

April 3, 2012

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Amy T. Kulb, Esq.
Jacobson, Goldberg & Kulb, LLP
585 Stewart Avenue
Garden City, New York 11530

Clifford Alan Berken, M.D.
REDACTED ADDRESS

Joel E. Abelow, Esq.
NYS Department of Health
ESP-Coming Tower-Room 2512
Albany, New York 12237

RE: In the Matter of Clifford Alan Berken, M.D.

Dear Parties:

Enclosed please find the Determination and Order (No. 12-61) of the Hearing Committee in the above referenced matter. This Determination and Order shall be deemed effective upon the 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 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.

As prescribed by the New York State Public Health Law §230, subdivision 10, paragraph (i), (McKinney Supp. 2007) and §230-c subdivisions 1 through 5, (McKinney Supp. 2007), "the determination of a committee on professional medical conduct may be reviewed by the Administrative Review Board for professional medical conduct." Either the licensee or the Department may seek a review of a committee determination.

Request for review of the Committee's determination by the Administrative Review Board stays penalties other than suspension or revocation until final determination by that Board. Summary orders are not stayed by Administrative Review Board reviews.

All notices of review must be served, by certified mail, upon the Administrative Review Board and the adverse party within fourteen (14) days of service and receipt of the enclosed Determination and Order.

The notice of review served on the Administrative Review Board should be forwarded to:

James F. Horan, Esq., Chief Administrative Law Judge
New York State Department of Health
Bureau of Adjudication
Hedley Park Place
433 River Street, Fifth Floor
Troy, New York 12180

The parties shall have 30 days from the notice of appeal in which to file their briefs to the Administrative Review Board. Six copies of all papers must also be sent to the attention of Mr. Horan at the above address and one copy to the other party. The stipulated record in this matter shall consist of the official hearing transcript(s) and all documents in evidence.

Parties will be notified by mail of the Administrative Review Board's Determination and Order.

Sincerely,

REDACTED SIGNATURE

James F. Horan
Chief Administrative Law Judge
Bureau of Adjudication

JFH:cah
Enclosure

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

COPY

IN THE MATTER
OF
CLIFFORD ALAN BERKEN, M.D.

DETERMINATION

AND

ORDER

BPMC #12-61

A hearing was held on January 25, 2012, at the offices of the New York State Department of Health ("the Petitioner"). A Notice of Referral Proceeding and Statement of Charges, dated March 5, 2011 and April 5, 2011, respectively, were served upon the Respondent, **Clifford Alan Berken, M.D.**. Pursuant to Section 230(10)(e) of the Public Health Law, **Irving S. Caplan**, Chairperson, **Mary E. Rapazzo, M.D.**, and **William A. Tedesco, M.D.**, duly designated members of the State Board for Professional Medical Conduct, served as the Hearing Committee in this matter. **William J. Lynch, Esq.**, Administrative Law Judge, served as the Administrative Officer.

The Petitioner appeared by James E. Dering, Esq., General Counsel, by **Joel Ablove, Esq.**, of Counsel. The Respondent appeared in person and was represented by Jacobson Goldberg & Kulb, LLP, **Amy T. Kulb, Esq.**, of Counsel.

Evidence was received and transcripts of these proceedings were made. The Hearing Committee held its deliberations on February 16, 2012.

After consideration of the entire record, the Hearing Committee issues this Determination and Order.

STATEMENT OF CASE

This case was brought pursuant to Public Health Law Section 230(10)(p). The statute provides for an expedited hearing when a licensee is charged solely with a violation of Education Law Section 6530(9). In such cases, a licensee is charged with misconduct based upon a prior criminal conviction in New York State or another jurisdiction, or upon a prior administrative adjudication regarding conduct that would amount to professional misconduct, if committed in New York. The scope of an expedited hearing is limited to a determination of the nature and severity of the penalty to be imposed upon the licensee.

In the instant case, the Respondent is charged with professional misconduct pursuant to Education Law Section 6530(9)(a)(i), in that he was convicted of an act constituting a crime under the laws of New York State. Copies of the Notice of Referral Proceeding and the Statement of Charges are attached to this Determination and Order as Appendix 1.

Upon Respondent's application and agreement, the State Board for Professional Medical Conduct issued an Order dated January 28, 2009 prohibiting Respondent from practicing medicine in the State of New York pending a final disposition of the investigation which had commenced.

WITNESSES

For the Petitioner:

None

For the Respondent:

Clifford Alan Berken, M.D.

Leslie M. Lothstein, Ph.D.

FINDINGS OF FACT

The following Findings of Fact were made after a review of the entire record in this matter. Numbers below in parentheses refer to exhibits, denoted by the prefix "Ex." These citations refer to evidence found persuasive by the Hearing Committee in arriving at a particular finding. Conflicting evidence, if any, was considered and rejected in favor of the cited evidence. All Hearing Committee findings were unanimous.

1. Clifford Alan Berken, M.D., the Respondent, was authorized to practice medicine in New York State on October 15, 1982, by the issuance of license number 151731 by the New York State Education Department (Petitioner's Ex. 4).

2. On February 5, 2010, in the County Court, State of New York, Westchester County, Respondent was found guilty, based upon a plea of guilty, of Attempted Disseminating Indecent Material to Minors in the first degree, in violation of New York Penal Law section 110.235.22, a felony, and was sentenced on April 20, 2010, to time served, five years of probation, a \$300.00 Mandatory Surcharge, a \$50.00 DNA Fee, a \$25.00 CVAF, a \$50.00 Supplemental Sex Offender Victim Fee, and was required to register as a sex offender (Petitioner's Ex. 5).

VOTE OF THE HEARING COMMITTEE

FIRST SPECIFICATION

Respondent violated New York Education Law Section 6530(9)(a)(i) by having been convicted of committing an act constituting a crime under New York State law.

VOTE: Sustained (3-0)

HEARING COMMITTEE DETERMINATION

The evidence established that Respondent had engaged in a series of "chat" conversations with an undercover criminal investigator who had portrayed himself as being fifteen years old, that Respondent discussed engaging in sex acts, that Respondent sent sexually suggestive pictures, and that Respondent drove to the location where he intended to meet a youth, but was met instead by the police and arrested.

Respondent provided documentary evidence that the Connecticut Medical Examining Board issued a decision in April 2011, which resolved the disciplinary action brought in that State with terms which included prohibiting him from treating patients who were under eighteen years of age, requiring him to have a chaperone present while with all other patients, and placing him on probation with required psychiatric evaluations and therapy. Respondent claimed that the Connecticut Medical Examining Board would not consider whether to renew his license until this New York action was resolved because he had failed to renew his Connecticut medical license during the pendency of the disciplinary action in that State.

Respondent claimed that he suffered from an underlying depression, anxiety disorder and obsessive compulsive disorder which coupled with external pressures caused his aberrant behavior. Respondent alleged that his subsequent treatment and the insight which he has gained will prevent a reoccurrence of his misconduct. The Hearing Committee recognized that Respondent had taken some steps towards obtaining the necessary psychiatric treatment, but the Committee determined that his testimony at times was self-serving and lacked credibility. For example, Respondent claimed that his therapists had said that he had an extremely high likelihood of being cured (T. 53), although he provided no support for that statement from any one of his therapists. The

Hearing Committee also concluded that Respondent, in spite of his claims of having accepted responsibility for his actions, remains in denial regarding the psychiatric issues involved and the continued impact of the unresolved mental health stressors in his life.

Respondent offered the testimony of a psychologist who had evaluated and treated him. The psychologist indicated that he was able to reach a degree of professional certainty that Respondent was being truthful when he stated that the conduct which resulted in his conviction was an isolated incident of illegal sexual conduct. The psychologist was of the opinion that it was appropriate for Respondent to resume the practice of medicine provided that terms such as those contained in the decision of the Connecticut Board were imposed. The psychologist acknowledged, however, that his current contact with respondent is limited to periodic emails and telephone calls. The Hearing Committee credited this witness's testimony regarding the required treatment plan for Respondent, but was concerned with the weight which was given to a polygraph examination in determining Respondent's veracity. Further, Respondent's physical illness has apparently been an obstacle to his compliance with the proposed treatment plan. Accordingly, the Hearing Committee did not feel that Respondent had established that it was appropriate to permit him to practice medicine in New York State.

Petitioner recommended that Respondent's license be revoked, contending that Respondent's actions warranted a nullification of the privilege to hold a medical license and that no other penalty would sufficiently protect the public. Respondent asked the Committee to permit him to practice medicine with restrictions imposed similar to those contained in the Connecticut decision.

The Hearing Committee considered the option of permitting Respondent to maintain his license in New York State with the same limitations that had been decided upon by the Connecticut Board, but ultimately decided that Respondent's license to practice

medicine in this State should be revoked. Respondent's medical practice has been limited to Connecticut, and he is now a registered sex offender. Due to his criminal conduct, Respondent is no longer entitled to the trust which is required of those who practice the medical profession. Although he expressed remorse for his actions, he has only begun the rehabilitative process.

ORDER

IT IS HEREBY ORDERED THAT:

1. Respondent's license to practice medicine in the State of New York is revoked.
2. This Order shall be effective upon service on the Respondent in accordance with the requirements of Public Health Law Section 230(10)(h).

DATED: Malone, New York
3-28, 2012

REDACTED SIGNATURE

Irving S. Caplan, M.D. *Irving S. Caplan*
Chairperson

Mary E. Rappazzo, M.D.
William A. Tedesco, M.D.

TO: Amy T. Kulb, Esq.
Attorney for Respondent
Jacobson, Goldberg & Kulb, L.L.P.
585 Stewart Avenue
Garden City, New York 11530

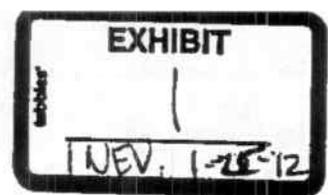
Joel E. Ablove, Esq.
Attorney for Petitioner
Associate Counsel
NYS Department of Health
Bureau of Professional Medical Conduct
Corning Tower – Room 2512
Empire State Plaza
Albany, New York 12237

APPENDIX 1

STATE OF NEW YORK

DEPARTMENT OF HEALTH

STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT



IN THE MATTER
OF
CLIFFORD ALAN BERKEN, M.D.
CO-08-12-7680-A

NOTICE OF
REFERRAL
PROCEEDING

TO: CLIFFORD ALAN BERKEN, M.D.
REDACTED ADDRESS

PLEASE TAKE NOTICE THAT:

An adjudicatory proceeding will be held pursuant to the provisions of New York Public Health Law §§230(10)(p) and New York State Administrative Procedures Act §§301-307 and 401. The proceeding will be conducted before a committee on professional conduct of the State Board for Professional Medical Conduct (Committee) on the 22nd day of June, 2011, at 10:00 a.m., at the offices of the New York State Department of Health, Hedley Park Place, 433 River Street, 5th Floor, Troy, NY 12180.

At the proceeding, evidence will be received concerning the allegations set forth in the Statement of Charges, that is attached. A stenographic record of the proceeding will be made and the witnesses at the proceeding will be sworn and examined.

You may appear in person at the proceeding and may be represented by counsel who shall be an attorney admitted to practice in New York state. You may produce evidence and/or sworn testimony on your behalf. Such evidence and/or sworn testimony shall be strictly limited to evidence and testimony relating to the nature and severity of the penalty to be imposed upon the licensee. Where the charges are based on the conviction of state law crimes in other jurisdictions, evidence may be offered that would show that the conviction would not be a crime in New York State. The Committee also may limit the number of witnesses whose testimony will be received, as well as the length of time any witness will be permitted to testify.

If you intend to present sworn testimony, the number of witnesses and an estimate of the time necessary for their direct examination must be submitted to the New York State Department of Health, Division of Legal Affairs, Bureau of Adjudication, Hedley Park Place, 433 River Street, Fifth Floor South, Troy, NY 12180, ATTENTION: HON. JAMES F. HORAN, ACTING DIRECTOR, BUREAU OF ADJUDICATION (Telephone: (518-402-0748), (henceforth "Bureau of Adjudication") as well as the Department of Health attorney indicated below, no later than ten (10) days prior to the scheduled date of the Referral Proceeding, as indicated above.

Pursuant to the provisions of New York Public Health Law §230(10)(p), you shall file a written answer to each of the charges and allegations in the Statement of Charges not less than ten (10) days prior to the date of the hearing. Any charge or allegation not so answered shall be deemed admitted. You may wish to seek the advice of counsel prior to filing such answer. The answer shall be filed with the Bureau of Adjudication, at the address indicated above, and a copy shall be forwarded to the attorney for the Department of Health, whose name appears below. You may file a written brief and affidavits with the Committee. Six (6) copies of all papers you submit must be filed with the Bureau of Adjudication at the address indicated above, no later than fourteen (14) days prior to the scheduled date of the Referral Proceeding, and a copy of all papers must be served on the same date on the Department of Health attorney, indicated below. Pursuant to §301(5) of the State Administrative Procedure Act, the Department, upon reasonable notice, will provide, at no charge, a qualified interpreter of the deaf to interpret the proceedings to, and the testimony of, any deaf person. Pursuant to the terms of New York State Administrative Procedure Act §401 and 10 N.Y.C.R.R. §51.8(b), the Petitioner demands, hereby, disclosure of the evidence that Respondent intends to introduce at the hearing, including the names of witnesses, a list of and copies of documentary evidence, and a description of physical and/or other evidence that cannot be photocopied.

YOU ARE ADVISED, HEREBY, THAT THE ATTACHED CHARGES WILL BE MADE PUBLIC FIVE (5) BUSINESS DAYS AFTER THEY ARE SERVED.

Department attorney: Initial here _____

The proceeding may be held whether or not you appear. Please note that requests for adjournments must be made in writing to the Bureau of Adjudication, at the address indicated above, with a copy of the request to the attorney for the Department of Health, whose name appears below, at least five (5) days prior to the scheduled date of the proceeding. Adjournment requests are not routinely granted. Claims of court engagement will require detailed affidavits of actual engagement. Claims of illness will require medical documentation. Failure to obtain an attorney within a reasonable period of time prior to the proceeding will not be grounds for an adjournment.

The Committee will make a written report of its findings, conclusions as to guilt, and a determination. Such determination may be reviewed by the administrative review board for professional medical conduct.

SINCE THESE PROCEEDINGS MAY RESULT IN A DETERMINATION THAT SUSPENDS OR REVOKES YOUR LICENSE TO PRACTICE MEDICINE IN NEW YORK STATE AND/OR IMPOSES A FINE FOR EACH OFFENSE CHARGED, YOU ARE URGED TO OBTAIN AN ATTORNEY TO REPRESENT YOU IN THIS MATTER.

DATED: Albany, New York

March 5, 2011

REDACTED SIGNATURE

PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional Medical Conduct

Inquiries should be addressed to:

Joel E. Abelove
Associate Counsel
Bureau of Professional Medical Conduct
Corning Tower – Room 2512
Empire State Plaza
Albany, NY 12237
(518) 473-4282

STATE OF NEW YORK DEPARTMENT OF HEALTH
STATE BOARD FOR PROFESSIONAL MEDICAL CONDUCT

IN THE MATTER
OF
CLIFFORD ALAN BERKEN, M.D.
CO-08-12-7680-A

STATEMENT
OF
CHARGES

CLIFFORD ALAN BERKEN, M.D., Respondent, was authorized to practice medicine in New York state on October 15, 1982, by the issuance of license number 151731 by the New York State Education Department.

FACTUAL ALLEGATIONS

A. On or about February 5, 2010, in the County Court, State of New York, Westchester County, New York, Respondent was found guilty, based on a plea of guilty, of Attempted Disseminating Indecent Material to Minors in the first degree, in violation of New York Penal Law §110.00 and 235.22, a class E felony, and on April 20, 2010 was sentenced to five (5) years probation, a \$300.00 Mandatory Surcharge, a \$50.00 DNA Fee, a \$25.00 CVAF, and a \$50.00 Supplemental Sex Offender Victim Fee.

SPECIFICATION

Respondent violated New York Education Law §6530(9)(i) by being convicted of committing an act constituting a crime under New York state law, in that Petitioner charges:

1. The facts in Paragraph A.

DATED: *April 5*, 2011
Albany, New York

REDACTED SIGNATURE

PETER D. VAN BUREN
Deputy Counsel
Bureau of Professional Medical Conduct