IN THE MATTER OF	*	BEFORE THE
ERNESTO C. TORRES, M.D.	*	MARYLAND STATE BOARD
Respondent	*	OF PHYSICIANS
License Number: D23651	*	Case Number: 2219-0183A

* * * * * * * * * * * * *

FINAL DECISION AND ORDER ON ORDER FOR SUMMARY SUSPENSION

On May 28, 2019, pursuant to Md. Code Ann., State Gov't § 10-226(c)(2), Disciplinary Panel A ("Panel A") of the Maryland State Board of Physicians (the "Board") issued and Order for Summary Suspension of License to Practice Medicine against Ernesto C. Torres, M.D.'s Maryland license. The case was forwarded to the Office of Administrative Hearings ("OAH") for an evidentiary hearing.

On July 26, 2019, an Administrative Law Judge ("ALJ") of OAH held the evidentiary hearing. On October 2, 2019, the ALJ issued a Proposed Decision determining that the summary suspension of Dr. Torres' license should be affirmed. No exceptions to the ALJ's proposed decision were filed. The case was brought before Board Disciplinary Panel B (the "Panel" or "Panel B") for a final decision.

FINDINGS OF FACT

Except as otherwise expressly stated in this decision, Panel B adopts the ALJ's Findings of Fact and Discussion (ALJ's Proposed Decision at pages 4 through 20), which are incorporated by reference into the body of this document as if set forth in full. The factual findings were proven by the preponderance of the evidence. The ALJ's Proposed Decision is attached as Exhibit 1.

CONCLUSIONS OF LAW

Based upon the Findings of Fact, Panel B concludes that the Order for Summary Suspension, issued on May 28, 2019, against Dr. Torres is imperatively required to protect the public health, safety, and welfare. *See* State Gov't § 10-226(c)(2).

Panel B does not adopt the ALJ's statements pertaining to § 14-404(a)(3)(i) and (ii) of the Health Occupations Article, Annotated Code of Maryland (immoral or unprofessional conduct in the practice of medicine). This proceeding does not concern § 14-404(a)(3) of the Health Occupations Article. This proceeding, instead, concerns the adjudication of the summary suspension under § 10-226(c)(2) of the State Government Article. The ALJ, therefore, mistakenly addressed whether Dr. Torres engaged in immoral or unprofessional conduct in the practice of Maryland. (ALJ's Proposed Decision at page 20.) While summary suspension proceedings are often consolidated with charges brought under § 14-404, that did not occur in this summary suspension proceeding. Because § 14-404(a)(3) was not at issue in this proceeding, Panel B does not adopt the ALJ's references, discussion, findings, or conclusions pertaining to § 14-404(a)(3).

Specifically, the Panel does not adopt the following language from the ALJ's Proposed Decision: (1) on page 1, "that the Respondent's conduct is immoral or unprofessional in the practice of medicine and"; (2) also, on page 1, "Md. Code Ann., Health Occ. § 14-404(a)(3)(i) and (ii) (2014 & Supp. 2018)"; (3) on page 2, in the Issues, "Does a preponderance of the evidence support the Board's determination that the Respondent engaged in immoral or unprofessional conduct in the practice of medicine; and if so"; (4) on page 10, "the Respondent's action constituted immoral or unprofessional conduct in the practice of medicine, and"; (5) on page 11, "the Respondent engaged in immoral and unprofessional conduct in the practice of

medicine, and that"; (6) on page 19, the third paragraph; (7) on page 20, "or diminish the standing of the medical profession in the eyes of a reasonable member of the general public. *See Finucan v. Board of Physicians,* 380 at 64"; and (8) also, on page 20, in the Conclusions of Law, "(1) that the State Board of Physicians proved by a preponderance of evidence that the Respondent engaged in immoral or unprofessional conduct in the practice of medicine, and (2)."

ORDER

It is, by Board Disciplinary Panel B, hereby

ORDERED that the Order of Summary Suspension of License to Practice Medicine against Ernesto C. Torres, M.D., issued on May 28, 2019, is **AFFIRMED;** and it is further

ORDERED that the summary suspension of Dr. Torres' license to practice medicine in Maryland remains in effect; and it is further

ORDERED that this is a public document.

01/06/2020
Date

Signature on File
Christine A. Farrelly, Executive Director
Maryland State Board of Physicians

NOTICE OF RIGHT TO APPEAL

Pursuant to § 14-408(a) of the Health Occupations Article, Dr. Torres has the right to seek judicial review of this Final Decision and Order on Order for Summary Suspension ("Final Decision"). Any petition for judicial review must be filed within 30 days from the date this Final Decision was sent to the Respondent. The Final Decision was sent on the date of the cover letter accompanying the Final Decision. The petition for judicial review must be made as directed in the Maryland Administrative Procedure Act, Md. Code Ann., State Gov't § 10-222, and Maryland Rules 7-201 *et seq.*

If Dr. Torres petitions for judicial review, the Board is a party and should be served with the court's process. In addition, Dr. Torres should send a copy of his petition for judicial review to the Board's counsel, David Wagner, Assistant Attorney General, Office of the Attorney General, 300 W. Preston Street, Suite 302, Baltimore, Maryland 21201. The administrative prosecutor is not involved in the circuit court process and does not need to be served or copied on pleadings filed in circuit court.

Exhibit 1

MARYLAND STATE BOARD OF	* BEFORE ROBERT B. LEVIN
PHYSICIANS	* AN ADMINISTRATIVE LAW JUDGE
v.	* OF THE MARYLAND OFFICE
ERNESTO C. TORRES, M.D.	* OF ADMINISTRATIVE HEARINGS
RESPONDENT	* CASE NO: MDH-MBP1-72-19-20000

* * * * * * * * * * * * *

PROPOSED DECISION

STATEMENT OF THE CASE

On May 28, 2019, the State Board of Physicians (the Board) issued an Order of Summary Suspension against Ernesto Torres, M.D. (Respondent), which suspended the Respondent's license to practice medicine in the State of Maryland. The Board alleges that the Respondent engaged in sexual misconduct with a patient. The Board alleges further that the Respondent's conduct is immoral or unprofessional conduct in the practice of medicine and that this behavior raises a substantial likelihood of risk of serious harm to the public health, safety, or welfare. Md. Code Ann., Health Occ. § 14-404(a)(3)(i) and (ii) (2014 & Supp. 2018).

I held a hearing on July 26, 2019 at the Office of Administrative Hearings (OAH), 11101 Gilroy Road, Hunt Valley, Maryland pursuant to section 14-405(a) of the Health Occupations Article, Annotated Code of Maryland (2014 & Supp. 2018). The Respondent was present and was represented by Margaret Teahan, Esquire. W. Adam Malizio and K.F. Michael Kao, Assistant Attorneys General, were the Administrative Prosecutors.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the Rules of Procedure of the Board, and the Rules of Procedure of the OAH. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2014 & Supp. 2018); Code of Maryland Regulations (COMAR) 10.32.02; and COMAR 28.02.01.

ISSUES

Does a preponderance of the evidence support the Board's determination that the Respondent engaged in immoral or unprofessional conduct in the practice of medicine; and if so

Is summary suspension of the Respondent's license necessary because public health, safety, or welfare imperatively requires emergency action?

SUMMARY OF THE EVIDENCE

Exhibits:

The Board submitted the following exhibits that were admitted into evidence:

Bd. Ex. #1	Memorandum to File, April 30, 2019
Bd. Ex. #2	Subpoena Duces Tecum to Frederick Police Department (FPD), May 1, 2019
Bd. Ex. #3	Patient's Written Statement, April 28, 2019
Bd. Ex. #4	FPD Case Summary Report, May 7, 2019
Bd. Ex. #5	Board Letter to Respondent, May 8, 2019
Bd. Ex. #6	Subpoena Ad Testificandum to Respondent, May 8, 2019
Bd. Ex. #7	Subpoena Duces Tecum to Respondent for Patient's Record, May 8, 2019
Bd. Ex. #8	Subpoena Duces Tecum to Respondent for Appointment Log, May 8, 2019
Bd. Ex. #9	Email from FPD, May 8, 2019
Bd. Ex. #10	Subpoena Duces Tecum to FPD for Patient's Record, May 8, 2019

Bd. Ex. #11	Subpoena Duces Tecum to FPD for reports, May 8, 2019
Bd. Ex. #12	Transcript of Respondent's Interview with FPD, April 29, 2019
Bd. Ex. #13	Subpoena Duces Tecum Fax to FPD, May 8, 2019
Bd. Ex. #14	Email from FPD in response to Subpoena Duces Tecum, May 10, 2019
Bd. Ex. #15	FPD Case Summary Report, May 10, 2019
Bd. Ex. #16	Patient's Medical Record and Certification from Respondent, Received by the Board May 13, 2019
Bd. Ex. #17	Supplement to Patient's Medical Record and Certification from Respondent, May 13, 2019
Bd. Ex. #18	Respondent's Written Response to the Board, May 14, 2019
Bd. Ex. #19	Transcript of Respondent's Board Interview, May 13, 2019
Bd. Ex. #20	Transcript of Patient's Board Interview, May 29, 2019
Bd. Ex. #21	Board File on Respondent including a prior complaint, excluding page 256 of the exhibit[1]
Bd. Ex. #22	Board Report of Investigation, May 10, 2019

The Respondent submitted the following exhibit that was admitted into evidence:

Resp. Ex. #1	Patient's Drawing, July 26, 2019[2]

[1] I sustained an objection to page 256 of this exhibit, but the remainder was admitted.
[2] The Patient prepared this drawing during her testimony at the hearing.

I also admitted the following exhibits into evidence as ALJ exhibits:

ALJ Ex. #1	CD of audio recording of Board's Interview with Patient, May 29, 2019[3]
ALJ Ex. #2	CD of audio recording of FPD's Interview with Respondent, April 29, 2019
ALJ Ex. #3	CD of audio recording of Board's Interview with Respondent, May 23, 2019

Testimony

The Board presented the testimony of Molly Dicken, Board Compliance Analyst.

The Respondent presented the testimony of [redacted] (Patient).[4]

FINDINGS OF FACT

Having considered the evidence presented, I find the following facts by a preponderance of the evidence:

1. At all times relevant, the Respondent was licensed to practice medicine in the State of Maryland. The Respondent was originally licensed to practice medicine in Maryland on June 21, 2019, under License No. D23651.
2. At all times relevant, the Respondent was a solo practitioner practicing pediatrics and adolescent medicine at an office in Frederick, Maryland.

[3] Respondent objected to the admission of the transcript of the Board's recorded interview of the Patient and the transcripts of the two recorded interviews of the Respondent (one by FPD and the other by the Board), on the ground that the best evidence of the interviews was the audio recordings of the interviews. The Board had produced to the Respondent the transcript of each interview in discovery, but did not produce the audio recordings. I overruled the Respondent's objection, and admitted the transcripts in evidence as Bd. Exs. 12, 19, and 20. During the hearing the administrative prosecutors emailed to Respondent's counsel and to me the audio files of the three interviews. Prior to the conclusion of the hearing the OAH media office downloaded the audio files onto three separate CDs. Without objection, I admitted the CDs as ALJ Exs. 1 (corresponding to Bd. Ex. # 12), 2 (corresponding to Bd. Ex. # 19), and 3 (corresponding to Bd. # 20), respectively. *See* July 26, 2019 Hearing Transcript, at pp. 218-20.

[4] The Patient's initials are used to protect her privacy.

3. On March 18 and 20, 2019, the Patient, then an eighteen-year-old freshman at [redacted] saw the Respondent at his office because she was experiencing anxiety and panic attacks.

4. On March 18, 2019, the Respondent diagnosed the Patient with generalized anxiety disorder, and prescribed sertraline (brand name Zoloft) 25 mg daily and clonazepam (brand name Klonopin) 0.50 mg as needed for panic attacks. The Respondent asked the Patient to call the office with weekly updates on her condition, and to schedule a follow-up appointment in four weeks.

5. On March 20, 2019, the Respondent again saw the Patient for an anxiety consultation.

6. On March 29, 2019, the Patient called the Respondent's office and advised that the Zoloft was working well, although she was still experiencing some anxiety. She stated she did not want to take more medication than she needed, and was not taking Clonazepam because she did not like the way it made her feel.

7. On Friday, April 26, 2019, the Patient, who was unaccompanied, arrived at the Respondent's office at approximately 3:57 p.m. for a scheduled, follow-up medication check.

8. The Patient signed in and was placed in a room where she waited because the Respondent was with another patient.

9. A nurse recorded the Patient's weight and blood pressure, and, after noting the Patient's blood pressure was high, made a joke about the Patient rushing to get to the doctor's office.

10. The Respondent entered the room. At that time, he and the Patient were alone in the room.

11. The Respondent listened to the Patient's heart with a stethoscope, and checked her eyes and ears.

12. Then the Respondent had the Patient lie down to feel her lower abdominal area.

13. The Respondent, when performing a physical examination, normally felt the Patient's lower abdominal area for swelling or abnormalities.

14. The pants (leggings) the Patient was wearing were tight and high-waisted. In order for the Respondent to reach her lower stomach area his hands had to be under her waistline. He pushed on the area of the Patient's lower stomach, and proceeded to ask the Patient questions about a recent anxiety attack she experienced when she had to appear before her field hockey team coaches. He began to lower his hand to the upper part of her vagina, just above but not actually touching the clitoris, between the labia majora and clitoris. For one or two minutes, which felt longer to the Patient, his hand rubbed there.

15. The Patient was unable to answer the Respondent's questions about her anxiety because she was so distracted. The Respondent handed the Patient tissues, and she tried to blow her nose, as she was crying. As she was lying down she could not breathe, and leaned or sat up to blow her nose.

16. The Respondent stopped touching the Patient and gave her a hug once she sat up.

17. The Respondent continued conversing with the Patient, talking about her self-esteem, and also about politics, a dream he had, and about an internal "judge." He said that patients with anxiety have a judge in their head like an inner voice. He asked the Patient which of her parents was her judge, who was always pushing her to do better. She said it was her father.

18. The Respondent said that the inner voice is not that of the Patient, it diminishes her creativity, and it is good to ignore her internal judge.

19. Once the appointment ended, the Patient put on her jacket and Respondent followed her out of the examination room.

20. The Patient walked past the reception desk and no one was there. The computer screens were black. The Patient asked, "where is everyone?" (Bd. Ex. # 3, bates no. 000005). The Respondent responded but the Patient could not make out what he was saying. He continued to talk about the Patient shadowing him in the future for clinical hours, because the Patient had expressed interest in becoming a physician assistant. The Respondent stated that she would have to spend many hours with him if she were to shadow.

21. The Patient opened the front door of the office and left.

22. The Patient checked her phone for the first time since 3:57 p.m., and noticed her father had texted her. She had not informed her father that she had the appointment with the Respondent, and only told him she was coming home from Frostburg. She responded to her father's text at 5:16 p.m. to tell him she was at the doctor's office. Then she drove home.

23. The Patient felt very violated and immediately took a shower.

24. At the Respondent's office when a patient is physically examined, either the parent or another staff member would normally be in the room during the examination.

25. The Respondent had never performed an abdominal examination on the Patient while he and she were alone in the examination room.

26. The Respondent normally did not perform physical examinations on patients who were being seen for a medication follow-up.

27. Prior to the April 26, 2019 appointment, the Patient was not experiencing or complaining of abdominal issues.

28. The Respondent did not inform the Patient that he was going to put his hands underneath and into her pants.

29. The Patient at the time had a gynecologist whom she saw for female reproductive issues.

30. She informed her mother about the Respondent's conduct the next day, Saturday, April 27, 2019, and informed her father the following day, Sunday, April 28, 2019.

31. On or about April 28, 2019, the Patient, accompanied by her parents, went to Frederick Police Department (FPD) headquarters to report a sex offense. The Patient initially spoke to an officer and later wrote a statement.

32. On or about April 30, 2019, the Board opened an investigation of the Respondent after receiving a telephone call from a FPD detective stating that FPD was conducting a criminal investigation of the Respondent for an alleged sexual offense against a patient (the Patient).

33. As part of its initial investigation, the Board obtained investigative materials from FPD, including, but not limited to, the Patient's written statement to FPD and the Respondent's recorded audio interview.

34. On or about May 3, 2019, a Frederick County grand jury returned a three-count indictment against the Respondent for Second Degree Rape of the Patient, in violation of Md. Code Ann., Criminal Law (Crim. Law) § 3-304 (2012 & Supp. 2018); Fourth Degree Assault of the Patient, in violation of Crim. Law § 3-308(b)(1); and Second Degree Assault of the Patient, in violation of Crim. Law § 3-203. The indictment is pending in the Circuit Court for Frederick County, Maryland.

35. On May 28, 2019, the Board's Disciplinary Panel A issued an Order for Summary Suspension of the Respondent's License to Practice Medicine in which it: (a) concluded as a matter of law that the public health, safety, or welfare imperatively requires emergency action, pursuant to State Gov't § 10-226(c)(2) and COMAR 10.32.02.08B(7)(a); and (b) ordered that the Respondent's license to practice medicine in the State of Maryland is summarily suspended.

36. The Respondent's conduct on April 26, 2019, in touching the Patient's vaginal area, made her anxiety worse, because she kept revisiting the incident in her mind.

37. Summary suspension of the Respondent's license to practice medicine is an appropriate use of the Board's discretion because the public health, safety, or welfare imperatively requires the emergency action.

DISCUSSION

I. GOVERNING STATUTES AND REGULATIONS

In accordance with COMAR 10.32.02.08B(1), the Board may summarily suspend the license of a health care provider if "there is a substantial likelihood of a risk of serious harm to the public health, safety, or welfare." Summary suspensions are governed by the Administrative Procedure Act which permits suspension if "the public health, safety, or welfare imperatively requires emergency action" and the licensee is given notice of the suspension and the opportunity to be heard. State Govt § 10-226(c)(2)(2018); COMAR 10.32.02.08.

In turn, COMAR 10.32.02.02B(18) defines "imperatively requires" as an action required "as a result of factual contentions which raise a substantial likelihood of risk of serious harm to the public health, safety, or welfare before an evidentiary hearing governed by the Administrative Procedure Act is likely to be completed and result in a final order." At a contested case hearing, in accordance with section 10-217 of the State Government Article, the Board must establish by a

preponderance of the evidence that the summary suspension of the health care provider's license to practice medicine should be sustained.

It is well settled that "the Due Process Clause provides that certain substantive rights – life, liberty, and property – cannot be deprived except pursuant to constitutionally adequate procedures." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 541 (1985). The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards." *Id.* Thus, Maryland's pre-deprivation procedures must satisfy Constitutional due process requirements embodied in the Fourteenth Amendment. By requiring a contested case hearing based on a preponderance of the evidence, Maryland's procedures more than meet the minimum Constitutional standards.[5] Md. Code Ann. State Gov't §§ 10-217 and 226(c)(2) (2018).

II. THE PARTIES' CONTENTIONS

The Board contends that the evidence establishes the Respondent engaged in inappropriate sexual contact with a patient. It argued the Respondent's action constituted immoral or unprofessional conduct in the practice of medicine, and this behavior raises a substantial likelihood of risk of serious harm to the public health, safety, or welfare, Health Occ. § 14-404(a)(3)(i) and (ii), warranting the summary suspension of his license to practice medicine in Maryland.

The Respondent responded that his contact with Patient was incidental to an appropriate physical examination, and that there is no substantial evidence upon which the Board could properly have found either that the public health, safety, or welfare imperatively requires emergency action,

[5] "The due process clauses of Article 24 of the Maryland Declaration of Rights and the fourteenth amendment to the federal constitution have the same meaning; and we have said that Supreme Court interpretations of the federal provision are authority for interpretation of Article 24...." *Dep't of Transp. v. Armacost*, 299 Md. 392, 415 (1984).

or that there is a substantial likelihood of serious harm to the public health, safety, or welfare prior to the completion of a full evidentiary hearing on the Board's charges.

For the reasons stated below, I conclude that the Board has proved by a preponderance of the evidence that the Respondent engaged in immoral and unprofessional conduct in the practice of medicine, and that his continued practice of medicine raises a substantial likelihood of risk of serious harm to the public health, safety, or welfare.

III. THE WITNESSES AND THE RESPONDENT'S PRIOR STATEMENTS

A. The Board's Witness: Molly Dicken

The Board presented the testimony of Molly Dicken, its Compliance analyst, and through her submitted documentary evidence, including but not limited to the Patient's April 28, 2019 written statement to the FPD, her medical records from the Respondent, the transcript of the Patient's May 29, 2019 interview with the Board, the transcript of the April 29, 2019 FPD interview of the Respondent, the Respondent's May 14, 2019 letter to the Board in response to the Patient's allegations, the transcript of the Respondent's May 23, 2019 interview with the Board, and FPD records relating to its investigation. Ms. Dicken authenticated the Board's exhibits.

Ms. Dicken explained that the genesis of the Board's investigation was a FPD detective's call to her on April 30, 2019. The detective informed the Board that the Patient alleged that during a physical examination by the Respondent on April 26, 2019, the Respondent put his hands down her pants and touched her vagina. The detective stated that he interviewed the Respondent and the nurse who was on duty when the Patient arrived.

B. The Respondent's Witness: The Patient

The Respondent called the Patient as his only witness. She was nineteen at the time of the hearing, and eighteen on April 26, 2019. She lives with her mother, father, and younger brother when not at Frostburg State University, where she was completing her freshman year in April 2019.

She had been a patient of the Respondent since she was one week old. During her freshman year she saw the Respondent for a physical examination in connection with her participation in college sports. She plays field hockey. At the end of the semester, she saw the Respondent for anxiety, which had worsened when she went to college. In March 2019, the Respondent prescribed sertraline (brand name Zoloft)[6] and clonazepam (brand name Klonopin) [7] and diagnosed her as having generalized anxiety disorder (GAD). He stated it would take two weeks for the medication to achieve full effects, so he wanted her to check in to see if the dosage should be increased.

The Patient only took the clonazepam a few times because she reported that it made her feel out of it, and like a vegetable. She explained the difference between the anxiety and panic attacks she experiences. When she has an anxiety attack she can still function and speak, but gets upset and sweaty. When she has a panic attack, she is freaking out, has a hard time getting words out, her mind does not let her think, and she becomes sweaty and red-faced. She has a panic attack when she has to make an oral presentation, and has anxiety attacks when meeting with professors and teachers. When she has a panic attack, she can sometimes lose track of time and feel something lasted longer than it did in reality.

On April 26, 2019, she returned from college to Frederick for a scheduled follow-up appointment with the Respondent. The appointment was scheduled for 4:00 p.m.; she signed in at 3:57 p.m. The nurse said the doctor would be with her shortly as he was with a patient. The nurse took her weight on a scale and checked her blood pressure. Her blood pressure was high because of anxiety. The nurse said the Respondent would be with her in ten to fifteen minutes. The wait did not help the anxiety.

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[6] Zoloft is the brand name of sertraline, a selective serotonin reuptake inhibitor (SSRI) used to treat symptoms including anxiety. *See* https://www.drugs.com/sertraline.html.

[7] Clonazepam, the brand name of which is Klonopin, is a benzodiazepine used to treat symptoms including anxiety. *See* https://www.drugs.com/clonazepam.html

When she met with the Respondent, she was wearing a long sleeve shirt, a sports bra, and tight-fitting, high-waisted leggings, with no underwear. The waistband of the leggings stops an inch below her belly button. The Patient was alone in the examination room with the Respondent.

He asked about a most recent panic or anxiety attack. She told him about her most recent panic attack, which occurred when she had a meeting with her athletic coaches, in which she became sweaty and red-faced. The Respondent checked her heart with a stethoscope, and examined her eyes and ears.

The Patient was in the exam room for five to ten minutes before the Respondent motioned her to lie down on a table, and started rubbing on what she described as her lower stomach. He continued, and his hand went under her pants. He was pushing, not rubbing, on her stomach. He pressed with one ungloved hand. Normally he did not wear gloves when pressing her abdomen. He pressed for less than a minute. Each push lasted about a second. He pushed horizontally across her abdomen.

Then the Respondent lowered his hands to the upper part of her vagina, close to and above the clitoris. His fingers rubbed where the labia majora begins, in an area she described as right on top of the labia majora, between the labia majora and the clitoris. He was rubbing, not pushing. The duration was maybe one or two minutes or less, but it felt like five minutes to her. She was sure the Respondent touched her just above the clitoris for an extended period of time. She testified he did not touch the clitoris or the labia minora. She denied penetration, which she defined as entry into the vaginal canal.

She was feeling anxiety when the Respondent had her lie down on the examination table. Her anxiety worsened into a panic attack when he physically touched her. She was unable to answer the Respondent's questions about her meeting with the coaches because she was very upset when he was touching her.

When she has a panic attack, her heart rate increases. She was sweating and crying and, told the Respondent that she could not breathe and needed a tissue, so the Respondent got her a tissue box, and she sat up. That was when he removed his hand from under her leggings. She remembered the examination room had a theme of horses and no window. The door was closed. The Respondent hugged her frontally at some point.

Afterwards, the Respondent talked about politics and what she described as random topics unrelated to her anxiety medication. He asked her who her judge was in her head telling her to do better, and she said it was her dad. The Respondent told her not to listen to that voice, and complimented her on being a smart kid. He walked her down the hallway. No one was in the reception area, and the computer screens were black. The Respondent offered to let her shadow him, as she had previously expressed interest in being a physician assistant, but said it would have to be after hours, a comment she did not like. She has not returned to his office.

During her prior visits for anxiety consultation, the Respondent checked her heart rate, blood pressure, and ears but did not perform an abdominal examination. During her annual physical examinations, he did perform an abdominal examination, but only went about two inches below the navel. This time he moved lower down. She had previously been alone with the Respondent once or twice, but usually her mother and brother would be present.

She did not complain about abdominal issues on April 26, 2019. She expected to talk about her anxiety and her self-conception. The Respondent did not say why he was examining her abdomen or putting his hand under her pants. While he touched her, the thought crossed her mind to get up and leave, but he was standing over her with his right hand down her pants, and she would have had to push him out of the way.

She testified the incident made her anxiety worse because it is emotional for her to relive it, and she has to keep facing it. She has not gone into therapy, despite her parents pushing her to do

so. She spoke to the administrative prosecutors before the hearing to discuss her testimony, and has met with the Assistant State's Attorney handing the criminal case against the Respondent, but not to other attorneys. She mentioned to her ex-boyfriend the idea of possibly suing the Respondent. She has not joined a victims' rights organization or discussed this matter on social media.

C. The Respondent's Prior Statements

The Respondent did not testify, but the record includes (a) the transcripts of an April 29, 2019 FPD detective's interview of the Respondent, (b) the Respondent's May 14, 2019 letter to the Board in which he responded to the Patient's allegations, (c) the transcript of the Respondent's May 23, 2019 interview with the Board, and (d) the patient's medical records from the Respondent's office.

In his April 29, 2019 recorded interview with the FPD detective[8], the Respondent confirmed he saw the Patient on April 26, 2019, for a scheduled one-month follow-up appointment regarding her anxiety medication. She had been his patient her entire life. She is diagnosed with general anxiety disorder and panic attacks, and this visit was a follow-up to see how she was doing with the medication. He listened to her heart, looked at her throat, and checked her abdomen. Initially she was fine, but started crying as they were talking about her anxiety attacks. She cried for quite a while intermittently.

He examined her abdomen and hypogastrium[9] area with his hands. His hands were underneath her pants as he was examining her lower abdomen for about two minutes. Asked if he ever touched her vagina, he said he might have touched the upper portion of her vagina while transitioning from one side to the other. He told the detective he might have touched her vagina,

[8] The detective conducted a preliminary interview of the Respondent on April 29, 2019, which the detective summarized in Board Ex. 4, bates 000013-14. This preliminary interview was followed by a recorded interview, the transcript of which is Bd. Ex. # 12. The Respondent's statements in the two interviews are consistent.
[9] The hypogastrium is "that part of the central abdomen which is situated below the region of the stomach." https://www.oxfordreference.com/view/10.1093/oi/authority.20110803095954496

"[t]he very top portion as moving my hand from right to left...." (Bd. Ex. #12, bates 000030, condensed transcript page 7). He stated "I might have [touched the upper portion of the Patient's vagina], but, but not, not intently or with any purpose other than doing an exam." (*Id.*, condensed transcript page 6). He denied that his fingers had "gone into her vagina", but stated, "I might have brushed over it" referring to "the upper, the very top portion" of her vagina. (*Id.*, condensed transcript page 10).

The Respondent told the detective that the Patient did not complain to him about any abdominal issues during this visit, but said she is a girl who could have menstrual issues at her age, and he believed she may have had complaints in the past about irritable bowel syndrome, so it was a standard procedure for him to perform an abdominal examination.

By letter dated May 8, 2019, Ms. Dicken on behalf of the Board requested that the Respondent provide a written response to the Patient's allegations. The Respondent submitted a letter dated May 14, 2019. (Bd. Ex. 18). In his letter, the Respondent stated, among other things, that he performed an abdominal examination on the Patient, "during which I moved from her right to left lower quadrant, and might have brushed briefly the very upper edges of her vagina, but never massaged her clitoris or fingered her vagina as it was alleged by the D.A.[10] Nor did she have a panic attack while I was examining her." (*Id.* at bates 000185).

On May 23, 2019, Ms. Dicken and a colleague conducted a recorded interview of the Respondent, who was accompanied by his counsel. (Bd. Ex. # 19.) On advice of counsel he invoked his Fifth Amendment privilege against self-incrimination and declined to answer any questions about the allegations.

[10] Presumably, the reference is to the State's Attorney.

D. Analysis

It is undisputed from the Respondent's interview with the FPD, his written response to the Board, the Patient's testimony, and her medical records from the Respondent, that the Respondent saw the Patient at his office on April 26, 2019, for a medication follow-up appointment. The Respondent in his written response stated that while he moved from her right to left lower quadrant, he might have brushed briefly the upper edges of her vagina, but never rubbed the clitoris or digitally penetrated her.

In the Respondent's interview by the detective, he said he might have touched her vagina while transitioning from one side of her abdomen to the other. He said it was the upper portion of the vagina, and it was for examination purposes. The Respondent stated that with his hands down the Patient's pants for about two minutes, he may have brushed the top of her vagina.

The core issue for decision is whether the Respondent conducted a routine examination during which he unintentionally brushed the Patient's vagina, as opposed to intentionally and improperly touching her genitalia. I must agree with the State that the Respondent's innocuous explanation is not credible in light of the record taken as a whole.

The Patient's medical record states the reason for the appointment was "med check per Dr. Torres" and was to last fifteen minutes. (Bd. Ex. #17, bates no. 000184). Instead, the Patient was in the office for over an hour, during which the Respondent had his hands down her pants for at least two minutes, making contact with the top of her vagina. There was neither a chaperone present during the examination, nor any staff member present in the office by the time the Patient departed.

A member of the Respondent's staff, Stephanie Cavanaugh, told the detective who conducted the criminal investigation that she has never had any issue with the Patient, and that when a patient is physically examined, either the parent or a staff member is in the room during the examination. (Bd. Ex. #15, bates no. 000049). The Respondent's argument that he engaged in a

routine, standard physical examination was thus contradicted by his own staff. Also suspicious is the Respondent's performance of an examination of the Patient's lower abdomen when she was in his office for a fifteen minute medication check, and had reported no abdominal complaints.

I found the Patient to be a highly credible witness. Her accounts to the police and the Board, and her testimony at the hearing, were all consistent. She directly responded to the appropriately probing questions of the Respondent's counsel, who called her to testify.

She did not embellish or exaggerate. For example, she consistently denied the Respondent touched her clitoris or digitally penetrated her. In fact, in her written statement to the police, she initially wrote: "He proceeded to ask my [sic] questions about my recent anxiety attack as he began to lower his finger to my clitoris. For about five minutes his fingers rubbed on there." (Bd. Ex. #3, at bates 000004). However, she crossed out the word "on" in the second sentence, which I take as her indication that the Respondent was moving his hand toward (but not "on") the clitoris. (*Id.*) During her testimony, she drew a diagram of the female anatomy on which she wrote "Torres hand" and drew what appears to be a representation of two fingers pointing down, between the labia majora and (but not touching) the clitoris, both of which she labeled on the drawing . *See* Resp. Ex. # 1.

It was manifestly painful for the Patient to testify and relive the incident. Though she cried several times during the hearing, I did not find that she over-dramatized the incident. Rather, I found her demeanor, including her displays of emotion, to be consistent with her assertion that she had felt very violated by the Respondent's action.

I did not have the opportunity to evaluate the demeanor of the Respondent, who did not testify. The Respondent certainly was not required to testify at the hearing given the pending criminal charges against him relating to this matter. However, the fact remains that as between the Respondent and the Patient, only the Patient was subjected to cross-examination under oath, the time-honored technique used to test a witness's credibility.

I find the Patient's testimony at the hearing, which was consistent with her prior statements to the police and the Board, was more credible than the Respondent's statements in his interviews with the police and his response letter to the Board. I give substantial weight to the following factors bearing on credibility: the Patient's demeanor on the witness stand was credible; her prior statements and hearing testimony were both highly detailed (for example, she recalled the examination room's theme was horses, and that it had no windows), as well as consistent; the Respondent suspiciously performed a physical exam without a chaperone on a young female patient who had no abdominal complaint; and an appointment that was supposed to be a fifteen minute medication check lasted much longer.

Therefore, I reject the Respondent's contention that he merely accidentally brushed the top of the Patient's vagina in the course of a routine examination. Rather, I conclude that the contact with the Patient's vaginal area was improper and unprofessional. The Patient credibly testified that the Respondent's action exacerbated her anxiety. I find that the Respondent thereby caused the Patient actual harm.

The Respondent's conduct was immoral and unprofessional conduct in the practice of medicine. A physician's sexual misconduct involving a patient provides the basis for disciplinary action, including license suspension. *See Finucan v. Board of Physicians*, 380 Md. 577, 604 (2004), *cert. denied*, 125 S. Ct. 227 (2004) (physician's sexual relationships with patients were immoral or unprofessional conduct in the practice of medicine), and *Shirazi v. Board of Physicians,* 199 Md. App. 469, 477 (2011) (physician's sexual assault of patient was immoral or unprofessional conduct in the practice of medicine).

As previously noted, summary suspensions are governed by the Administrative Procedure Act which permits suspension if "the public health, safety, or welfare imperatively requires emergency action." Md. Code Ann., State Govt § 10-226(c)(2)(2018); COMAR

10.32.02.08. In turn, COMAR 10.32.02.02B(18) defines "imperatively requires" as an action required "as a result of factual contentions which raise a substantial likelihood of risk of serious harm to the public health, safety, or welfare before an evidentiary hearing governed by the Administrative Procedure Act is likely to be completed and result in a final order." "[T]he phrase 'imperatively requires' describes the circumstances that will satisfy section 10-226(c)(2)(i)'s requirement of an emergency and signals the degree of exigency contemplated for summary suspension orders." *Board of Physician Quality Assur. v. Mullan,* 381 Md. 157, 166 (2004). That degree of exigency has been demonstrated in this case. The Respondent's conduct reflects on the Respondent's fitness to practice medicine. The conduct caused the Patient actual harm, and raises reasonable concerns that he may continue to abuse the status of being a physician in such a way as to harm patients or diminish the standing of the medical profession in the eyes of a reasonable member of the general public. *See Finucan v. Board of Physicians*, 380 at 604.

I conclude that the Board has proved by a preponderance of the evidence that the Respondent's continued practice of medicine raises a substantial likelihood of risk of serious harm to the public health, safety, or welfare. He engaged in inappropriate sexual contact with a vulnerable, eighteen year-old patient, who saw him for anxiety and panic attacks. The concern is acute because the Respondent's patient population is made up of potentially vulnerable children and adolescents. Thus, the Respondent's conduct imperatively demonstrates the degree of exigency needed for a summary suspension.

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude, as a matter of law, (1) that the State Board of Physicians proved by a preponderance of the evidence that the Respondent engaged in immoral or unprofessional conduct in the practice of medicine, and (2) that the summary suspension of the Respondent's license to practice medicine on May 28, 2019 is

imperatively required to protect the public health, safety and welfare. Md. Code Ann., State Gov't § 10-226(c)(2)(2018).

PROPOSED DISPOSITION

I **PROPOSE** that the May 28, 2019 Summary Suspension of the Respondent's license to practice medicine be **AFFIRMED**.

October 2, 2019
Date Decision Mailed

Robert B. Levin
Administrative Law Judge

RBL/cmh
#181559

NOTICE OF RIGHT TO FILE EXCEPTIONS

Any party may file exceptions, in writing, to this Proposed Decision with the Board of Physicians within fifteen days of receipt of the decision. Md. Code Ann., State Gov't § 10-216 (2018) and COMAR 10.32.02.05B. The Office of Administrative Hearings is not a party to any review process.

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