IN THE COURT OF COMMON PLEAS
LUCAS COUNTY, OHIO

CAPITAL CARE NETWORK OF TOLEDO	:	Case No. CI201403405
	:	
	:	Judge Myron C. Duhart
Appellant,	:	
	:	
v.	:	
	:	
OHIO DEPARTMENT OF HEALTH	:	
	:	
Appellee.	:	

NOTICE OF SUPPLEMENTAL AUTHORITY

The Department files this notice to advise the Court that in *Preterm-Cleveland, Inc. v. Kasich, et al.,* CV-13-815214 (Cuyahoga Ct. Com. Pl.), cited by Appellants as then pending, judgment has been entered for Defendants and against Plaintiffs based on lack of standing and is now on appeal. A copy of that Order granting summary judgment for Defendants is attached and provides no reason for further delay here. The administrative appeal pending before this Court has been fully briefed and submitted and remains appropriate for decision on the law and the facts of record.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June18, 2015, a true and accurate copy of the foregoing Notice of Supplemental Authority was filed with the Clerk and sent via e- mail and regular mail to the following:

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IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY

FILED

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CLERK OF COURTS
CUYAHOGA COUNTY

PRETERM-CLEVELAND, INC.,	)	
	)	
Plaintiff	)	CASE NO. CV 13 815214
	)	
vs.	)	
	)	
GOVERNOR JOHN R. KASICH, et al.,	)	OPINION AND ORDER

Defendants

CV13815214 89376167

MICHAEL J. RUSSO, JUDGE:

This matter comes before the court upon cross-motions for summary judgment filed on behalf of Plaintiff Preterm-Cleveland, Inc., ("Preterm") and on behalf of the following defendants: Governor John R. Kasich; the State of Ohio; the Ohio Department of Health; Theodore E. Wymslo, M.D; the State Medical Board of Ohio; Anita M. Steinbergh, D.O.; Kris Ramprasad, M.D.; J. Craig Strafford, M.D., M.P.H., F.A.C.O.G.; Mark A. Bechtel, M.D.; Michael L. Gonidakis; Donald R. Kenney, Sr.; Bruce R. Saferin, D.P.M.; Sushil M. Sethi, M.D.,M.P.H., F.A.C.S.; Amol Soin,M.D., M.B.A.; Lance A. Talmage, M.D.; the Ohio Department of Job and Family Services; and Michael B. Colbert (the "State Defendants"). Defendant Cuyahoga County Prosecutor Timothy J. McGinty ("McGinty") has filed a separate motion for partial summary judgment.

Preterm challenges the 2014-2015 Ohio Budget Bill, Am.Sub.H.B.No. 59 ("HB 59"), on the grounds that certain provisions in the bill (i.e., "heartbeat provisions," "written transfer agreement provisions," and "parenting and pregnancy provisions") violate the One-Subject Rule contained in Article II, Section 15(D) of the Ohio Constitution. Preterm seeks a

declaratory judgment that HB 59 is unconstitutional and that these provisions are void and unenforceable. The State Defendants maintain that Preterm lacks standing to challenge the inclusion of these provisions in HB 59, but even if Preterm has standing, the State Defendants further maintain that the provisions in question do not violate the One-Subject Rule. McGinty asserts that since Preterm is not subject to any threat of criminal prosecution under the "written transfer agreement provisions" or "the parenting and pregnancy provisions" of HB 59, then McGinty need not be enjoined from exercising his prosecutorial responsibilities as it relates to those provisions. For the following reasons, the motion of the State Defendants for summary judgment and the motion of McGinty for summary judgment are granted. The motion of Preterm for summary judgment is denied.

RELEVANT FACTS

Preterm is a healthcare facility that provides reproductive health services, including abortion care. (Complaint at ¶2.) Preterm has filed this lawsuit on its own behalf, but no patient or physician has joined in this constitutional challenge to HB 59. Preterm is a state-licensed ambulatory surgical facility ("ASF"), and thus must have a written transfer agreement with a local hospital under preexisting law. (Complaint at 5, Transcript at p. 11.) Preterm has a current written transfer agreement with University Hospitals Cleveland Medical Center, which is not a public hospital. (Requests for Admissions 2 & 3.) Further, Preterm did not receive any of the TANF funds referred to in the challenged "parenting and pregnancy provisions" prior to the passage of HB 59. (Request for Admission 1.) Preterm is not subject to any threat of criminal prosecution from McGinty under the "written transfer agreement provisions" or under the "parenting and pregnancy provisions" of HB 59. (Requests for Admissions 7 & 8.)

LAW & ANALYSIS

As a threshold issue, the Court must determine whether Preterm has standing to bring this constitutional challenge to HB 59. As the Ohio Supreme Court recently reaffirmed, "[b]efore an Ohio Court can consider the merits of a legal claim, the person or entity seeking relief must establish standing to sue." *ProgressOhio.org v. JobsOhio*, 139 Ohio St.3d 520, 2014-Ohio-2382, 13 N.E. 3d 1101, ¶ 7. It is well settled in Ohio that, in order to establish standing to attack the constitutionality of a legislative enactment, a litigant must show it "has suffered or is threatened with direct and concrete injury in a manner or degree different from that suffered by the public in general, that the law in question has caused the injury, and that the relief requested will redress the injury." *Cuyahoga Cty. Bd. of Commrs. v. State*, 112 Ohio St.3d 59, 2006-Ohio-6499, 858 N.E.2d 330, ¶ 22, citing *State ex rel. Ohio Academy of Trial Lawyers v. Sheward*, 86 Ohio St.3d 451, 469-470, 715 N.E.2d 1062 (1999).

In this matter, the court previously considered the issue of standing when all defendants filed motions to dismiss. At that stage of the proceedings, the court's review was limited to the four corners of the complaint. All material allegations were accepted as true and all reasonable inferences were made in favor of Preterm. *High St. Props., L.L.C. v. City of Cleveland*, 8th Dist. Cuyahoga No. 101585, 2015-Ohio-1451, ¶17. Based on the foregoing review, the court made an initial finding that Preterm had standing "because it is threatened with a direct and concrete injury by the enactment of the written transfer agreement provisions, which regulate licensing of an ASF in a restrictive and onerous manner." (Journal Entry of 9/18/14.)

At the summary judgment stage, however, the court is not restricted to information contained in the four corners of the complaint, but is able to consider a wider range of

admissible evidence, including admissions by counsel made at oral hearing on the motions. Thus, in order to establish standing to bring a one-subject challenge to HB 59 and avoid a summary disposition, Preterm must set forth admissible evidence which demonstrates that it has suffered a direct and concrete injury. *Cuyahoga Cty. Bd. of Commrs. v. State, supra,* at ¶25.

HB 59 contains "parenting and pregnancy provisions," which create a new substantive program, the Ohio Parenting and Pregnancy Program ("OPPP"). The purpose of the OPPP is to "[p]romote childbirth, parenting, and alternatives to abortion," and is funded by the TANF (i.e., Temporary Assistance for Needy Families) block grant. With respect to the "parenting and pregnancy provisions," Preterm has admitted that it did not receive any of the TANF funds prior to the passage of HB 59. (Request for Admission 1.) In fact, the complaint does not allege any injury related to the "pregnancy and family provisions." In similar fashion, the affidavit of Heather Harrington, Director of Clinic Operations at Preterm, contains no statement or evidence that Preterm has suffered any direct or concrete injury as a result of these provisions. Preterm simply did not receive any TANF funds prior to the enactment of HB 59, nor has it received any after the enactment. As a result, Preterm lacks standing to challenge the "parenting and pregnancy provisions" which allocate TANF funds because Preterm cannot show it is entitled to any of the TANF monies and thus has not suffered an injury.

HB 59 contains "written transfer agreement provisions" which require each ambulatory surgical facility ("ASF") to have a written transfer agreement with a local hospital for implementation when emergencies occur or medical complications arise. An ASF must file a copy of an updated written transfer agreement every two years, and a public hospital may not enter into a written transfer agreement with an ASF that performs nontherapeutic abortions. With respect to the "written transfer agreement provisions," the evidence before the court is

that Preterm has had a written transfer agreement with a private hospital, University Hospital, since 2005. Preterm was able to secure a new written transfer agreement with University Hospital in 2013, and there is no evidence before the court that this agreement will not be renewed in the future. (Requests for Admissions 2 & 3 and Transcript p.13.) There likewise is no evidence that Preterm has suffered an injury as it relates to the "written transfer agreement provisions," nor any evidence that Preterm is threatened with an injury in the future. As a result, Preterm has failed to establish that it has standing to challenge those provisions.

HB 59 contains "heartbeat provisions" which require physicians who intend to perform or induce abortions to attempt to detect a fetal heartbeat at least twenty-four hours before performing an abortion. If there is a detectable heartbeat, the pregnant woman must be informed of the heartbeat and given the option to view and/or listen to it; in addition, the woman must be told the statistical probability of carrying the pregnancy to term. With respect to the "heartbeat provisions," the only evidence submitted on behalf of Preterm is the affidavit of Heather Harrington, Director of Clinic Operations. In her affidavit, Harrington broadly states that Preterm has been administratively burdened by its increased responsibilities in maintaining patient records that comply with requirements of the heartbeat provisions and that Preterm has had to modify the procedures and protocols it follows in advance of performing an abortion due to the heartbeat provisions. (Affidavit of Heather Harrington at¶ ¶ 10, 12.) The injury asserted by Preterm in this case is distinguishable, however, from the injury determined to be present in *Little Sisters of the Poor v. Sebelius*, 6 F. Supp.3d 1225 (D.Colo. 2013), cited by Preterm. In *Little Sisters*, the party claiming injury was able to point to specific quantifiable costs associated with the new regulations being imposed. For the purposes of standing, an injury is not required to be large or economic, but it must be palpable. See *Aarti Hospitality,LLC, d/b/a*

*Hilton Garden Inn, v. City of Grove City, Ohio,*486 F.Supp.2d 696 (D.Ohio 2007), 6-9. Although Preterm has filed the affidavit of Heather Harrington in support of its position, her affidavit is generally conclusory and fails to demonstrate an injury suffered by Preterm that is monetarily quantifiable or concrete and particularized.

While the "written transfer agreement provisions" are directed to an ASF, the "heartbeat provisions" are directed to a physician that performs or induces the abortion. Nevertheless, Preterm argues that the "heartbeat provisions" subject it to criminal liability and that their physicians are subject to civil suit or criminal liability. Since Preterm has filed suit solely on its own behalf and not on behalf of its physicians or patients, Preterm may not rely on any injury suffered by their physicians or patients to prove standing. In that regard, Preterm has set forth no evidence that it is currently subject to criminal prosecution but relies instead on the possibility it could be subject to criminal prosecution in the future. In order for Preterm to have standing, a real justiciable controversy must exist. It is well settled that courts only have the power to resolve present disputes and controversies; courts do not have the authority to issue advisory opinions to prevent future disputes. "A real, justiciable controversy is a 'genuine dispute between parties having adverse legal interest of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Kuhar v. Medina County Board of Elections,* 9th Dist. Medina No. 06CA0076-M, 2006-Ohio-4527, ¶ 14, citing *Wagner v. Cleveland,* 62 Ohio App.3d 8, 13, 574 N.E.2d 533 (8th Dist. 1988). Also, "[t]he constitutionality of a state statute may not be brought into question by one who is not within the class against whom the operation of the statute is alleged to have been unconstitutionally applied and who has not been injured by its alleged unconstitutional provision." *State of Ohio v. Coburn,* 4th Dist. Ross, No. 08CA3062, 2009-Ohio-632, citing *Palazzi v. Estate of Gardner,* 32 Ohio St.3d 169, 512 N.E.2d

971 (1987), syllabus. This pre-enforcement challenge by Preterm of the "heartbeat provisions" is not permissible because there is no present controversy. In short, Preterm is not currently subject to criminal prosecution because of the heartbeat provisions, and there is nothing before the court indicating that Preterm will be the subject to any future prosecution, or even that prosecution is likely to happen at any indeterminate point in the future. Accordingly, Preterm has failed to prove it has standing to challenge the heartbeat provisions.

McGinty has filed a motion for partial summary judgment which Preterm has not opposed as it relates to the "parenting and pregnancy provisions" and the "written transfer agreement" provisions. (Transcript p. 4.) With respect to the additional claim regarding the heartbeat provisions, since the court has determined that Preterm does not have standing to challenge HB 59, the remaining claim for injunctive relief against McGinty is dismissed as well.

Preterm does not have standing; therefore, the motion for summary judgment of the State Defendants is granted. In similar fashion, summary judgment is granted in favor of McGinty on those claims conceded by Preterm and on the additional claim involving the "heartbeat provisions" upon which Preterm lacks standing to sue. Since Preterm lacks standing to bring this action against any of the defendants, the court does not reach the merits of the constitutional challenge to HB 59.

Date: May 15, 2015

MICHAEL J. RUSSO, JUDGE

Pursuant to Civ.R. 58(B), the Clerk of Courts is directed to serve this judgment in a manner prescribed by Civ.R. 5(B). The Clerk must indicate on the docket the names and addresses of all parties, the method of service, and the costs associated with this service.

CERTIFICATE OF SERVICE

A copy of the foregoing Opinion and Order has been sent by regular U.S. mail this 15th day of May, 2015.

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MICHAEL J. RUSSO, JUDGE