



STATE OF NEW YORK
DEPARTMENT OF HEALTH

433 River Street, Suite 303 Troy, New York 12180-2299

Richard F. Daines, M.D.
Commissioner

Public

Wendy E. Saunders
Chief of Staff

June 24, 2009

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Jamie Marcelo Benitez, M.D.
Redacted Address

Ann Gayle, Esq.
NYS Department of Health
Division of Legal Affairs
90 Church Street – 4th Floor
New York, New York 10007

Bhalinder L. Rikhye, Esq.
Peltz & Walker
222 Broadway
New York, New York 10036

RE: In the Matter of Jaime Marcelo Benitez, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 09-07) of the Professional Medical Conduct Administrative Review Board in the above referenced matter. This Determination and Order shall be deemed effective upon receipt or seven (7) days after mailing by certified mail as per the provisions of §230, subdivision 10, paragraph (h) of the New York State Public Health Law.

Five days after receipt of this Order, you will be required to deliver to the Board of Professional Medical Conduct your license to practice medicine **if said license has been revoked, annulled, suspended or surrendered**, together with the registration certificate. Delivery shall be by either **certified mail or in person** to:

Office of Professional Medical Conduct
New York State Department of Health
Hedley Park Place
433 River Street-Fourth Floor
Troy, New York 12180

If your license or registration certificate is lost, misplaced or its whereabouts is otherwise unknown, you shall submit an affidavit to that effect. If subsequently you locate the requested items, they must then be delivered to the Office of Professional Medical Conduct in the manner noted above.

This exhausts all administrative remedies in this matter [PHL §230-c(5)].

Sincerely,

Redacted Signature

James F. Horan, Acting Director
Bureau of Adjudication

JFH:cah

Enclosure

STATE OF NEW YORK : DEPARTMENT OF HEALTH
ADMINISTRATIVE REVIEW BOARD FOR PROFESSIONAL MEDICAL CONDUCT

In the Matter of

Jaime Marcelo Benitez, M.D. (Respondent)

A proceeding to review a Determination by a
Committee (Committee) from the Board for
Professional Medical Conduct (BPMC)

Administrative Review Board (ARB)

Determination and Order No. 09-07

COPY

Before ARB Members Lynch, Pellman, Wagle, Wilson and Milone
Administrative Law Judge James F. Horan drafted the Determination

For the Department of Health (Petitioner): Anne Gayle, Esq.

For the Respondent:

Peltz & Walker, by Bhalinder L. Rikhye, Esq.

Following a hearing, a BPMC Committee determined that the Respondent practiced with gross negligence and engaged in conduct of a sexual nature with a patient. The Committee voted to place the Respondent on probation for two years, under terms that included practicing in a supervised setting and completing continuing education in physician/patient boundaries. In this proceeding pursuant to New York Public Health Law (PHL) § 230-c (4)(a)(McKinney 2009), the Petitioner asks the ARB to overturn the Committee, to sustain additional charges and to revoke the Respondent's License to practice medicine in New York State (License). After reviewing the hearing record and the parties' review submissions, the ARB affirms the Committee's Determination.

Committee Determination on the Charges

The Committee conducted a hearing into charges that the Respondent, a psychiatrist, violated New York Education Law (EL) §§ 6530(4), 6530(20), 6530(31) & 6530(44) (McKinney 2009) by committing professional misconduct under the following specifications:

- practicing the profession with gross negligence,
- engaging in conduct that evidences moral unfitness in the practice of medicine,
- willfully harassing, abusing or intimidating a patient, and,
- engaging in contact of a sexual nature with a patient.

During the hearing, the Petitioner withdrew a charge that the Respondent also practiced with negligence on more than one occasion. The charges related to the Respondent's conduct toward one person, Patient A. The charges refer to the Patient by initials to protect patient privacy.

The Committee determined that the Respondent provided psychiatric services at the Broadway House Shelter (Shelter) in Brooklyn, in addition to working at Woodhull Hospital and Mental Health Center. At the shelter, the Respondent provided treatment to Patient A on three occasions between July 6, 2006 and March 1, 2007. At the time, Patient A was a woman in her forties with mild mental retardation, an eighth grade level of special education and chronic, psychiatric problems. During the March 1, 2007 treatment session, Patient A told the Respondent that Patient A lived at the shelter, that she desired to obtain permanent housing, that she was hungry and that she lacked the money to buy dinner. The Committee found that the Patient's story moved the Respondent and that the Respondent gave the Patient money to buy dinner and the Respondent's business card so the Patient could contact the Respondent for counseling. The Committee found further that the Respondent kissed Patient A on the mouth and hugged her for a few seconds. On March 6, 2007, the Respondent contacted the Director of Psychiatry for the Shelter and documented the Respondent's encounter with Patient A. The Respondent admitted to kissing the Patient inappropriately on the mouth and hugging her for a few seconds.

The Committee found that the Respondent engaged in physical contact of a sexual nature with a patient and that the Respondent practiced with gross negligence in his conduct toward Patient A on March 1, 2007. The Committee dismissed factual allegations that the Respondent fondled Patient A and the Committee dismissed misconduct specifications that charged engaging in conduct that evidenced moral unfitness in the practice of medicine and that charged willfully harassing, abusing or intimidating a patient. The Committee found the Respondent remorseful and found the Respondent aware that what he did was wrong. The Committee also found no

evidence to indicate that the Respondent took advantage of the treatment setting to prey upon a vulnerable patient or to indicate that the Respondent willfully harassed, abused or intimidated a patient. The Committee voted to place the Respondent on probation for two years. The probation terms appear as Appendix A to the Committee's Determination. The probation terms restrict the Respondent to working in an institutional setting and require that the Respondent complete sixteen hours of continuing medical education in the area of physician/patient boundaries.

Review History and Issues

The Committee rendered their Determination on January 12, 2009. This proceeding commenced on or about January 30, 2009, when the ARB received the Petitioner's Notice requesting a Review. The record for review contained the Committee's Determination, the hearing record, the Petitioner's brief and the Respondent's reply brief. The record closed when the ARB received the reply brief on March 5, 2009.

The Petitioner asks that the ARB sustain the charges that the Respondent's conduct toward Patient A amounted to willfully harassing, intimidating and/or abusing a patient and to engaging in conduct that evidences moral unfitness in the practice of medicine. The Petitioner argues that the Respondent's conduct showed a complete disregard for the consequences of his conduct on a vulnerable person. The Petitioner asks further that the ARB overturn the Committee and revoke the Respondent's License or, in the alternative, that the ARB impose a period of actual License suspension, limit the Respondent permanently to practice in an institutional setting and increase the time on probation from two years to five years. The Petitioner argues that the penalty the Committee imposed would give the Respondent and other physicians the message that BPMC will tolerate conduct such as the Respondent exhibited in this case.

The Respondent argues that no evidence showed that he acted in a premeditated manner. The Respondent contends that the Petitioner failed to explain how the penalty that the Committee imposed would fail to deter misconduct in the future.

ARB Authority

Under PHL §§ 230(10)(i), 230-c(1) and 230-c(4)(b), the ARB may review Determinations by Hearing Committees to determine whether the Determination and Penalty are consistent with the Committee's findings of fact and conclusions of law and whether the Penalty is appropriate and within the scope of penalties which PHL §230-a permits. The ARB may substitute our judgment for that of the Committee, in deciding upon a penalty Matter of Bogdan v. Med. Conduct Bd. 195 A.D.2d 86, 606 N.Y.S.2d 381 (3rd Dept. 1993); in determining guilt on the charges, Matter of Spartalis v. State Bd. for Prof. Med. Conduct 205 A.D.2d 940, 613 NYS 2d 759 (3rd Dept. 1994); and in determining credibility, Matter of Minielly v. Comm. of Health, 222 A.D.2d 750, 634 N.Y.S.2d 856 (3rd Dept. 1995). The ARB may choose to substitute our judgment and impose a more severe sanction than the Committee on our own motion, even without one party requesting the sanction that the ARB finds appropriate, Matter of Kabnick v. Chassin, 89 N.Y.2d 828 (1996). In determining the appropriate penalty in a case, the ARB may consider both aggravating and mitigating circumstances, as well as considering the protection of society, rehabilitation and deterrence, Matter of Brigham v. DeBuono, 228 A.D.2d 870, 644 N.Y.S.2d 413 (1996).

The statute provides no rules as to the form for briefs, but the statute limits the review to only the record below and the briefs [PHL § 230-c(4)(a)], so the ARB will consider no evidence

from outside the hearing record, Matter of Ramos v. DeBuono, 243 A.D.2d 847, 663 N.Y.S.2d 361 (3rd Dept. 1997).

A party aggrieved by an administrative decision holds no inherent right to an administrative appeal from that decision, and that party may seek administrative review only pursuant to statute or agency rules, Rooney v. New York State Department of Civil Service, 124 Misc. 2d 866, 477 N.Y.S.2d 939 (Westchester Co. Sup. Ct. 1984). The provisions in PHL §230-c provide the only rules on ARB reviews.

Determination

The ARB has considered the record and the parties' briefs. The ARB affirms the Committee's Determination on both the charges and the penalty. In making this Determination, the ARB relied on the Committee's assessment that the Respondent testified in a credible and remorseful manner and on the Committee's conclusion that the Respondent's conduct amounted to an egregious lack of judgment rather than an attempt to take advantage of a treatment setting. The ARB defers to the Committee's judgment, because the Committee saw the Respondent and the Patient and the ARB did not. The ARB also considered that the Respondent took responsibility and admitted his conduct in writing close in time to the incident. The ARB agrees with the Committee that the Respondent is open to and can benefit from additional training and supervision. The ARB discussed extending the probation term from two years to five years, but again we deferred to the Committee's judgment and left intact the penalty the Committee imposed.

ORDER

NOW, with this Determination as our basis, the ARB renders the following ORDER:

1. The ARB affirms the Committee's Determination that the Respondent committed professional misconduct.
2. The ARB affirms the Committee's Determination to place the Respondent on probation for two years, to limit the Respondent to practice in an institutional setting during the probation period and to require that the Respondent complete sixteen hours of continuing education in the area of physician patient boundaries.

Thea Graves Pellman
Datta G. Wagle, M.D.
Linda Prescott Wilson
Therese G. Lynch, M.D.
Richard D. Milone, M.D.

In the Matter of Jaime Marcelo Benitez, M.D.

Linda Prescott Wilson, an ARB Member concurs in the Determination and Order in the
Matter of Dr. Benitez.

Dated: 17 June, 2009

Redacted Signature

Linda Prescott Wilson

In the Matter of Jaime Marcelo Benitez, M.D.

Thea Graves Pellman, an ARB Member concurs in the Determination and Order in the
Matter of Dr. Benitez.

Dated: June 22, 2009

Redacted Signature

Thea Graves Pellman

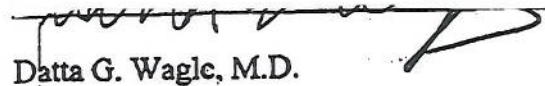
In the Matter of Jaime Marcelo Benitez, M.D.

Datta G. Wagle, M.D., an ARB Member concurs in the Determination and Order in the

Matter of Dr. Benitez.

Dated: 6/17/, 2009

Redacted Signature


Datta G. Wagle, M.D.

In the Matter of Jaime Marcelo Benitez, M.D.

Therese G. Lynch, M.D., an ARB Member concurs in the Determination and Order in the

Matter of Dr. Benitez.

Dated: June 17, 2009

Redacted Signature

Therese G. Lynch, M.D. /