STATE OF VERMONT
BOARD OF MEDICAL PRACTICE

In re: Kellie M. Malaney, PA-C	)	Docket No. MPS 133-0819

STIPULATION AND CONSENT ORDER

NOW COME Kellie M. Malaney, PA-C and the State of Vermont, by and through Vermont Attorney General Thomas J. Donovan, Jr., and hereby stipulate and agree to the following in the above-captioned matter:

1. Kellie M. Malaney, PA-C ("Respondent") holds Vermont medical license number 055.0031364 originally issued by the Vermont Board of Medical Practice ("the Board") on November 1, 2017. Respondent is a physician assistant.
2. Jurisdiction in this matter rests with the Board, pursuant to 26 V.S.A. §§ 1353-1357, 3 V.S.A. §§ 809-814, and other authority.

Findings of Fact

3. The Board opened this matter in August of 2019 upon receipt of information concerning Respondent's care provided to patients who were coworkers. The matter was assigned to the South Investigative Committee of the Board ("the Committee").
4. Respondent has practiced medicine as a physician assistant at Lumina Med Spa ("Lumina") in South Burlington, Vermont since April of 2019. Prior to working at Lumina, she worked at Northern Tier Center for Health in St. Albans, Vermont.
5. Respondent has had prior public disciplinary action taken by the Board. In March of 2017, Respondent entered into a Stipulation and Consent Order ("Stipulation") with the Board for writing and filling multiple prescriptions for Scheduled IV controlled

substances in another person's name for her own use. Along with numerous other conditions on her Vermont medical license, the Stipulation resulted in a three-month suspension of Respondent's Vermont medical license and an agreement not to re-apply for her Drug Enforcement Administration license until March of 2018.

6. Respondent entered into a second Stipulation and Consent Order with the Board in November of 2017 for misrepresenting her responses to questions regarding the length of time that she was not engaged in the clinical practice of medicine on her initial, renewal and reinstatement applications for her Vermont medical license. This Stipulation resulted in Respondent receiving a public reprimand and the payment of an administrative penalty.

7. The Committee's current investigation revealed that Respondent was prescribing phentermine to a co-worker ("the Patient") as part of the "medical weight loss" component of her practice at Lumina. Phentermine is a Schedule IV controlled substance. The Committee requested to review the records of Respondent's treatment of the Patient.

8. The Patient's medical records at Lumina were sought via subpoena duces tecum ("subpoena"). On October 15, 2019, Board Investigator Scott Frennier ("Investigator Frennier") went to Lumina and personally served the subpoena for the Patient's records. Investigator Frennier waited three hours at Lumina before being provided with the Patient's medical records.

9. The Patient's medical records indicate that Respondent had office visits with the Patient on June 19, 2019, June 25, 2019, July 23, 2019 and September 6, 2019 for medical weight loss treatment. Phentermine was prescribed to the Patient during the June 19, 2019, July 23, 2019, and September 6, 2019 office visits.

10. Upon inspecting the original copy of the Patient's medical records (which were handwritten records created by Respondent), Investigator Frennier suspected that Respondent may have created portions of the medical record while he was waiting at Lumina.

11. During a subsequent interview with Respondent and her attorney, Investigator Frennier asked Respondent whether she created any of the records for the Patient on October 15, 2019 while he was waiting at Lumina. Respondent responded that her primary supervising physician instructed her to transfer her handwritten records that were in the form of "Progress Notes" to a new handwritten "SOAP" format while he waited. Respondent explained that she created the Progress Notes after the first three office visits. Investigator Frennier further inquired why there was a SOAP note but not a Progress Note for the September 6, 2019 office visit. Respondent explained that she took notes on Post-It notes for the September 6, 2019 office visit and that the Post-It notes were adhered to the inside of the Patient's paper file.

12. Investigator Frennier interviewed Respondent's primary supervising physician, who indicated that she did not instruct Respondent to transfer her handwritten Progress Notes into a new SOAP format on October 15, 2019.

13. Investigator Frennier compared Respondent's Progress Notes and Post-It notes to the SOAP notes for all four office visits. He discovered that the SOAP notes contain significantly more detail than the Progress Notes and the Post-It notes. These substantive differences include:

a. The June 19, 2019, June 25, 2019 and July 23, 2019 SOAP notes contain the Patient's vital signs such as blood pressure, heart rate and respiratory rate. However, the Progress Notes for all three visits do not include these vital signs.

b. Additionally, the SOAP notes include findings from examinations of the Patient's neck, chest and lungs, abdomen, as well as the Patient's cardiovascular, neurological, and psychological systems. The Progress Notes are devoid of most of these findings.

c. The SOAP notes for the June 19, 2019 office visit contain additional information regarding the Patient's history and the Patient's family history of eating disorders or drug/alcohol abuse, which is important information to gather when prescribing Phentermine. The Progress Notes for the June 19, 2019 office visit do not contain the same information regarding the Patient's history.

d. Lastly, the SOAP notes for three of the four office visits indicate that symptoms of primary pulmonary hypertension ("PPH") were discussed with the patient[1]. The Progress Notes for the same three office visit do not indicate whether symptoms of PPH were discussed with the Patient.

14. The Committee determined that the information Respondent added when she created the SOAP notes on October 15, 2019 lacked sufficient reliability to include in the Patient's medical record. The SOAP notes were created between one and four months after the Patient office visits and contained details Respondent was not likely to remember accurately given the passage of time. Moreover, the information in the original Progress

[1] PPH is a serious and frequently fatal disease of the lungs which is a potential, but rare, adverse reaction in individuals taking Phentermine and is included in the black box warning for the medication.

and Post-It notes would have been insufficient to justify Respondent's course of treatment for the patient. The Committee found that it was not plausible that the medical records she subsequently created represented an accurate record of the medical care she provided. Thus, on October 15, 2019, Respondent fabricated medical documentation creating a false record.

Conclusions of Law

15. Unprofessional conduct as described in 26 V.S.A. § 1354 by a licensed physician assistant shall constitute unprofessional conduct per 26 V.S.A. § 1736(a). As such, the definitions of unprofessional conduct found in 26 V.S.A. § 1354 and § 1736 apply to Respondent's conduct as a physician assistant.

16. "Making or filing false professional reports or records…or failing to file the proper professional report or record," and "willfully making and filing and filing false reports or records in his or her practice…" constitutes unprofessional conduct. 26 V.S.A. §§ 1736(b)(1) and 1354(a)(8).

17. Respondent intentionally fabricated the SOAP notes that contained false information not appropriately documented contemporaneously regarding her treatment of the Patient from June 19, 2019 through September 6, 2019. The false information in the Patient's medical records was created five weeks to four months after her treatment of the Patient but was represented as being made contemporaneously. Such actions constitute unprofessional conduct in violation of 26 V.S.A. §§ 1736(b)(1) and 1354(a)(8).

18. "Failure to practice competently by reason of any cause on … multiple occasions constitutes unprofessional conduct." 26 V.S.A. § 1354(b). "[F]ailure to practice

competently includes, as determined by the board...(2) failure to conform to the essential standard of acceptable and prevailing practice." 26 V.S.A. § 1354(b)(2).

19. Creation of medical records from five weeks to four months after a series of several visits with a patient spanning the period, based upon inadequate notes, and only when presented with a request for the records from a Board Investigator, is not in accordance with the essential standard of acceptable and prevailing practice and constitutes unprofessional conduct in violation of 26 V.S.A. § 1354(b)(2).

20. "Failure to comply with provisions of ...state statutes or rules governing the practice of medicine" constitutes unprofessional conduct;" and "failing to comply with provisions of ...state statutes or rules governing the profession;" constitutes unprofessional conduct. 26 V.S.A. §§ 1354(a)(27) and 1736(a)(4).

21. Rule 36.2.2 of the Rules of the Board of Medical Practice provides, "...Professional are prohibited from ...altering...any evidence that is or may be pertinent to a Board investigation."

22. Respondent altered patient medical records that she knew were requested via subpoena by the Board, which is prohibited by Rule 36.2.2 of the Rules of the Board of Medical Practice and constitutes unprofessional conduct in violation of 26 V.S.A. § 1354(a)(27) and 26 V.S.A. § 1736(a)(4).

23. Respondent agrees that the Board may enter as its facts and/or conclusions paragraphs 1 through 22 above, and further agrees that this is an adequate basis for the Board's actions set forth herein. Any representation by Respondent herein is made solely for the purposes set forth in this Stipulation and Consent Order "(Stipulation").

24. Therefore, in the interest of Respondent's desire to fully and finally resolve the matter presently before the Board, she has determined that she shall enter into this Stipulation with the Board. Respondent enters no further admission here, but to resolve this matter without further time, expense and uncertainty; she has concluded that this Stipulation is acceptable and in the best interest of the parties.

25. Respondent acknowledges that she is knowingly and voluntarily entering into this Stipulation with the Board. She acknowledges she has had the advice of counsel regarding this matter and in the review of this Stipulation Respondent is fully satisfied with the legal representation she has received in this matter.

26. Respondent agrees and understands that by executing this Stipulation she is waiving any right to challenge the jurisdiction and continuing jurisdiction of the Board in this matter, to be presented with a specification of charges and evidence, to cross-examine witnesses, and to offer evidence of her own to contest any allegations by the State.

27. The parties agree that upon their execution of this Stipulation, and pursuant to the terms herein, the above-captioned matter shall be administratively closed by the Board. Thereafter, the Board will take no further action as to this matter absent non-compliance with the terms and conditions of this Stipulation by Respondent.

28. This Stipulation is conditioned upon its acceptance by the Board. If the Board rejects any part of this document, the entire Stipulation shall be considered void. Respondent agrees that if the Board does not accept this Stipulation in its current form, she shall not assert in any subsequent proceeding any claim of prejudice from any such prior consideration. If the Board rejects any part of this Stipulation, none of its terms shall bind Respondent or constitute an admission of any of the facts of the alleged misconduct, it shall not be used

against Respondent in any way, it shall be kept in strict confidence, and it shall be without prejudice to any future disciplinary proceeding and the Board's final determination of any charge against Respondent.

29. Respondent acknowledges and understands that this Stipulation shall be a matter of public record, shall be entered in her permanent Board file, shall constitute an enforceable legal agreement, and may and shall be reported to other licensing authorities either directly or through medical licensing information sharing centers, including but not limited to: the Federation of State Medical Boards Board Action Databank and the National Practitioner Data Bank. In exchange for the actions by the Board, as set forth herein, Respondent expressly agrees to be bound by all terms and conditions of this Stipulation.

30. The parties therefore jointly agree that should the terms and conditions of this Stipulation be deemed acceptable by the Board it may enter an order implementing the terms and conditions herein.

ORDER

WHEREFORE, based on the foregoing, and the consent of Respondent, it is hereby ORDERED that:

1. Respondent shall be reprimanded for the conduct set forth above.
2. Respondent shall pay an administrative penalty of $3,000.00 consistent with 26 V.S.A. § 1361(b). Payment shall be made to the "State of Vermont Board of Medical Practice," and shall be sent to the Vermont Board of Medical Practice office, at the following address: David Herlihy, Executive Director, Vermont Board of Medical Practice, P.O. Box 70, Burlington VT 05402-0070. The payment shall be due no later than 12 months after this Stipulation and Consent Order is approved by the Board. Respondent shall make monthly payments of $250.00. The first monthly installment of $250.00 shall be due one month after this Stipulation and Consent Order is approved by the Board.
3. No later than one year from the date of approval of this Stipulation and Consent Order, Respondent shall have successfully completed AMA PRA Category 1 continuing medical education ("CME") courses on the topics of medical recordkeeping and medical ethics, boundaries and professionalism. Each CME course shall be at least 15 hours of CME credit. Respondent shall seek prior approval, in writing, from the Committee for each CME course. Upon successful completion of each CME course, she shall provide the Committee with proof of attendance. Respondent shall also provide the Committee with brief written narratives of each CME course which will document what she learned from the course, and how she will apply that knowledge to her practice. Respondent shall

provide each proof of attendance and written narrative to the Committee within 30 days of completion of each course. Respondent shall be solely responsible for all costs associated with the CME courses.

4. Respondent shall immediately notify her current and future employers, as well as her Board ordered practice monitor, of the contents of this Stipulation by providing a copy of said document to her employer and practice monitor. This condition shall remain in effect until August 1, 2021.

SIGNATURES

DATED at Montpelier, Vermont, this _____ day of _____, 2020.

STATE OF VERMONT

THOMAS J. DONOVAN, JR
ATTORNEY GENERAL

By: E-SIGNED by Kassandra Diederich on 2020-06-29 09:41:00 EDT

Kassandra P. Diederich
Assistant Attorney General
Office of the Attorney General
109 State Street
Montpelier, VT 05609-1001

DATED at S. Burlington, Vermont, this 26 day of June, 2020.

Kellie Michelle Malaney PA-C
Respondent

DATED at South Burlington, Vermont, this 26 day of June, 2020.

Matthew M. Shagam, Esquire
Counsel for Respondent
Rich Cassidy Law, P.C.
1233 Shelburne Road
Suite D5
South Burlington, VT 05403

AS TO KELLIE M. MALANEY, PA-C

APPROVED AND ORDERED
VERMONT BOARD OF MEDICAL PRACTICE

Signed on Behalf of the Vermont Board of Medical Practice

By: R A Bernstein
Richard Bernstein, MD
Chair
Vermont Board of Medical Practice

Vote documented in the Vermont Board of Medical Practice meeting minutes, dated July 1, 2020.

Dated: 7/5/20