

STATE OF INDIANA) IN THE MARION SUPERIOR COURT
) SS: CIVIL DIVISION, ROOM _____
 MARION COUNTY) CAUSE NO. _____

CAITLIN BERNARD, M.D.; and)
 CAROLINE ROUSE, M.D.,)
)
 Plaintiffs,)
 v.)
)
 INDIANA STATE HEALTH)
 COMMISSIONER, in the officer’s official)
 capacity; and VOICES FOR LIFE, INC.,)
)
 Defendants.)

COMPLAINT

Plaintiffs, by and through their undersigned attorneys, bring this Complaint against the above-named Defendants and in support thereof allege the following:

INTRODUCTION

1. Plaintiffs, who are Indiana physicians, file this declaratory judgment action to establish that terminated pregnancy reports (“TPRs”), which contain detailed information about their patients’ demographics, medical history, and medical care, are exempt from the general disclosure requirement in Indiana’s Access to Public Records Act (“APRA”), Ind. Code §§ 5-14-3-1 to 5-14-3-10.

JURISDICTION AND VENUE

- 2. Jurisdiction is conferred on this Court by Indiana Code § 33-29-1.5-2.
- 3. Plaintiffs’ claim for declaratory relief is authorized by Indiana Code § 34-14-1-1.
- 4. Venue is appropriate pursuant to Indiana Rule of Trial Procedure 75(A) because the principal office of the Indiana State Health Commissioner is located in Marion County.

PARTIES

5. Caitlin Bernard, M.D., is a board-certified obstetrician-gynecologist who is fellowship trained in complex family planning and licensed to practice medicine in Indiana. She serves on the faculty of the Indiana University School of Medicine, and she provides clinical care, including abortion care, in the Indiana University Health system. When she provides an abortion to a patient in Indiana, she submits a TPR to the Indiana Department of Health (“IDOH”) as required by Indiana Code § 16-34-2-5. She is bringing this case to establish that TPRs are exempt from disclosure under APRA.

6. Caroline Rouse, M.D., is a board-certified obstetrician-gynecologist who is fellowship trained in maternal-fetal medicine and licensed to practice medicine in Indiana. She serves on the faculty of the Indiana University School of Medicine, and she provides clinical care, including abortion care, in the Indiana University Health system. When she provides an abortion to a patient in Indiana, she submits a TPR to the Indiana Department of Health as required by Indiana Code § 16-34-2-5. She is bringing this case to establish that TPRs are exempt from disclosure under APRA.

7. The Indiana State Health Commissioner (“Health Commissioner”) serves as the director of IDOH, Ind. Code § 16-19-4-1(b), and is sued in the officer’s official capacity. Ind. Code § 16-19-4-1(b).

8. Voices for Life, Inc. (“VFL”), is a nonprofit organization incorporated in Indiana. It filed a lawsuit against the Health Commissioner and IDOH seeking to compel IDOH to disclose TPRs under APRA, which resulted in a settlement agreement.

FACTUAL ALLEGATIONS

I. Plaintiffs' Obligation to Submit Terminated Pregnancy Reports to the Indiana Department of Health

9. Indiana law requires physicians, including Plaintiffs, to submit a TPR to IDOH in connection with every abortion they provide. Ind. Code § 16-34-2-5.

10. The TPR must include the following thirty-one data points about each abortion patient:

- i. The age of the patient.
- ii. Whether a waiver of consent under section 4 of this chapter was obtained.
- iii. Whether a waiver of notification under section 4 of this chapter was obtained.
- iv. The date and location, including the facility name and city or town, where the: (A) pregnant woman (i) provided consent; and (ii) received all information required under section 1.1 of this chapter; and (B) abortion was performed or the abortion inducing drug was provided, prescribed, administered, or dispensed.
- v. The health care provider's full name and address, including the name of the physicians performing the abortion or providing, prescribing, administering, or dispensing the abortion inducing drug.
- vi. The city and county where the pregnancy termination occurred.
- vii. The age of the father, or the approximate age of the father if the father's age is unknown.
- viii. The patient's county and state of residence.
- ix. The marital status of the patient.
- x. The educational level of the patient.
- xi. The race of the patient.
- xii. The ethnicity of the patient.
- xiii. The number of the patient's previous live births.
- xiv. The number of the patient's deceased children.

- xv. The number of the patient's spontaneous pregnancy terminations.
- xvi. The number of the patient's previous induced terminations.
- xvii. The date of the patient's last menses.
- xviii. The physician's determination of the gestation of the fetus in weeks.
- xix. The reason for the abortion.
- xx. Whether the patient indicated that the patient was seeking an abortion as a result of being: (A) abused; (B) coerced; (C) harassed; or (D) trafficked.
- xxi. The following information concerning the abortion or the provision, prescribing, administration, or dispensing of the abortion inducing drug: (A) The postfertilization age of the fetus (in weeks); (B) The manner in which the postfertilization age was determined; (C) The gender of the fetus, if detectable; (D) Whether the fetus has been diagnosed with or has a potential diagnosis of having Down syndrome or any other disability; (E) If after the earlier of the time the fetus obtains viability or the time the postfertilization age of the fetus is at least twenty (20) weeks, the medical reason for the performance of the abortion.
- xxii. For a surgical abortion, the medical procedure used for the abortion and, if the fetus had a postfertilization age of at least twenty (20) weeks: (A) whether the procedure, in the reasonable judgment of the health care provider, gave the fetus the best opportunity to survive; (B) the basis for the determination that the pregnant woman had a condition described in this chapter that required the abortion to avert the death of or serious impairment to the pregnant woman; and (C) the name of the second doctor present, as required under IC 16-34-2-3(a)(3).
- xxiii. For a nonsurgical abortion, the precise drugs provided, prescribed, administered, or dispensed, and the means of delivery of the drugs to the patient.
- xxiv. For a nonsurgical abortion, that the manufacturer's instructions were provided to the patient and that the patient signed the patient agreement.
- xxv. For an abortion performed before twenty (20) weeks of postfertilization age of the fetus, the medical indication by diagnosis code for the fetus and the mother.
- xxvi. The mother's obstetrical history, including dates of other abortions, if any.

xxvii. Any preexisting medical conditions of the patient that may complicate the abortion.

xxviii. The results of pathological examinations if performed.

xxix. For a surgical abortion, whether the fetus was delivered alive, and if so, how long the fetus lived.

xxx. Records of all maternal deaths occurring at the location where the abortion was performed or the abortion inducing drug was provided, prescribed, administered, or dispensed.

xxxi. The date the form was transmitted to the state department and, if applicable, separately to the department of child services.

Ind. Code § 16-34-2-5(a).

11. “Each failure to complete or timely transmit a form . . . for each abortion performed or abortion inducing drug that was provided, prescribed, administered, or dispensed, is a Class B misdemeanor.” *Id.* § 16-34-2-5(d).

12. In addition, the Medical Board “may revoke the license of a physician if, after appropriate notice and an opportunity for a hearing, the attorney general proves by a preponderance of the evidence that the physician failed to transmit the form to the Indiana Department of Health as described in [Ind. Code § 16-34-2-5(b)].” Ind. Code § 25-22.5-8-6(b)(1).

13. IDOH must compile a public report on a quarterly basis summarizing aggregate data contained in the TPRs without including any patient identifying information. *Id.* § 16-34-2-5(e)-(f).

II. VFL’s Requests for Public Disclosure of Terminated Pregnancy Reports

14. APRA generally requires public agencies to provide members of the public with access to public records in their possession. *See* Ind. Code § 5-14-3-3.

15. The statute exempts certain public records from its disclosure requirement, however. Ind. Code § 5-14-3-4. These include records “required to be kept confidential by federal law” and “[p]atient medical records and charts created by a provider, unless the patient gives written consent” in accordance with Indiana law. Ind. Code § 5-14-3-4(a)(3), (9).

16. On October 16, 2023, VFL submitted a request to IDOH under APRA for all TPRs submitted in August 2023. That request encompasses TPRs submitted by the Plaintiffs. Citing an advisory opinion by the Public Access Counselor discussed below, IDOH denied VFL’s public records request on January 12, 2024.

17. On April 12, 2024, VFL requested that IDOH provide it with all TPRs from August 2023 through November 2023. A week later, it requested all TPRs from December 2023 through March 2024. Both of these requests encompass TPRs submitted by the Plaintiffs. IDOH denied each request on April 22, 2024.

18. VFL filed a lawsuit in this Court on May 1, 2024, captioned *Voices for Life v. Indiana Department of Health, et al.*, No. 49D02-2405-MI-019876. It asked the Court, among other things, to “[d]eclare that IDOH is required to satisfy public requests for TPRs under APRA”; and “[o]rder the IDOH to provide full and complete access to Plaintiff’s requests for TPRs.”

19. On June 12, 2024, the Court granted a motion for intervention by Drs. Bernard and Rouse, who intervened as defendants.

20. On September 9, 2024, the Court dismissed the lawsuit pursuant to Indiana Rule of Trial Procedure 12(B)(6).

21. On October 4, 2024, VFL filed a notice of appeal, and the case was docketed in the Indiana Court of Appeals (No. 24A-MI-2396).

22. On February 4, 2025, VFL filed a motion to dismiss the appeal, and its lawyers issued a press release that linked to a settlement agreement between VFL, IDOH, and the Health Commissioner. *See Indiana Health Department Concedes Lawsuit, Agrees to Release Previously Withheld Abortion Records*, Thomas More Society (Feb. 4, 2025), <https://www.thomasmoresociety.org/news/indiana-health-department-concedes-lawsuit-agrees-to-release-previously-withheld-abortion-records>. The agreement states that IDOH agrees to “[i]mmediately release terminated pregnancy reports as public records upon lawful request and not designate the reports as confidential medical records.”

III. The Public Access Counselor’s Opinion Against Public Disclosure of Terminated Pregnancy Reports

23. Indiana has a Public Access Counselor tasked with providing advice and assistance concerning the state’s public access laws to members of the public and government officials. *See* Ind. Code §§ 5-14-4-1 to 5-14-4-14; *Indiana Public Access Counselor*, IN.gov, <https://www.in.gov/pac/about-us/what-we-do/> (last visited Feb. 4, 2024). While VFL’s public records request was pending, IDOH sought an informal advisory opinion from the Public Access Counselor on whether it is required to produce TPRs in response to requests made under APRA. The Public Access Counselor summarized IDOH’s inquiry as follows:

Your inquiry concerns the release of [the TPR] form in its entirety. Given that the report is populated with information that could be reverse engineered to identify patients—especially in smaller communities—you argue that the required quarterly reports should suffice in terms of satisfying any disclosure and transparency considerations.

Public Access Counselor, *Opinion Letter 23-INF-15 on Terminated Pregnancy Reports*, 2 (Dec. 19, 2023), <https://www.in.gov/pac/files/informal/23-INF-15.pdf>.

24. The Public Access Counselor concluded that IDOH is not required to produce TPRs under APRA for two reasons. First, TPRs constitute patient medical records, and APRA

exempts patient medical records from disclosure. *Id.* at 2 (citing Ind. Code § 5-14-3-4(a)(9)). Second, insofar as the statute governing TPRs requires IDOH to produce a *public* report on a quarterly basis containing aggregate data, it implies that the individual TPRs are not intended to be made public. *Id.* The Public Access Counselor further explained that redaction is not a viable option for TPRs: “Courts will mandate separation when disclosable materials are not inextricably linked to confidential materials. Here, however, the entirety of the form is a medical record.” *Id.* (citing *Unincorporated Operating Div. of Ind. Newspapers, Inc. v. Trs. of Ind. Univ.*, 787 N.E.2d 893, 914 (Ind. Ct. App. 2005)).

V. The Attorney General’s Campaign for Public Disclosure of Terminated Pregnancy Reports

25. Four months after the Public Access Counselor issued his opinion on TPRs, the Attorney General issued an opinion reaching the opposite conclusion. Attorney General, Opinion Letter 2024-2 on Nondisclosure of Terminated Pregnancy Reports, 1 (Apr. 11, 2024), <https://www.in.gov/attorneygeneral/about-the-office/advisory/opinions/>. The Attorney General maintained that TPRs do not constitute medical records within the meaning of APRA. *Id.* The Attorney General also maintained that denying public disclosure would frustrate the purpose of the TPR statute. *Id.* In his view, the legislature intended to rely on members of the public to act as private investigators and police potential violations of abortion law. *Id.* at 7-8. Subsequently, the Attorney General held a press conference touting his opinion, and he wrote letters to the Governor and key members of the Indiana legislature urging them to take retaliatory action against IDOH and the Public Access Counselor.

VI. The Medical Board’s Disciplinary Proceedings Against Dr. Bernard

26. In 2023, the Medical Board concluded that Dr. Bernard should be disciplined for disclosing certain information about an abortion patient to another physician and a reporter.

Findings of Fact, Ultimate Findings of Fact, Conclusions of Law & Final Order, *In re Bernard*, No. 2022 MLB 0024 (Ind. Med. Licensing Bd. July 27, 2023), <https://www.in.gov/apps/pla/litigation/viewer.aspx?id=22362>. According to the Medical Board, Dr. Bernard disclosed: “(1) Patient had been referred to her on or about June 27, 2022; (2) Patient was ten years old; (3) Patient was from Ohio; (4) she would be providing abortion care to Patient; and (5) Patient was six weeks and three days pregnant.” *Id.* All of this information is included in the TPR concerning the patient at issue.

27. The Medical Board found that Dr. Bernard’s “disclosures to [the physician and reporter], when taken in their entirety, contained unique identifying characteristics regarding Patient,” and concluded that they violated Dr. Bernard’s obligations under the Health Insurance Portability and Accountability Act of 1996 (“HIPAA”), 110 Stat. 1936 (1996), as amended, as well as related provisions of Indiana law. Consequently, the Medical Board issued a letter of reprimand to Dr. Bernard and directed her to pay a \$3,000 fine. The letter of reprimand states, in part: “[Y]ou are expected to maintain the confidentiality of all knowledge and information regarding a patient and comply with all applicable elements of HIPAA and Indiana patient privacy protections afforded pursuant to 844 I.A.C. 5-2-2.” *Id.* at 11.

CLAIM FOR RELIEF

28. Plaintiffs hereby reallege the allegations made in ¶¶ 1-27 as if set forth fully herein.

29. Indiana law provides that: “Courts of record within their respective jurisdictions have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed The declaration may be either affirmative or negative in form and

effect. The declaration has the force and effect of a final judgment or decree.” Ind. Code § 34-14-1-1.

30. Plaintiffs seek a declaration that terminated pregnancy reports submitted to the Indiana Department of Health pursuant to Ind. Code § 16-34-2-5 are exempt from disclosure under Indiana’s Access to Public Records Act, Ind. Code §§ 5-14-3-1 to 5-14-3-10.

31. Plaintiffs seek a declaration that Indiana’s Access to Public Records Act, Ind. Code §§ 5-14-3-1 to 5-14-3-10, does not authorize the Indiana Department of Health to grant members of the public access to terminated pregnancy reports it received pursuant to Ind. Code § 16-34-2-5.

32. TPRs are patient medical records created by a medical provider.

33. Federal law requires TPRs to be kept confidential.

REQUEST FOR RELIEF

WHEREFORE, Plaintiffs respectfully ask the Court to grant the following relief:

- A. Issue a declaratory judgment that terminated pregnancy reports submitted to the Indiana Department of Health pursuant to Ind. Code § 16-34-2-5 are exempt from disclosure under Indiana’s Access to Public Records Act, Ind. Code §§ 5-14-3-1 to 5-14-3-10.
- B. Issue a declaratory judgment that Indiana’s Access to Public Records Act, Ind. Code §§ 5-14-3-1 to 5-14-3-10, does not authorize the Indiana Department of Health to grant members of the public access to terminated pregnancy reports it received pursuant to Ind. Code § 16-34-2-5.
- C. Grant such other and further relief as the Court may deem just, proper, and equitable.

Date: February 6, 2025

Respectfully submitted:

/s/ Kathrine D. Jack

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*Petition for temporary admission forthcoming