

No.

**STATE OF MINNESOTA
IN SUPREME COURT**

DENISE WALKER AND BRIAN WALKER,
wife and husband, on behalf of themselves
and other Minnesota taxpayers,

Plaintiffs/Petitioners,

vs.

LUCINDA JESSON, in her official capacity
as Commissioner, Minnesota Department
of Human Services,

Defendant/Respondent.

Appellate Court Case No. A13-0986

**PETITION FOR REVIEW OF DENISE WALKER AND BRIAN WALKER
Date of Filing of Court of Appeals' Decision: May 5, 2014**

Jordan W. Lorence (MN Bar # 0125210)
Steven H. Aden
ALLIANCE DEFENDING FREEDOM
801 G St., N.W., Suite 509
Washington, DC 20001
Tel.: 202.393.8690

Nathan Brennaman (MN Bar # 331776)
Cynthia B Jahnke (MN Bar # 294858)
MINNESOTA ATTORNEY GENERAL'S OFFICE
445 Minnesota St., Bremer Tower, Suite 1200
St. Paul MN 55101
Tel.: 651.757.1415

Attorneys for Petitioners

Attorneys for Respondent

STATEMENT OF ISSUES

1. Under Minnesota law, do Petitioners have taxpayer standing to challenge unlawful expenditures by the Department of Human Services (DHS) when their Complaint alleges facts derived from state records that DHS has paid for tens of thousands of abortions that are not “therapeutic” under *Doe v. Gomez*, 542 N.W.2d 17, 32 (Minn. 1995)?

The Court of Appeals held that Petitioners lack taxpayer standing because the Complaint does “not allege that any particular payment was illegal,” after concluding that it need not consider for purposes of a Rule 12.02(e) motion allegations based on evidence from the State’s own records that thousands of unlawful expenditures have been made for non-therapeutic abortions.

2. Does the state constitutional right of privacy announced in *Doe v. Gomez* prohibit DHS from inquiring into or seeking verification of a reimbursement request by an abortion provider for performing a purportedly “therapeutic” abortion under *Gomez*, when there is evidence from the State’s own records that tens of thousands of purportedly “therapeutic” abortions have been performed only for elective, non-therapeutic reasons?

The Court of Appeals held that the “right of privacy” announced in Doe v. Gomez prevents the State from inquiring with doctors whether an abortion was done for therapeutic reasons even when significant evidence exists that it may not have been.

STATEMENT OF CRITERIA SUPPORTING PETITION FOR REVIEW

This Court’s review of the Court of Appeals opinion is warranted under two recognized criteria: (1) this case presents two questions that are “important one[s] upon which the Supreme Court should rule,” and (2) a decision by this Court “will help develop, clarify, or harmonize the law” with statewide impact. Minn. R. Civ. App. P. 117, subds. 2(a), 2(d)(2).

First, this case provides the Court with an opportunity to provide further guidance on what is required to establish taxpayer standing. Under Minnesota law, taxpayers may sue to restrain the “unlawful disbursements of public money or illegal action on the part of public officials.” *McKee v. Likins*, 261 N.W.2d 566, 571 (Minn. 1977). Previous Minnesota appellate cases, such as *McKee*, have addressed whether taxpayers have standing where they alleged that a government entity or official made unlawful expenditures by not following a required process. In contrast, this case presents the question of whether taxpayers have standing where they allege,

based on state records, that unlawful disbursements have been made because public money was spent on an *impermissible* item or service, even though a government entity followed its self-approved process in determining whether to make a payment. Stated differently, it is important for this Court to answer whether following a process makes payment for an impermissible item lawful, barring taxpayers from contesting such payments, or whether taxpayers are permitted to contest disbursements of public money where they allege, based on evidentiary support, that unlawful expenditures have been made, regardless of whether a process was followed.

The Court of Appeals decision denies taxpayers standing to challenge unlawful expenditures by state officials by developing a new rule that a state agency may ignore evidence from another agency that it is making unauthorized payments, as long as a claimant files some document asserting that the payment meets legal requirements. This “see no evil” exception to taxpayer standing hamstring taxpayers from suing to halt unlawful disbursements even when they have ample evidence from the State’s own records that undercuts the veracity of the signed statements claimants made to receive the government payments. This Court should grant review to reverse the Court of Appeals and rule that a taxpayer complaint alleging unauthorized expenditures cannot be dismissed merely because the agency has statements from claimants that a disbursement meets legal requirements.

Second, this Court should grant review to clarify that its decision in *Doe v. Gomez*, 542 N.W.2d 17 (Minn. 1995), did not create an unworkable, contradictory set of requirements by first requiring the State to pay for only therapeutic abortions and not elective abortions, but then prohibiting the State from seeking verification that the abortions it pays for are therapeutic by erecting an impenetrable wall between DHS and the doctor seeking payment for abortions. *Gomez* made clear that “this court’s decision will not permit any woman eligible for medical

assistance to obtain an abortion ‘on demand.’” *Id.* at 32. The Court of Appeals’ understanding of *Gomez* renders it unworkable in practice, because it requires the State to pay for abortions but then prevents the State from verifying that it is not paying for “abortion ‘on demand.’” *Id.* This Court should grant review to resolve the conflict the Court of Appeals has created by its unworkable interpretation of *Gomez*.

STATEMENT OF THE CASE

Petitioners are Minnesota taxpayers who filed this action alleging that DHS has been expending public funds to pay for elective, non-therapeutic abortions for indigent women. Petitioners allege these expenditures violate Article XI, Section 1 of the Minnesota Constitution.

Prior to the Court’s holding in *Gomez*, 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. Minn. Stat. § 256B.0625, subd. 16. In *Gomez*, the Court held 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 (emphasis added). The Court 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.* The Court was clear that its holding did not authorize public funding for elective, non-therapeutic abortions. *Id.*

Petitioners’ allegation of unlawful disbursement of public funds to pay for elective, non-therapeutic abortions is based on abortion data collected by the Minnesota Department of Health (MDH). 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. to Pet. 6. 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. to Pet. 7. By far, the two largest reasons for publicly funded abortions given to the MDH were “economic reasons” and “does not want children at this time,” which do not qualify as “therapeutic” abortions. App. to Pet. 7.

The district court granted the State’s motion to dismiss under Rule 12.02(e). The court concluded that 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.” App. to Pet. 31. The Court of Appeals affirmed, holding that the Petitioners “fail to establish taxpayer standing by alleging conduct that constitutes an unlawful expenditure.” App. to Pet. 35.

ARGUMENT

The Court of Appeals made two significant errors warranting reversal. First, it found a “see no evil” limitation in the law on taxpayer lawsuits. Under Minnesota law, taxpayers may sue to restrain the “unlawful disbursements of public money or illegal action on the part of public officials.” *McKee*, 261 N.W.2d at 571. But the Court of Appeals thwarted the taxpayers’ ability to bring such a lawsuit because it held that claim forms signed by abortion doctors seeking reimbursement are sufficient to permit the State to ignore statistics from MDH, gathered from information submitted by the very same doctors as required under Minnesota statute, indicating that most of these abortions are non-therapeutic. App. to Pet. 37-38. That Minnesota abortion providers characterized abortions one way when they reported abortion data and another way when they sought payment from public funds is sufficient to warrant further inquiry.

This factual dispute should not be resolved on a Rule 12 motion to dismiss. On a Rule 12.02(e) motion to dismiss, a court accepts as true the facts alleged in the complaint and construes all reasonable inferences in favor of the non-moving party. *Bodah v. Lakeville Motor*

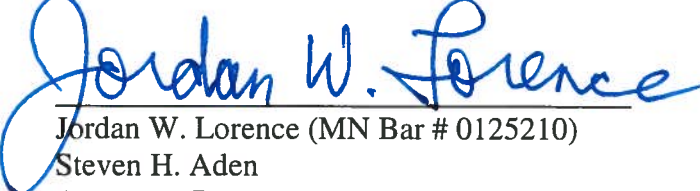
Express, Inc., 663 N.W.2d 550, 553 (Minn. 2003). The Court of Appeals essentially resolved a factual dispute on a motion to dismiss, failed to draw all reasonable inferences in favor of the non-moving party, and ruled that the State is entitled to ignore evidence from another department of state government that it is paying for many more abortions than this Court authorized in *Gomez*. The Complaint's allegations, based on information gathered by MDH, assert that unlawful expenditures have been made because DHS has paid for abortions that do not qualify as "therapeutic." It may not be said, as is required for dismissal, that "it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded." *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010).

Second, the Court of Appeals erred by construing *Doe v. Gomez* to create an irreconcilable set of conflicting requirements, using *Gomez* to compel the State to do exactly what *Gomez* said it was *not* forcing the State to do: pay for elective abortions. The Court of Appeals (App. to Pet. 37-38) agreed with DHS that the agency's hands are tied from making any efforts to independently verify whether an abortion claim submitted to it for reimbursement was performed for a therapeutic reason, because any such verification efforts would purportedly run afoul of this Court's statement in *Gomez* that "the right of privacy under our [state] constitution protects not simply the right to an abortion, but rather it protects the woman's decision to abort; any legislation infringing on the decision-making process, then, violates this fundamental right." 542 N.W.2d at 31. The Court of Appeals pits that statement against another statement of this Court in *Gomez* which says, "[c]ontrary to the dissent's allegations, this court's decision will not permit any woman eligible for medical assistance to obtain an abortion 'on demand.'" *Id.* at 32. These two provisions are internally inconsistent and mutually exclusive, requiring this Court to clarify the application of *Gomez* to the present facts.

For these reasons, Petitioners seek an order granting review of the decision of the Court of Appeals.

Respectfully submitted,

Dated: June 2nd, 2014


Jordan W. Lorence (MN Bar # 0125210)

Steven H. Aden

ALLIANCE DEFENDING FREEDOM

801 G St., N.W., Suite 509

Washington, DC 20001

Tel.: 202.393.8690

Attorneys for Petitioners


ORIGINAL

APPENDIX

TABLE OF CONTENTS

District Court Complaint	A1
District Court Opinion Granting Defendants' Motion to Dismiss	A28
Minnesota Court of Appeals Opinion.....	A34

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
Charles R. Shreffler (MN Bar # 0183295)
SHREFFLER LAW, PLLC
chuck@chucklaw.com
410 11th Ave. So.
Hopkins, MN 55343
Tel: 612.872.8000

Fax: 651.925.0080

Jordan Lorence (MN Bar # 0125210)
jlorenc@alliancedefendingfreedom.org
Steven H. Aden (DC Bar No. 466777)
saden@alliancedefendingfreedom.org
ALLIANCE DEFENDING FREEDOM
801 G St., N.W., Suite 509
Washington, DC 20001
Tel.: 202.393.8690
Fax: 202.347.3622

Counsel for Plaintiffs

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

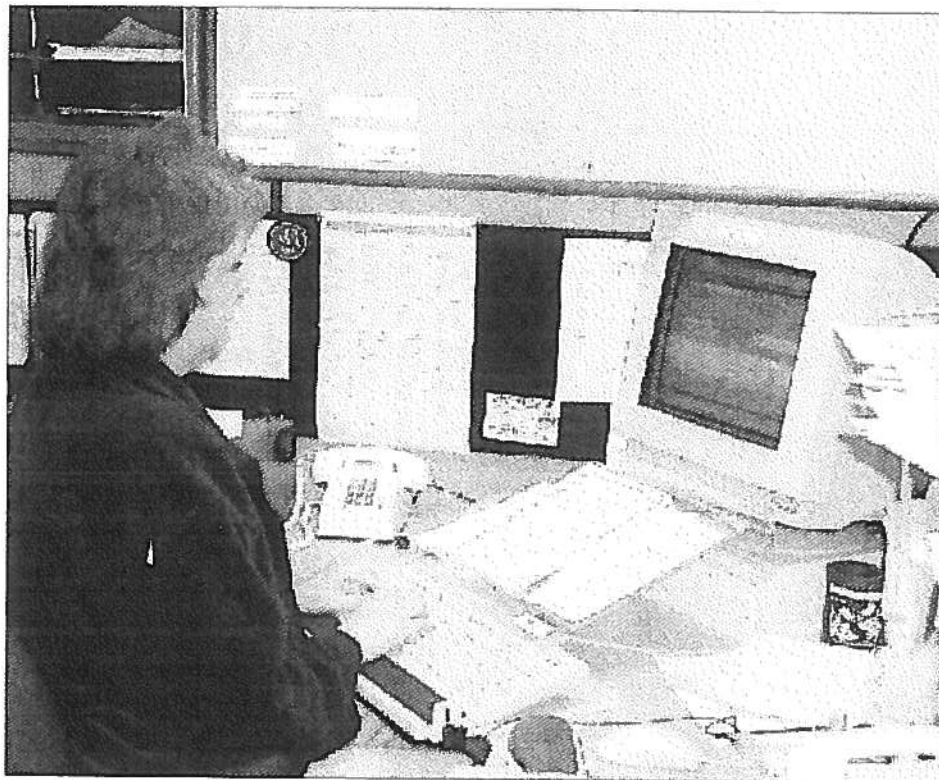
Report # 03-07



OFFICE OF THE LEGISLATIVE AUDITOR
STATE OF MINNESOTA

EVALUATION REPORT

Controlling Improper Payments in the Medical Assistance Program



AUGUST 2003

PROGRAM EVALUATION DIVISION
Centennial Building - Suite 140
658 Cedar Street - St. Paul, MN 55155
Telephone: 651-296-4708 • Fax: 651-296-4712
E-mail: auditor@state.mn.us • Web Site: <http://www.auditor.leg.state.mn.us>

Exhibit A

A14



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

Table of Contents

	<u>Page</u>
SUMMARY	ix
INTRODUCTION	1
1. CONTROLLING IMPROPER PAYMENTS IN MINNESOTA	3
Minnesota's Medical Assistance Program	4
Improper Payments	6
The Payment Control System	7
2. COMPONENTS OF A COMPREHENSIVE PAYMENT CONTROL STRATEGY	15
Component 1: Assess the Size and Nature of the Improper Payment Problem	17
Component 2: Coordinate the Various Payment Control Sections	20
Component 3: Have Appropriately Trained Staff	27
Component 4: Emphasize Preventing Improper Payments	29
Component 5: Proactively Detect Emerging Fraud Schemes and Patterns	38
Component 6: Control for Both Simple and Complex Schemes	40
Component 7: Make Sure That Every Claim Faces Some Risk of Review	41
Component 8: Give Managed Care Proper Attention	43
Component 9: Ensure Sufficient Consequences	46
Component 10: Periodically Assess and Revise the Payment Control System	50
Conclusion	52
3. RECOMMENDATIONS	53
FURTHER READING	59
AGENCY RESPONSE	63
RECENT PROGRAM EVALUATIONS	65

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.

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.

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

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

<u>Procedure</u>	<u>Minnesota Procedure</u>
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
 Clinic Outpatient hospital Inpatient hospital Ambulatory surgery Other (Specify) _____

5. Patient Age at Last Birthday **6. Married** Yes No

7. Date of Pregnancy Termination _____ / _____ / _____
Month, Day, Year

8. Patient Residence
 City: _____ County: _____
 State: _____ Zip Code:

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 <i>(Specify):</i> _____	10. Race <input type="checkbox"/> American Indian <input type="checkbox"/> Asian <input type="checkbox"/> Black <input type="checkbox"/> White <input type="checkbox"/> Other <i>(Specify):</i> _____	11. Education <i>(Specify only highest grade completed)</i> <input style="width: 20px;" type="text"/> <input style="width: 20px;" type="text"/> <i>Elementary/Secondary (0-12)</i> <input style="width: 20px;" type="text"/> <input style="width: 20px;" type="text"/> <i>College (1-4 or 5+)</i>
---	--	---

12. Date Last Normal Menses Began <input style="width: 20px;" type="text"/> <input style="width: 20px;" type="text"/> <i>Month,</i> <input style="width: 20px;" type="text"/> <input style="width: 20px;" type="text"/> <i>Day,</i> <input style="width: 20px;" type="text"/> <input style="width: 20px;" type="text"/> <i>Year</i>	13. Clinical Estimate of Gestation <input style="width: 20px;" type="text"/> <input style="width: 20px;" type="text"/> <i>(LMP Weeks)</i>
---	---

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

A. Use Status: (Check only one)
 Unknown - patient did not know if they used a method. (*Do not fill out Part B.*)
 Never used any contraceptive method (*Do not fill out Part B.*)
 Has used contraception, but not at the estimated time of conception. (*Do not fill out Part B.*)
 Method used at time of conception. (*Fill out PART B, METHOD USED.*)
 Patient did not provide information.

B. Method Used:

<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	<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) _____
---	--

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

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

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 of be any of the above races

Exhibit F

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.

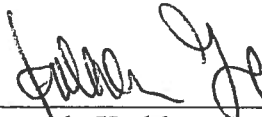
The above-entitled matter came on for hearing before the undersigned on February 28, 2013 pursuant to a motion to dismiss filed by the defendant. Appearances were as noted in the record.

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

A28

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.

*This opinion will be unpublished and
may not be cited except as provided by
Minn. Stat. § 480A.08, subd. 3 (2012).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0986**

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

vs.

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

and

Pro-Choice Resources,
Applicant of Intervention Below.

**Filed May 5, 2014
Affirmed
Smith, Judge**

Ramsey County District Court
File No. 62-CV-12-9027

Charles R. Shreffler, Shreffler Law, PLLC, Hopkins, Minnesota (for appellants)

Lori Swanson, Attorney General, Nathan A. Brennaman, Deputy Attorney General,
Cynthia B. Jahnke, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Jill Gaulding, Lisa Stratton, Gender Justice, St. Paul, Minnesota; and

Stephanie Toti (pro hac vice), Center for Reproductive Rights, New York, New York (for
amicus curiae Pro-Choice Resources)

Lawrence M. Shapiro, Jenny Gassman-Pines, Karl C. Procaccini, Janine A. Wetzel,
Greene Espel PLLP, Minneapolis, Minnesota (for amicus curiae American Civil Liberties
Union of Minnesota)

Erick G. Kaardal, James R. Magnuson, Mohrman & Kaardal, PA, Minneapolis, Minnesota; and

Teresa S. Collett (pro hac vice), Minneapolis, Minnesota (for amici curiae Frederick Douglass Foundation and Dr. Alveda King)

Considered and decided by Chutich, Presiding Judge; Halbrooks, Judge; and Smith, Judge.

UNPUBLISHED OPINION

SMITH, Judge

We affirm the district court's dismissal of appellant's challenge to the department of human services' expenditure of public funds to provide indigent women with abortions because appellants fail to establish taxpayer standing by alleging conduct that constitutes an unlawful expenditure.

FACTS

In November 2012, appellants Denise and Brian Walker sued the state as taxpayers, alleging that the Minnesota Department of Human Services (DHS) engaged in unlawful expenditure of state funds by paying for nontherapeutic abortions performed on indigent women. The Walkers alleged that DHS lacks "a process for reviewing the medical necessity of publicly funded abortions." They contended that DHS's reliance on a form submitted by doctors to certify that publicly funded abortions are medically necessary violates the supreme court's instruction in *Women of State of Minnesota by Doe v. Gomez*, 542 N.W.2d 17 (Minn. 1995) that state funds be used to pay for therapeutic abortions only. They asserted that "abortion providers are vastly overstating the number of publicly funded abortions being performed for 'other health reasons,'" that

“[a]s 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 that comparing DHS’s data to data from another state department proves that “DHS paid for at least 37,051 abortions performed on indigent women for non-therapeutic reasons,” concluding that this demonstrates that DHS is engaging in unlawful expenditures.

Respondent Commissioner of DHS moved to dismiss the Walkers’ complaint, and the district court granted the motion. The district court held that DHS’s “decision to rely upon a physician’s decision that a patient is seeking an abortion for legitimate therapeutic reasons is [not] illegal”

DECISION

The Walkers argue that the district court erred by dismissing their complaint because they alleged facts that would constitute illegal expenditures. We review de novo a district court’s grant of a motion to dismiss under Minn. R. Civ. P. 12.02(e). *Sipe v. STS Mfg., Inc.*, 834 N.W.2d 683, 686 (Minn. 2013). In doing so, we accept as true all facts alleged in the complaint, and we independently consider whether those facts are sufficient to support a legal claim for relief. *Bodah v. Lakeville Motor Express*, 663 N.W.2d 550, 558-59 (Minn. 2003). A pleading should be dismissed only when “it appears to a certainty that no facts, which could be introduced consistent with the pleading, exist which would support granting the relief demanded.” *Bahr v. Capella Univ.*, 788 N.W.2d 76, 80 (Minn. 2010) (quotation omitted).

The district court granted the commissioner’s motion to dismiss the complaint because it found that the Walkers failed to allege any illegal expenditure by the state.

“To establish standing, a plaintiff must have a sufficient personal stake in a justiciable controversy.” *Olson v. State*, 742 N.W.2d 681, 684 (Minn. App. 2007). “Absent express statutory authority, taxpayer suits in the public interest are generally dismissed.” *Id.*; see also *Annandale Advocate v. City of Annandale*, 435 N.W.2d 24, 27 (Minn. 1989) (stating that standing is “essential” to a court’s jurisdiction). “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 public officials.’” *Olson*, 742 N.W.2d at 684 (quoting *McKee v. Likins*, 261 N.W.2d 566, 571 (Minn. 1977)) (alteration in original). “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.” *Id.* (quotations omitted).

The Walkers do not allege that any particular payment was illegal, nor do they challenge DHS’s authority to fund therapeutic abortions. Rather, they contend that DHS’s reliance on the medical-necessity form from physicians is insufficient. They contend that other data—gathered from other forms submitted to a different department and filtered through the Walkers’ own definition of what constitutes a “therapeutic” reason—justifies the inference that abortion providers are falsely certifying that many publicly funded abortions are therapeutic. But our caselaw supports DHS’s decision to rely solely on the judgment of a woman’s physician to determine what constitutes a therapeutic abortion in a particular case. The supreme court has held that “the right of privacy under our [state] constitution protects not simply the right to an abortion, but

rather it protects the woman's *decision* to abort; any legislation infringing on the decision-making process, then, violates this fundamental right." *Gomez*, 542 N.W.2d at 31 (emphasis added). It defined the scope of a woman's right as "encompass[ing] her decision whether to choose health care services necessary to terminate or to continue a pregnancy without interference from the state." *Id.* The supreme court concluded that, "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." *Id.* at 32.¹ Thus, although the Walkers may prefer a more intrusive inquiry into the reasons that an abortion is therapeutic, DHS's method is not beyond the scope of its discretion. The Walkers therefore have failed to allege any illegal expenditure to support taxpayer standing.

The Walkers also contend that the legislature has enacted a statutory bar to DHS's reliance on physicians certifying medical necessity. They cite Minn. Stat. § 256B.04, subd. 13 (2012), to support their argument that "DHS has a statutory duty to independently review 'whether medical care to be provided to eligible recipients is medically necessary.'" But the cited statute relates to "person[s] *appointed by the commissioner* to participate in decisions" regarding medical necessity. Minn. Stat.

¹ Federal caselaw provides support for the principle that the determination of whether a particular abortion is therapeutic is entirely within the scope of a physician's medical judgment. *See, e.g., Roe v. Wade*, 410 U.S. 113, 163, 93 S. Ct. 705, 732 (1973) ("[T]he attending physician, in consultation with his patient, is free to determine, *without regulation by the State*, that, *in his medical judgment*, the patient's pregnancy should be terminated." (emphasis added)); *id.* at 164-65, 93 S. Ct. at 732 ("[T]he State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion *except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.*" (emphasis added)).

§ 256B.04, subd. 13 (emphasis added). It does not restrict independent physicians from certifying medical necessity because those physicians are not appointed by the commissioner.

Because DHS's reliance on physicians' certifications of medical necessity for abortions is not beyond the scope of its discretion, we affirm the district court's dismissal of the Walkers' suit for lack of standing.

Affirmed.

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2014 four copies of the foregoing petition and appendix were sent via FedEx Overnight with the Clerk of Appellate Courts. An additional copy was sent to opposing counsel via FedEx Overnight at the address below:

Nathan Brennaman (MN Bar # 331776)
Cynthia B Jahnke (MN Bar # 294858)
MINNESOTA ATTORNEY GENERAL'S OFFICE
445 Minnesota St., Bremer Tower, Suite 1200
St. Paul MN 55101
Tel.: 651.757.1415


JORDAN LORENCE

ORIGINAL