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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

KENNEDY, RON, M.D., Plaintiff, **v.** **ALEXIS PODESTA IN HER OFFICIAL CAPACITY AS SECRETARY OF THE DCA, *ET AL.*,** Defendants.	Case No. CPF-19-516639 **~~[PROPOSED]~~ ORDER SUSTAINING DEMURRER TO FIRST AMENDED COMPLAINT** Date: August 20, 2019 Time: 9:30 a.m. Dept: 302 Judge: Hon. Ethan P. Schulman Trial Date: Unassigned Action Filed: April 23, 2019

This matter came on regularly for hearing on August 20, 2019, in Department 302 of the San Francisco Superior Court, the Honorable Ethan P. Schulman, Judge presiding. Defendants and moving parties were represented ~~by Xavier Becerra, Attorney General,~~ by Lawrence Mercer, Deputy Attorney General. Plaintiff was represented by his attorneys Jacques G. Simon and Michael Machat. The Court, having read and considered all pleadings and documents on file in this action, having heard oral argument, and good cause appearing therefore, hereby adopts its tentative ruling on this matter and orders as follows:

Defendants' demurrer to plaintiff Ron Kennedy, M.D.'s First Amended Complaint is sustained without leave to amend. Plaintiff fails to state a cause of action for injunctive or declaratory relief.

This case stems from a series of investigative subpoenas served by the Medical Board of California ("Board") regarding vaccination exemptions that plaintiff issued to minors. In a prior action (No. CPF-19-516531), this court issued an order compelling plaintiff to produce patient records sought by certain of those subpoenas, finding that the Board had demonstrated good cause for their issuance and that they were relevant and material to its investigation of whether Dr. Kennedy is improperly issuing blanket exemptions from vaccination in violation of the standard of care. The Court of Appeal, in a published opinion, denied Dr. Kennedy's petition for a writ of supersedeas to stay that order pending appeal. (*Kennedy v. Superior Court* (2019) 36 Cal.App.5th 306.) The Court of Appeal rejected Dr. Kennedy's argument that the court's order was automatically stayed, observing that "an automatic stay would impede the Board's discharge of its duty to 'protect the public against incompetent, impaired, or negligent physicians.' The Legislature has 'broadly' vested the Board with authority to investigate complaints against physicians. The power to investigate would be hamstrung if a physician could force the Board to bring a court action to enforce a subpoena, then obtain an automatic stay of an adverse action pending a subsequent appeal." (*Id.* at 309-310 [quoting *Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 7.) The court acknowledged that Dr. Kennedy could seek a discretionary stay pending appeal by showing that his appeal raises substantial questions and that disclosure of the records would cause irreparable harm. However, it observed, "We would likely conclude that the superior court acted within its discretion in finding the Board's interest in obtaining records of vaccination exemptions outweighed the patients' privacy rights, given that the Board must keep the records confidential during its investigation." (*Id.* at 310, citing Gov. Code, § 11183, Bus. & Prof. Code, §

2225(a).) Dr. Kennedy filed a petition for review and request for stay, both of which, just two days later, the California Supreme Court denied. (*Kennedy v. Superior Court (Grafilo)*, S256516 (June 28, 2019).)

In this action, plaintiff alleges that in addition to the subpoenas served on him, the Board issued investigative subpoenas to 12 school districts for minors' medical records, in response to which those districts produced 50 vaccination exemptions issued by him to school-aged children. (First Amended Complaint ¶ 108(a).) Plaintiff appears to allege that the Board subpoenaed from the school districts only the one-page exemption forms themselves, together with the names and contact information of the affected children and their parents, not the children's complete medical records. (See, e.g., *id.*, ¶¶ 24-27, 47-53.) Plaintiff contends that by issuing those subpoenas without prior notice to him, the Board violated the Fourth Amendment of the United States Constitution, the California Constitution, and several state statutes. He seeks injunctive relief to enjoin the Board from using any of those records in its investigation and from commencing any disciplinary action against him based on those records, as well as related declaratory relief. The court rejects plaintiff's claims.

As noted, the Board is charged with the duty to protect the public against incompetent, impaired, or negligent physicians. "A primary power exercised by the Board in carrying out its enforcement responsibilities is the power to *investigate*: the statute broadly vests the Board with the power of 'Investigating complaints from the public, from other licensees, from health care facilities, or from a division of the board that a physician and surgeon may be guilty of unprofessional conduct.'" (*Arnett v. Dal Cielo* (1996) 14 Cal.4th 4, 7-8, quoting Bus. & Prof. Code § 2220(a) (emphasis in original).) Further, "[b]ecause the statute authorizes the Board to issue a subpoena 'in any inquiry [or] investigation (Gov. Code, § 11181, subd. (e)), the Board may do so for purely investigative purposes; it is not necessary that a formal accusation be on file

or a formal adjudicative hearing be pending. [Citation.] Indeed, such investigations often do not result in formal charges or hearings." (*Id.* at 8.) "If after an investigation the Board determines there is sufficient evidence to warrant a formal disciplinary action against a licensee, it refers the matter to the Attorney General. The action is then prosecuted by the Senior Assistant Attorney General of the Health Quality Enforcement Section, and the proceedings are conducted in accordance with the Administrative Procedure Act." (*Lewis v. Superior Court* (2017) 3 Cal.5th 561, 567.)

Plaintiff is correct that a physician has standing to protect his or her patients' privacy rights. (See *M.B. v. Superior Court* (2002) 103 Cal.App.4th 1384, 1392 ["[T]he Supreme Court and other federal courts have permitted third parties to move to quash grand jury subpoenas directed to another person where a litigant has sufficiently important, legally-cognizable interests in the materials or testimony sought to give the litigant standing to challenge the validity of that subpoena."] For example, in *Lewis v. Superior Court* (2018) 3 Cal.5th 561, the Court held that a physician had standing to assert his patients' constitutional privacy rights in a disciplinary proceeding the Board brought against him for prescribing dangerous drugs without an appropriate examination, among other charges. (Id. at 569-571.) Contrary to plaintiff's position, however, he has no statutory or constitutional right to notice and an opportunity to intervene in the Board's investigation *before* it has completed that investigation and determined that disciplinary proceedings are warranted.

Here, plaintiff seeks to enjoin "defendants from proceeding or continuing to proceed with any further investigation or administrative prosecution of the Plaintiff." (First Amended Complaint, ¶6.) While *Lewis* establishes that plaintiff can raise the privacy issues *in a disciplinary proceeding*, there is no authority holding that plaintiff can bring an action such as this one, which seeks to hamstring or obstruct the Board in the conduct of its investigation *before*

it has even completed the investigation or reached a conclusion. That is because there is a fundamental difference between a confidential investigative process, which often does not result in formal charges, and a public adjudicatory proceeding, which can lead to discipline. (See *Sehlmeyer v. Department of General Services* (1993) 17 Cal.App.4th 1072, 1080 [holding that "before confidential third party personal records may be disclosed in administrative disciplinary proceedings, the subpoenaing party must take reasonable steps to notify the third party of the pendency and nature of the proceedings and to afford the third party a fair opportunity to assert his or her interests by objecting to disclosure, by seeking an appropriate protective order from the administrative tribunal, or by instituting other legal proceedings to limit the scope or nature of the matters sought to be discovered."].) Plaintiff's property interest or license is not currently at stake, and to the extent that the parents and plaintiff have legitimate privacy interests in the subpoenaed records, they are protected by the mandatory confidentiality provisions that bind the Board in conducting its investigation. (Gov. Code, § 11183; Bus. & Prof. Code, § 2225(a).) Any such privacy interests are limited, since the exemption letters themselves are required by law to be filed with the school district or "governing authority." (Health & Safety Code, § 120370(a).) If the Board seeks to enforce an investigative subpoena against plaintiff for the child's medical records, it would be required to make the statutory good cause showing, and plaintiff would have an opportunity to object and be heard, just as he did in the prior action.

Plaintiff fails to show that the Fourth Amendment, California Constitution, or any of the cited statutes required notice to plaintiff of the subpoenas served on the school districts. Every fledgling investigation does not trigger the full panoply of constitutional protections. Notice to plaintiff was unnecessary upon weighing the harm to plaintiff and his patients against the purpose of the Board's conduct. Moreover, such notice and satellite proceedings like the instant one would disrupt the investigative process. As the U.S. Supreme Court has observed, "[T]he

investigative process could be completely disrupted if investigative hearings were transformed into trial-like proceedings... Fact-finding agencies without any power to adjudicate would be diverted from their legitimate duties and would be plagued by the injection of collateral issues that would make the investigation interminable." (*Hannah v. Larche* (1960) 363 U.S. 420, 443; see also *Alexander D. v. State Bd. of Dental Examiners* (1991) 231 Cal.App.3d 92, 98 [explaining that the government's interest in protecting the public from incompetent practitioners would be severely undermined if full due process protections were provided for every preliminary investigation and noting that any subsequent adjudicatory hearing provides for a full rebuttal].) Plaintiff's authorities do not compel a contrary conclusion. *City of Los Angeles, Calif. v. Patel* (2015) 135 S.Ct. 2443 was a facial challenge under the Fourth Amendment to a provision of the Los Angeles Municipal Code that required hotel operators to make their registries available to the police on demand. The Court held "only that a hotel owner must be afforded an opportunity to have a neutral decisionmaker review an officer's demand to search the registry before he or she faces penalties for failing to comply." (*Id.* at 2453.) In this case, there is no chance that plaintiff will be penalized based on the subpoenas served on the school districts, which are merely one step in the investigative process; if the Board files disciplinary proceedings against him, he will be entitled to defend those proceedings in accordance with the APA.

Dated: August 20, 2019

ETHAN P. SCHULMAN
Judge of the Superior Court