IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CHRISTINA HOLTON, Plaintiff, v. TANJA D. BATTLE, in her official capacity as Executive Director of the Georgia Board of Dentistry, *et al.*, Defendants.	:	CIVIL ACTION NO. 1:14-CV-03824-LMM

ORDER

This case comes before the Court on Defendants' Motion for Summary Judgment [78] and Objection to Evidence [98]. After due consideration, the Court enters the following Order:

I. BACKGROUND[1]

Plaintiff is the owner and operator of Mobile Whites, a business through which she provided tooth whitening services. Dkt. No. [92] ¶ 1. Until recently, Plaintiff offered and provided those services to customers in Georgia. Id. ¶ 4. However, in 2014, the Georgia Board of Dentistry (the "Board") opened an investigation into Plaintiff's services and determined she was violating the Dental Practice Act. Dkt. No. [1] ¶ 40. In response, Plaintiff closed her business and filed

[1] All facts are construed in a light most favorable to Plaintiff as the non-moving party.

this suit, asking the Court to enjoin the Board from enforcing the Dental Practice Act against her and other persons providing similar teeth whitening services. Id. at 20.

Plaintiff has not attended or completed dental school and is not licensed to practice dentistry in Georgia or in any other state. Dkt. No. [92] ¶ 2. Plaintiff took an online course in tooth whitening in December 2011. Id. ¶ 3. She "watched some clips . . . read some stuff and then [] answered some questions." Id. She completed the course in roughly two hours. Id. The course did not offer any patient and customer interaction, and the entire course was done via computer screen. Id.

In providing her services to customers, Plaintiff used teeth whitening products or whitening agents with a concentration of 16% hydrogen peroxide and/or 33% concentration carbamide peroxide. Id. ¶ 5. Plaintiff did not purchase any of these teeth whitening products or whitening agents in a supermarket or drug store. Id. ¶ 8. Instead, Plaintiff bought the products from an online company that required a business license or tax identification number. Id.

Plaintiff's website made numerous claims about her products and services. Id. ¶ 9. For instance, the website stated: (1) "Mobile Whites is a cosmetic teeth whitening company. We offer the most superior products with the highest quality customer service;" (2) "We are highly trained in cosmetic teeth whitening;" (3) Our state-of-the-art Blue LED Light technology helps whiten your teeth in just minutes with little to no sensitivity;" (4) "Mobile Whites provides 'affordable,

high quality, effective, and professional cosmetic teeth whitening with 100 percent satisfaction guaranteed;'" (5) "Cosmetic teeth whitening is painless yet effective with little to NO sensitivity and guaranteed instant results." Id. The website also acknowledged there are some risks with teeth whitening, but stated, "Such conditions are rare so it can be assumed that over 90% of people can undergo and benefit from teeth whitening." Id. ¶ 10.

Plaintiff advertised and sold vouchers for her services through Groupon and Livingsocial. Id. ¶ 12. Those advertisements included representations that the business offered "advanced in-office teeth whitening treatment." Id.

When providing her services, Plaintiff admits that she would "explain the process [of teeth whitening] and explain to customers how to do the teeth whitening." Id. ¶ 13. She would also make recommendations to her customers regarding whether, when, and how often they should repeat the tooth whitening process. Id. ¶ 14.

Plaintiff contends that her usual teeth whitening procedure was as follows: First, Plaintiff would ask customers to review and sign a waiver sheet indicating that he or she did not have any condition that would contraindicate whitening and acknowledging that he or she understood that the treatment was self-administered.[2] Dkt. No. [93] ¶ 7. Next, Plaintiff would seat her customers in a

[2] Defendants object to this statement, first arguing that it is hearsay. Specifically, Defendants contend it must be hearsay because Plaintiff discarded her business records such that her assertion that she made the customers sign waivers cannot be "tested." However, the Court disagrees that a statement is hearsay simply

reclining chair and provide them with a single-use disposable cheek retractor to be placed in his or her mouth.[3] Id. ¶¶ 10-11. Plaintiff would then hold up a shade guide to measure the starting shade of the customer's teeth.[4] Id. ¶ 12. Based on the shade guide, Plaintiff would usually provide the customer with a single-use teeth whitening pen and instruct the customer on how to apply it to their teeth.[5] Id. ¶ 15.

During her deposition, Plaintiff admitted to a number of facts. Dkt. No. [92] ¶ 15. They include: (1) that she does not take medical history or dental history from a customer; (2) she does not make a medical diagnosis or a dental

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because it cannot be verified. Plaintiff asserts that she made customers sign a waiver acknowledging that they had no prior conditions. This information comes directly from Plaintiff's own knowledge of how she operated her business.

Next, Defendants contend it is not material. However, the Court includes the information to provide context to the way in which Plaintiff claims she operated her business.

[3] Defendants object to this statement, claiming that Plaintiff admits to having placed the cheek retractors in the customers' mouths on at least three occasions. According to Defendants, Plaintiff's contention that she *usually* made the customers place the retractor in his or her own mouth is not supported by the evidence because she threw out her business records. However, Plaintiff has also submitted a declaration wherein she specifically states that is how she usually operated her business. The fact that she does not have business records indicating this was the usual procedure does not mean there is no evidence showing it was the usual procedure.

[4] Defendants object, arguing that on some occasions the customers would hold the shade guide. While Plaintiff admits this would happen, she also contends that she would, on occasion, hold it herself.

[5] Defendants object, stating that on at least three occasions Plaintiff applied the whitening to the customers' teeth herself. While Plaintiff admits this, she also contends that she usually made the customers apply it themselves. These two facts are not mutually exclusive.

diagnosis for a customer; (3) she does not perform a clinical examination of a customer's teeth and gums; (4) she does not attempt to determine by her own independent examination the underlying cause of a customer's tooth discoloration; (5) she is not qualified to determine by her own independent examination the underlying cause of a customer's tooth discoloration; (6) she is not qualified to examine and assess the condition of a customer's tooth or gums to determine if underlying disease or pathology is the cause of the customer's tooth discoloration; and (7) she is not qualified to identify by her own independent examination of a customer the following conditions: defective or leaking restorations, poor or worn enamel, decalcification, periodontal disease, gingivitis, gums in poor condition, abscess, caries, exposed dentin, root exposure, untreated tooth decay, pulp necrosis, calcific metamorphosis, or root resorption. Id. Plaintiff did, however, deny services to customer if she believed they had obvious signs of tooth decay. Id. ¶ 16.

Plaintiff directly applied the tooth whitening product on a customer's teeth at least two or three occasions. Id. ¶ 17. She did so because the customer asked her to apply the product. Dkt. No. [86-1] at 66:1. Plaintiff had no training in infection control. Dkt. No. [92] ¶ 20.

Plaintiff provided her services in a room without running water and no sink. Id. ¶ 22. She had customers rinse their mouths and spit into a Dixie cup which she would then toss into the trash. Id.

The customers often handled the tooth whitening equipment, including items that were used repeatedly by different customers. Id. ¶ 23. These items included mirrors, the tooth shade guide, the LED light, and protective glasses. Id. When handling these items, the customer did not wear gloves. Id. According to Plaintiff's description, the customer would handle these repeat tools and equipment without gloves even though they would also touch their own mouths in the whitening process including by inserting a cheek retractor in their mouths while applying the whitening gel. Id.

Plaintiff, however, wore gloves throughout the teeth whitening process. Dkt. No. [93] ¶ 22. After each customer, Plaintiff would use Cavicide disinfectant before the next customer began the process. Id. ¶ 23.

Plaintiff admits that she did not charge a sales tax when she provided and sold her tools. Dkt. No. [92] ¶ 24. In contrast, supermarkets and drug stores that sell similar equipment include a sales tax. Id.

As discussed above, the Board initiated an investigation into Plaintiff in October of 2014. Id. ¶ 29. Plaintiff received an email from Ryan McNeal, an agent of the Board, informing her that the Dental Board deemed her business to be the unlawful practice of dentistry based on the Dentistry Practice Act (the "Act"). Dkt. No. [93] ¶ 28.

Under the Act, dentistry is defined as "the evaluation, diagnosis, prevention, or treatment, or any combination thereof, of the oral cavity . . .

provided by a dentist." O.C.G.A. § 43-11-1(6). The Act further defines the *practice* of dentistry to include a person who:

> Supplies, makes, fits, repairs, adjusts, or relines, directly for or to an ultimate user of the product in the State of Georgia, any appliance, cap, covering, prosthesis, or cosmetic covering . . . usable on or as human teeth unless such provision, production, fit, repair, adjustment, or reline of such product is ordered by and returned to a licensed dentist or unless such product is used solely for theatrical purposes.

O.C.G.A. § 43-11-17(a)(6). The Act allows the Board to "enjoin any person . . . who without being licensed or registered to do so by the [B]oard engages in or practices the profession of dentistry." O.C.G.A. § 43-11-2(e).

Plaintiff signed a Cease and Desist Order presented to her by Mr. McNeal. Id. ¶ 32. The Order states that Plaintiff "has consented to this Order and agrees to voluntarily cease and desist from any act or practice that requires licensure under the [Dental Practice Act]" Dkt. No. [92] ¶ 30. The Order further states that it "shall remain in effect until such time as [Plaintiff] is properly licensed with the Board or until further order." Id.

The Board's position is that tooth whitening when provided as a service by one person directly to another constitutes the practice of dentistry. Id. ¶ 31. Both parties have filed expert reports describing why teeth whitening does or does not constitute the practice of dentistry. Based on their report, and their legal argument, Defendants ask the Court to dismiss Plaintiff's claims.[6]

[6] Both Plaintiff and Defendants included many more facts in their Statements of Facts. However, the remaining facts are either immaterial to this case or better discussed in the sections below.

II. LEGAL STANDARD

Federal Rule of Civil Procedure 56 provides "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a).

A factual dispute is genuine if the evidence would allow a reasonable jury to find for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A fact is "material" if it is "a legal element of the claim under the applicable substantive law which might affect the outcome of the case." Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997).

The moving party bears the initial burden of showing the Court, by reference to materials in the record, that there is no genuine dispute as to any material fact that should be decided at trial. Hickson Corp. v. N. Crossarm Co., 357 F.3d 1256, 1260 (11th Cir. 2004) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). The moving party's burden is discharged merely by "'showing'—that is, pointing out to the district court—that there is an absence of evidence to support [an essential element of] the nonmoving party's case." Celotex Corp., 477 U.S. at 325. In determining whether the moving party has met this burden, the district court must view the evidence and all factual inferences in the light most favorable to the party opposing the motion. Johnson v. Clifton, 74 F.3d 1087, 1090 (11th Cir. 1996).

Once the moving party has adequately supported its motion, the non-movant then has the burden of showing that summary judgment is improper by coming forward with specific facts showing a genuine dispute. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). There is no "genuine [dispute] for trial" when the record as a whole could not lead a rational trier of fact to find for the nonmoving party. Id. (citations omitted). All reasonable doubts, however, are resolved in the favor of the non-movant. Fitzpatrick v. City of Atlanta, 2 F.3d 1112, 1115 (11th Cir. 1993).

III. DISCUSSION

Plaintiff asserts two constitutional violations stemming from the closure of her teeth whitening business pursuant to the Board's interpretation of the Dental Practice Act. First, Plaintiff asserts that Defendants violated the Equal Protection Clause of the Fourteenth Amendment. Dkt. No. [1] ¶ 59. Second, Plaintiff asserts that Defendants violated the Due Process Clause of the Fourteenth Amendment.[7] Id. ¶ 71.

Plaintiff asks the Court to declare that the Dental Practice Act and its attendant regulations violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment as applied to teeth-whitening services. Plaintiff asks that the Court enjoin the Board from enforcing the Dental Practice Act and its attendant regulations against her and other teeth-whitening providers. And

[7] Plaintiff originally asserted a claim under the Privileges and Immunities Clause but the Court dismissed that claim in its Order on Defendants' Motion to Dismiss. Dkt. No. [51].

lastly, Plaintiff asks that the Court award attorney's fees and expenses pursuant to 42 U.S.C. § 1988, and any other monetary or equitable relief the Court deems fit. The Court will discuss each alleged violation in turn.

a. Equal Protection

Plaintiff first asserts that Defendants violated her right to equal protection under the law because identical products previously sold by Plaintiff are available for purchase in supermarkets, drug stores, and online. See Dkt. No. [1] ¶ 63. Additionally, Plaintiff alleges that the Board is treating her differently from Lisa Colindres, the proprietor of Enlightened Expressions, LLC—a teeth whitening service Plaintiff asserts is indistinguishable from her services. Colindres was similarly shut down by the Board. However, Colindres sued the Board for antitrust violations and the Board subsequently settled, allowing Colindres to continue her teeth whitening services. According to Plaintiff, by preventing her from selling those products through her company, but allowing another to do the same, Defendants are violating her right to equal protection under the law. Id. ¶ 65.

"The Equal Protection Clause requires that the government treat similarly situated persons in a similar manner." Gary v. City of Warner Robbins, 311 F.3d 1334, 1337 (11th Cir. 2002). The degree of scrutiny for such claims depends on the right asserted. Id. "If an ordinance does not infringe upon a fundamental right or target a protected class, equal protection claims relating to it are judged under the rational basis test." Id. Specifically, the ordinance must be rationally

related to the achievement of a legitimate government purpose. Id. Plaintiff's Complaint acknowledges that her Equal Protection Claim falls within this category. Dkt. No. [1] ¶ 65.

Defendants contend that Plaintiff's Equal Protection Claim must fail for two reasons. First, Defendants argue that Plaintiff has not shown she was treated differently from similarly situated comparators. Second, Defendants argue there is a rational basis for the Board's restriction on Plaintiff's business.

i. Similarly Situated Comparators

As discussed above, Plaintiff attempts to compare herself to drugstores and supermarkets selling teeth whitening products and to Lisa Colindres. Focusing first on the drugstore comparison, Defendants contend it is a false comparison as Plaintiff did more than simply sell the teeth whitening product to customers. Instead, according Defendants, Plaintiff provided a service through supervision and instruction on how to apply the product to a client's teeth. Plaintiff provided a chair for the client to sit in and a light enhancer that she does not sell to the client. She made recommendations to clients about whether, when, and how often they should repeat the tooth whitening process. She made visual assessments of clients' teeth and denied tooth whitening services to clients she believed showed signs of tooth decay. And lastly, on at least two to three occasions, Plaintiff placed the whitening product on the clients' teeth. According to Defendants, these additional services created a risk of reliance by the

customers that would not be present if the customer bought the product from the drugstore.

In addition, according to Defendants, there are more differences between Plaintiff and drugstores. First, Defendants contend that Plaintiff did not use a drug store product. Instead, Plaintiff purchased her products online with a business license. Additionally, Defendants contend that the products Plaintiff used had a higher hydrogen peroxide concentration than typically found in drugstore products.

Defendants' expert witness, Dr. Yiming Li, wrote in his expert report that in-home whiteners typically contain less than 10% hydrogen peroxide. Dkt. No. [84-1] at 5. At that level of concentration, Dr. Li contends that oral tissue protection, such as gum protection, may not be required. Id. However, at higher concentrations, tissue protection "remains imperative" as the concentration of hydrogen peroxide may have a corrosive effect on the tissue. Id.; id. at 4 (discussing the corrosive and irritating nature of concentrated hydrogen peroxide solutions). The parties agree that Plaintiff bought and used teeth whitening products with 16% hydrogen peroxide concentration. Dkt. No. [92] ¶ 5.

Plaintiff rebuts Defendants argument by claiming that, while Defendants have identified a number of distinctions between her business and a drugstore selling a similar product, those differences are irrelevant. According to Plaintiff, the only relevant distinction is whether her services carry a greater risk of harm than a drugstore selling the product directly to the customer. Plaintiff contends

that Defendants have not shown this difference and therefore have failed to show that she is *not* similarly situated to a drugstore.

However, the Court disagrees. In at least one respect, Defendants have shown that Plaintiff's product, containing 16% hydrogen peroxide concentration, is of greater concentration and greater risk of harm, if even slightly, than products generally found in a drugstore.[8] According to their expert, higher concentrations can cause oral tissue irritation due to its corrosive effect.[9]

Plaintiff attempts to rebut this evidence through the opinion of her expert witness, Dr. Martin Giniger. Specifically, Dr. Giniger states in his expert report, "The products used by Plaintiff are similar in strength, composition, and quality to drugstore teeth whitening products." Dkt. No. [85-1] at 4. As support, Dr. Giniger claims that one of the most popular drugstore whitening products—Procter Gamble's Crest WhiteStrips—can have up to 16% hydrogen peroxide concentration. Id. at 9.

However, there are a number of factual issues with Dr. Giniger's expert report made clear through Dr. Li's rebuttal report and Dr. Giniger's own deposition testimony. First, turning to the rebuttal report, Dr. Li points out that there is no such Crest Whitestrips product with a 16% hydrogen peroxide

[8] While Defendants contend there are many reasons why Plaintiff is not similarly situated, the Court only needs one and therefore will only analyze one.

[9] Importantly, Plaintiff's expert admits that higher levels of hydrogen peroxide concentration can lead to tissue irritation. While the expert claims the irritation is simply temporary and reversible, he does not refute the fact that higher concentrations lead to a greater risk of irritation. Dkt. No. [91-2] at 44.

concentration. Looking at Dr. Ginger's source for this information, http://sale.dentist.net/products/crest-whitestrips-supreme, shows only Crest Whitestrips at 14% concentration, not 16% as Dr. Giniger contends. Additionally, the website indicates that the product is not sold in stores, demonstrating that it is not available over-the-counter at drugstores as Dr. Giniger suggested.

During his deposition, Dr. Giniger admitted that the product he was referring to only has about 14% hydrogen peroxide concentration. See Dkt. No. [89-1] at 99:17-20. While he claimed that the product is for at home use, he admits that it is only sold by professionals, meaning a customer cannot buy it at a drugstore. Id. at 100:3-9 ("To be sold by professionals."). As such, Dr. Giniger has not identified any product sold over-the-counter at a concentration similar to Plaintiff's products.

Plaintiff has failed to rebut Defendants' contention that her products are not similar to products found in drugstores.[10] As such, the Court agrees with

[10] In her response brief, Plaintiff claims that the drugstore products are no safer than the products she uses. However, as support for this contention, Plaintiff cites to Dr. Giniger's declaration where he states Plaintiff's products are of similar strength as drugstore products. Dkt. No. [91-2] ¶¶ 24, 102. The Court has just discussed that Dr. Giniger's claim is not supported by the record evidence. Plaintiff also cites to Dr. Giniger's claim that hydrogen peroxide toxicity through ingestion is unlikely. Id. ¶ 74. However, ingestion toxicity and gum irritation are separate issues. In this case, Dr. Giniger did not refute that higher hydrogen peroxide concentrations lead to a greater risk of gum irritation, even if that irritation is temporary and reversible. Next, Plaintiff cites Dr. Giniger's opinion regarding disinfection of tools—again, not relevant to issues of high hydrogen peroxide concentration on gum tissue. Lastly, Plaintiff cites Dr. Giniger's opinion regarding tooth irritation. Id. ¶¶ 139, 142. However, this does not go towards gum irritation due to the corrosive effect of high concentrations of hydrogen peroxide.

Defendants that Plaintiff is not similarly situated to a drugstore or supermarket selling over-the-counter tooth whitening products.

Turning to Lisa Colindres, Defendants contend she is a red herring. According to Defendants, the Equal Protection Clause is concerned with classifications, not individual enforcement decisions. The Court agrees.

In Engquist v. Oregon Department of Agriculture, 553 U.S. 591, 604 (2008), the Supreme Court specifically held, "There are some forms of state action . . . which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments." Engquist, 553 U.S. at 604. According to the Supreme Court, "[i]n such cases treating like individuals differently is an accepted consequence of the discretion granted to government officials." Id. In this case, the Court cannot speculate as to why the Board settled with Colindres and has chosen, at this point, not to settle with Plaintiff. However, the fact that these two individuals are being treated differently is not an Equal Protection Clause issue. Based on the above, the Court finds that Plaintiff has not demonstrated she is similarly situated to any of her comparators and therefore her Equal Protection Claim must fail.[11]

[11] In its Order on Defendants' Motion to Dismiss, the Court concluded that Plaintiff was similarly situated to drugstores. However, that conclusion was based on Plaintiff's allegation in her Complaint that she sold identical products to those sold in drugstores. Dkt. No. [51] at 26. At that stage, the Court had to take Plaintiff's well pled allegations as true. Now, however, even taking the facts in a light most favorable to Plaintiff, the evidence shows that the products are *not*, in fact, identical.

ii. Rational Basis

Even if Plaintiff's products were similar to a drugstore's products, the Court finds there is still a rational reason for the legislature to treat her class of services differently. See Haves v. City of Miami, 52 F.3d 918, 921-22 (11th Cir. 1995) (finding that, in the absence of a fundamental right or protected class, there is no equal protection violation where a classification rationally furthers a legitimate state interest). "The first step in determining whether legislation survives rational-basis scrutiny is identifying a legitimate government purpose—a goal—which the enacting government body *could* have been pursuing." Id. at 921 (emphasis in original). "The second step . . . asks whether a rational basis exists for the enacting governmental body to believe that the legislation would further the hypothesized purpose." Id. at 922.

The Court notes that rational basis scrutiny is a highly deferential standard that proscribes only the very outer limits of a legislature's power. Williams v. Pryor, 240 F.3d 944, 948 (11th Cir. 2001). "A statute is constitutional under rational basis scrutiny so long as 'there is *any reasonably conceivable state of facts* that could provide a rational basis for the' statute." Id. (quoting FCC v. Beach Commc'ns., Inc., 508 U.S. 307, 314 (1993)) (emphasis in original). The state of facts may be erroneous, but if it is "arguable," it is sufficient. Id. at 320.

Defendants contend that the legitimate government purpose is to protect public health. The Eleventh Circuit has held that public health is a legitimate

state interest. See Deen v. Egleston, 597 F.3d 1223, 1231-32 (11th Cir. 2010). As such, Defendants have met the first step of the inquiry.

Second, the Court finds that a rational basis exists for treating Plaintiff, someone who provides a service, differently from a drugstore, which merely sells a product. As Defendants suggested above, Plaintiff held herself out to be an expert with professional training in teeth whitening. This created a likely risk that customers would rely on her alleged expertise, possibly to their detriment.

That is to say, if someone bought the exact same product in a store, they would have to rely on themselves to read the instructions, determine if they are a good candidate for whitening, apply the whitener, and remove it in a timely manner. However, the legislature could rationally believe a customer at a whitening salon would simply rely on a proprietor's alleged expertise without considering any warnings or instructions provided with the product themselves. See Haves, 52 F.3d at 921 ("[R]ational-basis scrutiny asks whether a rational basis exists for the enacting governmental body *to believe* that the legislation would further the hypothesized purpose.") (emphasis added).

The legislature could believe that such reliance, if misplaced, could cause the customer harm and affect the public health. For instance, a proprietor may not know a customer's full dental history, leading her to incorrectly conclude the customer is a good candidate for teeth whitening.[12] The legislature, however,

[12] As Plaintiff admits, she never asked about a customer's dental history.

could believe that a customer would know his or her history and could better heed any instructions or warnings provided with the product.[13]

Aside from merely dental health, the legislature could rationally believe that issues of contamination and infection control are more prevalent in whitening salons than through at-home use. Plaintiff has argued that she disinfects all multi-use tools. However, it is certainly possible for the legislature to believe that not all whitening salon proprietors would be as careful—particularly without extensive training into the risk of infection. This is compounded by the fact that customers often handle the multi-use tools without gloves after having placed their hands in their mouths. In an at-home setting, where only one customer is using the multi-use tools, the legislature could believe that the risk of cross-contamination and infection is greatly reduced.

While Dr. Giniger contends that infection issues are extremely rare, the question for the Court is not whether there is actually a risk of an infection. Beach Commc'n, 508 U.S. at 320. Instead, the Court must only determine if the legislature could rationally believe that banning teeth whitening salons could benefit the public health. In this situation, the Court finds that it is reasonable to believe a risk of infection or cross-contamination is greater at a salon than through at-home use.

[13] While Dr. Giniger contends that having the proprietor apply the product is actually safer than at-home use, it is not irrational for the legislature to believe that these issues might come up, thus affecting the public health. See id. While their belief may be erroneous, the question for the Court is whether they could rationally believe it. Beach Commc'n, 508 U.S. at 320.

For those reasons, the Court concludes that, even if Plaintiff were similarly situated to drugstores, there is a rational basis for prohibiting teeth whitening services like the ones provided by Plaintiff. As such, Plaintiff's Equal Protection Claim is **DISMISSED**.[14]

b. Due Process

The Due Process Clause prohibits government action that irrationally or unreasonably interferes with a protected liberty interest, such as choice of employment. Conn. v. Gabbert, 526 U.S. 286, 292 (1999). Plaintiff's substantive Due Process Claim is subject to the same rational basis test as her equal protection claim. Gary v. City of Warner Robins, Ga., 311 F.3d 1334, 1338 n.10 (11th Cir. 2002).

Plaintiff claims that Defendants violated her right to due process because, under their current rules, if Plaintiff wishes to continue her business, she must attend undergraduate college and dental school for a total of eight years of higher education. According to Plaintiff, this requirement is irrational because very little of that training would pertain to teeth whitening.

[14] In its Order on Defendants' Motion to Dismiss, the Court found that, based on Plaintiff's allegations, there were no differences between her services and a drugstore's product that rationally related to public health concerns. However, at that stage in the litigation, the Court could only rely on what was alleged in the Complaint. Plaintiff specifically alleged there were no risks for a person applying the product at home from a drugstore or in her salon. Dkt. No. [1] ¶ 19. However, at the summary judgment stage, the Court need not take these allegations as true. Instead, the Court considers Defendants' proffered facts and construes all facts in a light most favorable to Plaintiff.

While it may be true that teeth whitening makes up a very small portion of dentistry training, for the reasons discussed above, it is not irrational for the legislature to believe that any amount of the training is necessary to protect the public health. Additionally, Plaintiff's cited cases do not change this outcome.

First, in Craigmiles v. Giles, 312 F.3d 220, 225 (6th Cir. 2002), the Sixth Circuit determined that requiring mortician licensure (and therefore two years of schooling) for funeral casket sellers was not rationally related to promoting public health. Giles, 312 F.3d at 225. That is, the Sixth Circuit determined there could be absolutely no connection between selling the caskets and the public health as the casket sellers were not handling or embalming any bodies. Id. Nor were there any concerns with the quality of the caskets as Tennessee law allowed licensed morticians to sell any quality they desired. Id. Here, however, the Court has identified at least two sets of facts that the legislature could rationally believe concern the public health.

Similarly, in Cornwell v. Hamilton, 80 F. Supp. 2d 1101, 1113 (S.D. Cal. 1999), the court determined there were no conceivable public health risks in allowing hair-braiders to perform their work without a cosmetology license. Cornwell, 80 F. Supp. 2d at 1113. Instead, the Court determined that the requirement was not rationally related to public health concerns and unnecessarily burdened braiders who would be forced to receive a license with "virtually nothing in the mandatory curriculum" related to hair braiding. Id. 1118 n.50. However, in this case, there are conceivable reasons why the legislature

would require a license to perform the type of services with the type of products that Plaintiff did. As such, Plaintiff's Due Process Claim is **DISMISSED**.

IV. CONCLUSION

In accordance with the foregoing, the Court **GRANTS** Defendants' Motion for Summary Judgment [78]. Defendants' Objections to Plaintiff's evidence is **DENIED as moot** [96]. The Clerk is **DIRECTED** to close this case.

IT IS SO ORDERED this 1st day of February, 2017

LEIGH MARTIN MAY
UNITED STATES DISTRICT JUDGE