



DEBRA K. DAVENPORT, CPA
AUDITOR GENERAL

STATE OF ARIZONA
OFFICE OF THE
AUDITOR GENERAL

WILLIAM THOMSON
DEPUTY AUDITOR GENERAL

March 3, 2005

The Honorable Janet Napolitano, Governor

The Honorable Ken Bennett, Senate President

The Honorable James P. Weiers, Speaker of the House

Members of the Arizona Legislature

Catherine R. Eden, Ph. D., Director
Arizona Department of Health Services

In response to the provisions of Laws 2002, Chapter 245, §4, the Office of the Auditor General has reviewed the status of the Department of Health Services' (Department) ultrasound reviews.

Summary

In 1999, the Legislature established abortion clinic licensure standards, and legislation passed in 2000 requires that the Department contract with a qualified person or corporation to review ultrasounds of aborted second- and third-trimester fetuses to determine that their estimated ages are within legal guidelines. The Department adopted rules to implement the legislation and in 2000 entered into a contract for the reviews, but halted implementation of the statutes and rules when a lawsuit was filed in 2000 that challenged the legislation. Although some elements of the lawsuit are still being decided, a federal court has invalidated the laws that require ultrasound reviews and therefore, the Department has no plans for implementing these reviews.

Legislative History

In 1999, the Legislature established licensure requirements for abortion clinics as of April 1, 2000. Among the law's requirements, abortion clinics have to conduct ultrasound evaluations of all patients who choose to have an abortion after 12 weeks' gestation (approximately the first trimester of pregnancy) in order to estimate the gestational age of the fetus and review the results with the patient.¹ In 2000, the Legislature added a statute that requires abortion providers to provide a department contractor with a copy of the ultrasound result in order to verify the fetus' estimated age and that the estimate was made in compliance with the law.² The Auditor General is required to evaluate the ultrasound review program's effectiveness during the program's first 2 years.³

In compliance with the statutes, in 1999 and 2000 the Department adopted rules related to abortion clinic administration, personnel qualifications, and staffing requirements. Additionally, the rules address patient rights, medical records maintenance, and abortion procedures. For example, the rules require clinics to provide department representatives immediate access during business hours and provide on-site medical records to the Department within 2 hours of the Department's request.

Lawsuit Challenges Legislation

In 2000, a group of doctors sued the Department, challenging the constitutionality of statutes and rules related to the regulation of abortion clinics and providers. Although federal courts upheld some provisions of the statutes, they ruled that the provisions related to ultrasound evaluations violated patient privacy and Constitutional protection against illegal search and seizure. Specifically, the 9th Circuit Court of Appeals ruled that the Department is not entitled to ultrasound pictures with patient identifying information on them and could not conduct abortion clinic searches without a warrant.

In the 2000 lawsuit *Tucson Woman's Clinic v. Eden*, physicians in private practice sued the Department.⁴ They claimed that the abortion statutes and rules violated their constitutional rights. The Attorney General, on behalf of the Department and other defendants, agreed to delay the effective date of the statutes and rules pending

¹ Laws 1999, Ch. 311, amending A.R.S. §§36-402, and 36-2301.01; and adding A.R.S. Title 36, Ch. 4, Article 10 and A.R.S. §36-2301.02.

² Laws 2000, Ch. 365, amending A.R.S. §§36-449.03, 36-2301.01, and 36-2301.02; and Laws 1999, Ch. 311, §§5, 6, 7, 9, and 10.

♦ ³ Laws 2002, Ch. 245, amending Laws 1999, Ch. 311, §7, as amended by Laws 2000, Ch. 365, §6.

⁴ *Tucson Woman's Clinic v. Eden*, 379 F. 3d 531 (9th Cir. 2004).

a final decision on the merits of the case. In October 2002, the United States District Court issued its ruling, which stated in part that while Arizona had a rational basis for regulating abortion clinics, regulations permitting warrantless searches and access to personal medical records, and the statute requiring a department contractor to review ultrasound results, are unconstitutional. Both parties appealed to the United States Court of Appeals for the 9th Circuit, which issued its decision in August 2004. Among its rulings, the Court of Appeals found that:

- **Disclosing patients' personal medical information violated privacy rights**—The legislation required abortion providers to submit copies of fetal ultrasound results to a private contractor hired by the Department. Additionally, rules required abortion providers to retain copies of and give the Department access to medical records that identify the patients. The Court of Appeals agreed that these provisions violate patients' privacy rights.
- **Unlimited department access to abortion clinics was unconstitutional**—Rules adopted to implement the legislation would have allowed the Department unlimited and immediate access to abortion clinics and on-site medical records, including ultrasound results, during hours of operation. The district court determined that these rules violated the Fourth Amendment to the United States Constitution, which prohibits unreasonable search and seizure. The Court of Appeals noted that persons receiving medical services provided in private doctors' offices have a high expectation of privacy, and affirmed the district court's decision.
- **Regulating clinics may be appropriate if right to choose is not violated**—The United States Supreme Court has recognized that state interests in maternal health and protecting fetal life can, in some circumstances, justify abortion regulations. The Court of Appeals noted that one of the reasons Arizona enacted the statutes and rules was an abortion patient's death that resulted from substandard care. The Court of Appeals ruled that regulating abortion facilities may not unduly burden abortion rights. For example, statutes establishing requirements for clinic facilities such as sanitation, secure record storage, and availability of certain equipment and supplies, did not pose such a burden. However, questions about whether Arizona's overall system of statutes and rules violated abortion rights needed to be addressed in a trial. The Court of Appeals remanded these elements of the case to the federal district court for trial.

According to an Assistant Attorney General, the parties are discussing a settlement of the issues that were returned to the federal district court for a trial. If the parties agree to the terms of a settlement, the court will dismiss the case. However, if a settlement is not reached, the court will set a trial date, which is not expected to occur before late summer or early fall of 2005.

Status of Ultrasound Review

Since the Court of Appeals has invalidated the laws that require the Department to conduct the ultrasound reviews, the Department has not initiated the reviews and does not plan to do so in the future.

We have reviewed the results of this review with the Department. As outlined in its response, the Department agrees with the report. My staff and I will be pleased to discuss or clarify items in this report.

Sincerely,

Debbie Davenport
Auditor General

AGENCY RESPONSE

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JANET NAPOLITANO, GOVERNOR
CATHERINE R. EDEN, DIRECTOR

February 14, 2005

Debra K. Davenport
Auditor General
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Dear Ms. Davenport:

Thank you for giving us an opportunity to respond to your office's review of the status of the Department's ultrasound review program. We agree with the report and appreciate your recognition of our compliance with statutes and timely adoption of administrative rules related to the regulation of abortion clinics.

Thank you for your professionalism and your fair and thorough review.

Sincerely,

Catherine R. Eden
Director

CRE/dmm