

FILED WITH THE BOARD OF  
PSYCHOLOGICAL EXAMINERS  
ON April 13, 2015  
*J. Michael Walker*

DEPARTMENT OF LAW & PUBLIC SAFETY  
DIVISION OF CONSUMER AFFAIRS  
NEW JERSEY STATE BOARD OF  
PSYCHOLOGICAL EXAMINERS

IN THE MATTER OF THE SUSPENSION  
OR REVOCATION OF THE LICENSE OF

MARSHA J. KLEINMAN, Psy.D  
LICENSE NO. 35S100231900

**FINAL DECISION AND ORDER  
REVOKING LICENSE**

TO PRACTICE PSYCHOLOGY IN THE  
STATE OF NEW JERSEY

This matter was opened on May 20, 2014 before the New Jersey State Board of Psychological Examiners ("the Board") with the filing of an Administrative Complaint against the Respondent by the Acting Attorney General John J. Hoffman, by Joshua Bengal, DAG. The two-count Complaint alleged in Count I that Dr. Kleinman rendered psychological services to patient A.A.<sup>1</sup> without a license in violation of N.J.S.A. 45:14B-1 et seq. and other statutes after the Board issued an Order revoking Respondent's license to practice psychology in the State of New Jersey effective December 5, 2012. Respondent's license to practice psychology has not been reinstated. Count One further alleged that Respondent, while her license was revoked, continued a similar course of conduct to that which led her to the December 2012 revocation. It was specifically

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<sup>1</sup>Fictitious initials were used in the Complaint to protect the confidentiality of the patients referenced as A.A. and A.B.

alleged that she provided psychological services to A.A., a 15 year old boy, through in-person or telephone sessions, therapeutic modalities and/or the use of Eye Movement Desensitization and Reprocessing ("E.M.D.R.") therapy. It was also alleged that the Respondent uncovered A.A.'s repressed memories of being sexually abused by a parent when he was approximately 18 months old. In sum, the Complaint alleged that Respondent continued to provide psychological service and engaged ~~in~~ conduct similar to that involved in the prior case after her license was revoked. It was further alleged that Respondent failed to report abuse she uncovered to the Department of Children and Families as required by N.J.S.A. 9:6-8.8 et seq.<sup>2</sup>

The Complaint further sought additional revocation of Respondent's license for her unlicensed practice of psychology in violation of N.J.S.A. 45:14B-1 et seq. including tolling of the revocation period during the time that respondent practiced psychology and imposition of civil penalties for each separate offense set forth in the Complaint pursuant to N.J.S.A. 45:1-18.2, N.J.S.A. 45:1-22(b) and N.J.S.A. 45:1-25 and costs to include investigative costs, attorney's fees and costs of hearing, such as transcript costs pursuant to N.J.S.A. 45:1-25 (d) and such other

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<sup>2</sup>Count Two alleged that Respondent provided psychological services to A.B. between March and April 2013. This count was dismissed by the prosecution before the commencement of the October 6, 2014 hearing without prejudice.

relief as the Board shall deem appropriate. Respondent's July 3, 2014 Answer generally denied all allegations and Counts in the Administrative Complaint.

The State filed a Motion to Enforce Litigant's Rights simultaneously with the Complaint. The Motion sought a finding from the Board that Dr. Kleinman ("Respondent") practiced psychology in the State of New Jersey in 2013 after her license was revoked, in violation of the December 4, 2012 Board Final Order.<sup>3</sup> The Motion also sought among other things, entry of an order requiring Dr. Kleinman to cease and desist from administering psychotherapy in the State of New Jersey. Appended to the Motion were the certification of Joshua M. Bengal, DAG with exhibits and a Motion to Seal Exhibit B (an investigative report with attachments).

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<sup>3</sup>The December 4, 2012 Final Decision and Order was based on a five count Complaint alleging that the Respondent's conduct in providing psychological services to S.R., a three year old child, was in violation of the statutes and regulations governing the practice of psychology by committing gross malpractice in her treatment of a suspected victim of child sexual abuse at the hands of her father and in an unrelated matter, in encouraging an adult client to make false accusations of child sexual abuse against her husband. Respondent filed an appeal of this Order. Oral argument was heard in October 2014. On January 6, 2014 the Appellate Division of the Superior Court of New Jersey affirmed the Board's December 4, 2012 Final Decision and Order in its entirety.

Disposition of Motion in Lieu of Litigant's Rights

Mr. Robert Bonney, Esquire appeared before the Board on behalf of Respondent without her presence on June 2, 2014, at which time the Motion in Aid of Litigant's Rights was resolved by the entry of an Interim Consent Order orally on the record and then memorialized in an Order filed on June 10, 2014.

The Interim Order requires Respondent to comply with the terms set forth in the December 4, 2012 order of revocation of license and in addition specifically requires Dr. Kleinman not to perform EMDR therapy, cognitive or any form of behavioral therapy, supportive psychotherapy or family therapy. She is prohibited from discussing the subject of sex or repressed memories with any person in any professional services context. Respondent also agreed prospectively not to provide coaching services to anyone under the age of 18 or to any of her prior psychotherapy patients.<sup>4</sup>

The Interim Consent Order remained in effect pending a plenary hearing which was to be held peremptorily on July 8, 2014, and only if necessary, on August 11, 2014. Importantly, Mr. Bonney represented to the Board orally that he discussed "each and every one of the items with my client this morning via telephone." Furthermore, he indicated on the record that he was "authorized to

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<sup>4</sup>Additional provisions bar certain tutoring services, require identification of bank accounts used in Respondent's professional practice and identification of persons to whom Respondent provided coaching or therapeutic services since the December 2012 Order.

say to you that she [Respondent] consents to the entry of this order which will be drafted by the Deputy Attorney General."<sup>5</sup>

### Hearing on the Complaint

### Motions to Disqualify Board

Several motions were decided by the Chair prior to the hearing on the Administrative Complaint, with decision ratified by the Board at the October 6, 2014 hearing.<sup>6</sup> Appearing at the October 6, 2014 hearing were Joshua M. Bengal, DAG on behalf of the State and

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<sup>5</sup>The plenary hearing was rescheduled from July 8, 2014 to August 11, 2014 upon the receipt of a request from newly hired counsel for the Respondent, Bonnie Weir, Esq. on June 11, 2014 seeking a 60 day adjournment of the peremptory hearing date to early September 2014. Due to the urgency of the matter as it involved a revoked licensee who was allegedly practicing without a license, the board granted an adjournment only until August 11, 2014, the date previously noticed and agreed upon as a second hearing date by the parties. Dr. Kleinman signed the Interim Consent Order on June 4, 2014. As of June 2, 2014 Respondent was aware of the dates for plenary hearing as she was informed of all the items set forth in the order as was represented orally by her attorney. On June 17, 2014 Respondent informed the Board that she would not be available as she was out of the country for a portion of the summer and thus unavailable for either peremptory date. The August 11, 2014 hearing date was adjourned as the Respondent was unavailable as she was out of the country and the State's witness became ill. The hearing was rescheduled to October 6, 2014. On October 6, 2014 Respondent appeared Pro Se and asserted that her appearance was under protest as she believed that the Board's scheduling of the hearing date within 30 to 60 days from the entry of the Interim Consent Order precluded her from obtaining legal counsel.

<sup>6</sup>These motions included the State's motion to permit B.A. to testify by phone which was denied in part with B.A. permitted to testify by both audio and visual means. Respondent's motion to reconsider was denied. Respondent's motion that the State submit responsive answers to interrogatories and to adjourn the hearing date was denied. Finally, the State's motion to quash the Respondent's subpoena requiring A.A. to testify was granted.

Marsha J. Kleinman, Respondent, Pro Se. The Respondent was sworn at the beginning of the proceeding. Oral argument was heard on Respondent's Motion for Reconsideration to Disqualify the Board on the basis of bias. Respondent also requested that the Board dismiss the Complaint for failure to state a claim upon which relief may be granted and for lack of jurisdiction by the Board, requested that the matter be transferred to Superior Court and sought a stay if the Motion was denied.

Respondent argued that the Board's involvement in the previous Complaint against her resulting in the December 4, 2012 order revoking her license demonstrated the Board's bias as it could not be impartial based on participation in the previous disciplinary action. It was also her position that the Board should have transferred the current Complaint alleging unlicensed practice to Superior Court as the Board lacked jurisdiction as her license was revoked. In her papers, she further disputed numerous issues which arose and were addressed in the previous legal proceedings and raised the same or similar issues in this Motion before the Board as she had in her then pending appeal of the December 4, 2012 Order revoking her license.<sup>7</sup>

Respondent also argued the Board was biased because it did not reach a determination regarding a complaint Respondent had against

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<sup>7</sup>The Appellate Division of Superior Court on January 6, 2014 affirmed in its entirety the Board's December 4, 2012 Final Decision and Order.

the expert in the prior matter concerning certain representations in his curriculum vitae and his discussions of the Kleinman matter in seminars that he conducted. She also contended that the Board's decision to permit B.A. to testify by audio visual means rather than in person also demonstrated Board bias and constituted a denial of her constitutional rights to confront the witness.

The DAG opposed Respondent's motion arguing that the Board was within its statutory rights pursuant to N.J.S.A. 45:1-18.2 to investigate allegations of unlicensed practice and has the statutory authority to engage in proceedings alleging the unlicensed practice of psychology. He argued that the Board is not responsible for the Respondent's inability to obtain an attorney and that she had ample time to do so.

Following deliberations the Board denied Respondent's motion to disqualify itself. The Board acknowledged the previous Order concerning Respondent was then pending appeal. The Board has clear authority and jurisdiction to hear unlicensed practice matters (See N.J.S.A. 45:1-18.2) and at its discretion may retain a contested matter or transmit it to the OAL pursuant to the Administrative Procedure Act at (N.J.S.A. 52:14F-8). We are often called upon to investigate and then adjudicate multiple matters against a licensee. Performing those responsibilities does not demonstrate bias. Given the concern that a revoked licensee was allegedly continuing to provide psychological services to a vulnerable minor

patient the Board determined not to transmit the case to the OAL which typically takes a long period of time to conclude plenary proceedings. Further it is established that professional licensing boards have authority to both investigate and then adjudicate a matter. Withrow v. Larkin, 421 U.S. 35 (1975).

As to the Respondent's objection to the State's expert we concluded that Dr. Martindale, the State's expert in the prior matter, was declared an appropriate expert by the ALJ and independent from any determination of the Board. Further, all procedural scheduling in the Respondent's current case was done with notice and consent of the Respondent by the Interim Consent Order entered into with the advice of counsel and memorialized on the record.

#### Motions to Seal

The Board next heard oral argument on the State's Motions to Seal Exhibit A, to Seal the courtroom during the testimony of B.A., A.A.'s mother, and to redact motion papers that name A.A. and his family members. The State also moved to seal or redact the transcript of the October 6, 2014 plenary hearing.

The State argued that the legal standard for sealing the documents and the courtroom is governed by N.J.A.C. 1:1-18.1 which requires a finding of good cause. Exhibit A is a comprehensive investigation report compiled by the Enforcement Bureau containing information of a sexual and psychological nature. The report

contains private information regarding A.A. including but not limited to this minor's life, family relationships, time lines and religious affiliations. This information has the potential to reveal the minor's identity and thrust into the public arena information that he shared in confidence with someone whom he believed would protect his expectation of privacy.<sup>8</sup>

Respondent objected to sealing Exhibit A, the courtroom and the motion papers. She believed that her due process rights would be violated by sealing and the public has a legitimate interest in the process. If the Board grants the sealing, she requested the entire record be sealed including the allegations against her. She

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<sup>8</sup>As to the sealing of the courtroom, the State argued anyone seeing and recognizing the face of the minor's mother would be able to expose the identity of the minor A.A. Three considerations favor sealing. First the State argued sealing would not violate due process as Respondent will have an opportunity to confront the witness, B.A., during testimony and cross-examination. Respondent was provided with unredacted documents and is aware of A.A.'s and B.A.'s identities. The State argued that the public did not have a right to be present in the courtroom greater than the minor child's rights to protect his/her privacy. The second consideration is the need to protect the witness from undue embarrassment, deprivation of privacy and to protect other important rights. Exhibit A, the enforcement bureau report, contains a great deal of information about A.A.'s mental, emotional and sexual life. It contains A.A.'s sexual fantasies, memories of sexual abuse and information about sexual attractions uncovered by his interactions with the Respondent. The third consideration is public policy. The State argued that the public has no valid right to information exposing A.A.'s sexually-related information or the private life of a minor. Thus, the DAG urged that the Board seal the courtroom only during B.A.'s testimony, seal Exhibit A in its entirety and redact the names of A.A., B.A. and family members from all motion papers and from the transcript of the plenary hearing.

claimed the minor and his family waived their right to privacy when they presented the information to the State for investigation. However, she did not oppose using initials to refer to the minor.

Following deliberations the Board voted as follows. Although the State has a strong public policy valuing transparency as reflected in the Open Public Meetings Act, Open Public Records Act and the long standing practice of legal proceedings conducted in public, a minor's most confidential information is at issue here. Therefore, good cause exists for the Board to grant the Motion to Seal certain records and courtroom testimony in part. The Motion to Seal the hearing room from the public was granted, but only during the testimony of the mother, B.A. If the face of the mother is revealed to the public<sup>9</sup> the identity of the minor could be easily learned. We ruled in favor of preserving the minor's long held expectation of privacy. In reaching this determination the Board balanced Respondent's due process rights with the expectation of privacy of a vulnerable minor. Respondent will be present during the audio visual testimony of B.A. and can observe the witness's demeanor and hear her verbal responses. Respondent is also able to cross-examine and confront B.A. Thus, the Board believes her right to confront the witness is preserved.

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<sup>9</sup>The hearings were attended and reported on by a news agency and each of the hearing dates were recorded by cameras.

In balancing the Respondent's due process rights and the public policy in favor of open proceedings against safeguarding the heightened privacy expectations of the minor, the Board found that a partial measure addressed both interests. Therefore the Board also denied the Motion to Completely Seal any of the exhibits and ordered instead that Exhibit A to the Certification of the DAG, all motion papers and the transcripts from the hearings be carefully redacted for all personal identifiers and any sensitive sexual and psychological details. Thus, the Board protected the important interest of the public to have access to the facts of this matter yet safeguarded the minor's expectation of protection from undue embarrassment and deprivation of privacy in the confidential material.

The Board next considered Respondent's Motion for Summary Judgment<sup>10</sup> and to Dismiss the Complaint for Failure to State a Claim on the basis that the State had not presented any competent evidence to prove that she practiced psychology without a license, did not have a witness who had firsthand knowledge of her conduct with A.A. and failed to present an expert witness to testify that Respondent's conduct constituted the practice of psychology. The DAG argued that such motion is granted only when there are no

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<sup>10</sup>In administrative proceedings called a Motion for Summary Decision.

material issues of fact disputed by the parties, and here all the facts are in dispute.

The Board denied the Respondent's Motion for Summary Decision finding that there are material facts at issue in this matter. A summary decision should be rendered only "if the pleadings, discovery and affidavits demonstrate that there is no genuine issue as to any material fact challenged and that the moving party is entitled to prevail as a matter of law." Contini v. Board of Educ. of Newark, 286 N.J. Super. 106, 121(App. Div. 1995), certif. denied, 145 N.J. 372 (1996), (quoting N.J.A.C. 1:1-12.5(d)). The Board was mindful during this administrative proceeding that hearsay evidence is admissible provided some legally competent evidence exists to support findings of facts sufficient to provide assurances of reliability N.J.A.C. (1:1-15.5). The Board also recognized that it was appropriate for it to use its expertise and knowledge in evaluation of evidence. Respondent's Motion to Dismiss was denied. Respondent was advised that she could reassert the motion at the end of the State's case.

#### Hearing on Liability

The State's major contention was that Respondent engaged in the unlicensed practice of psychology while her license was revoked by providing psychological services including EMDR to a minor and by continuing the same damaging pattern of conduct, involving claimed uncovering of repressed memories of sexual abuse and

treatment that led to her revocation in the first instance. Respondent, who appeared pro se, argued in her opening that the State had not presented any specifics to determine whether the conduct she engaged in was the practice of psychology or coaching. Respondent quoted from the definition of the practice of psychology as found at N.J.S.A. 45:14B-2 and claimed that she did not participate in any conduct or modalities specified in the definition. She argued that expert testimony was needed to prove that her conduct constituted the practice of psychology. She urged that the State's witnesses as lay persons were not qualified to determine whether her conduct with the minor constituted the practice of psychology or coaching. Respondent focused her defense on the filing of motions. She further contended that the State's case was comprised of hearsay as the minor, the only person with personal knowledge of her conduct, was not testifying.

At the hearing the Attorney General relied in part on documentary evidence to support his case including:

- P-1: The December 4, 2012 Final Decision and Order revoking Respondent's license to engage in the practice of psychology;
- P-2: B.A.'s calendar wherein she noted the dates and times that Respondent met with A.A.;
- P-3: B.A.'s spiral notebook noting dates and times that Respondent met with A.A.;

- P-5: Enforcement Bureau report of the investigation prepared by Investigator Catherine Butter;
- P-6: Two page document consisting of a copy of a check in the amount of \$250.00 signed by B.A. and made out to the Respondent at GMK Associates dated 5/4/2013
- P-8: Certification of Sean Hiscox, Ph.D and complaint filed against Respondent by Dr. Hiscox with the Board of Psychological Examiners on August 16, 2013 with attachments;
- P-9: Certification of Felice Framo an employee of the New Jersey Department of Children and Families attesting that no reports of child abuse were made by the Respondent between May 31, 2013 and December 31, 2013.

He also presented two witnesses, B.A., the mother of A.A., and Catherine Butter, an investigator with the Enforcement Bureau of the Division of Consumer Affairs.

State's Witness B.A.

B.A., the mother of A.A., testified as to her family's long history with the Respondent which began in approximately 2001 to 2002 and resumed in 2012 and 2013.<sup>11</sup> The therapeutic relationship

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<sup>11</sup>B.A. testified by audio visual conference from a conference room located in a law office located in Westfield, New Jersey. The respondent and the Board members saw and heard the witness as her large image was projected on the wall of the hearing room. There was a short delay from the time B.A. spoke and the time that her responses were heard in the hearing room. As ordered by the Board the hearing room was occupied only by the Board members and staff, DAsG, a Certified Court Reporter, and Respondent. Members of the public and media present for aspects of the hearing left the room during the testimony of B.A.

began with the family in 2001 when Respondent was actively licensed and she counseled A.A.'s sister, CA, concerning alleged sexual abuse of CA by her biological father.

Therefore, in April of 2013, when B.A. became concerned with her son's conduct as he was praying a lot, washing his hands constantly, reading a sentence over and over again while doing homework and having "evil thoughts," she sought Respondent rather than another psychotherapist as she was familiar with her and Respondent was knowledgeable about the family background. Although Respondent disclosed to B.A. that her license was revoked, Respondent also informed her that the Board's findings against her were incorrect and B.A. believed Respondent.

Subsequently on April 28, 2013 A.A. commenced treatment with Respondent in person and telephonically. Initially, in person visits lasted 45 minutes, phone calls were 5 to 10 minutes and generally concerned social issues. B.A. testified she was charged by Respondent \$250 for a 45 minute visit with A.A. B.A.'s father also gave an advance payment of \$5,000 to Respondent to cover the costs of Respondent's services to A.A.

B.A. recorded appointments between A.A. and Respondent in a paper calendar with the notation "Marsha", (accepted into evidence as P-2), on her cell phone and in a spiral notebook (accepted into evidence as P-3). B.A. testified that notations in the paper

calendar reflected that A.A. saw Respondent on the following dates in 2013: 4/28, 5/4, 6/19, 6/21, 6/26 and 6/24.<sup>12</sup>

B.A. identified P-3, a small spiral notebook, as being a notebook into which she recorded dates that A.A. saw Respondent and also contained entries regarding visits to Dr. Kleinman and a couple of phone conversations between A.A. and the Respondent. The earliest date was 7/26/ 2013 and the final date was 8/5/2014. One notation indicated that Respondent saw A.A. twice on July 28, 2013 for at least two hours each visit. The spiral notebook was kept at the request of B.A.'s father who ~~wanted~~ B.A. to keep a record of A.A.'s visits with Respondent.<sup>13</sup>

B.A. firmly testified that she was present for all meetings between A.A. and Respondent in April, May, and June of 2013. However, she was not present during the phone conversations between A.A. and Respondent. Additionally it was B.A.'s testimony that Respondent spoke to her at the end of all of A.A.'s visits with Respondent.

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<sup>12</sup>Respondent objected to the entry of P-2 into evidence arguing the calendar contained many redactions, was not legible and she did not have access to the original before it was accepted into evidence. The State noted that a copy of the calendar was previously provided to Respondent during discovery. It was accepted into evidence.

<sup>13</sup>P-3 was entered into evidence by the State over Respondent's objection claiming her name was not listed on each entry. The State noted that the first page of the notebook contained the name "Marsha" followed by dates. The Board determined to admit the notebook which was identified by B.A. as a contemporaneous record and accord it the appropriate weight.

B.A. recounted that early sessions dealt with goals of helping A.A. socialize and make friends. However, sometime in late July of 2013, A.A. had a "meltdown" after he came home from church. B.A. brought A.A. to speak to Respondent and at that time Respondent informed B.A. that A.A. molested a cousin and possibly had sex with his sister. Respondent also related to B.A. that A.A. had shared repressed memories about sexual abuse he suffered at the age of 18 months by his biological father. Respondent also then diagnosed A.A. with Obsessive Compulsive Disorder (OCD) and informed B.A. that he might need medication. Respondent did not refer B.A. to a health care professional to deal with the OCD or to provide medication for him. Instead she advised B.A. on how to deal with the issues.

B.A. further testified that she learned from Respondent that A.A. had sexual desires for his mother, B.A., and sister, C.A. As a result of these revelations Respondent told B.A. that she advised A.A. neither to sit in the front seat of the car with his mother nor go shopping with her or hug her. A.A. was further advised not to watch TV in his mother's bedroom, to take a shower in another bathroom and sleep in the basement. B.A. also asserted that Respondent told her that A.A. should not be near or with other children or pets or his sister as A.A. could harm them. It was B.A.'s testimony that on the advice of Respondent she had to call a

mother of one of A.A.'s friends to tell her A.A. could no longer play with that friend.

The witness recounted that from that point in time in July 2013 changes occurred in the manner in which Respondent provided services to A.A. A.A. was no longer seen by Respondent downstairs but was seen in an office on the second floor of the Respondent's residence. The duration of the visits lasted anywhere from 45 minutes to 2 - 3 hours. B.A. was told by Respondent that A.A. was having repressed memories that "the biological father was molesting him in the crib when he (A.A.) was a baby." It was also B.A.'s testimony that issues regarding A.A.'s social situation were no longer discussed by Respondent after A.A.'s July "meltdown."

B.A. also testified that Respondent directed that A.A. should apologize to her niece (A.A.'s cousin) and to the parents of the niece. B.A. additionally stated that Respondent told her "it was possible that the niece may need treatment and that Respondent could help her." Respondent counseled B.A. that should A.A. stop treatment with her, A.A. would end up in a mental institution, in jail or kill himself.

B.A. believed that EMDR was performed on A.A. as she witnessed the machine several times being used on her son - even noted the color of the lights, that one machine was broken and another was used. B.A. testified that she was familiar with the EMDR machine as this technique had been performed on her years ago when she had

received psychological services from Respondent. She testified to details such as that she was asked by Respondent to purchase batteries for an EMDR machine when the first machine used on A.A. malfunctioned.

B.A. testified that Respondent told her that her daughter should not go away to a college that was more than two hours away from home as she might have a mental breakdown due to her repressed memories. Respondent also recommended to B.A. that her daughter should receive treatment and a meeting was scheduled in the future with the Respondent and C.A. The purpose of this meeting was to discuss her suppressed memories. It was B.A.'s opinion that her daughter did not need coaching as her social skills were very good and academically she was an A student.

B.A. asserted that Respondent inquired of B.A. whether B.A.'s current therapist would report Respondent's conduct with A.A. to the Board. B.A. testified that Respondent never referred B.A. to seek treatment for A.A. from any other mental health care provider in the State and told her that "she was the best in the State" and there was someone out-of-state qualified to treat A.A., but she did not provide B.A. with the name.

On cross-examination B.A. reaffirmed that at the end of A.A.'s visits with Respondent, she discussed with Respondent the content of the visits. B.A. was emphatic and clear on cross-examination that Respondent told her A.A. had definitely molested her niece and

that she made entries into the spiral notebook, marked P-3 upon arriving and leaving the sessions at Respondent's home documenting the dates of the sessions.<sup>14</sup>

#### Investigator Butter Testimony

The State next called Investigator Catherine Butter<sup>15</sup> who testified that she is an investigator for the Enforcement Bureau in the Division of Consumer Affairs for 13 years, and has conducted some 300 investigations. As part of Ms. Butter's duties she prepared an investigative report (P-5 in evidence) in which she reports on her interview of A.A. and B.A., and obtained bank records and pay stubs from a school. The complainant in this matter was Dr. Hiscox, a New Jersey licensed psychologist who performed a psychosexual evaluation on A.A. after his contact with Respondent was terminated. Ms. Butter also interviewed Dr. Hiscox and obtained his sworn statement as to the treatment of A.A. by Respondent.<sup>16</sup>

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<sup>14</sup>Respondent was offered the opportunity to examine B.A. for her case in chief so as not to expend additional resources by having the audio visual capabilities support reinitiated when Respondent presented her case. Respondent declined to examine BA out of order.

<sup>15</sup>Respondent objected to Ms. Butter testifying as she was not a witness with first-hand knowledge. The Board permitted the testimony as hearsay is admissible in an administrative proceeding.

<sup>16</sup>P-5, the investigative report, was introduced into evidence over objection by the Respondent on the basis of hearsay. The Board ruled that a residuum of competent evidence, B.A.'s testimony, permitted entry of the document in an administrative proceeding.

The State rested after the testimony of the investigator and entry of documents into evidence.

Respondent then renewed her Motion to Dismiss the Complaint claiming that the State had not produced any testimony or evidence that she practiced psychology, nor testimony that she provided an assessment in the matter involving A.A. or that she engaged in psychotherapy. The DAG argued the motion should be denied as the State produced competent evidence both through testimony and documents that Respondent's interactions with A.A. went far beyond coaching that Respondent counseled A.A., attempted adjustments to A.A.'s personality, discussed numerous sexual issues, helped him address personality disturbances, dealt with symptoms of OCD and that she engaged in the practice of psychology while unlicensed. The Board concurred with the State and denied the Motion to Dismiss.<sup>17</sup>

#### Reconvened Hearing Date

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<sup>17</sup>At this time the Respondent suddenly requested an adjournment stating that she was ill due to an immune deficiency disorder which she claimed she had for many years. The State did not object. The State informed the Board that B.A. was subpoenaed to appear by the Respondent and requested that all arrangements and costs to have B.A. appear by audio-visual means on a new date should be the sole responsibility of Respondent. The State reminded the Board that Respondent was offered the opportunity, while B.A. was present through video conference for her direct examination but Respondent rejected the offer. The Board adjourned the hearing and informed Respondent that on the adjourned date she should be ready to present her case.

On December 1, 2014 the matter was reconvened before the Board. At this proceeding the rulings on two prehearing motions decided by the Board Chair during the intervening time were ratified by the Board.<sup>18</sup> Respondent commenced her case by declaring she was not calling B.A. as a witness. Further, Respondent advised the Board that she was not presenting a case in chief as there was nothing to refute in this matter.<sup>19</sup>

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<sup>18</sup>Respondent's first motion was a request to limit all future hearings to four hours due to her medical condition and to seal the motion papers and the exhibit attached. The motion to limit the hearing to a specific timeframe was denied by the Chair in a letter dated November 19, 2014 on the basis that Respondent had other options available to her to deal with proceedings. The Board President ruled that Respondent could not be permitted to dictate the conduct and scheduling of a hearing as this interference could result in delay, obstruction and possibly prevent the efficient processing of matters. The Board agreed to provide accommodations, such as rest breaks. The Board agreed to redact medical information contained in the motion papers. Respondent's second motion sought to enforce a subpoena for cell phone and landline phone records of B.A. The President found that the information sought was previously provided and declined to enforce the subpoena. Both decisions were ratified in their entirety by the Board.

<sup>19</sup>~~Instead~~ she requested oral argument on two additional motions and entry of three documents into evidence. R-1 through R-3 included a letter from B.A. in support of Respondent (R-1), a letter from CA, the daughter of B.A., who was treated by Respondent when she was six years old (R-2), and a letter from DA, BA's father(R-3). These letters were previously submitted in Respondent's 2012 mitigation hearing before the Board concerning the prior Complaint. The DAG objected to the entry of these documents because they lacked relevance to the facts in the current case. Respondent contended that the letters supported the history of sexual abuse in this family, that this history was not newly discovered information and that they demonstrated that something happened to turn this family against her. The Board Chair permitted R-1 through R-3 into evidence subject to according them appropriate weight.

Along with other motions,<sup>20</sup> Respondent then renewed her Motion to Dismiss the case claiming the State had failed to state a cause of action as the State failed to prove that her conduct with A.A. constituted the practice of psychology. It was her position that no evidence was presented that proved that she performed EMDR on A.A. merely because B.A. said she saw red lights on a machine. Dr. Kleinman also stated that EMDR machines have green not red lights and that the State would require an expert to prove she performed EMDR. Respondent claimed that B.A. concurred that she coached A.A. and that she was aware that Respondent's license to practice was revoked prior to bringing A.A. to see Respondent. Respondent also stated that B.A. was not in the room with her and A.A. during the

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<sup>20</sup>Respondent then orally argued a Motion for the Board to reconsider its decision to permit into evidence the Enforcement Bureau report (P-5) and Dr. Hiscox's certification (P-8) because neither document was authenticated nor was Hiscox cross-examined. She objected Dr. Hiscox was not qualified as an expert and his credentials were not presented. She asserted that the Enforcement Bureau report needed to be authenticated, and hearsay could not be permitted into evidence.

The DAG again argued that the Residuum Rule as used in administrative proceedings permitted entry of the investigative report, clarified that Dr. Hiscox is not an expert in this case, rather he is a subsequent treating psychologist who reported Respondent to the Board. The DAG asserted that B.A.'s and Investigator Butter's testimony along with documentary evidence provided competent evidence to support the report.

The Board denied Respondent's Motion to exclude the Enforcement Bureau report and Dr. Hiscox's statement. There was sufficient competent testimony from B.A. and the investigator coupled with Respondent's own statements to permit the statement and the report into evidence pursuant to the residuum rule.

sessions and that the State did not introduce any evidence to demonstrate the difference between coaching and psychology. Respondent further argued that she did not have a duty to report the sexual abuse reported by A.A. as the State was aware of it 15 years ago when she reported this information to DYFS. Accordingly, she asked the Board to dismiss the Complaint against her.

The DAG relied on his papers in opposing Respondent's Motion to Dismiss the Complaint, and expressed three points. The first is that B.A. steadfastly testified that she was in the room for the last 15 to 20 minutes of nearly every in-person session. He then again clarified the law of hearsay. He reiterated that he was using hearsay to prove what Respondent told B.A. not as to the truth of Respondent's statements. The third point made by the DAG was that Respondent is confused as to the acts she had a duty to report. It was not the sexual abuse that was uncovered from A.A.'s repressed memories that needed to be reported, it was the alleged newly raised sexual abuse that A.A. stated he performed on his sister's friend and his cousin that required reporting pursuant to N.J.S.A. 9:6-8.10. Respondent in her statement commented that during the 15 to 20 minutes that she met with B.A. after a session Respondent would "catch her up" and make appointments.

The Board denied the Motion to Dismiss the Complaint finding that the State had presented sufficient proof to defeat the motion.

#### Findings of Fact

Following the liability portion of the hearing, the Board voted unanimously that the State had met its burden of demonstrating that the conduct of Respondent in the services provided to A.A. during the months of May through August 2013 while in a revoked license status unequivocally constituted the practice of psychology. We rejected Respondent's argument that she was merely coaching A.A. and found that Respondent presented little in opposition to the State's case. Essentially Respondent focused her case on motion practice and did not present competent evidence to refute the charges nor did she undermine B.A.'s credibility. Based on the evidence presented we find as follows:

1. Respondent's license to engage in the practice of psychology was revoked effective December 5, 2012.
2. The conduct that led to the Respondent's December 5, 2012 revocation involved revealing of repressed memories of sexual abuse of an infant by the father and use of EMDR on a minor.
3. After the time that Respondent's license was revoked she engaged in the unlicensed practice of psychology with A.A. by engaging in conduct similar to that involved in the treatment of the patient in the case that led to her prior revocation.
4. Respondent uncovered repressed memories of alleged sexual abuse of A.A. by his father when he was 18 months old;
5. Respondent diagnosed A.A. with OCD and advised that A.A. may need medication.

6. Respondent provided interventions to B.A. to address A.A.'s OCD symptoms.
7. Respondent failed to refer A.A. to appropriate health care professionals for treatment, medication and therapy for his OCD or sexual issues.
8. Respondent counseled A.A.'s mother regarding interventions concerning A.A.'s sexual behaviors.
9. Respondent failed to report alleged sexual abuse by A.A. of his cousin and sister to the Division of Child Protection and Permanency as required by N.J.S.A. 9:6-8.8.
10. Although B.A. identified the EMDR machine And its use on A.A. and Respondent acknowledged she utilized it on A.A. for for relaxation, we make no findings as to the performance of EMDR therapy.

### Discussion

The Board found B.A.'s testimony to be credible, detailed, sincere, forthright and unwavering. While B.A. was not physically present in the hearing room, she was both clearly visible and audible to all in the room. The Board was able to hear her responses and see her facial and bodily expressions and thus we were able to determine her demeanor and credibility.

B.A.'s testimony was consistent both on direct and cross examination that she was present for the last 10 - 15 minutes of all in-person sessions between Respondent and A.A. and that in that time Respondent related to her, the child's mother, the issues

addressed with A.A. Utilizing our expertise we believe she testified to issues Respondent discussed with A.A. that clearly constituted the provision of psychological services.

It is abundantly clear that no expert testimony is needed to ascertain whether or not Respondent's recent conduct with A.A. constituted the unlicensed practice of psychology. We take notice of the importance of the fact that the very conduct Respondent engaged in now repeats conduct that formed the basis for the revocation of her license. Further, it is basic knowledge and we also find in our expertise that an individual providing a diagnosis and offering treatment of obsessive compulsive disorder, offering services or treatment to deal with revelations of repressed memories of sexual abuse of an infant, or offering to provide treatment and interactions for sexual abuse and incestuous ideations of a minor, clearly involve the practice of psychology.

We do not find grey areas or fine distinctions here where coaching techniques have the potential to stray into psychological counseling. Instead we find that a bright line has been crossed whereby Respondent is providing psychological services to a minor with serious emotional issues. Further Respondent was aware that there were long term, serious sexual abuse and psychological issues in this family that predated the relevant time period of the Complaint. These significant psychological issues were not new. Therefore, it strains credulity that Respondent, educated and

trained as a psychologist would interact in any therapeutic capacity with A.A. regarding sexual abuse during a time period her license was revoked and think she was not practicing psychology. We find that no expert is needed to demonstrate that Respondent's diagnosis and offers to treat OCD and sexual abuse of A.A., his cousin and sister and the interventions she offered to his mother, were the unlicensed practice of psychology.

The practice of psychology is defined at N.J.S.A. 45:14B-2 as the rendering of professional psychological services to individuals, singly or in groups whether in the general public or private, for a fee or otherwise. Professional psychological services is further defined in this provision as meaning "the application of psychological principles and procedures in the assessment, counseling, or psychotherapy of individuals for the purpose of promoting the optimal development and interpersonal potential or ameliorating their personality disturbances and maladjustments as manifested in personal and interpersonal situations..."<sup>21</sup> The State has amply demonstrated that Respondent's activities with A.A. constituted the practice of psychology.

We find credible B.A.'s testimony that Respondent diagnosed a serious condition -OCD- offered treatment and failed to refer A.A.

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<sup>21</sup> Throughout the proceedings Respondent took the position that she was engaged in coaching. We take notice that the International Coach Federation, a nonprofit, membership organization defines coaching as "partnering with clients in a thought-provoking and creative process that inspires them to maximize their personal and professional potential."

to another mental health care professional. Further, Respondent offered B.A. techniques to deal with A.A.'s OCD issues. This testimony demonstrated that not only did Respondent diagnose symptoms of OCD which is within the scope of practice of a psychologist, she also directed the witness on how to address those symptoms, all while her license was in revoked status. It would be anomalous to conclude that Respondent's actions were anything other than an attempt to continue her practice of psychology after her license was revoked.

B.A.'s detailed testimony was supported by documentary evidence in that she kept a record of the dates of appointments between Respondent and A.A., as depicted in her calendar (P-2) and the spiral notebook (P-3), the length of times of the appointment was consistent in the testimony and notebook between 45 minutes and 2 to 3 hours. Both the testimony and documentary evidence established that Respondent was paid for her services.

B.A.'s testimony also demonstrated that while initially the Respondent may have addressed resolutions of social issues in the school context with A.A., Respondent also offered diagnosis and suggested treatment of OCD along with the sexual issues after A.A.'s July "meltdown." In our expertise we are aware that Respondent's counseling on A.A.'s sexual desires and conduct with his mother, sister, cousin and others and her counsel to B.A. as to

how to deal with A.A.'s sexual issues clearly constituted the practice of psychology.

Most concerning to the Board was B.A.'s testimony that Respondent elicited repressed memories of A.A. being sexually abused in his crib by his father at a very young age. This conduct by Respondent is an extraordinarily similar pattern of professional conduct that the Board found Respondent engaged in previously, and was involved in the matter resulting in the December 4, 2012 order. It would be anomalous to conclude that Respondent's repetition of this same conduct in this matter is anything other than her practicing psychology.

As to the use of EMDR, a psychological technique also involved in the earlier case, B.A. testified in extensive detail that she saw the EMDR machine with the lights in the room where A.A. was being seen by Respondent. A.A. also confirmed the light therapy that Respondent used on him. While Dr. Kleinman denies that she engaged in EMDR, during cross examination of B.A., she appeared to admit that she used the machine as light therapy to relax the minor. While we are aware EMDR is a therapeutic technique used by licensed psychologists to treat individuals with trauma, on the record before us the Board declines to make findings as to whether Respondent utilized EMDR.

It strains credulity that Respondent, a trained and formerly licensed psychologist who claimed during this hearing that she did

not assess or evaluate A.A.'s psychological issues could concede that she provided assistance to a minor with issues concerning possible sexual abuse, sexual fantasies and symptoms of OCD and consider that she was not engaging in the practice of psychology. B.A.'s testimony was convincing that Respondent reported that this child posed a danger to himself and those around him, that he would end up in a mental institution or might kill himself if he stopped seeing her, but Respondent did nothing to refer him to a licensed mental health provider other than herself to address his significant psychological issues. Respondent claimed she was the best in the State.

Based on the testimony of B.A., Respondent's own statements and the documentary evidence including the Enforcement Bureau report presented, the Board finds that the State produced an abundance of evidence to establish that Respondent engaged in the practice of psychology during a period from April through August 2013 after her license to practice psychology was revoked, in violation of N.J.S.A. 45:14B-1 et. seq., specifically N.J.S.A. 45:14B-5, and N.J.S.A. 45:1-18.1 and .2.

Additionally, the documentary and testimonial evidence produced by the State was sufficient to determine that Respondent never informed the Division of Child Protection and Permanency about the sexual abuse alleged to have occurred by A.A. to B.A.'s niece and to C.A.'s friend. Despite the Respondent's protestations

that she had no obligation to report abuse as she was no longer licensed, the child abuse statute provides that anyone with reasonable cause or suspicion of sexual abuse of a child shall report it to the Division of Child Protection and Permanency. Thus the Board also finds that Respondent was in violation of N.J.S.A. 9:6-8.10 for her failure to report the allegation of child abuse by A.A. towards his sister's friend and his cousin.

#### Conclusions of Law

1. The Board concluded that: Respondent's conduct with A.A. constituted the unlicensed practice of psychology while her license was revoked in violation of N.J.S.A. 45:14B-1 et. seq. and N.J.S.A. 45:1-18.2 and failure to comply with a Board Order in violation of N.J.A.C. 13:45C-1.4.
2. Respondent's conduct in failing to report suspected sexual abuse by A.A. is in violation of N.J.S.A. 9:6-8.10.
3. Respondent's conduct in providing psychological services to A.A. constitutes a failure to comply with an act or regulation administered by the Board in violation of N.J.S.A. 45:1-21(h).

#### Penalty Hearing

Immediately following the Board's announcement of its determination that cause for discipline was found, the Board proceeded to a hearing for determination of sanctions.

Respondent informed the Board that her mitigation witness was not able to appear due to illness. Respondent asked the Board to consider that she has no income and no funds to pay a penalty or

costs. She submitted R-4, federal income tax returns for 2012 and 2013, showing loss of income in both years and a letter from Elliot Freidenreich, CPA indicating that Respondent had no income for the 2014 tax year.

The DAG argued that Respondent should receive the harshest penalty and further revocation of her license to practice psychology as under the guise of "coaching" she offered counseling to a family with whom she had a previous therapeutic relationship and who trusted her. He noted that this is a second offense and monetary sanctions increase pursuant to N.J.S.A. 45:1-25 to not more than \$20,000 per violation. The State also sought costs and attorney fees for the prosecution of this case.

In determining the appropriate penalty the Board considered the Respondent's lack of remorse or insight into her conduct with A.A. Importantly, the Board was troubled by the pattern of Respondent engaging in the very same damaging conduct she was previously disciplined for involving discovery of repressed memories of sexual abuse of infants. Respondent's claim that only she could provide A.A. with the tools to deal with his issues was also echoed from her position in the prior matter.

The Board recognizes and is concerned with the Respondent's inability to accept any responsibility for her misconduct or to recognize her limitations after the initial disciplinary action resulted in the revocation of her license. The Board is troubled

with Respondent's conduct in diagnosing and treating a troubled youth while her license is revoked and her steadfast position that her conduct is not a violation of the Board's statutes or regulations. The Board believes that the likelihood of recidivism is high. Respondent clearly demonstrated that she lacks the ability to restrain herself from the practice of psychology.

Therefore the Board believes only the most severe sanction of revocation is appropriate and in light of the fact that Respondent's license is already revoked, this revocation is to be effective once Respondent has satisfied the terms for reinstatement of the previously imposed revocation.

#### Costs

As to the imposition of costs and monetary penalties in this matter, we have reviewed the costs sought by the State and find the application sufficiently detailed and the amount reasonable given the length of time and complexity of the prosecution of this matter. Our analysis follows.

The Attorney General's certification in this matter documented the time the attorneys expended in these proceedings, detailing costs beginning in April 16, 2014 through November 24, 2014 which reflect total attorney fees in the amount of \$40,142.

The rate charged by the Division of Law for a Deputy Attorney General of \$135 for 0-5 years; \$175 for more than ten years and \$200 per hour for an Assistant Attorney General, (as in this

matter) has been approved in prior litigated matters and appears to be well below the community standard. The Board finds the certification attached to the billings to be sufficient. We note that no fees have been sought for any time after November 24, 2014, following which trial on the merits, and response and appearances on numerous motions occurred and transcript costs for several hearings were incurred. We find the application to be sufficiently detailed to permit our conclusion that the amount spent on each activity, is objectively reasonable as well. (See, Poritz v. Stang, 288 N.J. Super 217 (App. Div. 1996). We find the Attorney General has adequately documented the legal work necessary to advance the prosecution of this case. We are thus satisfied the Attorney General's claims are reasonable, especially when viewed in the context of the seriousness and scope of the action maintained against the Respondent.<sup>22</sup>

Respondent argues that costs and monetary penalties should not be imposed because Respondent has little source of income. Respondent presented tax returns for 2012 and 2013 showing reduced income, but without including schedules or certifications of assets she may hold. As to other costs sought, sufficient documentation has been submitted to support imposition of the following costs (including the attorney fees discussed above). Costs are

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<sup>22</sup> Similarly the certification submitted in support of investigative costs were sufficient and based on a fee schedule accepted in the past. No specific objection was made to investigative fees.

traditionally imposed pursuant to N.J.S.A. 45:1-24 so as not to pass the costs of the proceeding onto licensees who support Board activities through licensing fees.

Investigative Costs:	14,133.08
Attorney's Fees:	40,142.00
Videoconference Costs:	<u>1,975.00</u>
Total Costs:	\$56,250.00

Additionally, the Board determined to impose a civil penalty of \$20,000 for engaging in the practice of psychology during a period of time when Respondent's license was revoked and for her failure to report sexual abuse she alleged A.A. conducted on his sister's friend and cousin to the Department of Children and Families.<sup>23</sup> We could impose separate penalties for each instance of unlicensed practice, however, we choose in view of Respondent's mitigation presentation regarding limited income to impose only a total penalty of \$20,000.

For all the reasons set forth in the Initial Decision and in this Final Decision and Order;

IT IS THEREFORE ON THIS *13<sup>th</sup>* DAY OF APRIL, 2015

ORDERED:

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<sup>23</sup>The Respondent made a request for the Board to stay its decision to permit her to file an appeal in this matter. The basis of the stay was to prevent the Board from putting a lien on her property. The State opposed the request for a stay arguing that Respondent's license is revoked and she has not provided a valid reason to stay the decision or the penalty. Additionally, Respondent's license is revoked by previous Order of the Board and a stay would not affect the revoked status. The stay was denied.

1. The license of Respondent, Marsha J. Kleinman to practice psychology is revoked. This revocation will not commence until such time as the Respondent has applied for and satisfied all the conditions for reinstatement of her license as set forth in the December 4, 2012 Order.

2. Respondent is assessed a civil penalty in the amount of \$20,000. Payment shall be made by certified check, bank cashier, or money order payable to the "State of New Jersey," or by wire transfer, direct deposit, or credit card payment delivered or mailed to J. Michael Walker, Executive Director, State Board of Psychological Examiners, P.O. Box 45017, Newark, New Jersey 07101. Any other form of payment will be rejected and will be returned to the party making the payment. Payment shall be made no later than 30 days after the filing date of this order.

3. Respondent is assessed costs in the amount of \$56,240.00 to be paid within thirty days after the filing date of this order. Payment shall be made by certified check, bank cashier, or money order payable to the "State of New Jersey," or by wire transfer, direct deposit, or credit card payment delivered or mailed to J. Michael Walker, Executive Director, State Board of Psychological Examiners, P.O. Box 45017, Newark, New Jersey 07101. Any other form of payment will be rejected and will be returned to the party making the payment.

4. Failure to remit any payment required by this Order will

result in the filing of a certificate of debt and such other proceedings as are permitted by law.

BOARD OF PSYCHOLOGICAL EXAMINERS

By: *Nancy E. Friedman*  
Nancy E. Friedman, Chair