

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

PLANNED PARENTHOOD OF)	
KANSAS AND MID-MISSOURI,)	
)	
Plaintiff,)	
)	
v.)	Case No. 2:15-CV04273-NKL
)	
PETER LYSKOWSKI,)	
)	
Defendant.)	

**DEFENDANT’S OPENING BRIEF ON THE MERITS OF PLAINTIFF’S
CLAIMS FOR RELIEF**

PPKM seeks a permanent injunction barring Defendant from revoking the Columbia Center’s abortion facility license and declaratory relief. Notably, PPKM’s Columbia Center remains without a physician who possesses the legally required hospital privileges. The evidence presented to the Court in connection with the preliminary injunction proceedings is part of the record. Fed. R. Civ. P. 65(a)(2). To avoid unnecessary repetition, Defendant respectfully refers the Court to the fact section of its preliminary injunction opposition (see Ct. Doc. 36 at 6-9) and the attached exhibits.

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PERMANENT INJUNCTION STANDARD

In determining whether to enter a permanent injunction, the court considers the *Dataphase* factors, “except that to obtain a permanent injunction the movant must attain success on the merits.” *Bank One, Utah v. Guttau*, 190 F.3d 844, 847 (8th Cir. 1999). In order for this Court “to grant a permanent injunction, the plaintiff must show that [it] will suffer irreparable harm if the injunction is not granted.” *United States v. Green Acres Enter., Inc.*, 86 F.3d 130, 132-33 (8th Cir. 1996).

I. Defendant is entitled to judgment on PPKM’s claims.

PPKM is not entitled to a permanent injunction because it has not sustained irreparable harm and Defendant has not violated PPKM’s rights to procedural due process or equal protection. PPKM’s request for declaratory relief should be denied because PPKM’s constitutional claims fail on the merits.

A. PPKM will not suffer irreparable harm.

PPKM must show that it will sustain irreparable harm absent a permanent injunction. *Green Acres Enter., Inc.*, 86 F.3d at 132-33. PPKM cannot meet that burden because it cannot provide abortion services at its Columbia Center, regardless of the Center’s licensure status, without a physician who possesses the hospital privileges required by Missouri law (*see*

19 C.S.R. §30-30.060(1)(C)(4); *see* §188.080 RSMo)¹. Notably, PPKM had stopped providing abortion services at the Columbia Center before DHSS made a final decision to revoke that facility's license (see Ct. Doc. 6-1 at 15). Ct. Doc. 36-2 at 3 (Langston Aff., ¶ 9).

As of this writing, PPKM does not claim to have secured a physician for the Columbia Center who satisfies the hospital privileges requirements. See e.g. Ct. Doc. 50-1 at 3. The physician who last provided abortion services at the Columbia Center still has not obtained staff privileges at a hospital within fifteen minutes' travel time from that facility.

The mere possibility that PPKM may locate a physician with the required hospital privileges to provide abortion services at the Columbia Center before the Center's license expires does not justify a permanent injunction. PPKM cannot use the Columbia Center's abortion facility license because, without a physician possessing the legally required privileges, it cannot provide abortion services at the Columbia Center. Accordingly, no irreparable harm exists. It is error to grant a permanent injunction without proof of irreparable harm. *Buetow v. A.L.S. Enter., Inc.*, 650 F.3d 1178, 1183 (8th Cir. 2011).

¹ PPKM has not challenged the validity of §188.080 RSMo or 19 C.S.R. §30-30.060(1)(C)(4). *See e.g.*, Ct. Doc. 6 at 2, n. 1.

B. PPKM's constitutional claims fail on the merits.

I. Procedural due process

“The fundamental requirement of due process is the opportunity to be heard at a meaningful time, and in a meaningful manner.” *Mathews v. Eldridge*, 424 U.S. 319, 323 (1976). “Depending upon the circumstances, this right may be fulfilled either before or after a deprivation.” *Grand River Enter. Six Nations, Ltd. v. Beebe*, 418 F.Supp.2d 1082, 1096 (D. W.D. Ark. 2006).

“ ‘(D)ue process is flexible and calls for such procedural protections as the particular situation demands.’ ” *Mathews* at 334, quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). In fact, in *Mathews*, a post-deprivation hearing was found to comport with due process. 424 U.S. at 349.

PPKM was afforded process quite similar to the process provided in *Mathews*. In *Mathews*, the process began with a continuing-eligibility investigation to assess whether a Social Security recipient was eligible to continue receiving benefits. 424 U.S. at 337. Here, DHSS investigated and independently confirmed that PPKM's physician would be losing her privileges with MU Health Care by contacting the manager at the Columbia Center, as well as the university. Ct. Doc. 36-1 at 7-8.

In *Mathews*, the next step in the process once information obtained through the continuing-eligibility investigation led to a tentative decision to

terminate benefits was notifying the beneficiary of the tentative decision. 424 U.S. at 338. Prior to the final determination, the beneficiary had an opportunity to respond and present additional evidence. *Id.*

In this case, after having investigated and confirmed that PPKM's physician would lose the required hospital privileges on December 1, 2015, DHSS notified PPKM of its position in a September 25, 2015, letter. That letter stated that, unless the Columbia Center satisfied the hospital privileges requirement, as of December 1, 2015, the Columbia Center would not be in compliance with state licensure mandates, and its license would be revoked. Ct. Doc. 36-1 at 12. PPKM had an opportunity to respond to the September 25, 2015, letter before DHSS made its final decision to revoke the Columbia Center's license.

On November 23, 2015, at the direction of his supervisor, John Langston called the Columbia Center to speak with its manager². Ct. Doc. 36-2 at 2-3. Mr. Langston called because the Bureau of Ambulatory Care had not heard from PPKM since the September 25, 2015, letter. Ct. Doc. 36-2 at 2. Prior to making a final decision with respect to the Columbia Center license, the Bureau of Ambulatory Care wanted to know whether PPKM had put any

²The content of the conversation between Mr. Langston and the Columbia Center's manager was set forth in the preliminary injunction briefing. Ct. Doc. 36 at 21; Ct. Doc. 36-2 at 2-3.

corrective action in place to address the Columbia Center's impending lack of a physician who would meet the hospital privileges requirement. Ct. Doc. 36-2 at 2.

The manager explained that PPKM was attempting to persuade the University of Missouri to delay the elimination of privileges and to find a new physician with privileges. Ct. Doc. 36-2 at 3. The manager also advised that the Columbia Center had ceased offering abortion services. Ct. Doc. 36-2 at 3. Mr. Langston spoke with his supervisor, Bill Koebel, and the Administrator of DHSS's Section for Health Licensing Standards and Licensure concerning his conversation with the manager. Ct. Doc. 36-2 at 3. There were also conversations between PPKM's counsel, Douglas Ghertner, and DHSS's General Counsel before DHSS made its final decision to revoke the Columbia Center's license. Ct. Doc. 16 at 4-5.

In *Mathews*, the government agency made a final decision to terminate benefits, and notified the beneficiary in writing. 424 U.S. at 338. That written notice included notice of the right to an administrative appeal. *Id.* at 338-39. Here, following the conversations with PPKM representatives, DHSS made a final decision to revoke the Columbia Center's abortion facility license. DHSS notified PPKM of that decision through a November 25, 2015, letter that was sent to PPKM's CEO by e-mail and certified mail. Ct. Doc. 36-

1 at 13. The November 25, 2015, letter notifying PPKM of the revocation decision included notification of PPKM's right to appeal the revocation decision to the AHC. Ct. Doc. 36-1 at 13.

In *Mathews*, the beneficiary's right to an evidentiary hearing occurred after the deprivation. *Id.* at 339. Here, PPKM could have appealed to the AHC, see §197.221 RSMo, and sought a stay, before DHSS's revocation decision went into effect on December 1, 2015, §621.035 RSMo. In *Mathews*, the beneficiary would be entitled to judicial review. *Id.* Likewise, an AHC decision would be subject to judicial review. Section 621.145 RSMo.

Under *Mathews*, the factors considered in identifying “the specific dictates of due process” are: (1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation through the procedures used; and (3) the government's interest, “including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews*, 424 U.S. at 335.

Missouri's current statutory process—allowing aggrieved persons to appeal DHSS actions that impact ASC licenses to the AHC—is sufficient to satisfy due process. For the first *Mathews* factor, the affected private interest, PPKM has asserted financial harm and time. PPKM asserts that there are significant financial costs associated with applying for a license for

its Columbia Center. PPKM's financial interest is of little weight, *see Grand River Enter. Six Nations, Ltd. v. Beebe*, 418 F.Supp.2d at 1097, particularly where Missouri law requires a facility to reapply for its license every year, *see* §197.215.2 RSMo. PPKM is required to pay an annual license fee, §197.210.2 RSMo, and would incur costs any time that it seeks to renew or reapply for a license. The Columbia Center license will expire on June 30, 2016. Ct. Doc. 6-1 at 11.

The second *Mathews* factor, the risk of erroneous deprivation, strongly favors DHSS. The basis for DHSS's licensing decision, a third party's elimination of the Columbia Center physician's hospital privileges, is undisputed. The applicability of the hospital staff privileges requirement to the Columbia Center also is not in dispute. Accordingly, there is no risk of erroneous deprivation. *Booker v. City of St. Paul*, 762 F.3d 730, 735-36 (8th Cir. 2014); *see Grand River Enter. Six Nations, Ltd. v. Beebe*, 418 F.Supp.2d 1082, 1097 (W.D. Ark. 2006). The process afforded to PPKM was constitutionally sufficient.

With regard to the hospital privileges requirement, and with respect to the third *Mathews* factor, without question the state has a "legitimate interest in ensuring that prompt backup care is available to patients who undergo abortions in outpatient clinics." *Women's Health Ctr. of West County*,

Inc. v. Webster, 871 F.2d 1377, 1381 (8th Cir. 1989). DHSS's enforcement of the hospital staff privileges requirement furthers "important state health objectives." *See id.* The state has an interest in public health and safety. *Women's Health Ctr. of West County, Inc. v. Webster*, 871 F.2d at 1381. Requiring a pre-deprivation hearing would burden those interests. Moreover, DHSS has an interest in ensuring that ambulatory surgical centers do not remain licensed if they are unable to continuing operating as ASCs.

In *Mathews*, the continuation of a government benefit was conditioned upon continued eligibility. *Mathews*, 424 U.S. at 335-36. Once the necessary requirement of disability ceased to exist, the state took action to terminate benefits. *Id.* at 323-24. Here, the benefit of licensure is conditioned upon the facility having a physician with the hospital privileges required by Missouri law. PPKM has asked to remain a licensed ASC without a physician with the legally required privileges for an indefinite period. DHSS has a legitimate interest in preventing that from occurring.

The remedies available to PPKM through the AHC afforded sufficient process with regard to the interests at stake. If the government affords sufficient process, even a significant liberty interest or economic interest will not require additional procedures to satisfy due process. *Reeve Aleutian Airways v. United States*, 982 F.2d 594, 602 (D.C. Cir. 1993).

Finally, here, as in *Mathews*, “[i]n assessing what process is due in this case, substantial weight must be given to the good-faith judgments of the individuals charged” with administering the law, including the statutes and regulations applicable to ASC licensing. *See Mathews*, 424 U.S. at 339.

II. Equal protection

PPKM must show that it “has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). “A class-of-one plaintiff must... ‘provide a specific and detailed account of the nature of the preferred treatment of the favored class,’ especially when the state actors exercise broad discretion to balance a number of legitimate considerations.” *Nolan v. Thompson*, 521 F.3d 983, 990 (8th Cir. 2008), quoting *Jennings v. City of Stillwater*, 383 F.3d 1199, 1213-14 (10th Cir. 2004). PPKM has not shown that another ASC was treated more favorably than the Columbia Center under similar circumstances.³ Thus, PPKM has failed to meet the demanding standard for class-of-one equal protection claims. *Robbins v. Becker*, 794 F.3d 988, 996 (8th Cir. 2015).

PPKM lost its ability to operate as a licensed abortion facility because

³ The record shows that Surgical Center of Creve Coeur’s physician remained on staff and continued to perform surgical procedures in 2012. See Ct. Doc. 40-1 at 3-4. With respect to Surgical Center of Creve Coeur, and its physician, there is no evidence of non-compliance with the general ASC hospital privileges requirement.

it no longer had a physician with the hospital privileges required by Missouri law, Section 188.080 RSMo; 19 C.S.R. §30-30.060 (1)(C)(4). PPKM must show that, with respect to the decision to revoke the Columbia Center's license when it became unable to comply with the hospital privileges requirement, it was treated differently than persons who were "in all respects similarly situated." *Flowers v. City of Minneapolis*, 558 F.3d 794, 798 (8th Cir. 2009).

Legally, the Columbia Center is not similarly situated to general ASCs. Abortion facilities are a distinct category of ASC. *See Planned Parenthood of Kansas and Mid-Missouri Inc. v. Drummond*, 2007 WL 2811407 at *1 (W.D. Mo. Sept. 24, 2007). Abortion facility ASCs and general ASCs are governed by different sets of regulations. *Id.*

Physicians performing abortions at abortion facilities "shall have staff privileges at a hospital" within fifteen minutes of the abortion facility. 19 C.S.R. §30-30.060(1)(C)(4). "Any physician performing or inducing an abortion who does not have clinical privileges at a hospital which offers obstetrical or gynecological care located within thirty miles of the location at which the abortion is performed or induced shall be guilty of a class A misdemeanor." Section 188.080 RSMo.

Physicians performing surgical procedures at general ambulatory surgical centers must have privileges "to perform surgical procedures in at

least one (1) licensed hospital in the community in which the ambulatory surgical center is located” to ensure continuity of care, or a working agreement with a licensed hospital in the community “guaranteeing the transfer and admittance of patients for emergency treatment...[.]” §197.215.1(2) RSMo; 19 C.S.R. §30.020(1)(B)(4).

Factually, the Columbia Center is not similarly situated to any general ASC. To DHSS’s knowledge, it has not allowed a general ASC with a single physician⁴ who lost the hospital privileges required by law, and lacked a working agreement guaranteeing emergency transfers, to keep its license. Ct. Doc. 36-2 at 2. PPKM’s situation was unique (see Ct. Doc. 36-2 at 2) and DHSS’s response to that situation was rational.

Once the hospital privileges of its only physician were eliminated, the Columbia Center was unable to provide the only service that it was licensed to provide. PPKM knew, more than two months in advance, that its physician’s refer and follow privileges would be eliminated effective December 1, 2015. As the effective date loomed, PPKM could not say when the Columbia Center would have a physician with the legally required

⁴ Dr. Eggleston was the only physician practicing at Surgical Center of Creve Coeur (Ct. Doc. 40-1 at 3), and, without another physician on-site “there is no physician-physician oversight[.]” (Ct. Doc. 40-1 at 2). The record does not indicate that Surgical Center of Creve Coeur “lost” its physician in 2011 (see e.g., 40-1 at 2-4; see also Ct. Doc. 49 at 14).

hospital privileges. PPKM did not estimate when it could comply with state licensure mandates in any communication with DHSS. More than five months have passed since the Columbia Center's physician lost the required hospital privileges. The Columbia Center's deficiency has not been corrected.

The Columbia Center's inability to continue operating at its licensure level was the "operative factor" in DHSS's November 25, 2015, decision to revoke the Columbia Center's license. Ct. Doc. 36-1 at 1-2.⁵ A facility's inability to continue operating at the licensed level is the deficiency of "the highest" severity. Ct. Doc. 36-1 at 1, 3.

DHSS has adopted regulations applicable to ASCs, including abortion facilities, "to assure quality patient care and patient safety," including the qualifications of personnel responsible "for any part of the care provided to patients[,]" §197.225(1). Section 197.225 RSMo. One such regulation is the hospital privileges requirement for abortion facilities, 19 C.S.R. §30-30.060(1)(C)(4). There is a rational relationship between DHSS's concern about the Columbia Center's inability to continue operating at a licensed level due to the lack of a physician with the required hospital privileges and DHSS's interest in assuring quality patient care and patient safety that is

⁵ The evidence supporting DHSS's decision to revoke the Columbia Center's license was discussed at greater length in Defendant's Suggestions in Opposition to Plaintiff's Motion for Preliminary Injunction. See Ct. Doc. 36 at 8, 15-17.

advanced by its enforcement of 19 C.S.R. §30-30.060(1)(C)(4).

DHSS's revocation decision also cited the statutory hospital privileges requirement, §188.080 RSMo. Ct. Doc. 6-1 at 15. Section 188.080 RSMo furthers important state health objectives. *Women's Health Ctr. of West County, Inc. v. Webster*, 871 F.2d 1377, 1381 (8th Cir. 1989). The statute ensures that a physician will have authority to admit a patient into a hospital with which the physician is familiar and that the patient will gain immediate access to needed care. *Id.*

As shown above, DHSS had a rational basis for enforcing the physician privileges requirement. The decision to revoke the Columbia Center's license was also rational. The Columbia Center could no longer function as an ASC without violating a criminal statute. It was unclear when, or whether, the Columbia Center's deficiency could be remedied, however, the Columbia Center's inability to provide abortion services was likely to persist for at least six months.

The fact that the Columbia Center's license was revoked because of its failure to comply with a single standard does not establish PPKM's equal protection claim. *See Woodruff v. Mason*, 542 F.3d 545, 555 (7th Cir. 2008). The record before the Court does not show that any ASC but the Columbia Center failed to satisfy a physician privileges requirement. Though revoking

an ASC license for failure to satisfy a single standard may have been unprecedented, that is insufficient to show an equal protection violation. *See Woodruff* at 555. The decision to revoke the Columbia Center's license was consistent with equal protection.

III. Declaratory relief.

As shown above, Plaintiff's constitutional claims fail on the merits. Thus, Defendant is entitled to judgment on Plaintiff's claim for declaratory relief. *See Keating v. Univ. of South Dakota*, 569 Fed.Appx. 469, 470-71 (8th Cir. 2014).

C. Harm to Defendant and the public interest

DHSS has an interest in assuring quality patient care and patient safety, including the qualifications of personnel responsible "for any part of the care provided to patients[,]§197.225. Section 197.225 RSMo. There is a rational relationship between DHSS's concern about the Columbia Center's inability to continue operating at the licensed level due to the lack of a physician with the hospital privileges required by law and DHSS's interest in assuring quality patient care and patient safety. DHSS's interests outweigh PPKM's limited economic interests.

CONCLUSION

In light of the foregoing, Defendant prays that the Court deny Plaintiff's requests for declaratory and permanent injunctive relief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 4, 2016, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which sent notification to the following:

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