

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF)
MEDICINE,)
)
Petitioner,)
)
vs.) Case No. 06-0184PL
)
DAVID ANDREW NICKER, M.D.,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a final hearing was held in this case on March 13 and 14, 2006, in Tampa, Florida, before Susan B. Harrell, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Ephraim D. Livingston, Esquire
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For Respondent: Rafael E. Martinez, Esquire
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STATEMENT OF THE ISSUES

The issues in this case are whether Respondent violated Subsection 458.331(1)(t), Florida Statutes (2003),¹ and, if so, what discipline should be imposed.

PRELIMINARY STATEMENT

On November 23, 2004, Petitioner, Department of Health, Board of Medicine (Department), filed an Administrative Complaint against Respondent, David Andrew Nicker, M.D. (Dr. Nicker), alleging that Dr. Nicker violated Subsection 458.331(1)(t), Florida Statutes. Dr. Nicker requested an administrative hearing, and the case was forwarded to the Division of Administrative Hearings on January 17, 2006, for assignment of an administrative law judge to conduct the final hearing.

By order dated March 2, 2006, official recognition was taken of Sections 20.43, 458.331, and 766.102, Florida Statutes, and Florida Administrative Code Rule 64B8-8.001.

The parties filed a Pre-Hearing Statement and agreed to certain facts contained in Section E of the Pre-hearing Statement. To the extent relevant, those facts have been incorporated into this Recommended Order.

At the final hearing, the Department called the following witnesses: J.H.F., E.J.H., and James W. Meade, M.D. Petitioner's Exhibits 1, 2, and 4 were admitted in evidence.

Dr. Nicker testified in his own behalf at the final hearing and called the following witnesses: Colin J. Condron, M.D.; Holly Beth Yerger, P.A.; Steven Earl Sywenki, R.N.; and Jay L. Falk, M.D. Respondent's Exhibits 1, 2, and 3 were admitted in evidence.

The three-volume Transcript of the final hearing was filed on April 10, 2006. The parties timely filed their proposed recommended orders, which have been considered in the rendering of the Recommended Order.

FINDINGS OF FACT

1. At all times material to this proceeding, Dr. Nicker was a licensed physician within the State of Florida, having been issued license number ME 73441. Dr. Nicker is board-certified in emergency medicine.

2. T.F. was an 11-year-old, developmentally delayed autistic child, who appeared "older, adult size for age 11 years." He did not communicate verbally, but could communicate using an electronic computer and a picture exchange system.

3. On the evening of January 10, 2004, T.F. ate some pizza, and subsequently threw up three or four times. His mother, J.F., slept with him that night in case he got sick during the night.

4. The next morning T.F. awoke congested with a lot of mucous and appeared to have a cold. T.F. did not have the

ability to blow his nose; therefore, his mother had to suction the mucous from his nasal passages. He did not eat anything during the day, but drank liquids. His condition worsened as the day went on. His mother took his temperature with an ear thermometer, and his temperature registered 101 degrees, which was the highest temperature the thermometer would register.

5. During the night of January 11, 2004, and into the early morning of January 12, 2004, T.F.'s condition deteriorated. He had trouble breathing and felt warmer to the touch, although the ear thermometer registered only a temperature of 101 degrees.

6. Around 2 a.m. on January 12, 2004, J.F. awoke T.F.'s sister and told her they needed to take T.F. to the hospital. T.F.'s mother and sister got him into the car with the intention of taking him to All Children's Hospital. Because of T.F.'s deteriorating condition, J.F. decided to take him to Morton Mease Plant, a nearby hospital.

7. When they arrived at the hospital at 2:37 a.m., T.F. was seen by a triage nurse. J.F. told the nurse that T.F. had been throwing up on Saturday night, woke up congested on Sunday, continued to have a temperature of 101 degrees, and experienced heavy breathing. The initial examination by the triage nurse noted that T.F.'s blood pressure was 103/62; his pulse rate was 166; his respiration was 40; and he had an oxygen saturation of

93 percent. The triage nurse did not document taking T.F.'s temperature.

8. After the triage nurse did an initial examination, T.F. was examined at 3 a.m. by Holly Yeager, a physician's assistant. J.F. again relayed T.F.'s history of vomiting, fever, congestion, and heavy breathing. Ms. Yeager's examination revealed that T.F. had a purulent nasal drainage, had dried emesis on his lips, tongue, and pajama shirt, and had an increased temperature to the skin.

9. Ms. Yeager noted that T.F.'s temperature had not been taken by the triage nurse and ordered a rectal temperature to be taken. Ms. Yeager also ordered a 5 mg neb treatment with deep nasal suctioning, an IV at 500 cc bolus, CBC, blood culture, basic metabolic panel, and a chest x-ray.

10. A chest x-ray was taken of T.F. to determine if he had acute aspiration pneumonia. The x-ray was negative.

11. Dr. Nicker saw T.F. for the first time at 3:15 a.m. Immediately prior to treating T.F., Dr. Nicker had been treating a critically ill patient who required airway management and resuscitative measures. When T.F. came to the Morton Plant Mease emergency room, there was one physician, Dr. Nicker, and one physician's assistant, Ms. Yeager, on staff to cover the patients being treated in the emergency room.

12. Dr. Nicker ordered 40 percent oxygen to be administered to T.F. Because T.F. would not keep the oxygen mask on his face, his mother held the oxygen mask in front of his face. Dr. Nicker ordered that an arterial blood gas (ABG) be taken. In addition to ordering oxygen, Dr. Nicker ordered broad spectrum antibiotics to be administered to T.F.

13. During his initial examination of T.F., Dr. Nicker did not look at T.F.'s medical chart, including the assessment form completed by the triage nurse. Dr. Nicker did examine T.F. from head to toe. Dr. Nicker was unaware that T.F.'s temperature had not been taken; however he did lay hands on T.F. and did not feel that T.F. had a significant temperature at that time. Based on his experience as a physician, Dr. Nicker is able to tell by feeling a patient whether the patient has a significant temperature.

14. After making his initial examination and giving orders for oxygen, antibiotics, and further tests, Dr. Nicker left T.F. to attend to other patients in the emergency room. Dr. Nicker had approximately 15 patients in the emergency room during the time T.F. was being treated at Morton Plant Mease.

15. After Dr. Nicker left T.F. to attend other patients, the nurses and physician assistant attempted to insert an IV line into T.F., and the respiratory therapist attempted to get an ABG. T.F. was combative and uncooperative with the medical

staff in their attempts to treat T.F. An IV was started, but the respiratory therapist was unable to get an ABG.

16. Dr. Nicker returned to T.F.'s bedside at 3:53 a.m. Because the respiratory therapist was unable to get an ABG, Dr. Nicker drew blood from T.F.'s femoral artery to get the ABG. At the time the ABG was taken, T.F. was essentially on room air because the oxygen mask was not on T.F.'s face for any prolonged period of time. The ABG revealed that the oxygen saturation had dropped to 89 percent. Dr. Nicker ordered 100 percent oxygen to be administered to T.F. using a bigger mask.

17. Dr. Nicker left the treating room and returned at 4:15 a.m. At this time, T.F.'s condition had worsened. He was lethargic; his breathing was slower; and he was no longer making eye contact with family members. Because of the deterioration in his condition, ventilation and oxygenation became a primary concern. Dr. Nicker made the decision to intubate T.F. so that he could be placed on a ventilator.

18. T.F. was transferred to a larger room for the intubation to accommodate the size of the ventilator. At 4:30 a.m., T.F. was given intravenously a sedative, Versed. Dr. Nicker was able to intubate T.F. successfully, which was confirmed by an x-ray.

19. At 4:45 a.m., T.F.'s vital signs were taken. T.F.'s temperature was 108 degrees, and his blood pressure had dropped

to 65/38. T.F. was given Tylenol rectally at 4:50 a.m., and ice was applied to T.F.'s groin and his axilla.

20. The dramatic fall in blood pressure, which T.F. experienced after the intubation, can occur when a patient is dehydrated and has a low intravascular volume. The resulting hypotension is life threatening and must be dealt with by delivering more intravenous fluid to the patient. In order to get more fluids in T.F., Dr. Nicker attempted to get an intravenous central line established. His attempt to get a right intravenous central line established was unsuccessful; however, he was successful in establishing a left central line at 5:15 a.m. After the central line was established and fluids were administered intravenously, T.F.'s blood pressure steadily increased.

21. At 6 a.m., T.F.'s temperature was taken, and his fever had dropped to 105 degrees. By 6:50 a.m., his temperature had dropped to 103.8 degrees.

22. T.F. was transferred to the intensive care unit at All Children's Hospital via helicopter at 7:15 a.m. T.F. died on January 16, 2004, from influenza A and acute renal failure.

23. The Department contends that Dr. Nicker did not meet the standard of care required of similar physicians under similar conditions and circumstances. The Department's expert witness, Dr. James Meade, opined that Dr. Nicker should have

sedated T.F. intramuscularly and intubated T.F. earlier than Dr. Nicker did. Dr. Meade suggested that the drug Droperidol should have been used to sedate T.F. so that IV's could be inserted and tests such as ABG could be done. Droperidol carries a black box warning from the Food and Drug Administration. Several hospitals removed the drug from their formulary. The drug's manufacturer indicated that the drug should be used and reserved only for use and treatment of patients who fail to show an acceptable response to other adequate treatments either because of insufficient effectiveness or ability to achieve an effective dose due to intolerable adverse effects from those other drugs.

24. Sedation of a patient relaxes the patient's gag reflex that protects his airway. In the case of T.F., who had a history of repeated vomiting and who had dried emesis on his clothing and around his mouth, sedating him would have robbed him of his ability to protect his airway and set him up for aspiration pneumonia. Additionally, any sedation would have been better if done intravenously rather than intramuscularly so that the amount of sedation could be monitored. Contrary to the opinion of Dr. Meade, intramuscular sedation was contraindicated.

25. Intubation carries great risks such as decrease in blood pressure; placing the tube in the esophagus; and causing trauma or injury to the vocal cords resulting in bleeding and

loss of the airway. Based on the ABG results and given the risks associated with intubation, it was appropriate for Dr. Nicker to give additional oxygen after the first ABG rather than intubate T.F. at that time. Intubation was not indicated until T.F.'s mental status changed at 4:15 a.m. and he was fatiguing in terms of his respiratory efforts.

26. The Department contends that Dr. Nicker failed to meet the standard of care for similar physicians in similar circumstances and conditions because he failed to note that T.F.'s temperature had not been recorded until two hours after T.F. had arrived at the hospital. Although, Dr. Nicker did not look at the triage nurse's assessment, he did feel T.F. when he examined him and determined that T.F.'s temperature was not significantly elevated. Thus, he made his own assessment of T.F.'s temperature based on his medical training and experience.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding. §§ 120.569 and 120.57, Fla. Stat. (2005).

28. The Department has the burden to establish the allegations in the Administrative Complaint by clear and convincing evidence. Department of Banking and Finance v. Osborne Stern and Co., 670 So. 2d 932 (Fla. 1996).

29. The Department has alleged that Dr. Nicker violated Subsection 458.331(1)(t), Florida Statutes, which provides that a physician may be disciplined for the following actions:

Gross or repeated malpractice or the failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physician as being acceptable under similar conditions and circumstances. The board shall give great weight to the provisions of s. 766.102 when enforcing this paragraph. As used in this paragraph, "repeated malpractice" includes, but is not limited to, three or more claims for medical malpractice within the previous 5-year period resulting in indemnities being paid in excess of \$50,000 each to the claimant in judgment or settlement and which incidents involved negligent conduct by the physician. As used in this paragraph, "gross malpractice" of the "failure to practice medicine with that level of care, skill, and treatment which is recognized by a reasonable prudent similar physician as being acceptable under similar conditions and circumstances," shall not be construed so as to require that a physician be incompetent to practice medicine in order to be disciplined pursuant to this paragraph. . . .

30. The Department alleged that Dr. Nicker violated Subsection 458.331(1)(t), Florida Statutes, as follows:

- a. Failing to intubate Patient T.F. in a timely manner or calling anesthesiology to intramuscularly sedate Patient T.F. prior to intubating him;
- b. Failing to realize that a rectal temperature had not been performed on Patient T.F. until 2 hours after he arrived in the emergency room;

c. Failing to adequately assess Patient T.F.'s symptoms in that he did not note the absence of a temperature and his respiratory distress.

31. The Department has failed to establish by clear and convincing evidence that Dr. Nicker violated Subsection 458.331(1)(t), Florida Statutes. Given the risk involved with intubating a patient, it was appropriate for Dr. Nicker to attempt to improve T.F.'s oxygenation level by administering more oxygen while T.F. still had control of his airway and was maintaining eye contact with his family. Dr. Nicker appropriately intubated T.F. when T.F.'s mental status changed and it appeared that he was not able to protect his airway.

32. Dr. Nicker appropriately waited to sedate T.F. until an IV line could be established so that the sedative could be administered intravenously. It would not be appropriate, as suggested by the Department's expert, to administer a drug intramuscularly which had a black box warning by the FDA and had been banned by several hospitals.

33. Although Dr. Nicker was unaware that T.F.'s temperature had not been taken when he initially examined him, Dr. Nicker did assess T.F.'s temperature by feeling the patient. Based on his experience and training, he determined that T.F. did not have a significantly elevated temperature at that time. Based on the circumstances of this case, Dr. Nicker's failure to

note that T.F.'s temperature had not been taken did not fall below the standard of care required for a similar physician in similar conditions and circumstances.

34. Dr. Nicker did adequately assess T.F.'s symptoms. When he placed his hands on T.F., he did not note a significantly elevated temperature. He tried less intrusive methods of raising T.F.'s oxygenation level as long as T.F. was protecting his airway and was alert to his family. Once T.F.'s mental status changed and he appeared to be unable to protect his airway, Dr. Nicker took appropriate measures by intubating T.F.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered finding that Dr. Nicker did not violate Subsection 458.331(1)(t), Florida Statutes, and dismissing the Administrative Complaint.

DONE AND ENTERED this 12th day of June, 2006, in
Tallahassee, Leon County, Florida.

Susan B. Harrell

SUSAN B. HARRELL
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 12th day of June, 2006.

ENDNOTE

1/ Unless otherwise indicated, all references to the Florida
Statutes shall be to the 2003 version.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.