

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN THE MATTER OF INDIANA)
STATE MEDICAL ASSOCIATION)
APPLICATION FOR DISCLOSURE) CAUSE NO. 1:22-MC-00005-TWP-DLP
OF RECORDS PROTECTED UNDER)
42 U.S.C. 290dd-2)

**DR. JOHN DOE’S RESPONSE IN OPPOSITION TO INDIANA STATE MEDICAL
ASSOCIATION’S APPLICATION FOR ORDER AUTHORIZING
DISCLOSURE OF RECORDS PROTECTED UNDER 42 U.S.C. 290dd-2**

Respondent, Dr. John Doe, (“Doe”), by counsel, submits his response in opposition to the Indiana State Medical Association’s (“ISMA”) Application for Order Authorizing Disclosure of Records Protected Under 42 U.S.C. 290dd-2 (the “Application”). The Court should deny the Application for three reasons: (1) the ISMA cannot establish the necessity of disclosure where there is no existing threat; (2) the ISMA cannot establish good cause for the disclosure where the public interest will not be served; and finally (3) the Application will become moot upon [REDACTED]

I. The Records at Issue

[REDACTED]

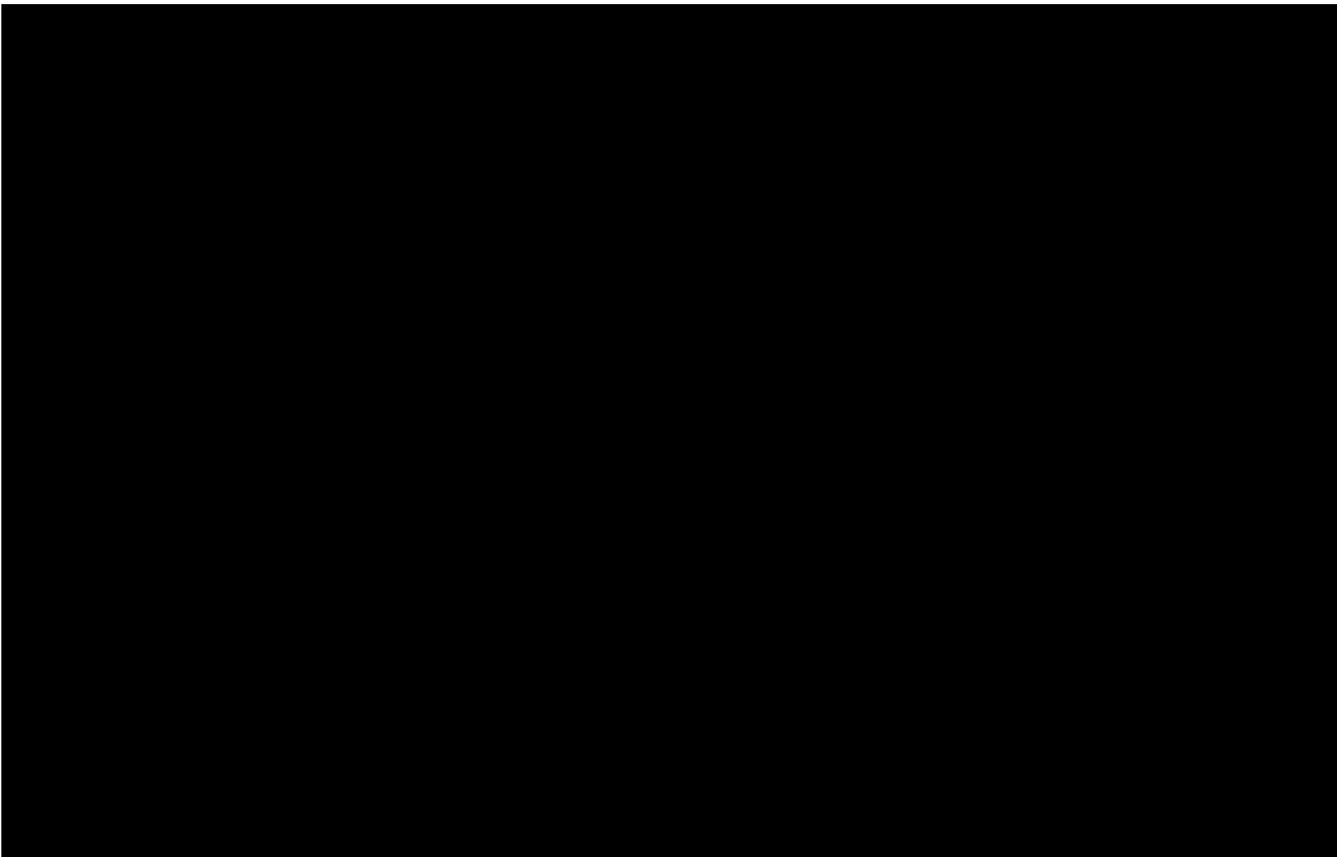


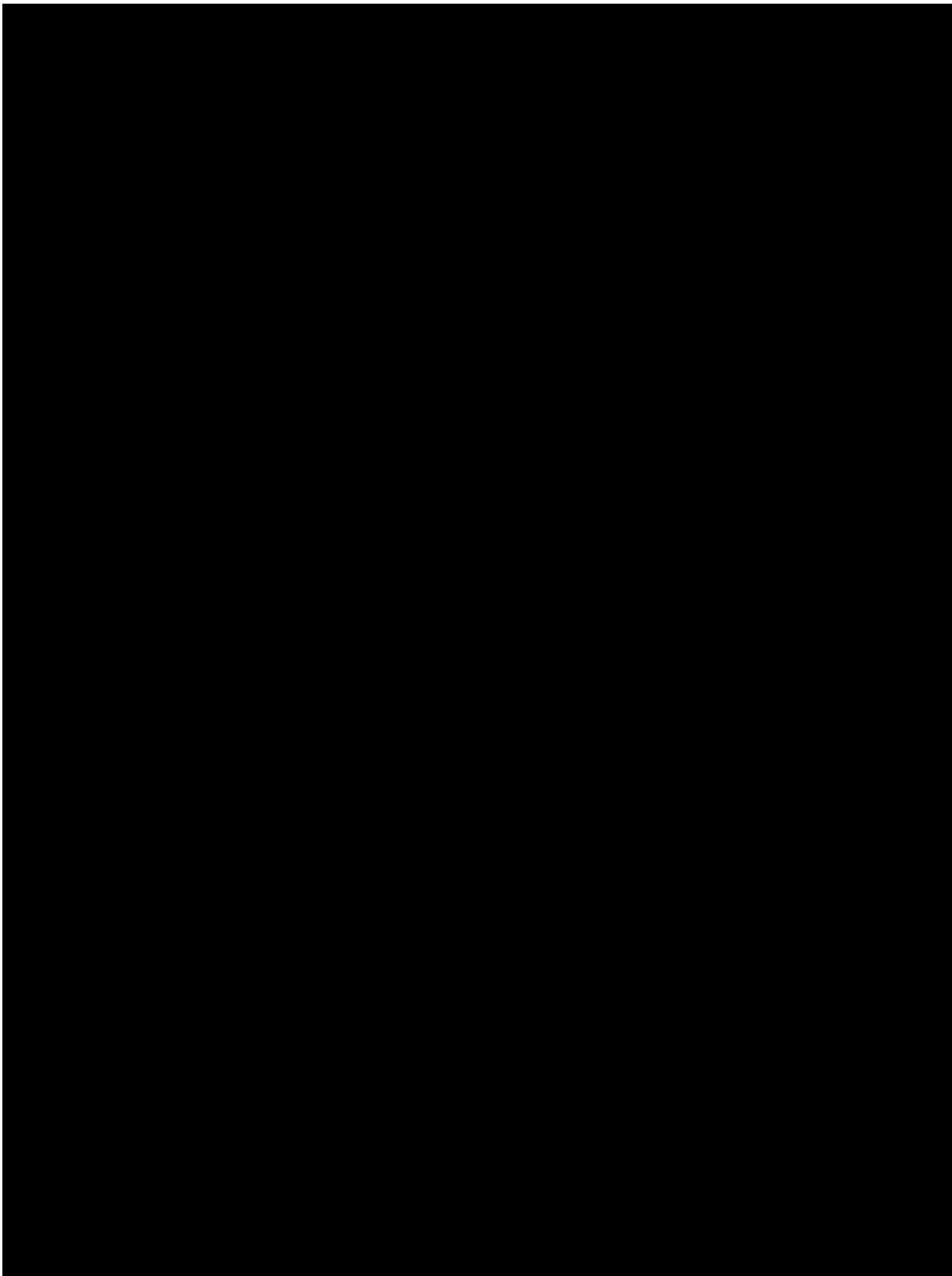
There is no evidence of any

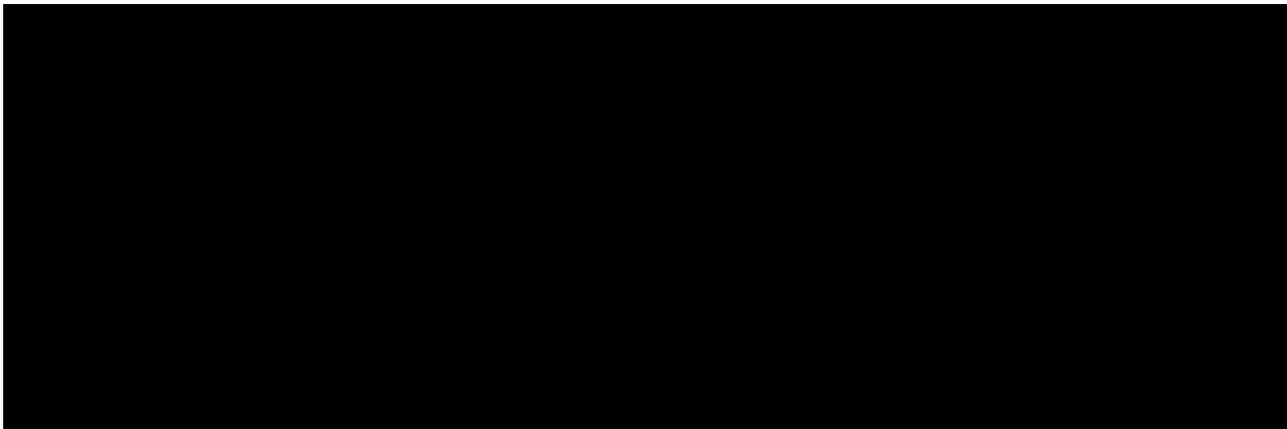
other reason for that referral, let alone a reason to suspect the referral was due to suspected substance abuse.

The ISMA requested that Doe obtain a fitness for duty evaluation through its Physician Assistance Program (“PAP”). Without providing explanations about the full ramifications of continuing through the process, the ISMA guided Doe to a facility for evaluation. The ISMA failed to inform Doe that after initiating this process under the PAP he would be forced to submit to whatever recommendation was handed down by the facility or face public scrutiny and sanctions before the Licensing Board.

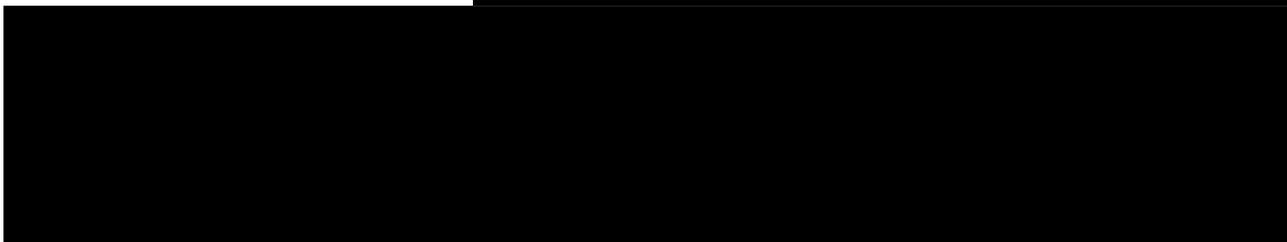
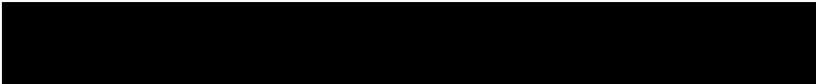
A. The First Report





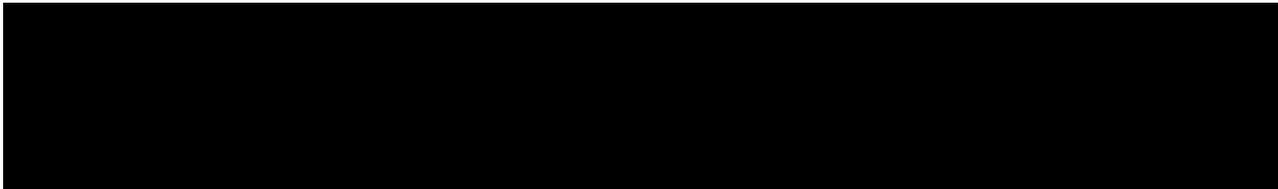


Based on this limited information and review, the First Report found that Doe met the criteria for alcohol use disorder, setting forth 5 alleged criteria met by Doe. (Ex. A, p. 14.) Yet, noticeably absent from the First Report is evidence for several of these 5 alleged criteria used to diagnosed Doe.

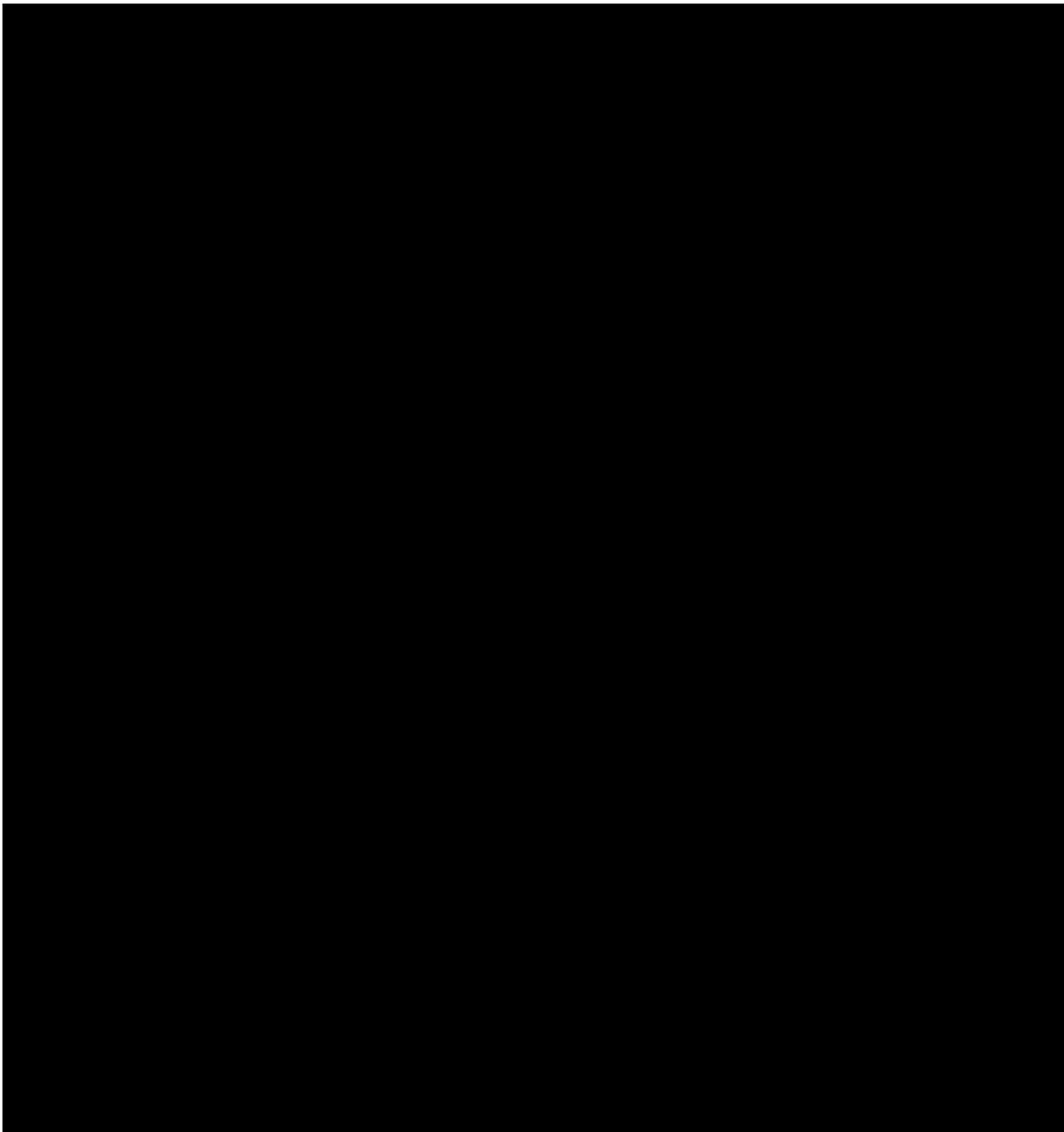


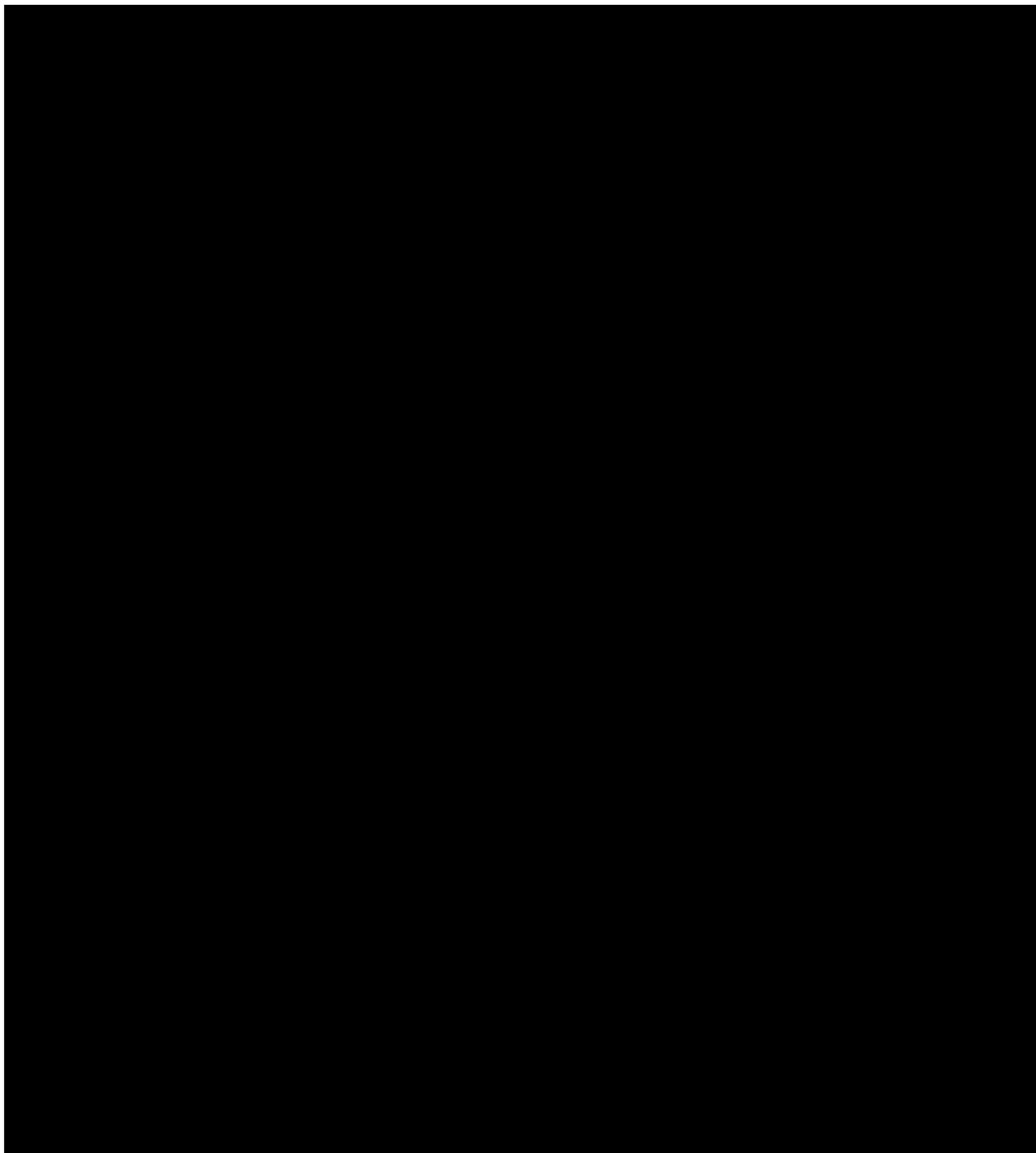
The First Report

is flawed, inaccurate, and unreliable given the methodologies employed by the facility and the unsupported conclusions it drew from that flawed information. It concluded by



B. The Second Report





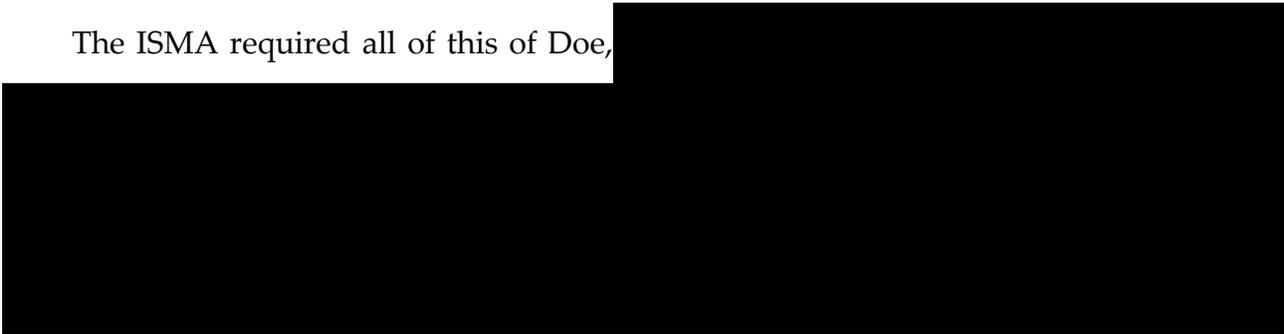
In addition to the problems set forth above, the Second Report also suffers from the same flaws as the First Report in that it manufacturers inferences allegedly from certain statements of Doe (without any supporting evidence), and relies on the statements of

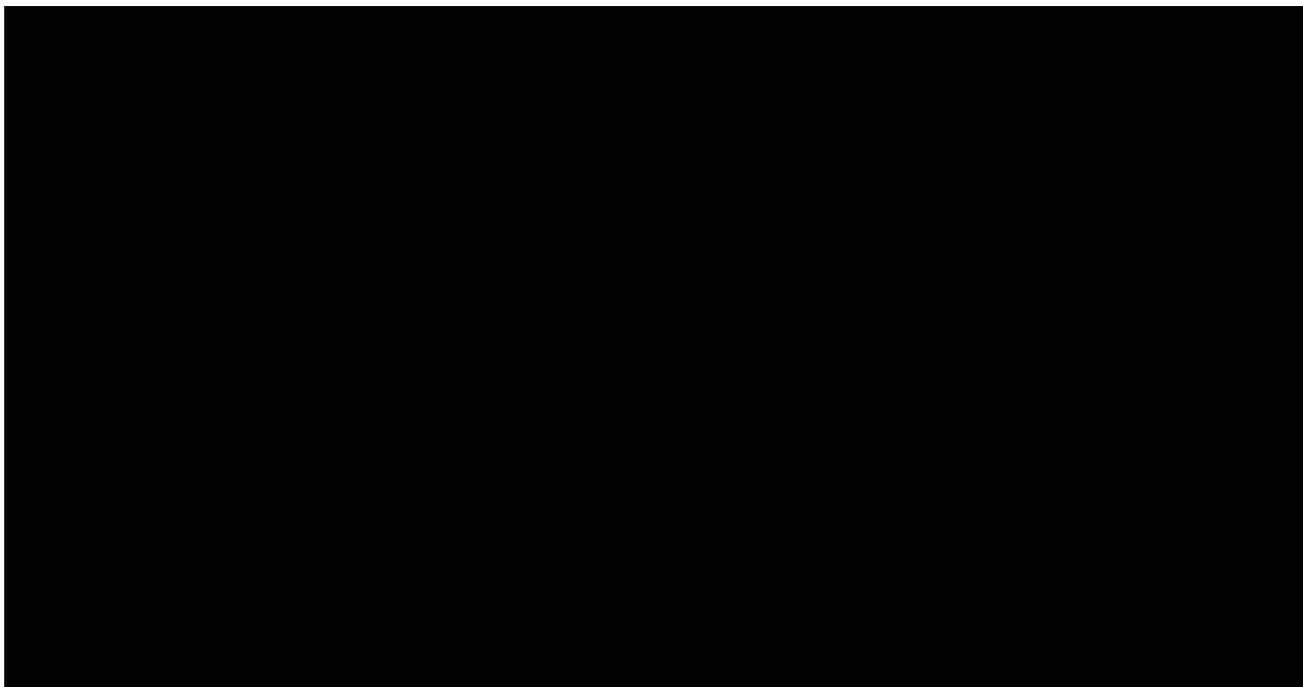
witnesses made only after being asked about whether they had concerns of Doe's use of alcohol. Despite finding that Doe had no substances in his system, and that he had ceased all use of alcohol on his own, the Second Report simply adopted the findings of the First Report.

C. The ISMA Demands Doe Seek Invasive Treatment

The ISMA adopted the recommendation of the facilities whole cloth and demanded that Doe submit to an extended residential treatment program, in a city hundreds of miles away from his residence, followed by monitoring for five (5) years. It is Doe's understanding that the ISMA's monitoring includes submitting to a breathalyzer exam four (4) times each day for at least two years, check-ins by phone with ISMA staff, and random urine screens. Missed appointments and positive breathalyzer exams subject a participant to further testing, like hair follicle testing. If a physician declines to participate in residential treatment, the ISMA initiates a proceeding such as this one, seeking authorization to disclose the doctor's confidential patient records to the Licensing Board for a public hearing on the reported behavior.

The ISMA required all of this of Doe,





This entire scenario is the result of a process that, while designed to protect the public and physicians, has been applied in an overzealous and unreasonable manner. There is no threat to anyone, first and foremost because Doe does not abuse any substances, 



 In fact, the only thing threatened in this scenario is Doe's reputation. There is simply no basis to turn over his confidential patient records.



II. Legal Standard

Two regulations, 42 C.F.R. §§ 2.63 and 2.64, control the process of disclosing confidential records without the patient's consent. 42 C.F.R. § 2.63 lists the three instances in which a court may order disclosure:

(a) A court order under the regulations in this part may authorize disclosure of confidential communications made by a patient to a part 2 program in the course of diagnosis, treatment, or referral for treatment only if:

(1) The disclosure is necessary to protect against an existing threat to life or of serious bodily injury, including circumstances which constitute suspected child abuse and neglect and verbal threats against third parties;

(2) The disclosure is necessary in connection with investigation or prosecution of an extremely serious crime allegedly committed by the patient, such as one which directly threatens loss of life or serious bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, or child abuse and neglect; or

(3) The disclosure is in connection with litigation or an administrative proceeding in which the patient offers testimony or other evidence pertaining to the content of the confidential communications.

42 C.F.R. § 2.63(a)(1)-(3). If the request for disclosure meets one of these three criteria, the

Court must then determine that good cause exists to disclose these confidential records:

(d) Criteria for entry of order. An order under this section may be entered only if the court determines that good cause exists. To make this determination the court must find that:

(1) Other ways of obtaining the information are not available or would not be effective; and

(2) The public interest and need for the disclosure outweigh the potential injury to the patient, the physician-patient relationship and the treatment services.

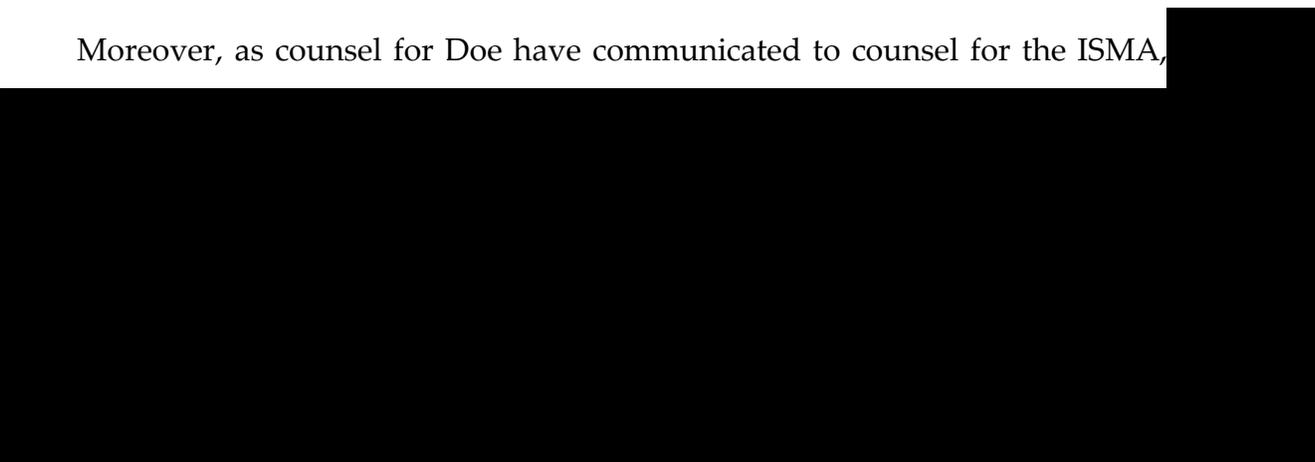
42 C.F.R. § 2.64(d)(1)-(2). Thus, for court-ordered disclosure of records protected under 42 U.S.C. 290dd-2, the ISMA must establish that the disclosure of the records is necessary under Section 2.63(a) and that good cause for disclosure exists under Section 2.64(d). Because the ISMA can establish neither, the Application must be denied.

III. Analysis

A. The ISMA failed to establish the necessity of disclosing Doe's records.

The ISMA argues disclosure of Doe's records is "necessary to protect against a substantial existing threat to life or of serious bodily injury to any patients Dr. John Doe may treat and perform surgery upon." (Doc. 01, p. 9.)³ But there is no substantial *existing* threat to life or serious bodily injury to Doe's patients, because Doe is not actively practicing medicine.

Moreover, as counsel for Doe have communicated to counsel for the ISMA,



³ Respondent limits his response to 42 C.F.R. § 2.63(a)(1) because ISMA does not argue any other instances when a court may order disclosure of patient records apply in this case.



The ISMA's insistence on proceeding with this Application despite knowing Doe is not actively practicing medicine and [REDACTED] is unsettling. This is not a case where a doctor has been accused of performing surgery under the influence or of committing more serious crimes, such as driving under the influence. Doe has been a doctor in good standing prior to this overzealous behavior by the ISMA. As a result, Doe has been forced to choose between being subjected to residential treatment and stringent monitoring over the course of five years, or public disclosure of private and intimate facts based on conflicting reports from two treatment facilities. [REDACTED]



He should be allowed to do so in peace.

Because Doe is not currently practicing and [REDACTED] there is no substantial existing threat to life or of serious bodily injury to anyone and no circumstance necessitating disclosure of Doe's records. The ISMA's Application should be denied.

B. The ISMA failed to establish that good cause exists for disclosure of Doe's records.

Although there may not be other methods for the ISMA or the Licensing Board to obtain Doe's records, the public interest favors denial of the ISMA's Application in this instance specifically. No substantial threat to life or of serious bodily injury presently exists, nor do any of the other circumstances which allow for court-mandated disclosure

under 42 C.F.R. § 2.63. If Doe refused to consent to disclosure of these records *and* insisted on continuing to practice, then perhaps a substantial threat would exist. But that is not the case here— [REDACTED] The public interest is best served keeping private matters private when they do not impact the public.

Disclosure of Doe's records in this instance would serve only to publicly humiliate Doe and his family [REDACTED] Even if the public interest supported disclosure in this case (it does not), the harm to Doe and his family, well-known and involved members of the local community, if this information were publicly disclosed far outweighs it. Not to mention, as set forth above, there are very real concerns about the accuracy and credibility of the First and Second Report. This factor also weighs in favor of denying disclosure where the evidence of Doe's alleged substance abuse disorder is not credible. Because good cause for disclosure of Doe's records does not exist, the ISMA's Application should be denied.

C. The Licensing Board has no authority over Doe making the ISMA's Application moot. [REDACTED]

Finally, the Licensing Board does not have authority over a licensee who no longer maintains an active license. Despite the fact that counsel for Doe have informed the ISMA's counsel that Doe is not actively practicing medicine and [REDACTED] [REDACTED] the ISMA argues it still must disclose Doe's records to the Licensing Board [REDACTED]

[REDACTED] But concerns about future harm are not within the purview of the

Licensing Board; the moment [REDACTED] the Licensing Board loses authority to act against him as a licensee. *See, e.g., Indiana Bd. of Pharmacy v. Elmer*, 171 N.E.3d 1045, 1052 (Ind. Ct. App. 2021).

In *Elmer*, the Indiana Board of Pharmacy attempted to permanently revoke Elmer's expired pharmacy license. *Id.* at 1048. The trial court held that the Board of Pharmacy exceeded its authority by attempting to revoke an expired license. *Id.* On appeal, the Board of Pharmacy argued that it "must be able to protect the public from pharmacists who commit criminal acts by sanctioning those pharmacists' licenses, even if those licenses have expired. Otherwise, corrupt pharmacists could simply allow their license to expire in order to avoid discipline." *Id.* at 1051. However, the court held that the Board could satisfy its obligation to the public if and when Elmer sought reinstatement, because

If and when an individual with an expired, invalid license applies for reinstatement, then the Board has an obligation to determine whether reinstatement is warranted. *See* Ind. Code § 25-26-13-14(e)-(f). Significantly, the Board is authorized to delay reinstatement "to permit the [B]oard to investigate information received by the licensing agency that the applicant for reinstatement may have committed an act for which the applicant may be disciplined[,] and the Board may deny reinstatement of the license "following a personal appearance by the applicant" before the Board. Ind. Code § 25-1-8-8(b).

Id. at 1052.

Similarly, the ISMA's concern about [REDACTED] is irrelevant once

[REDACTED] the ISMA's Application should be denied.

IV. Conclusion

For the foregoing reasons, the ISMA's Application for Disclosure of Records Protected Under 42 U.S.C. 290dd-2 should be denied.

Respectfully submitted,

/s/ Tracy N. Betz

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 15, 2022, I electronically filed the foregoing document with the Clerk of the Court using the electronic court filing system, which will provide notification of such filing to all counsel of record.

/s/ Tracy N. Betz

Tracy N. Betz

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EXHIBIT A- September 27, 2021 Evaluation Report

FILED UNDER SEAL

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EXHIBIT B- November 2, 2021 Evaluation Report

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