

HEARING CONDUCTED BY THE
TEXAS STATE OFFICE OF ADMINISTRATIVE HEARINGS
SOAH DOCKET NO. 503-18-5102 .MD
TEXAS MEDICAL LICENSE NO. D-2355

IN THE MATTER OF THE
COMPLAINT AGAINST

ROBERT MCREE BATTLE, M.D.

BEFORE THE

TEXAS MEDICAL BOARD

COMPLAINT

TO THE HONORABLE TEXAS MEDICAL BOARD AND THE HONORABLE
ADMINISTRATIVE LAW JUDGE:

COMES NOW, the Staff of the Texas Medical Board ("Board Staff"), and files this Complaint against Robert McRee Battle, M.D. ("Respondent"), based on Respondent's alleged violations of the Medical Practice Act (the "Act"), Tex. Occ. Code, Title 3, Subtitle B and Tex. Admin. Code, Title 22, Part 9 ("Board Rules"), and would show the following:

I. SUMMARY OF FACTUAL ALLEGATIONS

It is alleged that Respondent failed to meet the standard of care for the treatment of one patient's childhood lymphoma. It is also alleged that Respondent failed to maintain adequate medical records and failed to comply with Board Rules for the provision of alternative/complementary medical treatment. Last, it is alleged that Respondent failed to comply with laws regarding the mandatory reporting of child abuse and neglect.

II. LEGAL AUTHORITY AND JURISDICTION

1. Respondent is a Texas Physician and holds Texas Medical License No. D-2355, originally issued by the Board on August 14, 1965. Respondent's license was in full force and effect at all times material and relevant to this Complaint.

2. Respondent received appropriate notice of an Informal Settlement Conference (ISC). The Board complied with all procedural rules, including but not limited to, Board Rules 182 and 187, as applicable.

3. No agreement to settle this matter has been reached by the parties.

4. All jurisdictional requirements have been satisfied.
5. The filing of this Complaint and the relief requested are necessary to protect the health and public interest of the citizens of the State of Texas, as provided in Section 151.003 of the Act.

III. APPLICABLE STATUTES AND STATUTORY VIOLATIONS

The following Statutes, Rules, and Agency Policy are applicable to the procedures for conduct of the hearing this matter:

A. General Statutes and Rules:

1. Section 164.007(a) of the Act requires that the Board adopt procedures governing formal disposition of a contested case before the State Office of Administrative Hearings.
2. Chapter 187 of the Board Rules sets forth the procedures adopted by the Board under the requirement of Section 164.007(a) of the Act.
3. Chapter 190 of the Board Rules sets forth aggravating factors that warrant more severe or restrictive action by the Board.
4. 1 Tex. Admin. Code, Chapter 155 sets forth the rules of procedure adopted by SOAH for contested case proceeding.
5. 1 Tex. Admin. Code § 155.507, requires the issuance of a Proposal for Decision (PFD) containing Findings of Fact and Conclusions of Law.
6. Section 164.007(a) of the Act, Board Rule 187 et. seq. and Board Rule 190 et. seq., provide the Board with the sole and exclusive authority to determine the charges on the merits, to impose sanctions for violation of the Act or a Board Rule, and to issue a Final Order.

B. Specific Violations Cited:

1. Section 164.051(a)(1) of the Act authorizes the Board to take disciplinary action against Respondent based on Respondent's commission of an act prohibited under Section 164.052 of the Act.
2. Section 164.051(a)(3) of the Act authorizes the Board to take disciplinary action against Probationer based on Probationer's violation of a Board Rule, specifically Board Rules 165.1(a), failure to maintain an adequate medical record; and 200.3, failure to adhere to those established standards for physicians practicing complementary and alternative medicine.

3. Section 164.051(a)(6) of the Act authorizes the Board to take disciplinary action against Respondent based on Respondent's failure to practice medicine in an acceptable professional manner consistent with public health and welfare, as further defined by Board Rule 190.8(1)(A), failure to treat a patient according to the generally accepted standard of care; 190.8(1)(B), negligence in performing medical services; 190.8(1)(C), failure to use proper diligence in one's professional practice; 190.8(1)(D), failure to safeguard against potential complications; 190.8(1)(G), failure to disclose reasonably foreseeable side effects of a procedure or treatment; 190.8(1)(H), failure to disclose reasonable alternative treatments to a proposed procedure or treatment; 190.8(1)(I), failure to obtain informed consent from the patient or other person authorized by law to consent to treatment on the patient's behalf before performing tests, treatments, or procedures; and 190.8(1)(K), prescription or administration of a drug in a manner that is not in compliance with Chapter 200 of this title (relating to Standards for Physicians Practicing Complementary and Alternative Medicine).

4. Section 164.052(a)(5) of the Act authorizes the Board to take disciplinary action against Respondent based upon Respondent's unprofessional or dishonorable conduct that is likely to deceive or defraud the public or injure the public, as further defined by Board Rules 190.8(2)(O), failing to report suspected abuse of a patient by a third party, when the report of that abuse is required by law; and 190.8(2)(R), violation of federal and state laws whether or not there is a complaint, indictment, or conviction for any criminal violation of the Medical Practice Act or other statutes regulating or pertaining to the practice of medicine, specifically, Tex. Fam. Code § 261.101 mandates physicians to report possible child abuse or neglect to Child Protective Services within 48 hours.

5. Section 164.053(a)(1) of the Act authorize the Board to take disciplinary action against Respondent based on Respondent's commission of an act that violates a law of this state that is connected with Respondent's practice of medicine, specifically, Tex. Civ. Prac. and Remedies Code § 74.104, as further defined by 25 Tex. Admin. Code § 601.4 (required consent form); and Tex. Family Code § 261.101, failure of a mandated reporter to report abuse or neglect of a child.

IV. FACTUAL ALLEGATIONS

Based on information and belief, Board Staff alleges the following:

1. Respondent is not board certified by the American Board of Medical Specialties.
2. The patient involved in this matter was five years of age at the time of the events.¹
3. On February 12, 2016, the patient was admitted to McClane Children's hospital for progressive and enlarged lymphadenopathy. Pathology results indicated an initial diagnosis of lymphoma of T-cell lineage.
4. On February 15, 2016, the patient's parents sought a second opinion about the cancer from Respondent, who is not trained as an oncologist. The patient was discharged from the hospital at the parent's request.
5. That same day, McClane Children's hospital contacted Respondent to inform him of the seriousness of the patient's condition in the hope that he would encourage the parents to promptly return the patient for treatment.
6. The parents did not return the patient to the hospital. Instead, the parents elected to have Respondent treat the patient with nutritional supplements and homeopathy.
7. Respondent treated the patient from February 15, 2016 until May 13, 2016. Respondent failed to inform the patient's parents in writing what the underlying therapeutic basis or the mechanism of action of Respondent's proposed alternative treatments were. Respondent also failed to provide a statement in writing to the patient's parents that the treatments had a reasonable potential of treating the patient's lymphoma.

Respondent's conduct constitutes violations of the Act and Board Rules, as follows:

Section 164.051(a)(3) of the Act authorizes the Board to take disciplinary action against Respondent based on Respondent's violation of a Board Rule, specifically Board Rules 165.1(a), failure to maintain an adequate medical record; and 200.3, failure to adhere to those established standards for physicians practicing complementary and alternative medicine.

Section 164.051(a)(6) of the Act authorizes the Board to take disciplinary action against Respondent based on Respondent's failure to practice medicine in an acceptable professional manner consistent with public health and welfare, as further defined by Board Rule 190.8(1)(A), failure to treat a patient according to the generally accepted standard of care; 190.8(1)(B), negligence in performing medical services; 190.8(1)(C),

¹ The patient will be identified in a separate, confidential pleading.

failure to use proper diligence in one's professional practice; 190.8(1)(D), failure to safeguard against potential complications; 190.8(1)(G), failure to disclose reasonably foreseeable side effects of a procedure or treatment; 190.8(1)(H), failure to disclose reasonable alternative treatments to a proposed procedure or treatment; 190.8(1)(I), failure to obtain informed consent from the patient or other person authorized by law to consent to treatment on the patient's behalf before performing tests, treatments, or procedures; and 190.8(1)(K), prescription or administration of a drug in a manner that is not in compliance with Chapter 200 of this title (relating to Standards for Physicians Practicing Complementary and Alternative Medicine).

8. On February 25, 2016, the hospital reached a final diagnosis of stage III lymphoblastic lymphoma, which has a long-term survival rate estimated at 70-80%. Standard therapy required chemotherapy and three years of supportive care.

9. When the parents did not return the patient to the hospital after the final diagnosis, the hospital ethics committee met. The ethics committee found that the parent's failure to consent to the best-known evidence-based therapy placed the child at significant risk and constituted medical neglect. The committee recommendations included notifying child protective services.

10. During Respondent's care of the patient, the patient experienced increasingly alarming symptoms, and it was clear that Respondent's treatments had no effect on the patient's lymphoma.

11. On March 29, 2016, Respondent notes that the patient had a history of difficulty with breathing, but there was no physical exam documented or vitals obtained.

12. On April 25, 2016, Respondent notes that the patient was in respiratory distress, but Respondent did not document the patient's oxygen saturation and the plan of care does not address the patient's respiratory distress. An email from the patient's parents notes poor food intake, increased left arm swelling, and left lower abdominal swelling.

Respondent's failure to document essential information, such as a physical exam and vital signs, in the patient's medical record, and his failure to address the patient's respiratory distress, constitutes a violation of the Act and Board Rules, specifically:

Section 164.051(a)(3) of the Act authorizes the Board to take disciplinary action against Probationer based on Probationer's violation of a Board Rule, specifically Board Rule 165.1(a), failure to maintain an adequate medical record.

Section 164.051(a)(6) of the Act authorizes the Board to take disciplinary action against Respondent based on Respondent's failure to practice medicine in an acceptable professional manner consistent with public health and welfare, as further defined by Board Rule 190.8(1)(A), failure to treat a patient according to the generally accepted standard of care; 190.8(1)(B), negligence in performing medical services; 190.8(1)(C), failure to use proper diligence in one's professional practice; 190.8(1)(D), failure to safeguard against potential complications; and 190.8(1)(H), failure to disclose reasonable alternative treatments to a proposed procedure or treatment;.

13. On April 28, 2016, the patient's parents reported to Respondent that the patient was lethargic and had a fever of 101.

14. On May 2, 2016, the patient's parents reported to Respondent that the patient is sleeping almost all the time and that his oxygen saturation was 60% after the patient took a trip to the bathroom without his oxygen supply.

15. On May 4, 2016, Respondent's progress notes document dyspnea and that the parents found the patient in a pool of blood.

16. On May 13, 2016, an out-of-state cardiologist in communication with Respondent recommended a transfusion of two units of packed red blood cells. The patient's parents attempted to take the patient for a blood transfusion at a short-stay facility, but the facility was closed. The parents elected to take the patient to the emergency room. Respondent notes that he is only treating the patient because the parents had refused standard oncology treatment and the parents might go to a "less experienced" alternative practitioner if he did not help them.

17. By the time the parents brought the patient to the Memorial Hermann Hospital emergency room, the patient was in critical condition. The emergency room physicians had to immediately intubate the patient. The physicians were unable to obtain IV access, which forced them to obtain intraosseous access instead. The patient was diagnosed with large right pleural effusion associated with malignancy, chronic respiratory failure with hypoxia and hypercapnia, sepsis with altered mental status, acute respiratory failure, advanced malignant lymphoma, and anasarca.

18. Initially, the patient's father declined treatment for the patient's life-threatening diagnoses and wanted to take the patient home for the weekend. The emergency room physicians contacted Respondent in an effort to have Respondent convince the patient's father to consent to the immediate treatment of the patient's critical conditions. Respondent spoke with the patient's father and convinced him to consent to the emergency treatments.

19. The patient's parents, however, continued to refuse standard chemotherapy. The ethics committee of Memorial Hermann Hospital met and concluded that the parents' refusal to treat the patient's lymphoma constituted medical neglect. As a result, child protective services was contacted.

20. Once child protective services informed the parents of the legal consequences of failing to treat the patient's cancer with standard chemotherapy, the patient's mother provided consent for treatment.

21. The patient was then transferred to Texas Children's Hospital. The attending hematologist at Texas Children's Hospital noted that the delay in treating the patient's lymphoma had reduced the patient's chances of survival.

22. Despite his obligation to report suspected abuse and/or neglect of a patient, at no point did Respondent contact authorities, including child protective services, to report the medical neglect being committed by the patient's parents.

Respondent's failure to contact authorities to report the medical neglect being committed by the patient's parents was a violation of laws connected to the practice of medicine as follows:

Section 164.052(a)(5) of the Act authorizes the Board to take disciplinary action against Respondent based upon Respondent's unprofessional or dishonorable conduct that is likely to deceive or defraud the public or injure the public, as further defined by Board Rules 190.8(2)(O), failing to report suspected abuse of a patient by a third party, when the report of that abuse is required by law; and 190.8(2)(R), violation of federal and state laws whether or not there is a complaint, indictment, or conviction for any criminal violation of the Medical Practice Act or other statutes regulating or pertaining to the practice of medicine, specifically, Tex. Fam. Code § 261.101 mandates physicians to report possible child abuse or neglect to Child Protective Services within 48 hours.

Section 164.053(a)(1) of the Act authorize the Board to take disciplinary action against Respondent based on Respondent's commission of an act that violates a law of this state that is connected with Respondent's practice of medicine, specifically, Tex. Civ. Prac. and Remedies Code § 74.104, as further defined by 25 Tex. Admin. Code § 601.4 (required consent form); and Tex. Family Code § 261.101, failure of a mandated reporter to report abuse or neglect of a child.

V. AGGRAVATING AND MITIGATING FACTORS

Board Rule 190.14 provides that the Board may impose more restrictive sanctions when there are multiple violations of the Act. Board Rule 190.15 provides that the Board may consider aggravating factors in reaching a determination of sanctions. In this case, the facts warrant more severe or restrictive disciplinary action. This case includes the following aggravating factors: 1) harm to one or more patients; 2) the severity of patient harm; 5) increased potential for harm to the public; 7) intentional, premeditated, knowing, or grossly negligent act constituting a violation; 8) prior similar violations; 9) previous disciplinary action by the Board; and 11) other relevant circumstances increasing the seriousness of the misconduct. Respondent has previously been the subject of disciplinary action by the Board as follows:

1. On October 26, 1990, Respondent entered into an Agreed Order and received a public reprimand and was placed on probation for two years under the following terms: 50 hours of continuing medical education; and documentation of a physical examination and patient history before performing any test on or treating any patient. The order was based on Respondent violating statutes and rules related to the provision of complementary and alternative treatment.
2. On December 8, 2016, Respondent entered into an Agreed Order assessing an administrative penalty of \$1,000 action based on allegations that Respondent terminated a physician-patient relationship in an unprofessional manner.
3. On November 6, 2009, Respondent entered into a Mediated Agreed Order to resolve a formal complaint at SOAH. The order required the following: 10 hours of continuing medical education in medical record keeping and 10 hours in family practice; maintenance of adequate medical records; submission of medical charts to an evaluation by a one-time monitor; within 90 days, create an informed consent form to be provided to complementary and alternative medicine patients; and provide patients with a brochure or handout of estimated cost of treatments before engaging in treatment. The action was based on Respondent's use of test and treatments not generally recognized in traditional medicine practice and inadequate medical records.

Board staff is aware of no mitigating factors that apply and demands that Respondent submit proof to substantiate any alleged mitigating factors.

VI. NOTICE TO RESPONDENT

IF YOU DO NOT FILE A WRITTEN ANSWER TO THIS COMPLAINT WITH THE STATE OFFICE OF ADMINISTRATIVE HEARINGS WITHIN 20 DAYS AFTER THE DATE OF RECEIPT, A DEFAULT ORDER MAY BE ENTERED AGAINST YOU, WHICH MAY INCLUDE THE DENIAL OF Licensure OR ANY OR ALL OF THE REQUESTED SANCTIONS, INCLUDING THE REVOCATION OF YOUR LICENSE. A COPY OF ANY ANSWER YOU FILE WITH THE STATE OFFICE OF ADMINISTRATIVE HEARINGS SHALL ALSO BE PROVIDED TO THE HEARINGS COORDINATOR OF THE TEXAS MEDICAL BOARD.

VII. PRAYER

WHEREFORE, PREMISES CONSIDERED, Board Staff requests that an administrative law judge employed by the State Office of Administrative Hearings conduct a contested case hearing on the merits of the Complaint, and issue a Proposal for Decision (PFD) containing Findings of Fact and Conclusions of Law necessary to support a determination that Respondent violated the Act as set forth in this Complaint.

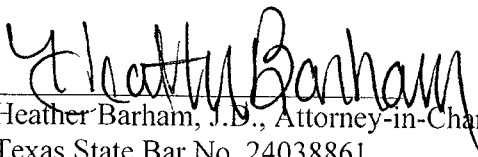
Respectfully submitted,

TEXAS MEDICAL BOARD

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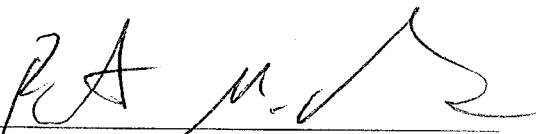

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THE STATE OF TEXAS

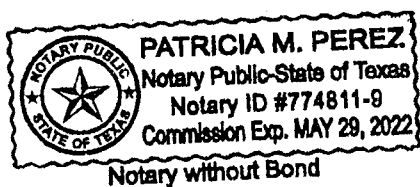
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COUNTY OF TRAVIS

SUBSCRIBED AND SWORN to before me by the said Heather Barham, J.D., on
August 9, 2018.



Notary Public, State of Texas



Filed with the Texas Medical Board on Aug 7th, 2018.

Scott M Freshour per
Stephen 'Brint' Carlton, J.D.
Executive Director
Texas Medical Board

by per million

CERTIFICATE OF SERVICE

I certify that on the 9 day of August, 2018, a true and correct copy of the foregoing document has been served as follows:

By Email to docketing@soah.texas.gov

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