



Catherine E. Heigel, Director

Promoting and protecting the health of the public and the environment

February 24, 2016

The Honorable Gary E. Clary
Ad Hoc Committee Chair
Legislative Oversight Committee
Post Office Box 11867
Columbia, SC 29211

Dear Representative Clary:

In our presentation to the Legislative Oversight Committee (LOC) on January 11, 2016, the Department recommended six conceptual changes to South Carolina's abortion statute.¹ We are writing to provide additional information concerning Recommendation 3 related to performance of an ultrasound and Recommendation 4 related to the time at which an abortion may be performed in a clinic.

Important to this discussion is the manner in which the time of conception and the gestational age of a fetus is determined. The abortion statute defines the three trimesters of a pregnancy as follows:

"First trimester of pregnancy" means the first twelve weeks of pregnancy commencing with conception rather than computed on the basis of the menstrual cycle.

"Second trimester of pregnancy" means that portion of a pregnancy following the twelfth week and extending through the twenty-fourth week of gestation.

"Third trimester of pregnancy" means that portion of a pregnancy beginning with the twenty-fifth week of gestation.²

"Conception" is defined in statute as "the fecundation of the ovum by the spermatozoa."³

"Gestation" is not defined in statute.⁴

We understand the medical community views these two concepts distinctly. According to the American College of Obstetricians and Gynecologists (ACOG), "Gestational age (GA) refers to the length of pregnancy after the first day of the last menstrual period (LMP) and is usually expressed in weeks and days. This is also known as menstrual age. Conceptional age (CA) is the true fetal age and refers to the length of pregnancy from the time of conception."⁵ Our medical advisors indicate that it is not possible, with current technology, to determine the exact time of

¹ Attachment 1.

² S.C. Code §§ 44-41-10(i), (j), and (k), respectively. (Emphasis added).

³ S.C. Code § 44-41-10(g).

⁴ While "gestation" is not defined in statute, the use of the phrase "of gestation" in the definitions of second and third trimesters correlates gestation with conception. This is inconsistent with the view of the medical community, which links gestational age to the length of pregnancy after the first day of the last menstrual period (LMP).

⁵ ACOG Guidelines for Perinatal Care, Seventh Edition, Published 2012.

conception; however, as discussed below, an ultrasound provides for a more accurate estimation of GA. A better estimation of GA, in turn, provides for a better estimation of CA.

The Department's regulation defines the "Probable Gestational Age of the Embryo or Fetus" as follows:

What, in the judgment of the attending physician, based upon the attending physician's examination and the woman's medical history, is within reasonable probability, the gestational age of the embryo or fetus at the time the abortion is planned to be performed. This estimate must be guided by recommendations found in The American College of Obstetricians and Gynecologists Standards for Obstetric-Gynecologic Services, i.e., calculated from the first day of the last menstrual period.⁶

The regulation also provides the following chart to clarify gestational age as referenced throughout the regulation⁷:

Calculation	Weeks of Gestational Age								
Conception	8	10	12	14	16	18	20	22	24
LMP	10	12	14	16	18	20	22	24	26

As noted in the chart, the regulation recognizes a two-week differential between the first day of a woman's LMP and the date of conception. ACOG states, however, the practice of determining an estimated due date based solely on the first day of the LMP "assumes a regular menstrual cycle of 28 days, with ovulation occurring on the 14th day after the beginning of the menstrual cycle," and "does not account for inaccurate recall of the LMP, irregularities in cycle length, or variability in the timing of ovulation."⁸

ACOG concludes that "[u]ltrasound measurement of the embryo or fetus in the first trimester (up to and including 13 6/7 weeks of gestation) is the most accurate method to establish or confirm gestational age."⁹ As noted by ACOG, "[a]ccurate dating of pregnancy is important to improve outcomes and is a research and public health imperative."¹⁰

ACOG's conclusion is reflected in the 2015 report prepared by Legislative Audit Council (LAC) wherein LAC recommended, "The General Assembly should amend state law to require a pre-abortion ultrasound to determine the gestational age of the fetus for all abortions."¹¹ An ultrasound is the current gold standard for determining the gestational age of a fetus, and the Department recommended that the performance of an ultrasound be required prior to the performance of an abortion for the purpose of making that determination.¹²

The Department also recommended limiting abortions that can be performed in an abortion clinic to those within the first 18 weeks of pregnancy, beginning with conception rather than calculated on the basis of the menstrual cycle.¹³ The LOC requested an Attorney General Opinion regarding

⁶ S.C. Code Regs. 61-12, § 101.Q.

⁷ S.C. Code Regs. 61-12, § 101.S.4.

⁸ ACOG Committee Opinion No. 611, Method of Estimating Due Date.

⁹ *Id.*

¹⁰ *Id.*

¹¹ LAC Report, A Review of the S.C. Department of Health and Environmental Control's Regulation of Abortion Clinics (Report), May 2015, p. 29.

¹² See Recommendation 3.

¹³ See Recommendation 4.

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this recommendation. The Attorney General opined, and the Department agrees, the recommendation is constitutional.

It was the Department's intent in making this recommendation to place a statutory limitation, consistent with the existing regulation, on when abortions may be performed in an abortion clinic. However, the recommendation does not accurately reflect the existing regulatory limitation.

As noted above, the Department's regulation recognizes a two-week time differential between LMP and conception. The recommendation, if implemented as currently stated, would limit the performance of abortions in abortion clinics to 20 weeks from LMP, which is greater than the current regulatory limitation of 18 weeks from LMP. *See* S.C. Code Regs. 61-12, § 101.S.4 and § 302.A. The recommendation as written also did not incorporate the language in the regulation permitting abortion clinics dually licensed as ambulatory surgical facilities to perform abortion procedures up to 26 weeks from LMP. It was not the intent to change the current law related to this issue. Therefore, the Department amends the recommendation as follows:

Limiting abortions that can be performed in an abortion clinic to those within 18 weeks from gestational age. Abortion clinics that are also licensed as ambulatory surgical facilities may perform abortion procedures on patients within 26 weeks from gestational age.¹⁴

I hope this letter is helpful in clarifying our recommendations and appreciate any guidance the Committee has going forward.

Sincerely,

A black rectangular redaction box covering the signature of Catherine E. Heigel.

Catherine E. Heigel

Attachment 1: January 11, 2016, Recommendations

¹⁴ As used in this recommendation, gestational age correlates with LMP, and can best be confirmed with use of an ultrasound.

Attachment 1

January 11, 2016, Recommendations

1. Adding a provision to make it illegal to sell or donate products of conception.
2. Adding a provision to require abortion clinics and hospitals to report to DHEC post-operative complications arising as a result of an abortion procedure.
3. Adding a provision to require that an ultrasound be performed prior to an abortion procedure to determine the gestational age of the fetus.
4. Limiting the abortions that can be performed in an abortion clinic to those within the first 18 weeks of pregnancy, beginning with conception rather than calculated on the basis of the menstrual cycle.
5. Requiring physicians performing any abortion to comply with requirements of the "Woman's Right to Know" article. Currently, the law applies only to facilities in which any second trimester or five or more first trimester abortions are performed in a month.
6. Adding a requirement for some identifying information to be included in the abortion reports, which would allow DHEC to utilize these reports, as necessary, to assist in investigating potential violations. Also, we would add sanctions for failure to report this information to us in a timely manner.