

**BEFORE THE BOARD OF LICENSED
PROFESSIONAL COUNSELORS AND THERAPISTS
STATE OF OREGON**

In the Matter of:) Agency Case No. 2009-026
) OAH Case No. 1001729
RACHEL M. WELDON, LPC,)
)
Respondent.) FINAL ORDER

The Board of Licensed Professional Counselors and Therapists (Board), having considered this matter and the Proposed Order issued on February 10, 2011, and having issued an Amended Proposed Order issued on October 21, 2011 hereby proposes the following Amended Findings of Fact, Conclusions of Law, Opinion, and Order:

HISTORY OF THE CASE

On December 14, 2009, the Board issued a Notice of Intent to Impose Discipline and Right to Request Hearing (Notice) to Rachel M. Weldon (Respondent). The Notice accused Respondent of violating *former* ORS 675.745(1)(c) and (d) and the Board's Code of Ethics (*former* OAR chapter 833, Division 60), by failing to act in accordance with the highest standards of professional integrity and competence; by failing to recuse herself from providing services to a child when her objectivity, fairness and effectiveness became impaired; by ignoring her professional responsibility to her client; by failing to take care to do no harm to the child; by continuing her counseling relationship with the child to further her financial interest; by failing to provide the child's parents with requested counseling records; and by engaging in gross negligence as a result of the same alleged violations. The Notice also sought from Respondent recovery of costs associated with the disciplinary proceeding.

On December 31, 2009, the Board issued another Notice of Intent to Impose Discipline and Right to Request Hearing to Respondent. The new Notice was essentially the same as the Notice issued on December 14, 2009. Respondent filed a timely Request for Hearing and Answer on or about February 1, 2010.

The Board referred the case to the Office of Administrative Hearings on June 10, 2010. The case was assigned to Senior Administrative Law Judge Ken L. Betterton.

A telephone pre-hearing conference was held on August 17, 2010. Respondent was represented by new counsel Attorney Michael B. Mendelson. The Board was represented by Senior Assistant Attorney General (AAG) Kelly Gabliks. Respondent filed an Amended Answer on or about August 20, 2010.

A telephone status conference was held on December 15, 2010. Respondent was represented by Attorney Mendelson. The Board was represented by Senior AAG Gabliks.

A hearing was held in Salem, Oregon on December 22 and 23, 2010. Respondent appeared and was represented by Attorney Mendelson. The Board was represented by Senior AAG Gabliks. At the beginning of the hearing, the Board moved to make the December 31, 2009 Notice an “Amended” Notice, and to amend the dates of some events in the Notice from “2009” to “2008,” to reflect the correct year. Respondent had no objection to the amendments. The Notice was amended by interlineation to reflect the changes. (See P3.)

The following witnesses testified at the hearing for the Board: Respondent; Child’s father (Father); Child’s mother (Mother); and Charlene Sabin, M.D. The following witnesses testified for Respondent: Leasia Cleary, Licensed Clinical Social Worker; Steven Donaldson, Licensed Professional Counselor; Eric Johnson, Ph.D.; and Becky Eklund, Board Executive Director.

At the end of the hearing, ALJ Betterton asked counsel to brief the HIPAA issues raised in the matter. The record closed January 21, 2011 with the filing of the Board’s response to Respondent’s Memoranda on HIPAA Applicability. The matter was taken under advisement.¹

On February 10, 2011, ALJ Betterton issued his Proposed Order (hereinafter “Proposed Order”) recommending that no disciplinary action be taken against Respondent. In accordance with ORS 183.650(2) & (3) and OAR 137-003-0655(3) & (4), on October 21, 2011, the Board issued an Amended Proposed Order. The Amended Proposed Order notified Respondent of her right to file exceptions and argument “not later than twenty (20) days following the mailing of the Amended Proposed Order.” As such, Respondent’s Exceptions were due by Thursday, November 10, 2011. However, Respondent failed to file her exceptions by that date. Because Respondent’s exceptions were untimely filed, the Board declines to consider them.

ISSUES

The Board restates the issues because the Proposed Order did not adequately or specifically address each alleged violation by Respondent:

- (1) Did Respondent fail to recuse herself from providing services to Child when her objectivity, fairness and effectiveness became impaired in violation of *former* ORS 675.745(1)(d), *former* OAR 833-060-0021(10) and *former* OAR 833-060-0031(3)?
- (2) Did Respondent ignore her professional responsibility to her client, and fail to take care to do no harm or avoid harming her client when she failed to immediately report the suspected abuse of Child to the appropriate authorities in violation of *former* ORS 675.745(1)(d), *former* OAR 833-060-0021(1) and *former* OAR 833-060-0031(1) and (2)?

¹ On February 3, 2011, Respondent’s counsel filed a response to the Board’s counsel’s written response to Respondent’s HIPAA Memoranda, asking the ALJ to “strike” counsel’s statements in her closing argument that Respondent could have added the last two entries in her counseling notes after the parents filed their complaint with the Board. The ALJ took the Board’s counsel’s comments as the “give and take” of legal argument by attorneys, held that the statements were not evidence and denied Respondent’s request to “strike” such comments.

- (3) Did Respondent fail to take care to do no harm to Child or take reasonable steps to avoid harming Child when she confronted Sibling, the suspected abuser, without discussing the allegations with the parents first in violation of *former* ORS 675.745(1)(d) and *former* OAR 833-060-0031(1) and (2)?
- (4) Did Respondent fail to take care to do no harm to Child or take reasonable steps to avoid harming Child when she confronted Sibling, the suspected abuser, in front of Child in violation of *former* ORS 675.745(1)(d) and *former* OAR 833-060-0031(1) and (2)?
- (5) Did Respondent use her counseling relationship with Child to further Respondent's financial interests when Respondent told Child's parents she would not report the alleged abuse if the parents continued the Child's counseling sessions with Respondent in violation of *former* ORS 675.745(1)(d) and *former* OAR 833-060-0041(10)?
- (6) Did Respondent fail to provide Child's parents with requested counseling records in violation of *former* ORS 675.745(1)(d) and *former* OAR 833-060-0051(12)?
- (7) Did Respondent engage in gross negligence when she engaged in the conduct set out above in violation of *former* ORS 675.745(1)(c) and *former* OAR 833, Chapter 60?
- (8) Did Respondent fail to act in accordance with the highest standards of professional integrity and competence when she engaged in the conduct described above in violation of *former* ORS 675.745(1)(d), *former* OAR 833-060-0041 and *former* OAR 833-060-0061(1)?
- (9) Should Respondent's professional counseling license be suspended or subject to other discipline for her conduct pursuant to *former* ORS 675.745(1)(c) and (d) and the Board's Code of Ethics?
- (10) Should Respondent be assessed the costs for the disciplinary proceedings pursuant to *former* ORS 675.745(6)?

EVIDENTIARY RULING

The Board adopts the rulings made by the ALJ as set out below:

Exhibits A1 through A10, offered by the Board, were admitted into evidence without objection. Exhibits R1 through R3, offered by Respondent, were admitted into evidence over the Board's objection that the exhibits were not provided to Board's attorney by the deadline set for the parties to file and exchange exhibits. Pleadings P1 through P12 were also made a part of the record.

CREDIBILITY DETERMINATIONS

The credibility and reliability of witnesses is pivotal to this case because of the material contradictions between Respondent's testimony and the testimony of Mother and Father. In assessing such credibility and reliability, the Board considers inherent probability, internal inconsistencies, corroboration and bias, which can include a licensee's self-interest and motive to fabricate. See *Corcoran v. Board of Nursing*, 197 Or App 517, 532-33 (2005); *Tew v. Driver and Motor Vehicle Services*, 179 Or App 443, 449 (2002). The Board also assesses a witness's credibility without any deference to the fact finder when a credibility finding is not based entirely upon demeanor at the hearing. See *State v. Rider*, 157 Or App 480, 486 (1998).

The Proposed Order did not make any specific findings regarding the credibility of the witnesses, but appeared to give little weight to Mother and Father's testimony despite the fact the Proposed Order noted its understanding regarding the basis of their anger and concern over their interaction with Respondent. The Proposed Order also gave less weight to the testimony of Dr. Charlene Sabin, MD, a Behavioral Pediatrician, with over thirty years of experience in providing therapy and treatment to children for mental health issues, over the expert retained by Respondent for this hearing, Dr. Eric Johnson.

Based on a review of the record and evaluation of the evidence, the Board makes the following findings as to the credibility and reliability of the witnesses:

Rachel Weldon

A review of the record reveals numerous inconsistencies and inherent improbabilities as well as significant bias that raise serious questions about the reliability of her testimony, including, but not limited to, the following:

1. Respondent testified that she did not report the alleged abuse of Child by Sibling because it was not "reportable abuse." However, her own clinical notes contradict this testimony. According to her notes from the July 15, 2008 session, "Therapist explained to client that what [Child] was experiencing from [Sibling] was **abuse**, and would continue and get worse unless [Child's] parents stopped it." (Exhibit A5 at 2 (emphasis added).) However, in contrast, Dr. Sabin testified that as a mandatory report, she uses the word abuse very carefully, and does not use the term unless the conduct is something she needs to report. (Dr. Sabin's testimony.)
2. After determining that abuse had occurred, Respondent informed Child during the July 15th session that "it is my duty to bring this to [Child's] parent's attention, and tell them how important it is to make it stop." (Exhibit A5 at 2.) Mother testified that she brought Child to each counseling session, and waited outside Respondent's office during the session. (Mother's testimony.) Mother was right outside the door, but Respondent failed to raise the abuse issue with Mother at that time despite her comments to Child. (Mother's testimony.)

3. Respondent also told Child that “unless [Child’s] parents make it stop, it will get worse. [Sibling] will get bigger and hurt [Child] more, and [Sibling] will destroy any chance of a relationship with [Child] later, as well as lead to worst things for [Sibling]. (Exhibit A5 at 2.) Mother was right outside the door, but Respondent failed to raise the abuse issue with Mother to make it stop at that time or set up a meeting to discuss this conduct with the parents. (Mother’s testimony.)
4. Respondent asked Child to “document further incidents of abuse” during the July 15, 2008 counseling session. (Exhibit A5 at 2.) During the next session held on July 21, 2008, Child brought notes documenting additional abuse. The abuse included kicking, slapping, hurting Child, making fun of Child and calling Child names. Despite the fact that Respondent’s notes provide that she explained to Child that “these behaviors are * * * emotionally abusive” Respondent testified that she was under no obligation to report this abuse. (Exhibit A5 at 3.) Nor did she raise the abuse with Mother, who was again waiting for Child in the room outside Respondent’s office. (Mother’s testimony.)
5. Respondent testified that she was very concerned about Child’s safety. However, she had already learned about numerous incidents of abuse of Child by Sibling and had not done anything to stop it. This despite the fact Respondent was aware that Child would not be attending any session the next week (July 28th) because Child would be on vacation with the parents and abusive Sibling. (Exhibit A5 at 3.)
6. As of August 4, 2008, Respondent testified that she was still under no obligation to report the abuse of Child by Sibling. However, her notes of the counseling session on that day include reports from Child that additional episodes of abuse had occurred during the vacation, including more slapping, kicking, shoving, and name calling – “Client reports to therapist on incidents of emotional and physical abuse by [Sibling] since July 21st.” (Exhibit A5 at 4.)
7. Respondent testified she had no abuse reporting obligations despite the fact Child, in addition to noting further incidents of slapping and kicking, also informed her that Sibling punched Child in the stomach and that Sibling “shoved me toward the stairs and I almost fell.” (Exhibit A5 at 4-5.)
8. Respondent’s notes from the July 15, 2008 session provide that “it was my duty to bring this [the abuse] to [Child’s] parent’s attention, and tell them how important it is to make it stop.” (Exhibit A5 at 2.) However, Respondent did not even attempt to set up a meeting with parents until after her August 4, 2008 session with Child. (Exhibit A5 at 5.)
9. Respondent testified that she had no abuse reporting obligation after the August 4, 2008 session despite the fact her clinical notes provide that she explained to Child she would finally be setting up a meeting between Child and parents “so we can address the problem of the physical abuse.” (Exhibit A5 at 5.)

10. Respondent testified that she set up a meeting between parents and Child for August 8, 2008 to address this “urgent” problem. She did not tell Mother the reason for the meeting. Mother testified that because of their busy schedule, she had forgotten about the meeting, which would need to be rescheduled. When Respondent returned Mother’s call, Mother testified that Respondent’s main priority appeared to be to advise Mother that she would have to pay for the missed session because their insurance did not cover missed sessions. (Mother’s testimony). Respondent’s notes also reflect this priority – “Advised her that, according to the contract that we discussed in the first session, I do need to charge for missed sessions, and that insurance does not cover missed sessions.” (Exhibit A5 at 6.)

11. Respondent testified to the importance of meeting with parents to discuss Sibling’s conduct. Mother contacted Respondent on Monday, August 11, 2008 to set up an appointment for next week. However, this “urgent” meeting did not occur until Thursday, August 21, 2008. (Exhibit A5 at 6.)

12. The family meeting took place on August 21, 2008, and included Mother, Father, Child and Sibling. Respondent testified that she did not confront Sibling about the abuse during the meeting, but her own client notes contradict her testimony - “Therapist directed [sic] address family dysfunction related to repeated incidents of **physical abuse** by [Sibling] toward the client, which has been documented by the client as it occurred, and reported in writing to the therapist.” (Exhibit A5 at 6, emphasis added.)

13. Respondent testified that she reported parental neglect to DHS. However, Dr. Sabin testified that when she interviewed DHS personnel, the investigator told her she was investigating a report of sibling abuse. (Sabin testimony; Exhibit A7 at 1.) Mother and Father also both testified that they were told by DHS that the reported incident did not involve the parents but abuse between the siblings. (Mother’s testimony; Father’s testimony.)

14. Respondent testified that she was surprised the investigation focused on the sibling abuse and that she was never contacted by DHS to discuss the matter. Dr. Sabin testified that DHS told her they had contacted Respondent but she had never returned their call. (Sabin testimony; *see also* Exhibit A7 at 1 (“[The DHS investigator] indicated that they had called Ms. Weldon as part of their investigation but that she had never called them back”.)

15. Respondent testified that she reported parental neglect in part because she was concerned that the parents would not continue Child’s therapy. However, Father testified that he said no such thing, and Respondent’s own client notes of her conversation with Father contradicts her testimony – “I asked [Child’s] father if he intended to continue therapy. He said he had to talk to his wife about it.” (Father’s testimony; Exhibit A5 at 8.)

16. Respondent testified that she reported parental neglect in part because she was concerned parents would do nothing to stop Sibling's abuse of Child. However, Respondent's client notes indicate that in the two sessions Respondent had with Child after the family meeting, the Child reported no further incident of abuse – "Client returned for first session after family meeting. Affect was bright and buoyant. She reported no further incidents of abuse * * *" (8/25/2008 session); "Client returned after being away two weeks. Family had car trouble the previous Sunday night and was not able to come to therapy. Client's affect was again bright." (9/15/2008 session). (Exhibit A5 at 7.)

17. Respondent testified that she reported parental neglect in part because of her concerns that the Sibling abuse would continue. She decided to contact Child's school counselor to see if Child had ever complained of abuse or neglect. Respondent's client notes indicate that Child's school counselor told her that the counselor "had no knowledge of an alleged physical abuse reported by" Child. Instead, consistent with the reasons parents had sought counseling for the Child in the first place, the school counselor reported that Child "had difficulty getting along with other children at school because of [Child's] verbal behavior." (Exhibit A5 at 9.)

18. Respondent testified that she maintained her objectivity and did not overly identify with Child. However, Respondent immediately began to interpret everything the parents said or did as pointing to abuse. For example, on the Client Information Form (R1), Mother was asked to describe the reasons for the need for counseling. Mother wrote that the problem started when Child was in Pre-School, but as she got older it had become "more sophisticated." According to Respondent, such a response indicated that Child had become the "identified patient in the family" i.e., the person in the family with the problems, and "the symptom bearer of the family dysfunction." (Respondent's testimony.)

However, Dr. Sabin testified that the notion that the Parents saw the Child as the source of the problem wouldn't even be on her list of possible hypothesis. The fact that the problem had become more "sophisticated" meant only that the problems would be different for a pre-schooler as opposed to a child in the fourth or fifth grade. Dr. Sabin testified that she interpreted the Mother's answer as merely "a short-hand way of answering the question; it's been going on for awhile, but it's changed over time." (Dr. Sabin's testimony.)

19. Respondent also demonstrated her bias toward Child when she got emotional during the family meeting and cried. Respondent shared that she had come from a large family with many siblings and tried to relate her past to this family's situation. (Mother's testimony; Father's testimony.)

20. Respondent concluded that Sibling was abusing Child after only one complete session with Child, and without ever meeting Sibling or talking to the parents about Child's relationship with Sibling. Child's first session with Respondent took place on July 1, 2008. Most of that session was devoted to fact gathering, filling out forms and meeting with Mother. (Exhibit A5 at 1; Mother's testimony.) The first full session between Respondent and Child took place on July 8, 2008. It was at the beginning of the next full session, on July 15th, that Respondent concluded that Child was being abused by Sibling and shared her abuse conclusion with Child. (Exhibit A5 at 2.)

In many critical instances, Respondent's testimony is completely inconsistent with her own documentation in the Child's records. Despite her repeated reference to physical and emotional abuse, it is only after a complaint is filed that Respondent attempts to distinguish the abuse she repeatedly recorded as "unreportable" abuse. As Dr. Sabin testified, and the Board agrees, professionals use the term "abuse" very carefully – "I mean, if I use the word abuse, to me, I usually mean it's something I need to report." (Dr. Sabin's testimony.)

Based on the above, the Board finds that Respondent's testimony at hearing was self-serving, biased, and unreliable such that the Board does not give it any weight when Respondent's testimony is either inconsistent with or contradicted by other evidence in the record.

Father and Mother

The Proposed Order made no specific findings regarding the credibility or reliability of Father and Mother, but apparently gave their testimony little weight given the conclusions reached regarding what occurred during the family meeting. On review of the record, the Board finds Father and Mother are credible and their testimony reliable based on the following:

1. Both parents testified that they engaged Respondent's services to assist their Child in developing skills to improve socialization and ability to develop friendships. Both testified that they had taken Child to counseling service before for a similar issue and received good results, so viewed Child's ability to attend sessions with Respondent as a positive experience. Both parents testified that Child was getting ready to enter middle school and they wanted the year to get off to a "good start." Respondent testified, and her notes reflect, that Child was brought to counseling for "peer relation issues." (Mother's testimony; Father's testimony; Respondent testimony; Exhibit A5 at 1.)
2. Both parents testified that they respected the use of counseling and did not push Child to discuss the issues addressed with Respondent. (Mother's testimony; Father's testimony.)

3. Both parents testified about the fullness of their schedule in the summer of 2008, which included work and ferrying their children to athletic and other activities. Both parents testified that Child inadvertently missed the August 8, 2008 session, and Mother testified she contacted Therapist to alert her to the mistake. (Mother's testimony; Exhibit A5 at 5.) Mother testified she had no idea that the August 8, 2008 meeting was any more important than the other sessions, and Respondent confirmed that when she made the appointment with parents and Child she did not tell parents the reason for the meeting. (Respondent's testimony; Mother's testimony.)
4. Both parents testified regarding the sequence of the family meeting. Both parents stated it immediately began with accusations of abuse against Sibling. (Mother's testimony; Father's testimony.) Their testimony is consistent with Respondent's own client notes, which provide "Therapist joined with family, then presented evidence of ongoing abuse." (Exhibit A5 at 6.)
5. Both parents testified that Respondent stated that this was reportable abuse but that if they continued therapy with her, Respondent would not have to report the abuse. (Mother's testimony; Father's testimony.) Respondent's own client notes state that she "informed parents of my legal reporting responsibilities." (Exhibit A5 at 6.)
6. Both parents testified that Respondent became emotional during the meeting and cried. (Mother's testimony; Father's testimony.) Respondent agreed that she became emotional and that tears welled up in her eyes, but denied only that she cried. (Respondent's testimony.)
7. Mother testified that she was in shock during the family meeting and did not say much. (Mother's testimony.) Respondent agreed, testifying that Mother did not say much during the meeting. (Respondent's testimony.)
8. Both parents testified that they felt they had no choice but to continue Child's counseling sessions with Respondent, or Sibling would be reported to DHS as a child abuser. Child attended two more sessions with Respondent. (Mother's testimony; Father's testimony; Exhibit A5 at 7.)
9. Ultimately, given Respondent's actions during the family meeting, the parents both testified that they could not continue using Respondent's services. The parents did not discuss whether they would continue therapy with another counselor. Both parents were concerned that Respondent might retaliate against them for discontinuing therapy with Respondent. (Mother's testimony; Father's testimony.)
10. Father testified that during his conversation with Respondent, Respondent referred to Child as a "psychopath." (Father's testimony.) Respondent's own client notes provide that during her conversation with Father, she referred to Child as a possible "budding psychopath." (Exhibit A5 at 8.)

11. Mother and Father were both interviewed as part of the DHS investigation. Both testified that the DHS personnel were focused on Sibling's alleged abuse of Child and never included any discussion of parental neglect. (Mother's testimony; Father's testimony.) Dr. Sabin testified that in her discussion with DHS personnel, they stated the report was of Sibling abuse. (Dr. Sabin's testimony; Exhibit A7 at 1.)

12. Both parents testified that they contacted Respondent by telephone and in writing to request a copy of Child's counseling records. Respondent admitted that she received both telephone calls (which she refused to return) and two letters requesting Child's counseling records. (Respondent's testimony; Mother's testimony; Father's testimony; Exhibits A1 – A4.)

13. The parents testified that they retained the services of Dr. Sabin in spring 2009 to discuss the traumatic impact of the events with Respondent and for advice on whether the family should enter therapy to address their concerns. The discussions the parents had with Dr. Sabin about what had occurred with Respondent were consistent with how they later testified during the hearing. (Mother's testimony; Father's testimony.)

14. Dr. Sabin prepared a report of her findings, which included a discussion of the information provided by the parents. (Exhibit A7.) For example, the parents testified that Respondent had told them during the family meeting that abuse had occurred but that she would not report it if they continued therapy with her. Dr. Sabin's report indicates that the parents told her "Ms. Weldon indicated that she would not report the abuse at that time, but indicated that it was reportable." (Exhibit A7 at 1.)

15. The parents testified that Respondent became very emotional during the family meeting and cried. (Mother's testimony; Father's testimony.) Dr. Sabin's report indicates that the parents told her "that this meeting was very emotional for Ms. Weldon and that she was in tears or close to tears." (Exhibit A7 at 1.) Respondent herself admitted that "tears came to [her] eyes." (Respondent's testimony).

16. The parents testified that they stopped therapy with Respondent and then she reported the alleged abuse. Dr. Sabin's Report indicates the parents told her that the parents "later discontinued their therapy with her and she reported the alleged abuse." (Exhibit A7 at 1.)

17. The parents testified that they have not pursued legal action against Respondent. Instead, they participated in this process out of their belief that the public should be protected from the same harm they experienced when using Respondent's professional services. (Mother's testimony; Father's testimony). They also consulted with Dr. Sabin out of concern for their family, not to support any claims against Respondent. (*Id.*).

Dr. Charlene Sabin

The Proposed Order did not make specific findings regarding the credibility of Dr. Sabin. Instead, the Proposed Order opined that Dr. Johnson, a Licensed Clinical Social Worker who testified for Respondent, provided more persuasive testimony. (Proposed Order at 12.) The Proposed Order considered Dr. Johnson's testimony more persuasive despite the fact he was retained by Respondent, after the fact, to evaluate Respondent's conduct. The Proposed Order also contains findings that indicate confusion regarding Dr. Sabin's experience and practice focus.

Based on a review of the record, the Board concludes that Dr. Sabin's testimony is more persuasive for the following reasons:

1. Unlike Dr. Johnson, who was retained by Respondent specifically to testify in this matter, Dr. Sabin was retained by the parents to address family concerns relating to their experience with Respondent. (Dr. Sabin testimony; Exhibit A7.) Dr. Sabin's retention was unrelated to any complaint filed against Respondent, so her conclusions were not driven by a need to support or refute allegations of misconduct made against Respondent.
2. Dr. Sabin received her Medical Degree in Pediatrics from OHSU in 1977, so she has been assessing and treating children for over thirty years. From 1981 to 1983, she preformed a Child Psychiatry fellowship at OHSU and then began her private practice, which focuses on Behavioral Pediatrics – the assessment and treatment of children mental health issues. (Dr. Sabin's testimony; Exhibit A9.)
3. Dr. Sabin testified that she had been treating child abuse victims since the late 1970s. As she explained, she was one of the few female pediatric residents at OHSU at that time. As there were no child abuse care units, most child abuse evaluations took place at the medical schools. Because most of the victims were female, Dr. Sabin was called upon to conduct the evaluation. Dr. Sabin testified that she actually began testifying in court on child abuse allegations while still in her residency. (Dr. Sabin's testimony.)
4. Dr. Sabin was also a consult to the Oregon Graduate School of Professional Psychology regarding victims of child abuse and since 1990 has been a member of the consultation panel for reviewing allegations of sexual abuse in the context of domestic relations disputes. (Exhibit A9.)
5. Dr. Sabin has been retained by the Oregon State Bar to provide child abuse reporting training to attorneys. As Dr. Sabin testified, she defines what child abuse is and the attorney who co-teaches the presentation with her discusses the legal issues. (Dr. Sabin's testimony; Exhibit A9.)

6. The ALJ found Dr. Sabin less persuasive, in part, because of his belief that her practice emphasized medical treatment. Instead, Dr. Sabin's testimony actually indicates that her practice includes providing a range of services to children, including medication management. Dr. Sabin's testimony was that she specialized in counseling children and she considered herself to be a child therapist. (Dr. Sabin's testimony.)

MODIFICATIONS TO THE PROPOSED FINDINGS OF FACT

In accordance with ORS 183.650(2) & (3) and OAR 137-003-0665(3) & (4), the Board identifies and explains the following changes to the ALJ's Proposed Findings of Fact:

A. Proposed Findings of Fact that were not Considered because such Findings are Unnecessary, Irrelevant or Immaterial.

The Findings set out in Findings of Fact 32, 33, and 34 relating to the parents' response to the abuse report are not considered because the Board concludes that such Findings are irrelevant and immaterial to the determination of whether Respondent's conduct was appropriate. The Findings not considered include:

1. The portions of Findings of Fact No. 32² that provide: "in front of another student's parents. Mother was unhappy and embarrassed that the other parent overheard what sibling said."
2. The portion of Findings of Fact No. 33 that provides: "DHS officials told parents that although the report was labeled "unfounded," the report would be still "on their record." (Father's testimony.) The parents, especially Mother, as a school teacher and mandatory reporter herself, are concerned about there being a "report on their record." (Mother's testimony.)"
3. The portion of Finding of Fact No. 34, which provides: "Parents of other students helping out at the school on September 29 became aware of DHS's interview of Child and Sibling at the school. Some parents contacted Father in the following days and expressed their concern for the family and offered their support. Father was embarrassed and angry about the attention DHS's investigation had brought on the family."

B. Additional Findings of Fact

The Board makes the following additional Findings of Fact because the ALJ failed to fully and adequately set forth the material evidence in the record:

² For ease of reference, the Board uses the same numbering set out in the Proposed Order.

1. Mother received regular updates/feedback from Child's previous counselor regarding Child's progress, so was not surprised when Respondent checked with her at the end of the July 9, 2008 session. Mother assumed that Respondent would continue to provide such updates. (Mother's testimony.)
2. Mother did not provide any information regarding her other child, Sibling, or Sibling and Child's relationship to Respondent during the intake process. (Mother's testimony.)
3. Mother brought Child to all counseling sessions. Mother stayed in Respondent's waiting room during the session and then transported Child home. (Mother's testimony; Father's testimony.)
4. Even though Respondent had never met Sibling or talked to the parents about Sibling, Respondent explained to Child during the counseling session on June 15, 2008 that unless Child's parents made the abuse stop, it will get worse. "Sibling will get bigger and hurt Child more, and Sibling will destroy any chance of a relationship with Child later, as well as lead to worst things for Sibling. Child responded "I know" and cried harder." (Exhibit A5 at 2.)
5. Respondent also told Child during this same session that Sibling was abusing Child because Sibling was angry, "but that anger is a problem between [Sibling] and their parents that [Sibling] cannot express to them, so Sibling takes it out on [Child] because [Child] has less power and is younger and weaker. (Exhibit A5 at 2.)
6. Child told Respondent during the July 15th session that Child gets into verbal disagreements at school because of Child's problems with Sibling. Child said that Sibling constantly complains about Child and shames Child in front of peers. (Exhibit A5 at 2.)
7. Consistent with their usual procedure, Mother transported Child to Respondent's office on July 15, 2008 and was waiting outside Respondent's office to take Child home after the counseling session had ended. Although Respondent had specifically discussed with Child the need to raise the abuse with the parents, Respondent said nothing to Mother at the end of the session to make the abuse stop. (Mother's testimony).
8. Neither Respondent nor Child ever shared the abuse documentation assignment with the parents, who did not learn of the existence of such a journal until Respondent provided it to Dr. Charlene Sabin months after the parents initially requested Child's counseling records. (Mother's testimony; Father's Testimony.)

9. During the July 21, 2008 session, after Child told Respondent about the latest incidences of abuse, Respondent told her that Sibling's behaviors were "emotionally abusive." (Exhibit A5 at 3.)
10. Although Respondent had never met Sibling or talked to the parents about Sibling, during the July 21st session, Respondent told Child that Sibling's actions were coming from Sibling's emotional issues relating to growing up, and power struggles within the family. (Exhibit A5 at 3.)
11. Mother was excited about being included in the next counseling session, and assumed the counseling had reached some kind of closure on Child's peer issues. Mother saw the parents' inclusion in the counseling session as a positive thing given her expectation, from Child's last counseling experience, that the parents would be more involved. (Mother's testimony.)
12. Despite learning of additional incidences of Sibling's abuse of Child during the July 21st session, and knowing Child would be on vacation with Sibling, Respondent said nothing to Mother after the session about the abuse. (Mother's testimony.)
13. Respondent said this was a family meeting, so Mother asked who should be included. Respondent told Mother it would be nice if Sibling could attend, and Mother agreed. (Mother's testimony.)
14. Father, who had never met Respondent, thought the purpose of the meeting was for Child to speak honestly about the issues Child was having with peers and that the family was there to support Child. (Father's testimony.)
15. Respondent confronted Sibling with allegations that Sibling was physically and emotionally abusing Child. (Mother's testimony; Father's testimony.)
16. Despite her duty to report abuse, Respondent told the parents that if they continued counseling with Respondent she would not report the abuse. (Father's testimony; Mother's testimony.)
17. Respondent became very emotional during the meeting – her voice started to shake and she got teary-eyed and cried. The parents became confused at her lack of professionalism. Respondent then started talking about her own family. Respondent shared that she came from a large family with a lot of siblings and tried to relate it to this situation, which further confused the parents. (Father's testimony; Mother's testimony.)
18. Mother did not say much, if anything at the meeting because she was shocked by the allegations. Father took the lead in an attempt to protect his family and placate Respondent so she would not report them to DHS. Father felt

he had no choice but to tell Respondent what he thought she needed to hear so the family could get out of the session. (Father's testimony, Mother's testimony.)

19. Child became very upset and was crying during the session. Although he didn't believe it had happened, Father felt he couldn't refute Respondent's allegations because she might turn them into DHS. Father also felt he had no choice but to ask Sibling about the allegations, but Sibling never responded. All that was on Father's mind was to end the session as soon as possible so he could take care of his family. (Father's testimony.)

20. The two children had a typical sibling relationship. Neither parent had ever seen Sibling abuse Child, nor had Child ever complained that Sibling had abused Child. (Father's testimony; Mother's testimony.)

21. The entire family was very upset after the session. Although the parents thought the session had been handled badly, they felt they had no choice but to continue counseling sessions with Respondent or she would report to DHS that Child was being abused by Sibling. (Father's testimony; Mother's testimony.)

22. Father did tell Respondent that he did not believe that abuse had occurred. Respondent told Father that she believed Child's story and that if it didn't happen, that Father had a "budding psychopath" on his hands. (Father's testimony; Exhibit A5 at 8.)

23. Despite the fact the school counselor had no knowledge of abuse and Child had reported no further incidences of abuse after the family meeting, Respondent reported Sibling's abuse of Child to DHS on September 29, 2008. (Exhibit A5 at 9; Dr. Sabin's testimony.)

24. DHS contacted Respondent as part of their investigation, but she never returned their call. (Dr. Sabin's testimony; Exhibit A6 at 1.)

25. Dr. Sabin received her Medical Degree in Pediatrics from OHSU in 1977. From 1981 to 1983, she preformed a Child Psychiatry fellowship at OHSU and then began her private practice, which is focused on Behavioral Pediatrics – the assessment and treatment of children mental health issues. Dr. Sabin essentially specializes in counseling children. (Dr. Sabin's testimony; Exhibit A9).

26. Dr. Sabin has been treating child abuse victims since the late 1970s. At that time, she was one of the few female pediatric residents at OHSU. As there were no child abuse care units at that time, most child abuse evaluations took place at the medical schools. Because most of the victims were female, Dr. Sabin was called upon to conduct the evaluation. Dr. Sabin began testifying in court on child abuse allegations while still in her residency. (Dr. Sabin's testimony.)

27. Dr. Sabin was also a consult to the Oregon Graduate School of Professional Psychology regarding victims of child abuse and since 1990 has been a member of the consultation panel for reviewing allegations of sexual abuse in the context of domestic relations disputes. (Exhibit A9.)

28. Dr. Sabin has rarely asked her clients to journal. The one example she could provide would be in cases when a teenager got upset in between appointments who couldn't remember what they were upset about. In that case she might ask them to take some notes about it. (Dr. Sabin's testimony.)

29. Dr. Sabin has also been retained by the Oregon State Bar to provide child abuse reporting training to attorneys. During this training, she defines what child abuse is and the attorney who co-teaches the presentation with her discusses the legal issues. (Dr. Sabin's testimony; Exhibit A9.)

30. Dr. Sabin discussed the pros and cons of whether the children should also be interviewed with the parents, and she concluded that she could answer their concerns without subjecting the children to that anxiety. (Dr. Sabin's testimony.)

31. Dr. Sabin felt that Respondent's choice to meet with the entire family was not an acceptable way to handle the situation because it was traumatizing. In addition, the results obtained from that meeting were not the results of a carefully planned, intentional caring process, so ultimately the family did not feel cared for. There is an accepted process in cases where abuse has occurred that Respondent did not follow. That process does not include telling the alleged perpetrator (Sibling) in front of the victim (Child). Here, both Sibling and parents were traumatized, and the confrontation was not even helpful to Respondent's client, Child. Ultimately, Dr. Sabin concluded that Respondent's approach was inappropriate, as it was ineffective and traumatizing to the family. (Dr. Sabin's testimony.)

32. Dr. Sabin also testified that Child's trust in Respondent could have been maintained without including Child and Sibling in the meeting in which the parents were told about the abuse. There are many ways to keep the trust of a child without having the child there, and many times the therapist can communicate more effectively without the child there, as long as the therapist plans for it. In her experience, a 10-year old child will usually agree to allow the therapist to meet alone with the parents. (Dr. Sabin's testimony.)

33. Based on her review of Respondent's counseling notes, Dr. Sabin would not have reported abuse because the different hypotheses regarding what was going on in the relationship between Sibling and Child were not well developed and there was no clear understanding of what was really happening. (Dr. Sabin's testimony.) However, Respondent's notes reflect she had concluded that Sibling's actions were abuse as of the July 15th session, so Respondent should have reported abuse at that time. Respondent's notes provided she had concluded

it was abuse, she told Child it was abuse and asked Child to “document” the abuse, and told the parents it was abuse, so Respondent was required to report abuse then, not when she thought the parents might not continue therapy with her. (Dr. Sabin’s testimony.)

34. There does not have to be signs of physical abuse for the abuse to be reportable. (Dr. Sabin’s testimony; Dr. Johnson’s testimony.) For example, a child may tell the therapist that the child has been raped. Even though the therapist does not see the rape, the therapist is still obligated to report it. (Dr. Sabin’s testimony.)

35. Because Respondent concluded, as of July 15, 2008, the Child had been abused by Sibling, Respondent was obligated to immediately report this abuse to the appropriate authorities. (Dr. Sabin’s testimony; Exhibit A5 at 2.) Respondent only reported the abuse after the parents terminated therapy with her. (Dr. Sabin’s testimony; Father’s testimony.) Dr. Sabin interviewed the DHS worker assigned to investigate this matter, and the DHS worker told Dr. Sabin she was investigating an abuse claim, not a claim of neglect. Dr. Sabin concluded that Respondent reported abuse by Sibling to DHS. (Dr. Sabin’s testimony.)

36. Dr. Johnson also agreed that Respondent’s notes do not reflect that parents had definitively decided not to continue with therapy, and that indecision alone would not be grounds for making an abuse/neglect report. (Dr. Johnson’s testimony.) Dr. Sabin testified that she did not find evidence of reportable neglect in this case. (Dr. Sabin’s testimony.)

37. Ms. Eklund testified that if she gets calls from licensees, the first thing she says is that “I’m not an attorney and I can not give you legal advice.” When the licensee confirms that they are not seeking legal advice, Ms. Eklund testified that she usually reviews the Board’s administrative rules with the licensee to see if they apply to the situation and “And then kind of, just kind of talk through the situation. I never tell people what they should do.” Ms. Eklund also testified that in many cases when she talks to licensees, she “jots” down notes about the topics discussed. However, she had reviewed her files and has no notes of ever speaking to Respondent. (Eklund testimony.)

C. Deletions Based on the Unreliable Testimony of Respondent

The Board, for the reasons stated above, finds by clear and convincing evidence that the testimony of Respondent is unreliable and gives no weight to such testimony and statements in all cases where Respondent’s testimony was contradicted by or is inconsistent with other evidence in the record. Consistent with this determination, the following Proposed Findings of Fact have been deleted³:

³ The Board lists in this section only those portions of the proposed Findings of Fact that have been deleted in their entirety. The Board uses the same numbering as in the Proposed Order.

(13) She understands the law. As of July 15, 2008, Respondent did not believe that anything Child had described triggered her duty to report abuse by Sibling to the Oregon Department of Human Services (DHS) authorities. Respondent did not see any evidence of physical injury or marks on Child. Respondent used the term “abuse” in talking to Child and in her session notes in a general sense, meaning that Sibling was harming Child physically and emotionally, not as a legal term of “abuse” reportable under Oregon law to DHS. Respondent did not talk to Mother after the July 15 session about what Child had told her about abuse by Sibling because she did not want to lose Child’s trust. (Respondent’s testimony.)

(15) Child reported to Respondent that when she told Mother about what Sibling did, Mother told Child that “her own Mexican father was very strict and used to physically beat her.” The comment about Mother telling child she had been physically beaten by her father led Respondent to have concerns that there might be other issues of abuse in the family. Respondent did not believe, based on what Child had told her up to that point, and because she saw no evidence of physical injury or marks on Child, that she had a duty to report abuse to DHS. (Respondent’s testimony.)

(16) She did not believe it would be in Child’s best interest for her to meet with the parents alone. Respondent did not tell or suggest to Mother that they bring Sibling to the meeting. Respondent sensed, however, that Mother knew it would deal with Sibling’s conduct toward Child. Respondent tried to impress upon Mother the importance of the meeting. (Respondent’s testimony.)

(20) Respondent explained to the parents what Child had reported to her as abuse by Sibling. Respondent denied that she “confronted” Sibling with abusing Child. Respondent noted that Mother had a pained look on her face. Father asked Sibling if he had been striking and shoving Child. (Respondent’s testimony.)

(21) But that she hoped as parents they could take steps to stop the abuse before it reached the level that would require mandatory reporting by her. She tried to impress upon the parents the need to stop any abuse before it went further. Father insisted that he and his wife were with their children “all the time.” Mother and Father explained they did not always provide good examples to their children of how to handle anger and asked Respondent for help finding a family therapist. Respondent sensed that there might be issues of abuse within the family and believed the family could benefit from counseling. (Respondent’s testimony.)

(22) Respondent felt empathy for the family. Respondent denied talking about any abuse in her own family while she was growing up. Respondent did not tell parents about Child’s journal because she believed it would be a breach of trust with her client, Child. Respondent offered business cards from some of her colleagues with Mosaic. The parents thanked Respondent and left. (Respondent’s testimony.)

(23) Respondent did not tell the parents that she would not report abuse to authorities if they continued Child’s counseling or if they got family counseling. Respondent believed, based on the parents’ comments and demeanor that they intended to follow through with family

counseling. Respondent believed as of August 20, based on what she had heard and observed, that she did not have a legal duty to report any abuse to DHS. (Respondent's testimony.)

(28) Respondent told Father that she had concerns about his and his wife's commitment to resolving their family issues because of the sessions that had been missed. She stressed to Father that the family had a narrow window of opportunity to address the problems between Sibling and Child. Respondent told Father that she believed his attitude toward the family situation and therapy had changed completely from the meeting on August 20. Father acted very angry toward Respondent during the phone call that lasted between 15 and 20 minutes. (Respondent's testimony; Ex. A5 at 7-8.) Respondent sensed that Father was dismissive of Child's complaints about abuse. She feared the family would not continue Child's counseling or not follow through with family counseling. (Respondent's testimony.)

(29) At that point, Respondent had concerns that the parents would blame Child for the turmoil in the family. Respondent believed that the parents had no plans to return Child for counseling or follow through with family counseling. Given those circumstances, Respondent believed Child could be put at risk of neglect by the parents for failing to protect her. (Respondent's testimony.)

(31) Immediately after talking to the school counselor, Respondent telephoned DHS and formally reported neglect, based on her concern that the parents were not taking serious the possibility of abuse resuming against Child by Sibling, and that the parents would not follow through with Child's counseling or family counseling like they had agreed to do. (Respondent's testimony; Ex. A5 at 9.)

(35) Respondent expected DHS to call her back seeking more information for their investigation, but she was never contacted again by DHS. Respondent was surprised to learn later that DHS's investigation focused on abuse by Sibling against Child, rather than on her report of neglect of the Child and her concern that the parents would not follow through with family counseling or counseling for Child. (Respondent's testimony.)

(37) Respondent telephoned the Board on October 7 and spoke with Becky Eklund (Eklund), the Board's Executive Director, about the matter. Respondent told Eklund that the case had resulted in her filing a report with DHS, and that she had concerns Child would be placed at risk of neglect and possibly abuse, particularly because Father had told Respondent he thought Child was exaggerating her story. Respondent asked Eklund if she had to release Child's records to the parents. Eklund told Respondent that she receives calls like this from counselors, and that based on what the Board's attorneys have advised, a counselor does not need to release a child's records to the parents if the counselor believes the child might be exposed to further danger. (Respondent's testimony.) Respondent made a note of her conversation with Eklund in Child's session notes immediately after talking to Eklund. (Ex. A5 at 10.)

(40) Respondent believed releasing the file to another professional would provide a measure of protection for Child. (Respondent's testimony.)

(42) Respondent promptly turned Child's file over to Dr. Sabin. (Respondent's testimony.)

(49) Respondent was never contacted by the Board to answer questions or to explain the decisions she made while she counseled Child. (Respondent's testimony.)

FINDINGS OF FACT⁴

(1) Respondent received a Bachelor of Arts degree in 1982. She received a Masters Degree in Counseling Psychology in 2000. Although Respondent has worked in the counseling field since 1999, she worked under required supervision until 2006, when she was finally licensed as a Licensed Professional Counselor (LPC). (Respondent's testimony; Exhibit R2.)

(2) Respondent has been affiliated with Mosaic Counseling Associates (Mosaic), Portland, Oregon since 2000, as an associate therapist. Mosaic is a counseling service owned by Leasia Cleary (Cleary), Licensed Clinical Social Worker (LCSW), and Steven Donaldson (Donaldson), LPC. (Respondent's testimony.) Cleary has been a counselor since 1993. (Cleary's testimony.) Donaldson has been an LPC since 1989. (Donaldson's testimony.) Mosaic provides facilities and clerical and support services for approximately seven or eight counselors and therapists who operate their own individual practices. (Respondent's testimony.)

(3) Respondent has operated as a sole proprietor with Mosaic. She typically sees between 18 and 20 clients a week. Client sessions generally last between 50 and 60 minutes. She pays a percentage of the fees she collects to Mosaic to cover the overhead to operate her practice. (Respondent's testimony.)

(4) Counselors with Mosaic can participate in weekly sessions in which they collaborate, talk about their individual cases, and share ideas on how best to handle those cases. When counselors share information about their cases, they are careful not use the client's real name or provide other information that could identify a particular client. (Respondent's testimony; Cleary's testimony.)

(5) Respondent takes notes by hand of her discussions with a client during the session. She types more complete and thorough notes in the client's file within 24 hours after the client's session. On rare occasions, because of time constraints or because a computer in the shared offices is not available, Respondent will hand-write notes in the client's session notes in the client's file. The typed notes are Respondent's summary of the discussion with the client, not a verbatim transcript. Because of the often sensitive nature of discussion with clients, Respondent attempts to summarize the discussions. (Respondent's testimony.)

(6) Father and Mother⁵ are married and have two children, Child, age 10 during the summer of 2008, and Sibling, age 11 during the summer of 2008. Father is a musician in the

⁴ The Board has renumbered the Findings of Fact to be consecutive to accurately reflect the material evidence in the record.

⁵ Although the names of the parents, Child and Sibling were included in the Proposed Order, they have been removed in all locations in the Final Order to protect their confidentiality. In addition, all personal pronouns have also been removed to further protect the confidentiality of the children.

Portland area⁶. Mother is a teacher with a school district in Portland/Vancouver area. The family lives in the Portland area. (Father's testimony; Mother's testimony.)

(7) During the early summer of 2008, Mother and Father decided to have Child see a counselor because they believed Child was having problems socializing with fellow students at school during the previous school year. Child had seen a counselor in the past. The parents believed that experience helped Child. The parents wanted to have Child benefit from counseling before school started in September 2008. (Father's testimony; Mother's testimony.) The parents chose Respondent from a list of counselors they obtained through their health insurance carrier. (Mother's testimony.)

(8) Respondent first met Child and Mother on July 1, 2008. Mother brought Child to the appointment and completed an intake form and signed the counseling contract for the minor Child. (Respondent's testimony; Exhibit R1.) Respondent considered Child to be her client. Respondent met with both Mother and Child in that first meeting to get to know them and understand their family. Mother explained her and her husband's interest in helping Child with her socialization skills at school. (Respondent's testimony.) Mother did not provide any information regarding her other child, Sibling, or Sibling and Child's relationship to Respondent during the intake process. (Mother's testimony.)

(9) Mother brought Child to all counseling sessions. She stayed in Respondent's waiting room during the sessions and then transported Child home. (Mother's testimony.)

(10) Mother returned Child on July 9, 2008 for the second session. Mother remained in the waiting room during the session while Respondent talked to Child and got to know Child better. (Mother's testimony.) Respondent noted that Child displayed positive affect and had good eye contact and easily conversed with her. Child made no spontaneous comments about Child's emotional life or issues or concerns. Respondent checked with Mother at the end of the session while Child was in the restroom. Mother reported that Child seemed happy with Respondent, and that she had told Child that Child could talk to Respondent about anything Child wished to discuss. (Respondent's testimony; Exhibit A5 at 1.) Mother told Respondent that Child told her Child knew Child could talk to Respondent about anything. (Respondent's testimony; Mother's testimony.)

(11) Mother received regular updates/feedback from Child's previous counselor regarding Child's process, so was not surprised when Respondent checked in with her at the end of the July 9, 2008 session. Mother assumed that Respondent would continue to provide such updates. (Mother's testimony.)

(12) Mother returned Child for the third session on July 15, 2008. The session started with Child playing a card game with Respondent. Child then asked if Child could tell Respondent something. Respondent acknowledged that Child could. Child began to reveal details of instances where Sibling physically abused and verbally berated Child. Child began

⁶ While the Board agrees with the accuracy of the historical Findings of Fact made by the ALJ in this paragraph, the Board has generalized the nature of those Findings to protect the identity of the parents. See OAR 137-003-0665(4).

crying and sobbing and continued to do so at times throughout the session with Respondent. (Respondent's testimony; Exhibit A5 at 2.)

(13) Respondent explained to Child that what Child was experiencing from Sibling was abuse, and that it would continue and get worse unless the parents stopped it. Child explained that when Child did bring it to the parents' attention, the parents did not believe Child. When Respondent heard Child say "Child's parents don't believe Child," Respondent believed she needed to talk to the parents. Respondent told Child it was Respondent's duty to bring the issue to Child's parents and to impress upon them the importance of making the abuse stop. Respondent assured Child that she would do so in a sensitive way and that it was her goal to make the family get better, not worse. Respondent wanted to make sure that Child was on board with her talking to the parents. Child acknowledged Child understood what Respondent was telling Child. (Respondent's testimony; Exhibit A5 at 2.)

(14) Respondent also told Child during the same session that Sibling was doing this because Sibling was angry, "but that anger is a problem between [Sibling] and their parents that [Sibling] cannot express to them, so [Sibling] takes it out on [Child] because [Child] has less power and is younger and weaker." (Exhibit A5 at 2.)

(15) Even though Respondent had never met Sibling or talked to their parents about Sibling, Respondent explained to Child during the counseling session on June 15, 2008 that unless their parents made the abuse stop, it will get worse. "Sibling will get bigger and hurt [Child] more, and Sibling will destroy any chance of a relationship with [Child] later, as well as lead to worse things for Sibling." Child responded "I know" and cried harder. (Exhibit A5 at 2.)

(16) Child also told Respondent during the July 15th session that Child gets into verbal disagreements at school because of Child's problems with Sibling. Child said that Sibling constantly complains about Child and shames Child in front of peers. (Exhibit A5 at 2.)

(17) Because Child had told Respondent that the parents did not believe Child when Child told them what Sibling was doing to Child, Respondent suggested that Child keep a journal of any further instances of Sibling abuse so that she could better explain to the parents what Sibling was doing to Child. Child acted afraid at the suggestion of keeping a journal. Respondent told Child that the journal was Child's, and that Child did not have to show it to anyone if Child did not want to. (Respondent's testimony; Ex. A5 at 2.) Neither Respondent nor Child shared the abuse documentation assignment with the parents, who did not learn of the journal's existence until Respondent provided it to Dr. Charlene Sabin months after the parents initially requested Child's counseling records. (Mother's testimony; Father's testimony.)

(18) Respondent knows that she is a mandatory reporter in Oregon of child abuse pursuant to ORS 419B.005 *et seq.* (Respondent's testimony.)

(19) Consistent with their usual procedure, Mother transported Child to Respondent's office for the July 15, 2008 session and was waiting outside Respondent's office to take Child home after the counseling session had ended. Although Respondent had specifically discussed

with Child the need for Respondent to raise the issue of abuse with the parents, Respondent said nothing to Mother at the end of the session to make the abuse stop. (Mother's testimony.)

(20) Respondent met with Child for their fourth session on July 21, 2008. Child brought the journal with Child's documented incidents of abuse since the last session. Child had written comments such as: "[Sibling] kicks me;" "He slaps me in the face;" "He makes fun of me;" "When I tell mom and dad, they ignore me;" "[Sibling] says I'm ugly;" "[Sibling] pushes me away;" "He excludes me;" "He tells me to shut up." Respondent told Child that these behaviors were "emotionally abusive." (Exhibit A5 at 3.)

(21) Although Respondent had never met Sibling or talked to the parents about Sibling, during the July 21, 2008 session, Respondent told Child that Sibling's actions were coming from Sibling's own emotional issues relating to growing up, and power struggles within the family. (Exhibit A5 at 3.)

(22) Respondent noted that the family would be on vacation the following week and that Mother could bring Child back on August 4 for the next session. (*Id.*) Despite learning of additional examples of Sibling's abuse of Child during this session, and knowing Child would be on vacation with Sibling, Respondent said nothing to Mother after the session about the abuse. (Mother's testimony.)

(23) At the fifth session, on August 4, Child reported further instances of abuse by Sibling since the July 21 session. Child reported that at different times Sibling kicked Child, pushed Child, picked on Child, made fun of Child to Child's face and to other children, and called Child "ugly" and "stupid." Child also reported that Sibling made mean faces to Child when their parents weren't looking, called Child an idiot and shoved Child hard. Child also reported to Respondent that when she complained to her parents, "dad slapped both of us," and "dad punished me." "He slaps me on the thigh or bops me on the head." Child reported to Respondent one incident while the family was on vacation where Sibling, "shoved me toward the stairs and I almost fell." Respondent explained to Child that she would like to set up a meeting with Child and the parents to talk about the physical abuse by Sibling. Respondent told Child she would handle the task carefully, with the goal of helping the family and not making things worse for Child. (Respondent's testimony; Exhibit A5 at 4.)

(24) After the session and in front of Child, Respondent made an appointment with Mother for her to bring Dad and Child for a meeting on August 8. (Exhibit A5 at 5.) She did not tell Mother the purpose of the meeting. Mother was excited about being included in the next counseling session, and assumed the counseling had reached some kind of closure on Child's peer issues. Mother saw the parents' inclusion in the counseling session as a positive thing given her expectation, from Child's last counseling experience, that the parents would be involved. (Mother's testimony.)

(25) Child's parents missed the August 8 appointment and did not call in advance to say they would not be in. About 30 minutes after the scheduled appointment, Mother telephoned and left a recorded message for Respondent. The message explained that Child had reminded her of the appointment, but that the family was busy with activities with the children that day,

and that Child would be at summer camp the following week. (Respondent's testimony; Exhibit A5 at 5.)

(26) Respondent returned Mother's call later that day, Friday, August 8, 2008. The first thing they discussed was that Mother was responsible for paying for the missed session as insurance does not pay for missed sessions. Respondent then explained that she believed a meeting between her and the parents and Child was urgent, and suggested scheduling an appointment when Child returned from camp. (Respondent's testimony; Mother's testimony; Exhibit A5 at 6.)

(27) Mother telephoned Respondent over the weekend asking for an appointment. On August 11, Respondent returned Mother's call and scheduled a meeting with her on August 21st. Respondent said this was a family meeting, so Mother asked who should be included. Respondent told Mother it would be nice if Sibling could attend and Mother agreed. (Mother's testimony.)

(28) Father, who had never met Respondent, thought the purpose of the meeting was for Child to speak honestly about issues Child was having with her peers and that the family was there to support Child. (Father's testimony.)

(29) Father, Mother, Child, and Sibling appeared for the scheduled August 21 meeting. This was the first time Respondent had seen Father or Sibling. (Exhibit A5 at 6-7.) Respondent confronted Sibling with allegations that Sibling was physically and emotionally abusing Child. Respondent explained to Mother and Father her legal obligation to report abuse to state authorities and that what was occurring was abuse – that it was actually one of the worse cases she had ever seen. Despite her duty to report abuse, Respondent told them that if they continued counseling with Respondent she would not report the abuse. (Mother's testimony; Father's testimony; Exhibit A5 at 6.)

(30) Respondent became very emotional during the meeting – her voice started to shake and she got teary-eyed and cried. The parents became confused at her lack of professionalism. Respondent then started talking about her own family. Respondent shared that she came from a large family with a lot of siblings and tried to relate it to this situation, which further confused the parents. (Father's testimony; Mother's testimony.)

(31) Mother did not say much, if anything at the meeting because she was shocked by the allegations. Father took the lead in an attempt to protect his family and placate Respondent so she would not report them to protective services. Father felt he had no choice but to tell Respondent what he thought she needed to hear so the family could get out of the session. Sibling appeared frightened and remained silent. (Father's testimony, Mother's testimony.)

(32) Child became very upset and was crying during the session. Although he didn't believe it had happened, Father felt he couldn't refute Respondent's allegations because she might turn them into DHS. Father also felt he had no choice but to ask Sibling about the allegations, but Sibling never responded. All that was on Father's mind was to end the session as soon as possible so he could take care of his family. (Father's testimony.)

(33) The two children had a typical sibling relationship. Neither parent had ever seen Sibling abuse Child, nor had Child ever complained that Sibling had abused Child. (Father's testimony; Mother's testimony.)

(34) The entire family was very upset after the session. Although the parents thought the session had been handled badly, they felt they had no choice but to continue counseling sessions with Respondent or she would report to DHS that Child was being abused by Sibling. (Father's testimony; Mother's testimony.)

(35) Child returned with Mother for Child's next scheduled session on August 25. Mother remained in the waiting room. Child acted happy and buoyant with Respondent and did not report any further instances of abuse by Sibling. (Mother's testimony; Exhibit A5 at 7.)

(36) The family was on vacation for a week or so and missed an appointment in early September due to car problems. (Mother's testimony; Exhibit A5 at 7.)

(37) Child returned for a scheduled session on September 15. She acted bright and happy and did not report any instances of abuse. (Respondent's testimony; Exhibit A5 at 7.)

(38) Mother telephoned and cancelled Child's next scheduled appointment for September 22. (Mother's testimony; Ex. A5 at 7.) Mother decided to cancel the session to think about whether they wanted to continue counseling with another counselor. (Mother's testimony.)

(39) Father telephoned Respondent on September 29 and cancelled the appointment scheduled that day. He told Respondent that he believed the family meeting on August 21 had gone badly. Father told Respondent that he believed that she had encouraged Child to make these statements and that he thought Child had "fooled" Respondent with Child's "story." Father admitted that he and his wife had tempers, but stated that they were trying to develop their own skills to work on it. He denied that they hit their children, but acknowledged they did yell at them. (Father's testimony; Exhibit A5 at 7.)

(40) Father did tell Respondent that he did not believe that the abuse had occurred. Respondent told him that she believed Child's story and that if it didn't happen, that he had a "budding psychopath" on his hands. (Father's testimony; Exhibit A5 at 8.)

(41) Respondent asked Father if he planned to continue Child's counseling. Father did not indicate that the counseling would be discontinued; instead Father said he would need to check with his wife about it. Father and Respondent ended their phone call. (Father's testimony; Exhibit A5 at 8.)

(42) Immediately after the September 29 telephone call with Father, Respondent conferred with Mosaic co-owner Donaldson about what she should do given that she might be losing this client. (Respondent's testimony; Donaldson's testimony.) Respondent decided to telephone Child's school on September 29 to see if Child had reported any abuse to school

authorities. Respondent called and spoke to a school counselor and learned the counselor had no knowledge of any physical abuse reported by Child, although the counselor was aware of Child having difficulty getting along with other children at school. Respondent did not talk to the school counselor about the issues she had been addressing with the family. (Respondent's testimony; Exhibit A5 at 9.)

(43) Despite the fact the school counselor had no knowledge of abuse and Child had reported no further instances of abuse after the family meeting, Respondent reported Sibling's abuse of Child to DHS on September 29, 2008. (Dr. Sabin's testimony; Exhibit A5 at 9.)

(44) Later, on September 29, DHS authorities went to Child's and Sibling's school and interviewed them separately. Mother learned about the interviews when she went to pick up the children at the end of the school day. DHS authorities interviewed Mother and Father at their home later that day. (Mother's testimony.)

(45) DHS treated the investigation as one of physical abuse by Sibling against Child. DHS concluded there was no abuse and labeled the report of abuse as "unfounded." One DHS official told Mother that the investigation was a "waste of time." (Mother's testimony; Dr. Sabin's testimony.)

(46) DHS contacted Respondent as part of their investigation, but she never returned their call. (Dr. Sabin's testimony; Exhibit A6 at 1.)

(47) The parents felt a responsibility to get all of the facts regarding what happened with Respondent to assist the Child, so contacted Respondent and left her a message requesting Child's files. Respondent never returned their call, so on October 6, 2008, Father sent Cleary and Donaldson, as Mosaic Owners, and Respondent a certified letter asking for Child's file. (Father's testimony; Exhibit A1.) Because Child was a minor, the parents believed that they had a legal right to Child's records. Respondent conferred with Cleary and Donaldson on October 7 about how she should respond. (Respondent's testimony; Cleary's testimony.)

(48) Becky Eklund (Eklund) is the Board's Executive Director. Ms. Eklund cannot recall talking to Respondent in October 2008. Ms. Eklund testified that if she gets calls from licensees, the first thing she says is that "I'm not an attorney and I can not give you legal advice." When the licensee confirms that they are not seeking legal advice, Ms. Eklund testified that she usually reviews the Board's administrative rules with the licensee to see if they apply to the situation "And then kind of, just kind of talk though the situation. I never tell people what they should do." Ms. Eklund also testified that in many cases when she talks to licensees, she "jots" down notes about the topics discussed. However, she had reviewed her files and has no notes of ever speaking to Respondent. Ms. Eklund added that she probably also would have told a licensee that he or she should consult with their attorney about the situation. (Eklund's testimony.)

(49) On October 8, 2008, Respondent responded to the parents' request with a letter, explaining that because the file resulted in a report to DHS, she did not believe it was in her client's best interest to release the file to them. (Exhibit A2.) The letter contained no HIPAA

language regarding the parents' appeal rights. (*Id.*) Cleary and Donaldson agreed with Respondent's decision not to turn over the file directly to the parents. (Cleary's testimony; Donaldson's testimony.)

(50) On October 29, 2008, parents sent another letter to Respondent asking for Child's file. (Exhibit A3.) Respondent responded in writing on November 5, 2008 to parents' October 29 letter. Respondent explained to parents that she did not believe it was in Child's best interest to release the file directly to them, but that she would release the file to another counselor or therapist. Respondent explained to parents that in her opinion she had discretion under Oregon law and HIPAA regulations to withhold the file from the parents in the best interest of the Child because she had reported the matter to DHS. (Exhibit A4.) This letter did not contain any language regarding the parents' HIPAA appeal rights. (*Id.*)

(51) Because Respondent considered Child's case a difficult one, she took the case to the weekly sessions with her colleagues between four and six times during the time she counseled Child. The only information considered by her colleagues in these sessions was the information provided by Respondent. Respondent admitted that she never documented any of the consultations in Child's client notes. She discussed Child's case with Cleary and Donaldson in particular. As co-owners of Mosaic, both Cleary and Donaldson have a vested financial interest in Respondent's practice. Cleary recommended that Respondent report child neglect to DHS which she did on September 29, 2008. In reviewing Respondent's actions throughout the case, Cleary would have handled the case the same way that Respondent handled it. (Cleary's testimony.) Donaldson believes that Respondent acted with Child's best interest in mind throughout the period she counseled Child. He recommended to Respondent on September 29, 2008 that she report child neglect to DHS. (Donaldson's testimony.)

(52) The parents conferred with Dr. Charlene Sabin in early November 2008. Dr. Sabin obtained a release from parents and requested Child's file from Respondent in December 2008. (Dr. Sabin's testimony.) Although Respondent did provide a copy of Child's file to Dr. Sabin, she never provided a copy to Child's parents. (Father's testimony; Mother's testimony; Dr. Sabin's testimony; Exhibit A7 at 1.)

(53) Dr. Sabin has practiced medicine since 1981. Her practice focuses on providing assessment and treatment from a medical prospective for children and families dealing with abuse issues. Dr. Sabin spends about 25% of her day seeing children for therapy who are not taking medication; 50% of her day is spent providing therapy to children who also take medication and the rest of the day is spent on providing custody/parenting time or developmental assessments. Dr. Sabin is a mandatory reporter under Oregon child abuse reporting laws. Dr. Sabin has provided child abuse reporting training to attorneys for several years. She has not provided child abuse reporting training to counselors or therapists. (Dr. Sabin's testimony.)

(54) Dr. Sabin received her Medical Degree in Pediatrics from OHSU in 1977. From 1981 to 1983, she preformed a Child Psychiatry fellowship at OHSU and then began her private practice, which is focused on Behavioral Pediatrics – the assessment and treatment of children mental health issues. Dr. Sabin essentially specializes in counseling children. (Dr. Sabin's testimony; Exhibit A9).

(55) Dr. Sabin has been treating child abuse victims since the late 1970s. At that time, she was one of the few female pediatric residents at OHSU. As there were no child abuse care units at that time, most child abuse evaluations took place at the medical schools. Because most of the victims were female, Dr. Sabin was called upon to conduct the evaluation. Dr. Sabin began testifying in court on child abuse allegations while still in her residency. (Dr. Sabin's testimony).

(56) Dr. Sabin was also a consult to the Oregon Graduate School of Professional Psychology regarding victims of child abuse and since 1990 has been a member of the consultation panel for reviewing allegations of sexual abuse in the context of domestic relations disputes. (Exhibit A9.)

(57) Dr. Sabin has also been retained by the Oregon State Bar to provide child abuse reporting training to attorneys. During this training, she defines what child abuse is and the attorney who co-teaches the presentation with her discusses the legal issues. (Dr. Sabin's testimony; Exhibit A9.)

(58) Child's parents conferred with Dr. Sabin to seek a professional opinion on their family's experience with Respondent. (Father's testimony.) The experience with Respondent was confusing and traumatizing to them, and they were trying to make sense of what happened. The parents were wondering whether their children needed counseling services and if they did need those services, how they could ever trust again. (Father's testimony; Mother's testimony.) Dr. Sabin met with Father and Mother twice, about one hour each time. She considered them to be her clients. Dr. Sabin reviewed Respondent's counseling notes with Child and Child's journal. She talked to the DHS investigator who concluded the charge of child abuse was unfounded. Dr. Sabin did not talk to Child or Sibling. Dr. Sabin discussed the pros and cons of whether the children should also be interviewed with the parents, and she concluded she could answer their concerns without subjecting the children to that anxiety. (Dr. Sabin's testimony.)

(59) The parents reported to Dr. Sabin their belief that Respondent filed her report with DHS in retaliation for them not continuing Child's counseling with her. Dr. Sabin read Respondent's counseling notes and Child's journal to the parents. Parents never received a copy of Child's counseling records with Respondent from Dr. Sabin. Dr. Sabin has rarely asked her clients to journal. The one example she could provide was in cases where teenagers who got upset between appointments that don't remember what they were upset about, she might ask them to take notes about it. She acknowledges that Respondent's counseling notes are summaries of her sessions with Child and the family, but still represent what happened in the sessions. (Dr. Sabin's testimony.)

(60) Dr. Sabin would have met separately with the parents to discuss the alleged abuse issue, rather than bring up the issue with the entire family. Dr. Sabin felt that Respondent's choice to meet with the entire family was not an acceptable way to handle the situation because it was traumatizing. In addition, the results obtained from that meeting were not the results of a carefully planned, intentional caring process, so ultimately the family did not feel cared for. There is an accepted process in cases where abuse has occurred that Respondent did not follow. That process does not include telling the alleged perpetrator (Sibling) in front of the victim

(Child). Here, both Sibling and parents were traumatized, and the confrontation was not even helpful to Respondent's client, Child. Ultimately, Dr. Sabin concluded that Respondent's approach was inappropriate, as it was ineffective and traumatizing to the family. (*Id.*)

(61) Dr. Sabin acknowledged that by telling the parents before the meeting there would be a risk that the parents might have punished Child before Respondent could have next met with Child alone. However, Dr. Sabin still concluded that Respondent's methods were inappropriate. (*Id.*)

(62) Dr. Sabin also testified that Child's trust in Respondent could have been maintained without including Child and Sibling in the meeting in which the parents were told about the abuse. There are many ways to keep the trust of a child without having the child there, and many times the therapist can communicate more effectively without the child there, as long as the therapist plans for it. In her experience, a 10-year old child will usually agree to allow the therapist to meet alone with the parents. (Dr. Sabin's testimony.)

(63) Based on her review of Respondent's counseling notes, Dr. Sabin would not have reported abuse because the different hypotheses regarding what was going on in the relationship between Sibling and Child were not well developed and there was no clear understanding of what was really happening. However, Respondent's notes reflect she had concluded that Sibling's actions were abuse as of the July 15th session, so Respondent should have reported abuse at that time. Respondent's notes provided she had concluded it was abuse, she told Child it was abuse, asked Child to "document" the abuse, and told the parents it was abuse, so Respondent was required to report abuse then, not when she thought the parents might not continue therapy with her. (Dr. Sabin's testimony.)

(64) There does not have to be signs of physical abuse for the abuse to be reportable. (Dr. Sabin's testimony; Dr. Johnson's testimony.) For example, a child may tell the therapist that the child has been raped. Even though the therapist does not see the rape, the therapist is still obligated to report it. (Dr. Sabin's testimony.)

(65) Because Respondent concluded, as of July 15, 2008, the Child has been abused by Sibling, Respondent was obligated to immediately report this abuse to the appropriate authorities. (Dr. Sabin's testimony; Exhibit A5 at 2.) Respondent only reported the abuse after the parents terminated therapy with her. (Dr. Sabin's testimony; Father's testimony.) Dr. Sabin interviewed the DHS worker assigned to investigate this matter, and the DHS worker told Dr. Sabin she was investigating an abuse claim, not a claim of neglect. Dr. Sabin concluded that Respondent reported abuse by Sibling to DHS. (Dr. Sabin's testimony.) Dr. Sabin prepared a one and one-half page summary of her consultation with the parents dated May 4, 2009. (Exhibit A7.)

(66) Respondent had Dr. Eric Johnson review Child's case to testify at the hearing as an expert. Dr. Johnson is a board certified clinical psychologist and has practiced in Portland since 1985. Among his duties, he trains counseling and therapy professionals on mandatory child abuse reporting requirements in Oregon. His training sessions have been approved by the

Board for continuing education credits for licensed professional counselors. (Dr. Johnson's testimony.)

(67) In preparation for his testimony, Dr. Johnson reviewed Respondent's file for Child, including her session notes and Child's journal. He also reviewed all correspondence between the Board and Respondent, the Board's Notice to Impose Discipline, Oregon Revised Statutes and Oregon Administrative Rules relevant to the case, Dr. Sabin's report, and talked to Respondent for about two hours about her thoughts and decision making process during the time she counseled Child. Dr. Johnson admitted that when he talked to Respondent shortly before the contested case hearing date, Respondent had an interest in presenting information to him as favorably as she could. (Dr. Johnson's testimony.)

(68) Dr. Johnson believes that through August 25, 2008, there was insufficient evidence of abuse under ORS 419B.005 *et seq* to require Respondent to report physical abuse on Child to DHS. Dr. Johnson believes Respondent had sufficient evidence to have concerns about dysfunction within Child's family and to have concerns about Child well-being and safety after September 29, 2008. He believes Respondent had reasonable grounds to believe she had a duty to report neglect of Child to DHS when she did so on September 29, 2008, based on Father's failure to believe Child's reports of abuse and what she believed were the parents' decision to discontinue Child's counseling and not undertake family counseling. However, Dr. Johnson also agreed that Respondent's notes do not reflect that parents had definitively decided not to continue with therapy, and that indecision alone would not be grounds for making an abuse/neglect report. (Dr. Johnson's testimony.) Dr. Sabin testified that she did not see reportable neglect in this case. (Dr. Sabin's testimony.)

(69) Dr. Johnson believes that a child in a hostile family environment where the parents do not take the child's situation seriously could be considered neglect and be reportable abuse under Oregon's mandatory child abuse reporting laws. Dr. Johnson has observed that because of the consequences to professional counselors and their careers for not reporting abuse, counselors are very cautious and report cases to DHS when there is any possibility of abuse. Dr. Johnson believes Respondent handled Child's case thoughtfully and had Child's best interest in mind during the entire time she counseled Child. (Dr. Johnson's testimony.)

(70) Respondent received notice in September 2009 of the complaint filed with the Board against her. Respondent was asked to respond to the allegations and provide material to support her response. She provided a three-page written response and copies of her file and counseling notes to the Board. (Respondent's testimony.)

(71) Respondent charged parents \$60 per session for counseling Child. Of that amount, the parents' insurance carrier paid \$45 and parents paid \$15. Respondent testified that she "billed" parents' health insurance for the \$45, but never provided any description of how this billing occurs. Child's counseling sessions constituted approximately five percent of Respondent's weekly gross income. (Respondent's testimony.)

CONCLUSIONS OF LAW

The Board rejects the ALJ's proposed Conclusions of Law, which were based upon erroneous Findings of Fact, and makes the following conclusions of law based upon the Findings of Fact set out above:

1. Respondent violated *former* ORS 675.745(1)(d), *former* OAR 833-060-0021(10) and *former* OAR 833-060-0031(3) when she failed to recuse herself from providing services to Child when her objectivity, fairness and effectiveness became impaired.
2. Respondent violated *former* ORS 675.745(1)(d), *former* OAR 833-060-0021(1) and *former* OAR 833-060-0031(1) and (2) when she ignored her professional responsibility to her client, and failed to take care to do no harm or avoid harming her client when she failed to immediately report the suspected abuse of Child to the appropriate authorities.
3. Respondent violated *former* ORS 675.745(1)(d) and *former* OAR 833-060-0031(1) and (2) when she failed to take care to do no harm to Child or take reasonable steps to avoid harming Child when she confronted Sibling, the suspected abuser, without discussing the allegations with the parents first.
4. Respondent violated *former* ORS 675.745(1)(d) and *former* OAR 833-060-0031(1) and (2) when she failed to take care to do no harm to Child or take reasonable steps to avoid harming Child when she confronted Sibling, the suspected abuser, in front of Child.
5. Respondent violated *former* ORS 6743745(1)(d) and *former* OAR 833-060-0041(10) when she used her counseling relationship with Child to further Respondent's financial interests when Respondent told Child's parents she would not report the alleged abuse if the parents continued the Child's counseling sessions with Respondent.
6. Respondent violated *former* ORS 675.745(1)(d) and *former* OAR 833-060-0051(12) when she failed to provide Child's parents with requested counseling records.
7. Respondent was grossly negligent when she violated *former* ORS 675.745(1)(c) and *former* OAR 833, Chapter 60 by engaging in the conduct set out above.
8. Respondent violated *former* ORS 675.745(1)(d), *former* OAR 833-060-0041 and *former* OAR 833-060-0061(1) when she failed to act in accordance with the highest standards of professional integrity and competence as set out above.
9. Given Respondent's conduct, the appropriate sanction is to suspend her professional counseling license for two years and impose other appropriate

sanctions pursuant to *former* ORS 675.745(1)(c) and (d) and the Board's Code of Ethics.

10. Respondent should be assessed the costs for the disciplinary proceedings pursuant to *former* ORS 675.745(6).

OPINION

The Board has the burden of proof to establish its allegations. ORS 183.450(2) and (5); *Harris v. SAIF*, 292 Or 683 (1980). The Board must prove the allegations by a preponderance of the evidence. *Sobel v. Board of Pharmacy*, 130 Or App 374, 379 (1994), *rev den* 320 Or 588 (1995) (standard of proof under the Administrative Procedures Act is preponderance of evidence absent legislation adopting a different standard). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

(1) Allegations of Misconduct

The Amended Notice accuses Respondent of violating *former* ORS 675.745(1)(d) and one or more of the Board's administrative rules in its Code of Ethics pertaining to the licensure of professional counselors. The Amended Notice also accuses Respondent of violating *former* ORS 675.745(1)(c) by acting with gross negligence in her practice.

Both parties relied on expert testimony to support their respective positions. Dr. Sabin testified for the Board. Dr. Johnson testified for Respondent. Drs. Sabin and Johnson had different opinions on important aspects of the case and some of the decisions that Respondent made.

The Board finds Dr. Sabin's testimony more persuasive for the following reasons. Dr. Sabin specializes in counseling children, with over 30 years of service in the field. Her expertise is such that the Oregon State Bar has retained her to provide child abuse training to attorneys.

In addition, Dr. Sabin was not retained after the fact to provide expert testimony like Dr. Johnson. Instead, Dr. Sabin was a fact witness who testified about the services she provided to the parents because of their concerns over Respondent's conduct. The parents were not gearing up for a lawsuit or, like Respondent, preparing to defend themselves from serious misconduct allegations. Instead, they came to Dr. Sabin as concerned parents trying to understand what happened and whether their children actually needed therapy. As such, Dr. Sabin's testimony was not tainted by any bias.

Moreover, Dr. Sabin reviewed Respondent's notes, and interviewed the parents and the DHS worker who investigated Respondent's abuse report. Dr. Sabin discussed with the parents whether her consultation should include interaction with the children. Given the traumatization of their interaction with Respondent, the parents did not believe Dr. Sabin needed to meet with the children. Given her vast experience in the area and that Dr. Sabin testified she was

comfortable providing her consultation without any meetings, the Board concludes that no such meeting was necessary.

Given all of her qualifications and lack of bias, the Board finds that Dr. Sabin's testimony is much more persuasive than Dr. Johnson and reviewed the facts accordingly.

(a) Violations of former ORS 675.745(1)(d) and the Board's Code of Ethics

The Board is responsible pursuant to ORS 675.705 *et seq* for licensing and regulating professional counselors. Respondent has been licensed by the Board as a professional counselor since August 2006. The Board seeks to suspend Respondent's license for two years for violating former ORS 675.745(1)(c) and (d) and provisions in the Board's Code of Ethics (former OAR chapter 833, Division 60), and impose various conditions of probation on her. (P3 at 6-8.)

Former ORS 675.745(1)(c) and (d)⁷ stated:

(1) The Oregon Board of Licensed Professional Counselors and Therapists may deny, suspend, revoke or refuse to issue or renew any license issued under ORS 675.715 to 675.835 upon proof that the applicant for licensure or the licensee:

(c) Has been grossly negligent in the practice of professional counseling or marriage and family therapy; [or]

(d) Has violated one or more of the rules of the board pertaining to the licensure or professional counselors or licensed marriage and family therapists;

The Board, in its Notice of Intent to Revoke, has accused Respondent of violating numerous provisions of its Code of Ethics.⁸ Those ethical provisions read as follows:

Former OAR 833-060-0011—General Purpose and Scope

(1) This code constitutes the standards against which the required professional conduct of licensed professional counselors and marriage and family therapists is measured. It has as its goal the welfare and protection of the individuals and groups with whom counselors and therapists work. This code applies to the conduct of all licensees, registered interns and applicants, including the applicant's conduct during the period of education, training, and employment which is required for licensure. Violations of the provisions of this code of ethics will be considered unprofessional or unethical conduct and is sufficient reason for disciplinary action, including, but not limited to, denial of licensure.

Former OAR 833-060-0021—Responsibility

⁷ *Former* ORS 675.745(1)(c) and (d) have been renumbered and are currently ORS 675.745(1)(d) and (e), respectively.

⁸ The Code of Ethics applicable to this matter was found in Division 60 of OAR chapter 833. The current Code of Ethics is found in Division 100 of OAR chapter 833. The two versions are the same.

(1) A licensee's primary professional responsibility is to the client. A licensee makes every reasonable effort to advance the welfare and best interests of all clients for whom the licensee provides professional services. A licensee respects the rights of those persons seeking assistance and makes reasonable efforts to ensure that the licensee's services are used appropriately:

(8) A licensee abides by all applicable statutes and administrative rules regulating the practice of counseling or therapy or any other applicable laws, including, but not limited to, the reporting of abuse of children or vulnerable adults.

(10) A licensee does not provide services to a client when the licensee's objectivity or effectiveness is impaired. If a licensee's objectivity or effectiveness becomes impaired during a professional relationship with a client, the licensee notifies the client that the licensee can no longer serve the client professionally and makes a reasonable effort to assist the client in obtaining other professional services.

Former OAR 833-060-0031—Client Welfare

(1) Licensees strive to benefit those with whom they work and take care to do no harm. In their professional actions, licensees seek to safeguard the welfare and rights of those with whom they interact professionally and other affected persons and shall hold the welfare and interests of clients as primary.

(2) Licensees take reasonable steps to avoid harming their clients, students, supervisees, research participants, organizational clients and others with whom they work, and to minimize harm where it is foreseeable and unavoidable.

(3) The primary obligation of licensees is to respect the integrity and promote the welfare of their clients, including treating the client at all times in a caring, fair, courteous and respectful manner. This is particularly true for vulnerable populations such as children, seniors or clients with disabilities.

Former OAR 833-060-0041—Integrity

(1) A licensee acts in accordance with the highest standards of professional integrity and competence. A licensee is honest in dealing with clients, students, trainees, colleagues, related third parties, and the public.

(10) A licensee does not use the counseling relationship to further personal, religious, political, sexual, or financial interests.

Former OAR 833-060-0051—Confidentiality

(12) A licensee provides clients reasonable access to records concerning them and should take due care to protect the confidences of others contained in those records, or when information from others about the client could result in harm to that person or persons

upon disclosure to the client. Following guidelines set forth in ORS 192.518(2) and 675.765(1), unless otherwise ordered by the court, parents shall have access to the client records of juveniles who are receiving professional services from the licensee.

Former OAR 833-060-0061—Conduct and Competence

(1) A licensee accepts the obligation to conform to higher standards of conduct in the capacity of a counseling professional. The private conduct of a licensee is a personal matter to the degree that it does not compromise the fulfillment of professional responsibilities. A licensee will respect the traditions of the profession, and refrain from any conduct that would bring discredit to the profession.

The allegations are addressed in turn and will track the allegations in the Amended Notice dated December 31, 2009.

(A) Respondent failed to recuse herself from providing services to Child when her objectivity, fairness and effectiveness became impaired in violation of former ORS 675.745(1)(d), former OAR 833-060-0021(10) and former OAR 833-060-0031(3).

The evidence indicates that Respondent failed to maintain her objectivity when providing services to Child through the conclusions she reached and manner in which she confronted the parents and Sibling with abuse allegations.

Child's parents were concerned about problems Child was having at school, and wanted to make sure she had every opportunity to be successful as she was heading to middle school. Because they had previously taken Child to counseling with good results, the parents decided to utilize that resource again. Mother took Child to the sessions, filled out the appropriate forms and encouraged Child to share everything with Respondent. These are not the actions of parents who have something to hide.

According to Dr. Sabin, it is important to ask the child-patient non-leading questions to help the therapist objectively begin to develop numerous hypotheses that need to be explored to determine the source of the child's problem.

However, instead of maintaining her objectivity, Respondent immediately began to interpret everything the parents said or did as pointing to abuse. For example, in Respondent's Client Information Form (R1), Mother was asked to describe the reasons for the need for counseling. Mother discussed Child's problems with being a part of group/interactive activities and that this problem "dribbles into our home situation." When asked how long this had been a problem, Mother wrote that the problem started when Child was in Pre-School, but as she got older it had become "more sophisticated." According to Respondent, such a response indicated that Child had become the "identified patient in the family" i.e., the person in the family with the problems, and "the symptom bearer of the family dysfunction."

In contrast, Dr. Sabin testified that such language raised no such "red flags" for her; the notion that the Parents saw the Child as the source of the problem wouldn't even be on her list of

possible hypothesis. The fact that the problem had become more “sophisticated” meant only that the problems would be different for a pre-schooler as opposed to a child in the fourth or fifth grade. Dr. Sabin testified that she interpreted the Mother’s answer as merely “a short-hand way of answering the question; it’s been going on for awhile, but it’s changed over time.”

Respondent also immediately concluded that Child was being abused by Sibling after only two sessions, without ever talking to the Parents about the sibling relationship or meeting with Sibling. Child’s first session with Child occurred on July 1, 2008. Although Respondent did get to spend some time alone with Child, most of the time was spent gathering information and discussing related issues with Mother. The first full session occurred the next week, on July 9, 2008.

It was during just the second full session that Child began to reveal details of alleged abuse by Sibling. According to Respondent’s own Client Notes, she immediately concluded that what Child was experiencing from Sibling was abuse and shared this conclusion with Child – “Therapist explained to client that what [Child] was experiencing from [Sibling] was abuse.” (Exhibit A5 at page 2.)

Respondent then told Child that this abuse would “continue and get worse unless [Child’s] parents stopped it.” *Id.* Respondent went on to diagnose Sibling, who she had never met, and told Child that “[Sibling] is doing this because [Sibling] is angry, but that anger is a problem between [Sibling] and their parents that [Sibling] cannot express to them, so [Sibling] takes it out on [Child] because [Child] has less power and is younger and weaker.” *Id.*

Respondent then asked Child to keep a journal of all future incidents of abuse that Child would share with Respondent. As Dr. Sabin testified, she rarely asks her clients to journal, and would never keep such an activity secret from the parents. Instead, in this case it appears Respondent was asking Child not to journal but to collect information.

Dr. Sabin noted that it is important for therapists not to polarize the child against the parents – “It’s a dangerous territory because children can idealize the therapist and so I think aligning with the child isn’t the problem, it’s aligning with the child in opposition to the parents or to the exclusion of the parents.” (Dr. Sabin testimony.) The Board agrees with Dr. Sabin’s conclusion that Respondent had inappropriately aligned with the Child:

I am concerned about the process of the therapist in making assumptions about the ‘abuse’ in the family. She quickly aligned herself with the [Child’s] view of [Child] as a victim, and encourage the [Child] to perceive [Child] as a victim without having any objective conversations with the parents or the other child. The temperament issues and the problems for which the child was brought to therapy were not assessed from what the notes indicate. The encouragement of keeping a secret journal is clearly an alignment with the child to the exclusion of the parents. If the therapist really felt the child was in danger, the ‘abuse’

should have been reported initially. The process does not indicate an objective approach of the therapist.

(Exhibit A7 at 2.)

Respondent admits that she became emotional during the family meeting. Respondent also discussed her own history of family abuse during this meeting, and Child observed Respondent's reaction and tears.

Given her lack of objectivity and conduct with Child's parents, Respondent's effectiveness became so impaired that she should have recused herself from continuing to provide services to Child. The Board concludes that Respondent's failure to do so is a clear violation of the Code of Ethics.

B. Respondent ignored her professional responsibility to her client, and failed to take care to do no harm or avoid harming her client when she failed to immediately report the suspected abuse of Child to the appropriate authorities in violation of former ORS 675.745(1)(d), OAR 833-060-0021(1) and OAR 833-060-0031(1) and (2).

As a licensed professional counselor, Respondent is a mandatory child abuse reporter under ORS 419B.005(3)(n). Therefore, once Respondent concludes that any child with whom she had come into contact with has suffered abuse, Respondent is required to "immediately report or cause a report to be made." ORS 419B.010(1).

Here, whether or not actual abuse was taking place, Respondent's own clinical notes indicate that **she concluded** Child was being physically abused by Sibling as of July 15, 2008, informed Child that Child was being abused, yet failed to report that abuse for more than two months.

Client began [July 15, 2008] session by playing a card game with the therapist. [Child] then stopped and said; "Can I tell you something?" Therapist responded, "Of course." Client then began to reveal details of incidents of being **physically abused** by [Sibling]. Affect was immediately and complete congruent with details client was revealing, i.e. many tears, and sobbing through remainder of session.

Therapist explained to client that what [Child] was experiencing from [Sibling] was **abuse**, and would continue and get worse unless [Child's] parents stopped it. Therapist told [Child] it was my duty to bring this to [Child's] parent's attention, and tell them how important it is to make it stop. * * *Therapist explained that unless [Child's] parents make it stop, it will get worse, [Sibling] will get bigger and hurt [Child] more, and [Sibling] will destroy any chance of relationship with [Child] later, as well as lead to

worse things for [Sibling]. Client responded “I know” and cried harder.

* * * Therapist assured client that we will handle this situation together and asked [Child] to document further incidents of **abuse** by [Sibling].

Exhibit A5 at 2 (emphasis added).

During the next counseling session, Child presented Respondent with new examples of abuse by Sibling, including that Sibling kicked Child, slapped Child in the face and said Child was ugly. (Exhibit A5 at 3.) Child complained that when Child told parents Sibling was hurting Child, that the parents ignored Child. Respondent also learned that Child would be leaving the next week for vacation with parents and the abusive Sibling. Despite learning of additional incidents of physical abuse, and the parent’s alleged failure to stop the abuse, Respondent failed to report the abuse to the appropriate authorities.

When Child returned from vacation for the next counseling session on August 4, 2008, Child detailed even more examples of abuse – “Client reports to therapist on incidents of **emotional and physical abuse** by [Sibling] since July 21st.” (Exhibit A5 at 4.) Child reported the Sibling again slapped Child in the face several times, kicked Child, called her names, including ugly, stupid and an idiot. (*Id.*) Ultimately, Child reported that Sibling punched Child in the stomach and shoved Child toward the stairs so Child almost fell. (*Id. at 4-5.*)

Respondent’s own notes again indicate that Respondent believed abuse had occurred as she told Child that she would be setting up a meeting between Child and the parents “so we can address the problem of the **physical abuse.**” *Id.* (emphasis added). In her notes from the family meeting, Respondent states that she “directed[sic] address family dysfunction related to **repeated incidents of physical abuse by [Sibling]** toward the client, which has been documents by the client as it occurred, and reported in writing to the therapist.” (Exhibit A5 at 6 – emphasis added.)

In an attempt to explain away the fact her own clinical notes repeatedly demonstrate that Respondent had concluded Child was being abused (and thus should have reported such abuse), Respondent introduced the notion of “reportable” versus “unreportable” abuse. According to Respondent, she was using the term “abuse” in the generic form, which did not trigger any reporting requirement. The Board rejects her attempt to make such a distinction. “Abuse” is a charged word and carries with it serious obligations – as such it is not a word used casually by counseling professionals, as Dr. Sabin noted in her testimony:

BETTERTON [ALJ]: Well, we have you know, you can use the word abuse to mean something and we have a definition of legal, reportable abuse, and those can be very different things. Would you agree with that?

SABIN: Yes and no, but I use that word abuse carefully. I mean, if I use the word abuse, to me, I usually mean it's something I need to report."

* * *

GABLIKS: And I guess to follow up on that then, a lay person so to speak may say I've been abused but as a professional then, that's not a word that you toss out willy-nilly is it?

SABIN: No because in my mind it does trigger my ... if I say somebody's abused, in my mind it triggers my reporting obligation.

(Dr. Sabin's testimony.)

Respondent's position that she was under no obligation to report abuse is further discredited by her repeated insistence that the "abuse" taking place was not "reportable" because it did not result in "physical injuries" – [Sibling] had not hurt her to the point where there were bruises and wounds." (Respondent's testimony.) As both Dr. Sabin and Dr. Jefferson testified, there does not have to be physical signs of abuse for the abuse to be reportable.

Thus, despite specific documentation by Respondent of her conclusion that Child was being physically abused, Respondent failed to report this abuse to the appropriate authorities. As Dr. Sabin observed in her report to the parents – "If the therapist really felt the child was in danger, the 'abuse' should have been reported initially." (Exhibit A7 at 2.) The Board agrees. As such, Respondent's failure to report this abuse violated *former* ORS 675.745(1)(d), *former* OAR 833-060-0021(1) and *former* OAR 833-060-0031(1) & (2).

(C) Respondent failed to take care to do no harm to Child or take reasonable steps to avoid harming Child when she confronted Sibling, the suspected abuser, without discussing the allegations with the parents first in violation of former ORS 675.745(1)(d) and OAR 833-060-0031(1) and (2).

(D) Respondent failed to take care to do no harm to Child or take reasonable steps to avoid harming Child when she confronted Sibling, the suspected abuser, in front of Child in violation of former ORS 675.745(1)(d) and former OAR 833-060-0031(1) and (2).

Although Respondent denied that she "confronted" Sibling in the family meeting on August 21, 2008 about Sibling's abuse of Child, her own clinical notes indicate otherwise – "Therapist joined with family, then presented evidence of ongoing abuse." (Exhibit A5 at 6.)

Dr. Sabin stated that in her professional opinion Respondent's decision to include Child and Sibling in the family meeting was inappropriate. The Board agrees. Instead, as Dr. Sabin testified, Respondent should have met with the parents separately about her concerns and to learn

more about the relationship with Child and Sibling. Depending on what was said, Dr. Sabin stated that the parents should then be given choices regarding whether Sibling needed a therapist, whether another family therapist was necessary or whether Respondent should start meeting with everyone as a family.

In addition, Dr. Sabin criticized Respondent's decision to include Sibling in the family meeting – "The inclusion of the other child in the therapy was done to confront him, but no therapeutic alliance had been made with him and thus the family meeting was not therapeutic, but rather traumatic to the family. (Exhibit A7 at 2.) The Board agrees. The evidence indicates that the Child cried throughout the meeting and the parents testified that everyone was very upset after the meeting. Both parents are concerned about the long-term effects this confrontation may have on Child's and Sibling's relationship, which could have and should have been avoided.

The Board concludes that Respondent failed to take reasonable steps to avoid harming Child when she confronted Sibling in front of Child without first consulting with the parents about the abuse allegations in violation of *former* ORS 675.745(1)(d) and *former* OAR 833-060-0031(1) & (2).

(E) Respondent used her counseling relationship with Child to further Respondent's financial interests when she told Child's parents she would not report the alleged abuse if the parents continued the Child's counseling sessions with Respondent in violation of former ORS 675.745(1)(d) and former OAR 833-060-0041(10).

The Amended Notice accuses Respondent of using the counseling relationship to further her financial interest. Although Respondent denied that she told parents she would not report abuse to authorities if they continued Child in counseling, her testimony is once again contradicted by her clinical notes.

In particular, Respondent's notes regarding the family meeting provide that "Therapist joined with family, then presented evidence of ongoing abuse, **informed parents of my legal reporting responsibilities, and offered them the option of making the abuse stop before I am required to report it.**" (Exhibit A5 at 6; emphasis added.) The parents both credibly testified that Respondent's statements were quite clear – it was her duty to report the abuse, but that she wouldn't put the family through that if they started family counseling with her immediately. The parents' credibility is buttressed by the fact Dr. Sabin testified that the parents made the same statements to her when she interviewed them as part of her consultation in spring 2009. *See also* Exhibit A7 at 1.

Respondent is in private practice and responsible for securing her own clients. The Board concludes that Respondent leveraged her reporting responsibility to scare the parents into continuing counseling sessions with her, to her financial benefit. As such, the Board finds that Respondent violated *former* ORS 675.745(1)(d) and *former* OAR 833-060-0041(10).

(F) Respondent failed to provide Child's parents with requested counseling records in violation of former ORS 675.745(1)(d) and former OAR 833-060-0051(12).

The Amended Notice accuses Respondent of violating the above statute and administrative rule by failing to provide the parents with Child's counseling records. The Code is clear that licensees must provide clients with reasonable access to their records. *See former OAR 833-060-0051(12)*. And, in the case of juveniles or minor children, their parents shall have access to their counseling records.

There is no dispute that the counseling records at issue here are those of an unemancipated minor (Child) **and** that, as such, the parents have a legal right to request such records. There is also no dispute that the parents made numerous requests, both orally and in writing, for such records. *See, e.g., Exhibits A1 and A3*. As such, Respondent's failure to provide parents with Child's records violated the Code unless Respondent proved that an exception exists to this requirement.

The Board finds that Respondent failed to meet this burden. Respondent appeared to rely on an exception provided in the HIPAA⁹ Privacy Rules (as set out in 45 CFR 164) to justify her decision not to provide Child's counseling records to the parents. However, before reaching the question of whether such an exception is available, she must prove that HIPAA applies. As Respondent failed to introduce such evidence, Respondent's may not rely on HIPAA to excuse her non-compliance with Board rules.

45 CFR § 160.102 sets out who must comply with HIPAA. Such entities are commonly referred to as a "covered entity." In particular, the law provides:

- (a) Except as otherwise provided, the standards, requirements, and implementation specifications adopted under this subchapter apply to the following entities:
- (1) A health plan.
 - (2) A health care clearinghouse.
 - (3) A health care provider who **transmits any health information in electronic form *in connection with*** a transaction covered by this subchapter.

45 CFR § 160.102(a) (emphasis added)¹⁰; see also 42 USC 1320d-1(a)(3).

As Respondent is neither a health plan nor a health care clearinghouse, she must prove that she is (a) a health care provider; and that she (b) transmits health information in electronic form in connection with providing health services. Although the services Respondent provides likely satisfies the health care provider requirement, absolutely no evidence was introduced during the hearing indicating that she electronically transmits any health information in the manner that the HIPAA rules require.

⁹ HIPAA refers to the Health Insurance Portability and Accountability Act.

¹⁰ The definition of "covered entity" set out in 45 CFR § 160.103 uses exactly the same wording.

The electronic transactions referred to in the HIPAA rules are those for which the Secretary of HHS has promulgated standards. By HIPAA definition, there is a critical difference between a provider who “**transmits any health information in electronic form *in connection with*** a transaction covered by this subchapter” and a provider that makes ordinary use of computers, fax machines, or other electronic communications processes in the conduct of their business. Thus, not all providers of health care services are automatically covered by HIPAA – only those providers of health care services that utilized electronic claims transactions processes for certain transactions for which the Secretary has issued standards.

Here, Respondent introduced no evidence or testified about how or even if, she used a computer in transacting business. In order to rely on the HIPAA rules to establish a mandatory standard of conduct, the Board finds that a mere assertion by Respondent that she is a “covered entity” clearly does not satisfy Respondent’s burden. As Respondent failed to prove that HIPAA is applicable in this matter, she was required to comply with the record access requirements set out in the Code of Ethics. Because she failed to do so, Respondent’s conduct violated *former* OAR 833-060-0051(12).

Even if the HIPAA privacy rules apply, Respondent failed to prove she satisfied the HIPAA access to records exception such that she did not to provide the parents with Child’s counseling records.

The HIPAA privacy rules, generally codified in 45 CFR § 164, Subpart E, set out the general rules for the use and disclosure of protected health information¹¹. The general rule, or standard, is that a covered entity is required to disclose protected health information (PHI) when requested by that individual. 45 CFR § 164.502(a)(2). In the case of an unemancipated minor, a covered entity is required to treat a personal representative such as the parent as the individual for the purpose of PHI access. Therefore, the burden is again on Respondent to prove that an exception to this standard exists.

One such exception involves cases of parental abuse. 45 CFR §165.502(g)(5) provides:

Notwithstanding a State law or any requirement of this paragraph to the contrary, a covered entity may elect not to treat a person as the personal representative of an individual if:

(i) The covered entity has a reasonable belief that:

(A) The individual has been or may be subjected to domestic violence, abuse, or neglect by such person; or

(B) Treating such person as the personal representative could endanger the individual; and

¹¹ Assuming the HIPAA privacy rules apply, the Board notes that the counseling records at issue would probably constitute “protected health information” that is subject to the requirements of the HIPAA privacy rules. *See* 45 CFR § 160.103 (definition of protected health information).

(ii) The covered entity, in the exercise of professional judgment, decides that it is not in the best interest of the individual to treat the person as the individual's personal representative.

(Emphasis added).

Here, Respondent asserted that she did not provide Child's records to the parents because she believed that Child would be subject to "further abuse" by the parents if she did so. However, Respondent can't have it both ways – either for the triggering of the abuse reporting statute or for releasing records. The conduct at issue here was *Sibling's* alleged abuse of Child, not the parents. As Dr. Sabin testified, when she discussed this case with DHS personnel, the focus of their investigation was on the *Sibling's* alleged abuse of Child only.

Respondent's own records indicate that Child reported no further incidents of *Sibling* abuse after the family meeting held on August 21, 2008. *See Exhibit A5 at 6-7.* The Board finds that Respondent did not have a reasonable belief that the parents would abuse Child or that treating the parents as a personal representative could endanger Child. Instead, the evidence reveals a counselor who, upset because the parents refused to continue to utilize her services, decided to finally report the alleged abuse by *Sibling*. Such motivation clearly does not satisfy the narrow exception to the general rule allowing parental access. Therefore, even if HIPAA applies, the Board concludes that Respondent failed to satisfy the requirements necessary to deny Child's parents access to her counseling records under HIPAA.

Respondent also argued that she is permitted to deny access to the parents under 42 CFR 164.524(a)(3)(iii). Section 164.524 provides the individual's right of access to their protected health information under the HIPAA rules. According to § 164.502, a covered entity must treat a personal representative as the individual, for purposes of the HIPAA rules, unless one of the exceptions applies. For the reasons discussed above, the Board found that no exception to parental access to these records applies in this case.

Under the access rules, the individual's right to access can only be denied outright for reasons not asserted by Respondent here. Denial of access in most cases is "reviewable" and HIPAA provides a specific process that must be followed for denial of access. Section 164.524(a)(3)(iii) provides that a health professional may deny access (subject to review) if the request for access is made by a personal representative and the health professional "has determined, in the exercise of professional judgment, that the provision of access to such personal representative is reasonably likely to cause substantial harm to the individual or another person." Respondent cited this regulation as a basis for her denial of information to a personal representative; however, reliance on this provision necessarily requires that the denial decision inform the personal representative of their right to obtain review of that decision in accordance with §164.524.

Assuming a covered entity determined that denial of access to the parents as personal representative was required under § 164.524(a)(3)(iii), the covered entity must provide a timely written denial to the individual that contains the basis for the denial, a statement of the individual's review rights and how the individual may exercise those rights, and the right of the

individual to complain to the Secretary of HHS about the denial. 42 CFR 164.524(d)(2). If the individual requests a review of the denial, the covered entity must designate a licensed health care professional who was not directly involved in the decision to deny access. The reviewing professional must review the denial and determine whether or not to deny access under the HIPAA standards in 42 CFR 164.524(a)(3).

Then, the covered entity must promptly provide written notice of the determination of the reviewing professional and take action required to carry out the reviewing official's recommendation. This process is clearly defined and, if applicable, mandatory if access by a personal representative is denied on the basis of § 164.524(a)(3)(iii).

Respondent asserted that she substantially complied with this process by offering to release the records to a family therapist. The Board disagrees and finds that none of these requirements were met. *See* Exhibits A2 and A4. Therefore, the Board concludes that Respondent's reliance on HIPAA to avoid providing the parents with Child's records is without merit.

Finally, Respondent asserted that she relied on advice received from Executive Director Becky Eklund in refusing to provide the parents with Child's counseling records. Given that Respondent failed to prove she ever received any advice from Ms. Eklund, the Board rejects this argument and concludes that Respondent improperly denied the parents' access to Child's records.

Respondent argues that she relied on representations allegedly made by Ms. Eklund, regarding whether she had to provide the parents with Child's records. However, Ms. Eklund's testimony was clear that she had no recollection¹² of ever having such a conversation.

Additionally, Ms. Eklund stated that although she often takes notes when talking to licensees, she had searched her files and found no such notes relating to any conversation with Respondent. Moreover, Ms. Eklund testified that even when licensees contact the Board to discuss issues, she does not advise the licensee what to do, but "kind of, just kind of talk[s] through the situation." (Eklund testimony.)

As Respondent failed to prove Ms. Eklund provided any advice to her, the Board finds that Respondent's refusal to provide Child's records to the parents, despite their repeated requests, violates *former* OAR 833-060-0051(12).

(G) Respondent was grossly negligent by engaging in the conduct set out above in violations of former ORS 675.745(1)(c).

The Amended Notice also accuses Respondent of violating *former* ORS 675.745(1)(c) by acting with "gross negligence" in the practice of professional counseling. Although neither ORS Chapter 675 nor OAR Chapter 833 define "gross negligence" application of the plain, ordinary

¹² Even assuming Ms. Eklund had talked to Respondent, any representation that would excuse Respondent from complying with all HIPAA requirements would be contrary to law and unenforceable.

meaning of this term to the facts here indicates that Respondent's conduct constitutes gross negligence.

In construing a statute, the first step is to examine the text and context of the provision. *State v. Gaines*, 346 Or 160, 171 (2009). In construing the text and context, rules of construction are considered that bear directly on how to read the text. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 611 (1993). One such rule is that "words of common usage typically should be given their plain, natural and ordinary meaning." *Id.* The "ordinary meaning" of a word is presumed to be what is stated in a dictionary. *Dept. of Revenue v. Faris*, 345 Or 97 (2008). *Black's Law Dictionary* (9th Ed. 2009) defines "gross negligence" as "A conscious, voluntary act or omission in reckless disregard of a legal duty and of consequences to another party." See also *Webster's Third New Int'l Dictionary* at 1002 (Unabridged Ed 2002) (defining gross negligence as "negligence marked by total or nearly total disregard for the rights of others and by total or nearly total indifference to the consequences of an act").

The Board finds that Respondent's reckless disregard of her legal duty to report suspected child abuse satisfies this standard and constitutes gross negligence. Respondent concluded after the July 15th session that Child was suffering physical abuse from Sibling, yet failed to do anything to stop the abuse. Respondent told Child she would talk to the parents to make the abuse stop, and Mother was right outside the door, but Respondent did not set up a meeting for more than two months after informing Child of her intentions.

Child continued to suffer abuse from her Sibling, in the form of kicking, hitting, and even a push toward the stairs, none of which would have occurred had Respondent contacted the appropriate authorities as soon as she suspected abuse. Respondent knew Child would not be attending therapy while on a family vacation, and would be in close contact with Sibling, yet failed to contact authorities or talk to the parents to prevent the abuse that occurred during the vacation, which Child reported to Respondent during the next counseling session on August 4th.

Given the totality of her conduct, the Board concludes that Respondent engaged in gross negligence in violation of *former* ORS 675.745(1)(c) and *former* OAR 833, Chapter 60.

(H) Respondent failed to act in accordance with the highest standards of professional integrity and competence when she engaged in the conduct described above in violation of former ORS 675.745(1)(d), former OAR 833-060-0041 and former OAR 833-060-0061(1).

Licensees are expected to follow all applicable statutes and rules. Here, the evidence shows that Respondent violated multiple statutes and rules when providing services to Child. As such, Respondent failed to act in accordance with the highest standards of professional integrity and competence the Board demands from its licensees.

Such conduct reflects poorly not only on Respondent, but the profession as a whole. The goal of counseling is to help those seeking such services, not cause harm. Unfortunately, Respondent's actions failed to provide such assistance – instead it harmed Child by failing to

stop suspected abuse and had serious repercussions for the family when she irresponsibly confronted Sibling in front of Child.

Both parents testified about the positive results Child had gained from Child's first counseling experience, so they had no trepidations about trying counseling again. Now, neither parent views counseling as an option given their experience with Respondent – as Father testified, “our faith in the counseling profession is really shot. * * * And it's depressing to know that should we need ... that counseling ... really isn't an option.”

The Board takes its obligation to protect the public seriously. The discipline imposed must not only be commensurate with the seriousness and number of violations Respondent committed, but ensure that Respondent does not commit similar violations in the future. To achieve that goal, the Board suspends Respondent's license for two years and imposes other supervision and educational requirements. The Board is hopeful that Respondent will then return to the profession armed with the tools she needs to be a successful counselor.

(I) The Board is entitled to recover the costs it incurred in bringing this disciplinary action under former ORS 675.745(6).

The Board in its Notice seeks to recover from Respondent its costs for bringing this disciplinary action against her. Former ORS 675.745(6)¹³ authorized the Board to recover its costs. The costs incurred are as follows:

DOJ Costs

Total attorney hours: **151.4**

Billable rate - \$137/hr from 7/1/09 until 6/30/2011 – 115.8 hours	\$15,864.60
\$143/hr from 7/1/11 until 6/30/2013 – 36.5 hours	\$ 5,090.80

DOJ Direct Expenses - (Motor Pool, travel and Westlaw)	\$ 7.31
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Total DOJ costs -	\$20,962.71
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Direct Board Costs

Witness Appearance Fees -	\$ 400.00
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¹³ Former ORS 675.745(6) provided:

In addition to the actions authorized by subsections (1) and (2) of this section, the board may take such disciplinary action as the board in its discretion finds proper, including but not limited to the assessment of the costs of the disciplinary process.

OAH Costs¹⁴

A.	OAH Direct Charges: (ALJ & Operations Staff Time, Travel, & Transcripts)	\$ 1,675.34
B.	OAH Admin. Charges: (OAH Overhead)	\$ 1,028.72
C.	OAH 9% Working Capital Charge:	\$ 235.14
	Total OAH Costs:	\$ 2,939.20
	Total Costs:	\$24,301.91

As the Board has imposed discipline on Respondent, the Board concludes that it is entitled to recover all costs associated with pursuing this matter, in the amount of **\$24,301.91**.

FINAL ORDER

NOW THEREFORE, the Board hereby **ORDERS** that:

1. Respondent Rachel M. Weldon’s license shall be suspended for two (2) years effective immediately (ORS 675.745(1));
2. When Respondent returns to practice, she must be supervised once per week for six months and the supervisor must be approved by the Board;
3. After six months, Respondent’s supervisor must prepare a report for the Board with a recommendation regarding whether supervision is still necessary;
4. Respondent must complete and pass 3 credit college-level course on Ethics before her suspension is completed which may not be used to satisfy any CEU requirement;
5. Respondent must complete and pass 3 credit college-level course on Child and Family Treatment before her suspension is completed which may not be used to satisfy any CEU requirement;
6. Respondent must arrange and undergo a Mental Health assessment/evaluation. The Board must approve, in advance of the assessment, the organization performing this assessment;
7. Respondent must authorize the release of the written report from the assessing organization to the Board. This report will contain all records pertaining to her assessment and treatment;

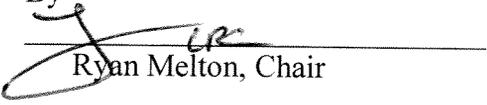
¹⁴ “Office of Administrative Hearings costs are based on actual charges calculated by Oregon Employment Department financial services for the administrative law judge, for the hearing, and for all associated administrative costs, pursuant to ORS 183.655. Direct costs include ALJ and OAH staff time, and any travel, transcripts and interpreters. Administrative costs include OAH overhead calculated based on hours. Working capital is assessed at 9%.”

8. Respondent will comply with the recommendations of the assessment, which may include treatment, and successfully complete any program for therapy recommended in the assessment; and
9. Respondent is **ASSESSED** the Board's costs associated with this action, including the Board's attorney fees, in the amount of **\$24,301.91** pursuant to *former* ORS 675.745(6).

DATED AND ISSUED this 25th day of January, 2012.

Oregon Board of Licensed
Professional Counselors and
Therapists

By



Ryan Melton, Chair

NOTICE OF RIGHT TO APPEAL

You are entitled to judicial review of this Final Order in accordance with ORS 183.480 et seq. If you wish to appeal the Final Order, you must file a petition for review with the Oregon Court of Appeals within sixty (60) days after the Final Order was served on you

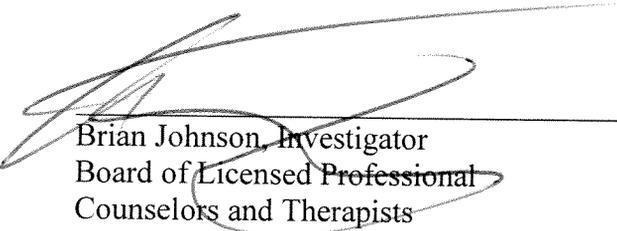
CERTIFICATE OF SERVICE

I hereby certify that on the 26 day of January 2012, I served the foregoing **FINAL ORDER** by depositing a true copy of the same in a sealed envelope sent by certified and regular mail, addressed as follows:

Rachel Weldon
Mosaic Counseling Associates
736 SE 60th Avenue
Portland OR 97215

A courtesy copy of the Final Order was mailed via regular mail this same date to Ms. Weldon's counsel, Michael Mendelson, at the following address:

Michael B. Mendelson
Attorney at Law
888 SW Fifth Avenue Suite 650
Portland OR 97204



Brian Johnson, Investigator
Board of Licensed Professional
Counselors and Therapists

cc: Kelly M. Gabliks, DOJ
Ken L. Betterton, ALJ