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

IN THE MATTER OF THE SUSPENSION OR REVOCATION OF THE LICENSE OF ARCHER IRBY, D.C. **License # 38MC00651000** TO PRACTICE CHIROPRACTIC IN THE STATE OF NEW JERSEY	Administrative Action **FINAL DECISION AND ORDER**

The State Board of Chiropractic Examiners Dentistry enters this Final Decision and Order after reviewing the Initial Decision issued by the Honorable Thomas R. Betancourt, A.L.J., finding that Archer Irby, D.C., had committed multiple acts of negligence and gross negligence, engaged in professional misconduct, and had violated laws and regulations administered by the Board. Dr. Irby's license was and has been temporarily suspended by consent since August 29, 2016.

The Initial Decision, and the record on which it is based, paint a picture of a practitioner who engaged in harassing, intimidating, and predatory conduct, and engaged in acts and practices that violate the standard of care for licensees in this State and that bring disrepute to the profession. After its review of the record the Board adopts Judge Betancourt's findings of fact, conclusions of law with one modification. Additionally, the

Board adopts the ALJ's recommendations on sanctions, including revocation of Dr. Irby's license, imposition of civil penalties, and an assessment of costs and attorney's fees.

FINDINGS

Archer Irby, D.C. ("Dr. Irby" or "respondent"), is a chiropractor licensed in New York and New Jersey. (ID at 25). On August 29, 2016, following the filing of criminal charges related to his conduct, he consented to the suspension of his license pending the outcome of these proceedings. Prior to that suspension, he practiced in Englewood, New Jersey. (ID at 25).[1]

The conduct underlying the Order to Show Cause and Amended Verified Complaint filed by the Attorney General[2] relates to the respondent's interactions and treatment of four women: S.I., P.H., E.W., and M.S. [3] The complaint alleges that Dr. Irby engaged in gross and repeated malpractice; engaged in professional misconduct; violated regulations administered by the Board (specifically N.J.S.A. 13:44E-2.3(c)); engaged in acts constituting a crime or offense involving moral turpitude or relating adversely to the profession; and failed to maintain good moral character (N.J.S.A. 45:9-41.5 and N.J.A.C. 13:44E-1A.1), providing bases for discipline under N.J.S.A. 45:1-21 (c), (d), (e), (f), and (h).

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1 The Initial Decision is referred to as "ID". The State's exhibits in evidence are referred to as "P"; respondent's exhibits as "R", and joint exhibit as "J". Respondent's letter of May 12, 2022, outlining his exceptions to the Initial Decision, is referred to as "Exceptions."

2 The Attorney General filed an Order to Show Cause and Verified Complaint on August 17, 2016. The complaint sought the suspension or revocation of respondent's license, penalties, costs, and attorney fees. Respondent filed an answer on September 15, 2016. The Board referred the matter to the Office of Administrative Law as a contested case on April 2, 2020. On May 12, 2021, the Attorney General's motion to amend the Verified Complaint was granted. Judge Betancourt, after eight days of hearing and receipt of post-hearing submissions, issued his Initial Decision on April 27, 2022. At the request of the Board, Acting Director and Chief Administrative Law Judge Barry E. Moscowitz granted an extension of time for the Board to file its Final Decision.

3 To protect their confidentiality, throughout the proceedings, patients are referred to by their initials.

During the hearing, the State presented testimony from four patients and from Dean Curtis, D.C., its expert witness. Respondent presented testimony from Carey Skorski, D.C., his expert witness, and testified on his own behalf. The parties moved 17 exhibits in evidence, including patient records for P.H., E.W., S.I., and M.S., as well as the treatment record for T.S. (P-4 through P-8). Exhibits also include expert reports (P-1, P-2, and R-1), the video of respondent's interview by detectives with the City of Englewood Police department (P-11a), a transcript of that interview prepared later at the State's request (P-11), and other items. (Complete list of exhibits in Appendix to Initial Decision at 34-35).

Judge Betancourt found each of the four patients to be more credible than Dr. Irby. The Board, recognizing the settled law that agencies are to give great deference to findings of credibility made by the trier of fact, accepts those credibility determinations and recounts the facts as found by Judge Betancourt. But even absent that deference, the Board's own review of the record compels it to agree completely with those findings. As described more fully below, each of the patients experienced gross violations of their bodily integrity at the hands of Dr. Irby.

Patient S.I.

S.I. first saw Dr. Irby for treatment in 2013-2014, and returned to his practice in June 2016 as her neck had "seized up." (ID at 25). At her appointment on July 27, 2016, S.I first saw the acupuncturist in the practice. She then saw respondent who had her lie face up and massaged the top of her breast. S.I. testified that she felt uncomfortable. (ID 25-26). S.I. returned for another visit on July 30, 2016. As she was lying on her back, Dr. Irby began manipulating her neck, shoulder and arms. He then began to massage the top

and side of her breast. He left the room for a period of time and upon his return began to rub her breasts, one at a time. He then pulled her sports bra down and she felt his mouth on her nipple. S.I. jumped off the table and left. Dr. Irby followed her from the treatment room and out of the office, apologizing. (ID at 4, 26).

S.I. went immediately to the Englewood Police Department. While at the police station, Dr. Irby called her three times. S.I., following the direction of police, answered only the first of three calls. (ID at 26).

There is nothing in S.I.'s patient record related to treatment respondent rendered on July 27 and July 30, 2016, that would provide any support for Dr. Irby's physical contact with her breast or skin on skin contact with breast tissue and nipple. (ID 26).

Patient P.H.

Dr. Irby initially treated P.H. in 2009. Although P.H. had a billing dispute related to certain treatment at that time, that issue had been resolved and P.H. continued to see respondent. (ID at 26). On October 2, 2012, at what would be her last appointment, respondent cupped his hands over her breasts, leaving them there for several seconds. (ID at 6; ID at 26).[4] P.H. did not report the incident to the police until after speaking with patient E.W., though she had told others of respondent's conduct at the time it occurred. (ID at 26-27). P.H.'s patient records do not document that any manual breast treatment was performed. The patient record does not give any indication there was a clinical justification for respondent to have touched P.H.'s breasts. (ID at 27).

Patient E.W.

4 The Initial Decision recounts P.H.'s testimony in detail, including the treatment date of October 2, 2012 (ID at 6). The Initial Decision in Finding of Fact #13 erroneously states the date of the inappropriate touching of P.H.'s breasts as October 2, 2016.

E.W., a teacher, began treating with respondent after meeting Dr. Irby's wife at a career day at the school where E.W. taught. Among other conditions, he treated her for issues related to her temporomandibular joint, which involved inserting his hands into her mouth. (ID at 27). At her appointment on July 20, 2016, respondent made inappropriate and sexually suggestive remarks regarding her gag reflex. On the same date, he placed his hands on her breasts, making her feel uncomfortable. Notwithstanding that encounter, E.W. convinced herself to return for treatment the following week. (ID at 27). On July 27, 2016, without any clinical justification for touching her breasts based on her diagnosis or as reflected in patient records, respondent massaged E.W.'s breasts. Dr. Irby then asked her: "are you ready for the real thing?" When she turned toward him, she saw respondent's exposed penis. (ID at 27). E.W. did not confront him at that time as she was scared. After she left, she reached out to S.S., a friend, who told her about P.H.'s experience. E.W. called P.H. Together, E.W. an P.H. reported respondent's conduct to the police. (ID at 10, 27).

Patient M.S.

A fourth patient, M.S., began treatment with Dr. Irby in 2009, financing her care through a medical loan. Although the proceeds from loan had been exhausted by 2011, respondent continued to treat her through the spring of 2012. (ID at 27). At her initial consultation, respondent commented on her breast implants and remarked "I'm sure you have painful sex from behind." Despite M.S.'s discomfort with his comments, she continued treatment as her pastor has introduced Dr. Irby to her and she wanted to support a Black-owned business. (ID at 28).

At her last visit in the Spring of 2012, a visit for which there is no treatment record,

Dr. Irby had M.S. disrobe except for her bra and panties. He unlatched her bra and began to massage her breasts. She then heard a belt buckle and, turning toward him, saw his exposed penis, which brushed against her face. She quickly got up, dressed, and left the office. (ID 28). She told a friend of the incident, but reported it to the police only after that friend told her Dr. Irby had been arrested for similar acts. (ID at 28).[5]

DISCUSSION

After consideration of the pleadings, the comprehensive Initial Decision, the extensive record including the transcripts of the hearing, and submissions and arguments on exceptions, the Board, as Judge Betancourt, has concluded that Dr. Irby engaged in acts and practices that violate the statutes and regulations governing the practice of the profession. Those violations pertain to his actions in touching the breasts of four patients, placing his mouth on the breast of S.I., and exposing his genitalia to two patients while they were ostensibly receiving care, and his professional conduct (or lack thereof) toward his patients, including lewd and suggestive comments.

As defined in the enabling statute, the "'Practice of chiropractic' means a philosophy, science and healing art concerned with the restoration and preservation of health and wellness through the promotion of well-being, prevention of disease and promotion and support of the inherent or innate recuperative abilities of the body." N.J.S.A. 45:9-14.5. Rather than preserving their health and wellness and promoting their well-being, Dr. Irby engaged in predatory and abusive conduct toward his patients – women who put their trust in him as a licensed health care professional. By engaging in

5 Dr. Irby was arrested in 2016 on charges related to his treatment of S.I., P.H., and E.W. He was acquitted of the charges following a jury trial in Superior Court of New Jersey, Bergen County. M.S.'s allegations were not part of the criminal trial.

acts for his prurient self-interest, he violated and disrespected his patients, violated the Board's regulations, and fell short of the standard of care expected of New Jersey chiropractors. He repeatedly and willfully disregarded the fundamental obligation of licensed chiropractors to practice ethically and do no harm.

In his exceptions, respondent claimed that Judge Betancourt was biased against him. He asserted that Judge Betancourt discounted his testimony because he didn't like him (Exceptions at 2), and further argued that the judge failed to discredit witness testimony based on Dr. Irby's proffered defenses. (Exceptions at 4-6). But the Board's review of the record demonstrates that the judge, having had the opportunity to observe all witnesses and to evaluate their demeanor and consistency of testimony and documentary evidence, had ample evidence to find the State's witnesses, and the patients in particular, to be more credible.

Of Dr. Irby, Judge Betancourt wrote:

> His testimony was almost entirely not believable. He justified his actions as they relate to touching his patients' breasts as attributable to his use of SOT [sacral occipital technique], as if it was somehow responsible for his actions. He was evasive, combative, non-responsive, argumentative and arrogant. At times his testimony contradicted what he told the police, which he characterized as misspeaking. I have a difficult time in believing much of what he said. I do not believe his blanket denial of any wrongdoing.

(ID at 31).

Judge Betancourt also found Dr. Dean Curtis, the State's expert witness, to be more credible than Dr. Carey Skorski, respondent's expert, finding that Dr. Skorski, through his report and testimony, "was clearly trying to spin his answers to make Respondent's actions seem justifiable." (ID at 31). The judge's conclusions are further supported by respondent's own records. The patients' charts do not reflect that the treatment he claims to have performed was warranted by the patients' presenting

conditions or would support Dr. Irby's touching or massaging their breasts. And there is absolutely no justification or any chiropractic treatment that would cause a practitioner to expose his penis.

Judge Betancourt, noting that the "matter is entirely decided based on the credibility of witnesses," concluded that by a preponderance of the evidence the Attorney General had demonstrated that respondent's actions violated N.J.S.A. 45:1-21 (c), (d), (e), (f), and (h). He found the patients' testimony very credible. (ID at 30). As noted, the Board defers to the trier of fact and has accepted those findings. The Board, using its expertise in assessing patient records and evaluating expert testimony, fully concurs. The findings are not arbitrary, capricious or unreasonable and are fully supported by sufficient, complete and credible evidence in the record. N.J.A.C. 1:1-8.6(c).

In sum, the Board finds Dr. Irby engaged in gross and repeated acts of negligence, N.J.S.A. 45:1-21 (c) and (d), violated Board regulations related to sexual misconduct, N.J.A.C. 13:44E-2.3, and thus N.J.S.A. 45:1-21(h), and engaged in professional misconduct. N.J.S.A. 45:1-21(e).

During deliberations the Board considered the fact of respondent's acquittal after trial in the Superior Court of New Jersey, Bergen County, of charges related to sexual assault of S.I., E.W., and P.H. (Exceptions at 1). In light of that acquittal, and without finding that the conduct did not constitute a violation of N.J.S.A. 45:1-21(f), the Board will exercise its discretion and modify the Initial Decision to exclude that conclusion of law from the bases for discipline to be imposed in this Final Order.[6]

6. N.J.S.A. 45:1-21(f) permits a Board to take action if a licensee "[h]as been convicted of, or engaged in acts constituting, any crime or offense that has a direct or substantial relationship to the activity regulated by the board or is of a nature such that certification, registration or licensure of the person would be inconsistent with the public's health, safety, or welfare...." Boards must act consistent with N.J.S.A. 45:1-

Having made his findings related to the charges, Judge Betancourt concluded that respondent had committed numerous acts or omissions, including gross malpractice or gross negligence, repeated acts of negligence, malpractice or incompetence, and professional or occupational misconduct, and that he violated or failed to comply with statutes and regulations administered by the Board. Judge Betancourt recommended that the Board revoke Dr. Irby's license, impose penalties of $70,000, and assess costs, attorney's fees. (ID at 32).

CONCLUSIONS

The Board, as detailed above, has accepted the findings of fact and conclusions of law, modifying the Initial Decision only to delete N.J.S.A. 45:1-21(f) as a basis for discipline. Dr. Irby's conduct was egregious, depraved, and predatory. When coupled with his lack of remorse, his refusal to admit wrongdoing, and his attempt to conceal his conduct under the veil of sacral occipital technique (SOT), the Board finds that nothing less than a permanent revocation is appropriate. Imposing a suspension only would diminish the severity of his offenses and the harm he caused and would fail to protect the public. The maximum penalty is warranted given the repeated and appalling conduct perpetrated on the four women and the disrepute he has brought to the profession.

Having found several bases on which disciplinary action may be predicated, the Board provided an opportunity for respondent to offer evidence in mitigation of the sanction to be imposed. In advance of the hearing, respondent submitted financial information for the Board's consideration,

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21.5, which describes the process to be followed in any application for licensure or reinstatement following conviction. In addition, the Chiropractic Board Act at N.J.S.A. 45:41.23, addresses the effects of a conviction for sexual crimes and offenses.

The Board heard arguments of counsel on the sanctions to be imposed. It accepted into evidence the certification of the prosecuting deputy attorney general with exhibits documenting investigative costs, transcripts, and her fees. The Board accepted from respondent, financial records, including personal and business tax returns, and a short statement of assets and liabilities.

We have considered the documents entered into evidence and arguments of counsel and conclude that no modification to Judge Betancourt's recommended sanction is warranted. As noted, we agree that nothing short of revocation is warranted, and indeed that revocation should be permanent. In recommending penalties of $70,000, the judge found that imposition of enhanced penalties for second offenses (of up to $20,000 per violation) was warranted. (ID at 31). The penalty of $70,000 reflects $10,000 as a first offense penalty for respondent's conduct toward S.I.; and $20,000 each for his conduct toward, P.H., E.W., and M.S. We agree.

The Board next reviewed the certification submitted detailing fees charged by the deputy attorney general who successfully brought the matter to hearing. Those fees are based on hours reflected on the prosecuting deputy's time sheets and multiplied by the rate set by the Division of Law's Uniform Rate of Compensation memorandum dated August 6, 2015. Time spent included review of the files, preparation of pleadings, discovery, preparation of witnesses and experts, conferences, correspondence, and eight days of hearing.[7] That certification does not include time spent after the Initial Decision was issued, including responding to exceptions and appearing at the Board's June 23,

7. The application for fees did not include the fees generated in the preparation of the initial verified complaint and the negotiation of the 2016 consent order, nor fees related to a modest amount of work done by other attorneys or paralegals.

2022 meeting. The attorney fees sought total $76,102.

We find the time spent on the prosecution of this matter and the hourly rate assessed are reasonable. As evident from the outcome, there can be no question that the Attorney General acted properly in vigorously pursuing this chiropractor's misconduct. The hours expended in preparing pleadings and submissions, prepping witnesses, and litigating the matter over eight days of hearings, were warranted in this matter of great public import.

We find the State's certification of investigative costs dated May 11, 2022, is also reflective of reasonable time and charges spent to investigate and prosecute the case, and for transcripts related to the proceedings. Those costs total $15,215.20.

Other than submitting documents purporting to relate to his financial status and holding, Dr. Irby did not submit a response to the deputy's certification of fees and costs.

The Board recognizes that generally costs of prosecution should not be borne by the professionals whose licensing fees fund the Board's operations, but rather by the licensee whose conduct has caused the expenditure. Respondent here should be made to bear those costs and fees, totaling $91,317.20.

The Board makes this determination notwithstanding Dr. Irby's submission that he is without resources to pay the assessments. The Board is aware that Dr. Irby has been precluded from practicing since the entry of the consent order on August 17, 2016, under which he agreed to the temporary suspension of his license. His submission that he currently lacks resources to pay the monies assessed does not alter the appropriateness of the Board's action. Even accepting Dr. Irby's claim that he currently lacks the ability to pay penalties, costs, and attorney's fees, his egregious conduct outweighs any

justification for reducing those assessments, which the Board might have otherwise considered based on demonstrated financial hardship. As noted, other licensees of the Board should not bear the costs associated with the prosecution of the administrative complaint. Moreover, the Board believes the assessment of a significant penalty in addition to revocation of license underscores the Board's commitment to rooting out grossly unprofessional behavior and will act as a deterrent against future violations of patients' bodily integrity perpetrated for an individual's prurient interests. The State will enter a certificate of debt reflecting the amount as permitted by N.J.S.A. 45:1-24 to ensure that Dr. Irby satisfies these assessments.

The Board will assess a total of $91,317.20 for costs and attorney fees, and $70,000 in civil penalties. Thus, as orally ordered by the Board on June 23, 2022,

IT IS ON THIS 27th DAY JULY, 2022,

ORDERED:

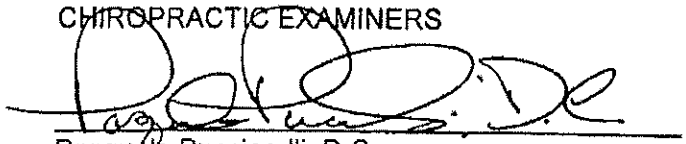
1. The license of Archer Irby, D.C., to practice chiropractic is permanently revoked. Nothing in this Order shall prevent the Attorney General from bringing any further action for any conduct that provides a basis for discipline under N.J.S.A. 45:1-21, including for violation of this Order.
2. Respondent shall cease and desist from practicing chiropractic and from holding himself out as eligible to provide any chiropractic service in this State.
3. Respondent is assessed civil penalties pursuant to N.J.S.A. 45:1-25a in the amount of $70,000 for conduct as set forth in this decision.
4. Respondent is assessed costs and attorney's fees pursuant to N.J.S.A. 45:1-25d of $91,317.20.

5. Respondent shall pay penalties, costs, and attorney's fees totaling $161.317.20, which costs and fees are deemed owed to the State upon entry of this order. A certificate of debt reflecting the amount owed shall be filed immediately. Respondent may, at his discretion, pay the costs and penalties in full within 30 days of the entry of this order or make periodic payments toward the total due, but in no event shall full payment of $161,317.20 be made later than 18 months from the entry of this order. Respondent shall advise the Board of his proposed plan for payment not later than 30 days from entry of this order. Payments shall be made by electronic transfer, bank check or money order made payable to the State of New Jersey, and forwarded to Lisa Tadeo, Executive Director, State Board of Chiropractic Examiners, P.O. Box 45004, Newark, NJ 07101.

6. Failure to make payment as required by this order shall be considered a violation of this Order.

7. Respondent shall comply with the Directives regarding suspended or revoked or suspended licensees attached to this order.

NEW JERSEY STATE BOARD OF
CHIROPRACTIC EXAMINERS



Pasquale Pucciarelli, D.C.
President