



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 2/29/2024 10:29:56 AM

D001 ALABAMA DEPARTMENT OF PUBLIC HEALTH
D002 IN HIS OFFICIAL CAPACITY AS STATE HEALTH OFFICER S
MOTION TO DISMISS PURSUANT TO RULE 12(B)
[Filer: ALBRITTON BENJAMIN HOWARD]

Notice Date: 2/29/2024 10:29:56 AM

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

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CIRCUIT COURT OF
MONTGOMERY COUNTY, ALABAMA
GINA J. ISHMAN, CLERK

STATE OF ALABAMA

Revised 3/5/08

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Unified Judicial System

03-MONTGOMERY

 District Court
 Circuit Court

CV21

OASIS FAMILY BIRTHING CENTER,LLC, ON
BEHALF OF ITSELF AND ITS PATIENTS

CIVIL MOTION COVER SHEET

Name of Filing Party: D001 - ALABAMA DEPARTMENT OF PUBLIC
HEALTH
D002 - IN HIS OFFICIAL CAPACITY AS STATE
HEALTH OFFICER S

Name, Address, and Telephone No. of Attorney or Party. If Not Represented.

Benjamin H. Albritton
501 Washington Avenue
Montgomery, AL 36130
Attorney Bar No.: ALB008

 Oral Arguments Requested
TYPE OF MOTION**Motions Requiring Fee**

- Default Judgment (\$50.00)
Joinder in Other Party's Dispositive Motion
(i.e. Summary Judgment, Judgment on the Pleadings,
or other Dispositive Motion not pursuant to Rule 12(b))
(\$50.00)
- Judgment on the Pleadings (\$50.00)
- Motion to Dismiss, or in the Alternative
Summary Judgment (\$50.00)
- Renewed Dispositive Motion (Summary
Judgment, Judgment on the Pleadings, or other
Dispositive Motion not pursuant to Rule 12(b)) (\$50.00)
- Summary Judgment pursuant to Rule 56 (\$50.00)
- Motion to Intervene (\$297.00)
- Other _____
pursuant to Rule _____ (\$50.00)

*Motion fees are enumerated in §12-19-71(a). Fees
pursuant to Local Act are not included. Please contact the
Clerk of the Court regarding applicable local fees.

Local Court Costs \$ 0 _____

Motions Not Requiring Fee

- Add Party
- Amend
- Change of Venue/Transfer
- Compel
- Consolidation
- Continue
- Deposition
- Designate a Mediator
- Judgment as a Matter of Law (during Trial)
- Disburse Funds
- Extension of Time
- In Limine
- Joinder
- More Definite Statement
- Motion to Dismiss pursuant to Rule 12(b)
- New Trial
- Objection of Exemptions Claimed
- Pendente Lite
- Plaintiff's Motion to Dismiss
- Preliminary Injunction
- Protective Order
- Quash
- Release from Stay of Execution
- Sanctions
- Sever
- Special Practice in Alabama
- Stay
- Strike
- Supplement to Pending Motion
- Vacate or Modify
- Withdraw
- Other _____
pursuant to Rule _____ (Subject to Filing Fee)

Check here if you have filed or are filing contemporaneously
with this motion an Affidavit of Substantial Hardship or if you
are filing on behalf of an agency or department of the State,
county, or municipal government. (Pursuant to §6-5-1 Code
of Alabama (1975), governmental entities are exempt from
prepayment of filing fees)

Date:
2/29/2024 10:28:56 AM

Signature of Attorney or Party
/s/ Benjamin H. Albritton

**Motions titled 'Motion to Dismiss' that are not pursuant to Rule 12(b) and are in fact Motions for Summary Judgments are subject to filing fee.

IN THE CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

OASIS FAMILY BIRTHING)
CENTER, LLC, et al.,)
))
Plaintiffs,)
))
v.)
))
ALABAMA DEPARTMENT OF)
PUBLIC HEALTH, et al.,)
))
Defendants)

Case No. 03-CV-2023-901109.00

DEFENDANTS’ MOTION TO DISMISS CLAIM ONE, CLAIM TWO, CLAIM THREE, CLAIM FOUR, AND CLAIM FIVE OF PLAINTIFFS’ FIRST AMENDED COMPLAINT

Defendants Alabama Department of Public Health (“ADPH”) and Scott Harris, sued in his official capacity as State Health Officer, pursuant to Rule 12(b)(6) of the Alabama Rules of Civil Procedure, move this Honorable Court to dismiss Claim One, Claim Two, Claim Three, Claim Four, and Claim Five of Plaintiffs’ First Amended Complaint. ADPH is rightfully regulating freestanding birth centers (FSBCs) pursuant to its statutory authority. Additionally, ADPH has promulgated regulations providing a timely, feasible pathway to licensure. To the extent that Plaintiffs challenge specific rules as unreasonable, they have failed to exhaust their administrative remedies.

LEGAL STANDARD

A motion to dismiss is due to be granted when the movant demonstrates “that the Plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief.” *Ex parte Mobile Infirmary Ass’n*, 349 So. 3d 842, 845 (Ala. 2021) (quoting *Lyons v. River Rd. Construction, Inc.*, 858 So. 2d 257, 260 (Ala. 2003)). A Rule 12(b)(6) motion “tests the sufficiency of the pleadings to determine if the plaintiff has stated a claim upon which relief can be granted, and in ruling on such a motion, the trial court’s examination is limited to the pleadings.” *Pub. Rels.*

Couns., Inc. v. City of Mobile, 565 So. 2d 78, 81 (Ala. 1990). “In considering whether a complaint is sufficient to withstand a motion to dismiss under Rule 12(b)(6), a court ‘must accept the allegations of the complaint as true.’” *Crosslin v. Health Care Auth. of City of Huntsville*, 5 So. 3d 1193, 1195 (Ala. 2008) (quoting *Creola Land Dev., Inc. v. Bentbrooke Hous., L.L.C.*, 828 So. 2d 285, 288 (Ala. 2002)). “Factual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true.” *Duran v. Buckner*, 157 So. 3d 956, 971 (Ala. Civ. App. 2014) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). But “conclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal.” *Ex parte Gilland*, 274 So. 3d 976, 985 n.3 (Ala. 2018) (quoting *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002)).

ARGUMENT

Plaintiffs fail to state a claim on Claims One through Five of the First Amended Complaint. These claims are due to be dismissed on numerous grounds. Plaintiffs’ first claim, that ADPH exceeded its statutory authority under the Alabama Administrative Procedures Act (AAPA) in determining that FSBCs are “hospitals” within the meaning of Ala. Code § 22-21-20(1), fails because ADPH’s interpretation of the term “hospital” is reasonable. In the alternative to such claim, Plaintiffs’ second claim, that ADPH has exceeded its statutory authority under the AAPA by failing to promulgate rules providing a path to licensure, creating a de facto “ban” upon FSBCs, fails because the final regulations provide a timely, feasible pathway to licensure. Claim Three fails because Plaintiffs have not exhausted their administrative remedies. Claims Four and Five fail because precedent established by the Alabama Court of Civil Appeals in *Tucker v. State Department of Public Health*, 650 So. 2d 910 (Ala. Civ. App 1994), clearly provides that the

activity engaged in by a separately licensed health care provider can cause the provider to become subject to ADPH's facility licensure rules.

I. Claim One fails because ADPH did not exceed its statutory authority under the AAPA in determining FSBCs are hospitals under Ala. Code § 22-21-20(1).

Plaintiffs' first claim alleges that "ADPH's adoption of the rule that any and all freestanding birth centers operating under the midwifery model of care are 'hospitals' . . . exceeds ADPH's statutory authority in violation of [Ala.] Code § 41-22-10." Doc. 144 ¶ 197. Ala. Code § 41-22-10 provides that a court may declare an agency's rule invalid "only if it finds that it violates constitutional provisions or exceeds that statutory authority of the agency or was adopted without substantial compliance with rulemaking procedures provided for [under the AAPA]." Ala. Code § 41-22-10. Here, Plaintiffs assert that "[b]ecause a freestanding birth center operating under the midwifery model of care is not engaged in offering obstetrical care to the public generally, it does not fall within ADPH's hospital regulatory and licensing authority." Doc. 144 ¶ 196. This is simply incorrect and ignores the definitions of "hospital" and "obstetrics" in different ways that distort Alabama law concerning statutory interpretation.

Alabama law unambiguously grants ADPH the authority to regulate the operation and conduct of hospitals. Ala. Code § 22-21-28(a). In relevant part, hospitals are defined to include "institution[s] . . . primarily engaged in offering to the public generally . . . obstetrical care." Ala. Code § 22-21-20(1). When a term is not defined, the commonly accepted definition is applied; however, when the term is defined, the court must apply that definition. *Republic Steel Corp. v. Horn*, 105 So. 2d 446, 447 (Ala. 1958). Whether FSBCs are hospitals under the statute is determined solely by whether they are "primarily engaged in offering to the public generally . . . obstetrical care," not on whether they are commonly accepted in public opinion as being distinct from hospitals. Plaintiffs allege that FSBCs operate under the midwifery model of care, which is

distinguishable from obstetrics, so that they are not hospitals within the statutory definition in Ala. Code § 22-21-20(1). Doc. 144 ¶¶ 52 & 196. But the definition of obstetrics includes precisely the care Plaintiffs allege they offer their patients, and so Plaintiffs' claim that they are not a hospital because they do not provide obstetrical care to the general public fails.

Where a term is not expressly defined in a statute, it is subject to construction by the courts. *See Ex parte Mitchell*, 989 So. 2d 1083, 1090 (Ala. 2008). "Words must be given their natural, ordinary, commonly understood meaning, and where plain language is used, the court is bound to interpret that language to mean exactly what it says." *Id.* (quoting *Ex parte Weaver*, 871 So. 2d 830, 823-24 (Ala. 2003)). In the statute at issue here, the term "obstetrical care" is not specifically defined. However, medical dictionaries define obstetrics as "the branch of medicine that concerns management of women during pregnancy, childbirth, and the puerperium." *Obstetrics*, TABER'S CYCLOPEDIA MEDICAL DICTIONARY (18th ed. 1997). *See also* Ala. Op. Atty. Gen. No. 2023-012. The puerperium is the period of forty-two days following childbirth. *Puerperium*, TABER'S CYCLOPEDIA MEDICAL DICTIONARY (18th ed. 1997). Similarly, the Alabama Supreme Court has quoted with approval a definition of "the practice of obstetrics" from an obstetrician's testimony in trial court that "the practice of obstetrics 'primarily . . . involves taking care of a mom . . . up to the time of her delivery, taking care of her through the delivery, and then after the delivery process.'" *Hegarty v. Hudson*, 123 So. 3d 945, 947 (Ala. 2013). Thus, according to the dictionary and an obstetrician's own testimony, FSBCs are engaged primarily in providing obstetrical care to the extent they are providing care for women during pregnancy, childbirth, and following delivery.

Plaintiffs' own First Amended Complaint avers that this is the type of care FSBCs provide. *See, e.g.*, Doc. 144 ¶ 8 (Plaintiff Oasis Family Birthing Center (OFBC) provides women "high-quality, affordable, patient-centered care . . . including prenatal, birthing (i.e., labor and delivery),

postpartum, and newborn care.”); *id.* ¶ 10 (Plaintiff Alabama Birth Center (ABC) intends to “provide high-quality, affordable, patient-centered care . . . including prenatal, birthing, postpartum, and newborn care.”). Other facts alleged further confirm the point that FSBCs are engaged in providing “obstetrical care” to their patients: Plaintiffs say that FSBCs “provide[] pregnancy, birthing, postpartum, and newborn care.” Doc. 144 ¶ 52. They also allege FSBCs “provide important access to high-quality prenatal and postpartum care.” *Id.* ¶ 53. Even in trying to distinguish between the “midwifery model of care” and obstetrics, they allege that the practice of midwifery is an “evidence-based, patient centered health care model for pregnancy-related care and newborn care.” *Id.* ¶ 54; *see also id.* ¶ 55. Thus, the Plaintiff FSBCs are engaged primarily in providing obstetrical care because they primarily concern the management of women during pregnancy, childbirth, and the puerperium (often termed the postpartum period). The very names of two Plaintiffs in this action - Oasis Family *Birthing* Center, LLC and Alabama *Birth* Center – even reflect that Plaintiffs are engaged in obstetrical care.

Plaintiffs’ attempts to distinguish their facilities that serve a subset of the population from other health care facility types that are required to serve anyone that walks through the door with an emergency fail. Hospices are within ADPH’s regulatory authority, but they only serve persons determined to have a terminal condition and a limited life expectancy. Psychiatric hospitals only serve psychiatric patients, rehabilitation hospitals only serve patients in need of rehabilitation services, women’s and children’s hospitals solely serve women and children, persons in need of surgery are served by ambulatory surgery centers, and so on. Ala. Code § 22-21-20. Ala. Code § 22-2-2 evidences the Legislature’s intent that the State Board of Health broadly regulate and supervise matters of health in Alabama, to include facilities engaged in the provision of obstetrical care.

Because Plaintiffs' own facts all point to FSBCs being primarily engaged in obstetrical care, they come within the definition of "hospital" set out in Ala. Code § 22-21-20(1), and so are subject to regulation by ADPH. Therefore, as to Claim One that ADPH has exceeded its statutory authority, Plaintiffs have failed to state a claim because ADPH's statutory authority to regulate "hospitals" was validly exercised in regulating FSBCs, since they provide obstetric care.

II. Claim Two fails because ADPH has regulations in place providing a pathway to licensure for FSBCs, and so Plaintiffs' claim is moot.

Plaintiffs' second claim alleges that "[e]ven if ADPH is authorized to require a freestanding birth center . . . to obtain a license under its hospital regulatory and licensing authority, ADPH's adoption of a de facto ban on all freestanding birth centers by refusing to provide any path to licensure constitutes a rule" under Ala. Code § 41-22-3(9). Doc. 144 ¶ 165. To the extent the gravamen of Plaintiffs' second claim is that ADPH has not promulgated rules providing a distinct path to licensure for FSBCs, this claim is now moot because rules providing such a path have been effective since October 15, 2023.

"A moot case or question is a case or question in or on which there is no real controversy; a case which seeks to determine an abstract question which does not rest on existing facts or rights, or involve conflicting rights so far as plaintiff is concerned." *Case v. Ala. State Bar*, 939 So. 2d 881, 884 (Ala. 2006) (quoting *American Fed'n of State, Cnty. & Mun. Employees v. Dawkins*, 104 So. 2d 827, 830–31 (1958)). "A case becomes moot if at any stage there ceases to be an actual controversy between the parties." *Chapman v. Gooden*, 974 So. 2d 972, 983 (Ala. 2007) (quoting *Crawford v. State*, 153 S.W.3d 497, 501 (Tex. App. 2004)). Once a case becomes moot, a court should not decide questions related to the case. *Arrington v. State ex rel. Parsons*, 422 So. 2d 759, 760 (Ala. 1982).

Plaintiffs claim that "ADPH's refusal to provide any statutory or regulatory path for

licensure of freestanding birth centers [] constitutes a de facto ban on [them] in Alabama that exceeds ADPH’s statutory authority in violation of [the AAPA].” Doc. 144 ¶ 205. But a path does exist—regulations governing FSBCs have been effective since October 15, 2023. *See* Ala. Admin. Code r. 420-5-13-.01 to -.19. The crux of this claim appears to be that ADPH has “categorically refused” to consider applications for FSBCs. *See* Doc. 144 at 50 ¶ 203. Contrary to this assertion, ADPH stands ready to evaluate any application and whether the applicant “compl[ies] with the minimum standards provided in this article or by regulations issued under [ADPH’s] authority.” Ala. Code § 22-21-23. Plaintiffs are free to challenge specific regulations and appear to do so in other claims. But any claim as to a “ban” on FSBCs is now moot because the regulations provide the pathway to licensure for the FSBC Plaintiffs. Therefore, Claim Two must be dismissed.

III. Claim Three fails because Plaintiffs have failed to exhaust administrative remedies by requesting a waiver or variance.

Alabama recognizes the doctrine of exhaustion of administrative remedies. *City of Huntsville v. Smartt*, 409 So.2d 1353, 1357 (Ala. 1982). “This doctrine ‘requires that where a controversy is to be initially determined by an administrative body, the courts will decline relief until those remedies have been explored and, in most instances, exhausted.’” *Id.* (quoting *Fraternal Order of Police, Strawberry Lodge No. 40 v. Entrekin*, 314 So. 2d 663, 670 (Ala. 1975)). The exhaustion-of-remedies doctrine “is a judicially imposed prudential limitation.” *Budget Inn of Daphne, Inc. v. City of Daphne*, 789 So. 2d 154, 157 (Ala. 2000).

FSBCs applying for a license may request a waiver or variance for specific rules in the regulations. Ala. Admin. Code r. 420-5-13-.01(8). ADPH “may grant an exception to, or modify the application of, one or more provisions of these rules . . . for a period and under conditions, if any, determined by the Board.” *Id.* “The birthing center’s request shall be in writing” and include “a statement regarding the specific provisions for which the exception or modification is requested

and the reasons for each requested exception or modification.” *Id.*; *see also* Ala. Admin. Code r. 420-1-2-.09(d) (“A current or prospective licensee, permittee, or registrant directly affected by a provision of a rule may request a waiver or variance from said rule. To be considered for a waiver or variance, the licensee, permittee, or registrant must demonstrate the following: (1) Conditions are such that the licensee, permittee, or registrant cannot meet the rule provision for which the waiver or variance is sought; and (2) Approval of the waiver or variance will not unreasonably increase the risk of harm to the public or undermine the public health purpose furthered by the rule.”)

Count Three of Plaintiffs’ First Amended Complaint challenges certain “unreasonable requirements” imposed on FSBCs. Doc. 144 ¶ 211. The complaint goes on to identify specific requirements that Plaintiffs deem to be burdensome. *Id.* Pursuant to the final regulations, Plaintiffs could have submitted a request for waiver or variance for any rule they found to be overly burdensome in lieu of or in conjunction with any temporary license they have obtained in accordance with this Court’s preliminary injunction, as suggested by the Commission on Accreditation of Birth Centers (CABC) and cited in this Court’s Supplemental Preliminary Injunction Order. Doc. 119 at 15. ADPH then could grant such waiver or variance “based on hardship, impracticality, or economic infeasibility in complying with the rules.” Ala. Admin. Code r. 420-5-13-.01(8). Having failed to request a waiver or variance for any provisions of the final regulations now in effect, Plaintiffs have not exhausted their administrative remedies. Accordingly, Claim Three must be dismissed.

IV. Claim Four fails because ADPH’s final regulations for birthing centers are not in conflict with the Childbirth Freedom Act, Ala. Act No. 2017-383.

The activity engaged in by a separately licensed provider, such as a CPM, can cause the provider to become subject to ADPH’s facility licensure rules. In *Tucker v. State Department of*

Public Health, 650 So. 2d 910, 911, 913 (Ala. Civ. App. 1994), a physician challenged ADPH's regulation of his abortion practice because private practices were excluded from the definition of hospitals. The court rejected this argument, finding that even though this was a private practice, it also fell under the definition of a hospital due to the abortion services being provided there. *Id.* at 913-14. ADPH was thus free to regulate Dr. Tucker's practice, not as a private practice, but as a health care facility subject to regulation under the definitions set out in Ala. Code § 22-21-20. *Id.* at 914. However, the Court found further that ADPH had authority not only to "define and regulate a health care provider," but that the authority to regulate also included a provider "whose practice, office, or facility comes within the definition of a health care facilities in one of the categories . . . within the scope of [ADPH's] authority to regulate."

"Additionally, the court finds that Rule 420-5-1.01(2)(b) is constitutional as a proper exercise of the State's authority to define and regulate a health care provider. This includes a physician whose practice, office, or facility comes within the definition of a health care facility in one of the categories, i.e., abortion or reproductive health centers, within the scope of the defendant's authority to regulate. Section 22-21-20, 1975 Code of Alabama. The State has the authority to regulate a profession, and this does not violate any privacy or property right. *Planned Parenthood v. Casey*, 505 U.S. 833 [112 S.Ct. 2791], 120 L.Ed.2d 674 (1992); *Whalen v. Roe*, 429 U.S. 589 [97 S.Ct. 869, 51 L.Ed.2d 64] (1977); *Watson v. State of Maryland*, 218 U.S. 173, 30 S.Ct. 54 L.Ed. 987 (1910); *Dent v. State of West Virginia*, 129 U.S. 76 [114, 9 S.Ct. 231, 32 L.Ed. 623] (1889); *State v. State Board of Medical Examiners*, 209 Ala. 9, 95 So. 295 (1923).

...

"Although § 22-21-20 excludes "private offices of physicians" for regulation, the State may determine appropriate definitions for regulation, including licensing. *Barsky v. Board of Regents*, 347 U.S. 442 [74 S.Ct. 650, 98 L.Ed. 829] (1953); *Haden v. Watson*, [270 Ala. 277,] 117 So.2d 694 (1960); *Brady v. State Pilotage Commission*, 496 So.2d 776 (Ala.Civ.App.1985). Neither the definition nor the evidence indicates an attempt to regulate a private office of a physician. It regulates the operation of a health care facility as reasonably defined by the State.

"The regulation of the operation of a defined health care facility, whether it be called a practice, office, facility, or center, is the regulation of what takes place there, viz., the routine provision of abortions on a continuing basis as defined by the Rule. Abortion is a surgical procedure. The evidence shows, and [Dr. Tucker

admits], abortion is essentially [his] exclusive service, done regularly and continuously, in numbers far exceeding those minimums set by the Rule. Dr. Tucker states that he does one hundred abortions during a sixty-hour working month.... Clearly, [Dr. Tucker operates a facility that is] doing regular and continuous surgical procedures that are intended to be covered by the rules.”

Tucker, 650 So. 2d at 912–14.

ADPH has adopted final regulations for FSBCs that provide a pathway to licensure for the Plaintiffs. Pursuant to Ala. Code § 22-21-21, those regulations necessarily include provisions for the activities to be performed in FSBCs and are not required to be limited to the facilities’ physical and operational facets. *See* Ala. Code § 22-21-21 (“The purpose of this article is to promote the public health, safety and welfare by providing for the development, establishment and enforcement of standards for the treatment and care of individuals in institutions within the purview of this article and the establishment, construction, maintenance and operation of such institutions which will promote safe and adequate treatment and care of individuals in such institutions.”) Within the scope of the medical services and interventions to be performed in FSBCs, the final regulations appropriately place CPMs under the supervision of qualified physicians, CNMs, and registered nurses and permit them to provide assistive care to these staff. Ala. Admin. Code r. 420-5-13-.01(2)(b). CPMs are thus free to provide prenatal, delivery, and postnatal services to clients in birthing centers to the extent permitted by the medical professionals under whose supervision they practice, not unlike the requirements under their own licensure rules that circumscribe their activities, including, but not limited to, a requirement to provide “[a] plan for medical referral, transfer of care, and transport of the client or newborn or both when indicated by specific antepartum, intrapartum, or postpartum conditions.” Ala. Code § 34-19-16(b)(3).

The CPMs, by engaging in activity in a FSBC, are rightfully subject to ADPH regulation. Accordingly, Claim Four must be dismissed.

V. **Claim Five fails because ADPH’s final regulations for birthing centers are not in conflict with Certified Nurse Midwife Statutes.**

Despite Plaintiffs’ claims to the contrary, supervision requirements for CNMs under the final regulations are consistent with the rules of the Alabama State Board of Medical Examiners (ASBME) and the Alabama Board of Nursing (ABON) governing collaborative practice agreements between CNMs and physicians. Both the ASBME and the ABON reviewed the 2023 proposed regulations preceding their submission to the State Committee of Public Health for approval to publish pursuant to the AAPA and reviewed them again following the receipt of public comments to ensure that the requirements for CNMs governing scope of practice, collaborative agreements, and staffing were consistent with and approved by both boards.

In particular, the ASBME filed written comments stating, in part, that “the Board of Medical Examiners proclaimed its support for these proposed regulations as being the appropriate *minimum standards* for any physician, or any other licensed healthcare personnel, to attend the birth of a child in an out of hospital healthcare facility.” Memorandum from Denise Milledge, MBA, BSN, Dir., ADPH Bureau of Health Provider Standards, to State Comm. of Pub. Health, *Proposed Rules for Birthing Centers, Chapter 420-5-13* (Aug. 8, 2023). Likewise, the ABON filed written comments that were “generally supportive of the proposed rules because they ‘establish additional opportunities for the care of patients during childbirth and recognize the capability of CNMs to provide safe, competent care for patients during childbirth in a setting other than a hospital.’” *Id.*

For the same reasons set forth regarding Claim Four hereinabove, *Tucker* provides that the activity engaged in by a separately licensed provider, such as a CNM, can cause the provider to become subject to ADPH’s facility licensure rules. Accordingly, Claim Five must be dismissed.

CONCLUSION

For the foregoing reasons, Claim One, Claim Two, Claim Three, Claim Four, and Claim Five of Plaintiffs' First Amended Complaint are due to be dismissed.

Respectfully submitted,

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/s/ Benjamin H. Albritton
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***Counsel for Defendants Alabama Department of
Public Health and Scott Harris***

CERTIFICATE OF SERVICE

I hereby certify that I have on February 29, 2024, electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of the same to all counsel of record.

/s/ Benjamin H. Albritton
Benjamin H. Albritton
Assistant Attorney General

/s/ Hunter L. Sims
Hunter L. Sims
Assistant Attorney General