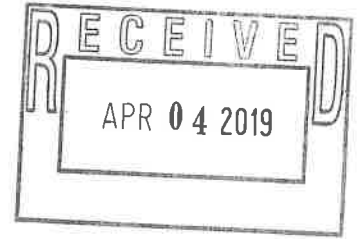


**State of New Hampshire
Board of Medicine
Concord, New Hampshire 03301**



In the Matter of:
Mathurin M. Malby, M.D.
License No.: 13049
(Misconduct Allegations)

SETTLEMENT AGREEMENT

In order to avoid the delay and expense of further proceedings and to promote the best interests of the public and the practice of medicine, the New Hampshire Board of Medicine (“Board”) and Mathurin M. Malby, M.D. (“Respondent”), a physician licensed by the Board, do hereby stipulate and agree to resolve certain allegations of professional misconduct now pending before the Board according to the following terms and conditions:

1. Pursuant to RSA 329:17, I; RSA 329:18; RSA 329:18-a; and Medical Administrative Rule (“Med”) 206 and 210, the Board has jurisdiction to investigate and adjudicate allegations of professional misconduct committed by physicians. Pursuant to RSA 329:18-a, III, the Board may, at any time, dispose of such allegations by settlement and without commencing a disciplinary hearing.
2. The Board first granted Respondent a license to practice medicine in the State of New Hampshire on April 5, 2006. Respondent holds license number 13049. Respondent practices in Rochester, New Hampshire.
3. On or about July 29, 2016, the Board was advised by Strafford Superior Court that Respondent had been named as a defendant in a civil action which alleged that he was negligent in the care of a fourteen year old girl (“Patient”) on or about August 7, 2013 in the Emergency Department (“ED”) of Frisbie Hospital in Rochester, NH.

4. In response to this, the Board conducted an investigation and obtained information from various sources pertaining to the allegations made against Respondent regarding the allegedly negligent treatment.
5. Respondent stipulates that if a disciplinary hearing were to take place, Hearing Counsel would present evidence seeking to prove that Respondent engaged in professional misconduct, in violation of RSA 329:17, VI (c) and/or (d), by the following facts:
 - A. On July 23, 2013, Patient was diagnosed with mononucleosis at a walk-in center.
 - B. On July 27, 2013, Patient presented in the ED with complaints of sore throat and trouble swallowing. She did not have a fever and denied any nausea or vomiting. Another emergency physician treated her with intravenous fluids and Toradol, which relieved her sore throat, and she was discharged with a continued diagnosis of mononucleosis and a prescription for prednisone.
 - C. Patient returned to the ED on August 7, 2013, at approximately 5:52 a.m., and was treated by Respondent. Patient presented with a severe headache at the back and left side of her head, an earache, a fever of 104 degrees, a pulse of 165, and vomiting for the last two days. Patient had no sore throat. Her neurological exam was normal. Respondent ordered a CBC, but did not order a CT, LP, or any other testing to rule out other infectious/bacterial diseases. Patient was noted to have left otitis media and cervical lymphadenopathy, but no obvious meningeal signs. Respondent ordered IV fluids, Zofran, Tylenol, and Auralgan eardrops. Respondent then signed Patient out to another

emergency physician. The second physician ordered her discharge at 9:26 a.m., by which time Patient's vital signs had normalized.

D. On August 8, 2013, when Patient had not improved, her father took her to the ED of a different hospital, where a blood culture was ordered after persistent vomiting despite IV fluids and anti-nausea medication. When her symptoms did not improve, she was admitted, and CT/LP procedures were performed the next day. Patient's symptoms continued to worsen, and she developed new neurological symptoms. On August 10, she was transferred to a Boston hospital, where she was diagnosed with sinusitis, left otitis media, cavernous sinus thrombosis, right orbital cellulitis, skull base osteomyelitis, neck cellulitis/myositis, and bilateral abducens nerve dysfunction. Her blood cultures were positive for fusobacterium necrophorum.

6. The Board finds that Respondent committed the acts as described above and concludes that, by engaging in such conduct, Respondent violated RSA 329:17, VI (c) and/or (d).
7. Respondent acknowledges that this conduct constitutes grounds for the Board to impose disciplinary sanctions against Respondent's license to practice as a physician in the State of New Hampshire.
8. Respondent consents to the Board imposing the following discipline, pursuant to RSA 329:17, VII:
 - A. Respondent is **reprimanded**.
 - B. Respondent is assessed an **administrative fine** in the amount of \$1,000. Respondent shall pay this fine in full within thirty (30) days of the effective

date of this *Settlement Agreement*, as defined further below, by delivering a money order or bank check, made payable to “Treasurer, State of New Hampshire,” to the Board’s office at 121 South Fruit Street, Concord, New Hampshire.

- C. Normally, the Board would require Respondent to meaningfully participate in and complete **six (6) hours of continuing medical education** in the area of identifying and treating infectious diseases. However, Respondent has already voluntarily completed eight (8) hours of continuing medical education in this area prior to the final negotiation of this *Settlement Agreement*. Respondent has provided written proof of completion of these hours. Therefore this condition is deemed satisfied. However, the hours already completed shall be in addition to the hours required by the Board for renewal of licensure.
- D. Within ten (10) days of the effective date of this agreement, as defined further below, Respondent shall furnish a copy of the *Settlement Agreement* to any current employer for whom Respondent performs services as a physician or work which requires a medical degree and/or medical license or directly or indirectly involves patient care, and to any agency or authority which licenses, certifies or credentials physicians, with which Respondent is presently affiliated.
- E. For a continuing period of one (1) year from the effective date of this agreement, Respondent shall furnish a copy of this *Settlement Agreement* to any employer to which Respondent may apply for work as a physician or for work in any capacity which requires a medical degree and/or medical license


or directly or indirectly involves patient care, and to any agency or authority that licenses, certifies or credentials physicians, to which Respondent may apply for any such professional privileges or recognition.

9. Respondent's breach of any terms or conditions of this *Settlement Agreement* shall constitute unprofessional conduct pursuant to RSA 329:17, VI (d), and a separate and sufficient basis for further disciplinary action by the Board.
10. Except as provided herein, this *Settlement Agreement* shall bar the commencement of further disciplinary action by the Board based upon the misconduct described above. However, the Board may consider the fact that discipline was imposed by this Order as a factor in determining appropriate discipline should any further misconduct be proven against Respondent in the future.
11. This *Settlement Agreement* shall become a permanent part of Respondent's file, which is maintained by the Board as a public document.
12. Respondent voluntarily enters into and signs this *Settlement Agreement* and states that no promises or representations have been made to him other than those terms and conditions expressly stated herein.
13. The Board agrees that in return for Respondent executing this *Settlement Agreement*, the Board will not proceed with the formal adjudicatory process based upon the facts described herein.
14. Respondent understands that his action in entering into this *Settlement Agreement* is a final act and not subject to reconsideration or judicial review or appeal.
15. Respondent has had the opportunity to seek and obtain the advice of an attorney of his choosing in connection with his decision to enter into this agreement.

16. Respondent understands that the Board must review and accept the terms of this *Settlement Agreement*. If the Board rejects any portion, the entire *Settlement Agreement* shall be null and void. Respondent specifically waives any claims that any disclosures made to the Board during its review of this *Settlement Agreement* have prejudiced his right to a fair and impartial hearing in the future if this *Settlement Agreement* is not accepted by the Board.
17. Respondent is not under the influence of any drugs or alcohol at the time he signs this *Settlement Agreement*, and further agrees that he has not been subject to any coercion, duress, or improper influence by anyone in connection with his decision to enter into this agreement.
18. Respondent certifies that he has read this document titled *Settlement Agreement*. Respondent understands that he has the right to a formal adjudicatory hearing concerning this matter and that at said hearing he would possess the rights to confront and cross-examine witnesses, to call witnesses, to present evidence, to testify on his own behalf, to contest the allegations, to present oral argument, and to appeal to the courts. Further, Respondent fully understands the nature, qualities and dimensions of these rights. Respondent understands that by signing this *Settlement Agreement*, he waives these rights as they pertain to the misconduct described herein.
19. This *Settlement Agreement* shall take effect as an Order of the Board on the date it is signed by an authorized representative of the Board.

FOR RESPONDENT

Date: 3/25/2019



Mathurin M. Malby, M.D.
Respondent

Date: 3/28/19



Gregory G. Peters, Esq.
Counsel for Respondent

FOR THE BOARD*

This proceeding is hereby terminated in accordance with the binding terms and conditions set forth above.

Date: April 11, 2019



(Signature)

PENNY TAYLOR

(Print or Type Name)
Authorized Representative of the
New Hampshire Board of Medicine

* David Conway, MD & Nina Gardner, Board member(s), recused