specify) _____			
5. Patient Age at Last Birthday <input style="width: 20px;" type="text"/> <input style="width: 20px;" type="text"/> 6. Married <input type="checkbox"/> Yes <input type="checkbox"/> No 7. Date of Pregnancy Termination ____/____/____ <i>Month, Day, Year</i>			
8. Patient Residence City: _____ County: _____ State: _____ Zip Code: <input style="width: 20px;" type="text"/> <input style="width: 20px;" type="text"/> <input style="width: 20px;" type="text"/> <input style="width: 20px;" type="text"/> <input style="width: 20px;" type="text"/> <input style="width: 20px;" type="text"/>			
9. Of Hispanic Origin <i>Specify No or Yes. If yes, specify, Cuban, Mexican, Puerto Rican, etc.</i> <input type="checkbox"/> No <input type="checkbox"/> Yes (Specify): _____	10. Race <input type="checkbox"/> American Indian <input type="checkbox"/> Asian <input type="checkbox"/> Black <input type="checkbox"/> White <input type="checkbox"/> Other (Specify): _____	11. Education <i>(Specify only highest grade completed)</i> <input style="width: 20px;" type="text"/> <input style="width: 20px;" type="text"/> Elementary/Secondary (0-12) <input style="width: 20px;" type="text"/> <input style="width: 20px;" type="text"/> College (1-4 or 5+)	
12. Date Last Normal Menses Began <input style="width: 20px;" type="text"/> <input style="width: 20px;" type="text"/> Month, <input style="width: 20px;" type="text"/> <input style="width: 20px;" type="text"/> Day, <input style="width: 20px;" type="text"/> <input style="width: 20px;" type="text"/> Year	13. Clinical Estimate of Gestation <input style="width: 20px;" type="text"/> <input style="width: 20px;" type="text"/> (LMP Weeks)		
14. Previous Pregnancies (Complete each section)			
<i>Live Births</i>		<i>Other Terminations</i>	
14a. Now Living Number <input style="width: 20px;" type="text"/> <input style="width: 20px;" type="text"/> <input type="checkbox"/> None	14b. Now Dead Number <input style="width: 20px;" type="text"/> <input style="width: 20px;" type="text"/> <input type="checkbox"/> None	14c. Spontaneous Number <input style="width: 20px;" type="text"/> <input style="width: 20px;" type="text"/> <input type="checkbox"/> None	14d. Induced (Do not include this abortion) Number <input style="width: 20px;" type="text"/> <input style="width: 20px;" type="text"/> <input type="checkbox"/> None
15. Contraceptive Use at Time of Conception <u>A. Use Status:</u> (Check only one) <input type="checkbox"/> Unknown - patient did not know if they used a method. (<i>Do not fill out Part B.</i>) <input type="checkbox"/> Never used any contraceptive method (<i>Do not fill out Part B.</i>) <input type="checkbox"/> Has used contraception, but not at the estimated time of conception. (<i>Do not fill out Part B.</i>) <input type="checkbox"/> Method used at time of conception. (<i>Fill out PART B, METHOD USED.</i>) <input type="checkbox"/> Patient did not provide information. <u>B. Method Used:</u> <div style="display: flex; justify-content: space-between;"> <div style="width: 45%;"> <input type="checkbox"/> Condoms <input type="checkbox"/> Condoms & Spermicide <input type="checkbox"/> Spermicide alone <input type="checkbox"/> Sterilization (M) <input type="checkbox"/> Sterilization (F) <input type="checkbox"/> Injectable (Depo-Provera) <input type="checkbox"/> IUD <input type="checkbox"/> Mini Pills </div> <div style="width: 45%;"> <input type="checkbox"/> Combination Pills <input type="checkbox"/> Diaphragm & Spermicide <input type="checkbox"/> Diaphragm alone <input type="checkbox"/> Cervical cap <input type="checkbox"/> Rhythm/Natural Fam. Planning <input type="checkbox"/> Fertility Awareness <input type="checkbox"/> Withdrawal <input type="checkbox"/> Other (Specify) _____ </div> </div>			

16. Type of Abortion Procedure *(Check only one)*

- Suction Curettage
- Medical *(Nonsurgical)*,
Specify Medication(s) _____ → Does not include administration of morning after pills or post coital IUD insertion.
- Dilation and Evacuation (D&E)
- Intra-Uterine Instillation (Saline or Prostaglandin)
- Hysterectomy/otomy
- Sharp Curettage (D&C)
- Induction of Labor (Pitocin, etc.)
- Intact Dilation and Extraction (D&X)
- Other Dilation and Extraction (D&X)
- Other *(Specify)* _____

17. Intraoperative Complication(s) from Induced Abortion

Complications that occur during and immediately following the procedure, before patient has left facility.

(Check all that apply)

- No complication(s)
- Cervical laceration requiring suture or repair
- Heavy bleeding/hemorrhage with estimated blood loss of ≥ 500 cc
- Uterine perforation
- Other *(Specify)* _____

**For post-operative complications, please refer to the REPORT OF COMPLICATION(S) FROM INDUCED ABORTION*

18. Method of Disposal for Fetal Remains *(Check only one)*

- Cremation Interment by burial

19. Type of Payment *(Check only one)*

- Private coverage Public assistance health coverage Self pay

20. Type of Health Coverage *(Check only one)*

- Fee for service plan Capitated private plan Other/Unknown

21. Specific Reason for the Abortion *(Check all that apply)*

- Pregnancy was a result of rape
- Pregnancy was a result of incest
- Economic reasons
- Does not want children at this time
- Emotional health is at stake
- Physical health is at stake
- Will suffer substantial and irreversible impairment of major bodily function if the pregnancy continues
- Pregnancy resulted in fetal anomalies
- Unknown or the woman refused to answer
- Other _____



Center for Health Statistics
Minnesota Department of Health
85 East 7th Place, Box 64882
Saint Paul, MN 55164-0882
(800)657-3900

REPORT OF INDUCED ABORTION

Mandated reporters

All physicians or facilities that perform induced abortions by medical or surgical methods.

Induced abortion defined

For purpose of these reports, induced abortion means the purposeful interruption of an intrauterine pregnancy with the intention other than to produce a live-born infant, and which does not result in a live birth. This definition excludes management of prolonged retention of products of conception following fetal death.

Importance of induced abortion reporting

Reports of induced abortion are not legal records and are not maintained permanently in the files of the State office of vital statistics. However, the data they provide are very important from both a demographic and a public health viewpoint. Data from reports of induced abortion provide unique information on the characteristics of women having induced abortions. Uniform annual data of such quality are nowhere else available. Medical and health information is provided to evaluate risks associated with induced abortion at various lengths of gestation and by the type of abortion procedure used. Information on the characteristics of the women is used to evaluate the impact that induced abortion has on the birth rate, teenage pregnancy, and out-of-wedlock births. Because these abortion data provide information necessary to promote and monitor health, it is important that the reports be completed carefully.

Physician and patient confidentiality

According to MN Statutes §145.4134, the commissioner shall issue a public report providing statistics for the previous calendar year compiled from the data submitted under sections 145.4131 to 145.4133. Each report shall provide the statistics for all previous calendar years, adjusted to reflect any additional information from late or corrected reports. The commissioner shall ensure that none of the information included in the public reports can reasonably lead to identification of an individual having performed or having had an abortion. All data included on the forms under sections 145.4131 to 145.4133 must be included in the public report except that the commissioner shall maintain as confidential data which alone or in combination may constitute information from which, using epidemiologic principles, an individual having performed or having had an abortion may be identified. Service cannot be contingent upon a patient's answering, or refusing to answer, questions on this form.

MINNESOTA STATE LAW

ARTICLE 10, HEALTH DATA REPORTING

§145.4131 [RECORDING AND REPORTING ABORTION DATA.] Subdivision 1. [FORMS.] (a) Within 90 days of the effective date of this section, the commissioner shall prepare a reporting form for use by physicians or facilities performing abortions. A copy of this section shall be attached to the form. A physician or facility performing an abortion shall obtain a form from the commissioner. (b) The form shall require the following information: (1) the number of abortions performed by the physician in the previous calendar year, reported by month; (2) the method used for each abortion; (3) the approximate gestational age expressed in one of the following increments: (i) less than nine weeks; (ii) nine to ten weeks; (iii) 11 to 12 weeks; (iv) 13 to 15 weeks; (v) 16 to 20 weeks; (vi) 21 to 24 weeks; (vii) 25 to 30 weeks; (viii) 31 to 36 weeks; or (ix) 37 weeks to term; (4) the age of the woman at the time the abortion was performed; (5) the specific reason for the abortion, including, but not limited to, the following: (i) the pregnancy was a result of rape; (ii) the pregnancy was a result of incest; (iii) economic reasons; (iv) the woman does not want children at this time; (v) the woman's emotional health is at stake; (vi) the woman's physical health is at stake; (vii) the woman will suffer substantial and irreversible impairment of a major bodily function if the pregnancy continues; (viii) the pregnancy resulted in fetal anomalies; or (ix) unknown or the woman refused to answer; (6) the number of prior induced abortions; (7) the number of prior spontaneous abortions; (8) whether the abortion was paid for by: (i) private coverage; (ii) public assistance health coverage; or (iii) self-pay; (9) whether coverage was under: (i) a fee-for-service plan; (ii) a capitated private plan; or (iii) other; (10) complications, if any, for each abortion and for the aftermath of each abortion. Space for a description of any complications shall be available on the form; and (11) the medical specialty of the physician performing the abortion. Subd. 2. SUBMISSION.] A physician performing an abortion or a facility at which an abortion is performed shall complete and submit the form to the commissioner no later than April 1 for abortions performed in the previous calendar year. The annual report to the commissioner shall include the methods used to dispose of fetal tissue and remains. Subd. 3. [ADDITIONAL REPORTING.] Nothing in this section shall be construed to preclude the voluntary or required submission of other reports or forms regarding abortions.

REPORTING PROCEDURE

COMPLETION AND SUBMISSION OF REPORTS

1. Reporting by physician or facility

The Minnesota Department of Health (MDH), Center for Health Statistics, encourages physicians and facilities to develop internal policies for the completion and submission of the Report of Induced Abortion. MDH recommends that these policies designate either the physician or the facility as having the overall responsibility and authority to see that the report is completed and filed on time. This may help prevent duplicate reporting and failure to report. If facilities take the responsibility to report on behalf of their physicians MDH suggests the following reporting procedure:

- * Notify physicians that the facility will be reporting on their behalf.
- * Call the Minnesota Center for Health Statistics for assignment of facility reporting codes and physician reporting codes (See instructions #2-3).
- * Assign physician reporting codes to physicians and maintain a list of these assignments.
- * Develop efficient procedures for prompt preparation and filing of the reports.
- * Collect and record the information required by the report.
- * Prepare a correct and legible report for each abortion performed.
- * Submit the reports to the Minnesota Center for Health Statistics within the time specified by the law.
- * Cooperate with the Minnesota Center for Health Statistics concerning queries on report entries.
- * Call on the Minnesota Center for Health Statistics for advice and assistance when necessary.

If a facility decides not to report on behalf of their physicians, or for physicians who perform induced abortions outside a hospital, clinic, or other institution, the physician performing the abortion is responsible for obtaining a physician reporting code from MDH (See instruction #3), collecting all of the necessary data, completing the report, and filing it with the Minnesota Center for Health Statistics within the time period specified by law (See instruction #7).

2. Facility reporting codes

All facilities reporting on behalf of physicians must be assigned a reporting code from MDH. This code is in addition to individual physician reporting codes (See instruction #3). Facilities must submit a name and address to receive a facility code. For facilities that have been reporting to MDH prior to October 1, 1998, already have a facility reporting code and may continue to use the same code for future reporting.

3. Physician reporting codes

All physicians must be assigned a reporting code in order to submit a Report of Induced Abortion. Reports submitted without a physician reporting code will be considered incomplete. To obtain a code, physicians, or facilities reporting on behalf of physicians (See instruction # 1), must call MDH to be assigned one code per physician. MDH will require that a valid mailing address be provided for the purposes of keying the reporting code, but no other identifying information will be asked or accepted. Addresses provided may be a business address, or an address established by the physician or facility, such as a PO Box. If facilities are reporting on behalf of their physicians, the facility address may be used for the physician address.

4. One report per induced termination of pregnancy

Complete one report for each termination of pregnancy procedure performed.

5. Criterion for a complete report

All items on the report should have a response, even if the response is "0," "None," "Unknown," or "Refuse to Answer."

6. "Reason for abortion" question

MDH recommends that Item #21 on the report be reviewed with each patient. All responses can be reviewed with the patient before completing the question. If this question is transcribed to another piece of paper, or read to the patient, the question must be copied or read exactly as it is worded on the Report of Induced Abortion. If the patient does not complete the question because she refuses to answer, then the facility or physician must check the appropriate response, which is "Refuse to answer."

7. Method of disposal for fetal remains

Reporters should be informed that this question applies to disposal of fetal remains as defined under MN Statutes §145.1621, subd.2.

8. Submission dates

Reports should be completed and submitted to the Center for Health Statistics as soon as possible following each procedure. MDH encourages facilities and physicians to submit reports on a monthly basis, but the final date for submitting reports is April 1 of the following year (e.g., all reports for procedures done in 1998 are due by April 1, 1999). (MN Statutes 1998, §145.411)

Induced Abortion in Minnesota, 1999 - 2010
 Reason for Abortion, Procedures Paid by Public Assistance

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Total Paid by Public Assistance	2,741	2,680	3,112	3,526	3,822	3,949	3,849	3,969	3,961	3,865	3,946	3,884	3,791
Pregnancy was a result of rape	30	34	34	35	28	22	28	33	33	38	26	24	24
Pregnancy was a result of incest	1	4	2	7	4	2	2	4	5	8	5	4	10
Economic reasons	360	551	702	877	883	1,000	1,283	1,489	1,546	1,321	1,258	1,359	1,456
Does not want children at this time	743	1,112	1,405	1,452	1,416	1,569	2,245	2,380	2,681	2,614	2,301	2,241	2,397
Emotional health is at stake	260	314	420	500	621	606	583	261	314	335	243	312	367
Physical Health is at stake	211	258	329	370	520	469	407	232	263	235	187	224	217
Continued pregnancy will cause impairment of major bodily function	20	6	11	12	15	15	9	13	6	8	17	14	17
Pregnancy resulted in fetal anomalies	29	18	31	19	28	19	24	26	29	24	32	52	45
Unknown or the woman refused to answer	1,154	682	665	997	1,271	1,307	650	624	484	523	778	778	499
Other stated reason	571	565	643	557	646	678	822	818	812	741	813	814	807



Minnesota Department of Human Services

Minnesota Health Care Programs Medical Necessity Statement

Section I. Patient Information

PATIENT'S NAME		RECIPIENT ID NUMBER	DATE OF PROCEDURE
STREET ADDRESS			
CITY		STATE	ZIP CODE

Section II. Physician Information

The abortion is being performed for the following reason: (please check only one)

- 1. The woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by or arising from the pregnancy itself, that would, as certified by a physician, place the woman in danger of death unless the abortion is performed. (Applies to Medical Assistance and General Assistance.)
- 2. Pregnancy resulted from rape. (Applies to Medical Assistance, General Assistance, and MinnesotaCare.)
- 3. Pregnancy resulted from incest. (Applies to Medical Assistance, General Assistance, and MinnesotaCare.)
- 4. Abortion is being done for other health reasons. (Applies to Medical Assistance, and General Assistance.)
- 5. Abortion is being done to prevent substantial and irreversible impairment of a major bodily function. (Applies to MinnesotaCare only.)
- 6. Continuation of the pregnancy would endanger the woman's life. (Applies to MinnesotaCare only.)

PHYSICIAN'S NAME		NPI	
OFFICE STREET ADDRESS			
CITY		STATE	ZIP CODE
PHYSICIAN'S SIGNATURE			DATE

PO Box 64893 North • Saint Paul, Minnesota 55164

Exhibit D

Minnesota Health Care Programs - Abortion Provider Report Fee-For-Service Data Only Final - CY 2006 (All Quarters)	
Abortion Reason Code	Count
1	7
2	14
3	2
4	3914
Total	3,937

KEY
ABORTION REASON CODE:
1 ABORT CONSENT YES ENDANGER
2 ABORT CONSENT YES RAPE
3 ABORT CONSENT YES INCEST
4 ABORT CONSENT YES OTHER HLTH
5 ABORT CONSENT YES IMPAIRMENT

Minnesota Health Care Programs - Abortion Provider Report Fee-For-Service Data Only Final - CY 2007 (All Quarters)	
Abortion Reason Code	Count
2	9
3	2
4	3,903
Total	3,914

Minnesota Health Care Programs - Abortion Provider Report Fee-For-Service Data Only Final - CY 2008 (All Quarters)	
Abortion Reason Code	Count
1	1
2	11
3	2
4	3,740
Total	3,754

Minnesota Health Care Programs - Abortion Provider Report Fee-For-Service Data Only Final - CY 2009 (All Quarters)	
Abortion Reason Code	Count
1	3
2	4
3	1
4	3,925
Total	3,933

Minnesota Health Care Programs - Abortion Provider Report Fee-For-Service Data Only Final - CY 2010 (All Quarters)	
Abortion Reason Code	Count
2	9
3	4
4	3,744
Total	3,757

Exhibit E

Induced Abortion in Minnesota, 1999 - 2011
 Race/Ethnicity of Patient for Procedures Paid by Public Assistance

	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011
Total Paid by Public Assistance	2,739	2,681	3,112	3,559	3,843	3,950	3,850	3,969	3,959	3,864	3,946	3,884	3,791
Race/Ethnicity													
White	1,087	1,064	1,370	1,635	1,747	1,788	1,711	1,716	1,648	1,654	1,624	1,653	1,456
African American	1,098	1,120	1,167	1,361	1,503	1,551	1,530	1,638	1,696	1,599	1,683	1,576	1,630
American Indian	135	142	174	179	191	159	167	141	175	172	203	197	182
Asian	258	195	217	189	186	174	178	154	155	170	168	168	154
Other	66	76	115	112	123	162	163	213	177	203	208	228	282
Race not Reported	95	84	69	83	93	116	101	107	108	66	60	62	87
Hispanic*	124	136	184	215	224	202	202	207	225	188	200	196	204

* may be any of the above races

Exhibit F

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Denise Walker and Brian Walker, on behalf of
themselves and other Minnesota taxpayers,

Case Type: Other Civil

Plaintiffs,

Court File No.: 62-CV-12-9027

Judge Kathleen R. Gearin

v.

Lucinda Jesson, Commissioner of Minnesota
Department of Human Services,

**COMMISSIONER LUCINDA JESSON'S
NOTICE OF MOTION AND
MOTION TO DISMISS**

Defendant.

To: Plaintiffs Denise Walker and Brian Walker by and through their attorneys Charles R. Shreffler, Shreffler Law, PLLC, 410 11th Avenue South, Hopkins, Minnesota 55343 and Jordan Lorence and Steven H. Aden, Alliance Defending Freedom, 801 G Street, N.W., Suite 509, Washington, D.C. 20001.

NOTICE OF MOTION

PLEASE TAKE NOTICE that on February 28, 2012, at 1:30 p.m., or as soon thereafter as counsel may be heard by the Honorable Kathleen R. Gearin, at the Ramsey County Courthouse, 15 W. Kellogg Blvd., St. Paul, Minnesota, Room 1210, Defendant Lucinda Jesson, Commissioner of the Minnesota Department of Human Services, will move for an Order granting her Motion to Dismiss in the above-captioned matter, pursuant to Rule 12.02 of the Minnesota Rules of Civil Procedure.

MOTION

Pursuant to Minn. R. Civ. P. 12.02, Commissioner Lucinda Jesson hereby moves this Court for an Order dismissing Plaintiffs' Complaint in its entirety, with prejudice, for failure to state a claim upon which relief can be granted, and any other relief the Court deems fair and just.

This Motion is based upon the entire file, record, and proceedings herein, including Commissioner Jesson's Memorandum of Law in Support of Motion to Dismiss.

Dated: December 18, 2012

Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota

s/Scott H. Ikeda

SCOTT H. IKEDA

Assistant Attorney General

Atty. Reg. No. 0386771

MIKIESHA R. MAYES

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ATTORNEYS FOR DEFENDANT
COMMISSIONER OF MINNESOTA
DEPARTMENT OF HUMAN SERVICES
LUCINDA JESSON

**MINN. STAT. § 549.211
ACKNOWLEDGMENT**

The party or parties on whose behalf the attached document is served acknowledge through their undersigned counsel that sanctions may be imposed pursuant to Minn. Stat. § 549.211.

Dated: December 18, 2012

s/Scott H. Ikeda

SCOTT H. IKEDA
Assistant Attorney General
Atty. Reg. No. 0386771

ATTORNEY FOR DEFENDANT
COMMISSIONER OF MINNESOTA
DEPARTMENT OF HUMAN SERVICES
LUCINDA JESSON

ATTORNEYS FOR DEFENDANT

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Denise Walker and Brian Walker, on behalf of
themselves and other Minnesota taxpayers,

Case Type: Other Civil

Plaintiffs,

Court File No.: 62-CV-12-9027

Judge Kathleen R. Gearin

v.

Lucinda Jesson, Commissioner of Minnesota
Department of Human Services,

**COMMISSIONER LUCINDA JESSON'S
MEMORANDUM OF LAW IN SUPPORT
OF MOTION TO DISMISS**

Defendant.

INTRODUCTION

Plaintiffs seek declaratory and injunctive relief for the alleged illegal disbursement of public funds, by the Commissioner of The Minnesota Department of Human Services (“DHS”), for abortion procedures. Plaintiffs fail to state a claim for which relief can be granted because, as stated in Plaintiffs’ Complaint, DHS funds abortion procedures only when such procedures are verified as a medical necessity, pursuant to state law. Plaintiffs’ Complaint should therefore be dismissed.

FACTS¹

Plaintiffs bring this lawsuit against Lucinda Jesson, in her official capacity as Commissioner of DHS, alleging she expended funds to pay for certain abortions without appropriation. (Compl. ¶¶ 48-54.) Plaintiffs’ Complaint concedes, however, that DHS only

¹ As is required in a motion to dismiss, the Commissioner recites the facts in the light most favorable to Plaintiffs, the non-moving party. *See Lorix v. Crompton Corp.*, 736 N.W.2d 619, 623 (Minn. 2009) (the court must accept the allegations contained in the pleading under attack as true and assumptions made and inferences drawn must favor the non-moving party). The Commissioner’s statement of facts is, therefore drawn from Plaintiffs’ Complaint (and statutes and case law), and is not admission by the Commissioner that any of the facts asserted by Plaintiffs are true.

funds abortion procedures when it receives a signed form establishing a medical necessity. (Compl. ¶ 35.) Therefore, Plaintiffs have failed to state a claim that the Commissioner has made improper disbursements.

DHS administers Minnesota Health Care Programs (“MHCP”), which provides medical insurance, through several programs, for Minnesotans who are unable to access or afford their own medical insurance. These programs include Medical Assistance (“MA”) and MinnesotaCare, among others. *See* Minn. Stat. §§ 256B.055, 256B.056 (2012) (MA); Minn. Stat. §§ 256L.04, 256L.07 (2012) (MinnesotaCare). It is undisputed that DHS is constitutionally obligated to provide coverage for therapeutic abortion procedures to women eligible for benefits through MA or MinnesotaCare. *See Gomez*, 542 N.W.2d 17, 32 (Minn. 1995). Moreover, the Commissioner and DHS are prohibited from involving themselves in a woman’s decision to obtain a therapeutic abortion: “the difficult decision whether to obtain a therapeutic abortion will not be made by the government, but will be left to the woman and her doctor.” *Id.*

In order to meet its obligations under *Gomez* and state law, DHS provides for payment for induced abortions and abortion-related services under the following conditions:

- The woman suffers from a physical disorder, physical injury, or physical illness, including a life-endangering physical condition caused by, or arising from the pregnancy itself that would, as certified by a physician, place the woman in danger of death unless the abortion is performed
- Continuation of the pregnancy would endanger the woman’s life
- Pregnancy resulted from rape
- Pregnancy resulted from incest
- Abortion is being done to prevent substantial and irreversible impairment of a major bodily function
- Abortion is being done for other health/therapeutic reasons.

(Compl. ¶ 18; DHS Minnesota Health Care Programs Provider Manual, Abortion Services)

Plaintiffs do not allege that any of these reasons are not therapeutic.

Plaintiffs acknowledge that “DHS requires that abortion providers submit a ‘Medical Necessity Statement’ in order to receive payment for these abortions from [MA or MinnesotaCare].” (Compl. ¶ 35.) The Medical Necessity Statement requires the patient’s physician to identify the reason for the abortion and requires the physician’s signature. (Compl. Ex. D.) Plaintiffs’ Complaint concedes that DHS only pays for abortion procedures under MA or MinnesotaCare when the treating physician signs and submits a form to DHS stating that the abortion procedure was done for one of the “qualifying reasons for a publicly funded abortion.” (Compl. ¶ 36.)

Plaintiffs’ allegation that DHS paid for non-therapeutic abortions is based entirely upon data published by a different state agency, the Minnesota Department of Health (“MDH”). Pursuant to Minnesota Statutes, section 145.4131, “[a] physician performing an abortion or a facility at which an abortion is performed” must complete MDH’s “Report of Induced Abortion” form. Minn. Stat. § 145.4131 (2012). The MDH form does not provide a patient’s name; indeed, “[t]he commissioner [of health] shall ensure that none of the information included in the public reports can reasonably lead to the identification of an individual having performed or having had an abortion” and “shall maintain as confidential data which alone or in combination may constitute information from which, using epidemiologic principles, an individual having performed or having had an abortion may be identified.” (Compl. Ex. B.; Minn. Stat. § 145.4134(a) (2012)) According to MDH, unlike DHS’ Medical Necessity Statement, which must be completed to receive payment, a provider may not require a patient to answer the questions on MDH’s form in order to receive services. (Compl. Ex. B.)

Aside from their reference to aggregate, anonymous data from another state agency, Plaintiffs make no allegation that DHS or the Commissioner knowingly paid for any non-

therapeutic abortion procedures. The Complaint fails to allege that the Commissioner either was aware, or even should have been aware, of the MDH data. Further, even if the Commissioner was aware, or should have been aware, of the MDH data, Plaintiffs fail to allege how knowledge of such anonymous, aggregate data would have allowed or required withholding of funding for any particular abortion, given the existence of DHS' Medical Necessity forms and *Gomez's* mandate to fund therapeutic abortions.

ARGUMENT

I. STANDARD OF REVIEW.

A motion to dismiss pursuant to Minn. R. Civ. P. 12.02 must be granted when the complaint does not support a cognizable claim or cause of action under substantive law. *Royal Realty Co. v. Levin*, 66 N.W.2d 5, 6 (Minn. 1954). The only question is whether the complaint sets forth a legally sufficient claim for relief. *Elzie v. Comm'r of Pub. Safety*, 298 N.W.2d 29, 32 (Minn. 1980); *Meyer v. Best Western Seville Plaza Hotel*, 562 N.W.2d 690, 691 (Minn. Ct. App. 1997). Generally, the Court may not consider materials outside the pleadings, however, this does not mean that only the complaint itself may be reviewed. The Court may also consider documents and statements that are incorporated by reference into the pleadings. *See Marchant Inv. & Mgmt. Co. v. St. Anthony W. Neighborhood Org., Inc.*, 694 N.W.2d 92, 95 (Minn. Ct. App. 2005). The Court must accept the allegations contained in the pleading under attack as true, and assumptions made and inferences drawn must favor the non-moving party. *See Lorix v. Crompton Corp.*, 736 N.W.2d 619, 623 (Minn. 2009). However, if it “appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded,” the motion should be granted. *Meyer*, 562 N.W.2d at 691.

II. PLAINTIFFS FAIL TO STATE A CLAIM FOR ILLEGAL DISBURSEMENT OF PUBLIC FUNDS.

A. Plaintiffs Lack Standing Because They Fail to State a Claim That the Commissioner's Expenditures Were Illegal.

Generally, taxpayer suits in the public interest are dismissed unless the taxpayer can show some damage or injury to the individual bringing the action which is special or peculiar and different from damage or injury sustained by the general public. *Olson v. State*, 742 N.W.2d 681, 684 (Minn. Ct. App. 2007). In Minnesota, taxpayers without a personal or direct injury may still have standing, but only to maintain an action that restrains the unlawful disbursements of public money or illegal action on the part of a public official. *McKee v. Likins*, 261 N.W.2d 566, 570 (Minn. 1977). To prove illegal expenditure of public funds, a plaintiff must show that the expenditure was contrary to law or for a non-public purpose. *See Oehler v. City of St. Paul*, 174 Minn. 410, 219 N.W. 760 (1928); *Arens v. Village of Rogers*, 240 Minn. 386, 61 N.W.2d 508 (1953); *McKee*, 261 N.W.2d 566; *Vollkommer v. Baldwin Township*, No. A09-1541, 2010 WL 2362839 (Minn. Ct. App. June 15, 2010). “Simple disagreement with policy or the exercise of discretion by those responsible for executing the law does not supply the ‘unlawful disbursements’ or ‘illegal action’ of public funds required for standing to support a taxpayer challenge.” *Olson*, 742 N.W.2d at 684; *Rukavina v. Pawlenty*, 684 N.W.2d 525, 531 (Minn. Ct. App. 2004). When a taxpayer’s individual challenges to state action are based primarily on his disagreement with policy or the exercise of discretion by those responsible for executing the law, they are insufficient to confer standing. *Olson*, 742 N.W.2d at 684.

In *McKee v. Linkin*, a 1977 Minnesota Supreme Court case relating to public funding of abortions, the plaintiff challenged the authority of both state and county welfare officials to make welfare payments for medical expenses connected with abortions. *McKee*, 261 N.W.2d at 568. The plaintiff alleged that a policy bulletin issued by the Commissioner of Public Welfare

authorizing coverage of non-therapeutic abortions was invalid because it constituted a rule within the meaning of the Administrative Procedure Act and was not issued pursuant to statutory requirements. *Id.* The plaintiff alleged that because the policy bulletin, which allowed funding for non-therapeutic abortions, was not issued pursuant to law, funding of abortions under the policy constituted an illegal expenditure of public funds. *Id.* The *McKee* court found that the plaintiff had standing to challenge the actions of the Commissioner of Public Welfare because the Commissioner's actions were in violation of the statute. *Id.* at 570-71. The court reasoned that when there is statutory law outlining the required actions of the Commissioner, such law must be followed and since the bulletin was issued without compliance with the law it could not be the basis for payment of non-therapeutic abortions. *Id.* at 577.

Here, unlike *McKee*, Plaintiffs do not have standing because their Complaint fails to state a claim that the Commissioner's actions were in violation of statutory law or *Gomez*. To the contrary, DHS is constitutionally required to cover therapeutic abortions for women eligible for public assistance. *Gomez*, 542 N.W.2d at 32.² Plaintiffs' Complaint concedes that every abortion expenditure was supported by a Medical Necessity Statement. *See* Compl. ¶ 35. The Medical Necessity Statement from the woman's physician attests that the abortion procedure is being performed because: (1) the woman suffers from a physical disorder, physical injury, or physical illness that would place the woman in danger of death unless the abortion is performed; (2) the pregnancy resulted from rape; (3) the pregnancy resulted from incest; (4) the abortion is being done for other health reasons; (5) the abortion is being done to prevent substantial and irreversible impairment of a major bodily function; or (6) the continuation of the pregnancy

² Plaintiffs improperly request this Court to dissolve the *Gomez* injunction. As is obvious, a district court does not possess the jurisdiction to review or overturn a decision of the supreme court.

would endanger the woman's life.³ See Compl. Ex. D. Each of these reasons is therapeutic⁴ within the plain meaning of the term and Plaintiffs do not allege that DHS provides coverage for abortion procedures that do not meet one of the requirements listed on the Medical Necessity Statement.

Plaintiffs lack standing because they have failed to state a claim for unlawful expenditure by the Commissioner. Far from being unlawful, the Commissioner is constitutionally required to fund therapeutic abortions. Plaintiffs' Complaint confirms that the Commissioner only pays those claims supported by a Medical Necessity Statement. This case is, therefore, distinguishable from *McKee*, which in fact supports dismissal in this case. See *McKee*, 261 N.W.2d at 571 ("the activities of governmental agencies engaged in public service ought not to be hindered merely because a citizen does not agree with the policy or discretion of those charged with the responsibility of executing the law."). Accordingly, Plaintiffs' Complaint should be dismissed.

B. The Complaint Does Not Allege the Commissioner Received MDH Data, and Even if the Court Imputes Knowledge of Such Data to the Commissioner, the Data Was Not Sufficient for the Commissioner to Determine That Funding Was Improper For Any Particular Claim.

Plaintiffs' allegation that DHS paid for non-therapeutic abortions is based entirely upon anonymous, aggregate data collected by MDH, a separate state agency. See Compl. ¶¶ 28-40. Notably, the Complaint does not allege that DHS received the MDH data. Further, Plaintiffs do

³ Moreover, the Complaint establishes that DHS' MHCP Provider Manual instructs medical providers that abortion procedures are covered by MA or MinnesotaCare only under limited circumstances relating to the health of the mother. See Compl. ¶ 18.

⁴ Therapeutic is defined as "of or relating to the healing of disease" or "administered or applied for reasons of health." Oxford University Press, *Oxford Dictionaries Online*, 2012, available at <http://oxforddictionaries.com/definition/english/therapeutic?q=therapeutic> (last visited December 17, 2012).

not allege or explain how the MDH data, even if known to the Commissioner, would allow or require the Commissioner to deny funding for any particular claim. The MDH data does not give any identification of the patient by which DHS could examine conflicting information, if any, concerning reasons for a particular abortion. In fact, the Commissioner of Health is required to “ensure that none of the information included in the public reports can reasonably lead to identification of an individual having performed or having had an abortion” and “shall maintain as confidential data which alone or in combination may constitute information from which, using epidemiologic principals, an individual having performed or having had an abortion may be identified.” *See* Compl. Ex. B; Minn. Stat. § 145.4134(a).

Plaintiffs allege that the number of publicly funded abortions being performed “for other health reasons” is being vastly overstated. *See* Compl. ¶ 40. In the context of Plaintiffs’ Complaint, this allegation implicitly suggests that DHS should do more to pry into the decision-making between women and their doctors concerning a woman’s reason to obtain an abortion. Such governmental interference, however, is in direct conflict with *Gomez*. *See Gomez*, 542 N.W.2d at 32 (“under our interpretation of the Minnesota Constitution’s guaranteed right to privacy, the difficult decision whether to obtain a therapeutic abortion will not be made by the government, but will be left to the woman and her doctor.”).

In short, Plaintiffs’ Complaint does not allege any claim of illegal expenditure by the Commissioner. The Commissioner, under *Gomez*, is required to fund therapeutic abortions. The Commissioner funds only those abortions supported by a Medical Necessity Statement. Plaintiffs have failed to allege how the anonymous, aggregate MDH data, even if known to the Commissioner, would allow or require the Commissioner to deny any particular abortion claim. Accordingly, the plaintiffs’ Complaint should be dismissed.

CONCLUSION

For the foregoing reasons, the Commissioner respectfully requests that this Court dismiss Plaintiffs' Complaint with prejudice, pursuant to Minn. R. Civ. P. 12.02(e).

Dated: December 18, 2012

Respectfully submitted,

OFFICE OF THE ATTORNEY GENERAL
State of Minnesota

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**MINN. STAT. § 549.211
ACKNOWLEDGMENT**

The party or parties on whose behalf the attached document is served acknowledge through their undersigned counsel that sanctions may be imposed pursuant to Minn. Stat. § 549.211.

Dated: December 18, 2012

s/Scott H. Ikeda

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DEPARTMENT OF HUMAN SERVICES
LUCINDA JESSON

AG: #3134721-v1

STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT
Case Type: Other Civil

Denise Walker and Brian Walker, wife and
husband, on behalf of themselves and other
Minnesota taxpayers,

Court File No. 62-CV-12-9027
Judge Kathleen R. Gearin

Plaintiffs,

v.

Lucinda Jesson, in her official capacity as
Commissioner, Minnesota Department of
Human Services,

**PLAINTIFFS' MEMORANDUM
OPPOSING
MOTION TO DISMISS**

Defendant.

Plaintiffs are Minnesota taxpayers who allege that the Minnesota Department of Human Services (“DHS”) “has expended public funds to pay for over 37,000 non-therapeutic abortions, without any authorizing appropriation. DHS has expended approximately \$14.9 million in public funds *ultra vires* for such abortions, in violation of Article XI, Section I of the Minnesota Constitution and Minn. Stat. § 245.03, subd. 2(1).” Complaint at ¶ 52. Plaintiffs seek declaratory relief “to halt these unconstitutional expenditures,” *id.* at ¶ 53, and “injunctive relief requiring DHS to correct and eliminate the unconstitutional expenditure of public funds for non-therapeutic abortions.” *Id.* at ¶ 54.

Specifically, Plaintiffs allege that:

- During that thirteen-year period [1999-2011], DHS paid for at least 37,051 abortions performed on indigent women for **non-therapeutic** reasons (47,095 publicly funded abortions minus 10,044 putatively therapeutic reasons). Less than 22% of the abortions paid for with public funds during this time period

were authorized by the *Gomez* injunction. Complaint at ¶ 32 (emphasis in original).

- DHS has been expending public funds *ultra vires*, without appropriation, in violation of Article XI, Section I, of the Minnesota Constitution by paying for over 37,000 non-therapeutic abortions performed on indigent women from 1999 through 2011. *Id.*, ¶ 34.
- On information and belief, abortion providers are vastly overstating the number of publicly funded abortions being performed for “other health reasons,” a situation which has been compounded by DHS’ lack of meaningful review of the medical necessity of the abortions for which it has been paying. As a result, the majority of abortions that have been paid for with public funds since at least 1999 have been performed for non-therapeutic reasons and in violation of the *Gomez* injunction. *Id.*, ¶ 40.
- On information and belief, DHS makes no independent review of whether an abortion that has been submitted to DHS for public funding was performed for a therapeutic reason. *Id.*, ¶ 51.

ARGUMENT

The legal standards guiding the court in consideration of a Rule 12.02(e) motion to dismiss are well established. “[T]he statement of entitlement to relief must go beyond ‘labels and conclusions’ or the ‘speculative’ presentation of a claim. The court demands that the complaint state ‘enough factual matter’ or ‘factual enhancement’ to suggest, short of ‘probability,’ ‘plausible grounds’ for a claim—a pleading with ‘enough heft’ to show entitlement.” *Bahr v. Capella Univ.*, 765 N.W.2d 428, 437 (Minn.App. 2009)(citing *Herbert v. City of Fifty Lakes*, 744 N.W.2d 226, 235 (Minn. 2008)).

“On a motion to dismiss, the only question before the court is whether the petition states a legally sufficient claim for relief. ... [T]he allegations contained in the pleading must be considered as true and viewed in the light most favorable to the pleader.” *NSP v. Minnesota Metropolitan Council*, 667 N.W.2d 501, 506 (Minn.App. 2003)(internal citation omitted). “All assumptions and inferences must favor the party against whom the dismissal is sought.” *St.*

James Capital Corp. v. Pallet Recycling Assoc. of N. Am., Inc., 589 N.W.2d 511, 514 (Minn. App. 1999).

DHS moves to dismiss this action under Rule 12.02(e), claiming that the Complaint states that “DHS funds abortion procedures only when such procedures are verified as a medical necessity, pursuant to state law.” DHS Memo. at 1 (emphasis added). There is, however, no allegation in the Complaint that either DHS or the abortion provider verifies the medical necessity of any state-funded abortion. In fact, as stated below, the DHS Medical Necessity Statement does not require the physician to verify anything.

DHS also argues that the Complaint fails to allege that DHS had knowledge of the abortion data reported by the Minnesota Department of Health (“MDH”). If it was not previously aware of the MDH data, DHS is now on notice of a significant discrepancy between the number of abortions reported to MDH as therapeutic and the number of abortions paid for by DHS. Plaintiffs are not required to prove that DHS had knowledge that it has been funding elective, non-therapeutic abortions. Plaintiffs seek prospective relief, enjoining any further *ultra vires* expenditure of State funds.

DHS also argues that the Complaint must be dismissed because DHS cannot “do more to pry into the decision-making between women and their doctors concerning a woman’s reason to obtain an abortion.” *Id.* at 8. In other words, DHS asks the court to rule, as a matter of law, that any requirements or review more rigorous than the status quo would violate *Gomez* dicta that “the difficult decision whether to obtain a therapeutic abortion will not be made by the government, but will be left to the woman and her doctor.” 542 N.W.2d at 32 (emphasis added). The Complaint, however, clearly alleges that the status quo is not working. The Court in *Gomez*

found a state constitutional right for public funding of therapeutic abortions for indigent women, but not for all abortions sought by women who qualify for medical assistance.

DHS ignores the crucial distinction that *Gomez* makes between an elective abortion and a therapeutic abortion. *Gomez* does not prohibit DHS from implementing effective procedures that would limit the expenditure of State funds to reimbursement of only therapeutic abortions for indigent women. The Complaint plainly pleads that the status quo is failing to prevent the State from funding elective abortions for indigent women.

A. Plaintiffs Have Standing to Assert Their Claims.

DHS argues that the plaintiffs lack standing because the Complaint fails to state a claim that its “actions were in violation of statutory law or *Gomez*.” DHS Memo. at 6. This is not a challenge to plaintiffs’ standing. It is a Rule 12.02(e) argument asserted as a challenge to standing. To be clear about standing, under Minnesota law, a taxpayer has standing to “maintain an action to restrain unlawful disbursements of public moneys; to recover for the use of the public subdivision entitled thereto money that has been illegally disbursed, as well as to restrain illegal action on the part of public officials.” *McKee v. Linkin*, 261 N.W.2d 566, 571 (Minn. 1977)(add’l citation omitted). A “taxpayer has sufficient interest to enjoin illegal expenditures of both municipal and state funds.” *Id.* (add’l citation omitted).

Plaintiffs’ action is not based on a disagreement with policy or discretionary actions by DHS. Regardless of plaintiffs’ subjective views about public policy, the facts pled show several years of *ultra vires* expenditures. “Taxpayers are legitimately concerned with the performance by public officers of their public duties.” *McKee*, 261 N.W.2d at 571.

DHS acknowledges that plaintiffs “must show that the expenditure was contrary to law or for a non-public purpose.” DHS Memo. at 5. Plaintiffs have pled facts, found in public data

published by MDH, demonstrating that the State is reimbursing doctors for performing elective, non-therapeutic abortions on indigent women. These expenditures are both contrary to law and for a non-public purpose. Plaintiffs allege that DHS' expenditure of public funds to pay for over 37,000 elective, non-therapeutic abortions is a violation of the *Gomez* injunction. The facts pled demonstrate that the plaintiffs have standing to restrain DHS' continued *ultra vires* expenditure of public funds.

B. The Medical Necessity Statement Does Not Justify DHS' Abortion Expenditures.

DHS moves to dismiss the Complaint under Rule 12.02(e), claiming that the Complaint states that "DHS funds abortion procedures only when such procedures are verified as a medical necessity, pursuant to state law." DHS Memo. at 1 (emphasis added). There is, however, no allegation in the Complaint that either DHS or the abortion provider verifies the medical necessity of any state-funded abortion. Actually, the Complaint alleges that "DHS does not have a process for reviewing the medical necessity of publicly funded abortions." Complaint at ¶ 20. Plaintiffs allege that "DHS defers to the representations of the abortion providers, who have a direct pecuniary interest, in order to determine whether an induced abortion may be paid for with public funds." *Id.* Plaintiffs further allege that "DHS makes no independent review of whether an abortion that has been submitted to DHS for public funding was performed for a therapeutic reason." *Id.* at ¶ 51.

DHS does not verify medical necessity. Neither does the abortion provider. The DHS Medical Necessity Statement contains no verification.¹ *See* Complaint, Ex. D. The physician

¹ The Medical Necessity Statement includes two sections. Section I is titled "Patient Information." Section II is titled "Physician Information." Section II states "The abortion is being performed for the following reason: (please check only one)." Following six check boxes,

checks a box and signs his or her name. The form does not require the provider to verify anything. According to Black's Law Dictionary, 5th Ed., "verify" means to "confirm or substantiate by oath or affidavit." DHS has no legal or factual basis for asserting that any abortion paid for by DHS is verified as a medical necessity.

DHS also argues that the "Medical Necessity Statement from the woman's physician attests that the abortion procedure is being performed" for a medically necessary reason. DHS Memo. at 6 (emphasis added). Attest is a synonym for verify. Black's Law Dictionary defines "attest" as "to make solemn declaration in words or writing to support a fact." The Medical Necessity Statement contains no such declaration.

The essence of DHS' argument is that it has met, and will continue to meet, its constitutional and statutory obligations by collecting a Medical Necessity Statement for each abortion paid for with State funds. DHS is asking the court to determine, as a matter of law, based solely on the allegations pled in the Complaint, without any discovery or testimony, that the DHS Medical Necessity Statement provides sufficient assurance that no money has been "paid out of the treasury of this state except in pursuance of an appropriation by law." Minn. Const., Art. XI, sec. 1.

The Medical Necessity Statement, however, does not deserve such deference. Plaintiffs have pled facts demonstrating that DHS' process of relying on the Medical Necessity Statement has resulted in DHS using public funds to pay for over 37,000 elective, non-therapeutic abortions since 1999. The clear inference from these factual allegations is that the DHS process does not comply with the *Gomez* injunction or State law. It is no defense for DHS to simply restate that it has a process.

Section II has an area for the physician's name, address, signature and date. There is no verification. A copy of this form is included as Ex. D to the Complaint.

C. Plaintiffs Do Not Need to Prove that DHS Had Knowledge of the MDH Abortion Data.

DHS argues that the Complaint contains no allegation that DHS has knowingly paid for any non-therapeutic abortions. Plaintiffs do not need to prove intent or knowledge. Plaintiffs bear the burden of proving that the challenged expenditure was contrary to law or for a non-public purpose. Plaintiffs' cause of action is straightforward: use of public funds to pay for non-therapeutic abortions is an illegal expenditure, and public data demonstrates that DHS is making such illegal expenditures. Whether these illegal expenditures have been made knowingly or not, plaintiffs seek to enjoin DHS from continuing to make these expenditures. Further, the MDH data is public information. In the exercise of its constitutional and statutory duties, DHS should know about it.

DHS also argues that the MDH data is anonymous, so it would not help DHS evaluate any particular claim. Whether or not that data could be linked to any particular claim, the MDH data puts DHS on notice that its process is seriously flawed. The MDH data shows that, at most, 10,044 abortions were performed for putatively therapeutic reasons out of 47,095 abortions paid for with public funds since 1999. This data does not square with the DHS data showing that 99.7% of the Medical Necessity Statements claim that the abortion "is being done for other health reasons." Complaint, ¶ 38.

The reasonable inference to be drawn from the inconsistency between the MDH data and DHS own data is that abortion providers are obtaining reimbursement from the State for thousands of elective, non-therapeutic abortions performed on indigent women by claiming these elective abortions are being performed for "other health reasons." Because of an unchecked reimbursement process, DHS is expending significant public funds for non-therapeutic abortions, which are illegal expenditures. There is no authorization, either enacted through the legislative

process or from the *Gomez* injunction, granting DHS the authority to use public funds to pay for elective, non-therapeutic abortions. Publicly available data should have already, and now does, put DHS on notice that such expenditures must be restrained.

D. Meaningful Review to Determine Medical Necessity Is Not Governmental Interference.

In response to plaintiffs' allegation that the number of publicly funded abortions performed for "other health reasons" is vastly overstated, DHS argues that plaintiffs want DHS to "pry into" the doctor-patient relationship, and that such "governmental interference" is in direct conflict with *Gomez*. DHS Memo. at 8. It is not clear whether DHS makes this assertion as an answer to a specific Complaint allegation, or as support for its Rule 12.02(e) motion.

In the context of a motion to dismiss for failure to state a claim, DHS is asking the court to rule, as a matter of law, that DHS cannot be expected to do anything to remedy its admitted² misuse of public funds to pay for elective, non-therapeutic abortions because that would require prying into doctor-patient decision-making. DHS asks the court to dismiss this Complaint, including all prayers for prospective relief, on the grounds that any requirements or review more rigorous than the status quo would violate *Gomez* dicta that "the difficult decision whether to obtain a therapeutic abortion will not be made by the government, but will be left to the woman and her doctor." 542 N.W.2d at 32 (emphasis added).

The holding in *Gomez* is that "the State cannot refuse to provide abortions to MA/GAMC-eligible women when the procedure is necessary for therapeutic reasons." 542 N.W.2d at 32. The majority opinion closes with a response to the dissent:

Contrary to the dissent's allegations, this court's decision will not permit any woman eligible for medical assistance to obtain an abortion "on demand." Rather, under our

² For purposes on this motion, it is an uncontested fact that DHS has paid for over 37,000 elective, non-therapeutic abortions over a 13-year period, and continues to do so.

interpretation of the Minnesota Constitution's guaranteed right to privacy, the difficult decision whether to obtain a therapeutic abortion will not be made by the government, but will be left to the woman and her doctor.

Id.

The dissent noted that “repeated references in the majority opinion to health care services and therapeutic abortions suggest an expectation that only abortions necessitated by significant health considerations will be state-funded” *Id.* at 42. The dissent “consider[ed] any such expectation doomed to failure. First, there is the practical problem posed by the court's inability to set any standard for determining when an abortion is ‘necessary for therapeutic reasons.’” *Id.* Second, “[h]aving determined that state-funding of medical services ... ‘coerces’ a pregnant woman’s decision whether to give birth or terminate her pregnancy and infringes her constitutional right to decide to terminate her pregnancy, as a matter of constitutional law the court is in no better position than the legislature to deny state-funding because the court does not approve of the reason for the decision to terminate the pregnancy.” *Id.*

In responding to the dissent, the majority in *Gomez* clearly directed that its decision will not permit abortion on demand, but instead will allow a woman and her doctor to make “the difficult decision whether to obtain a therapeutic abortion” *Id.* at 32 (emphasis added). DHS asks the court to rule, as a matter of law, that DHS has authority to expend State funds on thousands of elective abortions in order to fund the far smaller number of abortions that are authorized by the *Gomez* injunction. That, however, is a result that was clearly rejected by the Court in *Gomez*: “this court's decision will not permit any woman eligible for medical assistance to obtain an abortion ‘on demand.’”

An indigent woman has no constitutional right to obtain an elective abortion at taxpayer expense. *Id.* Since the Minnesota legislature has not appropriated funds to pay for elective abortions, DHS has an obligation to prevent the use of state funds to pay for such abortions. The

lack of state funding for elective abortions may have some influence on an indigent woman's abortion decision, but that is necessary in order to prevent the illegal expenditure of state funds on elective abortions.

Further, the decision at issue in this action is not the woman's decision of whether to obtain an abortion, therapeutic or not. The decision at issue is the DHS decision to use state funds to pay for any particular abortion procedure. If the DHS payment decision is made after the abortion has been performed, there is no even arguable involvement by the government in the decision of whether to obtain a therapeutic abortion. The abortion decision was already made before DHS received the payment request. The Complaint contains no allegation about when, before or after the abortion, the DHS approves a payment request. That is a topic for discovery. For purposes on this motion, the court must infer that such approval comes after the abortion has already been performed.

CONCLUSION

Plaintiffs have pled facts, based on public data, that demonstrate a prima facie basis for their claim that the State of Minnesota, through the DHS, is unlawfully disbursing public funds without authorization by paying for elective, non-therapeutic abortions performed on indigent women. DHS does not challenge the sufficiency of these factual allegations. Rather, it presents what are essentially affirmative defenses, and asks the court to rule, as a matter of law, that these defenses justify DHS' unauthorized expenditure of public funds. These defenses are, at this stage, no more than allegations. Like the denials or affirmative defenses pled in an Answer, these defenses should be submitted to the rigors of discovery. But these arguments are not grounds for the court to find that the Complaint fails to state a claim upon which relief may be granted.

Plaintiffs respectfully request that the court deny the motion to dismiss.

Dated: February 19, 2013

s/Charles R. Shreffler

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STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Denise Walker and Brian Walker, on behalf of
themselves and other Minnesota taxpayers,

Case Type: Other Civil

Plaintiffs,

Court File No.: 62-CV-12-9027

Judge Kathleen R. Gearin

v.

Lucinda Jesson, Commissioner of Minnesota
Department of Human Services,

**COMMISSIONER'S REPLY
MEMORANDUM IN SUPPORT OF
MOTION TO DISMISS**

Defendant.

INTRODUCTION

Plaintiffs' Complaint and opposition memorandum fail to allege facts or law to support that DHS' payment of abortion claims for women eligible for public assistance was "contrary to law," which is the applicable legal standard. To the contrary, the Commissioner's payment of such claims was required under *Gomez*, as they were supported by a Medical Necessity Statement from each claimant's physician. The state reporting data that Plaintiffs point to--while interesting--does not amount to a legal claim against the Commissioner of Human Services ("the Commissioner"), especially considering that there is no allegation that the Commissioner was even aware of the data. Additionally, Plaintiffs cite no authority to support their contention that it is the Commissioner's duty to intrude on the patient-physician relationship and second-guess physicians' representations. To the contrary, *Gomez* specifically prohibits such interference. Accordingly, Plaintiffs' Complaint should be dismissed with prejudice for failure to state a claim upon which relief can be granted.

ARGUMENT

I. THE COMMISSIONER'S EXPENDITURES WERE NOT "CONTRARY TO LAW."

To prove an illegal expenditure of public funds, Plaintiffs are required to show that the expenditure was contrary to law. *See Oehler v. City of St. Paul*, 219 N.W. 760 (Minn. 1928). Plaintiffs, however, have failed to demonstrate, either factually or legally, how the Commissioner's expenditures were unlawful. Plaintiffs' own Complaint concedes expenditures for abortion procedures paid by DHS are supported by a Medical Necessity Statement. *See* Compl. at ¶ 35. Thus, payment of the claims by the Commissioner was required under *Gomez*--not unlawful as Plaintiffs suggest.

Plaintiffs' argument that DHS' Medical Necessity Statement fails to provide "sufficient assurance" that no public funds have been expended without appropriation similarly fails to raise a claim against the Commissioner. *See* Response Memo. at 6. Plaintiffs have failed to cite any legal authority to support that the Commissioner was required to conduct further investigation before payment of the abortion claims at issue in this case. Also, as a factual matter, Plaintiffs have not alleged that the Commissioner was aware of the MDH data. Therefore, the Commissioner would not have had any reason to suspect that additional "sufficient assurance" was necessary to determine whether such claims should be paid.

Moreover, Plaintiffs' allegations regarding MDH data merely show there is an inconsistency in State reporting data. They do not show that DHS' expenditure of funds was unlawful and they certainly do not show that the Commissioner's actions, in creating and implementing the current policy for approval of abortion claims, were unlawful. Plaintiffs are essentially asking this Court to conclude that because there is inconsistency in two agencies' reporting data, the Commissioner has engaged in the unlawful disbursement of funds. But the

fact is, the Commissioner only paid claims that were verified as a medical necessity as required by state law and the *Gomez* decision. Indeed, under *Gomez*, the Commissioner could not have denied the payment of claims, based upon what was presented to her, without running afoul of patients' constitutional rights. Far from being unlawful, the Commissioner's expenditures were required under *Gomez*, in light of the information that was presented to DHS.

II. PLAINTIFFS' DISAGREEMENT WITH DHS' POLICY FOR APPROVING ABORTION CLAIMS DOES NOT CONFER STANDING.

While the Minnesota Supreme Court held in *McKee* that a taxpayer may maintain an action that restrains the unlawful disbursements of public money on the part of a public official, this allowance is not limitless. See *McKee v. Likins*, 261 N.W.2d 566, 570 (Minn. 1977); *Olson v. State*, 742 N.W.2d 681, 684 (Minn. Ct. App. 2007); see also *Citizens for Rule of Law v. Senate Committee on Rules & Admin*, 770 N.W.2d 169, 175 (Minn. Ct. App. 2009) (Minnesota courts have limited *McKee* closely to its facts); *Hageman v. Stanek*, No. A03-2045, 2004 WL 1563276, at *2 (Minn. Ct. App. July 13, 2004) ("the *McKee* case does not offer an open door to taxpayer standing on any issue."). "The line is drawn where a taxpayer seeks to challenge what the taxpayer perceives to be an illegal expenditure or waste of tax monies." *Alliance of Taxpayers Against Corruption, Inc. v. Lyon County*, No. A11-247, 2011 WL 3654502, at *2 (Minn. Ct. App. August 22, 2011) (citing *Olson v. State*, 742 N.W.2d 681, 684-85 (Minn. Ct. App. 2007)).

In this case, Plaintiffs essentially argue that the Commissioner's policy for paying abortion procedure claims was not effective enough. See Response Memo. at 4. The Commissioner's policy, however, requires certification that an abortion is a medical necessity. Thus, the Commissioner created and implemented a specific policy to provide state funds for therapeutic abortions only, as required by *Gomez*.

Case law is clear that Plaintiffs cannot contest the policy an agency implements to execute the law unless such policy is unlawful. *See Olson v. State*, 742 N.W.2d 681, 684 (Minn. Ct. App. 2007) (simple disagreement with policy or the exercise of discretion by those responsible for executing the law does not supply the ‘unlawful disbursements’ or ‘illegal action’ of public funds required for standing to support a taxpayer challenge). Plaintiffs have not alleged that the policy implemented by the Commissioner is in violation of law or that the Commissioner was legally required to conduct a heightened review of abortion claims above and beyond the Medical Necessity Statement from a licensed physician. Instead, Plaintiffs’ arguments highlight that it is their opinion that the Medical Necessity Statement is not sufficient. Despite Plaintiffs’ arguments to the contrary, their claims and allegations (i.e. that the Commissioner failed to “implement *effective* procedures”) rest on disagreements with DHS’ current policy. The Minnesota Supreme Court has determined that individuals have no standing to assert disagreements of this kind. *Olson*, 742 N.W.2d at 684.

Moreover, Plaintiffs are essentially asking that DHS second-guess physicians and intrude in the patient-physician relationship in a way that was specifically prohibited by the Supreme Court in *Gomez*. *See Gomez*, 542 N.W.2d at 32 (“Under our interpretation of the Minnesota Constitution’s guaranteed right to privacy, the difficult decision whether to obtain a therapeutic abortion will not be made by the government, but will be left to the woman and her doctor.”). Accordingly, Plaintiffs’ Complaint should be dismissed.

CONCLUSION

Based upon the foregoing, and the initial memorandum in support of dismissal, the Commissioner respectfully requests that the Court dismiss Plaintiffs' Complaint with prejudice.

Dated: February 25, 2013

Respectfully submitted,

OFFICE OF THE MINNESOTA
ATTORNEY GENERAL

s/Nathan Brennaman

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LUCINDA JESSON

**MINN. STAT. § 549.211
ACKNOWLEDGMENT**

The party or parties on whose behalf the attached document is served acknowledge through their undersigned counsel that sanctions may be imposed pursuant to Minn. Stat. § 549.211.

Dated: February 25, 2013

s/Nathan Brennaman

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LUCINDA JESSON

State of Minnesota
Ramsey County

District Court
Second Judicial District

Court File Number: **62-CV-12-9027**

Case Type: Civil Other/Misc.

Notice of Entry of Judgment

CHARLES R SHREFFLER JR
410 11TH AVE S
HOPKINS MN 55343

In Re: Denise Walker, Brian Walker vs Lucinda Jesson, in her official capacity

Pursuant to: The Order of Judge Kathleen Gearin dated May 2, 2013.

You are notified that judgment was entered on May 13, 2013.

Dated: May 13, 2013

cc :Nathan Allan Brennaman; Lisa
Christine Stratton

Lynae K. E. Olson
Court Administrator

By: *Linda Draske*
Deputy Court Administrator
Ramsey County District Court
15 West Kellogg Boulevard Room 600
St Paul MN 55102



62-CV-12-9027



NOENJUDG

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF RAMSEY

SECOND JUDICIAL DISTRICT

Denise Walker and Brian Walker, wife and
husband, on behalf of themselves and other
Minnesota taxpayers,

Court File No. 62-CV-12-9027

Plaintiffs,

**NOTICE OF APPEAL TO COURT
OF APPEALS**

vs.

TRIAL COURT CASE NO.: 62-CV-12-9027

Lucinda Jesson, in her official capacity as
Commissioner, Minnesota Department of
Human Services,

DATE OF ORDER: May 13, 2013

Defendant.

TO: Clerk of the Appellate Courts
Minnesota Judicial Center
St. Paul, MN 55155

Please take notice that the above-named plaintiffs appeal to the Court of Appeals of the State of Minnesota from an order of the court entered on the date shown, granting defendant's motion to dismiss and dismissing plaintiff's complaint in its entirety, with prejudice, and on the merits.

Dated: June 3, 2013

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Dated: June 3, 2013