

STATE OF INDIANA)
)
COUNTY OF ALLEN) IN THE ALLEN COUNTY COURT SYSTEM
) ROOM NO.
) CAUSE NO.

FORT WAYNE WOMEN’S HEALTH, on)
its own behalf and on behalf of its patients,)
DR. ULRICH G. KLOPFER, on his)
own behalf and on behalf of his patients,)

Plaintiffs,)

v.)

HEALTH COMMISSIONER, FORT)
WAYNE-ALLEN COUNTY)
DEPARTMENT OF HEALTH;)
FORT WAYNE-ALLEN COUNTY)
DEPARTMENT OF HEALTH,)

Defendants.)

Complaint for Declaratory and Injunctive Relief

Introduction

1. Allen County, Indiana has an Ordinance located in the Allen County Code Title 10, Article 8, entitled “An Ordinance Concerning Public Safety” (“the Ordinance”) (Attached) that is scheduled to go into effect on June 1, 2010. It provides for the Fort Wayne-Allen County Department of Health to regulate the practice of “Itinerate Medical Providers” in Allen County, containing provisions that, among other things: require specific actions regarding patient care and notice, require that providers identify a “physician designee” and pay a \$250 fee, and authorize unlimited review of patient medical records by officials of the defendants. Failure of the provider to comply with the ordinance may lead to both fines and an injunction action against the provider. The ordinance exceeds the powers of defendants under Indiana law and is therefore invalid. It is also violates the Indiana and United States Constitutions. To the extent it imposes

requirements with which plaintiffs are unable to comply, it represents an undue burden on the rights of plaintiffs' patients to obtain an abortion in violation of the Fourteenth Amendment to the United States Constitution. It subjects plaintiffs to unreasonable searches and seizures in violation of the Fourth Amendment to the United States Constitution and Art. 1, § 11 of the Indiana Constitution. It violates the right to informational privacy that plaintiffs' patients have in their medical records, protected by the Fourteenth Amendment and the Indiana Constitution, Art. 1 § 1, 11. It is unconstitutionally vague in violation of the Fourteenth Amendment to the United States Constitution. It also invidiously and irrationally discriminates against persons falling into the class of "Itinerate Medical Providers" in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. Appropriate declaratory and injunctive relief should therefore issue.

2. This action is brought pursuant to Indiana law and 42 U.S.C. § 1983 to redress the deprivation, under color of state law, of rights secured by the Constitution of the United States.

Parties

3. Fort Wayne Women's Health is a health clinic located in Ft. Wayne, Indiana.

4. Dr. Ulrich Klopfer is an Osteopathic Physician licensed by the State of Indiana.

5. The Fort Wayne-Allen County Department of Health is a governmental entity established by statute. IND. CODE § 16-1-7-16 (repealed).

6. The Health Commissioner, Fort Wayne-Allen County Department of Health is the duly appointed director of the agency.

Factual Allegations

7. The Ordinance was passed in April of 2010 by the Allen County Commissioners and is scheduled to become effective on June 1, 2010.

8. It applies to Itinerate Medical Providers who are defined as physicians who live outside of Allen County or a contiguous county and who do not have admitting privileges in hospitals in Allen County or contiguous counties. Sec. 10-8-1.
9. Its requirements are imposed on Itinerate Medical Providers who provide “medical care.” This latter term is defined as “any surgical or other invasive procedures, as defined in Indiana Code 25-22.5-1-1.1.” Sec. 10-8-1.
10. The Ordinance applies to all Itinerate Medical Providers offering any medical care in Allen County. Sec. 10-8-2(A).
11. It also applies to “Operators,” defined as “any person who controls, operates, manages, or owns any facility as defined in this chapter.” Sec. 10-8-1.
12. All such persons must provide certain information to the duly appointed Health Officer of the Fort Wayne-Allen County Department of Health or his or her designee, as well as to all Allen County operating hospitals, emergency departments and urgent care providers. Sec. 10-8-2.
13. Specifically, the Itinerate Medical Provider must “[f]ile verification of emergency contact information and alternate physician designee with all Allen County operating hospitals, emergency departments and urgent care providers.” Sec 10-8-2(A)(2).
14. The term “urgent care provider” is not defined in the Ordinance and plaintiffs are uncertain as to what the term refers to and what, in Allen County, would be classified as an “urgent care provider.”
15. There is no explanation as to how the Itinerate Medical Provider is to “file” information with hospitals, emergency departments and urgent care providers.

16. The required information includes emergency contact information for the Itinerate Medical Provider, including a phone number where the Provider or a physician designee may be reached 24 hours a day, 7 days a week. Sec. 10-8-2(A), Sec. 10-8-6(A)(a).
17. The concept of “physician designee” is not defined in the Ordinance.
18. The Ordinance further regulates the physician-patient relationship by providing that “follow-up care must be available on an appropriate and timely basis when clinically necessary by the Itinerate Medical Provider or their physician designee. Notification of this arrangement must be provided to the patient and the Allen County Department of Health as well as all Allen County operating hospitals, emergency departments and urgent care providers by the Itinerate Medical Provider.” *Id.*
19. No explanation is given in the Ordinance as to how this information can be given to the above entities while safeguarding patient confidentiality.
20. The Ordinance requires that information concerning the emergency contact information be given to the patient and that this notification must be signed by the patient and kept as part of her permanent record. *Id.*
21. The Ordinance requires that the Itinerate Medical Provider pay a \$250 filing fee to the Fort Wayne-Allen County Department of Health, although there is no explanation in the Ordinance what this fee is for. *Id.*
22. The operator of the location where the medical care is provided by the Itinerate Medical Provider must display a certificate demonstrating compliance with the Ordinance and provide materials provided or approved by the Department explaining the rights of patients under the Ordinance. Section 10-8-3.
23. It is unclear where or how these materials are to be obtained or approved.

24. The Ordinance provides that a representative of defendants shall “annually inspect written documentation to insure compliance.” Section 10-8-5. The representative “shall conduct follow-up reviews to determine compliance.” *Id.* Presumably, this includes reviewing medical records to determine if patients have been provided and signed the written notification required by Section 10-8-2.

25. If the Health Officer of defendant Department, or his designee, receives a complaint that the Ordinance is being violated the “Health Officer shall conduct a review of the records of said Facility, Operator or Itinerate Medical Provider, including without limitation the records of patient who have undergone similar care that may be relevant to the review as determined in the sole discretion of the Officer.” Section 10-8-6(B).

26. At no place in the Ordinance, or in any other location, are there any standards or criteria which defines the term “relevant to the review” as stated in Section 10-8-6(B).

27. The Ordinance further gives the Health Officer the right to seek a subpoena from the Allen Circuit or Superior court “to obtain records and/or written or oral testimony from a Facility, Operator or Provider, or the officers, contractors, employees or agents thereof.” *Id.*

28. Again, the Ordinance contains no standards to be applied in determining whether or not to grant the subpoena.

29. The Ordinance further allows the Health Officer to issue an order requiring the Itinerate Medical Provider and the facility in which he or she operates to close if a violation of the Ordinance is found and a determination is made by the Health Officer that “said violation poses a significant risk to public health.” Section 10-8-7.

30. The Ordinance provides for a hearing to challenge this order and for an appeal of the hearing officer’s decision. Sections 10-8-7, 10-8-8, 10-8-9. However, at no point in the

Ordinance are there any standards set out establishing the burdens or standards to be met in any appeal.

31. The Ordinance imposes on the Itinerate Medical Provider or the operator of the facility where the Itinerate Medical Provider provides medical care the costs of any administrative appeals. Section 10-8-9.

32. Any failure of the Itinerate Medical Provider or operator of the facility to comply with an order of the health Officer is considered to be a violation of the Ordinance. Section 10-8-10.

33. A violation of the Ordinance is subject to a fine of \$1,000 a day and is to be reported to the Indiana Medical Licensing Board. Section 10-8-11.

34. In addition to being subject to the above fine, a Health Officer may bring an action for an injunction to restrain anyone from violating the Ordinance. Section 10-8-12.

35. Any person violating the Ordinance is liable to the defendant Department for any “loss or damage occasioned by reason of such violation, including reasonable attorney’s fees and costs.” Section 10-8-13.

36. Dr. Ulrich Klopfer, D.O., has been granted an unlimited license to practice medicine by the Indiana State Medical Licensing Board (Indiana License No. 02000628).

37. Dr. Klopfer owns and operates Fort Wayne’s Women’s Health in Ft. Wayne. It was formerly named Fort Wayne Women’s Health Organization.

38. Abortion is considered to be one of the safest surgical procedures.

39. Dr. Klopfer has, for many years, performed abortions at Fort Wayne Women’s Health.

40. Dr. Klopfer resides outside of Allen County and its contiguous counties and does not have admitting privileges in any hospital in Allen County or its contiguous counties. He therefore is an Itinerate Medical Provider as set out in the Ordinance.

41. The Indiana State Department of Health has issued a license for abortions to be performed to Dr. Klopfer, doing business as Fort Wayne Women's Health Organization.

42. The name of the organization will be changed to Fort Wayne Women's Health at the time of the next annual registration.

43. Fort Wayne Women's Health is an abortion clinic, as that term is defined by Indiana Code § 16-18-2-1.5.

44. Dr. Klopfer and Fort Wayne Women's Health are regulated by various requirements imposed by Indiana law which requires, among other things, that the Indiana Department of Health :

adopt rules under IC 4-22-2 to do the following concerning birthing centers and abortion clinics:

(1) Establish minimum license qualifications.

(2) Establish the following requirements:

(A) Sanitation standards.

(B) Staff qualifications.

(C) Necessary emergency equipment.

(D) Procedures to provide emergency care.

(E) Quality assurance standards.

(F) Infection control.

(3) Prescribe the operating policies, supervision, and maintenance of medical records.

(4) Establish procedures for the issuance, renewal, denial, and revocation of licenses under this chapter. The rules adopted under this subsection must address the following:

(A) The form and content of the license.

(B) The collection of an annual license fee.

(5) Prescribe the procedures and standards for inspections.

IND. CODE § 16-21-2-1.

45. Pursuant to this statutory mandate, the Indiana Department of Health has promulgated specific standards regulating abortion clinics at 410 IAC 26-1-1, *et seq.*

46. Among other things, the regulations provide:

- a. that the clinic must have written procedures for emergencies. 410 IAC 26-5-2(a)(2)(A)
- b. that the clinic must have written procedures concerning contact physicians concerning emergencies. 410 IAC 26-4-1(c)(8)A)
- c. that the clinic must ensure confidentiality of records and they can be released “only to authorized individuals in accordance with federal and state laws.” 410 IAC 26-7-1(b)(7)(A)
- d. what is to be contained in the medial record of someone receiving a surgical abortion. 410 IAC 26-7-2
- e. explicit requirements as to what information is to be given to the patient or the patient’s legal representative concerning follow-up care including clinic emergency phone numbers. 410 IAC 26-10-1.
- f. that the clinic must have a written protocol for managing medical emergencies which must “ensure physician coverage and provide for a timely response for emergencies.” 410 IAC 26-12-1.

47. As a licensed medical provider, Dr. Klopfer is also required to abide by all rules established by the Medical Licensing Board pursuant to Indiana Code § 25-22.5-2-7.

48. This includes the rules of professional conduct established by 844 IAC 5-2-1, *et seq.*

49. Plaintiffs abide by all requirements imposed by Indiana law and regulations.

50. The medical records maintained by plaintiffs contain highly personal and private information relating to the health, and in particular the reproductive health, of patients.

51. For patients seeking reproductive health care, confidence that this information will remain confidential is crucial to their decision to seek these medical services.

52. There is nothing in the Ordinance that authorizes or requires patient-identifying information to be redacted from patient medical records before the Health Officer of the Fort Wayne-Allen County Department can review such records. Nor is there anything in the Ordinance that requires that the Health Officer, or any other entity which obtains confidential information to keep it confidential.

53. The threat that the Health Officer of the Fort Wayne-Allen County Department of Health, or his or her designee, can and will seek to review medical records is extremely disruptive to the on-going work of plaintiffs in Fort Wayne. It compromises the ability of plaintiffs to maintain the privacy of their patients and therefore compromises the ability of plaintiffs to serve their patients and impinges upon the privacy interests of their patients and harms the many patients who depend on plaintiffs for reproductive health care.

54. Additionally, there is absolutely nothing in the Ordinance which secures the privacy of any medical records that the Health Officer of the Fort Wayne-Allen County Department of Health, or his or her designee, reviews. This is an additional threat to the privacy rights of plaintiffs' patients and also impinges on plaintiffs' regulatory obligations to maintain the confidentiality of records.

55. Physicians who perform abortions are often subjected to violence and harassment.

56. Consequently, plaintiff Klopfer does not publicize his address and how he may be contacted. However, the Ordinance does not require that his contact information or the identify or contact information of his physician designee be kept confidential.

57. Plaintiff Klopfer has been unable to find a physician to serve as his “physician designee” as required by the Ordinance. He believes that physicians are unwilling to serve in this capacity because of the risk that their name and/or contact information will be publicized.

58. Plaintiffs are the only provider of surgical abortion services in Allen County, Indiana, home to Fort Wayne, Indiana’s second largest city.

59. If plaintiffs are not available to provide abortion services, women who want them will have to travel great distances to obtain them.

60. To the extent that the Ordinance affects plaintiffs, who perform abortions, it is not rational inasmuch as:

- abortions are extremely safe

- all persons receiving abortions are provided State-sanctioned emergency information that fully protects the health and safety of women receiving procedures

- all hospital emergency departments must treat emergency patients

61. At all times defendants have acted under color of state law.

62. The actions of defendants are causing plaintiffs irreparable harm for which there is no adequate remedy at law.

Legal claims

63. The Ordinance exceeds defendants’ powers under Indiana law, Indiana Code § 36-1-3-8.

Specifically, the Ordinance:

- a. Imposes a license fee greater than that reasonably related to the administrative cost of exercising a regulatory power.

- b. Regulates conduct that is regulated by state agencies, without statutory authorization for such regulation by ordinance.

64. To the extent that the Ordinance imposes obligations on plaintiffs, including, but not limited to, the naming of a “physician designee,” which plaintiffs cannot perform, thereby

permitting defendants to issue immediate closure orders, the Ordinance represents an undue burden on the right of women to obtain an abortion in violation of the Fourteenth Amendment to the United States Constitution and Art. 1, § 1 of the Indiana Constitution.

64. The Ordinance authorizes searches and seizures of plaintiffs' office and records without lawful cause in violation of the Fourth Amendment to the United States Constitution and Art. 1, 11 of the Indiana Constitution.

65. The Ordinance allows unrestricted access to patients' confidential medical records in violation of the right to informational privacy protected by the due process clause of the Fourteenth Amendment to the United States Constitution as well as by Art. 1, §§1, 11 of the Indiana Constitution.

66. The Ordinance imposes requirements on plaintiffs that are vague and unclear in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

67. The ordinance imposes irrational classifications on physicians who reside outside of Allen County and its contiguous counties and who do not have staffing privileges in the hospitals in Allen County and its contiguous counties in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Request for relief

WHEREFORE, plaintiffs request that this Court:

1. Declare that the Ordinance is unlawful and unconstitutional for the reasons noted above.
2. Enter a preliminary injunction, later to be made permanent, enjoining the enforcement of the Ordinance.
3. Award plaintiffs their reasonable costs and attorneys' fees pursuant to 42 U.S.C. § 1988.
4. Award all other proper relief.

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