SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

DATE / TIME **JUDGE**	**March 17, 2021 / 3:45 P.M.** **James P. Arguelles**	**DEPT. NO.** **CLERK**	**17** **Slort**
KENNETH P. STOLLER, M.D., **Petitioner,** **v.** **MEDICAL BOARD OF CALIFORNIA, DEPARTMENT OF CONSUMER AFFAIRS, STATE OF CALIFORNIA,** **Respondent.**		**Cases No.: 34-2021-80003606**	
Nature of Proceedings:	**Ex Parte Application for Stay**		

The application is DENIED.

Petitioner Kenneth P. Stoller, M.D.'s (Dr. Stoller) request for judicial notice is unopposed and GRANTED.

Background

After an evidentiary hearing, Respondent Medical Board of California (Board) revoked Dr. Stoller's physician's and surgeon's license. Dr. Stoller had written letters exempting 10 school-age children from vaccinations[1] otherwise required for entry into schools and day care centers. When Dr. Stoller wrote the letters, Government Code Section 120370(a)[2] provided that:

> If the parent or guardian files with the governing authority a **written statement by a licensed physician** to the effect that the physical condition of the child is such, or medical circumstances relating to the child are such, that immunization is not considered safe, **indicating the specific nature and probable duration of the medical**

[1] Pursuant to Government Code Section 120335, admission to schools and childcare centers requires proof of immunization to the following diseases: Diphtheria, Haemophilus influenza type b, Measles, Mumps, Pertussis (whooping cough), Poliomyelitis, Rubella, Tetanus, Hepatitis B and Varicella B (chicken pox).

[2] Undesignated statutory references shall be to the Government Code.

> **condition or circumstances, including, but not limited to, family medical history, for which the physician does not recommend immunization**, that child shall be exempt … to the extent indicated by the physician's statement. (Emphasis added.)

A prior version of the statute had required physicians to indicate "the specific nature and probable duration of the medical condition or circumstances *that contraindicate immunization*," and did not specifically identify family medical history as a basis for an exemption.

Two of the exemptions that Dr. Stoller authorized were temporary, but eight were for the children's lifetime. Dr. Stoller was not the treating physician of any of these children. He did not communicate directly with any treating physicians before writing the exemption letters, and he did not review the children's medical records in advance. Instead, he accepted medical histories that parents provided, but he failed to investigate the accuracy of the reporting. In most cases, he also predicated exemptions on genetic testing performed by the 23andME commercial service, which he then analyzed.

The Board found that Dr. Stoller issued his exemption letters without consulting either the best practices guidelines published by the federal Advisory Committee on Immunization Practices (ACIP) or the so-called "Red Book" published by the infectious diseases committee of the American Academy of Pediatrics (AAP). At the hearing below, the Board's expert testified that such failures constituted extreme departures from the professional standard of care. The Board's expert also impugned Dr. Stoller to the extent he issued exemptions based on reported family histories that he failed to investigate. The same expert testified that independent research does not support Dr. Stoller's methods. Moreover, unlike the expert that Dr. Stoller produced, the Board's expert had considerable expertise in pediatric infectious diseases. Dr. Stoller's expert identified Dr. Stoller as the source for many of her views.

The Board revoked Dr. Stoller's license. Dr. Stoller now applies for an order staying the revocation pending a disposition on the merits.

Discussion

Pursuant to Code of Civil Procedure Section 1094.5(h)(1), the court may stay the Board's decision only if it is satisfied that the public interest will not suffer and the Board is unlikely ultimately to prevail on the merits. On the merits, the court applies its independent judgment to the Board's findings. (See *Leone v. Medical Bd.* (2000) 22 Cal.4th 660, 674.) Even where the independent judgment test applies, however, the findings of the agency come before the court with a strong presumption of their correctness, and the petitioner bears the burden of demonstrating that the findings are contrary to the weight of the evidence. (See *Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 811-812.) The court reviews the merits of the Board's legal conclusions de novo. (See *Simpson v. Unemployment Ins. Comp. Appeals Bd.* (1986) 187 Cal.App.3d 342, 350.)

Dr. Stoller raises several arguments to support his application. Despite his arguments, the court is not satisfied that the Board is unlikely to prevail on the merits.

First, Dr. Stoller argues that the Board should not have credited expert opinions based on a "conventional" standard of care, such as a standard of care incorporating the ACIP Guidelines or the AAP's Red Book. Dr. Stoller contends that the law entitled him to write exemption letters without reference to prevailing standards within the medical community. In his view, former Section 120370(a) created a "statutory" standard of care authorizing exemptions broader than those recommended in the ACIP Guidelines. To support his reading of former Section 120370(a), Dr. Stoller refers to the testimony of a legislator who sponsored the bill creating that subdivision as it existed during the period in question. One legislator's opinion about statute's meaning, however, generally does not assist a court tasked with construing the statute:

> "In construing a statute we do not consider the motives or understandings of individual legislators who cast their votes in favor of it. [Citations.] Nor do we carve an exception to this principle simply because the legislator whose motives are proffered actually authored the bill in controversy [citation]; no guarantee can issue that those who supported his proposal shared his view of its compass." [Citation.] A legislator's statement is entitled to consideration, however, when it is a reiteration of legislative discussion and events leading to adoption of proposed amendments rather than merely an expression of personal opinion. [Citations.] The statement of an individual legislator has also been accepted when it gave some indication of arguments made to the Legislature and was printed upon motion of the Legislature as a "letter of legislative intent."

(*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699-700.) At this point, the legislator's testimony is not before the court, and it is unclear the whether the entire Legislature may have adopted the viewpoint that Dr. Stoller tenders.

Furthermore, there is other evidence in the legislative history that the Legislature did not intend to decouple vaccine exemptions from the professional standard of care. As noted above, before Dr. Stoller wrote the exemption letters in question, Section 120370 required such letters to set forth the "specific nature and probable duration of the medical condition or circumstances *that contraindicated immunization*." In 2015, the Legislature was considering a bill to eliminate an exemption based on personal beliefs. While the bill was making its way through committee, the Assembly Committee on Health wrote:

> As previously discussed, it is entirely within the professional judgment of a physician if vaccination is not recommended due to the medical history of the patient. Opponents of this bill have raised concerns that current law regarding the letter of medical exemption does not adequately make clear that the letter may be written based on the best medical judgment of the physician. To that end, the author may wish to consider amending this bill [as follows:]

> Section 120370. (a) If the parent or guardian files with the governing authority a written statement by a licensed physician to the fact that the physical condition of the child is such, or medical circumstances relating to the child are such, that immunization is not considered safe, indicating the specific nature and probable duration of the medical condition or circumstances ~~that contraindicate~~ ***for which the physician does not recommend*** immunization, that child shall be exempt … .

(See Assem. Com. on Health, Rep. on Sen. Bill No. 277 (2015-2016 Reg. Session) as amended May 7, 2015.) The Legislature adopted the recommended amendment and further amended the text to specify that "family medical history" is among the circumstances that may lead a physician to recommend against vaccination. Nonetheless, the court discerns no wholesale abandonment of the prevailing standard of care, as Dr. Stoller suggests. Section 120370 still conditions exemption from vaccinations upon a professional judgment that vaccination is "unsafe." The notion that the Legislature intended to authorize physicians to determine safety without reference to prevailing professional standards is problematic. Even the opponents of SB 277, who advocated deleting the "contraindication" requirement from Section 120370, tendered the amendment as a clarification that physicians should use their "best professional judgment." Professional judgment hardy excludes consideration of prevailing professional standards. Insofar as Dr. Stoller seeks a stay on the theory that the Board erred by crediting expert testimony incorporating a conventional standard of professional care, he is unlikely to prevail.

In a slight variation of the same theory, Dr. Stoller suggests that the Board revoked his license because he wrote exemption letters that went "beyond" ACIP Guidelines. The Board acknowledged in its decision, however, that the ACIP and the AAP allow for deviations from their guidelines where science and pertinent patient information so instruct. Contrary to Dr. Stoller's characterization, it appears the Board disciplined him in part because he did not even consider standards in the ACIP Guidelines or the AAP Red Book, not merely because he went beyond their recommendations. The Board also appears to have disciplined him for basing his exemption letters on a genetics-based approach without accepted scientific foundation.

Next, Dr. Stoller argues that the Board erred in its conclusions about the safe-harbor provisions in Business and Professions Code Section 2234.1. That section provides:

> (a) A physician and surgeon shall not be subject to discipline … solely on the basis that the treatment or advice he or she rendered to a patient is alternative or complementary medicine … if that treatment or advice meets all of the following requirements:
>
> (1) It is provided after … a good-faith prior examination of the patient … .
>
> [¶¶]
>
> (b) For purposes of this section, "alternative or complementary medicine," means those health care methods of diagnosis, treatment, or healing that are not generally

used but that provide a reasonable potential for therapeutic gain in a patient's medical condition that is not outweighed by the risk of the health care method.[3]

The Board concluded that Dr. Stoller did not meet the requirements in B&P Section 2234.1 because, among other things, he did not perform good-faith examinations of the children he exempted. The materials currently before the court support this conclusion. The Board found that the parents of many of the children in question sought exemptions at the outset. The Board also found that Dr. Stoller did not physically examine the children and did not seek medical records or other substantiation of the histories parents reported. Notably, it appears Dr. Stoller did not request medical records even for children whose parents reported adverse reactions to prior vaccinations. Hence, on the question whether Dr. Stoller examined the children in good faith before exempting them, the Board is likely to prevail.

Dr. Stoller argues that his failure to obtain medical records was not a failure to perform a prior good faith examination. He notes that a section of the Business and Professions Code governing the dispensation of dangerous drugs authorizes an "appropriate prior examination" that does not require a "synchronous interaction between the patient and the licensee." (See Gov't Code § 2242(a).) That section, however, does not require "good faith" and expressly does require compliance with the "appropriate standard of care." Moreover, B&P Section 2234.1 does not exclude synchronous interactions as B&P Section 2242 does. Given the several distinctions, and absent Dr. Stoller's demonstration that the dispensation of dangerous drugs is otherwise like exempting children from mandatory vaccinations, the analogy is unconvincing.

Dr. Stoller also argues that his failure to obtain medical records before exempting children was only relevant to a charge against him – failure to maintain adequate and accurate records – that the Board did not sustain. Dr. Stoller misreads the Board's Accusation against him. (See Pet. at 10:26-11:2 [identifying failure to obtain records as a ground for discipline].) Because the failure to *obtain* medical records was alleged to support a charge other than the one based on the failure to *maintain* medical records, Dr. Stoller's contrary argument fails.

Because the Board is likely to prevail in a dispute over the good faith of Dr. Stoller's prior examinations of children he exempted, the court need not consider other safe-harbor requirements in B&P Code Section 2234.1.

Dr. Stoller argues next that the penalty imposed against him – revocation without probation – is excessive given lighter penalties imposed against other physicians charged with improperly exempting children from vaccinations. Dr. Stoller would analogize himself to three such physicians, one who was merely reprimanded, and two who received probation. (See RJN, Exhs. A-C.)

[3] The court questions whether exempting children from vaccinations has the potential for "therapeutic gain" within the meaning of H&P Code 2234.1(b). Because resolution of this question is unnecessary at this time, the court does not address it further.

The court may only set aside a Board-ordered penalty constituting a manifest abuse of discretion. (See *Landau v. Superior Court* (1998) 81 Cal.App.4th 191, 217-218; see *id.*, p. 218 ["In reviewing the exercise of this discretion we bear in mind the principle 'courts should let administrative boards and officers work out their problems with as little judicial interference as possible'"].) In exercising its disciplinary authority, the Board must make protection of the public its highest priority. (See B&P Code § 2229(a).) Rehabilitation is also a consideration, but it must give way to protection of the public where the two considerations conflict. (See *id.*, § 2229(b), (c).) The vaccination of school children has obvious implications for the public's protection. Dr. Stoller's assertion, that the children he exempted did not actually suffer harm, discounts the potential for harm, including the potential harm to the public at large when school children are not vaccinated.

For reasons discussed above, the Board is likely to prevail on the merits of its position that Dr. Stoller exempted 10 children from vaccinations without proper investigation and for reasons without medical foundation. Dr. Stoller is unlikely to prevail on his contention that the discipline imposed on him is excessive given lesser discipline imposed on other physicians. The application contains almost no information about the physician who received a public reprimand. Exhibit A to the request for judicial notice indicates that this physician departed from the standard of care when she exempted children from vaccination, but there are no other details. The court would be required to speculate that the physician in question engaged in the extreme departures attributed to Dr. Stoller.

Exhibits B and C to the request for judicial notice describe physicians who settled disciplinary charges prior to hearing. Dr. Stoller was charged for exempting at least twice as many children as either of these physicians.[4] Given these distinctions, it appears that reasonable minds could differ with respect to the propriety of the discipline imposed against Dr. Stoller. As a result, the Board is likely to prevail against Dr. Stoller's challenge to the penalty imposed. (See *Landau*, *supra*, p. 221 [where reasonable minds could differ, courts will not set aside administrative penalties].)

Finally, Dr. Stoller makes brief reference to other grounds to set aside the Board's decision. (See App. at 2-3 [asserting abuses of discretion in excluding expert witnesses and ordering disclosure of communications between Dr. Stoller, his counsel and an expert witness].) Dr. Stoller has not genuinely argued these grounds in the application, and his cursory references do not demonstrate that the Board is unlikely to prevail on the merits.

For all the reasons above, the court is not satisfied that the Board is unlikely to prevail on the merits. Given this, the application must be denied, and the court need not decide whether entry of a stay would cause the public interest to suffer.

[4] Although the Board's accusation against one of these physicians indicates that she provided roughly 1,000 exemptions, (see RJN, Exh. C), she was only charged for an exemption written for one patient.

Disposition

The application is denied.

The minute order is effective immediately. Nor formal order pursuant to CRC 3.1312 is required.

The hearing will be conducted remotely through the Zoom application and live-streamed on the court's YouTube page. The clerk will email the Zoom ID to counsel prior to hearing. The YouTube page is accessible from the Sacramento County Superior Court's public website.

Although any hearing will be live-streamed on the court's YouTube page, the broadcast will not be saved. Thus, if any party wishes to preserve the hearing for future use, a court reporter will be required. Any party desiring a court reporter shall so advise the Department 17 Clerk no later than 4:30 p.m. on the day before the hearing. The reporter's fee is $30.00 for civil proceedings lasting under one hour, and $239.00 per half day for proceedings lasting more than one hour. (Local Rule 1.12 and Government Code § 68086.)