



MEDICAL BOARD OF CALIFORNIA

Protecting consumers by advancing high quality, safe medical care.

Enforcement Program

2005 Evergreen Street, Suite 1200

Sacramento, CA 95815-5401

Phone: (916) 263-2525

Fax: (916) 263-2473

www.mbc.ca.gov

Gavin Newsom, Governor, State of California | Business, Consumer Services and Housing Agency | Department of Consumer Affairs

December 8, 2021

Mary Kelly Sutton, M.D.
2050 Smith St.
POB 114022
North Providence, RI 02911-7700

Dear Dr. Sutton:

Enclosed is a copy of the Decision in the matter of the Accusation filed against you. Please note that this Decision shall become effective at 5:00 p.m. on January 7, 2022.

If you wish to file a Petition for Reconsideration pursuant to Government Code section 11521, the petition must be received prior to the effective date of the Decision. However, please be aware the Board needs approximately one week to process a petition for reconsideration. Attached is a copy of the Government Code section for your review.

Sincerely,

Regina Rodriguez
Associate Governmental Program Analyst
Discipline Coordination Unit

Attachment

CERTIFIED MAIL

cc: Richard Jaffe, Esq.
Greg W. Chambers, Deputy Attorney General, San Francisco
Thomas Ostly, Deputy Attorney General, San Francisco
Karen Reichmann, Administrative Law Judge, Oakland

MBC Case # 800-2016-023886

**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

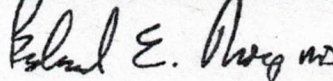
DECISION

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.”

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

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

DECLARATION OF SERVICE BY CERTIFIED AND FIRST-CLASS MAIL

IN THE MATTER OF THE ACCUSATION AGAINST:

Mary Kelly Sutton, M.D.

Case No. 800-2016-023886

I, the undersigned, declare that I am over 18 years of age and not a party to the within cause; my business address is 2005 Evergreen Street, Suite 1200, Sacramento, California 95815. I served a true copy of the attached:

DECISION AND ORDER

by mail on each of the following, by placing same in an envelope (or envelopes) addressed (respectively) as follows:

NAME AND ADDRESS

CERTIFIED MAIL TRACKING NO.

Mary Kelly Sutton, M.D.
2050 Smith St.
POB 114022
North Providence, RI 02911-7700

7021 0350 0002 0525 9634
And First-Class Mail

Richard Jaffe, Esq.
770 L Street, Suite 950
Sacramento, CA 95814-3361

7021 0350 0002 0525 9726

Greg W. Chambers
Thomas Ostly
Deputy Attorney General
California Department of Justice
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004

FIRST-CLASS MAIL

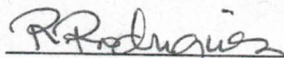
Karen Reichmann
Administrative Law Judge
Office of Administrative Hearings

E-File:
OAHSecureEFile@dgs.ca.gov

Each said envelope was then, on December 8, 2021, sealed and deposited in the United States mail at Sacramento, California, the county in which I am employed, either as certified mail or first-class U.S. mail with the postage thereon fully prepaid and return receipt requested for the certified mail.

Executed on December 8, 2021, at Sacramento, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.



Regina Rodriguez, Declarant