

BEFORE THE MEDICAL LICENSING
BOARD OF INDIANA
CAUSE NUMBER: 2022 MLB 0024

IN THE MATTER OF THE LICENSE OF:)
)
CAITLIN BERNARD, M.D.)
)
LICENSE NO.: 01078719A)



**DR. BERNARD'S RESPONSE IN OPPOSITION TO THE STATE'S
MOTION TO CONTINUE THE MAY HEARING**

Respondent Dr. Caitlin Bernard ("Dr. Bernard"), by counsel, objects to the State's Motion to Continue the May Hearing ("Motion") and asks the Medical Licensing Board (the "Board") to deny the Motion.

The May hearing was set with the agreement of the parties and pursuant to a Board order that included deadlines to accommodate that hearing date. The Board had originally set the hearing on the State's administrative complaint for February 23, 2023, and then moved it pursuant to an agreed motion. Despite the State agreeing to the May hearing date, agreeing to all deadlines to accommodate the May hearing date, and having months to prepare with counsel from both the Attorney General's office and an outside law firm, the State now asks for the Board to continue the Hearing to August 24—six months after its initial setting. The State has gathered evidence, conducted discovery, and made decisions about what discovery and evidence to pursue in the five months since the case was filed. The Parties can be ready for the May Hearing. Any

delay would be harmful to Dr. Bernard who is ready to move forward and have this matter resolved. She is eager to present evidence to respond to the State's claims and clear her name.

For the following reasons, Dr. Bernard respectfully requests that the Board deny the State's motion:

A. The State Agreed to the May 25th Hearing Date and All Case Management Deadlines.

1. The State filed an administrative complaint against Dr. Bernard on November 30, 2022. By Order dated December 28, 2022, the Board set the State's complaint for hearing for February 23, 2023.

2. The Parties jointly moved to continue the February hearing until May 25, 2023. The Parties also jointly requested the Board to adopt their Case Management Order (the "CMO") that set mutually agreed upon deadlines to exchange discovery, exchange witness and exhibit lists, conduct depositions, and complete other pre-hearing tasks.

3. When the Parties worked together to determine the new hearing date and deadlines in the CMO acceptable to both sides, the State requested that the hearing occur on May 25. Counsel for Dr. Bernard explicitly told the State that Dr. Bernard would prefer for the hearing occur on April 27, but agreed to the May hearing date as an accommodation to the State. Counsel for Dr. Bernard said they would object to any continuance of the May 25 hearing.

4. The Board ordered the hearing set for May 25 and entered the CMO setting the dates to coincide with the hearing. The Parties have been moving toward the hearing by serving and responding to written discovery, disclosing witness and exhibit lists, deposing witnesses, and preparing for the pre-hearing conference to address open matters for the hearing.

B. Continuing the Hearing Would Be Harmful to Dr. Bernard and Unnecessary.

5. Dr. Bernard is a practicing physician, assistant professor at the Indiana University School of Medicine, and mother. She vigorously denies that the State's claims against her have any merit.

6. The State already conducted and is conducting discovery related to these charges.

7. The State has devoted substantial resources toward attempting to prove that Dr. Bernard knowingly violated state and federal law (or failed to stay abreast of current professional theory or practice). The State is doing so despite evidence that IU Health determined Dr. Bernard did not violate HIPAA or privacy laws and that she followed IU Health's child abuse reporting policy.

8. When asked about IU Health records documenting that Dr. Bernard reported the ten-year-old child's abuse to a hospital social worker prior to the child's arrival in Indiana, former counsel for the State, Mary Hutchison, testified that she would close the State's investigation into whether Dr. Bernard complied with certain reporting

requirements “[a]s long as the social worker is the appropriate person to report to...I would need to ask, to make sure that is the appropriate person.”¹ Ex. 1, testimony of Mary Hutchison in *Bernard v. Rokita*, No. 49D01-2211-MI-038101, November 21, 2022, 61:3-22. The State then filed its administrative complaint charging Dr. Bernard with knowingly violating the child abuse reporting law less than 10 days later. The State received IU Health’s policy from Dr. Bernard on December 27 and deposed two IU Health witnesses (the social worker who Dr. Bernard reported the abuse to and the Director of Integrated Care Management who was the owner/responsible person for the Child Abuse Reporting Policy). The Director testified IU Health always reports in the state where the alleged abuse occurred. The social worker testified that she was an appropriate person for Dr. Bernard to report to -- in her experience the report is made to the social worker who does an assessment, and it is very standard for the report to the necessary authorities to come from social workers directly. The social worker has never encountered the physician, rather than the social worker, reporting to the necessary authorities.

9. The State is pursuing HIPAA and privacy charges against Dr. Bernard despite knowing IU Health conducted its own internal review of the information that Dr. Bernard confirmed for the IndyStar. IU Health found that “[a]t the time of the interview

¹ Ms. Hutchison gave this testimony on November 21, 2022, prior to the State filing its administrative complaint against Dr. Bernard.

with the Indianapolis Star, the patient was not identifiable. The provider was careful to protect the patient's identity and has not revealed any additional information about the patient since that time." The Risk Assessment concluded that "no protected health information was provided because re-identification was unlikely." The State is pursuing Dr. Bernard for an alleged *knowing* violation of HIPAA even though she cannot have knowingly violated HIPAA in light of IU Health's determination that she did not do so.

10. The evidence already gathered and that can be gathered in the next several weeks is sufficient for the hearing on these issues.

11. Dr. Bernard has done her utmost to cooperate with the State where the Parties can resolve matters informally and bring matters of dispute to the Board.

12. Extending the time that Dr. Bernard must divert away from her patients and students to litigate these charges would be harmful and unwarranted.

C. The State's Decisions and Timing for Discovery Do Not Warrant a Continuance.

13. Dr. Bernard is committed to keeping the May 25th hearing date and working with the State to conduct a thorough hearing.

14. The Parties can address many of the outstanding discovery and witness issues before the May hearing. Notably, these issues are able to be addressed before the hearing, or if not, are issues that State should have pursued several months ago if they believed the discovery was needed:

- a. Dr. Bernard's deposition and follow up on discovery. The State issued a Notice of Deposition to Dr. Bernard on April 6. It learned prior to

the notice that Dr. Bernard would seek a protective order because the deposition is cumulative and duplicative, which Dr. Bernard filed on April 20. Dr. Bernard will refile the motion consistent with the Board's order on April 26. Pending the Board's resolution of the protective order and by agreement of the parties, Dr. Bernard is holding May 9 to sit for her deposition if the Board grants the motion in part or denies the motion. Dr. Bernard's counsel is also available to discuss any concerns the State has with the written discovery responses. The State has not yet raised them with Dr. Bernard's counsel. The State will have ample time to adjust its strategy to account for Dr. Bernard's testimony—if she must give it—prior to May 25.

- b. Deposition of physician colleague. The State learned on November 21, 2022 that Dr. Bernard was speaking to another physician immediately prior to speaking with Rudavsky. The State did not inform Dr. Bernard's counsel until April that they wanted to depose the individual and that they needed the physician's name. Dr. Bernard provided the physician's name on April 21. That physician is represented by counsel and available to be deposed before the May 25 hearing. It is not clear why the State waited so long to request the deposition, but they can take it before the hearing.
- c. Deposition of Reporter - Ms. Rudavsky. The State learned Rudavsky's name and connection to Dr. Bernard prior to filing its administrative complaint. It has had months to notice Rudavsky's deposition and resolve any disputes pertaining to its content. The State's decision to delay doing so is not a basis for a continuance. Dr. Bernard testified under oath in response to questioning from a Deputy Attorney General about this conversation on November 21, 2022.² The State should not be surprised if Rudavsky resists testifying as reporters often decline to testify about stories. If the State believed this deposition was needed, it should have sought it anytime in December, January, February, or March.
- d. Additional depositions. The Parties have scheduled the deposition of an Ohio social worker, and Dr. Bernard's counsel has offered May 3 as a date for Dr. Bernard's expert deposition. Counsel also requested

² Dr. Bernard testified about her conversation with Rudavsky and the events leading up to it during the preliminary injunction hearing for *Bernard v. Rokita*, No. 4 9D01-2211-MI-038101.

dates the weeks of May 1 and May 14 to conduct the remaining expert depositions.

- e. IU Health's Conclusion of No Privacy Law Violation. The State has known that IU Health issued a press release announcing that it had "conducted an investigation" and "found Dr. Bernard in compliance with privacy laws," at the very latest, since December 27, 2022, when Dr. Bernard attached the press release as an exhibit to her Redacted Answer.³ At that time, Dr. Bernard made clear that she did not knowingly violate privacy laws because she did not knowingly share individually identifiable/confidential information. Her hospital, IU Health, conducted an investigation and concluded she did not share individually identifiable information. The State has had months to serve discovery to obtain this privacy report and information pertaining to it from Dr. Bernard or IU Health. In fact, the State chose never to ask Dr. Bernard for any documents. The State's delay of more than three months should not be grounds to request a continuance at this late date.

15. The State is represented by four attorneys in its prosecution of Dr. Bernard's medical license. Two of them—Gene Scherr and Christopher Bartolomucci—are outside counsel from a firm in Washington D.C. The State has and has had the resources to handle this case as they chose from the outset.

16. If some of the discovery the State now says it wants to pursue cannot be addressed, the State had ample time to obtain that discovery and gather evidence. For example, the State says it is "considering disclosing an expert" (Motion, p. 3) but the deadline for final witness lists is April 25. It is not clear why the State would not have

³ IU Health issued this press release on July 15, 2022. The State presumably learned of it during its investigation of the consumer complaints against Dr. Bernard prior to filing the administrative complaint against her.

retained an expert—if the State believed it needed one—given the stage of the case and the deadlines. The State’s decisions not to seek witnesses or discovery earlier should not provide a basis for a continuance now.

D. Conclusion

17. The State’s attorneys made decisions about the information they wanted to obtain and present before the Board in the almost five months since they filed the Administrative Complaint. The Parties can be ready for the hearing on May 25. To provide the State with additional time to seek discovery it chose not to seek earlier would be unfair to Dr. Bernard. On balance, Dr. Bernard requests the Board determine the hearing should go forward on May 25 and deny the State’s Motion.

18. If the Board grants the Motion, Dr. Bernard requests that the Board not reopen written discovery as that deadline closed in February. Further, if the Board continues the hearing, Dr. Bernard requests that it be set on August 25 as her legal team has conflicts with the Board dates in June and July.

WHEREFORE Dr. Bernard respectfully requests that the Board DENY the State’s Motion for Continuance and grant all other just and proper relief.

Respectfully submitted,

/s/ Alice M. Morical

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been filed and served upon the following counsel, via email, this 25th day of April, 2023:

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/s/ Alice M. Morical

PLAINTIFF WITNESS - MARY HUTCHISON (DIRECT)

have.

Q And the document confirms that Dr. Bernard consulted the social worker on June 27, 2022, which you know from the Ohio transcript that we reviewed a few minutes ago, is before the patient ever came to Indiana, correct?

A Yes.

Q So, would you agree with me that Dr. Bernard timely reported to the social worker at the hospital about this patient?

A To the social worker at the hospital, yes.

Q So, is it fair to say, you're going to close that component of your investigation now?

A On whether or not that very specific whether or not she reported to someone within the hospital?

Q Yes.

A As long as the social worker is the appropriate person to report to. I will need to ask the hospital that question. That would not require records. But I would need to ask, to make sure that is the appropriate person.

Q And you haven't asked that question yet, in the five months you've been investigating?

A I have not asked.

MR. CRAFT: Your Honor, I'd like to object here. This case - the Plaintiffs are trying to seek a preliminary injunction

EXHIBIT

1

BEFORE THE MEDICAL LICENSING
BOARD OF INDIANA
CAUSE NUMBER: 2022 MLB 0024

IN THE MATTER OF THE LICENSE OF:)
)
CAITLIN BERNARD, M.D.)
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LICENSE NO.: 01078719A)



**DR. BERNARD'S AMENDED MOTION FOR PROTECTIVE ORDER
TO PREVENT OR LIMIT HER DEPOSITION**

Respondent Dr. Caitlin Bernard ("Dr. Bernard"), by counsel, pursuant to Rules 28(F) and 26(C) of the Indiana Rules of Trial Procedure, respectfully moves the Medical Licensing Board (the "Board") for a protective order with respect to the Notice of Deposition (and Subpoena) issued by Petitioner the State of Indiana (the "State").

By this Motion, Dr. Bernard seeks to prevent or limit her deposition because she has been questioned under oath by the Office of Attorney General twice on the issues that are the subject of this proceeding, and she has responded to discovery and provided a declaration. As such, any further deposition would be cumulative, duplicative and an undue burden.

This Amended Motion includes an express Rule 26(F) statement, fact stipulations, and facts from testimony and discovery all in response to the Board's April 24, 2023, order denying the Motion for Protective Order. The 26(F) statement discusses the efforts counsel undertook to reach agreement with the State regarding the

deposition. Also consistent with that Order, counsel worked with the State to stipulate to facts that have been established by prior testimony or discovery responses. Those stipulations are included as are facts Dr. Bernard believes are established by testimony or discovery responses but that the State did not stipulate to. In support of this motion, Dr. Bernard states the following:

Standard

1. Ind. R. Trial P. 28(F) states that “[w]henever an adjudicatory hearing...is held by or before an administrative agency, any party to that adjudicatory hearing shall be entitled to use the discovery provisions of Rules 26 through 37 of the Indiana Rules of Trial Procedure,” and further states that “[p]rotective and other orders shall be obtained first from the administrative agency[.]”

2. Ind. R. Trial P. 26(C) allows the Board to issue a protective order limiting the scope of discovery if the “discovery sought is unreasonably cumulative or duplicative[.]”

3. On a motion establishing “good cause,” the Board may limit or prevent a deposition “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” *Nat’l Collegiate Athletic Ass’n v. Finnerty*, 191 N.E.3d 211, 219 (Ind. 2022), citing Ind. R. Trial P. 26(C).

Argument

4. On April 6, 2023, counsel for the State issued a Notice of Deposition (the “Notice”) setting Dr. Bernard’s deposition on April 21, 2023, at 10 a.m., “to continue from day to day until completed.” A copy of the Notice directed to Dr. Bernard is attached as Exhibit A.¹ Counsel for the State said the deposition would be set for the entire day.

5. Counsel for Dr. Bernard has complied with Ind. R. Civ. P. 26(F) and attempted to resolve the Parties’ dispute over Dr. Bernard’s deposition prior to filing this Amended Motion for Protective Order. Even before the State issued the Notice, on April 5, counsel for Dr. Bernard and the State had a phone conversation to discuss, among other topics, Dr. Bernard’s deposition. Counsel for Dr. Bernard informed counsel for the State that they did not think the deposition was necessary given all Dr. Bernard’s prior testimony when questioned by the Office of Attorney General and Dr. Bernard’s discovery responses. Counsel discussed the plan so that the motion for protective order could be presented to the Board and the deposition could occur before the hearing, if ordered. After the State issued the Notice, its counsel emailed counsel for Dr. Bernard regarding the deposition, and counsel for both sides discussed the deposition during phone conversations on April 10 and April 17.

¹ The State also served a Subpoena Duces Tecum for the deposition. The Parties agree consideration of the Subpoena is also deferred based on this Motion.

6. On April 24, in response to an email from Dr. Bernard's counsel, the State indicated via email that it had not changed its position with regard to Dr. Bernard's deposition and protective order.

7. Good cause exists to prohibit the State from taking Dr. Bernard's deposition in this action, or at the very least, to significantly limit the time of Dr. Bernard's deposition since Dr. Bernard has already testified on multiple occasions and produced discovery responses on these issues.

8. Dr. Bernard has already provided the State with sworn testimony and sworn written statements on the topics at issue in this licensing litigation—Dr. Bernard's handling of reporting of child abuse and Dr. Bernard's conversation with the IndyStar reporter:

- a. The State deposed Dr. Bernard on November 17, 2022, in *Bernard v. Rokita*, Cause No. 49D13-2211-MI-038101.² The State questioned Dr. Bernard on subjects including (i) Dr. Bernard's statements in the IndyStar's article, *Patients head to Indiana for abortion services as other states restrict care*, published July 1, 2022 (the "IndyStar Article"); (ii) Dr. Bernard's understanding of child abuse reporting requirements and HIPAA; (iii) the consumer complaints cited in the State's Administrative Complaint, filed November 30, 2022 (the "consumer complaints"); (iv) Attorney General Todd Rokita's public statements about the State's investigation of Dr. Bernard ("AG Rokita's statements"); and (v) the terminated pregnancy report documenting an abortion for a ten-year-old child and performed by Dr. Bernard (the "TPR");

² In that action, Dr. Bernard sought to enjoin Attorney General Rokita and the State from continuing its investigation pursuant to the consumer complaints filed against Dr. Bernard in the wake of the IndyStar Article, the same complaints that the State cites in the Administrative Complaint that initiated this licensing litigation.

- b. Dr. Bernard testified under oath during the preliminary injunction hearing in *Bernard v. Rokita*, and gave testimony on subjects including (i) her compliance with Indiana's laws on mandatory child abuse reporting; (ii) her compliance with HIPAA; (iii) her conversation with the reporter who authored the IndyStar article; (iv) non-confidential information about her care of the ten-year-old child; (v) the coordination between Dr. Bernard, her team, and Ohio law enforcement; and (vi) the TPR.
- c. Dr. Bernard provided a sworn declaration in *Bernard v. Rokita*, in which she gave information about subjects including the (i) the consumer complaints; (ii) AG Rokita's statements, and (iii) the TPR.
- d. Dr. Bernard has also provided the State with responses to interrogatories and requests for admission served in this action. Dr. Bernard has replied to the State's interrogatories that included, among other questions, the following:
 - i. Since obtaining her Indiana License, describe in detail every training that Dr. Bernard has received regarding reporting requirements for child abuse, including the date, location, and length of each training.
 - ii. Describe in detail how Dr. Bernard came to learn that the abuse of the ten-year-old child had been reported and was being investigated by any government or law enforcement authorities in Ohio, including the person(s) who told Dr. Bernard this information, the date and length of any such communication, and any efforts Dr. Bernard took to confirm the accuracy of this information.
 - iii. Describe in detail every communication with a person working in law enforcement in Indiana or Ohio that Dr. Bernard had regarding the ten-year-old child, including the date, time, and length of each conversation.
 - iv. Since Dr. Bernard obtained her Indiana License, describe in detail Dr. Bernard's practice and experience reporting child abuse when the abuse took place out of state, including how many out-of-state patients Dr. Bernard has seen or treated under the age of 18 and whether Dr. Bernard reported the abuse to the out-of-state or Indiana authorities.

- v. Since Dr. Bernard obtained her medical degree, describe in detail each training she has received regarding HIPAA or patient privacy. For each training, state the date, location, and length of each training.
- vi. Describe any investigation of Dr. Bernard's professional conduct by IU Health or any other entity and the results of each investigation.

Dr. Bernard has replied to the State's requests for admission that included, among other requests, the following:

- i. Admit that Dr. Bernard is responsible for knowing, understanding, and following the laws for reporting suspected child abuse.
- ii. Admit that Dr. Bernard had no personal contact with DCS in Indiana regarding the ten-year-old child prior to submitting the TPR on July 2, 2022.
- iii. Admit that Dr. Bernard never contacted law enforcement in Ohio about the ten-year-old child.
- iv. Admit that Dr. Bernard never contacted law enforcement in Indiana any time prior to July 1, 2022, regarding the ten-year-old child.
- v. Admit that Dr. Bernard is responsible for knowing, understanding, and following HIPAA regulations.
- vi. Admit that Dr. Bernard is responsible for knowing, understanding, and following Indiana laws and regulations relating to patient privacy.
- vii. Admit that IU Health provides training to its staff, including Dr. Bernard, regarding its Privacy Practices.
- viii. Admit that Dr. Bernard spoke to a reporter from the Indianapolis Star on June 29, 2022, about the ten-year-old child's pregnancy.

9. Dr. Bernard and the State have agreed to stipulate to the following facts, all drawn from her prior testimony and discovery, as referenced above:

- i. Dr. Bernard is an OB-GYN and is licensed to practice medicine in Indiana. (PI Testimony 132:21-133:2; Responses to Requests for Admission No. 1)
- ii. Dr. Bernard is employed by Indiana University Health Physicians and Indiana University School of Medicine. (PI Testimony 133:3-4; Responses to Requests for Admission No. 2)
- iii. Dr. Bernard is a Practitioner as that term is defined under Ind. Code § 25-1-9-2. (Responses to Requests for Admission No. 3)
- iv. Dr. Bernard is responsible for knowing, understanding, and following the laws for reporting suspected child abuse, including Ind. Code §§ 31-33-5-2.5 and 31-33-5-3 and she has always followed the law on reporting child abuse consistent with IU Health's policies and interpretation of those reporting laws. (Responses to Requests for Admission No. 13)

Background

- v. Dr. Bernard received a call from an Ohio physician on June 27, 2022, regarding a ten-year-old child who was pregnant. (Responses to Requests for Admission No. 5; PI Testimony, 148:17-18, 149:8-15)
- vi. Dr. Bernard talked with the patient's mother and Dr. Bernard's nurse scheduled the appointment with the hospital. (Responses to Requests for Admission No. 6)
- vii. The abortion was provided on June 30, 2022. (PI Testimony, 165:6-8)
- viii. Members of IU Health's legal department were staffed on the ten-year-old child's case. (Answers to Interrogatory No. 19)

- ix. Dr. Bernard filed a Terminated Pregnancy Report within the legal time requirement documenting that she performed an abortion for a ten-year-old child. (PI Testimony 133:5-19)

Child Abuse Reporting

- x. Dr. Bernard knew on June 27, 2022, that the abuse of the ten-year-old child had already been reported to Ohio child services and law enforcement agencies. (Responses to Requests for Admission No. 14; PI Testimony, 183:17-184:8)
- xi. Dr. Bernard immediately called IU Health's social work team when she learned of the abuse. (PI Testimony, 184:9-19)
- xii. Dr. Bernard is a mandatory reporter. (PI Testimony, 168:24-169:5, 174:16-18)
- xiii. Dr. Bernard's understanding is that it is not necessary to report child abuse to DCS if the incident has already been reported. (PI Testimony, 174:19-24)
- xiv. Dr. Bernard learned from the social worker providing services to the ten-year-old child that the social worker had confirmed with Franklin County Child Services ("FCCS") on June 28, 2022, that it had received a report of the ten-year-old child's abuse. The social worker also filed her own report of the ten-year-old child's abuse with FCCS. (Answers to Interrogatory No. 7)
- xv. On June 30, 2022, FCCS informed the social worker that her report of the child's abuse had been screened out because it was duplicative of the earlier report. Dr. Bernard also submitted the TPR to DCS. (Answers to Interrogatory No. 8)
- xvi. Dr. Bernard and her team provided full cooperation with Ohio authorities. (PI Testimony, 186:24-187:2)

The IndyStar Story

- xvii. After her workday on June 29, 2022, Dr. Bernard attended a rally on access to abortion care. (PI Testimony, 144:17-19)

- xviii. At the rally, Dr. Bernard spoke with another physician about the public health emergency they were facing due to multiple abortion bans coming down in other states. They discussed how concerned they were regarding the types of patients that they knew would be harmed by those laws and the clinical scenarios in which they and other doctors might need to take care of those patients in Indiana. (PI Testimony, 145:2-8)
- xix. As an example of what Dr. Bernard and her colleague were discussing, Dr. Bernard told the colleague that she had recently received a referral of a patient from a child abuse doctor in Ohio.³ (PI Testimony, 145:8-11)
- xx. Ms. Shari Rudavsky overheard the conversation and asked Dr. Bernard to confirm what she had said. (PI Testimony, 145:11-14)
- xxi. Dr. Bernard said she received the referral “just that week,” and did not state a precise day of the week. (PI Testimony, 148:13-16)
- xxii. Dr. Bernard confirmed that the child was 10 years old. (PI Testimony, 149:8-10)
- xxiii. Dr. Bernard discussed that the child was “just over the limit in Ohio,” which the reporter understood to be 6 weeks. (PI Testimony, 149:13-15)
- xxiv. Dr. Bernard testified that the reporter understood that the child was coming to Indiana to be taken care of by her medical team. (PI Testimony, 153:2-6)
- xxv. The reporter and Dr. Bernard did discuss that the child had been sexually abused because that is the only way a 10-year-old child can become pregnant. (PI Testimony, 153:16-22)
- xxvi. Dr. Bernard had not yet had her initial consultation with the child at the time that she confirmed information for the reporter. (PI Testimony, 153:7-10)

³ The State states that by stipulating to facts 19 - 33 it is not agreeing to waive cross examination on these facts.

- xxvii. Since Dr. Bernard hadn't yet had her initial consultation with the child at the time of her consultation, the child wouldn't have yet signed any consents. (PI Testimony, 163:24-164:12)
- xxviii. Dr. Bernard didn't personally oversee the child signing the consent forms. (PI Testimony, 159:18-22)
- xxix. Dr. Bernard understood the article's purpose was to share the impact of abortion bans and the fact that people would begin to have to travel for abortion services to Indiana and nearby states. (PI Testimony, 155:11-13)
- xxx. When Dr. Bernard has given interviews or spoken to the media, the contents relate to her expertise as a physician who is handling and managing the public health emergency that exists due to abortion bans in nearby states. (PI Testimony, 186:8-11)
- xxxi. After confirming information for the IndyStar reporter on June 29, 2022, Dr. Bernard has not communicated with any media outlet regarding the ten-year-old child. (Answers to Interrogatory No. 20)
- xxxii. IU Health issued the following press release regarding its investigation into Dr. Bernard's professional conduct:

As part of IU Health's commitment to patient privacy and compliance with privacy laws, IU Health routinely initiates reviews, including the matters in the news concerning Dr. Caitlin Bernard. Pursuant to its policy, IU Health conducted an investigation with the full cooperation of Dr. Bernard and other IU Health team members. IU Health's investigation found Dr. Bernard in compliance with privacy laws.

IU Health based this statement on the results of its internal Risk Assessment conducted to determine whether the information about the ten-year-old child that appeared in the Indy Star compromised the patient's protected health information. The Risk Assessment found that "[a]t the time of the interview with the Indianapolis Star, the patient was not identifiable. The provider was careful to protect the patient's identity and has not revealed any additional information about the patient since that time." The Risk

Assessment concluded that “no protected health information was provided because re-identification was unlikely.” (Answers to Interrogatory No. 22)

- xxxiii. Dr. Bernard believes that she complied with Indiana’s mandatory child abuse reporting law, HIPAA, and Indiana’s patient privacy law. (PI Testimony, 139:9-16)

10. Dr. Bernard has also provided the following testimony or discovery responses, but the State did not agree to stipulate to these facts:⁴

- i. Dr. Bernard is responsible for knowing, understanding, and following HIPAA regulations (Responses to Requests for Admission No. 17)
- ii. Dr. Bernard is responsible for knowing, understanding, and following Indiana laws and regulations relating to patient privacy (Responses to Requests for Admission No. 18)
- iii. Dr. Bernard participated in and passed training on mandatory reporting of child abuse and neglect provided through Planned Parenthood Great Northwest, Hawai’I, Alaska, Indiana, Kentucky on the following dates:
 - July 28, 2022
 - September 7, 2021
 - July 31, 2020
 - September 6, 2019
 - November 18, 2018

The training takes place annually online. The training informs participants about Indiana’s mandatory child abuse reporting requirements and the laws relevant to discharging that duty. (Answers to Interrogatory No. 6)

⁴ If the Board permits the State to take Dr. Bernard’s deposition and allows the State to ask questions to which Dr. Bernard has already provided an answer, Dr. Bernard’s responses will be consistent with these facts. Subjecting Dr. Bernard to further questioning on these topics will not, therefore, provide the State with new information.

- iv. It is a routine part of medical education, training, research and innovation to share patient cases in a de-identified manner. (Responses to Requests for Admission No. 20)
- v. IU Health posts a Notice of Privacy Practices in its facilities. (Responses to Requests for Admission No. 22)
- vi. IU Health provides training to its staff regarding its Privacy Practices. (Responses to Requests for Admission No. 24)
- vii. Since becoming employed by IU Health Physicians in 2017, Dr. Bernard has received training on patient privacy and HIPAA on four occasions. Dr. Bernard received online training through IU Health on HIPAA on the following dates:

- June 8, 2022
- November 28, 2021
- November 18, 2018
- August 24, 2017

Since obtaining her license to practice in Indiana, Dr. Bernard has received training on HIPAA and patient privacy lasting approximately 30 minutes from Planned Parenthood Great Northwest, Hawai'I, Alaska, Indiana, Kentucky on the following dates:

- September 25, 2022
- September 7, 2021
- September 10, 2020
- January 31, 2020
- November 13, 2019
- March 21, 2018
- March 15, 2018

(Answers to Interrogatory No. 12)

- viii. The Ohio physician and law enforcement officials were in the same room when Dr. Bernard learned about the 10-year-old. (PI Testimony, 184:3-8)

- ix. Dr. Bernard knew that Ohio child services and law enforcement were actively investigating the matter with open cases. (Responses to Requests for Admission No. 14; PI Testimony, 183:17-184:8)
- x. Dr. Bernard spoke with the patient's mother and coordinated with members of IU Health's social work staff to ensure that if the child arrived in Indianapolis for care she would have the services necessary to support her while she received medical care. (Responses to Requests for Admission No. 7)
- xi. Dr. Bernard did not see the child until June 30, 2022. (Responses to Requests for Admission No. 7)
- xii. Dr. Bernard used an interpreter with the ten-year-old child and her parent. (Responses to Requests for Admission No. 34)
- xiii. Consistent with IU Health's policy on Child Abuse and Neglect, Dr. Bernard did not personally contact Indiana Department of Child Services prior to submitting the TPR on July 2, 2022, because under IU Health's Child Abuse and Neglect policy, Dr. Bernard discharged her duty to report the ten-year-old child's abuse when she reported the abuse to the assigned IU Health social worker on June 27, 2022. (Responses to Requests for Admission No. 14)
- xiv. Dr. Bernard states the documents produced by IU Health to the State contain information confirming that Dr. Bernard and her team fully complied with Indiana's laws and IU Health's policies on reporting child abuse. (Answers to Interrogatory No. 7)
- xv. The social worker handled the communications with FCCS in compliance with IU Health's policy on Child Abuse and Neglect, which states that the social worker will process reports of child abuse and neglect. (Answers to Interrogatory No. 8)

11. The State's claims against Dr. Bernard pertain to two broad categories of alleged misconduct: that she violated patient confidentiality laws and Indiana's mandatory child abuse reporting laws. Dr. Bernard has, as shown above, already

testified under oath on both of these topics and other tangentially related subjects.

There are no topics relevant to this licensing litigation on which Dr. Bernard has not provided a sworn statement or testimony. Certainly, a deposition that imposes no limits on topics or time is guaranteed to duplicate the questions to which Dr. Bernard has already provided sworn answers on multiple occasions.

12. Indeed, the State intends for Dr. Bernard's deposition to last an entire day despite the existing record of Dr. Bernard's sworn testimony on the topics at issue in this action.

13. In contrast to the entire day that the State claims is necessary for Dr. Bernard's deposition, the State needed only one hour to depose other key fact witnesses, including Dr. Amy Caldwell, IU Health social worker Stephanie Shook, and IU Health's Director of Integrated Care Management, Cheryl Ramey-Hunt, and has requested only one hour to depose IndyStar reporter Shari Rudavsky. The State has not previously questioned Ms. Shook, Ms. Ramey-Hunt, or Ms. Rudavsky under oath. If the State is able to obtain the information it requires from these witnesses within an hour, it certainly does not need an entire day with Dr. Bernard when she has already provided sworn testimony on all relevant topics. The State's disparate requests underscore that its deposition of Dr. Bernard is excessive and unduly burdensome.

14. The State's proposed, unrestricted deposition would keep Dr. Bernard away from her patients and her students to ask her questions to which she has already

given an answer. This is the epitome of duplicative and oppressive discovery from which Ind. R. Trial P. should save a deponent.⁵

Conclusion

15. Good cause exists for the Board to grant Dr. Bernard's motion for protective order: the State should not require her to take hours away—"from day to day"—from her professional obligations as a practicing physician and assistant professor to give cumulative and duplicative testimony.

WHEREFORE Dr. Bernard respectfully requests that the Board enter a protective order and quash or, in the alternative, limit the deposition to one hour.

Respectfully submitted,

/s/ Alice M. Morical

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⁵ By agreement of the parties, Dr. Bernard's motion for protective order can be heard or decided at the April 27 pre-hearing conference or as soon thereafter as convenient. The parties have agreed that if the Motion is granted in part to limit the time of the deposition or denied, they will schedule the deposition before the May 25 hearing.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been filed and served upon the following counsel, via email this 26th day of April, 2023:

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Cory Voight
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Indiana Office of the Attorney General
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/s/ Alice M. Morical

**MEDICAL LICENSING BOARD
OF INDIANA
CAUSE NUMBER: 2022 MLB 0024**

IN THE MATTER OF THE LICENSE OF:

CAITLIN BERNARD, M.D.

LICENSE NO.: 01078719A

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**RESPONSE IN OPPOSITION TO RESPONDENT'S MOTION
FOR PROTECTIVE ORDER TO PREVENT OR LIMIT HER DEPOSITION**

Petitioner, by counsel, submits this Response in Opposition to Respondent's Motion¹ for Protective Order to Prevent or Limit Her Deposition and request the Board deny the motion.

I. INTRODUCTION

Respondent seeks to limit or prevent the State from deposing her in furtherance of presenting its case to the Board. This motion follows Respondent's prior successful attempts to substantially limit her testimony in the lawsuit she filed seeking to thwart an investigation into her conduct, *see Bernard v. Rokita*, Case no. 49D01-2211-MI-038101. In that matter, Respondent objected over thirty (30) times respectively in both her time and topic constrained deposition and at hearing resulting in her not answering a multitude of questions.² Needless to say, that matter concerned the propriety of the Attorney General's investigation³ into her conduct. This matter concerns the actual conduct at issue—divulging patient information to a reporter and failing to immediately report to Indiana authorities to provide them an opportunity to intervene before the child returned to Ohio.

¹ Respondent first motion was denied for failing to cite attempts to reach agreement with Petitioner before filing the motion. This response is in opposition to the renewed motion for protective order.

² These facts are conspicuously absent from Plaintiff's motion.

³ Respondent ultimately dismissed her lawsuit after the hearing.

Nevertheless, Respondent has failed to show good cause for such severe action of precluding her deposition in this matter. She does not make a showing as she must that the deposition will lead to unnecessary annoyance, embarrassment, oppression, or undue burden or expense. And she has otherwise failed to submit the prior testimony, so that the Board may consider her request in the context of the testimony she contends has been provided to the State. Respondent's continued attempt to preclude or limit her deposition deprives the Petitioner and ultimately, the Board of the full picture of her conduct at issue. As the regulating body charged with overseeing the licensure of physicians within the State, such an outcome is untenable. Moreover, given the vigorous advocacy to shield Respondent from providing testimony in the prior proceeding, the assertion that the requested deposition is cumulative is false. The Petitioner and the Board⁴ should not be limited to relying on a declaration—not subject to cross-examination—and on testimony that was vastly constricted in scope and where a multitude of questions were not answered due to Dr. Bernard's counsel's objections. Respondent's motion must be denied.

Respondent's Erroneous Representation

Also, for purposes of deciding the motion Respondent erroneously indicated in its re-filed motion, today, that Petitioner agreed to over thirty (30) of forty-five (45) proposed stipulations. At best Petitioner was willing to agree to thirteen stipulations with modification. These were included correctly in Respondent's motion. However, Petitioner in no manner came to agreement on stipulations and in fact indicated by email that Petitioner could not agree with

⁴ The Board's consideration of deposition testimony is implicated to the extent the testimony is utilized in prehearing motion practice, to the extent it is utilized for streamlining presentation at hearing, and to the extent it is utilized for impeachment purposes.

most⁵. (Email and Draft with Comments, Exhibit E, “Most of these we cannot stipulate too (sic) for the reasons I have expressed in comments.”) Respondent did not respond to Petitioner’s email and merely filed her motion. Comments in the stipulation draft were sent to opposing counsel as a part of the Petitioner’s email and most specifically included as to the ‘IndyStar Story’ facts that undersigned could not agree to the extent the stipulations would be used to preclude cross-examination of these facts—yet this is precisely what Respondent seeks to do by moving for the protective order and placing these facts before the Board as stipulated facts. In any event, for reasons explained in this response, Respondent should not be afforded the extraordinary relief she requests.

II. STANDARD

The utility of a deposition for parties involved in a matter cannot be understated. “Depositions in Indiana are governed by trial rules, which are meant to facilitate liberal discovery.” *National Collegiate Athletic Association v. Finnerty*, 191 N.E.3d 211, (Ind. Sup. Ct. 2022). “Depositions afford parties the opportunity to explore the strengths and weaknesses of their case, obtain witnesses who may be unavailable for trial, and unearth facts that can enable settlement or support pretrial motions. *Id.* (citation omitted).

A party may seek to limit or preclude a deposition by seeking protection under Indiana Rules of Trial Procedure 26 (C). Under the terms of Trial Rule 26 (C), upon a showing of “good cause,” the Board may limit or prevent a deposition to protect party or person from annoyance, embarrassment, oppression, or undue burden or expense. A showing of good faith is negated by a response “when it is nullified or proven false through particularized factual support.” *Id.* at 222 (citation omitted).

⁵ Petitioner sent an email requesting Respondent withdraw her renewed motion immediately after it was filed in light of the erroneous representations.

III. ARGUMENT

In her own lawsuit, Respondent filed a motion for protective order seeking to preclude her deposition from being conducted. The Marion County court granted the motion in part allowing a two (2) hour deposition confined to Respondent's declaration submitted in support of her lawsuit. (Exhibit A). The declaration solely addresses the Attorney General's purported media representations and the Office's investigations. It is limited to eleven (11) paragraphs. (Declaration, Exhibit B). The deposition was conducted, and Respondent's counsel objected some thirty (30) times instructing her not to answer. These objections were largely sustained by the trial court. (Order, November 19, 2022, Exhibit C). At the hearing on preliminary injunction, Respondent testified but again her counsel objected over thirty (30) times with many of the objections being sustained. (Hearing, *Bernard v. Rokita*, Exhibit D).

Despite being shielded from testifying in substantial, relevant part concerning the conduct at issue before the Board, Respondent seeks to preclude Petitioner and in a large sense the Board from learning the extent and context of Respondent's conduct, as well as learning the existence of all witnesses who Respondent may testify observed the conduct (statement and failure to report) or to whom she discussed the conduct with following. Nevertheless, she has failed to present good cause for such a drastic step as precluding or limiting her deposition. Moreover, she has failed to show how a deposition will serve as an annoyance, lead to embarrassment, oppression, or undue burden or expense.

Respondent submits no information in support of her motion and merely, alludes to broad categories of information to which she believes she has adequately testified.⁶ However, when the transcript of the hearing is actual reviewed (Exhibit B), it is evident that the questioning focused on consumer complaints and the Attorney General's investigation and to a lesser extent the issues before the Board. The testimony as to issues was in the form of cross-examination and before a judge. Under such circumstances, questioning is necessarily constricted and focused for presentation to the court, which is what happened in that matter. Indeed, Respondent has only provided limited testimony at this point. For instance, she has not testified in substantial part as to her education and training in patient privacy laws and regulations, has not testified as to her understanding of her employer's policies on patient privacy and reporting of child abuse, has not testified as to her knowledge of the IUH Risk Assessment document she produced last week, has not testified in substantial part as to prior communications with the reporter she alluded to in her testimony at hearing, has not testified as to all individuals who may have been in her vicinity when she talked to the reporter at the rally, and has not testified to any communications she had with the social worker who reported to Ohio after the report was made. Considering this, her deposition is surely needed.

It is unclear if Respondent will seek to limit testimony before the Board at Hearing. Given Respondent's current position there is a likelihood this may occur. Nevertheless, if she does testify, Petitioner's inability to depose Respondent on all potentially relevant topics and to vigorously question to obtain a full picture of each topic based upon Respondent's recollection

⁶ Respondent points to the deposition and hearing testimony in support of her motion. Respondent also points to her unverified responses to Request for Admissions and to her interrogatory response. Like the deposition and hearing testimony, she has not attached these documents and thus fails to make a supported argument for a finding of good faith. In any event, Petitioner believes the written discovery responses are deficient, particularly where many interrogatory responses merely point to the constricted hearing testimony.

will place Petitioner in a position of not knowing the full scope of Respondent's knowledge on the relevant issues before the Board. One of purposes of a discovery deposition is necessarily to understand the universe of knowledge a particular witness, including discovery of identification of other witnesses who observed the conduct and discovery of information, such as email communication memorializing conduct. The effect if she is not deposed, then, would put Petitioner at hearing in the matter at an unfair disadvantage in cross-examination and in presenting testimony in an efficient and persuasive manner to the Board.

Finally, if reviewed on appeal, the Board's decision will be subject to a standard of review that in part looks to whether there was substantial evidence to support its decision. Ind. Code § 4-21.5-5-14. It is in the interest of the proceedings as a whole that Respondent's deposition proceeds forward so that counsel is aware of all facts within Respondent's knowledge that support or do not support the final agency action in this matter. At that point, counsel for both parties can present substantial evidence at the hearing that will support the Board's ultimate decision.

IV. CONCLUSION

The Board should deny Respondent's extraordinary request in full. The deposition is not cumulative of prior testimony and good cause does not exist to deny or limit the deposition, particularly given Respondents' prior successful attempts at limiting her testimony. The Board, as a regulating body, is entitled to a full accounting of Dr. Bernard's conduct in adjudicating this matter and allowing the deposition to proceed will allow counsel for the parties to discover and consider testimony relevant for the Board's consideration. Knowledge of the deposition testimony will allow the parties to streamline presentation of Dr. Bernard's testimony.

Respectfully submitted,

Theodore E. Rokita, #18857-49
Indiana Attorney General

By: /s/ Cory C. Voight
Betsy M. DeNardi, 23856-71
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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2023, I hereby certify that a copy of the foregoing was served on the following persons via electronic mail:

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BEFORE THE MEDICAL LICENSING
BOARD OF INDIANA
CAUSE NUMBER: 2022 MLB 0024

IN THE MATTER OF THE LICENSE OF:)
)
CAITLIN BERNARD, M.D.)
)
LICENSE NO.: 01078719A)



**DR. BERNARD'S SECOND AMENDED MOTION FOR PROTECTIVE ORDER
TO PREVENT OR LIMIT HER DEPOSITION**

Respondent Dr. Caitlin Bernard ("Dr. Bernard"), by counsel, pursuant to Rules 28(F) and 26(C) of the Indiana Rules of Trial Procedure, respectfully moves the Medical Licensing Board (the "Board") for a protective order with respect to the Notice of Deposition (and Subpoena) issued by Petitioner the State of Indiana (the "State").

By this Motion, Dr. Bernard seeks to prevent or limit her deposition because she has been questioned under oath by the Office of Attorney General twice on the issues that are the subject of this proceeding, and she has responded to discovery and provided a declaration. As such, any further deposition would be cumulative, duplicative and an undue burden.

This Second Amended Motion includes an express Rule 26(F) statement, fact stipulations, and facts from testimony and discovery all in response to the Board's April 24, 2023, order denying the Motion for Protective Order. The 26(F) statement discusses the efforts counsel undertook to reach agreement with the State regarding the

deposition. Also consistent with that Order, counsel worked with the State to stipulate to facts that have been established by prior testimony or discovery responses. Those stipulations are included as are facts Dr. Bernard established by testimony or discovery responses but that the State did not stipulate to. This second amended motion clears up miscommunications between counsel for the State and Dr. Bernard on the stipulations. Dr. Bernard is also separately filing a motion for leave to file her full discovery responses exempt from public disclosure on the licensing litigation portal pursuant to the Indiana Administrative Regulation (IC 5-14-3-4(3)) and HIPAA to protect any potential Protected Health Information but to make the full discovery responses available to the Board.

In support of this motion, Dr. Bernard states the following:

Standard

1. Ind. R. Trial P. 28(F) states that “[w]henever an adjudicatory hearing...is held by or before an administrative agency, any party to that adjudicatory hearing shall be entitled to use the discovery provisions of Rules 26 through 37 of the Indiana Rules of Trial Procedure,” and further states that “[p]rotective and other orders shall be obtained first from the administrative agency[.]”

2. Ind. R. Trial P. 26(C) allows the Board to issue a protective order limiting the scope of discovery if the “discovery sought is unreasonably cumulative or duplicative[.]”

3. On a motion establishing “good cause,” the Board may limit or prevent a deposition “to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” *Nat’l Collegiate Athletic Ass’n v. Finnerty*, 191 N.E.3d 211, 219 (Ind. 2022), citing Ind. R. Trial P. 26(C).

Argument

4. On April 6, 2023, counsel for the State issued a Notice of Deposition (the “Notice”) setting Dr. Bernard’s deposition on April 21, 2023, at 10 a.m., “to continue from day to day until completed.” A copy of the Notice directed to Dr. Bernard is attached as Exhibit A.¹ Counsel for the State said the deposition would be set for the entire day.

5. Counsel for Dr. Bernard has complied with Ind. R. Civ. P. 26(F) and attempted to resolve the Parties’ dispute over Dr. Bernard’s deposition prior to filing this Amended Motion for Protective Order. Even before the State issued the Notice, on April 5, counsel for Dr. Bernard and the State had a phone conversation to discuss, among other topics, Dr. Bernard’s deposition. Counsel for Dr. Bernard informed counsel for the State that they did not think the deposition was necessary given all Dr. Bernard’s prior testimony when questioned by the Office of Attorney General and Dr. Bernard’s discovery responses. Counsel discussed the plan so that the motion for

¹ The State also served a Subpoena Duces Tecum for the deposition. The Parties agree consideration of the Subpoena is also deferred based on this Motion.

protective order could be presented to the Board and the deposition could occur before the hearing, if ordered. After the State issued the Notice, its counsel emailed counsel for Dr. Bernard regarding the deposition, and counsel for both sides discussed the deposition during phone conversations on April 10 and April 17.

6. On April 24, in response to an email from Dr. Bernard's counsel, the State indicated via email that it had not changed its position with regard to Dr. Bernard's deposition and protective order.

7. Good cause exists to prohibit the State from taking Dr. Bernard's deposition in this action, or at the very least, to significantly limit the time of Dr. Bernard's deposition since Dr. Bernard has already testified on multiple occasions and produced discovery responses on these issues.

8. Dr. Bernard has already provided the State with sworn testimony and sworn written statements on the topics at issue in this licensing litigation—Dr. Bernard's handling of reporting of child abuse and Dr. Bernard's conversation with the IndyStar reporter:

- a. The State deposed Dr. Bernard on November 17, 2022, in *Bernard v. Rokita*, Cause No. 49D13-2211-MI-038101.² The State questioned Dr. Bernard on subjects including (i) Dr. Bernard's statements in the IndyStar's article, *Patients head to Indiana for abortion services as other states restrict care*, published July 1, 2022 ((the "IndyStar Article"); (ii) Dr. Bernard's

² In that action, Dr. Bernard sought to enjoin Attorney General Rokita and the State from continuing its investigation pursuant to the consumer complaints filed against Dr. Bernard in the wake of the IndyStar Article, the same complaints that the State cites in the Administrative Complaint that initiated this licensing litigation.

understanding of child abuse reporting requirements and HIPAA; (iii) the consumer complaints cited in the State's Administrative Complaint, filed November 30, 2022 (the "consumer complaints"); (iv) Attorney General Todd Rokita's public statements about the State's investigation of Dr. Bernard ("AG Rokita's statements"); and (v) the terminated pregnancy report documenting an abortion for a ten-year-old child and performed by Dr. Bernard (the "TPR");

- b. Dr. Bernard testified under oath during the preliminary injunction hearing in *Bernard v. Rokita*, and gave testimony on subjects including (i) her compliance with Indiana's laws on mandatory child abuse reporting; (ii) her compliance with HIPAA; (iii) her conversation with the reporter who authored the IndyStar article; (iv) non-confidential information about her care of the ten-year-old child; (v) the coordination between Dr. Bernard, her team, and Ohio law enforcement; and (vi) the TPR.
- c. Dr. Bernard provided a sworn declaration in *Bernard v. Rokita*, in which she gave information about subjects including the (i) the consumer complaints; (ii) AG Rokita's statements, and (iii) the TPR.
- d. Dr. Bernard has also provided the State with responses to interrogatories and requests for admission served in this action. Dr. Bernard has replied to the State's interrogatories that included, among other questions, the following:
 - i. Since obtaining her Indiana License, describe in detail every training that Dr. Bernard has received regarding reporting requirements for child abuse, including the date, location, and length of each training.
 - ii. Describe in detail how Dr. Bernard came to learn that the abuse of the ten-year-old child had been reported and was being investigated by any government or law enforcement authorities in Ohio, including the person(s) who told Dr. Bernard this information, the date and length of any such communication, and any efforts Dr. Bernard took to confirm the accuracy of this information.
 - iii. Describe in detail every communication with a person working in law enforcement in Indiana or Ohio that Dr. Bernard had

regarding the ten-year-old child, including the date, time, and length of each conversation.

- iv. Since Dr. Bernard obtained her Indiana License, describe in detail Dr. Bernard's practice and experience reporting child abuse when the abuse took place out of state, including how many out-of-state patients Dr. Bernard has seen or treated under the age of 18 and whether Dr. Bernard reported the abuse to the out-of-state or Indiana authorities.
- v. Since Dr. Bernard obtained her medical degree, describe in detail each training she has received regarding HIPAA or patient privacy. For each training, state the date, location, and length of each training.
- vi. Describe any investigation of Dr. Bernard's professional conduct by IU Health or any other entity and the results of each investigation.

Dr. Bernard has replied to the State's requests for admission that included, among other requests, the following:

- i. Admit that Dr. Bernard is responsible for knowing, understanding, and following the laws for reporting suspected child abuse.
- ii. Admit that Dr. Bernard had no personal contact with DCS in Indiana regarding the ten-year-old child prior to submitting the TPR on July 2, 2022.
- iii. Admit that Dr. Bernard never contacted law enforcement in Ohio about the ten-year-old child.
- iv. Admit that Dr. Bernard never contacted law enforcement in Indiana any time prior to July 1, 2022, regarding the ten-year-old child.
- v. Admit that Dr. Bernard is responsible for knowing, understanding, and following HIPAA regulations.

- vi. Admit that Dr. Bernard is responsible for knowing, understanding, and following Indiana laws and regulations relating to patient privacy.
- vii. Admit that IU Health provides training to its staff, including Dr. Bernard, regarding its Privacy Practices.
- viii. Admit that Dr. Bernard spoke to a reporter from the Indianapolis Star on June 29, 2022, about the ten-year-old child's pregnancy.

9. Dr. Bernard and the State have agreed to stipulate to the following facts, all drawn from her prior testimony and discovery, as referenced above:³

- i. Dr. Bernard is an OB-GYN and is licensed to practice medicine in Indiana. (PI Testimony 132:21-133:2; Responses to Requests for Admission No. 1)
- ii. Dr. Bernard is employed by Indiana University Health Physicians and Indiana University School of Medicine. (PI Testimony 133:3-4; Responses to Requests for Admission No. 2)
- iii. Dr. Bernard is a Practitioner as that term is defined under Ind. Code § 25-1-9-2. (Responses to Requests for Admission No. 3)
- iv. Dr. Bernard is responsible for knowing, understanding, and following the laws for reporting suspected child abuse, including Ind. Code §§ 31-33-5-2.5 and 31-33-5-3 and she has always followed the law on reporting child abuse consistent with IU Health's policies and interpretation of those reporting laws. (Responses to Requests for Admission No. 13)

Background

³ The parties agree that the facts submitted in the stipulations and fact sections may permissibly be disclosed, to the extent it is "protected health information," pursuant to 45 CFR 164.512(d) & (e) and 45 CFR 164.502(b) because the information is being shared: as part of an administrative proceeding and in connection with a health oversight function, and that, under the circumstances, it is the minimum necessary amount of information to be disclosed for those purposes.

- v. Dr. Bernard received a call from an Ohio physician on June 27, 2022, regarding a ten-year-old child who was pregnant. (Responses to Requests for Admission No. 5; PI Testimony, 148:17-18, 149:8-15)
- vi. The abortion was provided on June 30, 2022. (PI Testimony, 165:6-8)
- vii. Members of IU Health's legal department were staffed on the ten-year-old child's case. (Answers to Interrogatory No. 19)
- viii. Dr. Bernard filed a Terminated Pregnancy Report within the legal time requirement documenting that she performed an abortion for a ten-year-old child. (PI Testimony 133:5-19)

Child Abuse Reporting

- ix. Dr. Bernard knew on June 27, 2022, that the abuse of the ten-year-old child had already been reported to Ohio child services and law enforcement agencies. (Responses to Requests for Admission No. 14; PI Testimony, 183:17-184:8)
- x. Dr. Bernard immediately called IU Health's social work team when she learned of the abuse. (PI Testimony, 184:9-19)
- xi. Dr. Bernard is a mandatory reporter. (PI Testimony, 168:24-169:5, 174:16-18)
- xii. Dr. Bernard's understanding is that it is not necessary to report child abuse to DCS if the incident has already been reported. (PI Testimony, 174:19-24)
- xiii. Dr. Bernard learned from the social worker providing services to the ten-year-old child that the social worker had confirmed with Franklin County Child Services ("FCCS") on June 28, 2022, that it had received a report of the ten-year-old child's abuse. The social worker also filed her own report of the ten-year-old child's abuse with FCCS. (Answers to Interrogatory No. 7)
- xiv. On June 30, 2022, FCCS informed the social worker that her report of the child's abuse had been screened out because it was

duplicative of the earlier report. Dr. Bernard also submitted the TPR to DCS. (Answers to Interrogatory No. 8)

- xv. Dr. Bernard and her team provided full cooperation with Ohio authorities. (PI Testimony, 186:24-187:2)

The IndyStar Story⁴

- xvi. After her workday on June 29, 2022, Dr. Bernard attended a rally on access to abortion care. (PI Testimony, 144:17-19)
- xvii. At the rally, Dr. Bernard spoke with another physician about the public health emergency they were facing due to multiple abortion bans coming down in other states. They discussed how concerned they were regarding the types of patients that they knew would be harmed by those laws and the clinical scenarios in which they and other doctors might need to take care of those patients in Indiana. (PI Testimony, 145:2-8)
- xviii. As an example of what Dr. Bernard and her colleague were discussing, Dr. Bernard told the colleague that she had recently received a referral of a patient from a child abuse doctor in Ohio. (PI Testimony, 145:8-11)
- xix. Ms. Shari Rudavsky overheard the conversation and asked Dr. Bernard to confirm what she had said. (PI Testimony, 145:11-14)
- xx. Dr. Bernard said she received the referral “just that week,” and did not state a precise day of the week. (PI Testimony, 148:13-16)
- xxi. Dr. Bernard confirmed that the child was 10 years old. (PI Testimony, 149:8-10)
- xxii. Dr. Bernard discussed that the child was “just over the limit in Ohio,” which the reporter understood to be 6 weeks. (PI Testimony, 149:13-15)

⁴ After further discussion between the State and Dr. Bernard’s counsel, the State does not stipulate to the facts in this IndyStar Story section through the end of this section. These facts are in the record as cited.

- xxiii. Dr. Bernard testified that the reporter understood that the child was coming to Indiana to be taken care of by her medical team. (PI Testimony, 153:2-6)
- xxiv. The reporter and Dr. Bernard did discuss that the child had been sexually abused because that is the only way a 10-year-old child can become pregnant. (PI Testimony, 153:16-22)
- xxv. Dr. Bernard had not yet had her initial consultation with the child at the time that she confirmed information for the reporter. (PI Testimony, 153:7-10)
- xxvi. Since Dr. Bernard hadn't yet had her initial consultation with the child at the time of her consultation, the child wouldn't have yet signed any consents. (PI Testimony, 163:24-164:12)
- xxvii. Dr. Bernard didn't personally oversee the child signing the consent forms. (PI Testimony, 159:18-22)
- xxviii. Dr. Bernard understood the article's purpose was to share the impact of abortion bans and the fact that people would begin to have to travel for abortion services to Indiana and nearby states. (PI Testimony, 155:11-13)
- xxix. When Dr. Bernard has given interviews or spoken to the media, the contents relate to her expertise as a physician who is handling and managing the public health emergency that exists due to abortion bans in nearby states. (PI Testimony, 186:8-11)
- xxx. After confirming information for the IndyStar reporter on June 29, 2022, Dr. Bernard has not communicated with any media outlet regarding the ten-year-old child. (Answers to Interrogatory No. 20)
- xxxi. IU Health issued the following press release regarding its investigation into Dr. Bernard's professional conduct:

As part of IU Health's commitment to patient privacy and compliance with privacy laws, IU Health routinely initiates reviews, including the matters in the news concerning Dr. Caitlin Bernard. Pursuant to its policy, IU Health conducted an investigation with the full cooperation of Dr. Bernard and

other IU Health team members. IU Health's investigation found Dr. Bernard in compliance with privacy laws.

IU Health based this statement on the results of its internal Risk Assessment conducted to determine whether the information about the ten-year-old child that appeared in the Indy Star compromised the patient's protected health information. The Risk Assessment found that "[a]t the time of the interview with the Indianapolis Star, the patient was not identifiable. The provider was careful to protect the patient's identity and has not revealed any additional information about the patient since that time." The Risk Assessment concluded that "no protected health information was provided because re-identification was unlikely." (Answers to Interrogatory No. 22)

- xxxii. Dr. Bernard believes that she complied with Indiana's mandatory child abuse reporting law, HIPAA, and Indiana's patient privacy law. (PI Testimony, 139:9-16)

10. Dr. Bernard has also provided the following testimony or discovery responses, but the State did not agree to stipulate to these facts:⁵

- i. Dr. Bernard is responsible for knowing, understanding, and following HIPAA regulations (Responses to Requests for Admission No. 17)
- ii. Dr. Bernard is responsible for knowing, understanding, and following Indiana laws and regulations relating to patient privacy (Responses to Requests for Admission No. 18)
- iii. Dr. Bernard participated in and passed training on mandatory reporting of child abuse and neglect provided through Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, Kentucky on the following dates:

⁵ If the Board permits the State to take Dr. Bernard's deposition and allows the State to ask questions to which Dr. Bernard has already provided an answer, Dr. Bernard's responses will be consistent with these facts. Subjecting Dr. Bernard to further questioning on these topics will not, therefore, provide the State with new information.

- July 28, 2022
- September 7, 2021
- July 31, 2020
- September 6, 2019
- November 18, 2018

The training takes place annually online. The training informs participants about Indiana's mandatory child abuse reporting requirements and the laws relevant to discharging that duty. (Answers to Interrogatory No. 6)

- iv. It is a routine part of medical education, training, research and innovation to share patient cases in a de-identified manner. (Responses to Requests for Admission No. 20)
- v. IU Health posts a Notice of Privacy Practices in its facilities. (Responses to Requests for Admission No. 22)
- vi. IU Health provides training to its staff regarding its Privacy Practices. (Responses to Requests for Admission No. 24)
- vii. Since becoming employed by IU Health Physicians in 2017, Dr. Bernard has received training on patient privacy and HIPAA on four occasions. Dr. Bernard received online training through IU Health on HIPAA on the following dates:
 - June 8, 2022
 - November 28, 2021
 - November 18, 2018
 - August 24, 2017

Since obtaining her license to practice in Indiana, Dr. Bernard has received training on HIPAA and patient privacy lasting approximately 30 minutes from Planned Parenthood Great Northwest, Hawai'i, Alaska, Indiana, Kentucky on the following dates:

- September 25, 2022
- September 7, 2021

- September 10, 2020
- January 31, 2020
- November 13, 2019
- March 21, 2018
- March 15, 2018

(Answers to Interrogatory No. 12)

- viii. The Ohio physician and law enforcement officials were in the same room when Dr. Bernard learned about the 10-year-old. (PI Testimony, 184:3-8)
- ix. Dr. Bernard knew that Ohio child services and law enforcement were actively investigating the matter with open cases. (Responses to Requests for Admission No. 14; PI Testimony, 183:17-184:8)
- x. Dr. Bernard talked with the patient's mother and Dr. Bernard's nurse scheduled the appointment with the hospital. (Responses to Requests for Admission No. 6)
- xi. Dr. Bernard spoke with the patient's mother and coordinated with members of IU Health's social work staff to ensure that if the child arrived in Indianapolis for care she would have the services necessary to support her while she received medical care. (Responses to Requests for Admission No. 7)
- xii. Dr. Bernard did not see the child until June 30, 2022. (Responses to Requests for Admission No. 7)
- xiii. Dr. Bernard used an interpreter with the ten-year-old child and her parent. (Responses to Requests for Admission No. 34)
- xiv. Consistent with IU Health's policy on Child Abuse and Neglect, Dr. Bernard did not personally contact Indiana Department of Child Services prior to submitting the TPR on July 2, 2022, because under IU Health's Child Abuse and Neglect policy, Dr. Bernard discharged her duty to report the ten-year-old child's abuse when she reported the abuse to the assigned IU Health social worker on June 27, 2022. (Responses to Requests for Admission No. 14)

- xv. Dr. Bernard states the documents produced by IU Health to the State contain information confirming that Dr. Bernard and her team fully complied with Indiana's laws and IU Health's policies on reporting child abuse. (Answers to Interrogatory No. 7)
- xvi. The social worker handled the communications with FCCS in compliance with IU Health's policy on Child Abuse and Neglect, which states that the social worker will process reports of child abuse and neglect. (Answers to Interrogatory No. 8)

11. The State's claims against Dr. Bernard pertain to two broad categories of alleged misconduct: that she violated patient confidentiality laws and Indiana's mandatory child abuse reporting laws. Dr. Bernard has, as shown above, already testified under oath on both of these topics and other tangentially related subjects. There are no topics relevant to this licensing litigation on which Dr. Bernard has not provided a sworn statement or testimony. Certainly, a deposition that imposes no limits on topics or time is guaranteed to duplicate the questions to which Dr. Bernard has already provided sworn answers on multiple occasions.

12. Indeed, the State intends for Dr. Bernard's deposition to last an entire day despite the existing record of Dr. Bernard's sworn testimony on the topics at issue in this action.

13. In contrast to the entire day that the State claims is necessary for Dr. Bernard's deposition, the State needed only one hour to depose other key fact witnesses, including Dr. Amy Caldwell, IU Health social worker Stephanie Shook, and IU Health's Director of Integrated Care Management, Cheryl Ramey-Hunt, and has

requested only one hour to depose IndyStar reporter Shari Rudavsky. The State has not previously questioned Ms. Shook, Ms. Ramey-Hunt, or Ms. Rudavsky under oath. If the State is able to obtain the information it requires from these witnesses within an hour, it certainly does not need an entire day with Dr. Bernard when she has already provided sworn testimony on all relevant topics. The State's disparate requests underscore that its deposition of Dr. Bernard is excessive and unduly burdensome.

14. The State's proposed, unrestricted deposition would keep Dr. Bernard away from her patients and her students to ask her questions to which she has already given an answer. This is the epitome of duplicative and oppressive discovery from which Ind. R. Trial P. should save a deponent.⁶

Conclusion

15. Good cause exists for the Board to grant Dr. Bernard's motion for protective order: the State should not require her to take hours away—"from day to day"—from her professional obligations as a practicing physician and assistant professor to give cumulative and duplicative testimony.

WHEREFORE Dr. Bernard respectfully requests that the Board enter a protective order and quash or, in the alternative, limit the deposition to one hour.

⁶ By agreement of the parties, Dr. Bernard's motion for protective order can be heard or decided at the April 27 pre-hearing conference or as soon thereafter as convenient. The parties have agreed that if the Motion is granted in part to limit the time of the deposition or denied, they will schedule the deposition before the May 25 hearing.

Respectfully submitted,

/s/ Alice M. Morical

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon the following counsel, via email and First Class, United States Mail, postage prepaid, this 26th day of April, 2023:

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/s/ Alice M. Morical

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BEFORE THE MEDICAL LICENSING
BOARD OF INDIANA
CAUSE NUMBER: 2022 MLB 0024

IN THE MATTER OF THE LICENSE OF:)
)
CAITLIN BERNARD, M.D.)
)
LICENSE NO.: 01078719A)



**MOTION TO EXCLUDE DR. BERNARD'S DISCOVERY RESPONSES FROM PUBLIC
DISCLOSURE**

Respondent Dr. Caitlin Bernard ("Dr. Bernard"), by counsel, respectfully asks the Medical Licensing Board ("Board") to allow her to submit her responses to the State's Requests for Admission and Interrogatories (collectively, the "Responses") with the Board, and for the Board to exempt the Responses from public disclosure on the Licensing Litigation Portal if the Board wishes to consider the entire Responses in connection with Dr. Bernard's motion for protective order. In support of her motion, Dr. Bernard states the following:

1. On November 30, 2022, the State of Indiana (the "State") submitted its Administrative Complaint (the "Complaint") against Dr. Bernard, alleging, in part, that she had violated Ind. Code § 25-1-9-4(a)(3) because she violated patient privacy regulations under state and federal law.

2. The Complaint made many allegations against Dr. Bernard that contained information about a child (the "child") that Dr. Bernard treated in the summer of 2022.

3. In its Complaint, the OAG has alleged that Dr. Bernard violated 45 C.F.R. § 164.502(a), 45 C.F.R. § 164.514, and 844 I.A.C. 5-2-2 by disclosing confidential patient information. Dr. Bernard has not violated these statutes and denies any wrongdoing. The Responses include information of the type the State alleges is confidential. Out of an abundance of caution and sensitivity for the publicity that her case has attracted, she is seeking to keep the Responses confidential, to the extent they might contain information that is protected health information (“PHI”). For example, the Responses reference information in IU Health’s records.

4. The parties agreed that the facts in the Motion for Protective Order under stipulations and facts in the record may permissibly be disclosed, to the extent it is “protected health information,” pursuant to 45 CFR 164.512(d) & (e) and 45 CFR 164.502(b) because the information is being shared as part of an administrative proceeding and in connection with a health oversight function, and that, under the circumstances, it is the minimum necessary amount of information to be disclosed for those purposes. However, to the extent that the Board would like to see the Responses in their entirety, Dr. Bernard requests that the Responses be excluded from the portal.

5. Dr. Bernard brings this motion under Ind. Code § 5-14-3-4(3) which states a public agency may not disclose records that are “required to be kept confidential by federal law.”

6. Dr. Bernard further states that 45 C.F.R. § 164.502(b) is a federal law that requires her to release the “minimum necessary” of her patient’s PHI.

7. Any filing in an administrative proceeding that contains PHI would, under 45 C.F.R. §§ 164.502(b), meet Ind. Code § 5-14-3-4(3)’s definition of a record “required to be kept confidential by federal law.”

8. Dr. Bernard submitted her Responses to the State pursuant to a mutually agreed upon protective order to comply with 45 C.F.R. § 164.502(b) and 45 C.F.R. § 164.512(e).

9. To adhere to 45 C.F.R. § 164.502(b)’s “minimum necessary” standard, Dr. Bernard respectfully requests that the Board allow her to file the full Responses exempt from public disclosure. Dr. Bernard does not believe that it is necessary for the public to see her Responses at this stage of the litigation.

10. 45 C.F.R. § 164.502(b) reflects Congress’s intent to protect patients by preventing more than the “minimum necessary” release of a patient’s personal information solely because their healthcare provider is involved in an administrative proceeding. 45 C.F.R. § 164.512(e)(vi) reflects Congress’s intent that a HIPAA-covered entity limit disclosure of a patient’s personal information consistent with HIPAA’s language and intent. Ind. Code § 5-14-3-4(3) allows the Board to enforce Congressional intent and federal law.

11. As noted above, Dr. Bernard denies any wrongdoing, but also seeks to protect patient information submitted to the Board.

12. The State will not suffer any harm if the Board grants this Motion.

WHEREFORE, for the foregoing reasons, Dr. Bernard respectfully requests that the Board GRANT her motion to submit Responses and exempt them from public disclosure on the licensing litigation portal.

Respectfully submitted,

/s/Alice M. Morical

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing has been served upon the following counsel, via First Class, United States Mail, postage prepaid, this 26th day of April, 2023:

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