

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF STATE  
BEFORE THE STATE BOARD OF MEDICINE

FROTHNOTARY

2007 DEC 21 AM 10:05

In the Matter of the  
Application for a License to  
Practice Medicine Without Restriction  
of Michael N. Kessler, M.D.,  
Applicant

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Docket No. 0332-49-07

File No. 07-49-00779

Department of State

**COPY**

Final Order Adopting Hearing Examiner's  
Proposed Adjudication and Order

AND NOW, this 21<sup>st</sup> day of December 2007, the State Board of Medicine (Board),  
having reviewed the entire record of this case established before the hearing examiner adopts the  
Proposed Adjudication and Order of the hearing examiner as the Final Adjudication and Order in  
this case. A copy of the Proposed Adjudication and Order is attached as Attachment A.

This order shall take effect immediately.

BY ORDER:  
STATE BOARD OF MEDICINE

*Charles D. Hummer, Jr., M.D.*

Charles D. Hummer, Jr., M.D., Chairman

Respondent's Attorney:

Kathryn L. Simpson, Esquire  
METTE, EVANS & WOODSIDE  
P.O. Box 5950  
Harrisburg, PA 17110-0950

Prosecuting Attorney:

Keith E. Bashore, Esquire  
P.O. Box 2649  
Harrisburg, PA 17105-2649

Board Counsel:

Sabina I. Howell, Esquire

Date of Mailing:

*December 21, 2007*

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Department of State  
Prothonotary

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PROPOSED ADJUDICATION AND AMENDED ORDER

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Ruth D. Dunnewold  
Hearing Examiner

P.O. Box 2649  
2601 North Third Street  
Harrisburg, PA 17105

ATTACHMENT A

## HISTORY

This matter arises on an appeal by Michael Nathaniel Kessler (Applicant) of the provisional denial by the State Board of Medicine (Board) of his application for a license to practice medicine without restriction in the Commonwealth. On January 29, 2007, the Board provisionally denied Applicant's application for a license based on sections 22 and 41 of the Medical Practice Act (Act), Act of December 20, 1985, P.L. 457, No. 112, *as amended*, 63 P.S. §§ 422.22 and 422.41, respectively. Section 22 provides that the Board shall not issue a license to an applicant unless the applicant establishes that, among other things, he or she is of good moral character, while section 41 authorizes the Board to refuse a license to an applicant who has had a license revoked, suspended or otherwise disciplined by the licensing authority of another state, § 41(4), 63 P.S. § 422.41(4), or who has been found guilty of immoral or unprofessional conduct. § 41(8), 63 P.S. § 422.41(8).

More specifically, the Board's provisional denial letter cited documents attached to Applicant's application indicating (1) that his license in New York had been revoked by the New York State Department of Health, Office of Professional Misconduct (New York Board) because of his alleged failure to disclose his affiliation with and dismissal from a psychiatry residency program on two hospital medical staff applications and to a professional liability carrier, and because of his alleged failure to disclose a criminal conviction on his application for a residency program, and (2) that the Massachusetts Board of Registration in Medicine (Massachusetts Board) revoked his license to practice medicine in that state based on the New York Board's revocation action.

Applicant submitted a timely appeal of the provisional denial and requested a hearing. By order dated February 22, 2007, the Board delegated this matter to a hearing examiner to



conduct a hearing and issue a decision. A hearing occurred on April 16, 2007, at which the Applicant did not appear, and shortly after the hearing on the same day, the Office of Hearing Examiner found that the Applicant had filed a faxed request for a continuance at approximately 10:30 p.m. the previous evening, based on foul weather that interfered with his ability to travel from New York to Pennsylvania for the hearing. The matter was subsequently scheduled for hearing on July 31, 2007, but that hearing was rescheduled at the Applicant's request because an essential witness on his behalf was to be out of the country. The matter was rescheduled again for August 31, 2007, but was rescheduled once more at the Applicant's request because the same witness was unavailable. At that point, the matter was rescheduled for hearing on October 12, 2007, and did occur on that date. Keith E. Bashore, Esquire, was present on behalf of the Commonwealth. Applicant appeared at the hearing and was represented by counsel, Kathryn L. Simpson, Esquire. The parties waived the filing of post-hearing briefs. The record in this matter was closed on October 25, 2007, with the filing of the hearing transcript.

## FINDINGS OF FACT

1. On or about November 1, 2006, Applicant submitted to the Board an application for a license to practice medicine without restriction (application). Board records; Exhibit C-1 at pages 804 – 805 (Application for a License to Practice Medicine without Restriction).

2. On January 23, 2007, the Board notified Applicant that the Board had provisionally denied his application based on attached documents indicating (1) that his license in New York had been revoked by the New York Board because of his alleged failure to disclose his affiliation with and dismissal from a psychiatry residency program on two hospital medical staff applications and to a professional liability carrier, and because of his alleged failure to disclose a criminal conviction on his application for a residency program, and (2) that the Massachusetts Board had revoked his license to practice medicine in that state based on the New York Board's revocation action. Board records (Letter of January 23, 2007 from Sabina I. Howell to Michael Nathaniel Kessler).

3. The Board's January 23, 2007 letter notified Applicant that its provisional denial was based on sections 22 and 41 of the Act, §§ 422.22 and 422.41, respectively, the first of which provides that the Board shall not issue a license to an applicant unless the applicant establishes that, among other things, he or she is of good moral character, § 22(b), 63 P.S. § 422.22(b), and the latter of which authorizes the Board to refuse a license to an applicant who has had a license revoked, suspended or otherwise disciplined by the licensing authority of another state, § 41(4), 63 P.S. § 422.41(4), or who has been found guilty of immoral or unprofessional conduct, § 41(8), 63 P.S. § 422.41(8). *Id.*

4. Applicant timely appealed the Board's provisional denial and requested a hearing. Board records (Applicant's letter of February 8, 2007).

5. Applicant appeared at the hearing in this matter and was represented by counsel.

T at 4.

*Applicant's education, licensure and medical employment background*

6. Applicant obtained his M.D. from the University of Connecticut School of Medicine in May of 1997. T at 10.

7. Applicant also earned a master's degree in psychology from Central Connecticut State University. *Id.*

8. Applicant was licensed to practice medicine in the state of New York in 1999. T at 14.

9. On June 30, 2001, Applicant completed a four-year combined internship and residency at Long Island Jewish Medical Center and Hillside Hospital, the affiliated psychiatric hospital, which are now known collectively as the North Shore Long Island Jewish Health System due to a merger. T at 10.

10. Applicant was licensed to practice medicine in the state of Massachusetts in July 2001. T at 15.

11. On July 1, 2001, Applicant began a residency in child and adolescent psychiatry at Cambridge Health Alliance (CHA) in Cambridge and Somerville, Massachusetts, where he was paid, enrolled in the health plan, had a key to CHA's locked unit, and began working with adolescent inpatients. T at 10, 12 – 13.

12. Applicant was terminated from the residency at CHA on August 1, 2001 because he was arrested on July 8, 2001. T at 11.

## *Applicant's Arrests*

### *Arrest of July 8, 2001: Criminal Docket #0157CR001822 – Wrentham (Massachusetts)*

#### *District Court*

13. On July 8, 2001, Applicant was arrested, in Norwood, Massachusetts, at Criminal Docket #0157CR001822, and charged with open and gross lewdness, a felony in Massachusetts, as well as with disorderly conduct. T at 11; Exhibit C-1 at page 806 (Applicant's Explanation for "Yes" Answers on Page 2 of Application); Exhibit A-1.

14. The charge was based on allegations of two males in their twenties who stated that Applicant had been masturbating in his car in a nearby parking lot. Exhibit C-1 at page 806 (Applicant's Explanation for "Yes" Answers on Page 2 of Application).

15. The disorderly conduct charge was dismissed at the request of the Commonwealth of Massachusetts. Exhibit A-1.

16. Under the Massachusetts Rules of Criminal Procedure, a defendant may plead not guilty, but admit to sufficient facts to warrant a finding of guilty. Official Notice of Mass. Ann. Laws R. Crim. P. Rule 12(a)(2) (2007).

17. Applicant pled "not guilty" to the charge of open and gross lewdness but admitted sufficient facts, accepted after colloquy and 278 Section 29D warning,<sup>1</sup> to warrant a finding of guilty, but the matter was continued for one year without a finding, and the open and gross lewdness count eventually was dismissed on June 3, 2003. T at 17 – 18, 43; Exhibit A-1.<sup>2</sup>

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<sup>1</sup>Under Massachusetts law, a judge before accepting a plea must give a warning to the defendant concerning the consequences to the defendant if the defendant is not a U.S. citizen; this is known as a 278 section 29D warning. Mass. Ann. Laws ch. 278, § 29D (2007). It is not relevant to this case.

<sup>2</sup>During the course of cross-examining the Applicant, the Commonwealth took issue with the meaning of the handwritten notation on the fourth page of Exhibit A-1, next to the stamped date "June 3, 2003." T at 34, 42.  
(Footnote 2 continued on following page).



Arrest of November 13, 2001: Criminal Docket #0189CR002580 – Falmouth  
(Massachusetts) District Court

18. On or about November 13, 2001, Applicant was arrested, in Falmouth, Massachusetts, at Criminal Docket #0189CR002580, and charged with open and gross lewdness, a felony in Massachusetts, and indecent exposure. T at 18 – 19; Exhibit C-1 at page 806 (Applicant's Explanation for "Yes" Answers on Page 2 of Application); Exhibit A-2.

19. The charges were based on allegations by two boys, ages 10 and 12, who lived across the street from Applicant and who alleged that they could see a man masturbating in the window of Applicant's home. Exhibit C-1 at page 806 (Applicant's Explanation for "Yes" Answers on Page 2 of Application); Exhibit A-3 (Opinion of Massachusetts Supreme Judicial Court in *Commonwealth v. Michael Kessler*, 442 Mass. 770, 817 N.E.2d 711 (2004)).

20. Applicant stood trial on the charges at Criminal Docket #0189CR002580 on June 2, 2002, and was convicted of open and gross lewdness; the judge dismissed the indecent exposure count as a lesser included offense of the open and gross lewdness count. T at 19; Exhibit A-2; Exhibit A-3 (Opinion of Massachusetts Supreme Judicial Court in *Commonwealth v. Michael Kessler*, 442 Mass. 770, 817 N.E.2d 711 (2004)).

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Applicant testified that the word handwritten next to that date says "clear." T at 34. The Commonwealth questioned that interpretation of the word, which is difficult to read, if not entirely illegible.

A close examination of the notation at issue indicates that it is similar to the handwritten notation, on the third page of A-1, under the stamped date "June 4, 2002," next to the handwritten text "ct 1." The June 4, 2002 notation is most logically deciphered as "Dism," based on the fact that the first page of A-1 indicates unmistakably that count 1 was dismissed. (See the "Sentence or other disposition" box to the right and just below Count 1 on the first page of A-1). Beside the similarity to the June 4, 2002 notation, the notation at issue, on the fourth page of A-1, also has a pronounced dot or mark which, rather than a stray mark, looks like the dot for the letter "i." Because of that dot and the similarity between the handwritten note dated June 3, 2003 and the handwritten note under the date June 4, 2002, the most logical conclusion is that the handwritten notation next to June 3, 2003 also should be deciphered as "Dism." It therefore denotes that the charge was dismissed on that date, which is consistent with Applicant's testimony and with the lack of reference to it, in the subsequent disciplinary matters, as anything other than an arrest. *C.f.* Finding of Fact 38, below.

21. Applicant appealed and the Massachusetts Supreme Judicial Court overturned the conviction in an opinion filed November 12, 2004, reversing the judgment of the District Court, setting aside the guilty verdict, and acquitting Applicant of the charge of open and gross lewdness; the indecent exposure count, which the judge had dismissed during the trial, was not reinstated. Exhibit A-2; Exhibit A-3 (Opinion of Massachusetts Supreme Judicial Court in *Commonwealth v. Michael Kessler*, 442 Mass. 770, 817 N.E.2d 711 (2004)).

22. Because of the dismissal of the charges stemming from the July 8, 2001 arrest and the appellate court's judgment of acquittal on the only outstanding charge stemming from the November 13, 2001 arrest, Applicant has no criminal convictions on his record. Findings of Fact 17 and 21.

#### *Applicant's misrepresentations*

23. After CHA terminated Applicant from its employment in August 2001, Applicant was unable to find employment in Massachusetts. T at 11 – 12.

24. Because of his inability to find any kind of work in Massachusetts, Applicant returned to New York, where, within a week of his return, he found employment at Brunswick Hospital Center located in Amityville, New York. *Id.*

25. Applicant started full time employment at Brunswick Hospital Center on December 1, 2001. T at 12.

26. However, when Applicant filled out the employment application for Brunswick Hospital Center, he did not include his month of employment with CHA, during July 2001, in the space in which the employment application asked about every hospital where he had ever had privileges. *Id.*

27. After returning to New York, Applicant also filled out an employment application for Holliswood Hospital, and in response to the directive to list every place that he had had privileges, he again omitted his employment with CHA. T at 13.

28. As a part of securing employment at Brunswick Hospital Center, Applicant had to fill out an application so that he could be added to the employer's group malpractice insurance policy. *Id.*

29. The malpractice insurance application included a question that asked if Applicant had ever been arrested for a felony. T at 14.

30. Applicant answered that question by stating "no," although he knew, at the time, that what he had been arrested for in July 2001 was a felony in Massachusetts. *Id.*

#### *Actions by the New York and Massachusetts Boards of Medicine*

##### *New York*

31. In approximately October 2002, Applicant received the renewal for his license to practice medicine in New York. T at 14.

32. The renewal application asked whether Applicant had ever been disciplined by a hospital, as well as whether Applicant had been arrested for a felony or a misdemeanor, and Applicant answered both questions truthfully, in the affirmative. T at 14 – 15.

33. On December 13, 2002, the New York Board issued a Statement of Charges against Applicant, charging him with (1) having been terminated from CHA; (2) lying about that termination on his application to Brunswick Hospital Center; (3) lying about the termination on his application to Holliswood Hospital; (4) lying on his application for medical malpractice insurance about having been the subject of an investigation or disciplinary proceeding by a

governmental agency, professional society or professional review board of a hospital and about having been charged with a felony; and (5) being found guilty of gross lewdness and lascivious behavior in Falmouth District Court. Exhibit C-1 at pages 836 – 837 (In the Matter of Michael N. Kessler, M.D., CO-02-10-05389-A, Statement of Charges).

34. After a hearing on January 22, 2003, which Applicant attended, the New York Board sustained all of the specifications alleged in the Statement of Charges, except the allegation that he lied on his application for medical malpractice insurance about having been the subject of an investigation or disciplinary proceeding by a governmental agency, professional society or professional review board of a hospital, which was not supported. Exhibit C-1 at pages 822 – 831 (In the Matter of Michael N. Kessler, M.D., BPMC No. 03-43, Determination and Order).

35. The New York Board determined that Applicant's actions constituted fraudulent practice of the profession, moral unfitness to practice medicine, the willful making or filing of a false report, and conviction of an act in another state which would, if committed in New York, be a crime. *Id.*

36. The New York Board revoked Applicant's license to practice medicine in New York. *Id.*

37. At the time of the New York Board's decision, Applicant's conviction on the November 13, 2001 arrest in Falmouth had not yet been overturned by the Massachusetts Supreme Judicial Court. T at 40; Exhibit A-2.

38. The New York Board did not set forth any specifications or make any findings related to the July 2001 arrest. Exhibit C-1 at pages 836 – 837 (In the Matter of Michael N. Kessler, M.D., CO-02-10-05389-A, Statement of Charges).

Massachusetts

39. Applicant had not renewed his license to practice medicine in Massachusetts after its initial issuance in July 2001 because at the time for renewal in December 2001, he had already returned to New York and did not plan to return to Massachusetts to work. T at 15.

40. Because he did not renew his license in Massachusetts, after the expiration date, Applicant's license there was labeled "revoked," although it was not a disciplinary action and he was considered to have an inchoate right to renew. T at 15 – 16.

41. On September 2, 2003, the Massachusetts Board initiated a disciplinary action against Applicant's Massachusetts license based on allegations that Applicant (1) had exposed himself in a parking lot in Walpole, Massachusetts; (2) had been criminally convicted in Falmouth District Court for standing nude in a window exposing himself in front of children; (3) had his New York license revoked for providing false information on two applications for hospital privileges and on an application for professional liability insurance; and (4) had been convicted of open and gross lewdness. Exhibit C-1 at page 842 (Commonwealth of Massachusetts Board of Registration in Medicine, In the Matter of Michael N. Keller, M.D., Adjudicatory Case No. 03-22-DALA).

42. On the advice of an attorney, Applicant did not attend any hearings related to the action against his license before the Massachusetts Board. T at 16, 46.

43. On July 26, 2006, the Massachusetts Board issued a Final Decision and Order which acknowledged that the Massachusetts Supreme Judicial Court had overturned Applicant's conviction and found that Applicant had engaged in conduct undermining the public confidence in the integrity of the medical profession and lacked good moral character, had engaged in conduct which placed into question his ability to practice medicine, and had been disciplined by

another state for conduct substantially similar to conduct which has the capacity to deceive or defraud; as a result, the Massachusetts Board revoked Applicant's inchoate right to renew his license to practice medicine in Massachusetts. Exhibit C-1 at pages 850 – 857 (Commonwealth of Massachusetts Board of Registration in Medicine, In the Matter of Michael N. Keller, M.D., Final Decision and Order, Adjudicatory Case No. 03-22-DALA (RM-03-662)).

*Applicant's situation since the arrests and other states' disciplinary actions*

44. After the New York Board's revocation of his license in 2003, Applicant obtained a license as a life, accident and health insurance broker in New York and began working in the insurance field, which led to his current ownership of his own insurance agency, K & L Agency. T at 8, 17.

45. Applicant also obtained licenses as a life, accident and health insurance broker in Connecticut, New Jersey and Pennsylvania. T at 17.

46. Applicant has never had discipline against his insurance licenses in any state. T at 31.

47. Applicant is also currently employed with Aram Health and Disease Management of New Jersey, a firm that works on disease management in order to minimize increases in the cost of health insurance. T at 8.

48. Additionally, Applicant is associated with 123College.com, representing Long Island, Nassau and Suffolk, providing free seminars once a month during the school year to parents and high school students, instructing them as to methods to maximize the financial aid the students can obtain for college. T at 8 – 9.

49. Applicant is also certified by the Internal Revenue Service as a federal income tax

preparer and he prepares both state and federal income tax returns for individuals and small businesses. T at 9.

50. In September 2007, Applicant married a woman whom he met during their residency, who is a psychiatrist. T at 7.

51. Applicant has a lifelong anxiety disorder that has been very successfully treated with therapy. T at 22.

52. Applicant was in therapy throughout his residency, which he found helpful. *Id.*

53. In March 2002, Applicant began treating with Dr. Marc Reubins and has been seeing him regularly ever since. T at 21 – 22, 54.

54. Dr. Reubins is a physician who specializes in child psychiatry, adolescent psychiatry, health psychiatry and forensic psychiatry. T at 53.

55. Dr. Reubins is board-certified in adult psychiatry and child and adolescent psychiatry, with subspecialty qualifications in forensic psychiatry. T at 54.

56. Applicant initially sought consultation with Dr. Reubins for anxiety and concerns about the effect Applicant's arrests and subsequent disciplinary actions were having on his medical license, as well as for general life problems. *Id.*

57. Applicant has been diagnosed with social phobias and anxiety. T at 55.

58. Applicant has a very good prognosis; he is on medication and in ongoing psychotherapy, to which he is responsive. *Id.*

59. Applicant had very positive recommendations from his residency program in 1999. T at 56; Exhibit C-1 at pages 920 – 923 (Various letters of recommendation related to his residency).

60. Applicant is sincere, focused, bright, assertive and caring, would be capable as a

physician, and would probably be better than most doctors. T at 56.

61. Practicing medicine is one area that is conflict-free for Applicant. *Id.*

62. The problems that resulted in Applicant's arrests and misrepresentations in 2001 were related to impulses that had to do with transitions from one level of training to a different level of training; they are not compelling at this point, would be bizarre to see now, were acute episodes of dysfunction and gross bad judgment that have not been seen since, and will not reappear. T at 56 – 57.

63. Applicant is not mentally impaired, and although Applicant can be anxious in public situations, he is capable of controlling it and showing no signs of the anxiety he is feeling, control which he demonstrated very well at the hearing. T at 58 – 59.

64. Applicant is absolutely fit to practice medicine and as a result of what he has experienced, is a more astute physician with a better awareness of the importance of honesty and candidness in his work. T at 59.

65. Applicant has matured tremendously and would be a great asset to the medical community. T at 60.

66. In an effort to remediate the wrongs he had committed, Applicant successfully completed the ProBE Program in Professional Problem-Based Ethics, which consisted of 22 hours of curriculum, including readings and seminar participation, in September 2005. T at 25 – 26; Exhibit C-1 at pages 905 – 906 (Letter dated October 24, 2005 from The Ethics Group, LLC and Certificate of Completion dated October 24, 2005).

67. As a part of completing the ProBE program, Applicant wrote a Final Essay that discussed his untruthful reports to the Brunswick and Holliswood Hospitals and on the professional liability insurance application. T at 26; Exhibit C-1 at pages 907 – 914



(Professional Problem-Based Ethics Final Essay, October 7, 2005).

68. Applicant now understands that the things he did that led to the discipline in New York and Massachusetts were wrong and he now sees no justification for having done those things; even when others argue with him and try to rationalize or explain away his actions, he remains convinced that what he did were absolutely the wrong things to do. T at 29 – 30.

69. Applicant does not use alcohol or drugs, has engaged in no further improper behavior, has had no other instances of being untruthful, and has had no disciplinary action of any kind, other than the New York and Massachusetts actions at issue in this matter. T at 30 – 31, 50.

70. Applicant will not pursue reinstatement of his license in New York because it is a lengthy and complicated process and, among other things, requires the applicant for reinstatement to provide recommendations from three licensed New York physicians who have known the applicant for a significant period of time, including the time during which the license was revoked, and who are distinct from any physicians who may serve as witnesses for the applicant at the reinstatement hearing. T at 23.

71. Applicant, because of the lapse of time and his brief periods of practice of medicine in New York and Massachusetts prior to his revocation, is unable to meet that New York recommendation requirement. T at 24.

72. Applicant would also need a tentative job offer in New York in order to apply for reinstatement there, and would have to commit to working in New York, but Applicant and his wife had already decided they would like to move to Pennsylvania before he decided to apply for a medical license in the Commonwealth, because New York is too expensive, and because his wife has family in New Jersey, which would be about an hour away. *Id.*

73. For these reasons, Applicant desires to be licensed in Pennsylvania rather than returning to the practice of medicine in New York. T at 25, 31.

74. Throughout the period of time since he stopped practicing medicine and his licenses were revoked, Applicant has done his best to keep current with medical practices by reading professional journals, completing continuing medical education, and attending conferences such as the annual meeting of the American Psychiatric Association. T at 27 – 28.

75. Applicant obtained 123 CME credits in 2006 and has completed 82 so far in 2007. T at 28.

76. Applicant finds nothing so satisfying as the practice of psychiatry and still desires to practice in that area of medicine. T at 29, 31.

77. Applicant is willing to practice under any restrictions and take any tests or undergo additional training in order to be licensed in Pennsylvania. T at 28 – 30.

### CONCLUSIONS OF LAW

1. The Board has jurisdiction in this matter. Findings of Fact 1 – 3.
2. Applicant had adequate notice of the statutory basis for the Board's provisional denial of his application for a license to practice medicine without restriction and was given an opportunity to be heard in accordance with the Administrative Agency Law, 2 Pa. C.S. § 504. Findings of Fact 4 – 5.
3. The record supports granting Applicant's application for a license to practice medicine in that Applicant has furnished satisfactory evidence that he is of good moral character, as required by section 22(b) of the Act, 63 P.S. § 422.22(b). Findings of Fact 43 – 77.
4. The record supports granting Applicant's application for a license to practice medicine in that Applicant has furnished satisfactory evidence that he has been rehabilitated to the extent that subsections 41(a)(4) and (8), of the Act, 63 P.S. § 422.41(a)(4) and (8), should not serve as a barrier to his licensure. *Id.*

## DISCUSSION

This action is brought under the Medical Practice Act (Act), Act of December 20, 1985, P.L. 457, No. 112, *as amended*, at sections 22(b) and 41(4) and (8), 63 P.S. §§ 422.22(b) and 422.41(4) and (8). The relevant provisions of the Act are as follows:

### § 22. Licenses and certificates; general qualification

\* \* \*

(b) **Qualifications.** — The board shall not issue a license or certificate to an applicant unless the applicant establishes with evidence, verified by an affidavit or affirmation of the applicant, that the applicant...is of good moral character...

\* \* \*

### § 41. Reasons for refusal, revocation, suspension or other corrective actions against a licensee or certificate holder

(a) The board shall have authority to impose disciplinary or corrective measures on a board-regulated practitioner for any or all of the following reasons:

\* \* \*

(4) Having a license or other authorization to practice the profession revoked or suspended or having other disciplinary action taken, or an application for a license or other authorization refused, revoked or suspended by a proper licensing authority of another state, territory, possession or country, or a branch of the federal government.

\* \* \*

(8) Being guilty of immoral or unprofessional conduct....

\* \* \*

Additionally, section 42(a) of the Act, 63 P.S. § 422.42(a), is relevant because it enumerates the actions the Board may take when the Board is empowered to take disciplinary or

corrective measures against a board-regulated practitioner. The relevant provisions of section 42(a) are as follows:

**§ 42. Types of corrective action**

(a) **Authorized actions.** — When the board is empowered to take disciplinary or corrective action against a board-regulated practitioner under the provisions of this act or pursuant to other statutory authority, the board may:

(1) Deny the application for a license, certificate or any other privilege granted by the board.

\* \* \*

Applicant submitted to the Board an application for a license to practice medicine without restriction. Thereafter, the Board provisionally denied his application, based upon the disciplinary actions imposed on his licenses in New York and Massachusetts, the facts found in the course of arriving at those disciplinary actions, and the concerns raised, by both the disciplinary actions and the underlying facts, about Applicant's moral character.

At the hearing, the Commonwealth argued that the Board's provisional denial of Applicant's application should be upheld because Applicant has had two revocations in the past four and a half years and the Applicant failed to prove that he is of good moral character. While it is true that Applicant's license in New York was revoked in 2003 and his license in Massachusetts revoked just last year, it is also true that the events underlying the New York revocation occurred in 2001 and that, while Massachusetts instituted its action against Applicant in 2003, it took three years to finalize the decision that finally revoked his license in 2006. It is not as if the egregious behaviors that led to the revocations are fresh, or as if Applicant has had no time to learn from his mistakes and move beyond them. Six years have elapsed since the occurrence of the events underlying the disciplinary actions in New York and Massachusetts, a

period of time longer than the five years a revoked Pennsylvania licensee would have to wait before applying for the reinstatement of his license in the Commonwealth. Therefore, it is reasonable at this point to scrutinize Applicant's overall circumstances rather than basing a decision on a cursory glance at the New York and Massachusetts revocations, as the Commonwealth advocates.

Underlying the disciplinary actions from the other states are two types of behavior on Applicant's part. The first type is immoral conduct, in the form of exposing himself in public or in a situation in which persons outside the privacy of his home would be able to view him, which led to his arrests (though not ultimately to convictions). The second type is dishonesty or untruthfulness, in the form of lying about his brief period of employment with Cambridge Health Alliance (CHA) and about his being arrested for a felony. These immoral and dishonest behaviors led to the most negative consequences and Applicant faced the most severe professional punishment, revocation of his licenses, in New York and Massachusetts. The question now is whether he has improved in morality and ethics since engaging in those activities, such that it would be appropriate to license him in the Commonwealth.

Applicant's long-time psychiatrist, Dr. Reubins, testified that Applicant's immoral and untruthful behaviors in 2001 were responses to stresses attributable to Applicant's transition from one level of medical training to another, circumstances that Applicant had never experienced before. T at 57. Moreover, Dr. Reubins characterized these behaviors as "episodes of dysfunction" that are part of Applicant's past, are not compelling now, and will not be repeated. T at 56 – 57. He also opined that Applicant would be a fine physician, perhaps with a keener sense of right and wrong as a result of what he put himself through, that he has no mental impairments, that he is absolutely fit to practice medicine, and that he would be an asset to the

medical community. T at 58 – 60. His opinions as to Applicant's fitness to practice, mental stability, and being deserving of licensure were free of any reservations or doubts. Dr. Reubins has been treating Applicant for a long time and on a consistent basis, and Dr. Reubins has a professional background that renders him well-qualified to make those judgments. T at 54 – 55. Accordingly, his testimony is credible and constitutes a strong factor supporting the conclusion that Applicant has grown beyond the anxieties and stresses of 2001 and has developed ethically and morally into a better person.

Applicant's testimony also demonstrates that Applicant regrets, has learned from, and has evolved beyond his poor choices of more than five years ago. He voluntarily took the ProBE course on professional ethics and as a part of that course, wrote an essay about his past behaviors. In that essay, he characterized his actions as reflecting "an appalling lack of integrity and honesty" and stated that he harmed the medical profession as a whole. Exhibit C-1 at pages 912 – 913 (Professional Problem-Based Ethics Final Essay at pages 3 – 4). His consequent heightened understanding of the immorality of his untruthful statements indicates that he has grown in his capacity for ethical reasoning since committing those gross errors of judgment six years ago. It is particularly telling that he cannot now accept the justifications of friends or family for his immoral conduct and that he is certain there is simply no justification for what he did in 2001, T at 29 – 30; Exhibit C-1 at page 911 (Professional Problem-Based Ethics Final Essay at pages 3 – 4), for that demonstrates that Applicant recognizes and makes no excuses for his ethical failures.

Applicant now has established a new life on a better path, and toward that end, he has accomplished many goals, including the obtaining of insurance licenses in four states, the establishment of his own insurance agency, and the establishment and maintenance of an

unblemished career as an insurance agent. The nature of his new career is relevant to an examination of whether Applicant has grown beyond the improper behaviors that led to the loss of his medical licenses in two states. An insurance agent is in a fiduciary position requiring honesty and integrity towards clients. Four states, by issuing him insurance agent licenses, have found Applicant deserving of such trust. That speaks significantly about Applicant's rehabilitation with regards to honesty.

Yet he is willing to give up that successful insurance career to re-enter the medical field and pick up what he lost six years ago, because there is nothing as satisfying to him as the practice of psychiatry. For that primary reason, he wishes to obtain a medical license in the Commonwealth. Many people, with a comparatively short period of practice experience prior to revocation such as Applicant had, if they had gone on to forge a new career in an unrelated field, would be loathe to give it up to take the risk of starting all over again in that old field. But Applicant wants to do that, and because of his past mistakes, is willing to submit to any conditions that the Board chooses to impose upon him in order to obtain a license. This humility also speaks well of Applicant's character development over the past six years.

The opinions of Applicant's psychiatrist, Applicant's own evidence as to his improved understanding of the ethical standards to which he must adhere, Applicant's nonmedical license achievements, and his willingness to give up his alternative career and subject himself to any conditions of practice that the Board might choose to impose, comprise a preponderance of the evidence demonstrating that he has rehabilitated himself and has grown into sufficient moral character to warrant licensure in the Commonwealth.

Based upon the record presented at the hearing, Applicant's application for licensure should be granted, albeit subject to evaluation, probation, terms and conditions, in part because it



has been six years since he actually practiced medicine. For, despite his efforts to keep current with the profession, Applicant's completion of CME and his reading of professional journals do not suffice to make up for a six-year gap in actual practice experience, nor do they adequately sharpen skills that may have become dull through disuse. Accordingly, based upon the foregoing findings of fact, conclusions of law and discussion, the following Order shall issue:

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF STATE  
BEFORE THE STATE BOARD OF MEDICINE

In the Matter of the Application for a License to  
Practice Medicine Without Restriction

of

Michael N. Kessler, M.D.,  
Applicant

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Docket No. 0332-49-07  
File No. 07-49-00779

AMENDED ORDER

AND NOW, this 2<sup>nd</sup> day of November, 2007, in accordance with the foregoing findings of fact, conclusions of law and discussion, it is **ORDERED** that the application of Michael N. Kessler, M.D. (Applicant), for a license to practice medicine shall be **GRANTED**, provided that:

(1) Applicant successfully meets and/or completes all licensing qualifications and requirements and pays any fees that are due; and

(2) Applicant demonstrates fitness to practice by successfully completing a nationally recognized, Board-approved clinical skills evaluation and remediation program, similar to the post-licensure assessment programs provided by The Institute for Physician Evaluation or The Center for Personalized Education for Physicians. A list of Board-approved programs is available from the Board's administrative office. Respondent shall cooperate fully with the evaluation and shall comply with all remedial education, training and counseling recommendations by the assessment program, including any cognitive, psychological, knowledge and skill evaluations and any continuing education, mini-residency, monitored practice, or other remedial activities.

Upon meeting the requirements of paragraphs (1) and (2), Applicant's license shall be issued in a **PROBATIONARY STATUS** for a period of **FIVE (5) YEARS**, subject to the following terms and conditions:

**GENERAL**

1. Applicant shall abide by and obey all laws of the United States, the Commonwealth of Pennsylvania and its political subdivisions and all rules and regulations and laws pertaining to the practice of the profession in this Commonwealth or any other state or jurisdiction in which Applicant holds a license to practice the profession. Summary traffic violations shall not constitute a violation of this Order.

2. Applicant shall at all times cooperate with the Bureau of Professional and Occupational Affairs and its agents and employees in the monitoring, supervision and investigation of Applicant's compliance with the terms and conditions of this Order, including requests for, and causing to be submitted at Applicant's expense, written reports, records and verifications of actions that may be required by the Bureau of Professional and Occupational Affairs.

3. Applicant shall not falsify, misrepresent or make material omission of any information submitted pursuant to this Order.

4. Applicant shall notify the Bureau of Professional and Occupational Affairs, in writing, within five (5) days of the filing of any criminal charges against Applicant, the initiation of any legal action pertaining to Applicant's practice of the profession, the initiation, action, restriction or limitation relating to

Applicant by a professional licensing authority of any state or jurisdiction or the Drug Enforcement Agency of the United States Department of Justice, or any other investigation, action, restriction or limitation relating to Applicant's privileges to practice the profession.

5. Applicant shall notify the Bureau of Professional and Occupational Affairs by telephone within 48 hours and in writing within five (5) days of any change of Applicant's home address, phone number, employment status, employer and/or change in practice.

#### **VIOLATION OF THIS ORDER**

6. Notification of a violation of the terms or conditions of this Order shall result in the **IMMEDIATE TERMINATION** of the period of probation and the **SUSPENSION** of Respondent's license(s) to practice the profession in the Commonwealth of Pennsylvania as follows:

a. The prosecuting attorney for the Commonwealth shall present to the Board's Probable Cause Screening Committee ("Committee") a Petition that indicates that Respondent has violated any terms or conditions of this Order.

b. Upon a probable cause determination by the Committee that Respondent has violated any of the terms or conditions of this Order, the Committee shall, without holding a formal hearing, issue a preliminary order terminating this probation and suspending Respondent's license.

c. Respondent shall be notified of the Committee's preliminary order within three (3) business days of its issuance by certified

mail and first class mail, postage prepaid, sent to the Respondent's last registered address on file with the Board, or by personal service if necessary.

d. Within twenty (20) days of mailing of the preliminary order, Respondent may submit a written answer to the Commonwealth's Petition and request that a formal hearing be held concerning Respondent's violation of probation, in which Respondent may seek relief from the preliminary order suspending his license. Respondent shall mail the original answer and request for hearing, as well as all subsequent filings in the matter, to the Bureau of Professional and Occupational Affairs' Prothonotary, 2601 N. Third Street, Harrisburg, PA 17110, and a copy to the prosecuting attorney for the Commonwealth.

e. If the Respondent submits a timely answer and request for a formal hearing, the Board or a designated hearing examiner shall convene a formal hearing within forty-five (45) days from the date of the Prothonotary's receipt of Respondent's request for a formal hearing.

f. Respondent's submission of a timely answer and request for a hearing **shall not stay the suspension** of Respondent's license under the preliminary order. The suspension shall remain in effect unless the Board or the hearing examiner issues an order after the formal hearing staying the suspension and reactivating the probation.

g. The facts and averments in this Order shall be deemed admitted and uncontested at this hearing.

h. If the Board or hearing examiner after the formal hearing makes a determination against Respondent, a final order will be issued sustaining the suspension of Respondent's license and imposing any additional disciplinary measures deemed appropriate.

i. If Respondent fails to timely file an answer and request for a hearing, the Board, upon motion of the prosecuting attorney, shall issue a final order affirming the suspension of Respondent's license.

j. If Respondent does not make a timely answer and request for a formal hearing and a final order affirming the suspension is issued, or the Board or the hearing examiner makes a determination against Respondent sustaining the suspension of Respondent's license, after at least 3 years of active suspension and any additional imposed discipline, Respondent may petition the Board for reinstatement upon verification that Respondent has complied with the Board's order, abided by and obeyed all laws of the United States, the Commonwealth of Pennsylvania and its political subdivisions, and all rules and regulations pertaining to the practice of the profession in this Commonwealth.

7. Respondent's failure to fully comply with any terms of this Order may also constitute grounds for additional disciplinary action.

8. Nothing in this Order shall preclude the prosecuting attorney for the Commonwealth from filing charges or the Board from imposing disciplinary or corrective measures for violations or facts not contained in this Order.

9. After successful completion of the five-year period of probation, Applicant may petition the Board to issue to Applicant an unrestricted, non-probationary license upon an affirmative showing that Applicant has complied with all terms and conditions of this Order.

The State Board of Medicine has announced its intention to review this Proposed Report in accordance with 1 Pa. Code § 35.226(a)(2).

**BY ORDER:**



**Ruth D. Dunnewold**  
**Hearing Examiner**

*For the Commonwealth:* Keith E. Bashore, Esquire  
COMMONWEALTH OF PENNSYLVANIA  
Department of State Office of Chief Counsel  
P.O. Box 2649  
Harrisburg, PA 17105-2649

*For the Applicant:* Kathryn L. Simpson, Esquire  
METTE, EVANS & WOODSIDE  
P.O. Box 5950  
Harrisburg, PA 17110-0950

*Date of mailing:* NOV. 2, 2007

**COPY**

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF STATE  
STATE BOARD OF MEDICINE

PROTHONOTARY  
2008 JUL 14 AM 10:42  
Department of State

In the Matter of the  
Application to  
Practice Medicine

of

Michael N. Kessler, MD,  
Applicant

Docket No. 1332-49-2008

File No. 08-49-06784

ORDER GRANTING LICENSE

AND NOW, this 14th day of July, 2008, applicant having completed the preliminary conditions to obtaining a license to practice medicine as described in the Board's adjudication and order issued December 21, 2007, the Board hereby **GRANTS** applicant an unrestricted license to practice medicine. During the first six months of applicant's practice applicant shall retain a psychiatrist as a preceptor to review applicant's records and discuss and review applicant's practice and cases.

Failure to do so may subject applicant to disciplinary action for failure to comply with a Board order.

BY ORDER:  
STATE BOARD OF MEDICINE



OLLIE BATES, JR., M.D.,  
CHAIRMAN

Applicant's Attorney:

Kathryn L. Simpson, Esquire  
Mette, Evans & Woodside  
3401 North Front Street  
PO Box 5950  
Harrisburg, PA 17110-0950

Prosecuting Attorney:

Keith Bashore, Esquire

Board Counsel:

Gerald S. Smith, Senior Counsel

Date of Mailing:

July 14, 2008



**COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF STATE  
BEFORE THE STATE BOARD OF MEDICINE**

**In the Matter of the Application for an  
Unrestricted License to Practice  
Medicine and Surgery of  
Michael N. Kessler, M.D.,  
Applicant**

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: **Docket No. 1332-49-08**  
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: **File No. 08-49-06784**  
:

Department of State

2008 SEP -2 AM 9:21

PROTHONOTARY

**MEMORANDUM ORDER VACATING PROBATION**  
**AND GRANTING LICENSE TO PRACTICE MEDICINE**

By order of the State Board of Medicine (Board), dated December 21, 2007, which adopted the Board Hearing Examiner's amended order of November 2, 2007, Applicant was ordered to demonstrate his fitness to practice the profession by successfully completing a nationally recognized, Board-approved clinical skills evaluation and remediation program. Applicant was to fully comply with the evaluation and comply with all recommendations made by the assessment and remediation program. *See BPOA v. Kessler, M.D.*, File no. 07-49-00779, Docket no. 0332-49-07.

Upon meeting the requirements of the clinical skills evaluation and remediation program, in addition to all other licensing qualifications, and requirements, Applicant was to be granted a license on **PROBATION** for a period of five (5) years. The Board has received a report from the clinical skills evaluation and remediation program, which indicates that Applicant can safely practice as long as he has a preceptor for the first 6 months of practice.

Accordingly further action against Applicant is not needed. Therefore the Board enters the following order vacating the probationary status of Applicant's license ordered by the Hearing Examiner and adopted by the Board.

**ORDER**

**AND NOW** this 2<sup>nd</sup> day of September, 2008, the State Board of Medicine hereby **ORDERS** that the probation of Michael N. Kessler, M.D. is vacated. Applicant having completed the preliminary conditions to obtaining a license to practice medicine as described in the Board's adjudication and order issued December 21, 2007, the Board hereby **GRANTS** Applicant an unrestricted license to practice medicine. During the first 6 months of Applicant's practice, Applicant shall retain a psychiatrist as a preceptor to review Applicant's records and discuss and review Applicant's practice and cases.

Failure to comply with this Order may subject Applicant to disciplinary action for failure to comply with a Board Order.

This order is effective immediately.

**BY ORDER:**

**STATE BOARD OF MEDICINE**



**OLLICE BATES, JR., M.D.**  
**CHAIRMAN**

Applicant's Attorney:

Kathryn L. Simpson, Esquire  
Mette, Evans & Woodside  
3401 North Front Street  
P.O. Box 5950  
Harrisburg, PA 17110-0950

Commonwealth's Attorney:

Keith E. Bashore, Esquire  
2601 N. Third Street, P.O. Box 2649  
Harrisburg, PA 17105-2649

Board Counsel:

Sabina I. Howell, Esquire  
2601 N. Third Street, P.O. Box 2649  
Harrisburg, PA 17105-2649

Date of mailing:

September 2, 2008

COPY

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF STATE  
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS

BEFORE THE STATE BOARD OF MEDICINE

COMMONWEALTH OF PENNSYLVANIA,  
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS

v.

MICHAEL N. KESSLER, M.D.,  
RESPONDENT

DOCKET NO. 0834-49-11  
FILE NO. 10-49-09847

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FINAL ADJUDICATION AND ORDER

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KATIE TRUE, COMMISSIONER  
BUREAU OF PROFESSIONAL AND  
OCCUPATIONAL AFFAIRS

JAMES W. FREEMAN, M.D., CHAIRPERSON  
STATE BOARD OF MEDICINE

2601 North Third Street  
Post Office Box 2649  
Harrisburg, Pennsylvania 17105-2649

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PROTHONOTARY

2012 JUL 25 AM 9:17

Department of State

## HISTORY

This case came before the State Board of Medicine (Board) for review of the report and order of the hearing examiner issued on April 11, 2012. The history of this case is set forth in the report and order of the hearing examiner. Neither party requested review by the Board. On May 2, 2012, the Board issued a notice of intent to review, which set forth a briefing schedule. Neither party filed a brief with the Board.

The Board reviewed the entire record in this matter at its meeting on June 26, 2012, and now issues this adjudication and order in final disposition of the matter. The report and order of the hearing examiner is appended to this adjudication and order of the Board as "Attachment A."

### **FINDINGS OF FACT, CONCLUSIONS OF LAW AND DISCUSSION**

It is consistent with the authority of the Board under the Medical Practice Act of 1985 (Act), Act of December 20, 1985, P.L. 457, No. 112, *as amended*, 63 P.S. §422.1 *et seq.*, and the Administrative Agency Law, 2 Pa. C.S. §504, for the Board to adopt the findings of fact, conclusions of law, and discussion of the hearing examiner if the Board determines that they are complete and supported by the evidence.

The Board has reviewed the entire record in this case. The Board concludes that the findings of fact and conclusions of law of the hearing examiner are supported by the evidence and the law. The Board, therefore, adopts the findings of fact and conclusions of law and hereby incorporates the hearing examiner's findings of fact and conclusions of law by reference as if they were set forth fully in this adjudication and order. The Board concludes that most of the hearing examiner's discussion is supported by the facts and hereby adopts the hearing examiner's discussion from page 23 through the end of the first full paragraph on page 37. The Board hereby incorporates the hearing examiner's discussion from page 23 through the end of the first full paragraph on page 37 by reference as if set forth fully in this adjudication and order. The remainder of the hearing examiner's discussion, wherein the hearing examiner weighs the evidence and reaches a conclusion, is not adopted by the Board.

The Board adds the following discussion:

The Board is charged with protecting the public by enforcing the Medical Practice Act and regulations of the Board. In this case, the Commonwealth filed a one count order to show cause alleging that Respondent was subject to discipline by the Board under section 41(5) of the Act, 63 P.S. § 422.41(5), in that he is unable to practice medicine with reasonable skill and safety to patients by reason of illness. In addition, the Commonwealth alleged that Respondent was

subject to the imposition of the costs of investigation under section 5(b)(5) of Act 48, 63 P.S. § 2205(b)(5), and alleged costs in the amount of \$7358.39.

In making a determination as to whether Respondent is able or unable to practice medicine with reasonable skill and safety, the Board carefully considered the testimony of Dr. Reubins, who has treated Respondent since the spring of 2002, Dr. Voskanian, who evaluated Respondent on May 2, 2011, and Dr. Block, who evaluated in light of the charges brought against him by the Commonwealth and who also reviewed Dr. Voskanian's expert report. Dr. Reubins testimony was limited because he could not draw any conclusions from any of Respondent's conduct which led to his arrests. Regarding the most recent arrest and guilty plea, Dr. Reubins testified that he could not opine on the significance of the arrest and plea because there was no way to determine exactly what Respondent did and what Respondent's intent was while he was doing what he did. Dr. Reubins did note that he was concerned that Respondent placed himself in positions or situations that, while not constituting pedophilia or exhibitionism, called attention to himself. (N.T. 153-154). Dr. Reubins also testified that "there is some compelling something that has gotten him [Respondent] so close to that behavior [exhibitionism] that he's been accused of it" three times. (N.T. 154).

Dr. Voskanian concluded that his examination of Respondent suggested pedophilia and exhibitionism, but did not reach a conclusive diagnosis. Dr. Block rejected the conclusions of Dr. Voskanian and opined that Respondent suffered from chronic social phobia and anxiety. (N.T. 132-137). The Board agrees with the hearing examiner's conclusion that regardless of the lack of a definitive diagnosis or an agreement among the experts, Respondent's mental state has manifested itself in inappropriate behavior.

The Board is also mindful of Respondent's disciplinary history before this Board and before the Boards of Medicine of New York and Massachusetts, and the conclusions of Dr. Berlin, the psychiatrist who examined Respondent in 2003 in preparation for Respondent's New York hearing. Dr. Berlin testified that Respondent had a sexual disorder characterized by exhibitionism and an urge to be seen masturbating by young males. The New York Board also found that Respondent had engaged in fraud and making a false report, and found him morally unfit to practice. This Board provisionally denied Respondent's application for licensure on January 23, 2007, and provided Respondent a hearing. The Board issued a license to Respondent with a five-year term of probation. After Respondent completed the CPEP program, the Board vacated the probation after Respondent had served less than one of the five years. The order vacating probation issued on September 2, 2008. Approximately 2 years later, on November 13, 2010, Respondent was arrested for the crime of lewdness. Respondent pleaded guilty to that charge on March 31, 2011.

The hearing examiner noted in the portion of the discussion that was not adopted by the Board that Respondent's inappropriate conduct has not taken place in a practice setting. Paradoxically, the hearing examiner then proposed that Respondent should again be placed on probation with the sole restrictions that he not treat individuals under the age of 18 and not further violate criminal laws. The Board assumes the hearing examiner intended to preemptively protect minors should Respondent's inappropriate conduct expand into his practice. The Board finds this approach insufficient to protect the public and the integrity of the profession.

The Board gives the greater weight to the testimony of Dr. Voskanian and concludes that Respondent is unable to practice with reasonable skill and safety to patients. Accordingly, the Board is authorized to revoke, suspend or otherwise discipline Respondent's license. Section

42(a)(3) of the Act, 63 P.S. § 422.42(a)(3). In determining the appropriate sanction, the Board considers the number and seriousness of violations and any evidence of an aggravating or mitigating character. In this case there is only one charge; that Respondent cannot practice safely. Considering the seriousness of this matter and Respondent's disciplinary history in the Commonwealth and the history of actions against Respondent in other states, which serve as factors to aggravate the sanction that might be imposed, the Board concludes that Respondent's license must be revoked. Pursuant to section 43 of the Act, 63 P.S. § 422.43, Respondent may apply for reinstatement after a period of at least 5 years.

The Board is also authorized, under section 5(b)(5) of Act 48, 63 P. S. § 2205(b)(5), to impose the costs of investigation in this matter. The Commonwealth, in its order to show cause, alleged costs of investigation of \$7,358.39. Because the Board has determined that revocation of the license is the appropriate sanction, the Board declines to impose the costs of investigation.

Wherefore, the following order shall issue.



COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF STATE  
BEFORE THE STATE BOARD OF MEDICINE

Commonwealth of Pennsylvania,  
Bureau of Professional and  
Occupational Affairs

v.

Michael N. Kessler, M.D.  
Respondent

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Docket No. 0834-49-11

File No. 10-49-09874

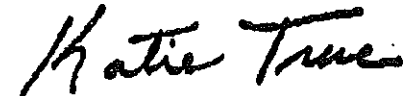
ORDER

NOW, this day 25<sup>th</sup> of July 2012, the State Board of medicine hereby **ADOPTS** the findings of fact and conclusions of law of the hearing examiner and those portions of the discussion of the hearing examiner as set forth in the Board's discussion, along with the foregoing additional discussion, and hereby **ORDERS** that the license to practice medicine and surgery of **Michael N. Kessler, M.D.**, license number MD-435080, shall be **REVOKED**. Respondent shall return all licensure documents from the Commonwealth in his possession to: Board Counsel, Department of State Legal Office, P.O. Box 2649, Harrisburg, PA 17105-2649 within 30 days of the date of this Order.

This Order shall take effect immediately; however, the revocation of Respondent's license shall become effective on August 24, 2012, 30 days from the date of issuance of this Order.

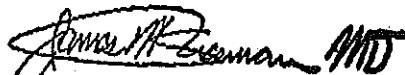
BY ORDER:

BUREAU OF PROFESSIONAL AND  
OCCUPATIONAL AFFAIRS



KATIE TRUE,  
COMMISSIONER

STATE BOARD OF MEDICINE



JAMES W. FREEMAN, M.D.  
CHAIR

***For Respondent:***

Kathryn L. Simpson, Esquire  
Mette, Evans & Woodside  
PO Box 5950  
Harrisburg, PA 17110-0950

***For the Commonwealth:***

Keith E. Bashore, Esquire  
Andrew Demarest, Esquire  
Commonwealth of Pennsylvania  
GOVERNOR'S OFFICE OF GENERAL COUNSEL  
Department of State  
P.O. Box 2649  
Harrisburg, PA 17105-2649

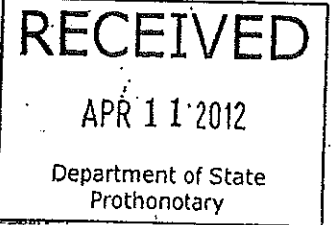
***Board Counsel:***

Teresa A. Lazo, Esquire

***Date of Mailing:***

July 25<sup>th</sup> 2012

# Attachment A



COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF STATE  
BEFORE THE STATE BOARD OF MEDICINE

Commonwealth of Pennsylvania  
Bureau of Professional and  
Occupational Affairs

v.

Michael N. Kessler, M.D.,  
Respondent

Docket No. 0834-49-11  
File No. 10-49-09874

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ADJUDICATION AND ORDER

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John T. Henderson, Jr.  
Hearing Examiner

P.O. Box 2649  
2601 North Third Street  
Harrisburg, PA 17105

DATE DISTRIBUTED 4/11/12  
PROSECUTION \_\_\_\_\_  
COUNSEL ✓  
HEARING EXAMINER \_\_\_\_\_  
OTHER \_\_\_\_\_

## HISTORY

This matter comes before the hearing examiner for the State Board of Medicine (Board) on a one count order to show cause (OSC) filed on May 16, 2011, alleging that Michael N. Kessler, M.D., License No. MD435080, (Respondent) is subject to disciplinary action under section 41(5) of the Medical Practice Act of 1985 (Act), Act of December 20, 1985, P.L. 457, *as amended*, 63 P.S. §§422.1 *et seq.*, at 63 P.S. §422.41(5) in that Respondent is unable to practice medicine with reasonable skill and safety to patients by reason of illness. (Exhibit C-1)

The Respondent filed an answer to the OSC on July 7, 2011. (Exhibit C-2) A hearing was originally scheduled to be held on September 21, 2011 in Harrisburg, Pennsylvania but was continued at the request of the Respondent. The matter was rescheduled for and held on November 21, 2011. Keith E. Bashore, Esquire, represented the Commonwealth. The Respondent was represented by Kathryn L. Simpson, Esquire. At the conclusion of the hearing the parties indicated a desire to file post hearing briefs and the hearing examiner established a briefing schedule. The hearing transcript was filed on December 6, 2011 and the Commonwealth filed its post-hearing brief on January 20, 2012. In its brief, the Commonwealth recommended that the Respondent's license be placed on probation for a period of five years, subject to terms and conditions of the Disciplinary Monitoring Unit (DMU) of the Pennsylvania Professional Health Monitoring Program (PHMP). The Respondent filed his post-hearing brief on February 24, 2012, submitting that the Commonwealth had failed to prove by a preponderance of the evidence that the Respondent was unable to practice medicine with reasonable skill and safety to patients by reason of illness. The Commonwealth declined to file a reply brief thereto.

### FINDINGS OF FACT

1. Respondent holds a license to practice medicine in the Commonwealth of Pennsylvania, license no. MD435080. (Board Records)
2. Respondent's license number MD435080 is active through December 31, 2012. (Board Records)
3. At all times pertinent to the factual allegations, Respondent held a license to practice medicine in the Commonwealth of Pennsylvania. (Exhibits C-1 and C-2)
4. Respondent's most recent address on file with the Board is 174 Eyland Avenue, Succasunna, NJ 07876-1518. (Board records)
5. Respondent obtained his M.D. from the University of Connecticut School of Medicine in May of 1997. (Board records; Docket No. 0332-49-07)
6. Respondent also earned a master's degree in psychology from Central Connecticut State University. (Board records; Docket No. 0332-49-07)
7. Respondent was initially licensed to practice medicine in the State of New York in 1999. (Exhibits C-1 and C-6)
8. On June 30, 2001, Respondent completed a four-year combined internship and residency at Long Island Jewish Medical Center and Hillside Hospital, the affiliated psychiatric hospital, which are now known collectively as the North Shore Long Island Jewish Health System due to a merger. (Board records; Docket No. 0332-49-07)
9. Respondent was initially licensed to practice medicine in the Commonwealth of Massachusetts in July 2001. (Exhibit C-1 and C-6)

10. On July 1, 2001, Respondent began a residency in child and adolescent psychiatry at Cambridge Health Alliance (CHA) in Massachusetts, where Respondent worked with adolescent inpatients. (Exhibits C-1, C-6 and C-7)

11. On July 8, 2001, Respondent was arrested in Norwood, Massachusetts, and charged with open and gross lewdness, a felony in Massachusetts, as well as with disorderly conduct at Criminal Docket #0157CR001822. (Exhibits C-1 and C-6)

12. The criminal charges were based on allegations of two males in their twenties who stated that Respondent had exposed his genitals and been masturbating in his car in the parking lot of a donut shop parking lot in Walpole, MA. (Exhibits C-1 and C-7)

13. On August 1, 2001, Respondent was terminated from the CHA child and adolescent psychiatry residency due to his arrest on July 8, 2001. (Exhibit C-1, C-6, and C-7)

14. The disorderly conduct charge was dismissed at the request of the Commonwealth of Massachusetts. (Board records; Docket No. 0332-49-07)

15. Under the Massachusetts Rules of Criminal Procedure, a defendant may plead not guilty, but admit to sufficient facts to warrant a finding of guilty. Official Notice of Mass. Ann. Laws R. Crim. P. Rule 12(a)(2) (2007). (Board records; Docket No. 0332-49-07)

16. On June 3, 2002 Respondent pled "not guilty" to the charge of open and gross lewdness but admitted sufficient facts, accepted after colloquy to warrant a finding of guilty, but the matter was continued for one year without a finding, and the open and gross lewdness count eventually was dismissed on June 3, 2003. (Board records; Docket No. 0332-49-07)

17. On November 13, 2001, Respondent was arrested in Falmouth, MA, and charged with open and gross lewdness, a felony in Massachusetts, and indecent exposure at Criminal Docket #0189CR002580. (Exhibits C-1, C-6 and C-7)

18. The charges were based on allegations by two boys, ages 10 and 12, who lived across the street from Respondent and who alleged that they could see a man standing nude and masturbating in the front window of the home of Respondent's mother. (Exhibits C-1, C-6 and C-7; See Opinion of Massachusetts Supreme Judicial Court in *Commonwealth v. Michael Kessler*, 442 Mass. 770, 817 N.E.2d 711 (2004)).

19. Respondent stood trial on the charges at Criminal Docket #0189CR002580 on June 2, 2002, and was convicted of open and gross lewdness; the judge dismissed the indecent exposure count as a lesser included offense of the open and gross lewdness count. (See Opinion of Massachusetts Supreme Judicial Court in *Commonwealth v. Michael Kessler*, 442 Mass. 770, 817 N.E.2d 711 (2004))

20. Respondent appealed and the Massachusetts Supreme Judicial Court overturned the conviction in an opinion filed November 12, 2004, reversing the judgment of the District Court, setting aside the guilty verdict, and acquitting Respondent of the charge of open and gross lewdness; the indecent exposure count, which the judge had dismissed during the trial, was not reinstated. (See Opinion of Massachusetts Supreme Judicial Court in *Commonwealth v. Michael Kessler*, 442 Mass. 770, 817 N.E.2d 711 (2004))

21. After CHA terminated Respondent from its employment in August 2001, Respondent was unable to find employment in Massachusetts. (Board records; Docket No. 0332-49-07)

22. Because of his inability to find any kind of work in Massachusetts, Respondent returned to New York, where, within a week of his return, he found employment at Brunswick Hospital Center located in Amityville, New York. (Board records; Docket No. 0332-49-07)



24. Respondent started full time employment at Brunswick Hospital Center on December 1, 2001. (Board records; Docket No. 0332-49-07)

25. However, when Respondent filled out the employment application for Brunswick Hospital Center, he did not include his month of employment with CHA, during July 2001, in the space in which the employment application asked about every hospital where he had ever had privileges. (Board records; Docket No. 0332-49-07)

26. After returning to New York, Respondent also filled out an employment application for Holliswood Hospital, and in response to the directive to list every place that he had had privileges, he again omitted his employment with CHA. (Board records; Docket No. 0332-49-07)

27. As a part of securing employment at Brunswick Hospital Center, Respondent had to fill out an application so that he could be added to the employer's group malpractice insurance policy. (Board records; Docket No. 0332-49-07)

28. The malpractice insurance application included a question that asked if Respondent had ever been arrested for a felony. (Board records; Docket No. 0332-49-07)

29. Respondent answered that question by stating "no," although he knew, at the time, that what he had been arrested for in July 2001 was a felony in Massachusetts. (Board records; Docket No. 0332-49-07)

30. In approximately October 2002, Respondent received the renewal for his license to practice medicine in New York. (Board records; Docket No. 0332-49-07)

31. The renewal application asked whether Respondent had ever been disciplined by a hospital, as well as whether Respondent had been arrested for a felony or a misdemeanor, and

Respondent answered both questions truthfully, in the affirmative. (Board records; Docket No. 0332-49-07).

32. On December 13, 2002, the New York State Board for Professional Medical Conduct (New York Board) issued a Statement of Charges against Respondent, charging him with (1) having been terminated from CHA; (2) lying about that termination on his application to Brunswick Hospital Center; (3) lying about the termination on his application to Holliswood Hospital; (4) lying on his application for medical malpractice insurance about having been the subject of an investigation or disciplinary proceeding by a governmental agency, professional society or professional review board of a hospital and about having been charged with a felony; and (5) being found guilty of gross lewdness and lascivious behavior in Falmouth District Court. (Board records; Docket No. 0332-49-07; See In the Matter of Michael N. Kessler, M.D., CO-02-10-05389-A, Statement of Charges)

33. At a hearing held on January 22, 2003, which Respondent attended, the New York Board heard testimony at the formal hearing from Fredrick S. Berlin, M.D., Ph.D, founder of the Johns Hopkins Sexual Disorders Clinic in Baltimore, Maryland. (Exhibits C-1, C-6 and C-7)

34. At the request of Respondent, Dr. Berlin had examined Respondent shortly before the January 22, 2003 hearing. (Exhibits C-1, C-6 and C-7)

35. Dr. Berlin testified, based on his knowledge of the evidence available to him, of his concern that Respondent had a sexual disorder characterized by exhibitionism and an urge to be seen masturbating by young males. (Exhibits C-1, C-6 and C-7)

36. Dr. Berlin testified that Respondent was not being adequately treated at that time for the sexual disorder. (Exhibits C-1 and C-6)

37. Marc S. Reubins, M.D. and Seymour H. Block, D.O. also testified for Respondent at the formal hearing before the New York Board. (Exhibits C-1, C-6, and C-7)

38. Dr. Reubins testified as Respondent's treating psychiatrist that Respondent has a systemic disorder characterized by anxiety and depression. (Exhibits C-1 and C-6)

39. Dr. Block is a physician licensed in New York and Florida, is a board certified psychiatrist, and testified that he performed a forensic examination of Respondent and that Respondent has an anxiety condition. (Exhibits C-1 and C-6; N.T. 168-169)

40. The New York Board found that the testimony of Drs. Reubins and Block was based in large part upon information provided by Respondent as to the nature of the conduct that led to Respondent's criminal arrests. (Exhibits C-1 and C-6)

41. The New York Board found Dr. Berlin's testimony to be the most convincing of any of the psychiatric witnesses at the January 22, 2003 hearing. (Exhibits C-1 and C-6)

42. On February 13, 2003, the New York Board issued a Determination and Order in which the Board sustained all of the specifications alleged in the Statement of Charges, except the allegation that Respondent lied on his application for medical malpractice insurance about having been the subject of an investigation or disciplinary proceeding by a governmental agency, professional society or professional review board of a hospital, which was not supported. Based upon these findings the New York Board determined in part that Respondent's actions constituted the fraudulent practice of the profession, moral unfitness to practice medicine, the willful making or filing of a false report, and conviction of an act in another state which would, if committed in New York, be a crime. (Board records; Docket No. 0332-49-07)

43. Pursuant to its Determination and Order of February 13, 2003 the New York Board revoked Respondent's license to practice medicine in the State of New York. (Exhibit C-

1, C-6 and C-7)

44. At the time of the New York Board's decision, Respondent's conviction on the November 13, 2001 arrest in Falmouth had not yet been overturned by the Massachusetts Supreme Judicial Court.

45. The New York Board did not set forth any specifications or make any findings related to the July 2001 arrest. (Exhibit C-1; See In the Matter of Michael N. Kessler, M.D., CO-02-10-05389-A, Statement of Charges).

46. After the New York Board's revocation of his license in 2003, Respondent obtained a license as a life, accident and health insurance broker in New York and began working in the insurance field, which led to his current ownership of his own insurance agency, K & L Agency. (Board records; Docket No. 0332-49-07)

47. Respondent also obtained licenses as a life, accident and health insurance broker in Connecticut, New Jersey and Pennsylvania. (Board records; Docket No. 0332-49-07)

48. Respondent has never had discipline against his insurance licenses in any state. Respondent was employed with Aram Health and Disease Management of New Jersey, a firm that works on disease management in order to minimize increases in the cost of health insurance. (Board records; Docket No. 0332-49-07)

49. Additionally, Respondent was associated with 123College.com, representing Long Island, Nassau and Suffolk, providing free seminars once a month during the school year to parents and high school students, instructing them as to methods to maximize the financial aid the students can obtain for college. (Board records; Docket No. 0332-49-07)

50. Respondent was also certified by the Internal Revenue Service as a federal income tax preparer and he prepares both state and federal income tax returns for individuals and

small businesses. (Board records; Docket No. 0332-49-07)

51. Respondent had not renewed his license to practice medicine in Massachusetts after its initial issuance in July 2001 because at the time for renewal in December 2001, he had already returned to New York and did not plan to return to Massachusetts to work. (Board records; Docket No. 0332-49-07)

52. Because he did not renew his license in Massachusetts, after the expiration date, Respondent's license there was labeled "revoked," although it was not a disciplinary action and he was considered to have an inchoate right to renew. (Board records; Docket No. 0332-49-07)

53. On September 2, 2003, the Massachusetts Board initiated a disciplinary action against Respondent's Massachusetts license based on allegations that Respondent (1) had exposed himself in a parking lot in Walpole, Massachusetts; (2) had been criminally convicted in Falmouth District Court for standing nude in a window exposing himself in front of children; (3) had his New York license revoked for providing false information on two applications for hospital privileges and on an application for professional liability insurance; and (4) had been convicted of open and gross lewdness. (Board records; Docket No. 0332-49-07; Exhibit C-1; See Commonwealth of Massachusetts Board of Registration in Medicine, In the Matter of Michael N. Keller, M.D., Adjudicatory Case No. 03-22-DALA).

54. On the advice of an attorney, Respondent did not attend any hearings related to the action against his license before the Massachusetts Board. (Board records; Docket No. 0332-49-07)

55. On July 26, 2006, the Massachusetts Board issued a Final Decision and Order which acknowledged that the Massachusetts Supreme Judicial Court had overturned Respondent's conviction and found that Respondent had engaged in conduct undermining the

public confidence in the integrity of the medical profession and lacked good moral character, had engaged in conduct which placed into question his ability to practice medicine, and had been disciplined by another state for conduct substantially similar to conduct which has the capacity to deceive or defraud; as a result, the Massachusetts Board revoked Respondent's inchoate right to renew his license to practice medicine in Massachusetts. ((Board records; Docket No. 0332-49-07; Exhibit C-1; See Commonwealth of Massachusetts Board of Registration in Medicine, In the Matter of Michael N. Keller, M.D., Final Decision and Order, Adjudicatory Case No. 03-22-DALA (RM-03-662)

56. The Massachusetts Board determined that Respondent's actions leading to his 2001 arrests were sexually exploitative in nature. (Exhibits C-1 and C-6)

57. The Massachusetts Board held that Respondent's sexually exploitative conduct calls into question his ability to practice medicine. (Exhibits C-1 and C-6)

58. In November 2006, Respondent submitted an Application for a License to Practice Medicine Without Restriction to the Board. (Exhibits C-1 and C-2)

59. On January 23, 2007, the Board notified Respondent that the Board had provisionally denied his application based on attached documents indicating (1) that his license in New York had been revoked by the New York Board because of his alleged failure to disclose his affiliation with and dismissal from a psychiatry residency program on two hospital medical staff applications and to a professional liability carrier, and because of his alleged failure to disclose a criminal conviction on his application for a residency program, and (2) that the Massachusetts Board had revoked his license to practice medicine in that state based on the New York Board's revocation action. (Board records; Docket No. 0332-49-07)

60. The Board's January 23, 2007 letter further informed Respondent that its

provisional denial was based on sections 22 and 41 of the Act, §§ 422.22 and 422.41, respectively, the first of which provides that the Board shall not issue a license to an Respondent unless the Respondent establishes that, among other things, he or she is of good moral character, § 22(b), 63 P.S. § 422.22(b), and the latter of which authorizes the Board to refuse a license to an Respondent who has had a license revoked, suspended or otherwise disciplined by the licensing authority of another state, § 41(4), 63 P.S. § 422.41(4), or who has been found guilty of immoral or unprofessional conduct, § 41(8), 63 P.S. § 422.41(8). Respondent timely appealed the Board's provisional denial and requested a hearing. (Board records; Docket No. 0332-49-07)

61. On October 12, 2007 Respondent appeared at the hearing regarding his application and was represented by counsel and where Dr. Reubins testified on his behalf. (Board records; Docket No. 0332-49-07)

62. In a Proposed Adjudication and Order of November 2, 2007 the hearing examiner found that the Respondent should be granted a license by this Board, subject to five years probation. (Board records; Docket No. 0332-49-07)

63. On December 21, 2007, the Board adopted the hearing examiner's Proposed Adjudication and Order under which the Respondent's application to practice medicine in Pennsylvania was approved, subject to a probationary status for a period of five (5) years subject to specific terms and conditions. (Board records; Docket No. 0332-49-07; Exhibits C-1 and C-2)

64. The Respondent's probationary terms and conditions included a requirement that Respondent complete a Board-approved clinical skills evaluation and remediation program. (Board records; Docket No. 0332-49-07; Exhibits C-1 and C-2)

65. The evaluation and remediation for Respondent completed by the Center for Personalized Education for Physicians in Denver, CO, found Respondent's weaknesses to

include: In-depth understanding of the reasons behind patient-generated pressure regarding boundary violations. (Exhibits C-1 and C-2)

66. On September 2, 2008, the Board issued an Order vacating Respondent's probation. (Board records; Docket No. 0332-49-07; Exhibits C-1 and C-2)

67. In September 2007, Respondent married a woman whom he met during their residency, who is a psychiatrist. (Board records; Docket No. 0332-49-07; N.T. 34)

68. Respondent has a lifelong anxiety disorder that has been very successfully treated with therapy. (Board records; Docket No. 0332-49-07)

69. Respondent was in therapy throughout his residency, which he found helpful. (Board records; Docket No. 0332-49-07)

70. In March 2002, Respondent began treating with Dr. Marc Reubins and has been seeing him regularly ever since, usually twice a week. (N.T. 53, 132)

71. Dr. Reubins is a board certified psychiatrist, licensed to practice in New York, who specializes in child psychiatry, adolescent psychiatry, health psychiatry and forensic psychiatry. (N.T. 130)

72. Respondent initially sought consultation with Dr. Reubins for anxiety and concerns about the effect Respondent's arrests and subsequent disciplinary actions were having on his medical license, as well as for general life problems. (N.T. 133)

73. In an effort to remediate the wrongs he had committed, Respondent successfully completed the ProBE Program in Professional Problem-Based Ethics, which consisted of 22 hours of curriculum, including readings and seminar participation, in September 2005. (Board records; Docket No. 0332-49-07)

74. As a part of completing the ProBE program, Respondent wrote a Final Essay that



discussed his untruthful reports to the Brunswick and Holliswood Hospitals and on the professional liability insurance application. (Board records; Docket No. 0332-49-07)

75. Respondent did not engage in the practice of medicine in any manner during the period of June 2002 through October 2008 (Exhibit C-7; N.T. 36)

76. Respondent returned to the practice of medicine as a psychiatrist in October 2008 in Pennsylvania. (Exhibit C-7)

77. During the period of October 2008 to June 2009, Respondent was employed as a psychiatrist with ISL Psychiatric Services. (Exhibit C-7)

78. Respondent quit employment with ISL Psychiatric Services because he did not have enough time to spend with patients. (Exhibit C-7)

79. During the period of July 2009 through May 2011, Respondent was employed as Associate Medical Director for a school-based partial hospitalization program for Colonial Intermediate Unit 20 in Northampton and Monroe Counties, Pennsylvania. (Exhibit C-7; N.T. 84)

80. Respondent's employment responsibilities for the period of July 2009 through May 2011 included traveling to schools to provide psychiatric services to children with various mental illnesses. (Exhibit C-7; N.T. 127)

81. Respondent provided psychiatric services to children with schizophrenia, depression, anxiety, and adjustment disorders due to problems at home. (N.T. 85, 127)

82. Respondent's employment responsibilities included psychiatric treatment provided to children of various ages, including children in elementary school. (Exhibit C-7; N.T. 126)

83. Respondent treated children approximately sixteen (16) hours per week in school-

based settings. (Exhibit C-7; N.T. 126)

84. During 2010 and until it closed in March 2011, Respondent was employed at Shawnee Academy in Shawnee-on-Delaware, PA, which was a residential treatment facility for children with severe mental illnesses. In that position he covered for the staff psychiatrist by responding to phone calls from Academy staff. (Exhibit C-7; N.T. 89)

85. Respondent is currently employed as a psychiatrist at Pocono Psychiatric Associates in East Stroudsburg, PA. (Exhibit C-7; N.T. 82)

86. Respondent treats individuals of all ages, currently treating mostly adults but also two adolescent patients in his practice at Pocono Psychiatric Associates. (N.T. 91-93)

87. On November 13, 2010, the Respondent was arrested for the crime of Lewdness by the Mount Olive Township (NJ) Police Department. (Exhibit C-3; N.T. 14-15)

88. Officer Marianne Wurtemberg of the Mount Olive Township Police responded to a police call at the Sutton Park Mall in Flanders, NJ for a report of a male masturbating in a vehicle at approximately 9:16 p.m. on November 12, 2010. (Exhibit C-4; N.T. 16)

89. A police check of the motor vehicle registration indicated that the vehicle belonged to Respondent. (Exhibits C-3 and C-4; N.T. 17)

90. Officer Wurtemberg was met by three juvenile male victims when she responded to the police call at Sutton Park Mall. (Exhibit C-4; N.T. 18)

91. Two of the victims were 14 years of age, and one victim was 15 years of age. (Exhibit C-4; N.T. 18)

92. The victims stated to Officer Wurtemberg that as they walked past the Respondent's vehicle parked outside of the Tractor Supply store, they saw the interior light go on inside the vehicle. (Exhibit C-4)

93. The victims stated to Officer Wurtemberg that they had observed the Respondent pull his zipper down, pull out his penis, and begin masturbating in the vehicle. (Exhibit C-4)

94. The victims stated to Officer Wurtemberg that they yelled and mentioned calling the police and the Respondent subsequently drove off. (Exhibit C-4)

95. On March 31, 2011, the Respondent entered a guilty plea in the Roxbury Township (NJ) Municipal Court to the criminal charge of Lewdness. (Exhibits C-1 and C-2; N.T. 21- 22)

96. The Respondent was sentenced to 90 days in county jail suspended; ordered to pay a fine of \$1000.00; and to continue to undergo psychiatric counseling for a period of one (1) year. (Exhibits C-1 and C-2)

97. The record of the Respondent's plea was ordered to "be sealed and not utilized or not be evidential in any subsequent civil proceeding pursuant to New Jersey Court Rules 7:6-2. (Exhibit C-2; N.T. 22)

98. On April 6, 2011, the Board issued an Order Compelling Mental and Physical Examination In Re: The Fitness of Michael N. Kessler, M.D. to Practice Medicine with Reasonable Skill and Safety. (Board records; Exhibits C-6 and C-7)

99. Psychiatrist Pogos H. Voskanian, M.D., of Huntingdon Valley, PA, conducted a mental and physical examination of the Respondent for one day, on May 2, 2011. (Exhibits C-6 and C-7; N.T. 30)

100. Dr. Voskanian performs forensic evaluations of sex offenders for state and federal agencies in New Jersey and Pennsylvania. (Exhibit C-5; N.T. 27)

101. Dr. Voskanian performs approximately 200 sex offender evaluations per year for the New Jersey Department of Human Services. (Exhibit C-5; N.T. 27)

102. Dr. Voskanian has conducted numerous lectures/seminars on sexual offender evaluations. (Exhibit C-5; N.T. 27)

103. Dr. Voskanian has served as a psychiatric consultant for United States Pretrial Services and United States Probation Office, Eastern District of Pennsylvania since 1998. (Exhibit C-5)

104. Dr. Voskanian has served as Associate Clinical Professor of Psychiatry at Drexel University College of Medicine (Medical College of Pennsylvania, Hahnemann University) since 1998. (Exhibit C-5; N.T. 26)

105. On May 9, 2011, Dr. Voskanian provided a twenty-nine (29) page mental and physical evaluation of the Respondent. (Exhibit C-7; N.T. 30)

106. As a result of his examination, Dr. Voskanian concluded that his "suggested diagnosis" of Respondent "...raises questions regarding pedophilia and exhibitionism" in other words Dr. Voskanian concluded that the Respondent's actions suggested pedophilia and exhibitionism but he could not make a diagnosis of pedophilia or exhibitionism. (Exhibit C-7; N.T. 46, 61, 69-70)

107. Dr. Voskanian testified that in his opinion Respondent is not able to practice as a psychiatrist with reasonable skill and safety to patients. (Exhibit C-7; N.T. 46-47)

108. In his examination report, Dr. Voskanian noted that Respondent did not engage in the practice of medicine in any manner during the period of June 2002 through October 2008. (Exhibit C-7; N.T. 36)

109. In his examination report, Dr. Voskanian noted that Respondent has chosen employment that involves considerable contact with children and adolescents. (Exhibit C-7)

110. In his examination report, Dr. Voskanian noted that Respondent started treatment

with mental health professionals at a young age. (Exhibit C-7; N.T. 40)

111. In his examination report, Dr. Voskanian noted that Respondent's parents did not display signs of affection and experienced conflict when Respondent was a child. (Exhibit C-7; N.T. 44)

112. In his examination report, Dr. Voskanian noted that Respondent does not like to be touched by others in any manner. (Exhibit C-7; N.T. 44)

113. In his examination report, Dr. Voskanian noted that Respondent had his first sexual contact with another person when he was 21 years of age. (Exhibit C-7; N.T. 32)

114. In his examination report, Dr. Voskanian noted that Respondent has not engaged in sexual contact with his wife for most of his marriage. (Exhibit C-7; N.T. p. 34)

115. In his examination report, Dr. Voskanian noted that Respondent has practically no history of adult relationships except for his marriage. (Exhibit C-7)

116. In his examination report, Dr. Voskanian noted that Respondent's psychological conditions have had a devastating impact on him and his ability to practice as a psychiatrist. (Exhibit C-7; N.T. 137)

117. In his examination report, Dr. Voskanian noted that Respondent does not accept responsibility for his inappropriate behaviors. (Exhibit C-7; N.T. 35, 42, 46)

118. In his examination report, Dr. Voskanian noted that Respondent explains that his legal difficulties result from others' unfounded behaviors and attempts to incriminate him. (Exhibit C-7)

119. In his examination report, Dr. Voskanian noted that Respondent claimed that the Walpole police lied to him pursuant to his July 2001 arrest in Walpole, MA. (Exhibit C-7)

120. In his examination report, Dr. Voskanian noted that Respondent blamed the

mother of the children involved in the Respondent's November 2001 arrest in Falmouth, MA, for calling the police regarding the incident. (Exhibit C-7)

121. In his examination report, Dr. Voskanian noted that Respondent claimed that the Mount Olive Township (NJ) police had fabricated the details of his November 2010 arrest in New Jersey. (Exhibit C-7; N.T. 100-101)

122. In his examination report, Dr. Voskanian noted that Respondent blames his own expert witness, Dr. Berlin, who testified at the formal hearing before the New York Board for the Respondent's legal problems. (Exhibit C-7)

123. Exhibitionism and pedophilia involve urges or thoughts suggesting that a person is pedophilic or is an exhibitionist and that the person acts on those urges or thoughts. (N.T. 134-135)

124. Respondent's pathology is chronic and pervasive. (Exhibit C-7; N.T. p. 69-70)

125. Respondent is currently prescribed Klonopin and Nardil. (N.T. 42)

126. At the hearing Dr. Reubins again testified on behalf of the Respondent. (N.T. 129-166)

127. Dr. Reubins testified that he disagreed with Dr. Voskanian's "suggested diagnosis" and found no clinical indication of pedophilia and exhibitionism. (N.T. 134)

128. Dr. Reubins also testified that he has seen nothing in Respondent that would evidence that the alleged pathology of pedophilia and exhibitionism has had a devastating effect on Respondent. (N.T. 136-137)

129. Respondent has been diagnosed with chronic social phobias and anxiety. (N.T. 134)

130. Dr. Reubins concluded that he did not see in Respondent what Dr. Voskanian did

and that if, indeed Dr. Voskanian's conclusions were correct, there would have been boundary violations and patients complaining and there are none. (N.T. 138-139)

131. Dr. Reubins also opined that he was concerned that the Respondent placed himself in positions or situations that, while not constituting pedophilia or exhibitionism, called attention to the Respondent. (N.T. 153-134)

132. Dr. Block also testified again on behalf of the Respondent. (N.T. 168-189)

133. Dr. Block evaluated Respondent in light of the charges brought against him in this matter and to review the Commonwealth's expert's report. (N.T. 174)

134. Dr. Block disagreed with Dr. Voskanian's conclusion that the Respondent's actions suggested exhibitionism and pedophilia. (N.T. 175)

135. Dr. Block found no evidence of recurrent, on-going thoughts, fantasies or desires to involve one in the behaviors necessary to justify the conclusion. (N.T. 175)

136. Respondent currently practices in an area where there are minimal psychiatric services available and there is a significant wait for a patient to see a psychiatrist. (N.T. 193)

137. The population of Carbon and Monroe Counties where Respondent practices has grown exponentially and there are only six psychiatrists. (N.T. 193)

138. Tracy Mohr is a nurse crisis worker in Stroudsburg, Pennsylvania. (N.T. 190)

139. In that role, her duties include mental health triage. (N.T. 90)

140. Before taking this position, she worked with Respondent at Salisbury Behavioral Health. (N.T. 191)

141. While at Salisbury, Respondent worked with patients who were over eighteen years of age. (N.T. 192)

142. Ms. Mohr sat through the entire hearing and heard all the testimony proffered.

(N.T. 194)

143. Ms. Mohr testified that her opinion of Respondent had not changed as a result of what she heard at the hearing and that she would still refer patients to him as he is an excellent doctor. (N.T. 194)

144. Further, Ms. Mohr testified that her opinion is shared by the community. (N.T. 195)

145. Josephine Martin is an addiction counselor at Pocono Psychiatric Associates in East Stroudsburg, Pennsylvania. (N.T. 197-198)

146. Ms. Martin works with Respondent. (N.T. 198)

147. She testified that she has heard no patient complaints about Respondent. (N.T. 199)

148. Nothing Ms. Martin heard at the hearing changed her opinion of Respondent. (N.T. 199)

149. Ms. Martin testified that there are few psychiatrists in the Stroudsburg area and the population continues to grow. (N.T. 200)

150. Respondent was served with the OSC and all subsequent pleadings, orders and notices filed of record in this matter, and attended and participated in the formal hearing held in this matter, on November 21, 2011, represented by counsel. (Docket No. 0834-49-11)



### CONCLUSIONS OF LAW

1. The Board has jurisdiction in this matter. (Findings of Fact, Nos. 1 – 3)
2. Respondent received adequate notice of the statutory charges filed against him and was given an opportunity to be heard in accordance with the Administrative Agency Law, 2 Pa. C.S. § 504. (Findings of Fact, No. 150)
3. Respondent is subject to disciplinary action under Section 41(5) of the Act, 63 P.S. §422.41(5) in that Respondent is unable to practice medicine with reasonable skill and safety to patients by reason of illness, absent monitoring and probation. (Findings of Fact, Nos. 11-125)

## DISCUSSION

This action is brought under the Medical Practice Act (Act), Act of December 20, 1985, P.L. 457, No. 112, *as amended*, at section 41(5), 63 P.S. § 422.41(5). The relevant provisions of the Act are as follows:

**§ 41. Reasons for refusal, revocation, suspension or other corrective actions against a licensee or certificate holder**

(a) The board shall have authority to impose disciplinary or corrective measures on a board-regulated practitioner for any or all of the following reasons:

\* \* \*

(5) Being unable to practice the profession with reasonable skill and safety to patients by reason of illness.....In enforcing this paragraph, the board shall, upon probable cause, have authority to compel a practitioner to submit to a mental or physical examination by a physician or a psychologist approved by the board. ...

At the hearing, in support of its contention that the Respondent is unable to practice the profession with reasonable skill and safety to patients by reason of illness, the Commonwealth initially presented the testimony of Officer Marianne Wurtemberg of the Mount Olive Township Police. Officer Wurtemberg testified that on November 12, 2010 she responded to a police call at the Sutton Park Mall in Flanders, NJ for a report of a male masturbating in a vehicle at approximately 9:16 p.m. (Exhibit C-4; N.T. 16) Officer Marianne Wurtemberg testified that a police check of the motor vehicle registration of the vehicle involved in the incident indicated that the vehicle belonged to Respondent. (Exhibits C-3 and C-4; N.T. 17)

Officer Wurtemberg further testified that when she responded to the police call at Sutton Park Mall she was met by three juvenile male victims. (Exhibit C-4; N.T. 18) Two of the victims were 14 years of age, and one victim was 15 years of age. (Exhibit C-4; N.T. 18) Based upon her report, Officer Wurtemberg testified that the victims stated to her that as they walked

past the Respondent's vehicle parked outside of the Tractor Supply store, they saw the interior light go on inside the vehicle. (Exhibit C-4) The victims stated to Officer Wurtemberg that they had observed the Respondent pull his zipper down, pull out his penis, and begin masturbating in the vehicle. (Exhibit C-4) The victims also stated to Officer Wurtemberg that they yelled and mentioned calling the police and the Respondent subsequently drove off. (Exhibit C-4)

Based upon the above, on November 13, 2010 Officer Wurtemberg arrested the Respondent for the crime of Lewdness. (Exhibit C-3; N.T. 14-15) On March 31, 2011, the Respondent entered a guilty plea in the Roxbury Township (NJ) Municipal Court to the criminal charge of Lewdness. (Exhibits C-1 and C-2; N.T. 21- 22) Pursuant to his plea, the Respondent was sentenced to 90 days in county jail suspended; ordered to pay a fine of \$1000.00; and to continue to undergo psychiatric counseling for a period of one (1) year. (Exhibits C-1 and C-2) The record of the Respondent's plea was ordered to "be sealed and not utilized or not be evidential in any subsequent civil proceeding pursuant to New Jersey Court Rules 7:6-2. (Exhibit C-2; N.T. 22)

In light of this most recent incident, and the Respondent's history with the Board, which will be detailed later, on April 6, 2011, the Board issued an Order Compelling Mental and Physical Examination In Re: The Fitness of Michael N. Kessler, M.D. to Practice Medicine with Reasonable Skill and Safety. (Board records; Exhibits C-6 and C-7) Accordingly, Psychiatrist Pogos H. Voskanian, M.D., of Huntingdon Valley, PA, conducted a mental and physical examination of the Respondent for one day, on May 2, 2011. (Exhibits C-6 and C-7; N.T. 30)

At the hearing, Dr. Voskanian testified for the Commonwealth and stated that he performs forensic evaluations of sex offenders for state and federal agencies in New Jersey and Pennsylvania. (Exhibit C-5; N.T. 27) Dr. Voskanian, reviewed his resume and detailed his

extensive experience, which served as the basis for being qualified as an expert in this proceeding. (Exhibit C-5; N.T. 27)

Based on his meeting with the Respondent, on May 9, 2011, Dr. Voskanian provided a twenty-nine (29) page mental and physical evaluation of the Respondent. (Exhibit C-7; N.T. 30) As a result of his examination, Dr. Voskanian concluded that his "suggested diagnosis" of Respondent "...raises questions regarding pedophilia and exhibitionism" in other words Dr. Voskanian concluded that the Respondent's actions suggested pedophilia and exhibitionism but he could not make a diagnosis of pedophilia or exhibitionism. (Exhibit C-7; N.T. 46, 61, 69-70) Dr. Voskanian concluded that based upon his findings, the Respondent is not able to practice as a psychiatrist with reasonable skill and safety to patients. (Exhibit C-7; N.T. 46-47)

A further review of his examination report revealed that Dr. Voskanian found that Respondent did not engage in the practice of medicine in any manner during the period of June 2002 through October 2008; has chosen employment that involves considerable contact with children and adolescents; started treatment with mental health professionals at a young age; that Respondent's parents did not display signs of affection and experienced conflict when Respondent was a child; that Respondent does not like to be touched by others in any manner; that he had his first sexual contact with another person when he was 21 years of age; that he has not engaged in sexual contact with his wife for most of his marriage; that Respondent has practically no history of adult relationships except for his marriage; that Respondent's psychological conditions have had a devastating impact on him and his ability to practice as a psychiatrist; that Respondent does not accept responsibility for his inappropriate behaviors; that Respondent explains that his legal difficulties result from others' unfounded behaviors and attempts to incriminate him; that Respondent claimed that the Walpole police lied to him

pursuant to his July 2001 arrest in Walpole, MA.; noted that Respondent blamed the mother of the children involved in the Respondent's November 2001 arrest in Falmouth, MA, for calling the police regarding the incident; that Respondent claimed that the Mount Olive Township (NJ) police had fabricated the details of his November 2010 arrest in New Jersey; that his pathology is chronic and pervasive; and that Respondent is currently prescribed Klonopin and Nardil.

(Exhibit C-7; N.T. 40-42)

In response thereto, the Respondent testified on his own behalf and also had two experts testify for him. In his testimony, the Respondent took issue with the length of time, methodology, and conclusions reached by Dr. Voskanian. (N.T. 83-114) Dr. Marc Reubins also testified on behalf of the Respondent. (N.T. 129-166) Dr. Reubins is a board certified psychiatrist, licensed to practice in New York, who specializes in child psychiatry, adolescent psychiatry, health psychiatry and forensic psychiatry. (N.T. 130)

Respondent began treating with Dr. Reubins in March 2002 and has been seeing him regularly ever since, usually twice a week. (N.T. 53, 132) Respondent initially sought consultation with Dr. Reubins for anxiety and concerns about the effect Respondent's arrests and subsequent disciplinary actions were having on his medical license, as well as for general life problems. (N.T. 133)

Dr. Reubins concluded that he did not see in Respondent what Dr. Voskanian did and that if, indeed Dr. Voskanian's conclusions were correct, there would have been boundary violations and patients complaining and there are none. (N.T. 138-139) Dr. Reubins testified that he disagreed with Dr. Voskanian's "suggested diagnosis" and found no clinical indication of pedophilia and exhibitionism. (N.T. 134) Dr. Reubins also testified that he has seen nothing in Respondent that would evidence that the alleged pathology of pedophilia and exhibitionism has

had a devastating effect on Respondent. (N.T. 136-137) Dr. Reubins noted that the Respondent has been diagnosed with chronic social phobias and anxiety. (N.T. 132, 134, 137)

Dr. Block also testified on behalf of the Respondent. (N.T. 168-189) Dr. Block evaluated Respondent in light of the charges brought against him in this matter and to review the Commonwealth's expert's report. (N.T. 174) Dr. Block also disagreed with Dr. Voskanian's conclusion that the Respondent's actions suggested exhibitionism and pedophilia. (N.T. 175) Dr. Block found no evidence of recurrent, on-going thoughts, fantasies or desires to involve one in the behaviors necessary to justify the conclusion. (N.T. 175)

Also testifying on behalf of the Respondent was Ms. Tracy Mohr, a nurse crisis worker in Stroudsburg, Pennsylvania. (N.T. 190) In that role, her duties include mental health triage. (N.T. 90) Before taking this position, Ms. Mohr worked with Respondent at Salisbury Behavioral Health. (N.T. 191) While at Salisbury, Respondent worked with patients who were over eighteen years of age. (N.T. 192)

Ms. Mohr testified that her opinion of Respondent had not changed as a result of what she heard at the hearing and that she would still refer patients to him as he is an excellent doctor. (N.T. 194) Further, Ms. Mohr testified that her opinion is shared by the community. (N.T. 195) Ms. Mohr noted that the Respondent currently practices in an area where there are minimal psychiatric services available and there is a significant wait for a patient to see a psychiatrist. (N.T. 193) The population of Carbon and Monroe Counties where Respondent practices has grown exponentially and there are only six psychiatrists. (N.T. 193)

Ms. Josephine Martin also testified on behalf of the Respondent. Ms. Martin is an addiction counselor at Pocono Psychiatric Associates in East Stroudsburg, Pennsylvania, where she works with the Respondent. (N.T. 197-198) She testified that she has heard no patient

complaints about Respondent. (N.T. 199) Ms. Martin also testified that nothing she had heard at the hearing changed her opinion of Respondent. (N.T. 199) Ms. Martin also testified that there are few psychiatrists in the Stroudsburg area and the population continues to grow. (N.T. 200)

At the outset, it should be noted that prior to this matter the Respondent has previously been before the Board and the hearing examiner has taken judicial notice of the prior proceeding and the findings of fact set forth therein, which were alluded to at numerous points in the instant proceeding. Specifically, in November 2006 Respondent submitted an Application for a License to Practice Medicine Without Restriction to the Board. (Exhibits C-1 and C-2) On January 23, 2007, the Board notified Respondent that the Board had provisionally denied his application based on attached documents indicating (1) that his license in New York had been revoked by the New York Board because of his alleged failure to disclose his affiliation with and dismissal from a psychiatry residency program on two hospital medical staff applications and to a professional liability carrier, and because of his alleged failure to disclose a criminal conviction on his application for a residency program, and (2) that the Massachusetts Board had revoked his license to practice medicine in that state based on the New York Board's revocation action. (Board records; Docket No. 0332-49-07) The Board's January 23, 2007 letter further informed Respondent that its provisional denial was based on sections 22 and 41 of the Act, §§ 422.22 and 422.41, respectively, the first of which provides that the Board shall not issue a license to an Respondent unless the Respondent establishes that, among other things, he or she is of good moral character, § 22(b), 63 P.S. § 422.22(b), and the latter of which authorizes the Board to refuse a license to an Respondent who has had a license revoked, suspended or otherwise disciplined by the licensing authority of another state, § 41(4), 63 P.S. § 422.41(4), or who has been found guilty of immoral or unprofessional conduct, § 41(8), 63 P.S. § 422.41(8).

Respondent timely appealed the Board's provisional denial and requested a hearing. (Board records; Docket No. 0332-49-07)

On October 12, 2007 Respondent appeared at the hearing regarding his application and was represented by counsel and where Dr. Reubins testified on his behalf. (Board records; Docket No. 0332-49-07) In a Proposed Adjudication and Order of November 2, 2007 the hearing examiner found that the Respondent should be granted a license by this Board, subject to five years probation. (Board records; Docket No. 0332-49-07)

On December 21, 2007, the Board adopted the hearing examiner's Proposed Adjudication and Order under which the Respondent's application to practice medicine in Pennsylvania was approved, subject to a probationary status for a period of five (5) years subject to specific terms and conditions. (Board records; Docket No. 0332-49-07; Exhibits C-1 and C-2) The Respondent's probationary terms and conditions included a requirement that Respondent complete a Board-approved clinical skills evaluation and remediation program. (Board records; Docket No. 0332-49-07; Exhibits C-1 and C-2)

The evaluation and remediation for Respondent completed by the Center for Personalized Education for Physicians in Denver, CO, found Respondent's weaknesses to include: In-depth understanding of the reasons behind patient-generated pressure regarding boundary violations. (Exhibits C-1 and C-2) Subsequently, on September 2, 2008, the Board issued an Order vacating Respondent's probation. (Board records; Docket No. 0332-49-07; Exhibits C-1 and C-2)

Throughout the instant proceedings, the Respondent's prior conduct, disciplinary history outside of Pennsylvania, employment history, and background were also mentioned, which were also set forth in great detail in the Board's prior decision reinstating the Respondent's license.



This information included the fact that the Respondent obtained his M.D. from the University of Connecticut School of Medicine in May of 1997. (Board records; Docket No. 0332-49-07)

Respondent also earned a master's degree in psychology from Central Connecticut State University. (Board records; Docket No. 0332-49-07)

Respondent was initially licensed to practice medicine in the State of New York in 1999. (Exhibits C-1 and C-6) On June 30, 2001, Respondent completed a four-year combined internship and residency at Long Island Jewish Medical Center and Hillside Hospital, the affiliated psychiatric hospital, which are now known collectively as the North Shore Long Island Jewish Health System due to a merger. (Board records; Docket No. 0332-49-07) Respondent was initially licensed to practice medicine in the Commonwealth of Massachusetts in July 2001. (Exhibit C-1 and C-6)

On July 1, 2001, Respondent began a residency in child and adolescent psychiatry at Cambridge Health Alliance (CHA) in Massachusetts, where Respondent worked with adolescent inpatients. (Exhibits C-1, C-6 and C-7) On July 8, 2001, Respondent was arrested in Norwood, Massachusetts, and charged with open and gross lewdness, a felony in Massachusetts, as well as with disorderly conduct at Criminal Docket #0157CR001822. (Exhibits C-1 and C-6) The criminal charges were based on allegations of two males in their twenties who stated that Respondent had exposed his genitals and been masturbating in his car in the parking lot of a donut shop parking lot in Walpole, MA. (Exhibits C-1 and C-7)

On August 1, 2001, Respondent was terminated from the CHA child and adolescent psychiatry residency due to his arrest on July 8, 2001. (Exhibit C-1, C-6, and C-7) The disorderly conduct charge was dismissed at the request of the Commonwealth of Massachusetts. (Board records; Docket No. 0332-49-07) Under the Massachusetts Rules of Criminal Procedure, a

defendant may plead not guilty, but admit to sufficient facts to warrant a finding of guilty.

Official Notice of Mass. Ann. Laws R. Crim. P. Rule 12(a)(2) (2007). (Board records; Docket No. 0332-49-07)

On June 3, 2002 Respondent pled "not guilty" to the charge of open and gross lewdness but admitted sufficient facts, accepted after colloquy to warrant a finding of guilty, but the matter was continued for one year without a finding, and the open and gross lewdness count eventually was dismissed on June 3, 2003. (Board records; Docket No. 0332-49-07)

On November 13, 2001, Respondent was arrested in Falmouth, MA, and charged with open and gross lewdness, a felony in Massachusetts, and indecent exposure at Criminal Docket #0189CR002580. (Exhibits C-1, C-6 and C-7) The charges were based on allegations by two boys, ages 10 and 12, who lived across the street from Respondent and who alleged that they could see a man standing nude and masturbating in the front window of the home of Respondent's mother. (Exhibits C-1, C-6 and C-7; See Opinion of Massachusetts Supreme Judicial Court in *Commonwealth v. Michael Kessler*, 442 Mass. 770, 817 N.E.2d 711 (2004)).

Respondent stood trial on the charges at Criminal Docket #0189CR002580 on June 2, 2002, and was convicted of open and gross lewdness; the judge dismissed the indecent exposure count as a lesser included offense of the open and gross lewdness count. (See Opinion of Massachusetts Supreme Judicial Court in *Commonwealth v. Michael Kessler*, 442 Mass. 770, 817 N.E.2d 711 (2004) Respondent appealed and the Massachusetts Supreme Judicial Court overturned the conviction in an opinion filed November 12, 2004, reversing the judgment of the District Court, setting aside the guilty verdict, and acquitting Respondent of the charge of open and gross lewdness; the indecent exposure count, which the judge had dismissed during the trial, was not reinstated. (See Opinion of Massachusetts Supreme Judicial Court in *Commonwealth v.*

*Michael Kessler*, 442 Mass. 770, 817 N.E.2d 711 (2004) After CHA terminated Respondent from its employment in August 2001, Respondent was unable to find employment in Massachusetts. (Board records; Docket No. 0332-49-07)

Because of his inability to find any kind of work in Massachusetts, Respondent returned to New York, where, within a week of his return, he found employment at Brunswick Hospital Center located in Amityville, New York. (Board records; Docket No. 0332-49-07) Respondent started full time employment at Brunswick Hospital Center on December 1, 2001. (Board records; Docket No. 0332-49-07) However, when Respondent filled out the employment application for Brunswick Hospital Center, he did not include his month of employment with CHA, during July 2001, in the space in which the employment application asked about every hospital where he had ever had privileges. (Board records; Docket No. 0332-49-07)

After returning to New York, Respondent also filled out an employment application for Holliswood Hospital, and in response to the directive to list every place that he had had privileges, he again omitted his employment with CHA. (Board records; Docket No. 0332-49-07) As a part of securing employment at Brunswick Hospital Center, Respondent had to fill out an application so that he could be added to the employer's group malpractice insurance policy. (Board records; Docket No. 0332-49-07) The malpractice insurance application included a question that asked if Respondent had ever been arrested for a felony. (Board records; Docket No. 0332-49-07) Respondent answered that question by stating "no," although he knew, at the time, that what he had been arrested for in July 2001 was a felony in Massachusetts. (Board records; Docket No. 0332-49-07)

In approximately October 2002, Respondent received the renewal for his license to practice medicine in New York. (Board records; Docket No. 0332-49-07) The renewal

application asked whether Respondent had ever been disciplined by a hospital, as well as whether Respondent had been arrested for a felony or a misdemeanor, and Respondent answered both questions truthfully, in the affirmative. (Board records; Docket No. 0332-49-07)

On December 13, 2002, the New York State Board for Professional Medical Conduct (New York Board) issued a Statement of Charges against Respondent, charging him with (1) having been terminated from CHA; (2) lying about that termination on his application to Brunswick Hospital Center; (3) lying about the termination on his application to Holliswood Hospital; (4) lying on his application for medical malpractice insurance about having been the subject of an investigation or disciplinary proceeding by a governmental agency, professional society or professional review board of a hospital and about having been charged with a felony; and (5) being found guilty of gross lewdness and lascivious behavior in Falmouth District Court. (Board records; Docket No. 0332-49-07; See In the Matter of Michael N. Kessler, M.D., CO-02-10-05389-A, Statement of Charges) At a hearing held on January 22, 2003, which Respondent attended, the New York Board heard testimony at the formal hearing from Fredrick S. Berlin, M.D., Ph.D, founder of the Johns Hopkins Sexual Disorders Clinic in Baltimore, Maryland. (Exhibits C-1, C-6 and C-7) At the request of Respondent, Dr. Berlin had examined Respondent shortly before the January 22, 2003 hearing. (Exhibits C-1, C-6 and C-7) Dr. Berlin testified, based on his knowledge of the evidence available to him, of his concern that Respondent had a sexual disorder characterized by exhibitionism and an urge to be seen masturbating by young males. (Exhibits C-1, C-6 and C-7) Dr. Berlin testified that Respondent was not being adequately treated at that time for the sexual disorder. (Exhibits C-1 and C-6)

Marc S. Reubins, M.D. and Seymour H. Block, D.O. also testified for Respondent at the formal hearing before the New York Board. (Exhibits C-1, C-6, and C-7) Dr. Reubins testified

as Respondent's treating psychiatrist that Respondent has a dysthymic disorder characterized by anxiety and depression. (Exhibits C-1 and C-6) Dr. Block is a physician licensed in New York and Florida, is a board certified psychiatrist, and testified that he performed a forensic examination of Respondent and that Respondent has an anxiety condition. (Exhibits C-1 and C-6; N.T. 168-169) The New York Board found that the testimony of Drs. Reubins and Block was based in large part upon information provided by Respondent as to the nature of the conduct that led to Respondent's criminal arrests. (Exhibits C-1 and C-6) The New York Board found Dr. Berlin's testimony to be the most convincing of any of the psychiatric witnesses at the January 22, 2003 hearing. (Exhibits C-1 and C-6)

On February 13, 2003, the New York Board issued a Determination and Order in which the Board sustained all of the specifications alleged in the Statement of Charges, except the allegation that Respondent lied on his application for medical malpractice insurance about having been the subject of an investigation or disciplinary proceeding by a governmental agency, professional society or professional review board of a hospital, which was not supported. Based upon these findings the New York Board determined in part that Respondent's actions constituted the fraudulent practice of the profession, moral unfitness to practice medicine, the willful making or filing of a false report, and conviction of an act in another state which would, if committed in New York, be a crime. (Board records; Docket No. 0332-49-07) Pursuant to its Determination and Order of February 13, 2003 the New York Board revoked Respondent's license to practice medicine in the State of New York. (Exhibit C-1, C-6 and C-7) At the time of the New York Board's decision, Respondent's conviction on the November 13, 2001 arrest in Falmouth had not yet been overturned by the Massachusetts Supreme Judicial Court. The New York Board did not set forth any specifications or make any findings related to the July 2001

arrest. (Exhibit C-1; See In the Matter of Michael N. Kessler, M.D., CO-02-10-05389-A, Statement of Charges).

After the New York Board's revocation of his license in 2003, Respondent obtained a license as a life, accident and health insurance broker in New York and began working in the insurance field, which led to his current ownership of his own insurance agency, K & L Agency. (Board records; Docket No. 0332-49-07) Respondent also obtained licenses as a life, accident and health insurance broker in Connecticut, New Jersey and Pennsylvania. (Board records; Docket No. 0332-49-07) Respondent has never had discipline against his insurance licenses in any state. Respondent was employed with Aram Health and Disease Management of New Jersey, a firm that works on disease management in order to minimize increases in the cost of health insurance. (Board records; Docket No. 0332-49-07) Additionally, Respondent was associated with 123College.com, representing Long Island, Nassau and Suffolk, providing free seminars once a month during the school year to parents and high school students, instructing them as to methods to maximize the financial aid the students can obtain for college. (Board records; Docket No. 0332-49-07) Respondent was also certified by the Internal Revenue Service as a federal income tax preparer and he prepares both state and federal income tax returns for individuals and small businesses. (Board records; Docket No. 0332-49-07) Respondent had not renewed his license to practice medicine in Massachusetts after its initial issuance in July 2001 because at the time for renewal in December 2001, he had already returned to New York and did not plan to return to Massachusetts to work. (Board records; Docket No. 0332-49-07) Because he did not renew his license in Massachusetts, after the expiration date, Respondent's license there was labeled "revoked," although it was not a disciplinary action and he was considered to have an inchoate right to renew. (Board records; Docket No. 0332-49-07)

On September 2, 2003, the Massachusetts Board initiated a disciplinary action against Respondent's Massachusetts license based on allegations that Respondent (1) had exposed himself in a parking lot in Walpole, Massachusetts; (2) had been criminally convicted in Falmouth District Court for standing nude in a window exposing himself in front of children; (3) had his New York license revoked for providing false information on two applications for hospital privileges and on an application for professional liability insurance; and (4) had been convicted of open and gross lewdness. (Board records; Docket No. 0332-49-07; Exhibit C-1; See Commonwealth of Massachusetts Board of Registration in Medicine, In the Matter of Michael N. Keller, M.D., Adjudicatory Case No. 03-22-DALA). On the advice of an attorney, Respondent did not attend any hearings related to the action against his license before the Massachusetts Board. (Board records; Docket No. 0332-49-07) On July 26, 2006, the Massachusetts Board issued a Final Decision and Order which acknowledged that the Massachusetts Supreme Judicial Court had overturned Respondent's conviction and found that Respondent had engaged in conduct undermining the public confidence in the integrity of the medical profession and lacked good moral character, had engaged in conduct which placed into question his ability to practice medicine, and had been disciplined by another state for conduct substantially similar to conduct which has the capacity to deceive or defraud; as a result, the Massachusetts Board revoked Respondent's inchoate right to renew his license to practice medicine in Massachusetts. ((Board records; Docket No. 0332-49-07; Exhibit C-1; See Commonwealth of Massachusetts Board of Registration in Medicine, In the Matter of Michael N. Keller, M.D., Final Decision and Order, Adjudicatory Case No. 03-22-DALA (RM-03-662) The Massachusetts Board determined that Respondent's actions leading to his 2001 arrests were sexually exploitative in nature. (Exhibits C-1 and C-6) Furthermore, the Massachusetts Board

held that Respondent's sexually exploitative conduct calls into question his ability to practice medicine. (Exhibits C-1 and C-6)

The Board's prior reinstatement decision also found that in September 2007, Respondent married a woman whom he met during their residency, who is a psychiatrist. (Board records; Docket No. 0332-49-07; N.T. 34) Respondent has a lifelong anxiety disorder that has been very successfully treated with therapy. (Board records; Docket No. 0332-49-07) Respondent was in therapy throughout his residency, which he found helpful. (Board records; Docket No. 0332-49-07)

After a review of the evidence presented at hearing, placed in the context of the Respondent's disciplinary history and his interactions with the criminal justice system, the hearing examiner finds that that the Respondent is subject to disciplinary action under Section 41(5) of the Act, 63 P.S. §422.41(5) in that Respondent is unable to practice medicine with reasonable skill and safety to patients by reason of illness, absent monitoring and probation. The hearing examiner notes that the Commonwealth's expert, Dr. Voskanian in his expert report and testimony concluded that his examination of Respondent suggested pedophilia and exhibitionism, but not a diagnosis. The Respondent's expert, Dr. Reubins, while not accepting such a conclusion, did agree that the Respondent suffered from chronic social phobia and anxiety. (N.T. 132-137) Regardless of the lack of a diagnosis or an agreement among the experts, the hearing examiner finds that the mental state of the Respondent is such that it manifests itself in inappropriate behavior. Even Dr. Reubins, who had treated Respondent on a regular basis since 2002 opined that he was concerned that the Respondent placed himself in positions or situations that, while not constituting pedophilia or exhibitionism, called attention to the Respondent. (N.T. 153-154) Such behavior, while not occurring in a practice situation, calls



into question the Respondent's ability to practice the profession with reasonable skill and safety to patients. This was the conclusion reached by Dr. Voskanian, which is adopted by the hearing examiner.

However, the hearing examiner is mindful that the Respondent's actions to date have not taken place in a practice setting, nor have they involved contact with others. In fact, during the period of July 2009 through May 2011, when Respondent was employed as Associate Medical Director for a school-based partial hospitalization program for Colonial Intermediate Unit 20 in Northampton and Monroe Counties, Pennsylvania, when his employment responsibilities for the period of July 2009 through May 2011 included traveling to schools to provide psychiatric services to children with various mental illnesses and providing psychiatric services to children with schizophrenia, depression, anxiety, and adjustment disorders due to problems at home treating children approximately sixteen (16) hours per week in school-based settings, there is no indication that the Respondent engaged in inappropriate behavior. (Exhibit C-7; N.T. 84)

Similarly, from 2010 and until it closed in March 2011, when Respondent was employed at Shawnee Academy in Shawnee-on-Delaware, PA, which was a residential treatment facility for children with severe mental illnesses, where he covered for the staff psychiatrist by responding to phone calls from Academy staff, there is no record of any complaints having been filed against the Respondent. (Exhibit C-7; N.T. 89)

The hearing examiner notes that the Respondent is currently employed as a psychiatrist at Pocono Psychiatric Associates in East Stroudsburg, PA. (Exhibit C-7; N.T. 82) In this position, Respondent treats individuals of all ages, currently treating mostly adults but also two adolescent patients in his practice. (N.T. 91-93)

In the Board's prior decision reinstating the Respondent's license, the Board stated that a preponderance of the evidence demonstrate that the Respondent has rehabilitated himself and has grown into sufficient moral character to warrant licensure in the Commonwealth. The hearing examiner finds that the Respondent's recent conduct in New Jersey, and having pleaded guilty thereto, calls into question his ability to practice with reasonable skill and safety to patients. In light of this, the hearing examiner finds that Respondent is should not be permitted to practice medicine within the Commonwealth absent monitoring and probation for a period of at least five years. In fashioning the terms of probation and monitoring, the hearing examiner notes the conclusions expressed by the Commonwealth's expert and the concerns expressed by the Respondent's experts. Since the Respondent's conduct, which has led to him being charged criminally, while taking place outside of the practice of the profession, was witnessed by under age children, the hearing examiner also finds that during this period of probation the Respondent shall not treat individuals under the age of eighteen unless another adult is present in the treatment area where the Respondent is within the sight of the adult.

Accordingly, based upon the foregoing findings of fact, conclusions of law and discussion, the following Order shall issue:

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF STATE  
BEFORE THE STATE BOARD OF MEDICINE

Commonwealth of Pennsylvania  
Bureau of Professional and  
Occupational Affairs

v.

Michael N. Kessler, M.D.,  
Respondent

Docket No. 0834-49-11  
File No. 10-49-09874

ORDER

AND NOW, this 10th day of April 2012, in accordance with the foregoing findings of fact, conclusions of law and discussion, it is **ORDERED** that the license to practice medicine and surgery of Michael N. Kessler, M.D. (Respondent), License No. MD435080 shall be placed on a **PROBATIONARY STATUS** for a period of **FIVE (5) YEARS**, subject to the following terms and conditions:

GENERAL

1. Respondent shall abide by and obey all laws of the United States, the Commonwealth of Pennsylvania and its political subdivisions and all rules and regulations and laws pertaining to the practice of the profession in this Commonwealth or any other state or jurisdiction in which Respondent holds a license to practice the profession. Summary traffic violations shall not constitute a violation of this Order.

2. Respondent shall at all times cooperate with the Bureau of Professional and Occupational Affairs and its agents and employees in the monitoring, supervision and investigation of Respondent's compliance with the

terms and conditions of this Order, including requests for, and causing to be submitted at Respondent's expense, written reports, records and verifications of actions that may be required by the Bureau of Professional and Occupational Affairs.

3. Respondent shall not falsify, misrepresent or make material omission of any information submitted pursuant to this Order.

4. Respondent shall notify the Bureau of Professional and Occupational Affairs, in writing, within five (5) days of the filing of any criminal charges against Respondent, the initiation of any legal action pertaining to Respondent's practice of the profession, the initiation, action, restriction or limitation relating to Respondent by a professional licensing authority of any state or jurisdiction or the Drug Enforcement Agency of the United States Department of Justice, or any other investigation, action, restriction or limitation relating to Respondent's privileges to practice the profession.

5. Respondent shall notify the Bureau of Professional and Occupational Affairs by telephone within 48 hours and in writing within five (5) days of any change of Respondent's home address, phone number, employment status, employer and/or change in practice.

6. Respondent shall not treat individuals under the age of eighteen unless another adult is present in the treatment area where the Respondent is within the sight of the adult.

#### **VIOLATION OF THIS ORDER**

7. Notification of a violation of the terms or conditions of this Order

shall result in the **IMMEDIATE TERMINATION** of the period of probation and the **SUSPENSION** of Respondent's license(s) to practice the profession in the Commonwealth of Pennsylvania as follows:

a. The prosecuting attorney for the Commonwealth shall present to the Board's Probable Cause Screening Committee ("Committee") a Petition that indicates that Respondent has violated any terms or conditions of this Order.

b. Upon a probable cause determination by the Committee that Respondent has violated any of the terms or conditions of this Order, the Committee shall, without holding a formal hearing, issue a preliminary order terminating this probation and suspending Respondent's license.

c. Respondent shall be notified of the Committee's preliminary order within three (3) business days of its issuance by certified mail and first class mail, postage prepaid, sent to the Respondent's last registered address on file with the Board, or by personal service if necessary.

d. Within twenty (20) days of mailing of the preliminary order, Respondent may submit a written answer to the Commonwealth's Petition and request that a formal hearing be held concerning Respondent's violation of probation, in which Respondent may seek relief from the preliminary order suspending his license. Respondent shall mail the original answer and request for hearing, as well as all subsequent filings in the matter, to the Bureau of Professional and Occupational Affairs'

Prothonotary, 2601 N. Third Street, Harrisburg, PA 17110, and a copy to the prosecuting attorney for the Commonwealth.

e. If the Respondent submits a timely answer and request for a formal hearing, the Board or a designated hearing examiner shall convene a formal hearing within forty-five (45) days from the date of the Prothonotary's receipt of Respondent's request for a formal hearing.

f. Respondent's submission of a timely answer and request for a hearing **shall not stay the suspension** of Respondent's license under the preliminary order. The suspension shall remain in effect unless the Board or the hearing examiner issues an order after the formal hearing staying the suspension and reactivating the probation.

g. The facts and averments in this Order shall be deemed admitted and uncontested at this hearing.

h. If the Board or hearing examiner after the formal hearing makes a determination against Respondent, a final order will be issued sustaining the suspension of Respondent's license and imposing any additional disciplinary measures deemed appropriate.

i. If Respondent fails to timely file an answer and request for a hearing, the Board, upon motion of the prosecuting attorney, shall issue a final order affirming the suspension of Respondent's license.

j. If Respondent does not make a timely answer and request for a formal hearing and a final order affirming the suspension is issued, or the Board or the hearing examiner makes a determination against

Respondent sustaining the suspension of Respondent's license, after at least 3 years of active suspension and any additional imposed discipline, Respondent may petition the Board for reinstatement upon verification that Respondent has complied with the Board's order, abided by and obeyed all laws of the United States, the Commonwealth of Pennsylvania and its political subdivisions, and all rules and regulations pertaining to the practice of the profession in this Commonwealth.

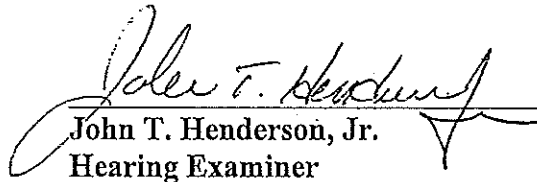
8. Respondent's failure to fully comply with any terms of this Order may also constitute grounds for additional disciplinary action.

9. Nothing in this Order shall preclude the prosecuting attorney for the Commonwealth from filing charges or the Board from imposing disciplinary or corrective measures for violations or facts not contained in this Order.

10. After successful completion of the five-year period of probation, Respondent may petition the Board to issue to Respondent an unrestricted, non-probationary license upon an affirmative showing that Respondent has complied with all terms and conditions of this Order.

The State Board of Medicine has announced its intention to review this Proposed Report in accordance with 1 Pa. Code § 35.226(a)(2).

BY ORDER:

  
John T. Henderson, Jr.  
Hearing Examiner

*For the Commonwealth:*

Keith E. Bashore, Esquire  
COMMONWEALTH OF PENNSYLVANIA  
Department of State Office of Chief Counsel  
P.O. Box 2649  
Harrisburg, PA 17105-2649

*For the Respondent:*

Kathryn L. Simpson, Esquire  
METTE, EVANS & WOODSIDE  
P.O. Box 5950  
Harrisburg, PA 17110-0950

*Date of mailing:* 4/11/12



## NOTICE

### REHEARING AND/OR RECONSIDERATION BY HEARING EXAMINER

A party may file an application to the hearing examiner for rehearing or reconsideration within 15 days of the mailing date of this adjudication and order. The application must be captioned "*Application for Rehearing*", "*Application for Reconsideration*", or "*Application for Rehearing or Reconsideration*". It must state specifically and concisely, in numbered paragraphs, the grounds relied upon in seeking rehearing or reconsideration, including any alleged error in the adjudication. If the adjudication is sought to be vacated, reversed, or modified by reason of matters that have arisen since the hearing and decision, the matters relied upon by the petitioner must be set forth in the application.

### APPEAL TO BOARD

An application to the State Board of Medicine for review of the hearing examiner's adjudication and order must be filed by a party within 20 days of the date of mailing of this adjudication and order. The application must be captioned "*Application for Review*". It must state specifically and concisely, in numbered paragraphs, the grounds relied upon in seeking the Board's review of the hearing examiner's decision, including any alleged error in the adjudication. Within an application for review a party may request that the Board hear additional argument and take additional evidence.

An application to the Board to review the hearing examiner's decision may be filed irrespective of whether an application to the hearing examiner for rehearing or reconsideration is filed.

### STAY OF HEARING EXAMINER'S ORDER

Neither the filing of an application for rehearing and/or reconsideration nor the filing of an application for review operates as a stay of the hearing examiner's order. To seek a stay of the hearing examiner's order, the party must file an application for stay directed to the Board.

### FILING AND SERVICE

An original and three (3) copies of all applications shall be filed with:

Prothonotary  
P.O. Box 2649  
Harrisburg, PA 17105-2649

A copy of all applications must also be served on all parties.

Applications must be received for filing by the Prothonotary within the time limits specified. The date of receipt at the office of Prothonotary, and not the date of deposit in the mail, is determinative. The filing of an application for rehearing and/or reconsideration does not extend, or in any other manner affect, the time period in which an application for review may be filed.

## NOTICE

The attached Adjudication and Order represents the final agency decision in this matter. It may be appealed to the Commonwealth Court of Pennsylvania by the filing of a Petition for Review with that Court within 30 days after the entry of the order in accordance with the Pennsylvania Rules of Appellate Procedure. See Chapter 15 of the Pennsylvania Rules of Appellate Procedure entitled "Judicial Review of Governmental Determinations," Pa. R.A.P 1501 – 1561. Please note: An order is entered on the date it is mailed. If you take an appeal to the Commonwealth Court, you must serve the Board with a copy of your Petition for Review. The agency contact for receiving service of such an appeal is:

Board Counsel  
P.O. Box 2649  
Harrisburg, PA 17105-2649

The name of the individual Board Counsel is identified on the Order page of the Adjudication and Order.

COPY

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF STATE  
BEFORE THE STATE BOARD OF MEDICINE

Commonwealth of Pennsylvania,  
Bureau of Professional and  
Occupational Affairs

v.

Michael N. Kessler, M.D.,  
Respondent

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:  
:  
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:  
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File No. 10-49-09874

Docket No. 0834-49-11

Department of State

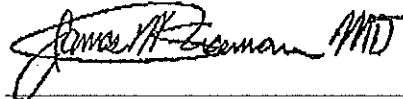
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PROTONOTARY

ORDER CORRECTING FILE NUMBER

AND NOW this 21<sup>st</sup> day of August 2012, upon notification that the file number on the Final Adjudication and Order issued on July 25, 2012, was incorrectly typed as 10-49-09847 rather than 10-49-09874, the State Board of Medicine hereby ORDERS that the file number be corrected to read 10-49-09874 on the Final Adjudication and Order.

BY ORDER:  
STATE BOARD OF MEDICINE



JAMES W. FREEMAN, M.D.,  
CHAIR

Petitioner:

Kathryn L. Simpson, Esquire  
METTE EVANS & WOODSIDE  
P.O. Box 5950  
Harrisburg, PA 17110

Prosecuting Liaison:

Keith E. Bashore, Esquire

Board Counsel:

Teresa Lazo, Counsel

Date of Mailing:

August 21, 2012