BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: Mary Kelly Sutton, M.D. Physician's & Surgeon's Certificate No. G 76932 Respondent.	Case No.: 800-2016-023886

DENIAL BY OPERATION OF LAW
PETITION FOR RECONSIDERATION

No action having been taken on the petition for reconsideration, filed by Respondent, Mary Kelly Sutton, M.D., and the time for action having expired at 5:00 p.m. on March 25, 2022, the petition is deemed denied by operation of law.

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: **Mary Kelly Sutton, M.D.** **Physician's & Surgeon's Certificate No. G 76932** **Respondent.**	**Case No. 800-2016-023886** **ORDER GRANTING STAY** **(Government Code Section 11521)**

Respondent, Mary Kelly Sutton, M.D., has filed a Request for Stay of execution of the Decision in this matter with an effective date of February 4, 2022, at 5:00 p.m.

Execution is stayed until March 25, 2022, at 5:00 p.m.

This Stay is granted solely for the purpose of allowing the Board time to review and consider the Petition for Reconsideration.

DATED: March 15, 2022

William Prasifka
Executive Director
Medical Board of California

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

DATE / TIME JUDGE	March 11, 2022 / 2:30 PM James P. Arguelles	DEPT. NO. CLERK	32 Ward
MARY KELLY SUTTON, M.D., Petitioner, v. MEDICAL BOARD OF CALIFORNIA, Respondent, WILLIAM PRASIFKA, EXECUTIVE DIRECTOR, MEDICAL BOARD OF CALIFORNIA, DEPARTMENT OF CONSUMER AFFAIRS, STATE OF CALIFORNIA, Real Party in Interest.		Case No.: 34-2022-80003830	
Nature of Proceedings:	Petitioner's Application for a Peremptory Writ in the First Instance and Other Relief		

The writ petition filed on March 2, 2022 is GRANTED in part, DENIED in part and DISMISSED in part without prejudice.

The second writ petition, filed in this action on March 4, 2022, is DISMISSED without prejudice.

Overview

After an evidentiary hearing, Respondent Medical Board of California (Board) revoked Petitioner Mary K. Sutton, M.D.'s (Dr. Sutton) California physician's and surgeon's license because she provided eight children -- wrongly in the Board's view -- with medical exemptions from immunizations otherwise required to obtain entry into a school. On March 2, 2022, Dr. Sutton filed the instant application for an order shortening time, staying the Board's revocation decision (Decision) and providing additional relief described below. Attached to the application is a petition for writ of mandate ("the first writ petition"), wherein Dr. Sutton alleges that the Board wrongly denied her petition for reconsideration of its Decision. In the first writ petition,

Dr. Sutton cites Code of Civil Procure Sections 1085 through 1087 as authority for the relief sought.

The Board opposes the application. The Board argues that it lost jurisdiction to reconsider its Decision because Dr. Sutton filed her petition for reconsideration two minutes before close of business on the last day on which reconsideration was available. With respect to Dr. Sutton's request for a judicial stay of the Decision, the Board argues that Dr. Sutton cannot demonstrate that the Board is unlikely to prevail on the merits or that a stay will not cause the public interest to suffer.

On March 4, 2022, the court set a hearing and briefing schedule on the application. The court indicated that it might grant a peremptory writ in the first instance or grant an alternative writ and order to show cause. The Board timely filed its opposition papers.

Also on March 4, 2022, Dr. Sutton filed a second writ petition containing citations to Code of Civil Procedure Section 1094.5 ("the second writ petition"). She filed the second writ petition, which challenges the merits of the Board's Decision, to comply with the 30-day limitations period in Government Code Section 11523.[1]

The First Writ Petition

Reconsideration of the Decision

Section 11521 governs the Board's authority to reconsider its decisions after hearing. Subdivision (a) provides that "[t]he power to order a reconsideration shall expire 30 days after the delivery or mailing of a decision to a respondent ... or at the termination of a stay of not to exceed 30 days which the agency may grant for the purpose of filing an application for reconsideration. If additional time is needed to evaluate a petition for reconsideration filed prior to the expiration of any of the applicable periods, an agency may grant a stay of that expiration for no more than 10 days, solely for the purpose of considering the petition."

The Board served Dr. Sutton with its Decision on or about December 8, 2021. At that time, it advised Dr. Sutton that, if she sought reconsideration, the Board would require approximately one week to process the application. On December 22, 2021, the Board stayed its Decision "until February 4, 2022, at 5:00 p.m." so that Dr. Sutton would have additional time to petition for reconsideration.

In the weeks following entry of the stay, Dr. Sutton sought access to documents in her file with the Board. On January 25, 2022, Dr. Sutton still had not obtained access to all documents of interest to her. On that date she sent an email to Board employee Erika Calderon (Calderon) inquiring about such access and about the possibility of a further stay of the Decision. The following day, Calderon advised, "[i]f you file a petition for reconsideration on or before

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

February 4, 2022, then the Board may grant an additional stay for 10 days to give the Board time to consider the petition."

On January 27, 2022, Dr. Sutton conveyed her intent to file a petition for reconsideration "by close of business" in February 4. (See Calderon Decl., Exh. 3, pp. 1-2.) Dr. Sutton's January 27 email contained questions about other aspects of her case. Calderon responded by email the same day and asked Dr. Sutton to telephone her to discuss. The two had a telephonic discussion on January 27, 2022, and Dr. Sutton memorialized the discussion in a follow-up email. During the discussion, Calderon did not advise Dr. Sutton that a petition for reconsideration submitted at or near the close of business on February 4, 2022 would be problematic.

On February 3, 2022, Dr. Sutton emailed Board employee Regina Rodriguez with questions, and advising that she intended to file a petition for reconsideration by close of business the next day. Ms. Rodriguez responded that the Board required a three-hour window to process the petition and, therefore, Dr. Sutton would need to submit her petition by 2:00 p.m. on February 4, 2022. Dr. Sutton protested by email, and Calderon responded that the Board could act on her petition for reconsideration two hours before close of business on February 4, i.e., at 3:00 p.m.

Dr. Sutton submitted her petition for reconsideration at 4:58 p.m. on February 4, 2022. On February 7, 2022, she received acknowledgment of her petition. The same day, however, the Board issued notice that the petition had been denied by operation of law.

Dr. Sutton, who is representing herself at this time, essentially argues that the Board is equitably estopped to deny her petition for reconsideration. (See, e.g., *Castaneda v. Dep't of Corrections & Rehab.* (2013) 212 Cal.App.4th 1051, 1064 ["'A public entity may be estopped from asserting the limitations of ... statutes where its agents or employees have prevented or deterred the filing of a timely claim by some affirmative act'"], italics omitted.) The following elements must be shown to establish the estoppel: "'(1) the party to be estopped must be apprised of the facts; (2) the party to be estopped must intend his or her conduct shall be acted upon, or must so act that the party asserting the estoppel had a right to believe it was so intended; (3) the other party must be ignorant of the true state of facts; and (4) the other party must rely upon the conduct to his or her injury.'" Dr. Sutton's argument has merit.

When the Board issued its Decision, it indicated that it required approximately one week to process a petition for reconsideration. But Calderon later advised Dr. Sutton that she could submit her petition on February 4, 2022 – the last day to apply for reconsideration – if she desired an additional 10-day stay. Calderon's advisement dispelled any notion that a week was required to grant a 10-day stay, which is what Dr. Sutton sought. Consequently, the earlier notice about a one-week processing period did not advise Dr. Sutton that appreciable time was required to grant a 10-day stay.

Further, Dr. Sutton notified Calderon on January 27, 2022, that she intended to submit her petition *by close of business* on February 4. Given Calderon's earlier assertion that Dr. Sutton could seek a 10-day stay on February 4, the Board was under a duty as of January 27 to apprise Dr. Sutton of the need the submit the petition a few hours before close of business. (See *Skulnick v. Roberts Express, Inc.* (1992) 2 Cal.App.4th 884, 891 ["An estoppel may arise from silence where there is a duty to speak"].) Because Dr. Sutton did not learn until February 3 that the Board required some lead time to process an additional stay, she was unfairly prejudiced when her petition was denied as untimely.

The Board emphasizes that it lost the statutory authority to act on Dr. Sutton's petition for reconsideration on February 4, 2022, when the original 30-day stay expired. A litigant seeking an estoppel must be ignorant of the true "facts," not the law. (See *Superior Dispatch, Inc. v. Insurance Corp. of New York* (2010) 181 Cal.App.4th 175, 186.) The Board thus suggests that it did not mislead Dr. Sutton, who should have appreciated the legal limits on its authority to evaluate petitions for reconsideration. Here, however, the question is not whether Dr. Sutton knew or should have known about the statutory limits on the Board's jurisdiction to reconsider the Decision. Rather, the question is whether she knew or should have known that the Board could not or would not process a 10-day stay based on a petition submitted just before close of business on the last day for the Board to act. Again, Caldron advised Dr. Sutton that she could submit her petition on February 4, and Dr. Sutton then expressed her intent to submit the petition by close of business that day. Given this, and because the Board did not timely correct Dr. Sutton, the court finds that Dr. Sutton neither knew nor should have known that the Board would not grant a further stay unless the petition was filed two or three hours before close of business.

In sum, the Board is equitably estopped to deny Dr. Sutton's petition for reconsideration on the ground that is lacked time to grant an additional 10-day stay. The court will remand the matter to the Board and direct it to exercise its discretion whether to grant an additional 10-day stay. The court expresses no opinion whether such a stay should be granted or whether the Board should reconsider the merits of its Decision.

Other Relief on the First Writ Petition

On remand, the Decision will be set aside pending the Board's determination whether to grant an additional 10-day. At this point, there is no final Decision for the court to stay. Consequently, Dr. Sutton's request for the court to stay the Decision is unripe. That request is dismissed without prejudice.

Dr. Sutton also asks the court to order the Board to produce her central file pursuant to Business and Professions Code Section 800. Subdivision (a) of that section requires the Board, for each licensee, to maintain a file documenting criminal convictions, civil judgments, public complaints and administrative discipline. Pursuant to subdivision (c)(1), the licensee is entitled to review his or her file, including records in the file that are otherwise confidential.

In the first writ petition, Dr. Sutton alleges somewhat ambiguously that she has worked with the Board to obtain access to her central file, but the Board "has yet to confirm whether it has released [the file] to her." (See 1st Pet. at 9:10-13.) At this time, Dr. Sutton has not produced evidence establishing that the Board has failed to comply with its obligations. Her declaration attached to the ex parte application says nothing about her attempts to obtain access to her central file. Exhibits attached to the first writ petition, on the other hand, reveal emails in which the Board attempted to explain the process for obtaining access to files. An email dated February 3, 2022, indicates that Board employee Keith DeGeorge was responding to Dr. Sutton's request and would try to "get it out to [her] today." (1st Pet., Exh. A at 9.)

There is currently insufficient evidence to support an order commanding the Board to comply with Business and Professions Code Section 800(c)(1). Given Dr. Sutton's application for a writ immediately requiring the Board to address her petition for reconsideration, the court will dismiss without prejudice her request based on Business and Professions Code Section 800. Nothing in this ruling precludes Dr. Sutton from renewing that request in the future.

Finally, Dr. Sutton seeks monetary sanctions pursuant to Code of Civil Procedure Section 128.5. She argues that sanctions are warranted in light of the Board's bad-faith, frivolous and dilatory conduct in denying her petition for reconsideration. The court questions whether Code of Civil Procedure Section 128.5 applies to conduct during administrative proceedings. But assuming it does apply to such proceedings, the evidence does not establish any bad faith, total lack of merit or intent solely to delay. Under the circumstances, the Board should have informed Dr. Sutton before February 3, 2022, that her petition for reconsideration would be denied if not submitted a few hours before close of business on February 4. But the Board's conduct was at most negligent, and it occurred in good faith. As a result, Dr. Sutton's request for sanctions is denied.

The Second Writ Petition

The second writ petition is unripe. Until the Board decides whether to grant an additional 10-day stay, the Decision will not be final, and the court may not review merits of the Decision. (See Code Civ. Proc. § 1094.5(a) [administrative writ review requires a "final administrative order or decision"].) Accordingly, the second writ petition will be dismissed without prejudice.

Disposition

On the first writ petition: A peremptory writ of mandate will issue setting the Decision aside and commanding the Board to exercise its discretion whether to grant Dr. Sutton an additional 10-day stay pursuant to Section 11521, subdivision (a). Dr. Sutton's request for sanctions pursuant to Code of Civil Procedure Section 128.5 is denied. Her further requests for a stay pursuant to Code of Civil Procedure Section 1094.5(h), and an order commanding the Board to comply with Business and Professions Code Section 800, subdivision (c)(1), are denied without prejudice.

On the second writ petition: The petition is not ripe and will be dismissed without prejudice.

SO ORDERED.

Dated: March 14, 2022

Hon. James P. Arguelles
California Superior Court Judge
County of Sacramento

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

DATE / TIME JUDGE	N/A James P. Arguelles	DEPT. NO. CLERK	32 Ward
MARY KELLY SUTTON, M.D., Petitioner, v. MEDICAL BOARD OF CALIFORNIA, Respondent, WILLIAM PRASIFKA, EXECUTIVE DIRECTOR, MEDICAL BOARD OF CALIFORNIA, DEPARTMENT OF CONSUMER AFFAIRS, STATE OF CALIFORNIA, Real Party in Interest.		Case No.: 34-2022-80003830	
Nature of Proceedings:	Judgment		

The matter was heard at 2:30 p.m. on March 4, 2022. Petitioner Mary K. Sutton, M.D., (Dr. Sutton) appeared remotely on her own behalf. California Deputy Attorney General Greg W. Chambers appeared remotely on behalf of Respondent Medical Board of California (Board). The court's final ruling after hearing is attached as an exhibit.

JUDGMENT IS HEREBY ENTERED AS FOLLOWS:

Dr. Sutton's March 2, 2022 petition for a peremptory writ of mandate setting aside the Board's written decision to revoke her physician's and surgeon's license, and commanding the Board to exercise its discretion whether to grant an additional 10-day stay pursuant to Government Code Section 11521, subdivision (a), is GRANTED.

Dr. Sutton's request for monetary sanctions pursuant to Code of Civil Procedure Section 128.5 is DENIED.

The balance of Dr. Sutton's March 2, 2022 petition for writ of mandate is DISMISSED without prejudice.

Dr. Sutton's March 4, 2022 petition for writ of mandate is DISMISSED without prejudice.

There is no prevailing party within the meaning of Code of Civil Procedure Section 1032(a)(4), and the parties shall bear their own costs.

Dated: March 14, 2022

Hon. James P. Arguelles
California Superior Court Judge
County of Sacramento

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

DATE / TIME JUDGE	N/A James P. Arguelles	DEPT. NO. CLERK	32 Ward
MARY KELLY SUTTON, M.D., Petitioner, v. MEDICAL BOARD OF CALIFORNIA, Respondent, WILLIAM PRASIFKA, EXECUTIVE DIRECTOR, MEDICAL BOARD OF CALIFORNIA, DEPARTMENT OF CONSUMER AFFAIRS, STATE OF CALIFORNIA, Real Party in Interest.		Case No.: 34-2022-80003830	
Nature of Proceedings:	Peremptory Writ of Mandate		

To Respondent Medical Board of California:

Judgment having been entered on March 14, 2022, ordering that a peremptory writ of mandate issue from this court,

YOU ARE HEREBY COMMANDED immediately upon receipt of this writ to set aside your written decision to revoke Petitioner Mary K. Sutton, M.D.'s Physician's and Surgeon's Certificate No. G 76932, and restore said license into full force and effect. YOU ARE FURTHER COMMANDED to exercise your discretion, pursuant to Government Code Section 11521, subdivision (a), whether to grant Dr. Sutton an additional 10-day stay for the purpose of considering her petition for reconsideration submitted to you on February 4, 2022.

By order of the court, Honorable James P. Arguelles.

Dated: March 14, 2022

Clerk of the Superior Court,
County of Sacramento

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: Mary Kelly Sutton, M.D. Physician's & Surgeon's Certificate No G 76932 Respondent.	Case No.: 800-2016-023886

DENIAL BY OPERATION OF LAW
PETITION FOR RECONSIDERATION

No action having been taken on the petition for reconsideration, filed by Respondent, Mary Kelly Sutton, M.D., and the time for action having expired at 5:00 p.m. on February 4, 2022, the petition is deemed denied by operation of law.

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: **Mary Kelly Sutton, M.D.** **Physician's & Surgeon's Certificate No. G 76932** **Respondent.**	**Case No. 800-2016-023886** **ORDER GRANTING STAY** **(Government Code Section 11521)**

Respondent, Mary Kelly Sutton M.D., has filed a Request for Stay of execution of the Decision in this matter with an effective date of January 7, 2022, at 5:00 p.m.

Execution is stayed until February 4, 2022, at 5:00 p.m.

This stay is granted solely for the purpose of allowing the Respondent to file a Petition for Reconsideration.

DATED: DEC 22 2021

for: William Prasifka
Executive Director
Medical Board of California

Reji Varghese
Deputy Director

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: Mary Kelly Sutton, M.D. Physician's and Surgeon's Certificate No. G 76932 Respondent.	Case No. 800-2016-023886

DECISION

The attached Proposed Decision is hereby adopted as the Decision and Order of the Medical Board of California, Department of Consumer Affairs, State of California.

This Decision shall become effective at 5:00 p.m. on January 7, 2022.

IT IS SO ORDERED December 8, 2021.

MEDICAL BOARD OF CALIFORNIA

Richard E. Thorp, M.D., Chair
Panel B

BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against:

MARY KELLY SUTTON, M.D.,

Physician's and Surgeon's Certificate No. G 76932

Respondent.

Agency Case No. 800-2016-023886

OAH No. 2021020936

PROPOSED DECISION

Administrative Law Judge Karen Reichmann, State of California, Office of Administrative Hearings State of California, heard this matter on June 14 through 16, 2021, by videoconference.

Deputy Attorneys General Greg W. Chambers and Thomas Ostly represented complainant William Prasifka, Executive Director of the Medical Board of California.

Attorney Richard Jaffe represented respondent Mary Kelly Sutton M.D., who was present.

The record was left open for written closing argument. The parties' submissions were timely filed and marked for identification as Exhibit 28 (complainant's argument), Exhibit BB (respondent's argument) and Exhibit 29 (complainant's reply). Respondent filed a request for judicial notice; this request is granted. In her closing argument, respondent also moved to admit her previously withdrawn Exhibit AA into evidence; this motion is denied.

The record closed and the matter was submitted for decision on September 8, 2021.

FACTUAL FINDINGS

Jurisdictional Matters

1. Complainant William Prasifka filed the Accusation in his official capacity as the Executive Director of the Medical Board of California, Department of Consumer Affairs (Board).

2. On February 4, 2004, the Board issued Physician's and Surgeon's Certificate No. G 76932 (Certificate) to respondent Mary Kelly Sutton, M.D. The Certificate was in full force and effect at all times relevant to the charges in the Accusation. It will expire on January 31, 2022, unless renewed.

3. Complainant alleges that respondent's issuance of vaccine exemptions to eight children between 2016 and 2018 provides cause to discipline her Certificate for gross negligence, repeated negligent acts, and incompetence.

Vaccination Laws

4. Health and Safety Code section 120325 et seq., requires that children who are enrolled in school or in childcare centers be immunized against specified diseases unless a valid exemption applies. Health and Safety Code section 120325, subdivision (a), requires immunization against 10 childhood diseases and any other disease deemed appropriate by the California Department of Public Health, "taking into consideration the recommendations of the Advisory Committee on Immunization Practices of the United States Department of Health and Human Services, the American Academy of Pediatrics, and the American Academy of Family Physicians." The American Academy of Pediatrics (AAP) and the Advisory Committee on Immunization Practices (ACIP) publish vaccine schedules which are updated regularly. These publications also contain guidance on contraindications and precautions for various vaccines.

5. Prior to January 1, 2016, parents were permitted to decline to immunize their children based on personal beliefs. Effective January 1, 2016, Health and Safety Code section 120325 was amended to eliminate personal beliefs as a basis for exemption from required immunizations.

6. Health and Safety Code section 120325, subdivision (c), provides for exemptions from immunizations for medical reasons. In order to obtain an exemption from immunizations for medical reasons, the child's parent must file a written statement by a licensed physician with the child's school or childcare center. The physician's statement must report the opinion 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, including, but not limited to, family medical

history, for which the physician and surgeon does not recommend immunization." (Health & Saf. Code, § 120370, subd. (a).[1])

Respondent's Background and Experience

7. Respondent graduated medical school in 1971. She completed an internship and residency in internal medicine and was first licensed in Missouri. She was board-certified in internal medicine in 1974, and is not required to recertify. She was in private practice in New Mexico for about five years. In the 1980s she worked as a locum tenens throughout the United States and abroad. She was licensed in California during this time, but allowed her license to lapse. Respondent moved to New England and worked part-time in emergency and urgent care medicine while she raised her family. In 1990, she opened her own practice in New Hampshire, and worked there until 2004.

8. Between 2005 and 2018, respondent was in private practice as a primary care physician at Raphael Medicine and Therapies, based in Fair Oaks, California. Respondent had no hospital privileges and did not accept insurance. She described her practice as integrative and holistic. She provided routine care, nutritional support, and what she called, "vaccine injury risk awareness."

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[1] Health and Safety Code section 120370 was amended, effective January 1, 2020, to include additional requirements in connection with obtaining medical exemptions from immunizations.

9. In late 2018, respondent moved to Rhode Island. She is currently in private practice with Raphael Medicine East, providing telehealth care to patients in California and Massachusetts.

10. This is the first disciplinary action against respondent in any jurisdiction where she has held a license to practice medicine. She has also never been the subject of disciplinary action by any hospitals or employers.

Respondent's Issuance of Vaccine Exemptions to Patients 1 through 8

11. Respondent acknowledged issuing the vaccine exemptions at issue in this case, and acknowledged that these exemptions did not comply with the vaccine guidelines set forth by the ACIP and AAP. Respondent was familiar with the ACIP and AAP guidelines, but did not adhere to them, believing them at the time to be advisory. Respondent was aware of the changes to the Health and Safety Code that went into effect in 2016. She followed the legislative developments, and believed that the amended statute gave physicians broad discretion to issue an exemption if they believed vaccination presented a risk of injury to a patient. Respondent believed the legislature expanded the bases upon which an exemption could be granted beyond what is contained in the ACIP and AAP guidelines. She was in contact with other physicians who formed a group called Physicians for Informed Consent, and the group had the advice of counsel. At the legislative hearings, there had been discussions of genetics and family history, and respondent believed the law endorsed physicians exempting children from vaccination based on genetic mutations and family history, including family history of extended family members.

Respondent believed that she was acting lawfully when she issued the exemptions, noting that the statute references "family medical history." She explained

that she would not have issued the exemptions if she understood that all exemptions must satisfy the ACIP and AAP guidelines. She has not issued any similar exemptions after the law was amended again in 2020 and does not plan to do so.

12. Respondent explained her views on vaccination and her rationale for issuing exemptions to Patients 1-8. Respondent does not believe the ACIP and AAP vaccination schedules and precautions and contraindications are up-to-date. She noted her view that it takes years for research to come into practice, and she offered into the record multiple articles which she believes support her decision to issue the exemptions. In respondent's view, vaccination is an "anti-precautionary regimen" and vaccines "invade the body." She identified four "problem areas" that she believes warrant not vaccinating children: 1. autoimmune disorders; 2. allergies; 3. neurologic disorders; and 4. prior vaccine reactions. In her view, a family history of any of these "problem areas" also constitutes cause to consider not vaccinating a child.

13. Respondent issued the vaccine exemptions to Patients 1-8 while working at Raphael Medicine and Therapies. They were all issued after the elimination of the personal beliefs exemption, to children whose parents sought out respondent specifically for the purpose of obtaining exemptions in order to enroll their children in school without vaccinating them.

In each case, respondent sent parents a lengthy medical history questionnaire inquiring about scores of symptoms and conditions. She then interviewed parents over the phone to discuss the items raised in the questionnaire and elicit more information. Some parents provided immunization records and other medical records, but respondent did not seek to acquire medical records for the patients. Respondent did not perform a physical examination of any of the patients and appears to have never spoken with or laid eyes on any of them. Respondent explained that she did not do

physical examination of any of the patients because she wanted to save them the time and expense of travelling to her office, and because she felt it was unnecessary. Her exemptions were based on patient medical history and family medical history as reported by the parents and she did not believe there would be any purpose to performing physical examinations. She did not seek to obtain medical records to corroborate the parents' claims because she believes in trusting her patients. She added that getting medical records "loads up the chart unnecessarily," and noted that other doctors in her practice did not get records for every patient, either.

Respondent testified that she discussed the risks and benefits of issuing the exemptions with the parents, but no such discussions are documented in the patients' medical records.

PATIENT 1

14. Patient 1 was a 10-year-old child who had never been vaccinated. Respondent issued an exemption dated August 9, 2016, exempting the child from all vaccines on a permanent basis due to "personal history of allergy, and family history of suspected vaccine reaction, allergy, neurologic and autoimmune disease." The exemption lists vaccines for 14 specific diseases, including all 10 required for school enrollment, and states it is for "all vaccines including those not mentioned." The exemption further states that vaccination constitutes a greater risk than benefit for the patient.

Respondent's records reflect that the child's father had meningitis, that the child had repeated ear infections with hearing loss, that a second cousin had "movement disorder," and that another second cousin had an adverse vaccine reaction.

PATIENT 2

15. Patient 2 was four years old when respondent issued a one-year exemption from all vaccines on September 6, 2016, based on "personal history of neurologic vulnerability and allergy, and family history of allergy, and neurologic disease." Respondent wrote that the exemption was pending genetic testing, and that it was a "medical necessity." On September 5, 2017, respondent issued a permanent vaccine exemption from all vaccines to Patient 2, due to "personal history of allergy and neurologic vulnerability and family history of genetic defect, neurologic disease and allergy."

The family reported that the child had irritable bowel symptoms and was "not healthy." Genetic testing was performed on the mother which revealed minor genetic mutations, which respondent extrapolated were present in the child. She believed it was "not wise" to vaccinate the child.

PATIENT 3

16. On March 4, 2016, respondent issued a permanent vaccine exemption to Patient 3, a 10-year-old, based on "family history of autoimmune disease, allergy, neurologic disease and vaccine reactions." She identified 14 diseases and added that the exemption was for all vaccines, included those not mentioned. She noted that it was a "medical necessity."

Respondent's notes reflect a family history of ALS, Raynaud's syndrome, multiple sclerosis, and celiac disease. Family reported a sibling had adverse vaccine reaction, screaming for days after one vaccine.

PATIENT 4

17. On June 16, 2016, respondent issued a permanent exemption from all vaccines to Patient 4, a four-year-old, based on "personal history of vaccine reaction and neurologic disease, and family history of neurologic disease, vaccine reaction, allergy, and autoimmune disease."

Respondent's notes from her conversation with the patient's father reflect that he reported sensory issues and that the patient was "borderline ASD" (Autism Spectrum Disorder), and that he had a cousin diagnosed with ASD after being vaccinated, and vaccinated family members who had Attention Deficit Disorder and learning disabilities, and that the patient's mother had a fever following a vaccine administered while pregnant with the patient. Also that he screamed and had a fever after prior vaccines.

PATIENT 5

18. On April 17, 2018, respondent issued a vaccine exemption for one year to Patient 5, a four-year-old, based on "personal history of allergy, neurologic vulnerability, and suspected vaccine reaction, and family history of suspected vaccine reaction, neurologic and autoimmune disease, and allergy."

Respondent was provided with vaccination records and a genetic report, but no other medical records for this patient.

On December 20, 2018, respondent issued a permanent exemption for all vaccines, based on "personal history of genetic defect, allergy, suspected vaccine reaction, and neurologic vulnerability, and family history of autoimmune disease, allergy, neurologic vulnerability, and suspected vaccine reaction."

The family reported the child previously screamed after being vaccinated, that the child had eczema at four months, and that the child had "clingy" behavioral issues. The family suspected the child might have attention deficit hyperactivity disorder (ADHD). They reported a family history of learning disabilities, diabetes, and rheumatoid arthritis.

PATIENT 6

19. On August 19, 2016, respondent issued an exemption to Patient 6, an unvaccinated 13-year-old, for one year, for all vaccinations, based on "personal history of allergy, and family history of autoimmune disease, allergy, and neurologic disease." The exemption states that it is temporary pending genetic testing.

Respondent issued a permanent exemption against all vaccines on September 14, 2017, basing it on "personal history of genetic defect, and allergy, and family history of autoimmune disease, and allergy."

Respondent's notes reflect that the patient had a history of allergies, headaches, earaches, and constipation. The family reported a family history including asthma and autoimmune diseases, and bad reactions to vaccines. Respondent ordered genetic testing of the patient.

PATIENT 7

20. On July 29, 2016, respondent issued a permanent exemption for all vaccines to Patient 7, a 12-year-old, based on "personal history of allergy and suspected vaccine reaction, and family history of autoimmune disease, allergy, neurologic disease, and suspected vaccine reaction."

Respondent had been provided eight pages of medical records for this child. The child had a history of asthma, allergies, and ear infections. The family reported congestion and ear infections following vaccinations, and reported a family history of endometriosis, psoriasis, and multiple sclerosis.

PATIENT 8

21. On March 8, 2016, respondent issued a permanent exemption for all vaccines to Patient 8, a 13-year-old, based on "personal history of vaccine reactions, allergy and neurologic disease, and family history of autoimmune disease, allergy, vaccine reactions, and neurologic disease." She wrote "This is a medical necessity."

There were medical records from an emergency room visit for febrile seizures at age 2. The parents reported, and the medical records suggested, that this was associated with the child having been administered the measles/mumps/rubella (MMR) vaccine. Further febrile seizures up to age 5 were reported. The family also reported vaccine reactions in family members and a family history of autoimmune diseases.

Expert Opinion Testimony

DEBORAH LEHMAN, M.D.

22. Deborah Lehman, M.D., was retained by complainant as an expert witness. Dr. Lehman is board-certified in pediatrics and pediatric infectious diseases. She is on the faculty of the University of California, Los Angeles (UCLA) medical school and regularly lectures physicians about vaccinations. Dr. Lehman reviewed respondent's records and listened to recordings of respondent being interviewed,

wrote a series of reports with her findings, and testified at hearing. Dr. Lehman was a persuasive witness.

23. Dr. Lehman explained that the standard of care in California at all times relevant to this Accusation, requires physicians to follow the vaccination schedules, precautions, and contraindications set forth by the ACIP and AAP. The amendment to the Health and Safety Code in 2016 did not change the standard of care in the community.

24. When considering whether to exempt a patient from a vaccine, a physician is required to examine the patient and to assess each vaccine individually. In Dr. Lehman's opinion, a permanent exemption from all vaccines would never be appropriate. There are no common components to the 10 mandated vaccines, and no child would be permanently contraindicated from all of them. Dr. Lehman explained that issuance of permanent exemptions for all vaccines increases the risk to the patient without reasonable potential gain and constitutes an extreme departure from the standard of care.

25. Dr. Lehman explained that the standard of care requires a physician who is being asked to provide a vaccine exemption to obtain medical records and to communicate with the patient's primary care physician.

26. Dr. Lehman explained that the standard of care requires a physician to explain the risks of not vaccinating a child when discussing with parents whether to issue a vaccine exemption. The risks of not vaccinating a child are great, including preventable serious illness and death. In addition, unvaccinated individuals pose a threat to public safety by potential transmission of illness to other unvaccinated individuals and to immunocompromised individuals.

27. Dr. Lehman believes that respondent's issuance of vaccine exemptions to the eight patients in question constituted extreme departures from the standard of care. She noted that the questionnaires sent to parents elicited information about conditions and symptoms that have no relevance to vaccination decisions.

28. Dr. Lehman explained that the following conditions are not contraindications from all vaccinations: asthma, allergies, ear infections, movement disorder, family history of a vaccine reaction, "sensory processing disorder tendencies," minor genetic mutations, family history of autoimmune disease or learning disabilities, febrile seizures, ASD, and mitochondrial dysfunction. Family medical history plays no role in the determination of whether to vaccinate an individual according to the ACIP and AAP guidelines, notwithstanding the reference to "family medical history" in Health and Safety Code section 120370.

Dr. Lehman explained that febrile seizures are common and generally benign, and can occur after certain vaccinations, including the MMR vaccine. If a child had a febrile seizure, including one following the MMR vaccine, or even a family history of febrile seizures, it is sometimes appropriate to delay administering the MMR vaccine, but these circumstances would never justify a permanent exemption from all vaccinations. Dr. Lehman also noted that Patient 8, the child with a history of febrile seizures, was 13 at the time respondent issued the exemption, which is past the age when febrile seizures generally occur.

Similarly, if a family reports that the child had a severe reaction to prior vaccination, the standard of care requires the physician to obtain further information and possibly alter the vaccine schedule; but it would not justify a permanent exemption from all vaccines.

Dr. Lehman also testified that "neurologic vulnerability" and "immune activation syndrome" are not medical terms and are not vaccine contraindications. Dr. Lehman views some of respondent's explanations for the exemptions as "nonsense," and expressed concern that respondent's adherence to "myths" surrounding vaccination furthers vaccine misperceptions and endangers the community.

29. In sum, Dr. Lehman concluded that respondent committed extreme departures from the standard of care in relation to the exemptions issued to all eight patients, by failing to examine them, failing to obtain medical records, failing to communicate with primary care physicians, failing to document discussions of risks, and by issuing exemptions that do not comport with the ACIP and AAP guidelines.

LETRINH HOANG, D.O.

30. Respondent's primary expert witness was LeTrinh Hoang, D.O., a pediatrician who has been licensed in California since 1997. She was board-certified in pediatrics from 2000 through 2007, but no longer holds any board certifications. She practices pediatrics with osteopathic manipulative medicine and homeopathy, using an integrative alternative approach. Dr. Hoang prepared a report and testified at the hearing. She reviewed Dr. Lehman's expert reports and respondent's written explanation of her decision to exempt each of the patients, but did not review the patients' medical records.

31. Dr. Hoang expressed disdain for Dr. Lehman and other infectious disease experts, stating that they follow the vaccination schedule at all costs, fail to look at the patient in front of them, and are only interested in "zero" transmission rate. Her credibility was diminished by her demeanor, attitude towards the proceeding, and by the baseless and hyperbolic statements she made about Dr. Lehman.

32. Dr. Hoang has many patients whose parents come to her because they believe the vaccination schedule is "too aggressive." She will implement a slower vaccination schedule, administering vaccines one at a time instead of administering multiple vaccines at the same time, especially if the patient was breastfed. She evaluates the child and uses a "catch up" schedule when the patient is ready.

33. Dr. Hoang also issued medical exemption letters between 2016 and 2020. Like respondent, Dr. Hoang is affiliated with Physicians for Informed Consent, a group which provided guidance to physicians relating to vaccine exemptions. Dr. Hoang stated that she thought at the time that the law permitted doctors to use their judgment and that family history of autoimmune reaction to vaccination was sufficient. Dr. Hoang called the ACIP guidelines "reference texts" and not hard and fixed "bibles," and she does not believe they establish the standard of care for vaccinating children. She thinks the guidelines push children to the limit and are "insane." She does not believe the guidelines are the standard of care. She believes that vaccinations cause injury and reported treating children who have been injured by vaccines with homeopathy. These extreme views diminished her persuasiveness.

34. Dr. Hoang endorsed respondent's issuance of medical exemptions for all the patients at issue, believing that allergies, genetic mutations, febrile seizures, repeated ear infections, irritable bowel, sensory processing issues, family history of autoimmune disorders, mitochondrial dysfunction, immune activation, neurologic vulnerability, and headaches warrant exempting a child from vaccination. She wrote in her report that had all the patients been vaccinated per the ACIP and AAP guidelines, three could have potentially died and all would have suffered. These opinions were speculative and inflammatory, and undermined her persuasiveness.

ANDREW W. ZIMMERMAN, M.D.

35. Andrew W. Zimmerman, M.D., a pediatric neurologist licensed in Massachusetts, wrote a report and testified on behalf of respondent. He is board-certified in pediatrics, and in neurology with a special competence in child neurology. Dr. Zimmerman has authored scores of peer-reviewed articles. He has a special interest in autism and especially its relation to the immune system. He believes vaccines can cause neurologic injuries.

36. Dr. Zimmerman only provided opinions as to Patient 4 and Patient 8. He found respondent's exemptions as to these children "reasonable and ethical". He did not express an opinion regarding the standard of care in California, because he is not qualified to do so.

As to Patient 4, Dr. Zimmerman opined that the exemption was appropriate due to the child's family history of vaccine reactions and ASD, and due to the child's "mitochondrial dysfunction," which he stated is common in children with ASD. He believed it appropriate for a physician to identify and treat problems and optimize this child's health before vaccinating. He added that it is appropriate to prioritize patient safety over public safety. He did not endorse permanently refraining from vaccinating Patient 4. Instead, he endorsed temporarily halting vaccinations pending further testing and evaluation. Dr. Zimmerman mistakenly believed that respondent was Patient 4's primary care physician.

As to Patient 8, Dr. Zimmerman agreed with Dr. Lehman that a majority of febrile seizures are benign. He believed that given this child's history, it was appropriate to exempt the child from vaccination temporarily, in order to investigate

the child's immune system. Dr. Zimmerman mistakenly believed that respondent was Patient 8's primary care physician.

37. Dr. Zimmerman's testimony and report failed to establish that respondent's actions in relation to Patient 4 and Patient 8 conformed with the standard of care or were medically reasonable.

JAMES NEUENSCHWANDER, M.D.

38. James Neuenschwander, M.D., an integrative medicine specialist licensed in Michigan, wrote a report and testified on behalf of respondent. Dr. Neuenschwander did not complete a medical residency. Dr. Neuenschwander treats chronically ill patients, including a large number of children with ASD, ADHD, asthma, and autoimmune disorders. He treats his patients with lifestyle recommendations, supplements, and medication. Dr. Neuenschwander was disciplined in Michigan pursuant to a consent decree in 2015, for violating Michigan Public Health Code section 16221, subdivision (a)[2], and was ordered to pay a $2,500 fine. At hearing, he denied admitting to the allegations against him in the Michigan disciplinary action.

39. Dr. Neuenschwander believes that there is a "disconnect" between the ACIP guidelines and what parents are reporting, noting that there are many reports of post-vaccination regression and loss of immune tolerance. He reported seeing children

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[2] This section provides for discipline against health professionals for "a violation of general duty, consisting of negligence or failure to exercise due care, including negligent delegation to or supervision of employees or other individuals, whether or not injury results, or any conduct, practice, or condition that impairs, or may impair, the ability to safely and skillfully engage in the practice of the health profession."

develop chronic immune disorders post-vaccination, and noted that vaccine components can "cross into the brain." He stated that researchers are unable to conduct studies critical of vaccination because it will not be funded and would be "career suicide." Dr. Neuenschwander stated that the ACIP guidelines are "irrelevant" to him. He does not believe any children should be vaccinated for polio, and expressed skepticism about vaccinating children against chicken pox, measles, diphtheria, tetanus, meningitis, measles, mumps, flu, and rubella, arguing that these diseases do not pose a serious risk to most children, and contending that the long-term possible outcomes of vaccination is worse than these diseases. He believes that unvaccinated children are far healthier than vaccinated children. These extreme views rendered his testimony and report unpersuasive.

40. Dr. Neuenschwander expressed opinions about the exemptions issued to Patient 4 and Patient 7. He believes the risk of vaccination of these two children outweighed the benefits of vaccination.

As to Patient 4, Dr. Neuenschwander expressed his view that the child's prior fever after vaccination, mild autism, and family history of ADD and learning disabilities justify exempting this patient from vaccination. He believes that vaccination could harm this child's immune system.

As to Patient 7, Dr. Neuenschwander believes the family history of "immune activation," and the patient's allergy history made it reasonable to exempt the child from vaccination.

Ultimate Findings re: Causes for Discipline

41. Clear and convincing evidence established that respondent's issuance of vaccine exemptions to Patients 1 through 8 constituted gross negligence and repeated

negligent acts. Respondent's experts failed to rebut the persuasive testimony of Dr. Lehman. Respondent acknowledged that she did not examine the patients, did not obtain medical records, did not contact primary care physicians, and issued vaccine exemptions that did not adhere to the ACIP or AAP guidelines. Instead, respondent based the exemptions on factors that are not recognized as contraindications. She failed to document advising patients about the extreme risks of deviating from the vaccination schedules.

Dr. Neuenschwander and Dr. Hoang were biased and hold extreme views. Their testimony regarding the standard of care and reasonableness of respondent's conduct was not persuasive.

Dr. Zimmerman only discussed two patients, and only endorsed holding off vaccinating the patients while investigating further. His opinion was premised on the mistaken belief that respondent was the patients' primary care physician and that she would be performing the investigation he recommended. Dr. Zimmerman did not opine that respondent's issuance of permanent, blanket exemptions to these patients, after failing to exam the patients and failing to obtain medical records, was reasonable. Dr. Zimmerman's opinions did not undermine the persuasive opinions of Dr. Lehman.

LEGAL CONCLUSIONS

1. It is complainant's burden to demonstrate the truth of the allegations by "clear and convincing evidence to a reasonable certainty," and that the allegations constitute cause for discipline of respondent's Certificate. (*Ettinger v. Board of Medical Quality Assurance* (1982) 135 Cal.App.3d 853, 856.)

2. Business and Professions Code section 2227 authorizes the Board to take disciplinary action against licensees who have been found to have committed violations of the Medical Practice Act. Business and Professions Code section 2234, included in the Medical Practice Act, provides that a licensee may be subject to discipline for committing unprofessional conduct, which includes conduct that is grossly negligent (Bus. & Prof. Code, § 2234, subd. (b)), repeatedly negligent (Bus. & Prof. Code, § 2234, subd. (c)), or incompetent (Bus. & Prof. Code, § 2234, subd. (d)).

3. Cause for discipline for gross negligence and repeated negligent acts in relation to Patients 1 through 8 was established in light of the matters set forth in Finding 41. No expert opinion evidence was offered to establish that respondent's actions were incompetent; therefore, no cause for discipline was established for incompetence.

4. In her Notice of Defense, respondent contended that her conduct was protected by Business and Professions Code section 2234.1, which permits physicians to rely on "alternative," rather than "conventional," medical treatments and theories. Under this statute, a physician does not act unprofessionally simply by relying on medical opinions the physician shares with only a minority, rather than a majority, of other practitioners.

To qualify as professionally responsible alternative medical advice or treatment, however, such advice or treatment must follow "informed consent and a good-faith prior examination of the patient," including "information concerning conventional treatment and describing the education, experience, and credentials of the physician and surgeon related to the alternative or complementary medicine that he or she practices." (Bus. & Prof. Code, § 2234.1, subds. (a)(1), (a)(2).) In addition, alternative medical advice or treatment must not "delay" or "discourage traditional diagnosis."

(*Id.*, subd. (a)(3).) Finally, professionally responsible alternative medical advice and treatment must "provide a reasonable potential for therapeutic gain in a patient's medical condition that is not outweighed by the risk" of the alternative strategy. (*Id.*, subd. (b).)

Respondent did not undertake a good-faith prior examination of any of the patients before issuing vaccination exemptions to them and respondent did not document informed consent. Furthermore, the evidence did not establish a reasonable potential therapeutic gain that was outweighed by the significant risk of failing to vaccinate these children.

5. In exercising its disciplinary functions, protection of the public is the Board's highest priority. (Bus. & Prof. Code, § 2229, subd. (a).) The Board is also required to take disciplinary action that is calculated to aid the rehabilitation of the physician whenever possible, as long as the Board's action is not inconsistent with public safety. (Bus. & Prof. Code, § 2229, subds. (b), (c).)

6. The Board's Manual of Disciplinary Orders and Disciplinary Guidelines (12th ed., 2016; Cal. Code Regs., tit. 16, § 1361) provide for a minimum discipline of five years' probation and a maximum discipline of revocation.

7. Respondent's conduct in this matter was egregious and posed a serious risk to her patients' health and the public health. Respondent made herself available to parents seeking medical exemptions after the personal beliefs exemption was eliminated in California. She provided the exemptions after telephone interviews of the parents without examining the children or reviewing medical records. Her practice of eliciting an extensive family history and basing her exemptions on irrelevant information fell far outside the standard of care. Her view that the amended statute

conferred complete discretion on physicians to ignore the ACIP and AAP guidelines was unreasonable and raises doubts about her commitment to practicing medicine in a manner consistent with patient and public safety. At hearing, respondent expressed a willingness to abide by the law, but also continued to defend her actions as reasonable and presented experts holding extreme views about vaccination. Respondent cannot be trusted to practice within the standard of care. In addition, respondent is no longer residing in California rendering probation impractical. Revocation is the only appropriate discipline. It would be against the public interest to permit respondent to retain her Certificate.

ORDER

Physician's and Surgeon's Certificate No. G 76932, issued to respondent Mary Kelly Sutton, M.D., is revoked.

DATE: 09/28/2021

Karen Reichmann

KAREN REICHMANN
Administrative Law Judge
Office of Administrative Hearings

XAVIER BECERRA
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BEFORE THE
MEDICAL BOARD OF CALIFORNIA
DEPARTMENT OF CONSUMER AFFAIRS
STATE OF CALIFORNIA

In the Matter of the Accusation Against: **Mary Kelly Sutton, M.D.** **9801 Fair Oaks Blvd., Ste. 300** **Fair Oaks, CA 95628** **Physician's and Surgeon's Certificate No. G 76932,** Respondent.	Case No. 800-2016-023886 **A C C U S A T I O N**

PARTIES

1. William Prasifka (Complainant) brings this Accusation solely in his official capacity as the Executive Director of the Medical Board of California, Department of Consumer Affairs (Board).

2. On February 4, 2004, the Medical Board issued Physician's and Surgeon's Certificate Number G 76932 to Mary Kelly Sutton, M.D. (Respondent). The Physician's and Surgeon's Certificate was in full force and effect at all times relevant to the charges brought herein and will expire on January 31, 2022, unless renewed.

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JURISDICTION

3. This Accusation is brought before the Board, under the authority of the following laws. All section references are to the Business and Professions Code (Code) unless otherwise indicated.

4. Section 2220 of the Code states:

Except as otherwise provided by law, the Board may take action against all persons guilty of violating this chapter. The Board shall enforce and administer this article as to physician and surgeon certificate holders, including those who hold certificates that do not permit them to practice medicine, such as, but not limited to, retired, inactive, or disabled status certificate holders, and the Board shall have all the powers granted in this chapter for these purposes including, but not limited to:

(a) Investigating complaints from the public, from other licensees, from health care facilities, or from the Board that a physician and surgeon may be guilty of unprofessional conduct. The Board shall investigate the circumstances underlying a report received pursuant to Section 805 or 805.01 within 30 days to determine if an interim suspension order or temporary restraining order should be issued. The Board shall otherwise provide timely disposition of the reports received pursuant to Section 805 and Section 805.01.

(b) Investigating the circumstances of practice of any physician and surgeon where there have been any judgments, settlements, or arbitration awards requiring the physician and surgeon or his or her professional liability insurer to pay an amount in damages in excess of a cumulative total of thirty thousand dollars ($30,000) with respect to any claim that injury or damage was proximately caused by the physician's and surgeon's error, negligence, or omission.

(c) Investigating the nature and causes of injuries from cases which shall be reported of a high number of judgments, settlements, or arbitration awards against a physician and surgeon.

5. Section 2234 of the Code states:

The board shall take action against any licensee who is charged with unprofessional conduct. In addition to other provisions of this article, unprofessional conduct includes, but is not limited to, the following:

(a) Violating or attempting to violate, directly or indirectly, assisting in or abetting the violation of, or conspiring to violate any provision of this chapter.

(b) Gross negligence.

(c) Repeated negligent acts. To be repeated, there must be two or more negligent acts or omissions. An initial negligent act or omission followed by a separate and distinct departure from the applicable standard of care shall constitute repeated negligent acts.

(1) An initial negligent diagnosis followed by an act or omission medically appropriate for that negligent diagnosis of the patient shall constitute a single negligent act.

(2) When the standard of care requires a change in the diagnosis, act, or omission that constitutes the negligent act described in paragraph (1), including, but not limited to, a reevaluation of the diagnosis or a change in treatment, and the licensee's conduct departs from the applicable standard of care, each departure constitutes a separate and distinct breach of the standard of care.

(d) Incompetence.

(e) The commission of any act involving dishonesty or corruption that is substantially related to the qualifications, functions, or duties of a physician and surgeon.

(f) Any action or conduct that would have warranted the denial of a certificate.

(g) The failure by a certificate holder, in the absence of good cause, to attend and participate in an interview by the board. This subdivision shall only apply to a certificate holder who is the subject of an investigation by the board.

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OTHER STATUTES

6. Health and Safety Code section 120325 provides:

In enacting this chapter, but excluding Section 120380, and in enacting Sections 120400, 120405, 120410, and 120415, it is the intent of the Legislature to provide:

(a) A means for the eventual achievement of total immunization of appropriate age groups against the following childhood diseases:

(1) Diphtheria.

(2) Hepatitis B.

(3) Haemophilus influenza type b.

(4) Measles.

(5) Mumps.

(6) Pertussis (whooping cough).

(7) Poliomyelitis.

(8) Rubella.

(9) Tetanus.

(10) Varicella (chickenpox).

(11) Any other disease deemed appropriate by the department, taking into consideration the recommendations of the Advisory Committee on Immunization Practices of the United States Department of Health and Human Services, the American Academy of Pediatrics, and the American Academy of Family Physicians.

(b) That the persons required to be immunized be allowed to obtain immunizations from whatever medical source they so desire, subject only to the condition that the immunization be performed in accordance with the regulations of the department and that a record of the immunization is made in accordance with the regulations.

(c) Exemptions from immunization for medical reasons.

(d) For the keeping of adequate records of immunization so that health departments, schools, and other institutions, parents or guardians, and the persons immunized will be able to ascertain that a child is fully or only partially immunized, and so that appropriate public agencies

will be able to ascertain the immunization needs of groups of children in schools or other institutions.

(e) Incentives to public health authorities to design innovative and creative programs that will promote and achieve full and timely immunization of children.

7. Health and Safety Code section 120370 provides, in pertinent part:

(a) 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 condition or circumstances, including, but not limited to, family medical history, for which the physician does not recommend immunization, that child shall be exempt from the requirements of Chapter 1 (commencing with Section 120325, but excluding Section 120380) and Sections 120400, 120405, 120410, and 120415 to the extent indicated by the physician's statement.

FACTUAL ALLEGATIONS

8. At all relevant times, Respondent was a physician and surgeon with a specialization in pediatrics at her office in Fair Oaks, California.

9. In 2015, the California Legislature amended Health and Safety Code section 120325 to eliminate personal beliefs as a basis for exemption from required immunizations for school-aged children. As a consequence, school-aged children not subject to any other exception were required to have immunizations for 10 vaccine-preventable childhood illnesses as a condition of public school attendance.

Patient 1

10. Patient 1[1] was 10 years old at the time an exemption letter was drafted by Respondent on August 9, 2016, and submitted stating that Patient 1 was "medically exempt from all vaccines on a permanent basis due to personal history of allergy, and family history of suspected vaccine reaction, allergy, neurologic and autoimmune disease."

[1] Numbers are used to protect patient privacy. Respondent may learn the names of the patients through the discovery process.

11. Respondent's medical records for Patient 1 include a medical history form for patients (parents) to complete. This includes a "Vaccine Reaction History." Within this, Respondent lists multiple conditions for patients to circle, indicating that they apply. These include "Brain and nervous system inflammation" and include conditions not associated with vaccines (aggression, depression, visual disturbance, meningitis, ADHD etc.), as well as "Immune system or organ inflammation," including (frozen shoulder, hepatitis, pneumonia, ITP, allergies, thyroiditis, 'signs of vaccine illness'). Malignancies are also listed as possible outcomes that may have resulted from vaccination. In fact, several of these conditions are vaccine preventable.

12. Medical records for Patient 1 indicate meningitis[2] with subsequent hearing loss at age 11 months as well as eczema, the need for PE tubes,[3] and frequent infections. The one-page written documentation does not appear to include a physical exam and does not note whether the meeting with the mother and patient was an in-person visit or a telephone consultation. The assessment section of the medical record states: "seeks ME- medical exemption." A check list for the patient medical history completed by the patient/parent is extensive, listing more common conditions (Crohn's disease, thyroiditis) to very unusual ones (Tolosa-Hunt syndrome and Takayasu's arteritis). A second cousin of Patient 1 is noted for a movement disorder, while another was noted to have had a vaccine reaction.

13. Respondent did not identify any vaccine contraindication or precaution, as defined by the Centers for Disease Control and Prevention and/or the American Academy of Pediatrics. Respondent issued a medical exemption for Patient 1 that was global, i.e. applying to all vaccines, and permanent in duration.

Patient 2

14. Patient 2 was 4 years old at the time an exemption letter was drafted by Respondent on September 5, 2017, and submitted stating that Patient 2 was "medically exempt from all vaccines on a permanent basis due to personal history of allergy and neurologic vulnerability, and

[2] Bacterial meningitis is a vaccine-preventable disease.

[3] Tiny hollow tubes made of soft material that decrease the frequency of ear infections by allowing air in and helping fluid to drain into the throat.

family history of genetic defect, neurologic disease and allergy." Respondent lists vaccination against, "diphtheria, hepatitis B, Hemophilus influenza type B, measles, mumps, pertussis, poliomyelitis, rubella, tetanus, varicella, pneumococcus, meningococcus, flu, and human papilloma virus." Respondent noted that the exemption is for all vaccines including those not specifically mentioned in the exemption.

15. The medical records provide an extensive check list and medical history reported by Patient 2's parent that reveals no significant underlying chronic diseases. The records include genetic testing for various mutations (polymorphisms) for which there is no evidence-based correlations or clinical relevance. Respondent makes assumptions about Patient 2's genetic make-up based on this testing and then extrapolates it to the child's ability to tolerate vaccinations: Respondent lists neurologic vulnerability and family history of genetic defect for Patient 2.[4] There is also a FoodStats Antibody Assessment, but this is without relevance to any vaccine exemption indication. Respondent also refers to the patient's sensory processing disorder as a reason to not vaccinate. While this is a recognized neurologic disorder, it has no relation to vaccinations.

16. Respondent raises concerns about aluminum in vaccines, perpetuating a common misconception about vaccine additives, and reports that exposure to aluminum in the vaccines, along with autoimmune disease in the family, is a valid reason for not vaccinating Patient 2. These concerns are not in line with the CDC,[5] AAP[6] or other medical bodies.

Patient 3

17. Patient 3 was 10 years old at the time an exemption letter was drafted by Respondent on March 4, 2016, and submitted stating that Patient 3 was "medically exempt from all vaccines on a permanent basis due to family history of autoimmune disease, allergy, neurologic disease and vaccine reactions."

[4] Neurologic vulnerability is not a real medical term and if a family member has a genetic disease, another family member may indeed carry that trait, but this would not be a legitimate reason for vaccine or all vaccines exemption.

[5] Centers for Disease Control and Prevention.

[6] American Academy of Pediatrics.

18. In the medical records, Respondent lists a family history of suspected vaccine reaction, allergy, neurologic and autoimmune disease. The records contain no physical examination or personal history noting how Patient 3 was currently doing, her development or her current state of health. Respondent's recommendations included some dietary interventions, one of which was raw milk.[7] Family history is not a legitimate reason for vaccine exemption, and in Patient 3's letter, Respondent claims medical exemption from all vaccines due to family history of allergy, among other conditions. None of these are vaccine contraindications. There are no identified family medical conditions that contradict all vaccines.

Patient 4

19. Patient 4 was 10 years old at the time an exemption letter was drafted by Respondent on June 16, 2016, and submitted stating that Patient 4 was medically exempt from all vaccines on a permanent basis due to a personal history of vaccine reaction and neurologic disease, and family history of neurologic disease, vaccine reaction, allergy and autoimmune disease. Respondent lists all vaccines for which Patient 4 should be exempt and then says that this exemption is for "all vaccines including those not mentioned here." There is also an additional more detailed exemption letter that recommends medical exemption from all vaccines on a permanent basis describing in more detail Patient 4's personal history of reaction to "cumulative vaccination schedule resulting in neurologic disease which is the basis of his IEP" and attributes his ADHD[8] and ASD[9] to cumulative vaccinations. Respondent also reports, "genetic mutations indicating vulnerability to autoimmune and allergic disease." Respondent details Patient 4's family history as a reason to exempt Patient 4 from vaccines that includes a paternal uncle and paternal cousins with ADD and other relatives with learning difficulties and autism, which Respondent attributes to vaccination but does qualify this as her personal opinion. Respondent notes other autoimmune diseases in Patient 4's family members, including celiac disease, psoriasis and Bechet's disease.[10]

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[7] A product advised against by CDC, AAP etc., as it has been associated with many foodborne outbreaks – E. coli 0157:H7 and Salmonella among other bacterial infections.

[8] Attention-Deficit/Hyperactivity Disorder.

[9] Autism Spectrum Disorder.

[10] A rare disorder that causes blood vessel inflammation throughout the body. The disease

There is no documentation that Respondent had a conversation with the patient or the parents regarding the risks of not receiving the vaccines.

Patient 5

20. Patient 5 was 5 years old at the time an exemption letter was drafted by Respondent on December 20, 2018, and submitted stating that Patient 5 was medically exempt from all vaccines on a permanent basis due to a personal history of genetic defect, allergy, suspected vaccine reaction, and neurologic vulnerability, and family history of autoimmune disease, allergy, neurologic vulnerability, and suspected vaccine reaction. Respondent lists all vaccines for which Patient 5 should be exempt and then says that this exemption is for "all vaccines including those not mentioned here."

21. The medical records reveal a conversation between Respondent and Patient 5's mother on April 17, 2018, noting that Patient 5 was vaccinated up until age 18 months. Patient 5 is reported by her mom to have poor focus and to be moody. There is a question of ADHD and from this Respondent's assessment is "suspect vaccine reaction." The reason for the appointment is to receive a medical evaluation to consider medical exemption. There is a long check list included in the intake materials that lists an extensive number of rare and common medical conditions – some exceptionally rare.[11] Patient 5's parent does not endorse any of these. There is also inclusion in the medical records of a genetic testing report (Single-Nucleotide Polymorphism's (SNPs) for Vaccine Medical Exemption Evaluation).[12] There is no documentation that Respondent had a conversation with the patient or the parents regarding the risks of not receiving the vaccines.

Patient 6

22. Patient 6 was 14 years old at the time an exemption letter was drafted by Respondent on August 19, 2016, and submitted stating that Patient 6 was medically exempt from all vaccines on a permanent basis due to personal history of genetic defect and allergy and family history of

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can lead to numerous signs and symptoms that can seem unrelated at first. They can include mouth sores, eye inflammation, skin rashes and lesions.

[11] Essential mixed cryoglobulimenia, autoimmune oophoritis.

[12] A non-evidence-based test that has no medical relevance in this arena.

autoimmune disease and allergy. Respondent listed all the vaccines Patient 6 should not receive and then stated that all other vaccines not mentioned in her letter should also be included in the exemption.

23. Medical records reveal communication, but no in-person clinic visit, between Respondent and Patient 6's father on August 19, 2016. Respondent documented allergies to shellfish, loud breathing and headaches. According to the father, he had a 'bad reaction' to a vaccine and "does not want his daughters to go through the same." There is an exhaustive check list for the family history and genetic testing for polymorphisms. There is no documentation of any vaccine reactions or an underlying condition that would qualify for an exemption.[13]

Patient 7

24. Patient 7 was 12 years old at the time an exemption letter was drafted by Respondent on July 29, 2016, and submitted stating that Patient 7 was medically exempt from all vaccines on a permanent basis due to personal history of allergy, neurologic disease, and suspected vaccine reactions, and family history of autoimmune disease, allergy, neurologic disease, and vaccine reactions. Respondent lists all the vaccines Patient 7 should not receive and then states that all other vaccines not mentioned in her letter should also be included in the exemption.

25. Medical records show that Respondent spoke with Patient 7's mother on July 29, 2016, and documented his allergies and asthma. There is no record of an in-person visit. Respondent also noted ADD. The reason for the visit is for "medical exemption" as recorded by the parent. The medical intake sheet is adult focused. The mother's medical history includes asthma, intolerance of "buildings" while on a school trip, and recurrent episodes of allergies and difficulty breathing with fatigue. Mother blames her difficulties, including Patient 7's infancy problems (GI issues, fevers), on vaccinations. An exhaustive list of "vaccine reactions" was included in the records for Patient 7's mother to circle, identifying the problems she thinks are due to vaccines, despite none of these conditions being associated with vaccinations. Based on this, Respondent provided exemptions from all vaccinations.

[13] Patient 6 had apparently not received any vaccinations.

Patient 8

26. Patient 8 was 12 years old at the time an exemption letter was drafted by Respondent on March 8, 2016, and submitted stating that Patient 8 was medically exempt from all vaccines on a permanent basis due to personal history of vaccine reactions, allergy and neurologic disease, and family history of autoimmune disease, allergy, vaccine reactions and neurologic disease. Respondent lists all the vaccines Patient 8 should not receive and then states that all other vaccines not mentioned in her letter, should also be included in the exemption.

27. Medical records note family history going back several generations with a check list for multiple diseases and conditions, none of which have any relation to vaccines.[14] The records also contain a "vaccine reaction history" that includes multiple conditions, also with no association with vaccinations.[15] The records suggest that Patient 8 may have had a febrile seizure following the MMR vaccine administered at 2 years of age.[16] Febrile seizures, although scary for parents, are benign and do not have long lasting effects, and are not a contraindication to further vaccine administration or exemption from all vaccines.

CAUSE FOR DISCIPLINE

(Unprofessional Conduct – Gross Negligence; Repeated Negligent Acts; Incompetence)

28. Paragraphs 8 through 27 are incorporated by reference as if fully set forth.

29. Respondent Mary Kelly Sutton, M.D. is subject to disciplinary action pursuant to section 2234 and/or 2234(b) and/or 2234(c) and/or 2234(d) in that Respondent engaged in unprofessional conduct and was grossly negligent, and/or repeatedly negligent, and/or incompetent in her care and treatment of Patients 1 through 8 when providing medical exemptions from all vaccinations without indication; issuing vaccine exemptions based on conditions that are not a contradiction to vaccination; issuing vaccine exemptions without conducting an adequate or meaningful assessment, evaluation or examination to arrive at a

[14] For example, Goodpasture's syndrome, Gulf War Syndrome, and Herpes gestationis.
[15] Encephalitis, GBS, ADHD, depression, bursitis, Lupus, Kawasaki's Disease etc.
[16] Febrile seizures are a reported complication of MMR vaccine and evidence suggests that when the vaccine is administered to older children (15-24 months rather than at the recommended 12-15 months), febrile seizures are slightly more common.

diagnosis; and issuing vaccine exemptions without providing and/or documenting a discussion with the parents regarding the risks and benefits of vaccines and of foregoing vaccination.

PRAYER

WHEREFORE, Complainant requests that a hearing be held on the matters herein alleged, and that following the hearing, the Medical Board of California issue a decision:

1. Revoking or suspending Physician's and Surgeon's Certificate Number G 76932, issued to Mary Kelly Sutton, M.D.;

2. Revoking, suspending or denying approval of Mary Kelly Sutton, M.D.'s authority to supervise physician assistants and advanced practice nurses;

3. Ordering Mary Kelly Sutton, M.D., if placed on probation, to pay the Board the costs of probation monitoring; and

4. Taking such other and further action as deemed necessary and proper.

DATED: SEP 15 2020

WILLIAM PRASIFKA
Executive Director
Medical Board of California
Department of Consumer Affairs
State of California
Complainant