



AlaFile E-Notice

03-CV-2023-901109.00

Judge: GREG GRIFFIN

To: MOLLMAN ALISON NICOLE
amollman@aclualabama.org

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

OASIS FAMILY BIRTHING CENTER, LLC, ON BEHALF OF ITSELF AND ITS PATIENTS
03-CV-2023-901109.00

The following matter was FILED on 6/4/2024 1:03:54 PM

Notice Date: 6/4/2024 1:03:54 PM

GINA J. ISHMAN
CIRCUIT COURT CLERK
MONTGOMERY COUNTY, ALABAMA
251 S. LAWRENCE STREET
MONTGOMERY, AL, 36104

334-832-1260



IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

OASIS FAMILY BIRTHING
CENTER, LLC, ON BEHALF OF)
ITS,)
M.D., ON BEHALF OF HERSELF)
AND HER PATIENTS HEATHE,)
ALABAMA BIRTH CENTER,)
M.D., ON BEHALF OF HERSELF)
AND HER PATIENTS YASHIC ET)
AL,)
Plaintiffs,)
)
V.) Case No.: CV-2023-901109.00
)
ALABAMA DEPARTMENT OF)
PUBLIC HEALTH,)
IN HIS OFFICIAL CAPACITY AS)
STATE HEALTH OFFICER S,)
Defendants.)

**ORDER DENYING DEFENDANTS' PARTIAL MOTION TO DISMISS
CLAIMS 1-5 OF PLAINTIFFS' FIRST AMENDED COMPLAINT**

The Court, having reviewed Defendants' Partial Motion to Dismiss and having considered the parties' arguments, including at the oral argument on April 29, 2024, concludes that Defendants have not demonstrated "beyond doubt" that Plaintiffs "can prove no set of facts in support of the claim[s] that would entitle the [Plaintiffs] to relief." *Young Ams. for Liberty at Univ. of Ala. in Huntsville v. St. John*, 376 So. 3d 460, 466 (Ala. 2022). When reviewing a motion to dismiss under Rule 12(b)(6), this Court must "accept the allegations of the complaint as true," and view the allegations "most strongly in the pleader's favor." *Ex parte Liberty Nat'l Life Ins. Co.*, 209 So. 3d 486, 494 (Ala. 2016).

Upon this "favorable standard," *Young Ams.*, 376 So. 3d at 467, Plaintiffs' Claims One, Two, Four, and Five, the only claims that Defendants

moved to dismiss, have sufficiently stated a claim upon which relief could be granted. Defendants originally moved to dismiss Plaintiffs' Third Claim, Am. Compl. ¶¶ 206–11, on the basis that Plaintiffs failed to exhaust administrative remedies by seeking a waiver or variance of the regulatory provisions challenged under that claim. MTD 7–8. At the argument, Defendants confirmed that they have dropped their motion to dismiss as to Plaintiffs' Third Claim. Accordingly, Defendants' motion to dismiss Claim Three is denied.

I. Plaintiffs' Primary Claim Sufficiently States a Claim Upon Which Relief Could Be Granted.

Plaintiffs' primary claim is that freestanding birth centers (FSBCs) are not hospitals for purposes of the Alabama Department of Public Health's (ADPH) regulatory and licensing authority under Alabama Code Section 22-21-20(1), see Pls.' First Am. Compl. Declaratory & Inj. Relief, Doc. 144 at ¶¶ 193–97 [hereinafter "Am. Compl."], and therefore ADPH's adoption of any rule that FSBCs operating under the midwifery model of care are "hospitals" exceeds ADPH's statutory authority in violation of the Alabama Administrative Procedure Act (AAPA), see Ala. Code § 41-22-10. The Parties agree that, whether a FSBC falls within the definition of "hospital," and therefore within ADPH's statutory authority, turns on whether that birth center falls within the catch-all clause of the definition by "primarily engag[ing] in offering to the public generally . . . obstetrical care," because FSBCs are not one of the categories of facilities explicitly listed in the first part of the "hospital" definition. Defs.' Mot. Dismiss Claims One Through Five Pls.' First Am. Compl., Doc. 165 at 3 [hereinafter "MTD"] (quoting Ala. Code § 22-21-20(1)); Pls.' Memo. Opp. Defs.' Mot. Dismiss, Doc. 169 at 7 [hereinafter Opp. MTD]. FSBCs must meet both criteria of the catch-all clause of the statutory definition—providing "obstetrical care" and offering it to the "public generally"—to qualify as a "hospital." See Ala. Code § 22-21-20(1).

Obstetrical Care. Defendants first argue that Plaintiff Birth Centers provide obstetrical care, relying on a definition of "obstetrics" as "the branch of medicine that concerns management of women during pregnancy, childbirth, and the puerperium." MTD 4 (quoting *Obstetrics*, Taber's Cyclopedic Medical Dictionary (18th ed. 1997)). Plaintiffs do not dispute that definition. Opp. MTD 8–9. Instead, Plaintiffs argue that, as a matter of law,

midwives are statutorily prohibited from practicing medicine. See Ala. Code § 34-24-50.1(4) (limiting practice of “medicine” *only* to “doctor of medicine” or “doctor of osteopathy”); *id.* § 34-24-51; *id.* § 34-21-81(2)(b) (authorizing certified nurse midwives (CNMs) to perform “nursing skills . . . relative to the management of women’s health care focusing on pregnancy, childbirth, the postpartum period, [and] care of the newborn.”); *id.* § 34-19-11(3) (authorizing certified professional midwives (CPMs) to engage in “[t]he provision of primary maternity care during the antepartum, intrapartum, and postpartum periods”). Therefore, because CNMs and CPMs—like Plaintiffs and their members who provide or intend to provide care at the Plaintiff Birth Centers, see Am. Compl. ¶¶ 13–14, 25, 34, 111–12, 153–54—cannot practice medicine or any branch thereof, they cannot provide obstetrical care consistent with that definition.

To argue that Plaintiff Birth Centers do provide obstetric care, Defendants focus on the part of the definition of “obstetrics” that describes the population being cared for and the time period they receive care (specifically, pregnancy, childbirth, and the puerperium). MTD 4. But the fact that different licensed professionals provide care to the same population during the same period does not mean they are practicing the same discipline or providing the same type of care. For example, the practice of psychiatry involves care for and treatment of mental health conditions, but not all mental health care (such as therapeutic care provided by psychologists or licensed professional counselors) is therefore the practice of psychiatry. Defendants also suggest that the phrase “obstetrical care” is broader than “obstetrics,” the branch of medicine itself, but for the same reasons as above, the Court rejects this argument: Just as a licensed professional counselor does not practice psychiatry, the phrase “providing psychiatric care” would not accurately describe the care a licensed professional counselor provides. For purposes of a motion to dismiss, these arguments are not sufficient to show that Plaintiffs have not stated a claim as a matter of law.

Aside from the legal question, Plaintiffs have also sufficiently alleged that Plaintiff Birth Centers practice the midwifery model of care, which is factually distinct from obstetrical care. Am. Compl. ¶¶ 8, 10, 19, 24–26, 52, 111–12. The allegations describe how midwifery and obstetrics are different models of care with distinct histories, practiced by practitioners with “different skill set[s], education, and training background[s].” Am. Compl. ¶ 55; see also *id.* ¶¶ 5 n.5, 52, 54 & n.24, 56, 67, 79–89. Taken as true, these

allegations cannot support Defendants' argument that Plaintiff Birth Centers provide obstetrical care as a factual matter either. MTD 4–5; *see also* Ala. Att'y Gen. Op. No. 2023-12, at 3 (Dec. 15, 2022) (concluding that whether a specific FSBC provides obstetrical care is a factual question).

Open to the Public Generally. Defendants next argue that FSBCs are hospitals because they are open to the public generally. But, as Plaintiffs' allegations make clear, Plaintiff Birth Centers provide or intend to provide care only to certain patients after they have been screened to ensure they have low-risk pregnancies and are otherwise eligible and appropriate candidates for care and delivery in the birth center—and even then, patients may develop risk factors that no longer make them eligible to give birth in the birth center. *See* Am. Compl. ¶¶ 26–27, 67. Defendants have argued that this is nevertheless consistent with being open to the “public generally” because other types of facilities listed in the statutory definition of a hospital, *e.g.* hospices, rehabilitation hospitals, and ambulatory surgery centers, similarly only provide care to specialized populations. MTD 5. But those facilities are explicitly listed elsewhere in the statutory definition of a hospital, *see* Ala. Code § 22-21-20(1), so they are hospitals regardless of whether they are open to the “public generally,” and therefore cannot inform how that statutory criterion should be interpreted. As such, for purposes of the motion to dismiss, Plaintiffs have sufficiently alleged that they are not open to the “public generally” within the meaning of the statutory definition of a hospital. █

Because Plaintiffs have sufficiently stated a claim that Plaintiff Birth Centers neither provide “obstetrical care” nor are open to the “public generally,” Defendants' motion to dismiss Claim One is denied.

II. Plaintiffs' Second Claim Is Not Moot.

Plaintiffs alleged in their Second Claim that ADPH's failure to provide a timely, feasible path to licensure for FSBCs under either its regulatory or statutory licensing authority violates the AAPA. Am. Compl. ¶¶ 198–205; *see also* Ala. Code § 41-22-10; *id.* § 22-21-28(a) (authorizing ADPH to “make and enforce . . . reasonable rules and regulations” for regulated facilities, not to categorically prohibit a particular type of “hospital”). Defendants do not contest the sufficiency of these allegations. Rather, Defendants seek dismissal only on the grounds that the claim became moot once the 2023 Final Regulations took effect, *see* Ala. Admin. Code r. 420-5-

13-.01 to -.19, and that “ADPH stands ready to evaluate any application” for birth center licensure under these Regulations, MTD 6, 7.

However, Plaintiffs’ well-pleaded allegations assert that the 2023 Final Regulations are currently operating as a *de facto* ban on FSBCs, not because ADPH categorically refuses to review applications submitted under those Regulations, but because the Regulations impose requirements that would be extremely onerous, if not impossible, for FSBCs to comply with. See Am. Compl. ¶¶ 153–62, 204. Additionally, Plaintiffs have alleged that, regardless of the Regulations, ADPH’s policy not to exercise its statutory licensing authority to grant licenses to birth centers is also ongoing. See Am. Compl. ¶ 203; see also *id.* ¶¶ 125–29 (describing ADPH’s policy not to exercise its statutory licensing authority in the absence of regulations). These allegations, which must be taken as true, are sufficient to demonstrate “an actual controversy between the parties.” *Chapman v. Gooden*, 974 So. 2d 972, 983 (Ala. 2007) (internal quotations and citation omitted). Accordingly, Defendants’ motion to dismiss Claim Two as moot is denied.

III. Plaintiffs’ Fourth and Fifth Claims Sufficiently State Claims Upon Which Relief Could Be Granted.

Plaintiffs’ Fourth and Fifth Claims alleged that the 2023 Final Regulations exceed ADPH’s statutory authority because they “conflict with law,” Ala. Code § 22-21-28(a)—namely, Plaintiffs alleged the Regulations conflict with the Childbirth Freedom Act, Ala. Code §§ 34-19-11 to -21, and Certified Nurse Midwife Statutes, *id.* §§ 34-21-80 to -93.1, respectively, see Am. Compl. ¶¶ 153, 155, 185, 187, 188, 212–26.

Citing *Tucker v. State Department of Public Health*, 650 So. 2d 910 (Ala. Civ. App. 1994), Defendants argue that Claims Four and Five should be dismissed because, where ADPH has authority to regulate FSBCs, that authority subjects providers like CPMs and CNMs who are “engaging in activity in a FSBC” to ADPH regulation, even if those regulations conflict with the midwifery statutes. MTD 10–11. But *Tucker’s* holding does not go that far. While ADPH’s authority to regulate certain facilities may extend to regulating the licensed employees practicing in those settings, that authority is still circumscribed by any relevant statutes applicable to those employees. In *Tucker*, the challenged regulations were consistent with the relevant statute. 650 S.2d at 912–13. Here, by contrast, Plaintiffs have sufficiently

alleged a conflict between the 2023 Final Regulations and the midwifery statutes, which takes this case beyond *Tucker's* holding. Because such a conflict would exceed ADPH's regulatory authority under Alabama Code Section 41-22-10, Plaintiffs have sufficiently stated a claim under Claims Four and Five, and the motion to dismiss as to these claims is denied.

The Court hereby **DENIES** Defendants' Partial Motion to Dismiss in full.

IT IS SO ORDERED.

DONE this 4th day of June, 2024.

/s/ GREG GRIFFIN

CIRCUIT JUDGE