Fulton County Superior Court
EFILEDAC
Date: 3/3/2022 2:35 PM
Cathelene Robinson, Clerk

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

MARY NICHOLSON JACKSON,
REACHING OUR SISTERS
EVERYWHERE, INC.,

Plaintiffs,

v.

BRAD RAFFENSPERGER, In His
Individual Capacity,

Defendant.

Civil Action File No. 2018CV306952

FINAL ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT AND GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The above referenced case is currently before the Court on the parties' cross-motions for summary judgment. After hearing oral argument from counsel and consideration of the record, the Court hereby GRANTS Plaintiffs' motion for summary judgment and DENIES Defendants' motion for summary judgment for the reasons set forth below.

Factual and Procedural Background

This case involves a challenge to the Georgia Lactation Consultant Practice Act, set forth at O.C.G.A. § 43-22A-1 *et seq.* ("the Act"), which creates a pathway to license lactation consultants and regulate the profession of lactation care and services in Georgia. Plaintiffs Mary Nicholson Jackson ("Jackson") and Reaching Our Sisters Everywhere ("ROSE") brought this action for declaratory judgment claiming that the Act prevents them from continuing to provide lactation care and services in Georgia in violation of their substantive due process and equal

protection rights under the Georgia Constitution. They ask the Court for an Order declaring the Act unconstitutional. See Plaintiffs' Verified Petition for Declaratory Judgment, Temporary Restraining Order, Interlocutory and Permanent Injunction, and Attorneys' Fees (hereinafter "Complaint").

The Act, which was promulgated by the Georgia General Assembly in 2016, sets forth the following legislative findings as its purpose:

> The General Assembly acknowledges that the application of specific knowledge and skills relating to breastfeeding is important to the health of mothers and babies and acknowledges further that the rendering of sound lactation care and services in hospitals, physician practices, private homes, and other settings requires trained and competent professionals. It is declared, therefore, to be the purpose of this chapter to protect the health, safety, and welfare of the public by providing for the licensure and regulation of the activities of persons engaged in lactation care and services.

O.C.G.A. § 43-22A-2. The Act establishes the minimum standards for providers of "lactation care and services," as defined by the Act,[1] and outlines the State's regulatory authority over the profession. See generally O.C.G.A. § 43-22A-7 (listing minimum standards for licensure).

---

[1] The Act provides the following definition of "lactation care and services":

> "Lactation care and services" means the clinical application of scientific principles and a multidisciplinary body of evidence for evaluation, problem identification, treatment, education, and consultation to childbearing families regarding lactation care and services. Lactation care and services shall include, but not be limited to:
>
> (A) Lactation assessment through the systematic collection of subjective and objective data;
> (B) Analysis of data and creation of a lactation care plan;
> (C) Implementation of a lactation care plan with demonstration and instruction to parents and communication to the primary health care provider;
> (D) Evaluation of outcomes;
> (E) Provision of lactation education to parents and health care providers; and
> (F) The recommendation and use of assistive devices.

O.C.G.A. § 43-22A-3(5).

The minimum requirements to obtain a license under the Act include being certified as an International Board Certified Lactation Consultant ("IBCLC") by an organization known as the International Board of Lactation Consultant Examiners ("IBLCE"). See O.C.G.A. § 43-22A-7. Plaintiff Jackson does not hold the IBCLC credential, but has received certification as a Certified Lactation Counselor ("CLC"). See Complaint, ¶¶ 2, 6. Because she does not meet the minimum qualifications for obtaining a license, Plaintiff Jackson cannot be licensed under the Act. Plaintiff ROSE is a non-profit corporation whose "fundamental purpose is to provide evidence-based breastfeeding education and to ensure that mothers have the support they need to meet their individual breastfeeding goals." Complaint, ¶ 10. ROSE relies on CLCs and other non-IBCLC lactation care providers in fulfilling its mission. ROSE claims that restricting licensure of lactation consultants to only IBCLCs would mean that "virtually all of ROSE's activities will be terminated, drastically reduced, or otherwise altered." Complaint, ¶ 95.

Plaintiffs filed this action on June 25, 2018, against Defendant, the Georgia Secretary of State,[2] as the party charged with enforcing the Act. Defendant moved to dismiss the Complaint on the basis that Plaintiffs failed to state a claim on which relief could be granted as to either their due process or equal protection claims. After a hearing, this Court granted Defendant's motion to dismiss, finding that Plaintiffs had failed to state a substantive due process claim or an

---

[2] This action was initially brought against then-Secretary of State Brian Kemp and members of the Lactation Consultant Advisory Group. The advisory group members were later dismissed and current Secretary of State Brad Raffensperger was substituted for Kemp.

equal protection claim in their Complaint. Plaintiffs appealed to the Georgia Supreme Court, arguing that the trial court erred in dismissing on the basis for failure to state a claim.[3]

The Georgia Supreme Court held that this Court erred in dismissing Plaintiffs' claims and remanded the case, with direction to the trial court to reconsider the motion to dismiss for failure to state a claim. Notably, the Supreme Court did not determine whether the Act is constitutional.[4] Subsequently, Defendant withdrew his Motion to Dismiss in this Court, and discovery commenced. Plaintiffs and Defendant now contend that they are each entitled to summary judgment in their favor.

Standard of Review on Summary Judgment

To prevail at summary judgment under O.C.G.A. § 9-11-56, the moving party must demonstrate that there is no genuine issue of material fact as to each element of its claim and that the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. O.C.G.A. § 9-11-56(c); Lau's Corp., Inc. v. Haskins, 261 Ga. 491 (1991). The party moving for summary judgment has the burden of establishing the nonexistence of any genuine issue of fact, and all doubts must be resolved in favor of the nonmoving party.

[3] Plaintiffs originally brought this action against the Secretary in both his individual and official capacities. Defendant also moved to dismiss the official capacity claim on the basis of sovereign immunity. That motion was granted, and was not appealed. Therefore, the only remaining claims are against the Secretary in his individual capacity. Plaintiffs have argued that their official capacity claim survived because they preserved it on appeal by including it in their notice of appeal. However, the Supreme Court did not address the official capacity claim in its opinion. Therefore, the Court finds that the only pending action is against Defendant in his individual capacity.

[4] While there was some discussion in the appellate briefing of how the rational basis test should be applied to Plaintiffs' Constitutional claims, the Supreme Court offered no guidance on same, and merely stated in a footnote "we leave any such arguments for the trial court to address as necessary on remand." Jackson v. Raffensperger, 308 Ga. 736, n.6 (2020).

Barlow v. Orkin Exterminating Co., 196 Ga. App. 822, 823 (1990). However, once the party moving for summary judgment has made a prima facie case showing that it is entitled to judgment as a matter of law, the burden shifts to the non-moving party, who must then come forward with rebuttal evidence sufficient to show the existence of a genuine issue of material fact. See O.C.G.A. § 9-11-56 (e); Weldon v. Del Taco Corp., 194 Ga. App. 174 (1990).

Conclusions of Law

I. The Court finds that the Act does not violate Plaintiffs' substantive due process rights under the Georgia Constitution.

Plaintiffs first allege that the Act violates a substantive due process right to "pursue a chosen professional calling" by requiring a license which is available only to individuals who are IBCLCs. Complaint, ¶ 141. The Due Process Clause of the Georgia Constitution provides that "[n]o person shall be deprived of life, liberty, or property except by due process of law." Ga. Const. art. I, § I, para. I. The Georgia Supreme Court has confirmed that Georgia's Due Process Clause "entitles Georgians to pursue a lawful occupation of their choosing free from unreasonable government interference." Jackson v. Raffensperger, 308 Ga. 736, 740 (2020). Therefore, this Court must now determine whether the Act actually deprives Plaintiffs of a right to work in a chosen profession and, if so, whether the Act's licensing requirements rise to the level of unreasonable government interference. For the reasons set forth below, this Court concludes that the Act does not deprive all individual from continuing their work under the Act and, even if it did, the Act is not unreasonable because it is rationally related to the protection of Georgia's mothers and babies.

A. The undisputed material facts demonstrate that not all lactation care providers are prohibited from continuing to work under the Act.

The Court finds that the undisputed material facts in the case show that not all lactation care providers are providing care that rises to the statutory definition of "lactation care and services" found at O.C.G.A. § 43-222A-3 (5) ("'Lactation care and services' means the clinical application of scientific principles and a multidisciplinary body of evidence…"). The legislature's choice to include the phrase "clinical application" in its definition of "lactation care and services" means that the type of "lactation care and services" to be provided by a licensed lactation consultant is more than just breastfeeding support, education, or encouragement.

Having conducted a thorough review of the record, the Court has considered the following facts regarding various types of providers in the lactation care and services field. ROSE CEO Dr. Kimarie Bugg testified in her deposition that she considers "lactation care and services" to be a "spectrum" of services with providers falling along a "continuum," and "[t]here are beginning, intermediate, and expert services in care." Deposition of Kimarie Bugg (hereinafter "Bugg Depo."), pp. 22-23, 28. Dr. Bugg also testified as follows regarding the continuum of lactation care providers: "So there are peers, there are mother-to-mother support, there are those who have had, you know, different specific trainings and certifications, and then there are also breastfeeding medicine physicians. So they're -- they all belong on that." Bugg Depo., p. 23. Dr. Bugg defined breastfeeding education as giving knowledge and information to different audiences, including mothers, students, community workers, nurses, physicians, other healthcare providers, social workers, hospital administrative staff, and family members. Bugg Depo., pp. 24, 60-61. Dr. Bugg stated that lactation care and support can include "counseling,

providing education, providing assistance that allows a mother or birthing person to handle common concerns and barriers, and challenges." Bugg Depo., p. 130.

With regard to community-based services, Plaintiffs' witness Tenesha Sellers, who holds both the CLC and IBCLC certification, distinguished between the different types of work provided by different providers as follows:

> "So as a WIC peer counselor, I'm here to give basic breastfeeding information and support, as well as a CLC or a ROSE community transformer, and to know when to yield it. I may not as a peer counselor or a CLC understand why something is happening, but I will know that something is not right." Deposition of Tenesha Sellers (hereinafter "Sellers Depo.," p. 76

Ms. Sellers went on to state that, by comparison, an IBCLC will be able to examine things on a more in-depth basis with a different perspective. Id. Dr. Bugg also notes in her affidavit that most mothers need "community-based affirmation and support to reach their own breastfeeding goals." Affidavit of Kimarie Bugg, filed June 25, 2018, in support of Complaint. Dr. Bugg further testified that she believes that IBCLCs and CLCs "might" fall into a different part of the continuum than other providers with respect to providing lactation services. Bugg Dep., pp. 91–92.

The record further demonstrates that, other than CLCs, some other lactation providers who are not eligible to receive licensure under the Act include the following:

- *Breast Friends*: Breast Friends are similar to La Leche and consist of "just a mom in the neighborhood" who talks to other moms. Deposition of Mary Jackson (hereinafter "Jackson Depo."), p. 113. They are given training about how to support other mothers with

"affirmations." Jackson Depo., p. 114. They receive less training than Community Transformers.

- *Breastfeeding Cafés/Baby Café Volunteers*: Breastfeeding cafes are casual, drop-in peer support groups in places like libraries, churches and health department that are designed to give parents the opportunity to socialize, receive peer support and practice breastfeeding in a public place. Deposition of Amy Smolinski (hereinafter Smolinski Depo., p. 28); Sellers Depo., p. 50; Bugg Depo., pp. 59, 68, Community Transformers, as well as other types of lactation care and services providers, attend breastfeeding cafes. Bugg Depo., pp. 47–48. At a breastfeeding club "everyone is just kind of sitting around discussing their concerns and issue." There is, however, no hands-on contact. Bugg Depo., p. 59.
- *ROSE Community Transformers*: A ROSE Community Transformer is a birthing mother who has successfully breastfed her child for a minimum of six months, and then volunteers to work with mothers within her community. Bugg Depo., p. 47. Community Transformers are like peer counselors in that they provide mother-to-mother breastfeeding education and encouragement; they are "promoters", "advocators," "investors," and "educators." Bugg Depo., pp. 43, 58, 107; Serano Depo., p. 67. Community Transformers are "not getting paid to specifically do clinical care." Bugg Depo., pp. 80–81.
- *WIC Peer Counselors*: Peer counseling is the support and cheerleading and sharing information that someone who has also breastfed shares with another. Aldridge Depo., p. 59.

The Court finds that the Act does not prohibit any provider from continuing to provide breastfeeding counseling, support or encouragement, whether or not for compensation. For

example, doulas and perinatal and childbirth educators may continue to perform "education functions consistent with the accepted standards of their respective occupations" under the Act. O.C.G.A. § 43-22A-13(2). Accordingly, the Court finds that not all of these non-IBCLC and non-CLC providers actually provide the type of lactation care and services that the Act regulates and, thus, they may continue to work under the Act.

B. Even if some providers will no longer be able to work under the Act, the Act does not violate substantive due process because the Act is rationally related to a legitimate government interest.

While the Court finds that not all lactation care providers will be prohibited from continuing to work under the Act, the Court does find that some providers, such as Plaintiff Jackson, may not be able to continue some of their current job duties under the Act. However, reaching such a conclusion does not mean that the Act should automatically be declared unconstitutional. Rather, this Court must now determine whether the Act's minimum qualifications for licensure rise to the level of unreasonable government interference such that this Court is required to overrule the General Assembly's legislative discretion.

In its motion for summary judgment, Defendant describes the level of scrutiny to be applied as the rational basis test, which provides that "a statute does not violate due process in substance as long as it 'bear[s] a rational relationship to a legitimate objective of the government.'" Women's Surgical Ctr., LLC v. Berry, 302 Ga. 349, 354 (2017), quoting Barzey v. City of Cuthbert, 295 Ga. 641, 645 (2014). By contrast, Plaintiffs contend that the Court should apply the "real and substantial" test, which they argue requires the Court to consider "whether a law has a meaningful relationship to its objectives." See Plaintiffs' Response in Opposition to Defendant's Motion for Summary Judgment, p. 16 (citing Rockdale County v.

Mitchell's Used Auto Parts, Inc., 243 Ga. 465, 465 (1979); Ciak v. State, 278 Ga 27, 28 (2004); Love v. State, 271 Ga. 398, 400 (1999); State v. Moore, 259 Ga. 139, 141 (1989); Clark v. Singer, 250 Ga. 470, 472 (1983); Gregory v. Quarles, 172 Ga. 45, 45 (1931)).

Having examined the cases cited by both parties, this Court finds that Georgia courts have consistently applied the rational basis test in cases similar to the one at bar. See e.g. State v. Moore, 259 Ga. 139, 141 (1989) (noting that the Court needed to find a "rational basis for distinction); Ciak v. State, 278 Ga. 27, 28 (2004) (noting that "an equal protection challenge is assessed under the "rational relationship" test); Love v. State, 271 Ga. 398, 400 (1999) (noting review under the "rational relationship" test). Under the rational basis test, a law is upheld if "any plausible or arguable reason" supports the furtherance of a legitimate state purpose. State v. Old S. Amusements, 275 Ga. 274, 278 (2002) (internal citation omitted). "[F]airly debatable questions as to reasonableness, wisdom and propriety are not for the determination of the courts, but for that of the legislative body on which rests the duty and responsibility of the decision." Id.

In this case, the Court finds that the undisputed material facts demonstrate that there are plausible and arguable reasons that the Georgia General Assembly could have relied upon in determining that the State should license lactation consultants who are providing clinical lactation care and services and regulate the provision of clinical lactation care and services. Based upon the record, the Court finds that these reasons may have included any or all of the following:

1) A recognition that there are substantial benefits of breastfeeding for both mothers and infants, together with the fact that some mothers and infants face significant challenges to breastfeeding (see e.g. Strong Aff., ¶¶ 14-16; Bugg Depo., p. 158; Wilson-Phillips Depo.,

pp. 100, 104-105; Jackson Depo., p. 106; Affidavit of Mary Jackson attached to the Complaint, ¶ 16);

2) A need to alleviate confusion about which type of providers offer clinical lactation care and services in an effort to help new mothers evaluate which provider's credentials meet her needs (see e.g. Aldridge Depo., p. 61; Strong Aff., ¶¶ 45, 46);
3) A desire to reduce the risk of harm that mothers and babies may face if they receive unsound care or advice related to lactation (see e.g. Strong Aff., ¶¶ 24, 74; Bugg Depo., pp. 25, 34; Jackson Depo, p. 32; Bugg Depo., p. 34);
4) An acknowledgement that the intimate and confidential nature of lactation care requires some level of regulation (see e.g. Bugg Depo., p. 31; Wilson-Phillips Depo., p. 81; Jackson Depo., pp. 38, 78, 84, 85; Strong Aff., ¶¶ 27, 46; Jackson's Response to First RFA, ¶ 9; ROSE's Response to RFA, ¶ 9);
5) An effort to protect the public from fraud (see generally City of Newnan v. Atlanta Laundries, 174 Ga. 99, 162 (1932)); and/or
6) A general recognition by all parties, including Plaintiffs, that some level of training is necessary before a provider can provide lactation care and services (see Plaintiffs' Brief in Support of Motion for Summary Judgment, p. 24).

In addition, the Court finds that there is evidence in the record that the General Assembly's decision to choose certification as an IBCLC as a minimum standard for licensing was based on plausible and arguable reasons, including the fact that the IBCLC certification is the only certification program that requires an individual to have specific education and training that includes (1) didactic, college-level education in health sciences, (2) 95 hours of lactation

specific education, and (3) somewhere between 300 and 1,000 hours of direct patient care. See Strong Aff., ¶¶ 75–78. Defendant has proposed plausible reasons that each of these components of the IBCLC's education and training are related to the General Assembly's recognition that there are "specific knowledge and skills" related to breastfeeding and that "sound lactation care and services" should be performed by "trained and competent professionals." O.C.G.A. § 43-22A-1. These reasons include the fact that an IBCLC's foundational college-level education in health sciences may allow for the lactation consultant to communicate effectively with other members of the maternal-child health team or to evaluate new and evolving research in the field of breastfeeding and lactation. Strong Aff., ¶¶ 87-88. Defendant notes that the 95-hour requirement for lactation specific education for an IBCLC could have been based on the legislature's desire to ensure that a licensed lactation consultant has ample lactation-specific education.[5] Finally, Defendant suggests that the legislature may have settled on restricting licensure to IBCLCs because the IBCLC is the only lactation care certification that requires an individual to have performed direct patient care before becoming certified.[6]

---

[5] To meet part of the 95-hour lactation specific education requirement, IBCLC candidates can use programs such as Certified Lactation Counselor training course or the Military Lactation Counselor training course. (*See* ¶¶ 117–135; 152–154; *infra*, for description of programs.) Strong Aff., ¶ 39; Cadwell Depo. p. 28; Deposition of Amy Smolinski ("Smolinski Depo."), attached as Exhibit 14, p. 32. By contrast, the CLC training is a week-long, 52-hour course followed by an exam. Cadwell Depo., p. 42; Serano Depo., p. 44. The CLC training is a week-long, 52-hour course followed by an exam. Cadwell Depo., p. 42; Serano Depo., p. 44. There are no prerequisites or minimum requirements required prior to taking the CLC course, including having graduated from high school or having earned a GED. Serano Depo., p. 46; Cadwell Depo., p. 71.

[6] The IBCLC program is the only certification that requires direct patient care hours as a prerequisite to licensure. Cadwell Depo., pp. 61–62; Strong Aff., ¶ 48. Dr. Strong describes the pre-licensure direct patient care as providing the "real world hand-on experience in providing clinical lactation care for lactating mothers and breastfeeding infants" that is the most important training that prepares a provider to provide clinical lactation care. Strong Aff., ¶ 18; Strong Depo., p. 82.

In light of all of the foregoing, this Court finds that the plausible and arguable reasons that the State has advanced in this case are supported in the record and are sufficient to satisfy rational basis review. Therefore, to the extent that the Act may restrict some lactation care providers from providing lactation care and services as defined under the Act, that restriction does not violate substantive due process under the Georgia Constitution.

II. Plaintiffs are entitled to summary judgment on their claim that the Act violates equal protection under the Georgia Constitution.

Plaintiffs next allege that the Act violates the Equal Protection Clause of the Georgia Constitution because "CLCs and other similarly situated unlicensed lactation consultants cannot apply for or be granted a license under the Act without obtaining IBCLC credentials and enduring all of the education and investment that credential requires." Complaint, ¶125. Plaintiffs allege that "[d]istinguishing IBCLCs from CLCs and other non-IBCLC lactation consultants is irrational and lacks any real and substantial relationship to the purposes of the Act." Complaint, ¶ 128. For the following reasons, the Court agrees.

Just as with Plaintiffs' substantive due process claim, the Court finds that this claim is subject to the rational basis analysis because their allegations do not implicate a fundamental right or a suspect class. See Bunn v. State, 291 Ga. 183, 186 (2012) (explaining that "the most lenient level of judicial review – 'rational basis' – applies" to an equal protection claim "if neither a suspect class nor a fundamental right is implicated"). As a threshold matter, in order to state an equal protection claim, Plaintiffs must first establish that they are "similarly situated to members of the class who are treated differently" from them. Harper v. State, 292 Ga, 557, 560

(2013) (citation omitted). If Plaintiffs meet that threshold, the Court then applies the rational basis test to determine whether the Act violates their equal protection rights. See id. The Court considers both issues below.

A. The undisputed material facts in the record demonstrate that the two classes are similarly situated.

When considering this case on a motion to dismiss, the Supreme Court determined that, for purposes of the similarly situated analysis, it was enough for Plaintiffs to allege that the non-IBCLC providers performed the same type of "work" as the IBCLC providers, and that the non-IBCLC providers were equally competent to do so. Jackson v. Raffensperger, 308 Ga. at 742. Now, on summary judgment, this Court must decide whether the undisputed material facts of the case support Plaintiffs' allegations. For the reasons stated below, this Court concludes that the evidence demonstrates that, because the two classes of providers do the same type of work, they are similarly situated for purposes of the equal protection analysis. The Court further finds that the Act treats the two classes of individuals differently in that it recognizes the certification of IBCLCs but not that of CLCs, while both perform the same services.

As the Supreme Court reasoned in this case, it has "consistently treated individuals who perform the same work as being similarly situated for equal protection purposes." Id. at 741. See e.g. Jenkins v. Manry, 216 Ga. 538, 545-546 (1961) (holding that plumbers and steam fitters who were not employees of public utility corporations were in the same class as those following the same vocation who were so employed); Southeastern Electric Co. v. Atlanta, 179 Ga. 514, 514 (1932) (holding that electricians performing work on new structures were in the same class as electricians working on existing structures); Gregory v. Quarles, 172 Ga. 45, 49 (1931) (holding

that plumbers performing original work and plumbers performing repair work were members of the same class).

Based on the testimony and record in this case, the Court finds that all non-IBCLC providers are similarly situated to IBCLC providers because they perform the same type of work. See Jenkins v. Manry, 216 Ga. at 545-546; Southeastern Electric Co. v. Atlanta, 179 Ga. at 514; Gregory v. Quarles, 172 Ga. at 49. With respect to the work performed by Plaintiff ROSE, it is clear that CLCs and other lactation care providers without IBCLC credentials are critical to ROSE's mission to provide lactation care and services to women throughout Georgia. See Pls.' SUMF ¶ 69; Bugg Aff. ¶ 58.[7] Additionally, ROSE attributes its success in helping mothers breastfeed to the fact that Community Transformers and ROSE-employed lactation consultants are able to relate to the lived experience of the women they support. See Pls.' SUMF ¶ 74; Bugg Aff. ¶ 37. Further, many ROSE Community Transformers are paid for lactation care and services that they perform in other roles outside of ROSE. See Pls.' SUMF ¶ 73; Bugg Aff. ¶ 39; Sellers Aff. ¶ 14.

With respect to Plaintiff Jackson, Ms. Jackson is a CLC at Grady Memorial Hospital who has been working as a professional lactation care provider for 31 years. See Pls.' SUMF ¶ 57; Jackson Aff. ¶ 3. As part of her job, Ms. Jackson counsels new mothers about breastfeeding, assesses breastfeeding challenges facing individual mothers and their babies, creates and implements lactation care plans, evaluates breastfeeding outcomes, assists mothers with babies in

---

[7] Defendant disputes this fact in part, contending that "it is unclear whether this statement includes the provision of clinical lactation care and services." Def.'s Resp. Pls.' SUMF ¶ 69. This Court finds that it does, because substantial evidence shows that "clinical lactation care and services" consists of any lactation care and services provided directly to mothers and babies.

the neonatal intensive care with breastfeeding, helps mothers use various tools such as breast pumps, teaches a variety of breastfeeding topics to doctors and nurses, and provides breastfeeding education to medical school students from Morehouse College and Emory School of Medicine. See Pls.' SUMF ¶ 59; Jackson Aff. ¶ 16.

Plaintiffs' expert Dr. Lynette Wilson-Phillips, a pediatrician who specializes in breastfeeding issues, regularly refers mothers with questions about breastfeeding to unlicensed, non-IBCLC lactation care providers, including Plaintiff Mary Jackson. See Pls.' SUMF ¶ 51; Dr. Wilson-Phillips' Aff. Supp. Pls. Mot. Summ. J. ¶¶ 13-14, 20-21. Dr. Wilson-Phillips states that she has referred patients to Mary and ROSE-employed CLCs and wishes to continue to do so in the future. Pls.' SUMF ¶ 51; Wilson-Phillips Aff. ¶¶ 14, 17, 20-22. Dr. Wilson-Phillips further avers that she has never had a negligent referral case brought against her from referring someone to a lactation care provider. Pls.' SUMF ¶ 119; Wilson-Phillips Aff. ¶ 23. Additionally, Defendant's expert Dr. Genae Strong, of the Loewenberg College of Nursing at the University of Memphis, testified that all types of lactation care providers should be paid for their work. See Pls.' SUMF ¶ 54; Strong Dep. 88:21-89:8, 91:15-92:6, 102:14-21. Dr. Karin Cadwell, Executive Director and Lead Faculty of Healthy Children Project's Center for Breastfeeding, states that she does not believe there is any reason why a CLC who is paid for her work would provide less safe or competent lactation care and services than someone who works for free. Pls.' SUMF ¶ 122; Cadwell Aff. ¶ 90. Furthermore, and notably, the Lactation Consultant Advisory Group has never received any complaints about lactation care and services provided by Plaintiffs Jackson or ROSE. See Pls.' SUMF ¶ 77; Flaherty Aff. Ex. 6, Def.'s Resp. Pls.' Third Set of Interrogatories, No. 20.

Considering all of the foregoing evidence, the Court finds that IBCLCs and CLCs with different certifications provide the same lactation care and services, and IBCLCs and CLCs are equally competent to provide lactation care and services to mothers and babies. In view of those findings, the Court cannot conclude that IBCLCs and CLCs who have obtained different credentials are not similarly situated in the relevant respects for the sole reason that the prerequisites for obtaining the various credentials differ. Accordingly, for purposes of the equal protection analysis, the Court finds that CLCs without an IBCLC certification are similarly situated to IBCLCs.

B. Having found that the two classes are similarly situated, the Court finds that the classification at issue is unconstitutional under the rational basis test.

As discussed above (see Part I, infra), the Court finds that Defendant has demonstrated plausible and arguable reasons for the General Assembly's decision to begin licensing lactation consultants and regulating the profession of lactation consulting sufficient to withstand scrutiny under the Due Process Clause. However, in support of their argument that the Act violates the Equal Protection Clause, Plaintiffs argue that the Act's exceptions to licensure found in the Act at O.C.G.A. § 43-22A-13 are sufficient to defeat rational basis review and support a finding that the Act is unconstitutional. This Court agrees for the reasons stated below.

As an initial matter, and as set forth above (see Part II (A), infra), the Court concludes that CLCs and IBCLCs are doing the same work and are equally competent to provide lactation care and services to mothers and babies. As defined by the legislature, the stated purpose of the Act is "to protect the health, safety, and welfare of the public by providing for the licensure and

regulation of the activities of persons engaged in lactation care and services." O.C.G.A. § 43-22A-2. Having found that the non-IBCLCs documented in the record are "engaged in lactation care and services," and doing it safely, the Court finds that the exclusion of CLCs or other licensed and trained professionals is contrary to the Act's stated purpose. In other words, the Court is confronted with two sets of licensed professionals, both performing lactation care and services and doing so safely and competently, and, following implementation of the Act, one group can work while the other cannot. Having reviewed the record and the applicable law, the Court finds that there is no rational reason to treat the two groups differently. This disparity is highlighted by the following exceptions provided in the Act, which permit untrained and/or unlicensed individuals to perform the same work that a licensed and trained professional without an IBCLC certification cannot perform under the Act.

The Volunteer Exception **(O.C.G.A. § 43-22A-13(6)):**

The Act states that it does not prevent individual volunteers from providing lactation care and services, provided that they do not use the title "licensed lactation consultant" or "licensed L.C.," and they perform their services without fee or other form of compensation. O.C.G.A. § 43-22A-13(6). The Court disagrees with Defendant's contention that the volunteer exception is a natural extension of the Act. Rather, the Court finds that it is irrational to classify unlicensed lactation consultants, like CLCs, who wish to provide lactation care and services for pay differently than those who provide lactation care and services for free. Indeed, there is no reason to think that the quality of lactation care and services provided by a CLC or other unlicensed lactation consultant would change based on whether or not the CLC is paid. Thus, the Court

cannot find that the volunteer exception survives the rational basis test, inasmuch as it cannot find "any plausible or arguable reason" that the exception supports the furtherance of a legitimate state purpose. State v. Old S. Amusements, 275 Ga. at 278.

***Government Employees* (O.C.G.A. § 43-22A-13(4) and (5)):**

The Court next finds that Defendant cannot state a plausible or arguable reason for the exception provided for government employees. The government exemption is two-fold. The first cited provision regarding the government employee exception deals with federal employees and exempts them from licensure so long as they are engaging in the practice "within the discharge of the employees' official duties" and when they are performing their duties within the "recognized confines of a federal installation." O.C.G.A. § 43-22A-13(4). The second cited provision is for employees of state, county, or local governments who engage "in the practice of lactation care and services within the discharge of the employees' official duties" and specifically exempts peer counselors who work for the WIC program. O.C.G.A. § 43-22A-13(5). 27. Defendant states that, by exempting these individuals, the Act ensures that women in the WIC program will continue to receive services. However, the record shows that many CLCs, including those employed by ROSE, have multiple jobs. For instance, there are CLCs who are WIC Peer Counselors and who also provide independent breastfeeding care and support for payment, outside of WIC facilities. The fact that those individuals may continue providing breastfeeding care and support as part of their WIC employment, since that profession falls within the government employee exception, but cannot provide identical breastfeeding care and support outside of the WIC office renders the exception as lacking in the furtherance of a legitimate state purpose. See State v. Old S. Amusements, 275 Ga. at 278.

***Other Licensed Individuals* (O.C.G.A. § 43-22A-13(1)):**

Finally, Plaintiffs take issue with the exemption that allows certain other licensed healthcare professionals to engage "in the practice of lactation care and services *when incidental to the practice of their profession*." O.C.G.A. § 43-22A-13(1) (emphasis added). Plaintiffs acknowledge the overlap between licensed lactation consultants and the healthcare professions in this exception. For example, chiropractors' scope of practice includes "the relationship between the musculoskeletal structures of the body, particularly of the spinal column and the nervous system in the restoration and maintenance of help." O.C.G.A. § 43-9-(2). Ms. Sellers identified that there are chiropractors who may be able help babies who may have a "crick" in their necks so that they can better breastfeed; and Plaintiff Jackson testified that there may be some "manipulations" that can assist the mother and baby, and chiropractors may have a reason to treat a breastfeeding mother. Jackson Depo., p. 90; see also Aldridge Depo., p. 54 (a breastfeeding mother's primary care provider can be a chiropractor). This same overlap occurs between dentistry and lactation care and services inasmuch as there are some physical deformities of a baby's mouth, the treatment of which is clearly within the scope of practice of dentistry, that may impede breastfeeding. See O.C.G.A. §§ 43-11-1(6); -47. For example, Plaintiff Jackson noted that a lactation consultant may refer a baby to a dentist if the baby has a short frenulum, a fold of mucus membranes located under the center position of the tongue. Jackson Depo., p. 45; Gober Depo., pp 62–63. Plaintiff Jackson also noted that some dietitians could provide lactation care and services based on their "knowledge and scope of practice." Jackson Depo., pp. 91-92.

Having considered the foregoing evidence, the Court finds that the record indicates that, while osteopaths, dentists, chiropractors, physician assistants, and dieticians may have a limited

role to play in caring for breastfeeding families, they are not equipped to provide the same kind of care as a dedicated lactation care provider such as a CLC. See Pls.' SUMF ¶ 131; Cadwell Aff. ¶ 37. Accordingly, the Court cannot find "any plausible or arguable reason" to exempt the foregoing professions from the licensing requirements of the Act while imposing them upon other non-IBCLC providers. See State v. Old S. Amusements, 275 Ga. at 278.

CONCLUSION

For the foregoing reasons, Defendant's motion for summary judgment is hereby DENIED, and the Plaintiffs' motion for summary judgment is hereby GRANTED.

The Court DECLARES that the Georgia Lactation Consultant Practice Act, O.C.G.A. §§ 43-22A-1 to -13, is unconstitutional on its face and as applied to Plaintiffs because it violates the equal protection guarantees of the Georgia Constitution. Accordingly, the Court hereby PERMANENTLY ENJOINS Defendant, his employees, agents, and officers, and his successors in office from enforcing the Act against Plaintiffs and all others similarly situated.

SO ORDERED, this 3rd day of March, 2022.

Eric K. Dunaway

Honorable Eric K. Dunaway
Judge, Fulton County Superior Court
Atlanta Judicial Circuit

Filed and served electronically via Odyssey eFileGA