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November 14, 2018

Via EMAIL

Re: Freedom of Information Act Request/Documents pertaining to Acts 1086 and 383

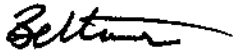
Ms. Laura Shue, Esq.
General Counsel
Arkansas Dept. of Health
4815 W. Markham St.
Little Rock, Arkansas 72205
Email: Laura.Shue@arkansas.gov

Dear Laura:

Respondents submit this Motion to Compel Order that Complies with Arkansas Law.

A hard copy will be mailed to you today.

Cordially,



Bettina E. Brownstein, Counsel for Respondents

BEFORE THE ARKANSAS BOARD OF HEALTH

**IN THE MATTER OF:
ARKANSAS DEPT. OF HEALTH**

PETITIONER

V.

**LITTLE ROCK FAMILY PLANNING SERVICES and
PLANNED PARENTHOOD OF
ARKANSAS AND EASTERN OKLAHOMA dba
PLANNED PARENTHOOD GREAT PLAINS**

RESPONDENTS

Motion to Compel Order that Complies with Arkansas Law

Respondents, pursuant to the Administrative Procedures Act, Ark. Code Ann. §25-15-201 *et seq.*, submit this motion to compel Petitioner to issue a revised order that complies with this Act and Arkansas law.

1. On November 8, 2018, the Arkansas State Board of Health (the “Board”) issued an order in the captioned matter which purports to be a final agency action. Order, p.3.

2. The order recites that it was issued, *inter alia*, under the Arkansas Administrative Procedures Act, A.C.A. §25-15-201 *et. seq.* (the “Act” or the “APA”). However, the order fails to comply with this Act, which requires that “there be findings of fact and conclusions of law separately stated.” §25-15-210. The order does not do this. It merely recites that “after consideration of the agreed facts and questions of law, the Board of Health voted . . . and affirmed the Department’s deficiency findings and its interpretation of the law. The Board of Health agreed with the Department’s written arguments and affirmed the determination that Respondents’ conduct fell with the terms of the statute, Ark. Code Ann. § 20-16-1703 (d).”

3. The order is insufficient to permit judicial review of the Board’s decision to uphold the deficiency citations that are the basis of the administrative appeal. It does not permit a

reviewing court to address and rule on each of the issues raised by Respondents in their administrative appeal.

4. It is well-established that Arkansas law requires the Board to make specific finding on individual issues raised by a respondent in an administrative appeal, including alleged constitutional issues, before a reviewing court will address them. *See Hanks v. Sneed*, 235 S.W. 3d 883, 890, 366 Ark. 371 (Ark. 2006) (citing *Arkansas Contractors Licensing Bd. v. Pegasus Renovation Co.*, 347 Ark. 320 (2001) (An appellant must obtain a ruling from the Board in order to preserve an argument, even a constitutional one, for an appeal from an administrative proceeding.))

3. Petitioners' initial brief raised the following eight, separate points of appeal:

(1) The statute upon which the citations are based, A.C.A. § 20-16-1703(d), as now interpreted by ADH, ("the Payment Ban"), violates the takings clauses of the 5th and 14th Amendments of the U.S. Constitution and Article 2, § 22 of the Arkansas Constitution;

(2) The Payment Ban violates the equal protection clauses of the 5th and 14th Amendments of the U.S. Constitution and Article 2, § 18 of the Arkansas Constitution;

(3) The Payment Ban violates the privacy rights of Respondents' patients, as guaranteed by the U.S. and Arkansas Constitutions;

(4) The Payment Ban violates the Contracts Clause of the U.S. Constitution, Art. 1, § 10.

(5) The Payment Ban constitutes tortious interference with contract in violation of Arkansas common law;

(6) ADH exceeded its authority in issuing the deficiency citations absent a regulation or rule prohibiting this conduct, and, under A.C.A. § 20-7-109(c), its interpretation of the law as prohibiting payment for services provided at a patient's first visit until the lapse of 48 hours interferes with the practice of medicine;

(7) Issuance of the deficiency citations was arbitrary and capricious, as ADH had previously found no violation of law in LRFPS's practice of charging for services provided at the patient's first visit before the lapse of 48 hours; and

(8) Issuance of the deficiency citations was arbitrary and capricious as PPCEO's practice of gathering credit card information at the first visit and then charging patients for services only after a delay of at least 48 hours complies with A.C.A. § 20-16-1703(d).

4. Petitioner, in its response to Respondents' initial brief, responded separately to all of the non-constitutional bases for the appeal (with the exception of number 6, which it did not respond to at all.) However, the order completely fails to respond to any of these separate bases.

5. Respondents intend to raise all the above-enumerated issues on appeal to the circuit court and, under the APA and Arkansas law, are entitled to an order from Petitioner that permits the reviewing court to address and rule on each of these issues.

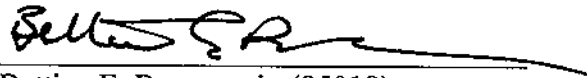
5. Respondents presented facts relevant to each point of appeal via six affidavits. None of these facts were controverted by the Department of Health. Moreover, the department presented no additional facts beyond the five the order characterizes as "Stipulated Facts." However, the order completely ignores the uncontroverted facts presented via Respondents' affidavits.

6. The order labels certain facts "Stipulated Facts." This is incorrect. While Respondents do not contest these facts, they were not stipulated to by Respondents. Moreover, they are incomplete, as there are many additional facts, as contained in the affidavits of Melanie Helsinki, Nathan Johnson, Lori Williams, and Dr. Mick Tilford, that should be considered "stipulated" because they were not disputed by the department. Since they were not controverted by the department, they must be accepted by the Board.

WHEREFORE, Respondents request that this motion be granted and that Petitioner issue a revised order with separately stated conclusions of law and findings of fact that support each conclusion on all eight points of appeal, including the constitutional issues, raised by Respondents in their appeal.

In addition, Respondents renew their request that the deficiency citations contained in the Statements of Deficiencies issued to Respondents be dismissed and that their Motion to Dismiss be granted.*

Respectfully submitted:



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*Respondents are in receipt of notices from Petitioner that it deemed affidavits submitted by Respondents in their administrative appeals to be Plans of Correction of the alleged deficiencies contained in the Statements of Deficiencies that are the subject of their appeal. Respondents do not consider these unilateral actions by Petitioner to constitute any type of agreement by them as to the validity of the deficiency citations at issue nor as any type of waiver of Respondents' challenges to the legality of the citations.