

Petition for a Review of Existing Agency Practice pursuant to Arizona Revised Statute
Section 41-1033

Submitted to the Arizona Department of Health Services 8/10/2014
by the Arizona Association of Midwives Legal and Regulatory Committee

REVIEW OF EXISTING AGENCY PRACTICE

This petition requests review of an existing agency practice that constitutes a rule. Specifically, the Department of Health has interpreted A.R.S. § 36-693 and developed a rule outside of the rulemaking process.

According to the midwifery rules “during the prenatal period, a midwife shall ... schedule or arrange the following tests for the client within 28 weeks gestation ... (f) Syphilis as required by § 36-693.” R9-16-108(l)(1)(f).

On August 3, 2015, Thomas Salow the Branch Chief in the Department of Health Division of Licensing, announced a new agency interpretation of section 36-693. Mr. Salow testified that the agency has interpreted A.R.S. § 36-693 to mean that a midwife is a “person permitted by law to attend pregnant women but not permitted to take blood samples.”

Specifically in 2015C-MDW-0244-DHS, at 52:00 minutes into the hearing, Mr. Salow and the defense attorney have the following exchange:

Attorney: Is it the departments position than that [the midwife] is "any other person permitted by law to attend pregnant women but not permitted to take blood."

Mr. Salow: Correct.

Further, on cross examination, Mr. Salow testified that, under the Department’s interpretation of the statute, midwives are obligated “cause a sample of the blood of each pregnant woman attended by him to be taken under the direction of a duly licensed physician of medicine and surgery” because they are “not permitted to take blood.”

The Department of Health has served at least two Notices to Assess Civil Penalties or Suspend Licenses based on this interpretation of the statute.

REQUEST TO REVIEW PRACTICE JUSTIFICATION

The assertion that a midwife is “not permitted to take blood samples” is a statement of general applicability that implements and interprets state statute. Further, that midwives have to “cause a sample of the blood of each pregnant woman attended by him to be taken under the direction of a duly licensed physician of medicine and

surgery” is a generally applicable interpretation of statute. Both of these interpretations were promulgated outside of both the Administrative Procedures Act and the exempt rulemaking pursuant to HB 2247.

This interpretation is problematic because midwives had no notice of this change in interpretation. In Arizona, there is no legislative framework or licensing system for taking blood samples or phlebotomy. Accordingly, any citizen is permitted to “take a blood sample.” Further, a “duly licensed physician of medicine and surgery” is no longer a license or title available to doctors in Arizona. According, no midwife can comply with the Department’s interpretation of the statute.

Last, the interpretation that a syphilis test is “required by § 36-693” is problematic in that the Department cannot constitutionally compel a pregnant woman to receive medical care against her will, nor can the Department threaten to withhold prenatal care if she does not consent. A.R.S. § 36-114.

The interpretation of § 36-693 was promulgated outside of the rulemaking process and purports to be applicable to all midwives. As such, the Arizona Association of Midwives asks Department to review its existing practice of fining midwives for violating its interpretation of the statute and engage in rulemaking surrounding the interpretation of § 36-693.