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COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
STATE BOARD OF MEDICINE

PROTHONOTARY

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BUREAU OF PROFESSIONAL
AND
OCCUPATIONAL AFFAIRS

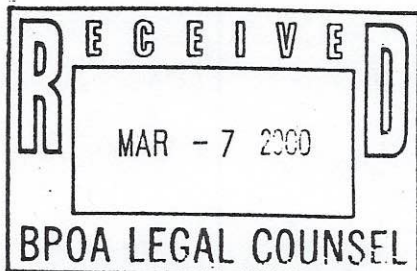
Commonwealth of Pennsylvania,
Bureau of Professional and
Occupational Affairs

V.

Johnnie Wilson Barto, M.D.
Respondent

Docket No. 0283-49-98

File No. 98-49-00222



DATE DISTRIBUTED

PROSECUTION

ADJUDICATION AND ORDER

~~HRG EXAM~~

Suzanne Rauer
Hearing Examiner

124 Pine Street
Harrisburg, PA 17101
(717) 772-2686

HISTORY

This matter comes before the hearing examiner for the Bureau of Professional and Occupational Affairs (BPOA) on an order to show cause filed against Respondent by the Commonwealth on May 14, 1998. The order to show cause alleged that Johnnie Wilson Barto, M.D. (Respondent) is subject to disciplinary Action under the Medical Practice Act of 1985 (Act), Act of December 20, 1985, P.L. 457, as amended, specifically at 63 P.S. §422.41(8), in that Respondent engaged in immoral or unprofessional conduct by inappropriately touching minor patients.

Respondent filed an answer to the Commonwealth's order to show cause on July 1, 1998 denying any wrongdoing and requesting a hearing. A formal administrative hearing was conducted before Hearing Examiner Suzanne Rauer for three days on January 26, 27 and 28, 1999. At the conclusion of the hearing on January 28, 1999, the hearing examiner set an additional hearing date for February 23, 1999, for the taking of testimony with regard to Count Two of the order to show cause. On February 22, 1999, the Commonwealth withdrew the allegations contained in Count Two, and closing arguments were heard on February 23, 1999. Bernadette Paul, Esquire represented the Commonwealth at the hearing in this matter. Walter W. Cohen, Esquire and Andrew J. Giorgione, Esquire represented Respondent at that hearing, at which Respondent was also present. The record in this matter was closed on May 17, 1999 with the filing of the Commonwealth's Reply Brief.

FINDINGS OF FACT

1. Respondent holds a license to practice medicine and surgery in the Commonwealth of Pennsylvania, license no. MD-015619-E, issued on August 7, 1974. (OSC ¶ 1; Board records)
2. Respondent's license is current through December 31, 2000. (Board records)
3. Respondent's address on file with the Board is 110 Main Street, Johnstown, Pennsylvania 15901. (OSC, ¶ 4; Board records)
4. At all times pertinent to the factual allegations, Respondent held a license to practice medicine and surgery in the Commonwealth, and practiced as a pediatrician in Pennsylvania. (Board records; N.T. 1/28/99 at pp. 92-94)
5. Dr. Barto has been an owner of the Johnstown Pediatrics since 1977. (N.T. 1/28/99 at p. 95)

Patient L.B.

6. P.B., the mother of Patient L.B., took Patient L.B. to an appointment with Respondent at Johnstown Pediatrics on February 9, 1994. (N.T. 1/26/99 at p. 138)
7. Patient L.B. was four years old at the time of the appointment. (N.T. 1/26/99 at p. 138)
8. Dr. Barto began caring for Patient L.B. at the time of her birth, in that she was born with an infection which caused her seizures and was immediately admitted to Regional Intensive Care Nursery. (N.T. 1/26/99 at p. 149)
9. Prior to Patient L.B.'s February 9, 1994 appointment, Dr.

Barto had treated Patient L.B. with Ritalin, and was then treating her with Clonidine, for hyperactivity. (N.T. 1/26/99 at p. 163)

10. At the time of the February 9, 1994 appointment, Patient L.B. had a runny nose and cough. (N.T. 1/26/99 at p. 138)

11. Respondent conducted a physical examination of Patient L.B. in an examination room at Johnstown Pediatrics. (N.T. 1/26/99 at p. 138)

12. During the examination of Patient L.B. on February 9, 1994, Dr. Barto examined her vagina and rectum. (N.T. 1/26/99 at p. 173)

13. Upon completion of his examination of Patient L.B., Respondent offered to walk with Patient L.B. down the hall to the "medicine room" to get medication for her cough and runny nose. (N.T. 1/26/99 at p. 139)

14. There were several rooms and a stairwell with doors in the vicinity of the medicine closet and examination rooms at Johnstown Pediatrics. (Respondent's Exhibit R-7)

15. The hearing and vision room immediately adjacent to the medicine closet has a door. (Respondent's Exhibit R-7)

16. When Respondent and Patient L.B. left the examination room, P.B. also left the room for "two seconds" to let her sister in the waiting area know that they were almost finished. (N.T. 1/26/99 at p. 179)

17. At some point during the time that Respondent and Patient L.B. were out of the examination room, Respondent placed his hand

down Patient L.B.'s pants and touched Patient L.B.s genital area.
(N.T. 1/26/99 at pp. 139-141, 210-216)

18. Respondent's touching of Patient L.B.'s genital area, which occurred at some point while he was alone with Patient L.B., did not occur in the context of a physical exam, and did not serve any medical purpose. (N.T. 1/26/99 at p. 139-141)

19. Respondent and Patient L.B. were returning from the medicine room to the examination room as P.B. returned to the examination room from the waiting room. (N.T. 1/26/99 at p. 179, 180)

20. When Patient L.B. and Respondent returned to the examination room, Respondent was carrying Patient L.B. (N.T. 1/26/99 at pp. 140, 180)

21. P.B. then left Respondent's office with Patient L.B. (N.T. 1/26/99 at p. 140)

22. In the car on the way home from Respondent's office, Patient L.B. told her mother that Patient L.B. did not like going to see Respondent. (N.T. 1/26/99 at p. 140)

23. Patient L.B. told her mother that, while Respondent and Patient L.B. were out of the examination room getting the medicine, Respondent stuck his hand inside Patient L.B.'s pants and underwear and placed his hand on her private area. (N.T. 1/26/99 at pp. 140-141)

24. P.B. and S.M. live together and have raised Patient L.B. and another daughter, S.M., as a family unit since Patient L.B. was

born. (N.T. 1/26/99 at pp. 195-196)

25. Within two days immediately following Patient L.B.'s appointment with Respondent, Patient L.B. told S.M. that Respondent had stuck his hands down her pants and had done something to her and to her bottom. (N.T. 1/26/99 at pp. 196-197)

26. P.B. and Patient L.B. reported the incident to Cambria County Children and Youth Services within a few days of its occurrence. (N.T. 1/26/99 at pp. 119-123, 132)

27. Sharee Charles, a former caseworker with Cambria County Children and Youth Services, talked to P.B. and Patient L.B.; and prepared a report of the incident. (N.T. 1/26/99 at pp. 119-121; Commonwealth's Exhibit C-3)

28. Patient L.B. told Ms. Charles that Respondent had put his finger "in there." (Commonwealth's Exhibit C-3)

29. Cambria County Children and Youth Services referred the matter to the Johnstown Police because Respondent did not meet the criteria for a perpetrator as established by the Child Protective Services Law. (N.T. 1/26/99 at pp. 127-129)

30. Sergeant Cancelliere of the Johnstown Police interviewed P.B., Patient L.B., Respondent, and Respondent's office personnel. (N.T. 1/26/99 at p. 192; N.T. 1/28/99 at pp. 148-149; Commonwealth's Reply Brief at p. 8)

31. P.B. and S.M. did not discuss this incident with Patient L.B. following their contact with Children and Youth Services and the Johnstown Police until a few months before the hearing in this

matter. (N.T. 1/26/99 at p. 146-147)

32. Following the incident with Respondent, P.B. and S.M. noticed that Patient L.B. had increasing bouts of self-directed violence and Acting out. (N.T. 1/26/99 at p. 197-198)

33. P.B. and S.M. sought treatment for Patient L.B. with Dr. Sara Hamel of Children's Hospital of Pittsburgh following this incident, and Patient L.B. had been seeing her for five years at the time of the hearing. (N.T. 1/26/99 at pp. 143-144, 198).

Patient K.B.

34. On January 9, 1998, Mrs. B. took her three year old daughter, Patient K.B., to Respondent for treatment. (N.T. 1/26/99 at p. 25)

35. Mrs. B. was referred to Respondent by her family physician, Dr. Crawford. (N.T. 1/26/99 at p. 25)

36. Dr. Crawford, a family practitioner, referred Patient K.B. to a pediatrician because of Patient K.B.'s bed wetting and blood in her stool. (N.T. 1/26/99 at p. 26, 49)

37. Respondent examined Patient K.B. while Mrs. B. was in the room. (N.T. 1/26/99 at p. 26)

38. Patient K.B. was dressed only in a shirt and socks for the physical examination. (N.T. 1/26/99 at p. 27)

39. Respondent performed a complete physical examination of Patient K.B. (N.T. 1/26/99 at p. 27; N.T. 1/28/99 at pp. 109-111)

40. During the examination, in full view of Mrs. B., Respondent lifted Patient K.B.'s legs and, with his fingers, spread

her rectum apart and opened her vagina. (N.T. 1/26/99 at p. 54)

41. Respondent advised Mrs. B. that he did not find a hairline tear in Patient K.B.'s rectum, that her care for Patient K.B.'s fungal infections was proper, and that he was not concerned with Patient K.B.'s bed wetting because of a family history of bed wetting. (N.T. 1/26/99 at p. 54, 55)

42. Respondent's examination of Patient K.B.'s perineal and rectal area was appropriate and raised no concerns for Mrs. B. (N.T. 1/26/99 at p. 56; N.T. 1/27/99 at pp. 31, 59, 94)

43. At the conclusion of the physical examination, Respondent sat on a stool facing the middle of the examination table, holding Patient K.B. on his lap, and began reviewing medical records with Mrs. B. to explain the laboratory results. (N.T. 1/26/99 at pp. 28, 64; N.T. 1/28/99 at p. 113)

44. While Respondent was holding her in his lap, Patient K.B. was still wearing only a shirt and socks. (N.T. 1/26/99 at p. 28; N.T. 1/28/99 at pp. 112-113)

45. Mrs. B. sat on a chair at the end of the examining table facing Respondent's profile. (N.T. 1/26/99 at p. 28-33)

46. Mrs. B. noticed that Patient K.B. kept nodding her head up and down and looking at her lap. (N.T. 1/26/99 at pp. 29-32)

47. Mrs. B. leaned onto the examining table, which was to her left, so that she could see what Patient K.B. was looking at. (N.T. 1/26/99 at pp. 30-32)

48. Patient K.B. was sitting on Respondent's lap with her

back to Mrs. B. (N.T. 1/26/99 at pp. 30-32)

49. Mrs. B. observed Patient K.B. give a sudden jerk and then shift her position so that Mrs. B. had an unobstructed view of Patient K.B.'s vaginal area. (N.T. 1/26/99 at pp. 30-32)

50. After she witnessed Patient K.B.'s sudden jerk, Mrs. B. observed that Respondent had his hand on Patient K.B.'s naked genital area. (N.T. 1/26/99 at pp. 30-32)

51. Respondent's hand made contact and remained in contact with Patient K.B.'s naked genital area for at least one minute. (N.T. 1/26/99 at pp. 30-32, 63-65)

52. Respondent's contact with Patient K.B.'s naked genital area occurred outside the context of any physical examination and served no medical purpose. (N.T. 1/26/99 at p. 84; N.T. 1/27/99 at pp. 17-20)

53. After observing Respondent's hand on Patient K.B.'s naked genital area, Mrs. B. did not ask Respondent to remove his hand or physically move his hand, but instead suggested that she dress Patient K.B. (N.T. 1/26/99 at pp. 32-33)

54. Respondent was aware that Mrs. B. had suddenly become uncomfortable and that she wanted to end their discussion and leave, and offered to help her dress Patient K.B. (N.T. 1/28/99 at pp. 116-118)

55. Respondent put Patient K.B.'s underpants on her, then Mrs. B. finished dressing Patient K.B. (N.T. 1/26/99 at p. 33; N.T. 1/27/99 at p. 118)

56. After Patient K.B. was dressed, Mrs. B. and Patient K.B. left Respondent's office and proceeded home. (N.T. 1/26/99 at p. 33)

57. About ten minutes into the drive home, Patient K.B. said "I want my daddy, I want my daddy, I want to tell my daddy what that mean doctor did," or words to that effect. (N.T. 1/26/99 at pp. 33-34)

58. Mrs. B. was not able to contact her husband when they arrived home, and asked Patient K.B. what Respondent had done to her. (N.T. 1/26/99 at p. 34)

59. Patient K.B. said she would show Mrs. B. what Respondent had done to her, then took down her underpants, put her hand on her vaginal area and started rubbing. (N.T. 1/26/99 at p. 34)

60. From the time Mrs. B. and Patient K.B. left Respondent's office to the time that Patient K.B. brought up the subject of Respondent touching her, Mrs. B. had made no comment about Respondent. (N.T. 1/26/99 at pp. 86-87)

61. Patient K.B. was the first person within the B. family to mention the subject of Respondent touching her. (N.T. 1/26/99 at p. 87)

62. After the medical visit to Respondent's office, Patient K.B. told her father that Respondent touched her "monkey." (N.T. 1/26/99 at p. 67)

63. Within hours of returning home from Respondent's office Mrs. B. called her family physician, Dr. Crawford, whose staff told

her that she could get counseling for Patient K.B., but that she should not call the police. (N.T. 1/26/99 at p. 35)

64. Mrs. B. called a local hospital and, without giving her name, sought advice concerning Patient K.B. (N.T. 1/26/99 at p. 35)

65. The local hospital staff told Mrs. B. to call the police or her medical insurance company. (N.T. 1/26/99 at p. 35)

66. Mrs. B. then called her insurance company, who advised her to call Cambria County Children and Youth Services. (N.T. 1/26/99 at p. 36)

67. Mrs. B. followed the advice given by her insurance provider and, within hours of the incident, contacted Cambria County Children and Youth Services to report her observation of Respondent touching her daughter's genitals. (N.T. 1/26/99 at pp. 34-36)

68. Mrs. K.B. told Todd Miller, a case worker with Cambria County Children and Youth Services, that she witnessed Respondent place his hand on Patient K.B.'s vagina and rub Patient K.B.'s vaginal area. (Transcript of January 26, 1999 at pp. 91, 108)

69. Caseworker Todd Miller prepared a report on January 12, 1998, based on the telephone call he received from Mrs. B. (N.T. 1/26/99 at pp. 89-90)

70. Mr. Miller's report stated that Respondent had examined Patient K.B., that after the examination Respondent sat the child

on his lap and rubbed the child's vaginal area, that Mrs. B. had witnessed this when the child moved around on Respondent's lap, and that the child later told her mother that Respondent had touched her "monkey" and demonstrated to her mother what Respondent had done. (N.T. 1/26/99 at pp. 90-92; Commonwealth's Exhibit C-5)

71. Mrs. B.'s report did not meet the three criteria giving Children and Youth Services jurisdiction to investigate this matter, and the report was referred to the Cambria County District Attorney's Office. (N.T. 1/26/99 at pp. 94-103, 107-112; Commonwealth's Exhibit C-6)

72. Following advice given to her by Children and Youth Services, Mrs. B. contacted Ron Portash, a detective from the Cambria County District Attorney's Office, regarding Respondent touching Patient K.B.'s genitals. (N.T. 1/26/99 at p. 36-37)

73. On January 28, 1998, Detective Portash interviewed Respondent about the alleged incident with Patient K.B. (N.T. 1/28/99 at p. 121)

74. Detective Portash advised Mrs. B. that he would be filing a complaint against Respondent with the State Board of Medicine. (N.T. 1/26/99 at pp. 43, 71-72)

75. Following the incident at Respondent's office, Mrs. B. noticed changes in her daughter's behavior in that Patient K.B. became afraid of men and continually put her hands under her underwear to touch her genitals. (N.T. 1/26/99 at p. 37)

76. In February 1998, Respondent's partner, Joseph F. Sheridan, M.D., contacted Mrs. B. and suggested a meeting with Mrs. B. and her husband to discuss the alleged incident with Respondent. (N.T. 1/26/99 at pp. 38, 70)

77. In February 1998, a meeting was held between Dr. Sheridan, Respondent, Mrs. B., and an undercover police officer whom Dr. Sheridan and Respondent believed to be Mr. B. (N.T. 1/26/99 at p. 70; N.T. 1/28/99 at pp. 83, 84, 119)

78. At the February 1998 meeting, Respondent apologized for any misunderstanding, but maintained that he had not improperly touched Patient K.B. (N.T. 1/26/99 at p. 40)

79. Mrs. B. asked Dr. Sheridan if Johnstown Pediatrics would be responsible for counseling for Patient K.B. because Mrs. B. could not afford that counseling, but Dr. Sheridan refused. (N.T. 1/26/99 at pp. 41-43)

80. Dr. Sheridan offered to discuss with Mrs. B. the services of the counselor that was employed by Johnstown Pediatrics, but Mrs. B. was not interested in that arrangement. (N.T. 1/28/99 at p. 121)

81. Mrs. B. had no contact from either Respondent or Dr. Sheridan after the February 1998 meeting. (N.T. 1/26/99 at pp. 41-42)

82. Respondent was served with the order to show cause and all subsequent pleadings, orders and notices filed of record in this matter. (Docket No. 0283-49-98)

CONCLUSIONS OF LAW

1. The Board has jurisdiction in this matter. (Findings of Fact Nos. 1, 2, 4)

2. Respondent was given reasonable notice of the charges against him and an opportunity to be heard in this proceeding in accordance with Administrative Agency Law, 2 Pa. C.S. §504. (Findings of Fact No. 81)

3. Respondent is subject to disciplinary or corrective measures for engaging in immoral or unprofessional conduct in violation of Section 41(8) of the Act, 63 P.S. §422.41(8). (Findings of Fact Nos. 6-80)

4. The Board is authorized to impose disciplinary or corrective measures or a civil penalty pursuant to sections 39(b) and 42(a) of the Act, 63 P.S. §§ 422.39(b) and 422.42(a).

DISCUSSION

In this action, Respondent is charged with violations of Section 41 of the Act, 63 P.S. § 422.41, which provides in pertinent part as follows:

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

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

* * *

(8) Being guilty of immoral or unprofessional conduct. Unprofessional conduct shall include departure from or failing to conform to an ethical or quality standard of the profession. In proceedings based on this paragraph, actual injury to a patient need not be established.

(i) The ethical standards of a profession are those ethical tenets which are embraced by the professional community in this Commonwealth.

(ii) A practitioner departs from, or fails to conform to, a quality standard of the profession when the practitioner provides a medical service at a level beneath the accepted standard of care. In the event the board has not promulgated an applicable regulation, the accepted standard of care for a practitioner is that which would be normally exercised by the average professional of the same kind in this Commonwealth under the circumstances, including locality and whether the practitioner is or purports to be a specialist in the area.

The charges against Respondent arose from allegations that on two occasions Respondent engaged in immoral or unprofessional conduct, in that Respondent allegedly engaged in inappropriate physical contact with two minor female patients.

Laches

Respondent argued that Count One of the OSC should be dismissed for unjustifiable delay by the complainant and the Commonwealth in filing charges against Respondent, and the resulting prejudice to Respondent. It is Respondent's position that Count One of the OSC contains allegations of behavior by Respondent that occurred more than five years prior to the hearing in this matter, that the alleged incident was reported to the police, but that the police did not charge or arrest Respondent and did not report this incident to the Board, that the alleged incident was also reported to Cambria County Children and Youth Services, who also did not report the incident to the Board, that the Commonwealth did not bring these charges until more than four years after the alleged incident, and that the Commonwealth did not contact P.B. concerning the allegations contained in Count One until January 1998, four years after the alleged incident. Respondent argued that this delay prejudiced Respondent's ability to exercise his due process right of notice to enable him to mount a credible defense.

In support of his argument of laches, Respondent cited the Supreme Court of Pennsylvania's decision in *Weinberg v. Commonwealth, State Board of Examiners of Public Accountants*, 501 A.2d 239, 243 (Pa. 1985), which held that laches is available to a defendant where the complaining party does not display due

diligence in instituting an action and the lack of due diligence results in prejudice to the defendant. *Id.*, 501 A.2d at 242 (citing *Class of Two Hundred Administrative Faculty Members v. Scanlon*, 466 A.2d 103 (Pa. 1983)).

In the *Weinberg* case, the Court held that the due diligence element of laches applies to a State Board's efforts to recognize misconduct and initiate action in a timely manner. *Id.*, 501 A.2d at 244. In *Lyness v. Commonwealth, State Board of Medicine*, the Court further held that the defendant is prejudiced by a victim who does not pursue his own claim, just as much as when the State Board of Medicine fails to pursue the claim. 561 A.2d 362, 370 (Pa. Commw. 1989); *rev'd & rem'd on other grounds*, 605 A.2d 1024 (Pa. 1992), *reargument denied*, June 20, 1992. The court in *Lyness* stated that laches may bar the proceedings if the defendant can prove that the victim unjustifiably delayed in bringing the incident before the Board. *Id.*, 561 A.2d at 371.

Respondent also cited *Shah v. State Board of Medicine*, 589 A.2d 783 (Pa. Commw. 1991), *reh'g denied* (Pa. Commw. May 22, 1991), *alloc denied*, 600 A.2d 197 (Pa. 1991), in support of his argument. In *Shah*, the Court dismissed allegations against Dr. Shah which were not made by the alleged victim. Respondent argued that the facts of *Shah* are indistinguishable from the facts in the instant matter. In *Shah*, the court dismissed a serious count of sexual misconduct when the victim did not report the alleged misconduct to

the Bureau until more than four years after the alleged incident. *Id.* at 804. The court in *Shah* held that, even though the complainant informed the police, who took no formal Action, in a timely manner, the test was whether the complainant unjustifiably delayed in reporting the incident to the State Board of Medicine. *Id.* at 801, 804. The court held that the unjustifiable delay test was met by the more than four year delay in which neither the police nor the alleged victim reported the incident to the Board. *Shah*, 589 A.2d at 801-802.

The Court in *Shah* also determined that the respondent in that case was prejudiced because several key witnesses had become unavailable during the intervening years, that the complainant's inconsistent testimony precluded the doctor from raising a specific defense, and that several possible witnesses had no memory of the incident and the doctor could reconstruct the visit only by review of his records. *Id.*, at 802-804. The Court held that prejudice becomes even more apparent when the final decision comes down to a credibility determination between the witnesses, who remember conflicting events, and the doctor, who remembers nothing. *Id.*, at 804.

It is Respondent's position that the analysis for determining undue delay, outlined in *Weinberg* as applied in *Shah*, is directly applicable to Count One of the OSC in the instant case. Respondent argues that here, as in *Shah*, there is no justification for the

delay in reporting this matter and in pursuing revocation of Respondent's license to practice medicine in the Commonwealth, and, as in *Shah*, the unconscionable delay prejudiced Respondent's ability to exercise his due process right of notice to enable him to mount a credible defense.

Respondent argued that the factors the Court found in *Shah*, which formed the basis for its finding of prejudice, are identical to the facts in the instant matter. Respondent alleged that testimony from several witnesses and documentary evidence was lacking. Key witnesses were either unavailable, removed from the Commonwealth's witness list or not called to testify by the Commonwealth, and no records exist at Johnstown Pediatrics which would indicate what staff was on duty on February 9, 1994. Respondent also went into great detail regarding prejudice resulting from inconsistent, contradictory or incomplete testimony of the Commonwealth's witnesses regarding the allegations in Count One of the OSC, asserting that such allegedly problematic testimony by the Commonwealth's witnesses prejudiced Respondent's due process rights as a result of laches. And finally, Respondent argued that, because of the time delay, he was unable to substantially recall the events of the February 9, 1994 visit with Patient L.B. and had to rely on his notes and medical records to recall the circumstances surrounding the examination and the care of Patient L.B.

The Commonwealth, on the other hand, argued that the only true similarity in facts between Respondent's situation and *Shah* is that a substantial amount of time passed between the victim's first reports and the report to the Bureau of Professional and Occupational Affairs. It is the Commonwealth's position that, given the fact that the alleged victims in *Shah* were adult women and the alleged victim here was a four year old girl, the factual circumstances between this case and *Shah* are quite different. The Commonwealth goes on to assert that considerations which would cause law enforcement officials to promptly report conduct when the victims are adults fully capable of comprehending, interpreting, and relating the actions of a doctor are not the same considerations those same law enforcement officials would use when the victim is a young child and there were no other eyewitness present, and that the decision to delay reporting to the Board was not unreasonable in light of all of the facts in this case.

The Commonwealth also pointed out that, in order to prevail on a laches defense, Respondent must also prove that he was prejudiced by the delay in this proceeding, which is the second prong of the laches defense. It is the Commonwealth's position that Respondent did not establish prejudice because the Commonwealth's witnesses testified consistently with their prior reports, because Respondent made no effort to obtain additional witnesses, and because Respondent's testimony and pleadings establish his memory of the

Patient L.B. incident.

The hearing examiner agrees with the Commonwealth that there are factual distinctions between this case and *Shah* which take this matter outside the *Shah* rationale with respect to unreasonable delay in reporting Respondent's alleged conduct to the Bureau of Professional and Occupational Affairs. As the prosecuting attorney correctly points out, the alleged victims in *Shah* were adult women at the time of the alleged sexual misconduct, while in this case Patient L.B. was four years of age at the time of the alleged incident.¹ Furthermore, Patient L.B.'s mother, P.B., immediately reported the incident to the Cambria County Children and Youth Services who, upon a determination that Respondent did not meet the criteria for a perpetrator as defined by the Child Protective Services Law, referred P.B. to the Johnstown Police.² P.B. contacted the Johnstown Police promptly, but the police told her that there was nothing that could be done because of Patient L.B.'s age, and that she would be torn apart in court.³ P.B. also testified that she did not report the incident to the Board because the Johnstown Police advised her there was nothing that could be done because of Patient L.B.'s age.⁴ P.B. reasonably relied upon

¹N.T. 1/26/99, p. 138.

²N.T. 1/26/99, p. 122.

³N.T. 1/26/99, pp. 142, 199.

⁴N.T. 1/26/99, p. 191.

that statement from professional law enforcement agents in not reporting the incident to the Board, and that reliance, coupled with a police investigation which gave Respondent notice that his alleged sexual misconduct was the subject of a criminal investigation, takes the length of time between Respondent's alleged sexual assault on Patient L.B. and P.B.'s report to the Board out of the "unreasonable" definition.

The hearing examiner is equally unpersuaded by Respondent's argument that he was prejudiced by the length of time between Respondent's alleged sexual assault on Patient L.B. and the formal proceeding in this matter. Although Respondent claims to have no independent memory of the patient visit in question in Count One, and that he is relying entirely on his office records for his testimony,⁵ Respondent admits that he remembers the alleged incident because he was questioned by the police shortly after Patient L.B.'s last visit to his office.⁶ The hearing examiner therefore does not find credible Respondent's claim that he does not remember the office visit itself, given the police interview. Either way, however, since it was not the physical examination itself, but rather Respondent's actions after the physical examination, that are in question, Respondent was not prejudiced in his ability to defend against the allegations in the OSC.

⁵N.T. 1/28/99 at p. 146.

⁶N.T. 1/28/99 at p. 148-149.

Similarly, the hearing examiner finds no prejudice to Respondent's ability to defend against the allegations in the OSC because the Commonwealth did not call witnesses Respondent believed should testify in this matter. The Commonwealth had the right to present its case as it saw fit, and lack of testimony from any witnesses that could have been called goes to sufficiency of evidence rather than prejudice to Respondent. Furthermore, Respondent had every opportunity to subpoena "key" witnesses he suspected might help his defense, but did not do so.

Respondent also argued that he was prejudiced in his defense because, after four years, no records existed within his practice of which employees were on duty in his office on February 9, 1994. However, Respondent was put on notice immediately after the alleged incident that his conduct on that date was in question. As Respondent himself admitted, it is not every day that he is interviewed by the police on possible child molestation charges.⁷ The Commonwealth was not responsible for preserving evidence crucial to Respondent's defense after notification of possible legal action against him. Furthermore, as the Commonwealth pointed out, Respondent gave no testimony that any staff member was present at any time during Patient L.B.'s visit, or that he had made any attempt to identify those staff persons interviewed by the Johnstown Police during their investigation of the matter, although

⁷N.T. 1/28/99 at p. 148.

Respondent testified to knowledge that the police did in fact interview staff at his office.⁸ That information was certainly memorialized in the police report of Sergeant Cancelliere's investigation of the alleged conduct. Given that immediate notification of possible charges against him, and availability of information through the police report, the hearing examiner is not persuaded that Respondent was prejudiced in his defense against the allegations in the OSC because of a four year delay in litigating those charges in this forum.

Respondent further alleged that testimony of the Commonwealth's witnesses was "inconsistent, contradictory and incomplete."⁹ To the contrary, the testimony of P.B., Patient L.B. and caseworker Sharee Charles of Cambria County Children and Youth Services is remarkably consistent. P.B.'s and Patient L.B.'s account of Respondent's alleged conduct has not varied from the day it was first reported until the day they testified in this forum. Any discrepancy about whether Ms. Charles talked to P.B. in person or by telephone, and whether Ms. Charles actually spoke to Patient L.B., are resolved by Ms. Charles' Report of Suspected Child Abuse, which was prepared at the time of the report and was admitted into evidence as Commonwealth's Exhibit C-3. As the Commonwealth points out, the only inconsistency is with paragraph 11 of the

⁸N.T. 1/28/99 at p. 149; Commonwealth's Reply Brief at p. 8.

⁹Omnibus Post-Hearing Brief of Respondent, Johnnie Wilson Barto, M.D. at p. 29.

Commonwealth's OSC, which goes not to the defense of laches but to whether the Commonwealth proved a particular factual allegation.

Similarly, testimony by P.B. and Patient L.B. that Respondent had a mustache on the date the alleged conduct took place does not go to a defense of laches. There is no dispute that Respondent had a beard on February 9, 1994. P.B. testified that Patient L.B. is now afraid of men with facial hair. That Respondent did not have a mustache, which is unusual for men with facial hair, is a minor detail which does not lend itself to establishing a defense of laches.

The hearing examiner also finds no inconsistency in P.B.'s testimony concerning the location of the "medicine room" or the fact that she did not accompany Respondent and Patient L.B. to get the cold medicine. P.B. testified that Respondent gave her sample medication for Patient L.B.'s symptoms, and the location of the sample closet corresponded with P.B.'s testimony. That P.B. ran out to the waiting room to speak with her sister "for two seconds"¹⁰ while Respondent and Patient L.B. went to get the medicine is not inconsistent with her earlier statement that she stayed in the exam room, given that P.B.'s testimony was that she remained behind when Respondent and Patient L.B. went to the "medicine room." It is also apparent from the context of P.B.'s testimony that P.B.'s statement that she ran out of the exam room "for two seconds" does

¹⁰N.T. 1/26/99 at p. 179, 181.

not define the amount of time Respondent and Patient L.B. were out of the exam room, but was rather a commonly used figure of speech for a short period of time, given that P.B. could not remember the exact length of time Respondent and her daughter were gone, or the exact length of time it took to let P.B.'s sister in the waiting room know that they were almost finished with the appointment.

P.B. and S.M. both testified that Patient L.B. became violent and destructive both to her surroundings and to herself after the February 9, 1994 visit to Respondent's office. This is not an inconsistency in testimony sufficient to make out a defense of laches as claimed by Respondent. Rather, it is a matter of degree. P.B. and S.M. do not deny that Patient L.B. was hyperactive and prone to tantrums and aggressive behavior prior to that date. Their testimony was that Patient L.B.'s behavior was exacerbated by Respondent's alleged conduct during that office visit.¹¹ Similarly, P.B.'s testimony about Patient L.B.'s medications was completely consistent with the evidence, in that P.B. did not testify that Patient L.B. has been off medication for almost four years. P.B.'s testimony was that Patient L.B. was off her seizure medication for almost four years, but continued to take medication for hyperactivity.¹² Again, both P.B. and S.M. testified that Ms.

¹¹N.T. 1/26/99 at pp. 143, 197-198.

¹²N.T. 1/26/99 at pp. 164-165, 166.

Charles of Cambria County Children and Youth Services had previously visited their home, and although neither was clear as to the genesis of that visit, S.M. testified that the visit was as a result of Patient L.B.'s hyperactivity, and that Ms. Charles was instrumental in obtaining help for the family.¹³ Respondent's characterization of this testimony as inconsistent is clearly in error.

Furthermore, as the Commonwealth points out, Respondent's answer to the OSC belies his claim that he was prejudiced as a result of a delay in reporting the alleged conduct to the Board because he had no independent memory of the February 9, 1994 visit. Respondent admitted the allegations in paragraphs 6 through 9 of the OSC, regarding Patient L.B.'s physical exam and walking with Patient L.B. down the hall to get her medicine, and denied only paragraphs 10 and 11 alleging sexual misconduct. Those answers are contrary to his claim at the hearing, and in his post-hearing brief, that he had no independent recollection of the February 9, 1994 visit.

A review of the record in this matter does not substantiate Respondent's arguments that the delay in reporting his alleged sexual misconduct to the Board was unreasonable, or that Respondent was prejudiced in his ability to defend against the allegation as a result of that unreasonable delay. Accordingly, after a review

¹³N.T. 1/26/99 at pp. 188-189, 200-204.

of Respondent's arguments and the evidence and testimony presented in this case, the hearing examiner finds that Respondent has not sustained his burden under *Shah* of proving both unreasonable delay and prejudice by a preponderance of the evidence, and has therefore not met his burden of establishing the affirmative defense of laches.

Having dealt with Respondent's assertion of the affirmative defense of laches, the hearing examiner will now turn to the merits of the case against Respondent. The charges relating to each of the counts against Respondent for sexual misconduct will be considered and addressed separately.

Count One

Count One of the OSC alleged that Respondent engaged in immoral or unprofessional conduct in that he sexually molested Patient L.B., a four year old child, by shoving his hand down her pants and touching and fondling Patient L.B.'s vaginal area, and inserting a finger into her vaginal area, during an office visit when Respondent walked with Patient L.B. down the hall from the examining room to a "medicine room" to get her medicine.

Respondent was Patient L.B.'s pediatrician. Patient L.B.'s mother, P.B., testified that she took her four year old daughter, Patient L.B., to Respondent's office at some time in 1994, which

turned out to be Patient L.B.'s last visit to Respondent,¹⁴ because Patient L.B. was suffering from a runny nose and cough.¹⁵ Respondent examined Patient L.B., then asked her if she would like to walk down the hall with him to get some medicine.¹⁶ P.B. remained in the examination room while Respondent and Patient L.B. walked down the hall to a "medicine room" to get the cold medicine. They were gone for a short period of time, during which time P.B. went out to the waiting room to let her sister know they would be finished soon.¹⁷ When Respondent returned to the exam room, he was carrying Patient L.B., and he gave P.B. a sample pack of cold medicine.¹⁸ P.B. and her daughter then left Respondent's office.

Patient L.B.'s mother, P.B., testified that in the car on the way home, Patient L.B. told her she did not like going to see Respondent because when they were alone getting the medicine, Respondent stuck his hands down her pants inside her underwear and put his hand on her "private area."¹⁹ Several days later, P.B. called Sharee Charles at Cambria County Children and Youth and reported the incident, and Ms. Charles took the information and

¹⁴Medical records established that Patient L.B.'s last visit with Respondent was on February 9, 1994. See Respondent's Exhibit R-1.

¹⁵N.T. 1/26/99 at p. 138.

¹⁶N.T. 1/26/99 at p. 138-139.

¹⁷N.T. 1/26/99 at p. 179-180.

¹⁸N.T. 1/26/99 at p. 140.

¹⁹N.T. 1/26/99 at pp. 140-141.

referred P.B. to the Johnstown Police.²⁰ P.B. then spoke with Sergeant Cancelliere of the Johnstown Police Department, who eventually advised her that there was nothing the police could do about the allegations because of Patient L.B.'s age and the fact that the courts would "rip her apart."²¹ P.B. then canceled Patient L.B.'s follow-up appointment at Respondent's office and got a referral from Children's Hospital in Pittsburgh to another doctor, Sara Hamel, M.D., who continues to be Patient L.B.'s treating physician.²²

P.B. also testified that Patient L.B.'s behavior became really violent after the February 9, 1994 visit to Respondent. While Patient L.B. had always been subject to temper tantrums, aggressive behavior and hyperactivity, that behavior worsened to the point that she became destructive and self-abusive.²³ Patient L.B. also became afraid of men with facial hair after that visit.²⁴ P.B. testified that after the Johnstown Police told them there was nothing that could be done, P.B. did not talk with Patient L.B. about the incident again for several years, during which time Patient L.B. continued her treatment with Dr. Hamel and became an

²⁰N.T. 1/26/99 at p. 141.

²¹N.T. 1/26/99 at p. 142.

²²N.T. 1/26/99 at pp. 142-143.

²³N.T. 1/26/99 at pp. 143, 168.

²⁴N.T. 1/26/99 at pp. 148-149.

honor roll student.²⁵ In 1998, P.B. was contacted by the Commonwealth and asked to participate in this licensure proceeding.²⁶ When P.B. and S.M. discussed this development with Patient L.B., she again became violent and abusive toward herself and her sister.²⁷ P.B. contacted her treating physician for an emergency appointment, and the treating physician referred her to the Family Intervention Center for an evaluation.²⁸ Patient L.B. told her parents she remembered what happened with Respondent, and said she wanted to testify at this hearing.²⁹ P.B. concluded her testimony by stating that Respondent had facial hair at the time of the February 9, 1994 appointment, but that he was clean shaven at the hearing.³⁰

Patient L.B.'s father, S.M.,³¹ testified that P.B. told him about Respondent's alleged misconduct on February 9, 1994, but that he waited several days before asking Patient L.B. what happened.³²

²⁵N.T. 1/26/99 at p. 145.

²⁶*Id.*

²⁷N.T. 1/26/99 at pp. 145-146.

²⁸*Id.*

²⁹N.T. 1/26/99 at pp. 147-148.

³⁰N.T. 1/26/99 at p. 148.

³¹S.M. is not Patient L.B.'s biological father, but has been living with P.B. and Patient L.B. as a family since she was born. See N.T. 1/26/99 at p. 195.

³²N.T. 1/26/99 at p. 196.

Patient L.B. gave him the same account that she had given P.B.³³ He and P.B. then contacted Cambria County Children and Youth Services and the Johnstown Police Department, canceled her next appointment with Respondent, spoke with her doctor's office at Children's Hospital, and got the referral to Dr. Hamel.³⁴ S.M. also noted that Patient L.B. became more violent and self-abusive after her last visit to Respondent.³⁵

Sharee Charles was the caseworker with Cambria County Children and Youth Services who took a report from P.B. and S.M. about the February 9, 1994 incident with Respondent. Ms. Charles testified that she received a telephone call from P.B. on February 16, 1994, alleging that her daughter was sexually molested by Respondent and that she now had a vaginal discharge.³⁶ Because the alleged perpetrator was not a caretaker for that child, Children and Youth Services did not have jurisdiction and referred the matter to the Johnstown Police Department.³⁷ Ms. Charles left Children and Youth Services several days after her report was taken from P.B., and she had no further access to that agency's records.³⁸ She also

³³N.T. 1/26/99 at p. 197.

³⁴*Id.*

³⁵N.T. 1/26/99 at pp. 197-198.

³⁶N.T. 1/26/99 at p. 121; Commonwealth's Exhibit C-3.

³⁷N.T. 1/26/99 at p. 122.

³⁸N.T. 1/26/99 at p. 127.

testified that her report of the conversation with P.B. would reflect the entire conversation with P.B.³⁹

The Commonwealth also presented the testimony of expert witness Joshua H. Bennett, M.D. Dr. Bennett testified that, to a reasonable degree of medical or professional certainty, Respondent breached the standard of care by touching Patient L.B. in the genital area in an inappropriate manner and with no medical purpose.⁴⁰

Perhaps the most significant testimony, however, came from Patient L.B. herself, nine years old at the time of the hearing. Patient L.B. had a difficult time testifying, although she insisted she wanted to tell the hearing examiner what had happened to her and refused any suggestion that she need not testify. Her demeanor was that of a child struggling to tell a truth that overwhelmed her. She was finally able to verbalize the events of February 9, 1994, and her testimony was consistent with her statements in 1994 immediately following the incident. The hearing examiner found her testimony to be wholly credible.

Respondent testified that Patient L.B. had a history of being "very hyper and aggressive when she doesn't get her own way, squeezes and pinches her face, may throw a tantrum for two to three hours, screams, can be destructive, fights with others, constantly

³⁹N.T. 1/26/99 at p. 131.

⁴⁰N.T. 1/27/99 at p. 21.

on the move."⁴¹ Respondent's diagnosis for Patient L.B. as of January 12, 1994 was attention deficit hyperactive disorder with aggression.⁴² At the time of the February 9, 1994 office visit, Respondent documented nasal congestion and noted one episode during the visit of uncontrolled behavior with aggressive and impulsive outbursts.⁴³ Although not documented, Respondent did not disagree with P.B.'s testimony that he examined Patient L.B.'s "genitals and vagina and bottom," testifying that it would not be unusual for him to do so.⁴⁴ Respondent then walked Patient L.B. down the hallway outside the examination room, but denied touching her in an inappropriate manner.⁴⁵ Respondent further testified that he does not recall from which of the three areas in the office where medicine was stored at that time he obtained the cold medicine for Patient L.B.,⁴⁶ but that it would be impossible to molest a child unobserved anywhere in the examination area of his office.⁴⁷

Respondent's expert witness, John Carlton Gartner, Jr., M.D., testified that Patient L.B. was a complicated patient, given her

⁴¹N.T. 1/28/99 at p. 131.

⁴²N.T. 1/28/99 at p. 143.

⁴³N.T. 1/28/99 at pp. 144-145.

⁴⁴N.T. 1/28/99 at p. 146.

⁴⁵N.T. 1/28/99 at pp. 150, 152.

⁴⁶N.T. 1/28/99 at pp. 154-155.

⁴⁷N.T. 1/28/99 at p. 176.

past medical history.⁴⁸ Dr. Gartner also testified that, while it would be difficult to insert a finger into a four year old's vagina, and that it is difficult to visually examine a child's genital area, neither of those difficulties would prevent someone from shoving his hand down her pants and touching the genital area.⁴⁹ Dr. Gartner appeared bemused as to how a physician could molest a child unobserved in an office hallway,⁵⁰ but the hearing examiner notes that this is a mischaracterization of prior testimony with regard to the incident.

Also testifying as an expert witness on behalf of Respondent was Karen M. Kaplan, M.D., who stated that Respondent's examination of Patient L.B.'s genital and rectal area was appropriate in that such an examination is part of any health supervision visit and when indicated by the nature of the complaint or the presenting problem.⁵¹ Dr. Kaplan testified that the hallmark of ADHD is inattention and difficulty with impulse control, along with hyperactivity.⁵² In addressing Patient L.B.'s complaint of vaginal discharge with an odor several days after Respondent's alleged fondling of her genital area, Dr. Kaplan testified that vaginal

⁴⁸N.T. 1/27/99 at pp. 67-68.

⁴⁹N.T. 1/27/99 at pp. 85, 86, 97.

⁵⁰N.T. 1/27/99 at pp. 85-86.

⁵¹N.T. 1/28/99 at p. 13.

⁵²N.T. 1/28/99 at p. 16.

discharge implies infection, and touching or fondling does not cause infection.⁵³ Dr. Kaplan also testified that four year old children do not have a good sense of time as to when things happened, or exactly where something happened, that nine year old children can have difficulty remembering something that occurred when they were four years old, specifically as to time and place, and that this may be exacerbated in a child with ADHD.⁵⁴ On cross examination, however, the witness admitted that she was not "an expert on child sexual abuse and children's memories thereafter,"⁵⁵ and that even ADHD children have sufficient memory to be able to report some events the same day those events happen.⁵⁶

Another witness for Respondent were Joseph F. Sheridan, M.D., who is the founder, president and managing partner of Johnstown Pediatric Associates, and who testified, with the aid of a videotape, as to the layout of the office. Dr. Sheridan testified that the area of the office in question here, which was the hallway outside the examination room and the sample medicine closet, was remodeled in 1994, and that the sample closet was no longer located in that hallway.⁵⁷ Other witnesses included Respondent's daughter,

⁵³N.T. 1/28/99 at pp. 18-19.

⁵⁴N.T. 1/28/99 at pp. 22-23, 25-26.

⁵⁵N.T. 1/28/99 at p. 36.

⁵⁶N.T. 1/28/99 at p. 38.

⁵⁷N.T. 1/28/99 at pp. 51, 55.

Abigail Barto, who testified that her father had a beard from the time he was born until 1997 but that he had never had a mustache,⁵⁸ four mothers of children who were Respondent's patients, who testified about Respondent's proficiency in his specialty of pediatrics, and Steven R. Rakoczy, who was acquainted with Respondent in his capacity as a school board member and parent and who testified that his reputation for honesty in the community was excellent.⁵⁹

The appropriate standard in assessing the evidence in this proceeding is the preponderance standard. *Lyness v. Com., State Board of Medicine*, 561 A.2d 362, 369 (Pa. Commw. Ct. 1989), reversed on other grounds, 606 A.2d 1204 (Pa. 1992). After an exhaustive review of the evidence and testimony presented in this matter, the hearing examiner finds that the Commonwealth has sustained its burden of proving Count One of the OSC by a preponderance of the evidence in that Respondent violated the Act at 63 P.S. §422.41(8) and is guilty of immoral or unprofessional conduct in his dealings with Patient L.B. The Commonwealth's witnesses testified consistently as to Patient L.B.'s claim that Respondent sexually molested her when they left the exam room to get her cold medicine. All of the testimony presented was consistent with Patient L.B.'s original statement to her parents,

⁵⁸N.T. 1/27/99 at p. 112.

⁵⁹N.T. 1/27/99 at p. 134.

and their report to Cambria County Children and Youth Services and to the Johnstown Police Department several days after the sexual molestation occurred.⁶⁰ The Commonwealth's expert testimony that such behavior breached a standard of care was not necessary for the hearing examiner to conclude that this is a heinous Act that should not be inflicted on a child by any adult, much less by a licensed medical professional in a position of trust with that child and her family. The hearing examiner did not find Respondent's testimony credible, and Respondent's expert witnesses simply attempted to cast doubt on a four year old ADHD child's ability to remember and communicate such a violation of her sexual boundaries minutes after that conduct occurred. That testimony, coupled with Dr. Kaplan's admission that she is not an expert in sexual assaults of children and subsequent memories of those assaults, did nothing to undermine the Commonwealth's case. Patient L.B.'s heart-stopping testimony, together with the testimony of two caretakers who Acted, and continue to Act, in the best interest of this child, is persuasive in this matter. That the criminal investigation did not lead to criminal charges does not negate the charges here, given the difference in standards of proof in criminal and administrative proceedings. The Commonwealth has proven that Respondent abused the trust placed in him by the licensing board, and by his

⁶⁰Alleged inconsistencies in that testimony have been addressed in the section of this Adjudication and Order entitled "Laches" and will not be reiterated here.

patients, and Respondent must suffer the consequences of his actions.

Count Three

Count Three of the OSC alleged that Respondent was guilty of immoral or unprofessional conduct in that he sexually molested Patient K.B., a three year old child, during an office visit by placing the child, dressed only in an undershirt and socks, in his lap after his physical examination of her, and placing his hand on Patient K.B.'s naked vaginal area.

Patient K.B.'s mother, Mrs. B., testified that she took her three year old daughter to Respondent's office on January 9, 1998 with symptoms including weight loss, rectal bleeding and bed wetting.⁶¹ Patient K.B. was referred to Respondent by Mrs. B.'s family physician, a Dr. Crawford.⁶² Mrs. B. was in the examination room when Respondent conducted his physical examination of Patient K.B., sitting in a chair next to and at the head of the exam table.⁶³ Patient K.B. was dressed only in a T-shirt and socks when Respondent performed his physical examination.⁶⁴ After he concluded his physical examination, Respondent sat on a stool and placed the

⁶¹N.T. 1/26/99 at pp. 26-26.

⁶²N.T. 1/26/99 at p. 25.

⁶³N.T. 1/26/99 at p. 26.

⁶⁴N.T. 1/26/99 at p. 27.

still undressed Patient K.B. in his lap.⁶⁵ Respondent was positioned on the stool midway down and facing the exam table, while Mrs. B. remained seated in a chair at the head of the table facing Respondent from a side view.⁶⁶ Holding Patient K.B. in his lap, with her back toward her mother, Respondent proceeded to discuss Dr. Crawford's records and results of Respondent's examination of Patient K.B. with Mrs. B.⁶⁷ Mrs. B. noticed that Patient K.B. repeatedly nodded her head up and down, looking at the ceiling and then looking down into her lap, and Mrs. B. shifted her position to see what Patient K.B. was looking at.⁶⁸ Patient K.B. jerked and shifted her position, and Mrs. B. had an unobstructed view of Respondent's hand resting on Patient K.B.'s vaginal area.⁶⁹ Mrs. B. testified that Respondent's hand remained on Patient K.B.'s vaginal area for at least a minute, until Mrs. B. told Patient K.B. they were leaving. Respondent put on Patient P.B.'s panties, and her mother finished dressing her and left the office.⁷⁰ On the drive home, Patient K.B. started crying and asking for her daddy, saying that she wanted to tell her daddy what that mean doctor

⁶⁵N.T. 1/26/99 at pp. 27-28.

⁶⁶N.T. 1/26/99 at p. 28.

⁶⁷N.T. 1/26/99 at p. 29.

⁶⁸N.T. 1/26/99 at pp. 30-31.

⁶⁹N.T. 1/26/99 at pp. 31-32.

⁷⁰N.T. 1/26/99 at pp. 32-33.

did.⁷¹ When they arrived home, Patient P.B. said she'd show Mrs. B. what Respondent did to her, took down her panties and started rubbing her vaginal area.⁷² Mrs. B. immediately called Dr. Crawford's office and spoke to one of the nurses in that office, who advised her not to call the police.⁷³ Mrs. B. called the local hospital, her health insurance provider, and Cambria County Children and Youth Services, who referred her to the Johnstown Police Department.⁷⁴ When Mr. B. arrived home, Patient P.B. told him that the "mean doctor touched me ... on my monkey."

After her January 9, 1998 visit to Respondent, Mrs. B. testified that Patient K.B. became afraid of men touching her, and began to masturbate constantly despite Mrs. B's efforts to contain that behavior.⁷⁵

At some time in February 1998, Mrs. B. met with Respondent and Dr. Sheridan at one of their medical offices. Also present at that meeting was Detective Ron Portash from the Cambria County District Attorney's Office, posing in an undercover capacity as Mr. B.⁷⁶ Respondent apologized to Mrs. B., but indicated that he did not

⁷¹N.T. 1/26/99 at p. 33-34.

⁷²N.T. 1/26/99 at p. 34.

⁷³N.T. 1/26/99 at pp. 34-35.

⁷⁴N.T. 1/26/99 at pp. 35-36.

⁷⁵N.T. 1/26/99 at p. 36.

⁷⁶N.T. 1/26/99 at pp. 39-40.

improperly touch Patient P.B.⁷⁷ Mrs. B. informed Respondent and Dr. Sheridan that Detective Portash would be filing a complaint with the Board on her behalf.⁷⁸ Dr. Sheridan informed Mrs. B. that his office would not be responsible for obtaining counseling for Patient P.B.⁷⁹

Todd Miller, a caseworker for Cambria County Children and Youth Services, testified that Mrs. B. contacted him on January 9, 1998 and reported that she had observed Respondent molesting Patient K.B. while she was sitting in his lap after a physical examination.⁸⁰ She also advised Mr. Miller that Patient P.B. had told her that Respondent had "touched her monkey."⁸¹ Mr. Miller's report of the phone call is consistent with Mrs. B.'s testimony in this proceeding.⁸² Mr. Miller did not speak to Patient P.B.⁸³ The witness testified that he forwarded a copy of his report to the Johnstown Police Department.⁸⁴

The Commonwealth's expert witness, Dr. Bennett, testified that

⁷⁷N.T. 1/26/99 at p. 40.

⁷⁸N.T. 1/26/99 at pp. 42-43.

⁷⁹N.T. 1/26/99 at p. 43.

⁸⁰N.T. 1/26/99 at pp. 91, 111.

⁸¹N.T. 1/26/99 at p. 98.

⁸²Commonwealth's Exhibit C-4

⁸³N.T. 1/26/99 at p. 100.

⁸⁴N.T. 1/26/99 at p. 110.

a physician who sits a naked child in his lap is guilty of conduct which constitutes inappropriate touching.⁸⁵ Dr. Bennett also testified that touching of the patient's vaginal area with no medical purpose also constitutes inappropriate touching.⁸⁶ Inappropriate touching of a pediatric patient, who cannot give her consent, breaches the trust that the both the minor patient and the parent have in the licensed physician.⁸⁷ Dr. Bennett testified that Respondent's alleged conduct breached both that trust and the standard of care of the profession.⁸⁸ Dr. Bennett also testified that a physician who placed an unclothed child in his lap ran the risk of transmitting a potential pathogen from the child's body orifices to the next patient on his clothing.⁸⁹

Respondent testified that he recalled Patient K.B.'s January 9, 1998 office visit because he was supposed to have been off that day but because of a family crisis his plans were canceled and he was in the office on that day.⁹⁰ Respondent testified that Patient K.B. was referred to him by Dr. John Crawford, a family practitioner, because of multiple problems that Mrs. B. had

⁸⁵N.T. 1/27/99 at p. 19.

⁸⁶N.T. 1/27/99 at p. 20.

⁸⁷*Id.*

⁸⁸N.T. 1/27/99 at p. 21.

⁸⁹N.T. 1/27/99 at p. 41.

⁹⁰N.T. 1/28/99 at pp. 99-100.

identified to him.⁹¹ Respondent performed a physical examination for bed wetting and rectal bleeding, noting that Mrs. B.'s complaint of weight loss was not borne out by Patient K.B.'s medical records.⁹² Respondent admitted that after the examination, he put Patient K.B. in his lap unclothed.⁹³ At some point following the examination, Respondent noted that Mrs. B. abruptly interrupted their conversation about Patient K.B. and suggested that Patient K.B. be dressed, and Respondent offered to help.⁹⁴ He also noted that Mrs. B. was not pleased when she left the examination room,⁹⁵ but that he did not ask her why she was displeased.⁹⁶ Respondent denied any improper touching of Patient K.B.⁹⁷ Respondent subsequently met with Mrs. B., Dr. Sheridan and a man Respondent assumed to be Mr. B. to discuss the matter.⁹⁸ Several weeks later, Respondent was interviewed by Detective Portash, who was the man Respondent had assumed to be Mr. B. at the earlier meeting.⁹⁹, but

⁹¹N.T. 1/28/99 at p. 101.

⁹²N.T. 1/28/99 at pp. 108-109.

⁹³N.T. 1/28/99 at pp. 112-113.

⁹⁴N.T. 1/28/99 at pp. 115, 117-118.

⁹⁵N.T. 1/28/99 at p. 118.

⁹⁶N.T. 1/28/99 at p. 164.

⁹⁷N.T. 1/28/99 at p. 117.

⁹⁸N.T. 1/28/99 at p. 119.

⁹⁹N.T. 1/28/99 at pp. 121-122.

no criminal proceedings were brought as a result of that investigation.¹⁰⁰

Respondent's expert witness, Dr. Kaplan, testified that she found nothing inappropriate in a pediatrician placing a three year old child in the pediatrician's lap, even if the child is unclothed.¹⁰¹ Dr. Kaplan testified that children of that age are not modest, and that pediatricians frequently hold young children in their laps.¹⁰² She also testified that it is not unusual for three year old children to masturbate, and that it is not logical to assume that masturbation would be a direct result of "lap sitting."¹⁰³ Dr. Kaplan declined to give an opinion as to whether there was a logical connection between a child being touched in her genital area by a physician and her subsequently developed masturbatory behavior,¹⁰⁴ and stated she had no opinion as to whether a physician placing his hand on a three year old child's unclothed genital area for at least a minute was appropriate.¹⁰⁵

Respondent's second expert witness, Dr. Gartner, testified that it is not inappropriate for a pediatrician to place a child on

¹⁰⁰N.T. 1/28/99 at p. 124.

¹⁰¹N.T. 1/28/99 at p. 8.

¹⁰²N.T. 1/28/99 at pp. 8-9.

¹⁰³N.T. 1/28/99 at p. 9-10.

¹⁰⁴N.T. 1/28/99 at p. 30.

¹⁰⁵N.T. 1/28/99 at p. 34.

his lap during the course of a discussion with the mother about the child's medical condition,¹⁰⁶ and that he would be comfortable holding an unclothed child in his lap for a few minutes.¹⁰⁷ Dr. Gartner also testified that it was difficult to understand an allegation that Respondent molested Patient K.B. when the mother was in the room listening and talking to Respondent, given that both of the physician's hands would be otherwise occupied.¹⁰⁸ He further testified that masturbatory Activity was not unusual in a three year old child, and that constipation, bed wetting and a sore rectal area could make that area a focus of the child's attention and lead to masturbation.¹⁰⁹ Interestingly, Dr. Gartner stated on cross examination that he did not believe that it is primarily the physician's responsibility to ensure that the physician does not inappropriately touch a patient.¹¹⁰ He did testify on cross examination that it would be inappropriate for a physician to place his hand on a three year old patient's vaginal area after the physical examination was concluded and to leave his hand in that position for a minute or more.¹¹¹

¹⁰⁶N.T. 1/27/99 at p. 60.

¹⁰⁷N.T. 1/27/99 at p. 98.

¹⁰⁸N.T. 1/27/99 at pp. 62-64.

¹⁰⁹N.T. 1/27/99 at pp. 65-66.

¹¹⁰N.T. 1/27/99 at pp. 99-100.

¹¹¹N.T. 1/27/99 at p. 100.

Again, Dr. Sheridan testified as to the layout of the office on January 9, 1998, and gave the hearing examiner a guided tour via video tape of the offices, paying particular attention to the size and layout of the examination rooms. Respondent's remaining witnesses testified as detailed in the discussion concerning Count One of the OSC.

As earlier stated, the appropriate standard in assessing the evidence in this proceeding is the preponderance standard. And again, after an equally exhaustive review of the evidence and testimony presented in this matter, the hearing examiner finds that the Commonwealth has sustained its burden of proving Count Three of the OSC by a preponderance of the evidence in that Respondent violated the Act at 63 P.S. §422.41(8) and is guilty of immoral or unprofessional conduct in his dealings with Patient K.B. The Commonwealth's primary witness, Mrs. B., testified that Respondent sexually molested her three year old daughter, Patient K.B., while she sat unclothed in Respondent's lap following his physical examination. Her testimony was consistent with the reports she made of this alleged conduct to Cambria County Children and Youth Services and to the Cambria County District Attorney's Office immediately following the January 9, 1998 appointment. The hearing examiner found her testimony to be credible, especially in light of the fact that she interrupted her discussion with Respondent regarding her daughter's physical condition to dress the child and

remove her from the examination room. This did not appear to be the Actions of a woman dissatisfied with Respondent's skill and diagnosis, but rather those of a mother protecting her child from inappropriate behavior. The Commonwealth's expert witness, Dr. Bennett, testified that it was a breach of a standard of care to seat an unclothed child in a physician's lap because pathogens from the child's orifices which attach to the physician's clothing could infect subsequent patients. But with reference to the allegations in the OSC, the hearing examiner again did not need an expert witness's testimony to conclude that sexual molestation of a three year old child by a physician is inappropriate and a breach of the standard of care. One of Respondent's expert witnesses, Dr. Gartner, agreed with this conclusion, while Dr. Kaplan declined to express an opinion. The hearing examiner notes that she did not find the testimony of either of Respondent's experts particularly persuasive, given that Dr. Gartner's primary point was that the behavior could not occur with the mother present and that Dr. Kaplan refused to state an opinion on anything directly affecting the alleged conduct. And again, the hearing examiner did not find Respondent's self-serving testimony to be credible, especially in light of his haughty and disdainful testimony, especially on cross examination. Respondent's character witnesses were credible, but given that sexual predators are secretive and selective in their behavior, that testimony does not affect the outcome here.

Conclusion

The evidence presented by the Commonwealth, consisting of the testimony of one of Respondent's minor patients, parents, caseworkers from Cambria County Children and Youth Services, and the Commonwealth's expert witness, Dr. Bennett, revealed disturbing conduct on the part of Respondent. Respondent sexually assaulted two of his very young patients, causing what may be a trauma that follows them throughout life. This conduct cannot be condoned.

Viewing the record in this case as a whole, and considering her independent determinations of credibility of each of the witnesses, the hearing examiner finds that Respondent abused both his minor patients' trust in him, and their parents' trust that he would behave appropriately with their children, for his own gratification. This is a grave abuse of his position as a licensed physician in this Commonwealth. Respondent demonstrated such a total lack of concern for his three year old and four year old patients, and for the medical profession as a whole, that there can only be one just outcome in this matter. Accordingly, the following order shall issue.

