COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS

BEFORE THE STATE BOARD OF MASSAGE THERAPY

IN THE MATTER OF THE APPLICATION FOR MASSAGE THERAPIST LICENSURE OF JOANNE M. GALLAGHER

DOCKET NO. 0585-72-12

FILE NO. 2012-72-01827

CORRECTED FINAL ADJUDICATION AND ORDER

KATIE TRUE, COMMISSIONER
BUREAU OF PROFESSIONAL AND
OCCUPATIONAL AFFAIRS

ROBERT C. JANTSCH, L.M.T., CHAIRMAN
STATE BOARD OF
MASSAGE THERAPY

P. O. BOX 2649
HARRISBURG, PA 17105-2649

CKMcN

HISTORY

This matter comes before the State Board of Massage Therapy ("Board") for its determination whether to grant the application for licensure of Joanne M. Gallagher (Applicant) under the Massage Therapy Law, Act of October 9, 2008, P.L. 1438, *as amended*, 63 P.S. § 627.1 *et seq.* (the Act). The case began on January 31, 2012, when Applicant filed an application for licensure. The Board considered the application at its meeting on February 14, 2012. On March 7, 2012, the Board notified Applicant that her application had been provisionally denied based upon her criminal record and revocation of her license to practice chiropractic, suggesting that Applicant is not of sufficient good moral character. On March 12, 2012, Applicant appealed the provisional denial and requested a hearing before the Board.

On May 14, 2012, after consultation with counsel for Applicant and the Commonwealth, the Board issued an order scheduling the matter for hearing. By the same order, Board Counsel also scheduled filing of prehearing statements and prehearing motions; recorded the recusal of the designee of the Office of Attorney General, Bureau of Consumer Protection; and requested production of additional documents by Applicant relating to matters raised by Applicant in her application, namely, her practice of massage therapy at Life Expressions Wellness Center, and two courses on CranioSacral Therapy for Pediatrics completed by Applicant at the Upledger Institute. By order dated June 19, 2012 the hearing was rescheduled due to illness of Applicant's co-counsel.

Board Counsel conducted several prehearing conferences with counsel for the Commonwealth and counsel for Applicant relating to the admissibility of evidence at the hearing. By Order dated August 10, 2012 and Amended Order dated August 13, 2012, Board Counsel ruled on objections raised by Applicant's counsel to the admissibility of certain

documents. Board Counsel sustained Applicant's objections to the admission of course study guides from the Upledger Institute; the Superseding Indictment in United States of America v. Joanne M. Gallagher; the Police Criminal Complaint in Commonwealth v. Joanne M. Gallagher; and the Civil Complaint in United States of America v. Joanne M. Gallagher, 1:03-CV-1100. Applicant's hearsay objection to the admission of the Affidavit of Probable Cause in Commonwealth v. Joanne M. Gallagher was overruled. Applicant did not object to the admission of promotional materials of Life Expressions Wellness Center or the Transcript of the Change of Plea Hearing in United States of America v. Joanne M. Gallagher, if such documents were offered at the hearing by the Commonwealth.

A formal hearing was held on August 14, 2012, before Robert C. Jantsch, L.M.T., Chairperson, Becky Lesik, LMT, William F. Vogel, L.M.T., Catherine Campbell and Christine Filipovich, designee of the Secretary of Health.[1] Christopher K. McNally, Esquire, Board Counsel, served as hearing officer. The Commonwealth was represented by Bridget Guilfoyle, Esquire. Applicant appeared and was represented by April L. McClaine, Esq. and Walter T. Grabowski, Esq. Applicant presented her case through her own testimony, and the testimony of witnesses.

The Board deliberated this matter at its regular meetings on September 11, 2012, and October 9, 2012 and now issues this adjudication and order as the final determination on Applicant's application for licensure.

[1] All Board members participating in the deliberation or decision of this matter have reviewed the entire record of admitted evidence. None of the Board members have reviewed any evidence that was excluded on the objection of Applicant, with the exception of a two-page newspaper article from the Hazleton Standard Speaker marked Exhibit B-5. Exhibit B-5 had been included by the staff of the Board Administrator with the application file that was presented to the Board at its meeting on February 14, 2012. However, the Board did not rely upon the contents of the article in its notice of provisional denial. Applicant's counsel objected to admission of Exhibit B-5 as hearsay, and the Board sustained the objection. Applicant asked, however, that the document be made a part of the record. The Board members were instructed by Board Counsel to disregard that article as hearsay and were instructed to dispose of it if they had a copy. The remainder of the application file was admitted as Board Exhibit 1.

FINDINGS OF FACT

1. Applicant submitted an application for Licensure as a Massage Therapist dated January 31, 2012. (Exhibit B-1; N.T. 8)

2. Applicant has completed 730 hours of instruction in massage therapy at Fortis Institute, which is a Pennsylvania private licensed school, and which was accepted by the Board in satisfaction of the educational requirements of the Massage Therapy Law. (Exhibit B-1, page 7 – 8; Exhibit B-2, Provisional Denial letter dated March 7, 2012)

3. Applicant took and passed an examination approved by the Board, which was accepted by the Board in satisfaction of the examination requirements of the Massage Therapy Law. (Exhibit B-1, page 6; Exhibit B-2, Provisional Denial letter dated March 7, 2012)

4. Applicant held a license as a chiropractor issued November 19, 1982, authorizing Applicant to practice chiropractic in the Commonwealth of Pennsylvania. (Exhibit B-1, p. 38, BPOA v. Joanne M. Gallagher, D.C., Docket No. 0997-43-2001, File No. 1999-43-06018, Adjudication and Order of the State Board of Chiropractic, hereinafter "Chiropractic A&O," Finding of Fact No. 1.)

5. Beginning on October 17, 1998 Kimberly Strohecker (hereinafter "Kimberly") was a patient of Applicant who was suffering from an epilepsy seizure disorder and was taking anticonvulsive medication prescribed by her neurologist to control her seizures. (Exhibit B-1, Chiropractic A&O, Finding of Fact Nos. 2, 3; Exhibit C-4, United States of America vs. Joanne M. Gallagher, Case No. 1:02-CR-253, Transcript of Change of Plea Hearing dated July 2, 2003, hereinafter referred to as "Plea Hearing Transcript," p. 15)

6. Kimberly sought treatment from Applicant because she had been told by Applicant's patients that Applicant had successfully treated their epilepsy or the epilepsy of a member of their family. (Exhibit C-4, Plea Hearing Transcript, p. 15; N.T. 121)

7. When Kimberly met with Applicant, she made clear that she was coming to Applicant to obtain treatment for her epilepsy. (Exhibit C-4, Plea Hearing Transcript, p. 15; N.T. 108, 121, 93)

8. In the course of purportedly treating Kimberly for her epilepsy seizure disorder, Applicant convinced Kimberly to discontinue her anticonvulsive medication, and told Kimberly repeatedly that she was taking too much medication for her own good. (Exhibit C-4, Plea Hearing Transcript, p. 15; N.T. 93, 109-110)

9. Applicant assured Kimberly that once she stopped taking her medication she would experience approximately three days of seizures, would fall into a deep sleep, and would wake up healed of her epilepsy seizure disorder. (Exhibit C-4, Plea Hearing Transcript, p. 15-16; N.T. 93-94, 110)

10. Upon discontinuing her anticonvulsive medication, Kimberly began to experience violent seizures. (Exhibit C-4, Plea Hearing Transcript, p. 16; N.T. 94)

11. Some of the seizures occurred in Applicant's presence. (Exhibit C-4, Plea Hearing Transcript, p. 16; N.T 94, 113)

12. From April 26, 1999 through April 29, 1999 Kimberly was taken by friends to Applicant, and Applicant characterized Kimberly's seizures as normal, stated that the seizures were supposed to happen and stated that Kimberly was merely getting the drugs out of her system. (Exhibit C-4, Plea Hearing Transcript, p. 16; N.T. 94)

13. Applicant took no steps to seek proper medical treatment for Kimberly, notwithstanding the fact that Kimberly could no longer walk, was forced to wear diapers, was severely dehydrated, had aspirated vomit into her lungs and shortly before her death was unconscious. (Exhibit C-4, Plea Hearing Transcript, p. 16)

14. Kimberly suffered irreversible brain damage. (Exhibit C-4, Plea Hearing Transcript, p. 16-17)

15. Applicant told Troy Schade, Kimberly's fiancé, and others that if they took Kimberly to a hospital, the hospital personnel would give her anticonvulsive drugs, she would not be able to handle the drugs and she could die if the drugs were administered. (Exhibit C-4, Plea Hearing Transcript, p. 17; N.T. 94, 114)

16. Applicant assured Troy Schade and his family that Applicant had expected these seizures to occur and that this was a normal manifestation of the healing process. (Exhibit C-4, Plea Hearing Transcript, p. 17; N.T. 93-94)

17. On April 28, 1999, Applicant engaged in a telephone conversation with Marcella Schade, the mother of Troy Schade. (Exhibit C-4, Plea Hearing Transcript, p. 17; N.T. 93-94, 115)

18. During the telephone conversation Applicant reiterated what she had been telling Kimberly from the beginning, that Kimberly's seizures were being caused by her anticonvulsive medication, that Kimberly's vomiting was the body getting rid of the toxic medications, that Kimberly would suffer no physical or mental damage from the seizures that she was undergoing, that Applicant had directed Troy to keep a record of Kimberly's seizures, that Kimberly would fall into a deep sleep, and at the end of several days of seizures would awaken drug free and seizure free. (Exhibit C-4, Plea Hearing Transcript, p. 17-18; N.T. 94, 115-116)

19. Kimberly was near death at the time of that telephone conversation. (Exhibit C-4, Plea Hearing Transcript, p. 18; N.T. 95-96)

20. As a basis for the plea agreement the United States submitted as Government Exhibit 1 the taped telephone conversation between Marcella Schade and Applicant. (Exhibit C-4, Plea Hearing Transcript, p. 18)

21. On April 29, 1999, Kimberly was pronounced dead in the emergency room at the Good Samaritan Hospital in Pottsville, Pennsylvania. (Exhibit C-4, Plea Hearing Transcript, p. 18)

22. The cause of death was uncontrolled epilepsy and complications thereof, including severe dehydration and aspiration of the contents of the stomach, with bronchopneumonia secondary to withdrawal of anticonvulsive medications. (Exhibit C-4, Plea Hearing Transcript, p. 18)

23. On July 2, 2003, Applicant entered a guilty plea in the case of United States of America v. Joanne M. Gallagher, Case Number 1:02-CR-253, to a felony charge of violating 18 U.S.C. §1341, mail fraud perpetrated through a scheme and artifice to defraud the Commonwealth of the intangible right to honest service. (Exhibit B-4, page 1 of 7, ¶ 2; Exhibit C-1, United States of America vs. Joanne M. Gallagher, Case No. 1:02-CR-253, Plea Agreement, hereinafter referred to as "Plea Agreement;" Exhibit C-4, Plea Hearing Transcript)

24. As part of the Plea Agreement, on July 2, 2003 Applicant agreed to the entry of a permanent injunction against her, prohibiting her from practicing in the fields of chiropractic, medicine or any other health care-related field without leave of court. (Exhibit C-1, Plea Agreement, p. 9, ¶18; *also see* United States of America v. Joanne M. Gallagher, Civil Case No. 1:03-CV-1100, Consent Decree and Stipulation, hereinafter referred to as "Stipulation," p. 3, ¶ 1)

25. Also as part of the Plea Agreement, Applicant agreed to surrender her license to practice chiropractic, and to not seek reinstatement, except under the terms and conditions of the permanent injunction. (Exhibit C-1, Plea Agreement, p. 9, ¶19; Stipulation, pp. 3 - 4, ¶ 2)

26. Also as part of the Plea Agreement, Applicant agreed to be enjoined from seeking restoration of her chiropractic license in the Commonwealth, and from applying for, obtaining or seeking restoration of a license to practice chiropractic in any other jurisdiction, without leave of the United States District Court. (Exhibit C-1, Stipulation, p. 4, ¶ 3)

27. By order dated January 20, 2012, upon review of a joint motion of Applicant and the United States of America, and following a telephone conference with counsel of record in which the United States Government and Applicant agreed that Applicant's request to practice as a massage therapist would be fully addressed by the Bureau of Professional and Occupational Affairs, Applicant was permitted to file an application for a license to practice in any health care related field or health care related occupation including massage therapy. (Exhibit B-4, United States of America v. Joanne M. Gallagher, Case No. 1:02-CR-00253, Joint Motion of the Defendant and the United States to Dismiss Motion and Terminate Proceedings, and Order)

28. Using the United States Mail, Applicant submitted claims to and was reimbursed by the Commonwealth of Pennsylvania, Department of Public Welfare, Office of Medical Assistance for services pertaining to chiropractic treatment of Kimberly. (Exhibit C-4, Plea Hearing Transcript, p. 18; N.T. 95, 117)

29. The scheme and artifice to defraud lay in Applicant's inducement to Kimberly to seek treatment from Applicant based on her statements that she could treat epilepsy. (Exhibit C-4, Plea Hearing Transcript, p. 19; N.T. 95)

30. Applicant's unauthorized and unlawful practice of medicine in her actual treatment of Kimberly for epilepsy and billing Medicaid for these unauthorized treatments, the Commonwealth of Pennsylvania, its institutions, and its citizens were defrauded of the right to honest service on the part of Applicant. (Exhibit C-4, Plea Hearing Transcript, p. 19)

31. Applicant admitted to all of the foregoing facts alleged by the United States Attorney. (Exhibit C-4, Plea Hearing Transcript, p. 20)

32. Specifically, Applicant billed the Office of Medical Assistance for approximately 40 chiropractic spinal manipulations, designated as Procedure Code W9960 – Manipulation of Spine by Chiropractor, with a diagnosis of Occipital/Cervical; 1st Cervical Subluxation, 2nd Cervical Subluxation; and Cervicalgia, but in fact, Applicant never performed a "manipulation of spine by chiropractor" on Kimberly, but used a light pressure on the head and back, which would not affect any misaligned or displaced vertebrae, and was a marked departure from the practice of chiropractic. (Exhibit B-1, Chiropractic A&O, Findings of Fact No. 8 – 10; Exhibit C-3, Commonwealth v. Joanne M. Gallagher, Docket No. 2431-2002, Affidavit of Probable Cause to Criminal Complaint, p. 7, ¶¶ 7, 8(a))

33. On September 4, 2003, Applicant pleaded guilty to a 3rd degree misdemeanor violation of the Chiropractic Practice Act, 63 P. S. §625.702(7). (Exhibit B-1, Commonwealth v. Joanne M. Gallagher, Docket No. 2431-2002, Guilty Plea Colloquy, hereinafter "Guilty Plea Colloquy," pp. 22 – 27)

34. In her colloquy, Applicant averred under oath that she:

(a) Understood the nature of the charge of violating the Chiropractic Practice Act and the maximum penalties. (Exhibit B-1, Guilty Plea Colloquy, page 4 of 6, ¶ 9)

(b) Discussed the case and the elements of the crime charged with her attorney. (Exhibit B-1, Guilty Plea Colloquy, page 4 of 6, ¶ 10)

(c) Admitted to the crime of violation of the Chiropractic Practice Act. (Exhibit B-1, Guilty Plea Colloquy, page 5 of 6, ¶ 19)

35. On March 8, 2004, the United States District Court for the Middle District of Pennsylvania, Conner, J., entered judgment of sentence on Applicant's plea of guilty and committed Applicant to the United States Bureau of Prisons to be imprisoned for a term of 18 months and was assessed fees of $100.00, a fine of $9,000 and restitution of $630.60. (Exhibit B-1, United States of America vs. Joanne M. Gallagher, Case No. 1:02-CR-253, Judgment in a Criminal Case, pp. 14 – 20)

36. Applicant successfully completed all of the requirements of her sentence and probation and paid all her fines. (N.T. 97)

37. By order dated March 28, 2005, the State Board of Chiropractic revoked Applicant's license to practice chiropractic for gross incompetence, negligence or misconduct in the practice of chiropractic, unprofessional conduct in departing from standards of acceptable and prevailing practice with the promise of a cure, convincing her patient, Kimberly, to reduce and discontinue taking anticonvulsive medication resulting in Kimberly's death. (Exhibit B-1, Chiropractic A&O, pp. 28 – 46.)

38. Applicant went to see a psychiatrist on one occasion before her release from prison. (N.T. 152-153)

39. The psychiatrist recommended to Applicant that she follow a treatment regimen of antidepressants, but Applicant declined to follow the recommended treatment because she did not want to be sedated or medicated. (N.T. 153)

40. Applicant sought no other professional health care counseling or treatment, but only legal guidance, and spiritual guidance from her family, her mother, her priests and fellow chiropractors. (N.T. 153-154)

41. In Applicant's statement to the Board that was submitted with her application, Applicant indicated that soul searching with prayer had allowed Applicant to move forward. (N.T. 154)

42. Applicant is 1 of 12 children, whose father died two years ago and mother is 80 and healthy. (N.T. 91)

43. Applicant was reared in Catholic traditions and the Catholic faith with scripture and sacraments and Catholic schooling. (N.T. 91)

44. Applicant has been married for 27 years and has four children ages 25, 24, 22 and 19. (N.T. 91-92)

45. Applicant did her undergraduate work for chiropractic schooling at Bloomsburg University in the Bachelor of Science nursing program. (N.T. 92)

46. Applicant attended Sherman College in Spartanburg, South Carolina, and graduated summa cum laude in 1982 with a Doctor of Chiropractic degree. (N.T. 92)

47. Applicant's original coursework in the craniosacral therapy modality was done in 2005 in New York. (N.T. 132)

48. Applicant entered Fortis Institute, the massage therapy program in September of 2005 and graduated in May 2006 with a certification in Massage Therapy. (N.T. 92-93, 99)

49. In May 2006 Applicant began practicing Craniosacral Therapy ("CST") which is a modality in the massage therapy profession. (N.T. 99-100, 139)

50. Applicant practiced CST at Life Expression Wellness Center in Sugarloaf, Pennsylvania which is a multi-disciplinary wellness center. (N.T. 100, 139)

51. At the Wellness Center, there are two licensed chiropractors, two licensed massage therapists, an acupuncturist and Applicant was on staff as a craniosacral therapist since 2006. (N.T. 101)

52. Applicant and her husband own The Wellness Center building. (N.T. 139)

53. Applicant employs three clerical or support staff at The Wellness Center. (N.T. 140)

54. Prior to ceasing her practice in 2011, the majority of Applicant's time was spent practicing craniosacral therapy. (N.T. 140)

55. In the two years prior to ceasing her massage therapy practice, Applicant had an estimated 1,200 to 1,500 clients that came from multiple states. (N.T. 141)

56. 40% to 60% percent of Applicant's massage therapy clients were former clients from her chiropractic practice. (N.T. 142)

57. Applicant describes craniosacral therapy as a modality of body work with the fascia or the soft tissue of the body being two pivotal part of the craniosacral system with the movement of cerebral spinal fluid and the rhythm that it contains, and described it as a very gentle body work experience, very similar to a massage of the soft tissue. (N.T. 100)

58. Applicant describes craniosacral therapy as being done on a massage table, with the patient fully clothed, and supine. (N.T. 129-130)

59. Applicant describes craniosacral therapy as a soft tissue maneuver that feels like a massage; addresses no joint dynamics; is totally within the fascia; is performed mainly with the

patient in a supine position; is a very different experience from chiropractic; and uses minimal force. (N.T. 130)

60. Many of Applicant's old and new clients still call her Doctor Joanne even though she tells them she is not a chiropractor. (N.T. 161-162)

61. Applicant does not bill any insurance carrier or government program for the massage therapy that she provides and intends to collect just cash at the time of service. (N.T. 155, 160)

62. Applicant's last day that she provided massage therapy in this Commonwealth was December 31, 2011, on New Year's Eve. (N.T. 101)

63. Applicant has provided massage therapy and craniosacral therapy after December 2011 in other states, including **Virginia**, New Jersey, Indiana, Texas and Illinois. (N.T. 162-163, 166)

64. Applicant contended that she has implemented new procedures relating to education and communication of massage and craniosacral therapy parameters and scope of practice. (Board Exhibit B-1, Personal Statement, p. 48)

65. Applicant's description of new procedures included statements that:

(a) Education has become a very big part of her craniosacral practice. (N.T. 104)

(b) Applicant's intake form states that Applicant does not provide medical care, will not give advice under medical care, that Applicant supports the patient's medical care, and does not replace any other treatment that the patient receives. (N.T. 104)

(c) Applicant is more committed to education before and after a session orienting the client to her objectives, always asking every visit "do you have questions of what you've experienced so far today." (N.T. 104)

(d) Applicant is committed to being more clear spoken so there can be no misgivings of what she has said in her literature, in the DVDs, in her forums and most importantly in her actions and my words. (N.T. 104-105)

66. Applicant received permission from the federal court to seek a massage therapy license. (Board Exhibit F; N.T. 160-161)

67. Andrew Mason is an adult individual who resides at 9 Spring Meadow Drive, Malvern, Pennsylvania, 19355. (N.T. 21)

68. Mason has known Applicant for over 20 years and was first referred to Applicant by a friend for chiropractic care. (N.T. 21)

69. Mason went to see Applicant when she was a practicing chiropractor. (N.T. 24)

70. Mason, his wife and children see Applicant for craniosacral therapy because they believe that it improves the quality of their health and do not see her for treatment of any specific medical condition. (N.T. 21)

71. Mason describes his chiropractic experience and his craniosacral therapy experience as different in that the chiropractic experience he lays on his stomach and the attention is directed to one specific area and there are adjustments while with CST he lays on his back, it's a head to toe massage, there's no physical adjustment involved and its extremely soft. (N.T. 24-25)

72. Cathy Saveri is an adult individual who resides at 120 Echo Lake Drive, Bangor, Pennsylvania 18013. (N.T. 39)

73. Saveri has known Applicant for about 22 years and through word-of-mouth a physical therapist who was treating her son referred her to Applicant. (N.T. 40)

74. Saveri's son Travis was born with cerebral palsy and developmental delays and cognitive issues. (N.T. 41)

75. Saveri was looking for optimum health and took Travis to Applicant when he was about two or three for chiropractic and CST care three or four times a year until October 2011. (N.T. 41-45, 49)

76. Saveri described the difference of Applicant chiropractic care to her CST care as no spinal manipulation and a gentle non-invasive technique. (N.T. 45)

77. On cross examination Saveri described the chiropractic care Travis was receiving as a "gentle sort of adjusting, as opposed to that snapping down on a chiropractic table that you might get". (N.T. 50)

78. Stephen Hoffman, D.C., is a chiropractor who resides at 590 Rancho Santa Fe Road in Encinitas, California. (N.T. 55)

79. Dr. Hoffman is a licensed chiropractor in the state of Michigan, has been licensed since 1980 and practiced full-time until 1995. (N.T. 56)

80. Dr. Hoffman met Applicant in 1990 when he had special needs for his son, heard about Applicant and took his son to her when he was 15 years old. (N.T. 56-57)

81. Applicant see's Dr. Hoffman and his family in California about twice a year. (N.T. 59)

82. Dr. Hoffman described Applicant's approach as a chiropractor as far gentler than others and believes that it's more honoring to the body to receive a gentle adjustment than a forceful one. (N.T. 65, 72)

83. Father Joseph Evanko, is an adult individual who resides at 420 South Mountain Boulevard, Mountain Top, Pennsylvania. (N.T. 82)

84. Father Evanko is a Catholic priest of the Diocese of Scranton and pastor of two parishes, St. Jude in Mountain Top and St. Mary's in Dorrance, Pennsylvania. (N.T. 82)

85. Father Evanko has known Applicant all his life. (N.T. 82-83)

86. Father Evanko also knows Applicant as a parishioner of St. John Bosco parish in Conyngham when he was pastor there from 2001 to 2009. (N.T. 83)

87. Father Evanko went with Applicant's husband several times to visit Applicant in prison. (N.T. 86)

88. Father Evanko states Applicant's reputation among her former patients and clients is very positive and they've appreciated a holistic approach to the experience. (N.T. 84-85)

89. The Board issued notice of provisional denial of Applicant's application for licensure as a massage therapist by correspondence dated March 7, 2012, citing Applicant's federal conviction for mail fraud, state conviction for violation of the Chiropractic Practice Act, as the basis for denial of her application under section 5(a)(1), 63 P. S. §627.5(a)(1), requiring good moral character, and section 9(a)(1), 63 P. S. §627.9(a)(1), for conviction of a crime of moral turpitude or a felony. (Board Exhibit B-2, Notice of Provisional Denial)

90. By letter dated March 8, 2012 Applicant filed a timely appeal from the provisional denial and requested a hearing. (Board Exhibit B-3, Notice of Appeal)

91. A formal hearing was held before the Board on August 14, 2012. (N.T. 1-8)

92. Applicant received notice of the formal hearing, as shown by her attendance at the hearing with counsel. (N.T. 9)

93. Applicant testified on her own behalf. (N.T. 90-167)

CONCLUSIONS OF LAW

1. The Board has subject matter jurisdiction of this matter. (Findings of Fact Nos. 1 - 13.)

2. Applicant had notice and opportunity to be heard as required by the Administrative Agency Law, 2 Pa. C.S. §501 *et seq.* (Findings of Fact Nos. 5 – 8, 89 - 93.)

3. The Board is authorized to deny Applicant's application for licensure as a massage therapist pursuant to Section 5(a)(1) of Act, 63 P. S. §627.5(a)(1), because Applicant does not possess good moral character. (Findings of Fact Nos. 1 – 6; 11 - 18.)

4. The Board is authorized to deny Applicant's application for licensure as a massage therapist pursuant to Section 9(a)(1) of Act, 63 P.S. §627.9(a)(1), because Applicant has "be[en] convicted under Federal law, under the law of any state or under the law of another jurisdiction of a crime of moral turpitude or of an offense which, if committed in this Commonwealth, would constitute a felony." (Findings of Fact Nos. 1 – 6, 11)

5. Applicant has failed to demonstrate, by a preponderance of the evidence, that she meets the qualifications for licensure. (Findings of Fact Nos. 1 – 4, 9 – 88.)

DISCUSSION

Governing Law

The issue before the Board is whether the Applicant should be granted a license to practice as a Massage Therapist in the Commonwealth, given her criminal history and the background leading to her chiropractic license being revoked. The Board provisionally denied this application under Section 5(a)(1) of the Massage Therapy Law, which provides for the qualifications for licensure.

> **Section 5. Qualification for licensure.**
>
> (a) Applicants.--An applicant shall be considered to be qualified for a license if the applicant submits proof satisfactory to the board of all of the following:
>
> *****
>
> (1) The applicant is of good moral character.
>
> *****

63 P.S. § 627.5(a)(1).

The Board also provisionally denied this application under Section 9 of the Act, which provides for refusal, suspension or revocation of licenses.

> **Section 9. Refusal, suspension and revocation of licenses.**
>
> (a) Grounds.--The board may refuse, suspend, revoke, limit or restrict a license or discipline a licensee for any of the following:
>
> (1) Being convicted under Federal law, under the law of any state or under the law of another jurisdiction of a crime of moral turpitude or of an offense which, if committed in this Commonwealth, would constitute a felony.
>
> *****

63. P.S. § 627.9(a)(1).

While the Massage Therapy Law is a relatively recent enactment, the Commonwealth Court has recognized that the state has the right to license professions "in a manner so as to safeguard the interest of the public from those who are incompetent or unqualified to engage in practice." *Allen v. State Board of Accountancy*, 595 A.2d 771, 773 (Pa. Cmwlth. 1991), *citing Keeley v. State Real Estate Commission*, 501 A.2d 1155 (Pa. Cmwlth. 1985); *Quintana v. State Board of Osteopathic Medical Examiners*, 466 A.2d 250 (Pa. Cmwlth. 1983).

In applying the licensure statutes of other health-related professions, the Commonwealth Court has held that there is no vested right to practice a licensed profession. Rather, the right is conditional upon the police power of the state to protect the public health. *Oliver v. Pennsylvania Board of Psychologist Examiners*, 404 A.2d 1386 (Pa. Cmwlth. 1979); *Reisinger v. State Board of Medical Education and Licensure*, 399 A.2d 1160 (Pa. Cmwlth. 1979). So long as the requirements relating to learning, skill and examination bear a direct, substantial, and reasonable relationship to the profession, the state may set reasonable standards for determining qualifications of those who hold themselves out as members of that profession, and may also grant to an administrative body the authority to enforce these standards. *Reisinger*, *supra*. Those who wish to engage in the practice of a profession in Pennsylvania are required to establish that they meet all of the requirements for licensure. *Barran v. State Board of Medicine*, 670 A.2d 765 (Pa. Cmwlth. 1996), *app. denied*, 679 A.2d 230 (Pa. 1996). *See also*, *Reisinger*, *supra*.

In addition to the law governing the qualifications and grounds for refusal of licensure the Board applies in evaluating an applicant's fitness for licensure, the Board also considers the substantive law relating to the offenses that constitute Applicant's criminal history. The Chiropractic Practice Act includes provisions relating to definitions; supportive personnel;

refusal, suspension or revocation of a license; and criminal penalties. Relevant definitions include:

> **§ 625.102. Definitions**
>
> **"Chiropractic."** A branch of the healing arts dealing with the relationship between the articulations of the vertebral column, as well as other articulations, and the neuro-musculo-skeletal system and the role of these relationships in the restoration and maintenance of health. The term shall include systems of locating misaligned or displaced vertebrae and other articulations; *the adjustment or manipulation of such misaligned or displaced vertebrae and other articulations*; the furnishing of necessary patient care for the restoration and maintenance of analysis, including X-ray. The term shall also include diagnosis, provided that such diagnosis is necessary to determine the nature and appropriateness of chiropractic treatment; the use of adjunctive procedures in treating misaligned or dislocated vertebrae or articulations and related conditions of the nervous system, provided that, after January 1, 1988, the licensee must be certified in accordance with this act to use adjunctive procedures; and nutritional counseling, provided that nothing herein shall be construed to require licensure as a chiropractor in order to engage in nutritional counseling. The term shall not include the practice of obstetrics or gynecology, the reduction of fractures or major dislocations, or the use of drugs or surgery.
>
> **"Manipulation/adjustment."** *A passive manual maneuver during which a joint complex is carried beyond the normal physiological range of motion that are applied without exceeding the boundaries of anatomical integrity of the joint complex* or other articulations and that are intended to result in cavitations of the joint or reduce subluxation.

63 P.S. § 625.102. (Emphasis added.)

Section 601 expresses the principle that certain activities or duties may not be delegated to supportive personnel.

> **§ 625.601. Supportive personnel**
>
> Nothing in this act shall prohibit a licensed chiropractor from utilizing the assistance of unlicensed supportive personnel performing under the direct on-premises supervision of a licensed

chiropractor, *provided that a chiropractor may not delegate any activity or duty to such unlicensed individuals which requires formal education or training in the practice of chiropractic or the knowledge and skill of a licensed chiropractor.*

63 P.S. § 625.601. (Emphasis added.)

Section 506 provides for various grounds for refusal, suspension or revocation of a chiropractic license, and provides in pertinent part:

Section 506. Refusal, suspension or revocation of license.

(a) Reasons enumerated. -- The board may refuse to issue a license or may suspend or revoke a license for any of the following reasons:

* * *

(4) Displaying gross incompetence, negligence or misconduct in carrying on the practice of chiropractic.

* * *

(6) Being convicted of a felony, a misdemeanor in the practice of chiropractic, or receiving probation without verdict, disposition in lieu of trial or an Accelerated Rehabilitative Disposition in the disposition of felony charges, in the courts of this Commonwealth, a Federal court, or a court of any other state, territory, possession or country.

* * *

(11) Committing immoral or unprofessional conduct. Unprofessional conduct shall include any departure from, or failure to conform to, the standards of acceptable and prevailing chiropractic practice. Actual injury to a patient need not be established.

* * *

(19) Failing to refer a patient to a licensed practitioner of another branch of the healing arts for consultation or treatment when a diagnosis of such patient indicates that such a referral is appropriate.

63 P.S. § 625.506.

Section 702 of the Chiropractic Practice Act includes provision for a criminal penalty, as follows:

Section 702. Violation of other provisions.

> A person commits a misdemeanor of the third degree and, upon conviction, shall be sentenced to pay a fine of not more than $500, or to imprisonment for not more than six months, or both, if he commits any act declared unlawful by any other provision of this act, other than section 701, if he:
>
> * * *
>
> (7) Commits immoral or unprofessional conduct. Unprofessional conduct shall include any departure from, or failure to conform to, the standards of acceptable and prevailing chiropractic practice. Actual injury to a patient need not be established.

63 P.S. § 625.702(7).

Applicant was also convicted of a felony violation of 18 U. S. C. § 1341, which provides, in relevant part:

> Sec. 1341. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.
>
> * * * * *

18 U.S.C. § 1341.

The phrase "scheme or artifice to defraud" is defined as:

> **Sec. 1346. Definition of "scheme or artifice to defraud"**
>
> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 1346.

The Board also considered questions of law relating to the admissibility of official documents and the effect of prior judgments.

In this case Applicant objected to admission of a court document, *i.e.,* an Affidavit of Probable Cause attached to a Police Criminal Complaint which commenced criminal proceedings filed in the Court of Common Pleas of Dauphin County, Pennsylvania in the matter of *Commonwealth v. Joanne M. Gallagher,* Docket No. 2431-CR-2002.

The Supreme Court has held:

> Typically, questions concerning the admission or exclusion of evidence in an administrative proceeding are within the discretion of the tribunal conducting the hearing and are not to be disturbed on appeal absent a finding of abuse of discretion.

D'Alessandro v. Pennsylvania State Police, 594 Pa. 500, 509, 937 A.2d 404, 409 (2007), *citing Gibson v. Workers' Compensation Appeal Board (Armco Stainless & Alloy Products)*, 580 Pa. 470, 861 A.2d 938, 947 (2004).

The Supreme Court has also noted Section 505 of the Administrative Agency Law, which provides:

> Commonwealth agencies shall not be bound by technical rules of evidence at agency hearings, and all relevant evidence of reasonably probative value may be received. Reasonable examination and cross-examination shall be permitted.

2 Pa. C. S. § 505.

Given this statutory provision, it has been held that hearsay evidence may generally be received and considered during an administrative proceeding. *A. Y. v. Commonwealth, Department of Public Welfare, Allegheny County Children & Youth Services,* 537 Pa. 116, 641 A.2d 1148, 1150 (1994).

The Supreme Court has also noted the provisions of the Judicial Code, which provide for the admissibility of public records.

§ 6103. Proof of official records

> (a) General rule.-An official record kept within this Commonwealth by any court, magisterial district judge or other government unit, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by that officer's deputy, and accompanied by a certificate that the officer has the custody. The certificate may be made by any public officer having a seal of office and having official duties with respect to the government unit in which the record is kept, authenticated by the seal of that office, or if there is no such officer[.]
>
> * * * * *
>
> **§ 6104. Effect of official records generally.**
>
> (a) General rule.-A copy of a record of governmental action or inaction authenticated as provided in section 6103 (relating to proof of official records) shall be admissible as evidence that the governmental action or inaction disclosed therein was in fact taken or omitted.
>
> (b) Existence of facts.-A copy of a record authenticated as provided in section 6103 disclosing the existence or nonexistence of facts which have been recorded pursuant to an official duty or would have been so recorded had the facts existed shall be admissible as evidence of the existence or nonexistence of such facts, unless the sources of information or other circumstances indicate lack of trustworthiness.

42 Pa.C.S. §§ 6103, 6104, *cited by D'Alessandro v. Pennsylvania State Police*, 594 Pa. 500, 513-514, 937 A.2d 404, 412 - 413 (Pa. 2007).

Based upon these statutory provisions, the Supreme Court has held that, "Under Section 6104(b) of the Judicial Code, facts recorded in police reports are admissible, as they were recorded pursuant to an official duty, unless they are untrustworthy." *D'Alessandro v. Pennsylvania State Police*, 594 Pa. 500, 515, 937 A.2d 404, 413 (Pa. 2007).

In this case, Applicant has been convicted in two separate criminal proceedings, and her rights were adjudicated in a federal civil action and an earlier administrative proceeding before

the State Board of Chiropractic. In one of the criminal proceedings and the civil administrative proceeding, Applicant's adversarial litigant was the Commonwealth.

Collateral estoppel applies if (1) the issue decided in the prior case is identical to the one presented in the latter case; (2) there was a final judgment on the merits; (3) the party against whom the plea is asserted was a party or in privity with a party in the prior case; (4) the party or person privy to the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior proceeding; and, (5) the determination in the prior proceeding was essential to the judgment. *City of Pittsburgh v. Zoning Board of Adjustment of City of Pittsburgh, Zullo and Dale*, 522 Pa. 44, 55, 559 A.2d 896, 901 (1989), *quoted by Office of Disciplinary Counsel v. Duffield*, 537 Pa. 485, 644 A.2d 1186 (1994).

The doctrine of collateral estoppel is a part of the Fifth Amendment's guarantee against double jeopardy, which was made applicable to the states through the Fourteenth Amendment. *See Ashe v. Swenson*, 397 U.S. 436, 437, 90 S.Ct. 1189, 1191, 25 L.Ed.2d 469 (1970) (*citing Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969)); *Commonwealth v. Brown*, 503 Pa. 514, 469 A.2d 1371, 1372 (1983). The phrase "collateral estoppel," also known as "issue preclusion," simply means that when an issue of law, evidentiary fact, or ultimate fact has been determined by a valid and final judgment, that issue cannot be litigated again between the same parties in any future lawsuit. *Ashe*, 397 U.S. at 443, 90 S.Ct. at 1194; see *Restatement 2nd, Judgments*, § 27 (1982). Collateral estoppel does not automatically bar a subsequent prosecution, but rather, it bars redetermination in a second prosecution of those issues *necessarily* determined between the parties in a first proceeding that has become a final judgment. *Commonwealth v. Smith*, 518 Pa. 15, 540 A.2d 246, 251 (1988) (emphasis in original).

Applying the Supreme Court's five part test, collateral estoppel is applicable and the prior judgments operate to preclude the re-litigation of several issues. The issues of the prior proceedings are identical to the issues herein. In this matter the Board must determine whether (1) Applicant possesses good moral character; (2) Applicant has committed a felony; and (3) whether Applicant has committed a crime of moral turpitude. The adjudication of the State Board of Chiropractic included a determination of whether Applicant committed immoral or unprofessional conduct as a chiropractor, and is identical to the first issue. The federal criminal conviction involved a felony and is identical to the second issue. The circumstances of both the federal and state criminal proceedings involve crimes of moral turpitude. The federal conviction involves mail fraud, while the state criminal conviction for a violation of the Chiropractic Practice Act required proof of immoral or unprofessional conduct.

All four actions, *i.e.,* two criminal convictions, the civil injunction, and the administrative adjudication, were final judgments against Applicant, thus satisfying the second and third requirements.

In this case, the Commonwealth is again Applicant's adversary, but in a different forum. The tribunal and the ultimate legal issue have changed, *i. e.,* qualification for licensure as a massage therapist. However, the disposition of this ultimate issue depends, in part, upon facts and legal issues that have been determined in Applicant's prior criminal and disciplinary proceedings.

The Supreme Court of Pennsylvania has addressed the use of the doctrine of collateral estoppel in subsequent administrative proceedings. Considering the application of the doctrine to administrative disciplinary proceedings, the Supreme Court held:

> The doctrine of collateral estoppel can be asserted either defensively as a shield to prosecution of an action or offensively as

> a sword to facilitate prosecution. Offensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party. *Shaffer v. Smith*, 543 Pa. 526, 673 A.2d 872, 874 (1996), *citing Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 4, 99 S.Ct. 645, 649 n. 4, 58 L.Ed.2d 552 (1979). Defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant. *Parklane Hosiery Co.*, 439 U.S. at 326 n. 4, 99 S.Ct. 645. In both the offensive and defensive use situations, the party against whom estoppel is asserted has litigated and lost in an earlier action. *Id.* at 328, 99 S.Ct. 645.

Office of Disciplinary Counsel v. Kiesewetter, 585 Pa. 477, 484 - 485, 889 A.2d 47, 51 (Pa. 2005).

The Supreme Court also held in *Kiesewetter* that:

> Due to the fact that offensive application of the doctrine can result in unfairness to a defendant under certain circumstances, [*e. g.,* if the previous adjudication involved a minor or trivial penalty or outcome that a litigant would not deem worth contesting] the United States Supreme Court crafted the following four factors to examine to ensure fairness in application: (1) whether the plaintiff could have joined the earlier action; (2) whether the subsequent litigation was foreseeable and therefore the defendant had an incentive to defend the first action vigorously; (3) whether the judgment relied upon as a basis for collateral estoppel is inconsistent with one or more previous judgments in favor of the defendant, and (4) whether the second action would afford the defendant procedural opportunities unavailable in the first action that could produce a different result. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. at 329-331, 99 S.Ct. 645.

Kiesewetter, 585 Pa. 477, 486 - 487, 889 A.2d 47, 52. (Footnote omitted.)

In the instant case, the State Board of Massage Therapy could not have joined the earlier proceedings because it did not exist in 1999, and in any event, it would have had no standing in a criminal proceeding or a proceeding before the State Board of Chiropractic. Nonetheless, as an agency of the Commonwealth the Board concludes that it shares the identity as a party in the state criminal proceeding and the state administrative proceeding. While this particular

application hearing may not have been foreseeable in 1999, Applicant had adequate incentive to vigorously contest the prior action, and in fact, did contest the administrative action before the State Board of Chiropractic. Also, she initially contested the criminal proceedings until a mistrial was declared and she then entered a guilty plea. All three prior judgments are consistent with one another, and this proceeding offers Applicant no procedural opportunities that were unavailable in the prior actions. In fact, in this proceeding the burden of proof has shifted to Applicant.

With respect to Applicant's criminal convictions, civil injunction and disciplinary action, the Board admitted the Commonwealth's exhibits for the purpose of establishing the fact of such prior adjudications. In addition, the guilty plea colloquy hearing transcript and the affidavit of probable cause establish the factual basis for the judgments, as well as the nature of the crimes establishing that they were crimes of moral turpitude.

Applicant objected only to the admission of the Affidavit of Probable Cause as double hearsay. The Affidavit of Probable Cause contains the out of court statements of the affiant, Randy Sunday, Special Agent for the Office of Attorney General, who, in turn, reported the out of court statements of witnesses, including the conclusions of Joseph M. Gnall, D. C. pertaining to the treatment of Kimberly. For the reasons more fully set forth below, the objection was overruled.

Applying the holding of *D'Alessandro,* the Board finds that the Affidavit of Probable Cause is more trustworthy than a police report, since it is a sworn statement and incorporated as part of a pleading, a Criminal Complaint, which serves to commence a criminal proceeding on which the judgment is based. Therefore, the Board admitted the Affidavit of Probable Cause as a record of facts recorded in furtherance of an official duty.

In the absence of the Affidavit of Probable Cause, the Board would have had only the Court Commitment and Guilty Plea Colloquy relating to her state misdemeanor conviction. While those documents record the statutory provision that was violated, neither document includes a statement of the facts on which the criminal violation of the Chiropractic Practice Act was based. The Affidavit of Probable Cause supplies that information.

To the extent that the Affidavit of Probable Cause contains double hearsay, the statements recorded by Special Agent Sunday are corroborated by several other sources. First, the history of Applicant's course of treatment of Kimberly is corroborated in the federal guilty plea colloquy hearing transcript, as well as the findings of fact in the adjudication of the State Board of Chiropractic. Second, Special Agent Sunday recounted Troy Schade's description of Applicant's chiropractic technique, described variously as "soft touch," "light pressure" or "gentle approach." That description of Applicant's chiropractic technique was consistent with the testimony of Applicant and her witnesses, Andrew Mason, Cathy Saveri, and Dr. Stephen Hoffman that described the technique or modality that Applicant used as a chiropractor.

To the extent that the Commonwealth attempted to infer that Applicant was practicing CST in 1999, the Board declines to accept that specific conclusion, but there is no dispute that Applicant employed a distinctive, light pressure technique not only on Kimberly but on other patients, and that "light pressure" technique was clearly distinct from conventional chiropractic manipulation. As Applicant herself testified, it was a "light force and low velocity adjustive technique." N. T., page 138, line 25 – page 139, line 1.

For purposes of this proceeding, the Affidavit of Probable Cause explains the course of treatment administered by Applicant to Kimberly. Her criminal conviction under the Chiropractic Practice Act constituted a judgment that the treatments rendered constituted

immoral or unprofessional conduct, including a departure from, or failure to conform to, the standards of acceptable and prevailing chiropractic practice. 63 P. S. § 625.702(7). The only record from that state criminal proceeding available to the Board in which a qualified individual identifies a departure from or failure to conform to the standards of acceptable and prevailing chiropractic practice are the conclusions of Dr. Gnall as recorded by Special Agent Sunday in the Affidavit of Probable Cause. Dr. Gnall's conclusions were based, in part, upon the information received concerning Applicant's treatment of the patient.

Dr. Gnall's conclusions regarding the departure from the standard of care are corroborated by the adjudication of the State Board of Chiropractic which found that Applicant had displayed gross incompetence, negligence or misconduct; committed immoral or unprofessional conduct; and failed to refer a patient to a licensed practitioner of another branch of healing arts.

The prior judgments represented by Applicant's criminal convictions, federal civil injunction and the administrative adjudication preclude the re-litigation of the facts essential to those judgments. Accordingly, the Board has deferred to the prior judgments in its findings of fact.

Facts

Applicant submitted an application for Licensure as a Massage Therapist dated January 31, 2012. In her application she documented that she had completed 730 hours of instruction in massage therapy at Fortis Institute, which is a Pennsylvania private licensed school, and which the Board accepted in satisfaction of the educational requirements of the Massage Therapy Law. Applicant took and passed an examination approved by the Board.

Applicant also reported in her application that she had previously held a license as a chiropractor issued November 19, 1982. In October 1998, while licensed as a chiropractor, Applicant undertook care of a patient named Kimberly Strohecker, who suffered from epilepsy and was taking anticonvulsive medication prescribed by her neurologist to control her seizures. Kimberly sought treatment from Applicant because she had been told by Applicant's patients that Applicant had successfully treated their epilepsy or epilepsy of a member of their family.

When Kimberly met with Applicant, she made clear that she was coming to Applicant to obtain treatment for her epilepsy. In the course of purportedly treating Kimberly for her epilepsy seizure disorder, Applicant convinced Kimberly to discontinue her anticonvulsive medication, and told Kimberly repeatedly that she was taking too much medication for her own good. Applicant assured Kimberly that once she stopped taking her medication she would experience approximately three days of seizures, would fall into a deep sleep, and would wake up healed of her epilepsy seizure disorder.

Upon discontinuing her anticonvulsive medication, Kimberly began to experience violent seizures. Some of the seizures occurred in Applicant's presence. From April 26, 1999 through April 29, 1999 Kimberly was taken by friends to Applicant, and Applicant characterized Kimberly's seizures as normal, stated that the seizures were supposed to happen and stated that Kimberly was merely getting the drugs out of her system. Applicant took no steps to seek proper medical treatment for Kimberly, notwithstanding the fact that Kimberly could no longer walk, was forced to wear diapers, was severely dehydrated, had aspirated vomit into her lungs and shortly before her death was unconscious. Kimberly suffered irreversible brain damage.

Applicant told Troy Schade, Kimberly's fiancé, and others that if they took Kimberly to a hospital, the hospital personnel would give her anticonvulsive drugs, she would not be able to

handle the drugs and she could die if the drugs were administered. Applicant assured Troy Schade and his family that Applicant had expected these seizures to occur and that this was a normal manifestation of the healing process.

On April 28, 1999, Applicant engaged in a telephone conversation with Marcella Schade, the mother of Troy Schade. During the telephone conversation Applicant reiterated what she had been telling Kimberly from the beginning, that Kimberly's seizures were being caused by her anticonvulsive medication, that Kimberly's vomiting was the body getting rid of the toxic medications, that Kimberly would suffer no physical or mental damage from the seizures that she was undergoing, that Applicant had directed Troy to keep a record of Kimberly's seizures, that Kimberly would fall into a deep sleep, and at the end of several days of seizures would awaken drug free and seizure free. Kimberly was near death at the time of that telephone conversation.

On April 29, 1999, Kimberly was pronounced dead in the emergency room at Good Samaritan Hospital in Pottsville, Pennsylvania. The cause of death was uncontrolled epilepsy and complications thereof, including severe dehydration and aspiration of the contents of the stomach, with bronchopneumonia secondary to withdrawal of anticonvulsive medications.

On July 2, 2003, Applicant entered a guilty plea in the case of *United States of America v. Joanne M. Gallagher*, Case Number 1:02-CR-253, to a felony charge of violating 18 U.S.C. §1341, mail fraud perpetrated through a scheme and artifice to defraud the Commonwealth of the intangible right to honest service.

On the same date, as part of the Plea Agreement, Applicant agreed to the entry of a permanent injunction against her, prohibiting her from practicing in the fields of chiropractic, medicine or any other health care-related field without leave of court. Also as part of the Plea Agreement, Applicant agreed to surrender her license to practice chiropractic, and to not seek

reinstatement, except under the terms and conditions of the permanent injunction, and Applicant agreed to be enjoined from seeking restoration of her chiropractic license in the Commonwealth, and from applying for, obtaining or seeking restoration of a license to practice chiropractic in any other jurisdiction, without leave of the United States District Court.

The nature of Applicant's fraud in the federal criminal proceeding was that she used the United States Mail to submit claims to and receive payment from the Commonwealth of Pennsylvania, Department of Public Welfare, Office of Medical Assistance for services pertaining to chiropractic treatment of Kimberly. The scheme and artifice to defraud lay in Applicant's inducement to Kimberly to seek treatment from Applicant based on her statements that she could treat epilepsy. Applicant's unauthorized and unlawful practice of medicine in her treatment of Kimberly for epilepsy and billing Medicaid for unauthorized treatments, defrauded the Commonwealth of Pennsylvania, its institutions, and its citizens, especially Kimberly Strohecker, of the right to honest service on the part of Applicant.

Her criminal conviction in the Court of Common Pleas provided other significant details concerning the nature of the deceit and fraud Applicant had practiced in billing the Office of Medical Assistance. Specifically, Applicant billed the Office of Medical Assistance for approximately 40 chiropractic spinal manipulations, designated as Procedure Code W9960 – Manipulation of Spine by Chiropractor, with a diagnosis of Occipital/Cervical; 1st Cervical Subluxation, 2nd Cervical Subluxation; and Cervicalgia. In fact, Applicant never performed a "manipulation of spine by chiropractor" on Kimberly, but used a light pressure on the head and back, which would not affect any misaligned or displaced vertebrae, and was a marked departure from the practice of chiropractic.

Based upon these facts, on September 4, 2003, Applicant pleaded guilty to a 3rd degree misdemeanor violation of the Chiropractic Practice Act, 63 P. S. §625.702(7), for committing immoral or unprofessional conduct, including a departure from accepted standards of chiropractic practice. In her guilty plea colloquy before the Court of Common Pleas of Dauphin County, Applicant averred under oath that she understood the nature of the charge of violating the Chiropractic Practice Act and the maximum penalties; discussed the case and the elements of the crime charged with her attorney; and admitted to the crime of violating the Chiropractic Practice Act.

On March 8, 2004, the United States District Court for the Middle District of Pennsylvania, entered judgment of sentence on Applicant's plea of guilty and committed Applicant to the United States Bureau of Prisons to be imprisoned for a term of 18 months and assessed against Applicant fees of $100.00, a fine of $9,000 and restitution of $630.60. Applicant successfully completed all of the requirements of her sentence and probation and paid all her fines.

By order dated March 28, 2005, and following a contested administrative proceeding, the State Board of Chiropractic revoked Applicant's license to practice chiropractic for gross incompetence, negligence or misconduct in the practice of chiropractic, unprofessional conduct in departing from standards of acceptable and prevailing practice with the promise of a cure, convincing her patient, Kimberly, to reduce and discontinue taking anticonvulsive medication resulting in Kimberly's death.

Applicant went to see a psychiatrist on one occasion before her release from prison. The psychiatrist recommended to Applicant that she follow a treatment regimen of antidepressants, but Applicant declined to follow the recommended treatment because she did not want to be

sedated or medicated. Applicant sought no other professional health care counseling or treatment, but only legal guidance, and spiritual guidance from her family, her mother, her priests and fellow chiropractors.

Applicant submitted her application and supporting documents to the Board following a series of events related to her Plea Agreement in the United States District Court, and concurrent civil permanent injunction. On January 20, 2012, upon review of a joint motion of Applicant and the United States of America, and following a telephone conference with counsel of record in which the United States Government and Applicant agreed that Applicant's request to practice as a massage therapist would be fully addressed by the Bureau of Professional and Occupational Affairs, the United States District Court entered an order permitting Applicant to file an application for a license to practice in any health care related field or health care related occupation including massage therapy.

In Applicant's statement to the Board that was submitted with her application, Applicant indicated that soul searching with prayer had allowed Applicant to move forward. Applicant is 1 of 12 children, whose father died two years ago and whose mother is 80 and healthy. Applicant was reared in Catholic traditions and the Catholic faith with scripture and sacraments and Catholic schooling. Applicant has been married for 27 years and has four children ages 25, 24, 22 and 19.

Applicant did her undergraduate work at Bloomsburg State University in the BSN nursing program. Applicant attended Sherman College in Spartanburg, South Carolina, and graduated summa cum laude in 1982 with a Doctor of Chiropractic degree. Applicant's original coursework in the craniosacral therapy modality was done in 2005 in New York. In September

2005 Applicant entered the massage therapy program at Fortis Institute and graduated in May 2006 with a certification in Massage Therapy.

In May 2006, following her release from prison and completion of massage therapy studies at Fortis Institute, Applicant began practicing Craniosacral Therapy ("CST") which is a modality in the massage therapy profession. Applicant practiced CST at Life Expression Wellness Center in Sugarloaf, Pennsylvania which is a multi-disciplinary wellness center. At the Wellness Center, there are two licensed chiropractors, two licensed massage therapists, an acupuncturist and Applicant was on staff as a craniosacral therapist since 2006.

Applicant and her husband own The Wellness Center building. Applicant employs three clerical or support staff at The Wellness Center. Prior to ceasing her practice in 2011, the majority of Applicant's time was spent practicing craniosacral therapy. In the two years prior to ceasing her massage therapy practice, Applicant had an estimated 1,200 to 1,500 clients that came from multiple states. 40% to 60% percent of Applicant's massage therapy clients were former clients from her chiropractic practice.

Applicant describes craniosacral therapy as a modality of body work with the fascia or the soft tissue of the body being two pivotal part of the craniosacral system with the movement of cerebral spinal fluid and the rhythm that it contains, and described it as a very gentle body work experience, very similar to a massage of the soft tissue. Applicant describes craniosacral therapy as being done on a massage table, with the patient fully clothed, and supine.

Applicant describes craniosacral therapy as a soft tissue maneuver that feels like a massage. It addresses no joint dynamics and is totally within the fascia. Most of the corrective work is supine, and is a very different experience from chiropractic and it uses minimal force.

Many of Applicant's old and new clients still call her Doctor Joanne even though she

tells them she is not a chiropractor. Applicant does not bill any insurance carrier or government program for the massage therapy that she provides and intends to collect just cash at the time of service. Applicant's last day that she provided massage therapy in Pennsylvania was December 31, 2011, on New Year's Eve. Applicant has provided massage therapy and craniosacral therapy after December 2011 in other states, including **Virginia**, New Jersey, Indiana, Texas and Illinois.

In support of her application, Applicant called several witnesses, including three current patients. Andrew Mason is an adult individual who has known Applicant for over 20 years and was first referred to Applicant by a friend for chiropractic care. Mason went to see Applicant when she was a practicing chiropractor. Mason, his wife and children see Applicant for craniosacral therapy because they believe that it improves the quality of their health and do not see her for treatment of any specific medical condition.

Mason described his chiropractic experience and his craniosacral therapy experience as different in that the chiropractic experience he lays on his stomach and the attention is directed to one specific area and there are adjustments while with CST he lays on his back, it's a head to toe massage, there's no physical adjustment involved and its extremely soft.

Cathy Saveri is an adult who has known Applicant for about 22 years and a physical therapist that she had been working with for her son referred her to Applicant. Saveri's son Travis was born with cerebral palsy and developmental delays and cognitive issues. Saveri was looking for optimum health and took Travis to Applicant when he was about two or three for chiropractic and CST care three or four times a year until October 2011.

Saveri describes the difference of Applicant chiropractic care to her CST care as no spinal manipulation and a gentle non-invasive technique. On cross examination Saveri described

the chiropractic care Travis had received as a "gentle sort of adjusting, as opposed to that snapping down on a chiropractic table that you might get."

Stephen Hoffman, D.C., is a chiropractor who resides at 590 Rancho Santa Fe Road in Encinitas, California. Dr. Hoffman is a licensed chiropractor in the state of Michigan, has been licensed since 1980 and practiced full-time until 1995. Dr. Hoffman met Applicant in 1990 when he had special needs for his son, heard about Applicant and took his son to her when he was 15 years old. Applicant sees Dr. Hoffman and his family in California about twice a year. Dr. Hoffman describes Applicant's approach as a chiropractor as far gentler than others and believes that it's more honoring to the body to receive a gentle adjustment than a forceful one.

Father Joseph Evanko is a Catholic priest of the Diocese of Scranton and pastor of two parishes, St. Jude in Mountain Top and St. Mary's in Dorrance, Pennsylvania. Father Evanko has known Applicant all his life. Father Evanko also knows Applicant as a parishioner of St. John Bosco parish in Conyngham when he was pastor there from 2001 to 2009. Father Evanko went with Applicant's husband several times to visit Applicant in prison. Father Evanko states Applicant's reputation among her former patients and clients is very positive and they've appreciated a holistic approach.

Application of Law to Facts

Pursuant to the Act, the Board is authorized to deny a license to an individual if, among other reasons, an applicant cannot demonstrate that she possesses good moral character required for licensure, 63 P. S. § 627.5(a)(1), or if an applicant has "be[en] convicted under Federal law, under the law of any state or under the law of another jurisdiction of a crime of moral turpitude or of an offense which, if committed in this Commonwealth, would constitute a felony." 63 P. S. § 627.9(a)(1).

At the outset, the Board will address one argument made implicitly by Applicant that the Board cannot and should not punish Applicant again for acts that she committed in 1999 and for which she has been adjudicated. The Board agrees. For purposes of this proceeding, the question before the Board is not whether Applicant has been punished enough for her past misdeeds. That issue has already been decided by two courts and another administrative agency.

For the Board the issue is prospective, which is to say, whether Applicant may be entrusted with a license to practice massage therapy. The Board's analysis rests upon a determination of whether Applicant, *at the present moment*, possesses good moral character. The analysis necessarily begins with an inquiry as to her past character and continues to an inquiry of whether her character has changed from past to present.

63 P. S. § 627.5(a)(1)

Based upon the criminal history reported by Applicant, the Board provisionally denied Applicant's licensure and Applicant timely appealed. Upon review of the record in its entirety, the Board concludes that Applicant does not possess good moral character. For reasons more fully described below, the Board arrived at that conclusion after weighing the gravity of the specific facts which led to Applicant's criminal convictions and discipline by the Chiropractic Board against the evidence of rehabilitation, or lack thereof. Applicant's convictions and disciplinary history constitute final judgments, and the Board may not be a forum to re-litigate facts that have been determined in prior judgments and which were essential to those judgments. Applicant's criminal convictions and prior disciplinary history with the State Board of Chiropractic constitute substantial evidence of Applicant's risk to public health and safety.

Against the considerable weight of evidence of Applicant's criminal and disciplinary history, the Board found that most of the testimony offered as evidence of Applicant's character

rehabilitation was simply not credible and worthy of belief. What limited credible evidence of rehabilitation that Applicant offered is outweighed by the evidence of her criminal and disciplinary history along with evidence that Applicant retains her past character flaws.

Applicant testified that in the course of her treatment of Kimberly she promised to cure Kimberly's serious medical condition; persuaded her to reduce and ultimately discontinue taking anticonvulsive medication that she had been taking to treat epilepsy and seizures; Applicant continued to see Kimberly and bill for chiropractic treatment; discouraged Kimberly from taking medical treatment as her condition worsened and she experienced increased seizure activity (including suffering at least one seizure while in Applicant's office) that resulted in the patient's death following a seizure; and defrauded the Medical Assistance program in billing for treatment that was not provided. This portion of Applicant's testimony was in accord with the adjudicated facts of the three prior proceedings.

The Board begins by noting that the burden of proof in a criminal proceeding is proof beyond a reasonable doubt as to each element of the charged offense. The evidence supported by Applicant's felony and misdemeanor convictions is overwhelming and points to several critical flaws of moral character. Applicant deceived Kimberly by falsely advising her that epilepsy could not only be treated, but *cured*, by chiropractic treatment. The extraordinary falsity of such a claim is staggering. "Quackery" is defined as "the practice of fraudulent medicine, usually in order to make money or for ego gratification and power; health fraud" and Applicant's treatment of Kimberly certainly fits that definition. Thus, the Board has been presented not simply with a prevarication, that is, an evasion or stretching of the truth, but with a person who dared to tell a lie of such magnitude that it would require her to completely disregard even the slightest hint of honesty.

The deficiency of character is not limited to dishonesty. There is also greed. Applicant billed the Pennsylvania Department of Public Welfare for providing chiropractic manipulation. The Board notes that the statutory definition of "manipulation/adjustment" is "...passive manual maneuver during which a joint complex is carried *beyond the normal physiological range* of motion that are applied without exceeding the boundaries of anatomical integrity of the joint complex...." 63 P. S. § 625.102 (Emphasis added). The Board also notes that chiropractic "manipulation" is a procedure that may not be delegated to a person who is not a chiropractor since "... a chiropractor may not delegate any activity or duty to such unlicensed individuals which requires formal education or training in the practice of chiropractic or the knowledge and skill of a licensed chiropractor." 63 P.S. § 625.601. These principles were reinforced further by the testimony of Applicant's witness, Dr. Stephen Hoffman, a chiropractor, who testified that, "In chiropractic we define an adjustment as *a concussion of external forces greater than the body's internal resisted force. So it's a forceful thing.*" N. T., at page 72, lines 10 – 13. Emphasis added.

However, as determined in both criminal convictions as well as the adjudication of the State Board of Chiropractic, Applicant did not perform any kind of forceful, concussive procedure on Kimberly that would constitute a chiropractic manipulation or adjustment. Rather, Applicant "... applied a light pressure on the head and back, *which would not affect any misaligned or displaced vertebrae*, and was a marked departure from the practice of chiropractic...." Finding of Fact 32, Emphasis added. The Board notes that the description of this "light pressure" procedure is described in some detail in the Affidavit of Probable Cause supporting the Complaint in Applicant's state criminal proceeding, and is corroborated in the adjudication of the State Board of Chiropractic, as well as the testimony of Applicant's witness,

the aforementioned Dr. Stephen Hoffman, who testified concerning Applicant's style of chiropractic: "Her approach was a soft touch approach that was more honoring to the body." N. T., page 72, lines 8 – 10.

Thus, the "scheme" or "artifice" that was the basis of Applicant's mail fraud conviction included 40 separate occasions when she billed for professional chiropractic procedures that only a chiropractor could perform, but, in fact, she only performed a "light pressure" adjunctive procedure that could have been performed by a nonchiropractor. Thus, Applicant was willing to sacrifice her professional integrity, to say nothing of her patient's life, for the sake of gaining the paltry sums paid by the Pennsylvania Department of Public Welfare Medical Assistance.

The record also demonstrates Applicant's hubris. Despite all of the dramatic evidence accruing over a 6½-month period that Applicant's care of Strohecker was leading to a horrifying catastrophe, Applicant continued to proceed in the face of danger to her patient, as well as her own career, supported by nothing other than unjustified confidence in her own irrational prescription. As Kimberly's condition deteriorated in dramatic and graphic fashion, Applicant threw caution to the wind and indulged her conceit. Disregarding the scope of practice for chiropractic which had been prescribed by a lawful statute enacted by the General Assembly, and tested by time and the scientific experience of the chiropractic profession, Applicant assumed the superiority of her own opinion. For this conduct, she was convicted of a criminal violation of the Chiropractic Practice Act and stripped of her chiropractic license by the State Board of Chiropractic.

The Board considered the testimony of Applicant and her character witnesses. While the Board found the testimony of Father Evancho credible and sincere, the Board also accorded his testimony little weight since he has little familiarity with Applicant in a professional

environment. With respect to the testimony of Andrew Mason, Cathy Saveri, and Dr. Stephen Hoffman the Board found their testimony not credible in support of Applicant's purported rehabilitation of character. None of them acknowledged Applicant's character flaws and none were willing to admit, accept or acknowledge the full truth of Applicant's criminality. In sum, they are in denial concerning the nature and gravity of Applicant's crimes. Given that they do not recognize the nature and degree of Applicant's character defects, their claims of trust in her ability and character are not worthy of belief.

In addition, the Board upon witnessing their testimony in person found their demeanor unsettling and unpersuasive. All three witnesses exhibited a quality of being "true believers." Indeed, the three shared a repetition of certain phrases such as "optimum health" and therefore, the Board concluded that their testimony in support of Applicant was not credible because it presented not as an objective testimonial about Applicant's current character and how she has changed, but as advocacy for the validity of Applicant's former practices and that Kimberly Strohecker's death was a tragic, but aberrant outcome.

In addition to the shared credibility problems of three witnesses, the Board found particular problems with respect to the testimony of Dr. Stephen Hoffman. While his testimony was presented ostensibly for the purpose of supporting Applicant's alleged rehabilitation of character, the Board was disturbed to hear that Applicant's recent practice since being released from prison is dangerously close to the same conduct that resulted in Kimberly's death, and is being carried to other states where massage therapy is not licensed. Hoffman described Applicant's chiropractic procedures before her convictions in much the same terms that they were described by the Commonwealth in its Affidavit of Probable Cause. Just as the Commonwealth described a "light pressure," Dr. Hoffman testified that "It wasn't twisting, it

wasn't popping, it wasn't pushing. ... And so Joanne's approach to correcting subluxations was far more gentle." N. T., page 65, lines 13 – 17.

Dr. Hoffman then described Applicant's current practice of craniosacral therapy (CST) in contrast to her previous "light pressure" chiropractic treatment. Hoffman noted two differences. First, CST is a "body based approach" while Applicant's chiropractic soft touch was a "spinally based approach." Second, CST is administered while the patient is face up; chiropractic is administered while the patient is face down. N. T., p. 78, lines 10 – 15. Hoffman acknowledged that both practices involved a "soft touch." N. T., p. 80, lines 11 – 15. Thus, the two principal differences identified by an expert in the field is that the former is performed over the entire body and with the patient lying face up, and the latter is applied to the spine while the patient is face down.

Given the alarming similarities in the description between Applicant's former practice and her recent CST practice, the Board concludes that Dr. Hoffman's testimony, taken in its entirety, does not support a conclusion of rehabilitation of character. To the contrary, it appears from Dr. Hoffman's testimony that Applicant is attempting to pick up where she left off, continuing to treat many of the same patients under the auspices of a "wellness center." She is treating Travis Saveri who is a young patient with cerebral palsy. She treats Dr. Hoffman's son, who has a history of an undiagnosed convulsive disorder. One would think that having cared for a person with a neurological disorder with such catastrophic results, a cautious individual would avoid even the appearance of engaging in the same kind of misconduct.

The record reflects other disturbing evidence that Applicant has not reformed. The Board considered Applicant's testimony that education has become a very big part of her craniosacral practice. Applicant's intake form states that Applicant does not provide medical care, will not

give advice under medical care, that Applicant supports the patient's medical care, and does not replace any other treatment that the patient receives. Applicant is more committed to education before and after a session orienting the client to her objectives, always asking every visit "do you have questions of what you've experienced so far or today."

Applicant also said that she is committed to being more clearly spoken so there can be no misgivings of what she has said in her literature, in the DVDs, in her forums and most importantly in her actions and words. Applicant also claimed that she would be very honoring and very compliant to whatever restrictions the Board may place on her including monitoring or supervision or probation, and that the Board can trust her honesty.

Despite the foregoing verbal assurances, the Board found none of them credible. First, throughout her testimony Applicant repeatedly deflected any personal responsibility and never candidly acknowledged that Kimberly died because Applicant's personal defects of character. Instead, Applicant talked about how her "words" that she spoke were wrong, that now she is "...committed to being so much more clear spoken so there can be no misgivings [sic] of what I've said in my literature, in the DVDs, in my forums, and most importantly, my actions and my words." N. T., page 104, line 23 to page 105, line 1.

Applicant's testimony indicates that she attributes Kimberly's death to her patient's misunderstanding of what Applicant advised her to do. Applicant even equivocated as to whether she told Kimberly to discontinue her epilepsy medications, fall into a deep sleep for approximately three days and awaken cured of the disease. When asked whether she made those statements, Applicant did not give a forthright "yes," Applicant testified, "They are the words of the record, yes." *See,* N. T., page 110, lines 5 – 10. With that response, and others like it, the

Board perceived that Applicant was telling the Board what it wanted to hear, or perhaps, what she had to say in order to get a license, but not what she really believes.

Second, in a similar vein of clinging to past error, and despite her testimony to the contrary, Applicant continues to contend that the procedures that she performed on Kimberly, *i.e.,* "light touch" or "light pressure," were chiropractic adjustments. *See,* N. T., page 111. Despite Applicant's equivocation, this point has been fully and finally adjudicated in the prior proceedings. Simply, Applicant did not perform chiropractic adjustments on Kimberly. Her present contention to the contrary not only undermines her credibility, but demonstrates the tenacity with which she holds to past error.

Third, Applicant presented testimony relating to an array of current protocols or "patient safeguards" that she employs to, in her words, be "more clear spoken" so that her patients do not misunderstand her. However, in light of her testimony and that of her supporting character witnesses that establishes the similarities between her prior practice and her recent CST practice, the Board was not persuaded that these protocols would effectively educate and inform patients, or even that they are, in fact, designed or intended to educate patients. Clearly Applicant has adopted written and recorded protocols that include several disclaimers, including any promise of a cure. Applicant's protocols may also advise patients that her services are not a substitute for medical care. Despite these written disclaimers, Applicant testified that she tells "...patients we're not treating or addressing symptoms, *we're allowing it to adapt to a better process of how the body may heal over time. And that's basically the explanation I gave to all the clients. And that's in our educational material, also.*" N. T., p. 128, lines 19 – 24.

While Applicant contends that the purpose of such written and recorded protocols is to educate and inform patients, another plausible interpretation of Applicant's new protocols are

that they are designed to create a paper trail to discredit or dispute the contentions of any future patient who is harmed as a result of following verbal advice given by Applicant. In considering this possible alternative interpretation of such protocols, the Board considered that portion of the record in which Applicant testified that she originally denied the statements that she made to Kimberly, until tape recordings of a telephone conversation were revealed in which Applicant made those very statements. Today, despite the fact that there is an audio recording in which she gave such advice, Applicant proffered no frank admission of what she said, but only admitted that they "are the words of the record."

Similarly, Applicant has been following an office protocol in which she disclaims treatment of symptoms in writing but verbally assures patients that her techniques will "allow their bodies to adapt to a better process of how the body may heal over time." If a professional assures a patient that her services will allow the body to heal, then a patient would reasonably expect that they will cease to experience symptoms. The Board considers this an example of the doublespeak that confuses or evades a patient's clear understanding of what benefits the patient may receive. Applicant's testimony, therefore, contradicts her claims of rehabilitation and reform.

Given Applicant's lack of credibility based upon her equivocation and lack of candor as described above, the Board does not give any weight to Applicant's assurances of trustworthiness or that her adoption of new protocols is designed for patient protection. While today she may say that the lesson she learned was to be clear spoken to her patients, the Board is left with the disturbing possibility that the only lesson that she has really learned is that she should not give advice over the telephone.

The Board notes that this is not the only occasion when Applicant has denied fault if she thought she could get away with it. In two prior criminal proceedings and a related federal civil action Applicant agreed to surrender permanently her license to practice chiropractic in exchange for a more lenient sentence. After the plea deal was concluded a disciplinary proceeding was commenced before the State Board of Chiropractic. When there was nothing more that the criminal courts could do to her, and notwithstanding her previous agreement to permanently surrender her chiropractic license, Applicant contested the disciplinary proceeding, and even complained that the recommended penalty of revocation was too harsh. Thus, having received the benefit of a lenient sentence, Applicant reversed course and opposed the administrative action that would have consummated the terms of the federal injunction. In that disciplinary proceeding before the State Board of Chiropractic, Applicant gave the same assurances of trustworthiness, remorse and reform that she offered to this Board.

At the conclusion of the hearing Applicant argued that this single tragedy was an isolated event, and that apart from Kimberly's death, the Board should consider that Applicant had a trouble free life and trouble free practice without tragic results. She is not likely to practice as a chiropractor again, and therefore, she may be entrusted with the lesser responsibility of a massage therapist as a productive outlet for her knowledge and expertise. The logic of this argument fails.

First, upon closer review, Applicant's argument is a denial that she had a fundamental character defect. Essentially, it is a variation on the fallacy that absence of evidence is evidence of absence. The fallacy is modified by arguing that Kimberly's death was an anomaly, and the absence of evidence of other problems is evidence that her character is fundamentally good. The Board rejects that reasoning as unsound. There are many people who cause only one

catastrophic event in their lives. It does not follow from a single result that there was not a systemic failure in their character. While it is true that mere inadvertence or unforeseeable breakdown may sometimes have an isolated tragic end, one cannot conclude from a single tragedy that it can only be the result of mere inadvertence or an unforeseeable breakdown.

In Applicant's case, the evidence is abundant that a young woman's death was not the result of mere inadvertence, failure to communicate clearly, a breakdown in office procedures or the failure to implement patient safeguards. The office visits continued over a protracted period of 6½-months with a notable decline in the patient's condition. Moreover, as discussed above, the promise of a cure would be an extraordinary claim to make in any case, but to promise a cure of epilepsy by an unconventional method requires an extraordinary degree of dishonesty that cannot reasonably be attributed to a momentary or isolated lapse of judgment.

Second, while the Board recognizes the difference between the chiropractic profession and the practice of massage therapy, one cannot conclude that the risk of harm to the public under the circumstances of Applicant's case is proportionately less. Admittedly, the practice of massage therapy requires a lesser quantity and rigor of professional education and training than a chiropractor, and a chiropractor assumes a greater degree of responsibility for a patient's care and well-being than a massage therapist. Nonetheless, even the modest scope of practice of a massage therapist is accompanied by professional duties which, if abused or ignored by a person of unscrupulous or defective character, would result in the same tragic results suffered by Kimberly.

For example, massage therapy standards of professional conduct require that a massage therapist "refer to an appropriate health care professional when indicated in the interest of the client." 49 Pa. Code §20.42(a)(5). A massage therapist who discovers an anomaly in a patient's

soft tissue during the course of a massage therapy session has a duty to inform the patient and refer the patient to another professional. An individual who violates that responsibility because they believe that her treatments "will allow the body to heal" would jeopardize the patient's life, whether that professional was a chiropractor or a massage therapist. Therefore, the Board rejects the argument that misconduct as a chiropractor carries less relevance to massage therapy.

In conclusion, the Board does not doubt that the death of Kimberly is an emotional and psychological burden that Applicant carries with her on a daily basis. The Board also recognizes the severe criminal and professional sanctions that Applicant has received. Nor does the Board contend that Applicant is devoid of any redeeming qualities. However, piety, sorrow, regret, and shame are not substitutes for reformation of character. The Board finds no evidence that Applicant has any genuine insight into the character defects, *i.e.,* dishonesty, greed, and pride, which caused the death of another human being. Rather she has surrounded herself with persons who reinforce her beliefs, insulate her from accepting full responsibility, and inhibit Applicant's motivation to fundamentally change her character. In sum, the Board concludes that she has not reformed and rehabilitated her character, and that the character defects present in 1999 continue to exist today. Given what is known about the consequences of those moral character defects, the Board finds that Applicant fails to possess the good moral character required for licensure as a massage therapist.

63 P. S. § 627.9(a)(1)

The Board next considers Applicant's qualification under Section 9(a)(1) of the Massage Therapy Law. Under that provision, the Board is authorized to refuse a license to one who has been "convicted under Federal law, under the law of any state or under the law of another

jurisdiction of a crime of moral turpitude or of an offense which, if committed in this Commonwealth, would constitute a felony." 63 P. S. §627.9(a)(1).

Clearly, Applicant's conviction for mail fraud, 18 U.S.C. §§ 1341, 1346, is graded as a felony. Under the case law interpreting these types of licensure standards, the Board notes that "*John's Vending* teaches that the nature of the offending conduct and its remoteness in time must be considered where an agency seeks to revoke a professional license on the basis of a conviction." *Ake v. Bureau of Prof'l & Occupational Affairs, State Bd. of Accountancy*, 974 A.2d 514, 520 (Pa.Cmwlth.2009), *allocatur denied*, —— Pa. ——, 987 A.2d 162 (2009). Although *Ake* involved a revocation of a license already held, for purposes of this proceeding the Board considers the principles applicable and consistent with the cited precedent in *Sec'y of Revenue v. John's Vending Corp.*, 453 Pa. 488, 309 A.2d 358 (1973) (conviction for selling alcohol and opium 15 years earlier not basis for denying applicant license to sell cigarettes).

In this case, Applicant has a felony conviction from 2003 for an offense occurring in 1999. Although the Board recognizes that the felony conviction is 9 years old, the Board also must consider the nature of the offending conduct. In contrast to *Ake*, this Applicant criminal conduct was not limited to offensive telephone calls in a two week period. Rather, as described in detail above, she engaged in a course of conduct in a professional-patient relationship over a protracted period of 6½ months during which she witnessed her patient deteriorate and have a seizure in her presence.

Applicant has presented evidence for the purpose of arguing that the convictions do not represent her present character or risk to the public. For the reasons previously discussed, the Board disagrees. A board may give greater weight to the seriousness of ... [an individual's] criminal convictions than to mitigating evidence. *Burnworth v. State Bd. of Vehicle Mfrs.*,

Dealers and Salespersons, 139 Pa.Cmwlth. 21, 589 A.2d 294, 297 (1991). In this particular case, the seriousness of Applicant's offenses are represented by the death of her patient. Applicant has presented little credible evidence to offset the gravity of her past felony conviction.

The Board also must consider that other applicants who have been convicted of a felony under the Controlled Substances Act within the past 10 years are statutorily barred from being licensed. 63 P. S. § 627.5(a)(6)(i). The Board cannot resolve the obvious irrationality of denying a license to an individual who has a 10 year old felony conviction for possession with intent to deliver a controlled substance but granting a license to a person with a 9 year old conviction for a criminal offense that involved violating a professional ethical duty and resulted in the death of a patient.

Therefore, solely on the basis of her felony conviction, Applicant may be refused a license to practice massage therapy. The Board has the duty to protect public health, safety and welfare. It would not be consistent with the Board's duty to issue a license to practice massage therapy to one who has engaged in a scheme or artifice using the postal system to deny others their intangible right to honest services. While Applicant may not have the opportunity to commit mail fraud in exactly the same manner that occurred in the case of Kimberly, if she were clothed with the legitimacy of a professional license issued by the Commonwealth, it would still be possible for her to use the mail, telecommunications or other forms of commerce, to make fraudulent claims for her own enrichment through the services she provides. Therefore, the Board concludes that Applicant's felony conviction alone should constitute a bar to holding a license to practice massage therapy in this Commonwealth.

The crime of mail fraud also constitutes a crime of moral turpitude as defined by our courts. A crime of moral turpitude is one which has been "... done knowingly contrary to justice, honesty or good morals." *Burnworth v. State Bd. of Vehicle Mfrs., Dealers and Salespersons*, 139 Pa.Cmwlth. 21, 25, 589 A.2d 294, 296 (Pa.Cmwlth. 1991). In those terms, mail fraud has already been held to be a crime of moral turpitude. "Specifically, mail fraud is a crime in which fraud is an ingredient and therefore, it is a crime involving moral turpitude." *Startzel v. Com., Dept. of Educ.*, 128 Pa.Cmwlth. 110, 114, 562 A.2d 1005, 1007 (Pa.Cmwlth. 1989), *citing State Dental Council & Examining Board v. Friedman*, 27 Pa.Cmwlth Ct. 546, 367 A.2d 363 (1976).

Furthermore, Applicant's state criminal conviction for violation of the Chiropractic Practice Act required proof of immoral or unprofessional conduct. Determination of whether a crime involves moral turpitude turns on the elements of the crime, not on an independent examination of the details of the behavior underlying the crime. *Startzel, supra, citing Flickinger v. Department of State*, 64 Pa. Commonwealth Ct. 147, 439 A.2d 235 (1982). While neither the court commitment nor the guilty plea colloquy in the state court specifically indicate whether Applicant's conduct was "immoral," "unprofessional," or both, given the facts upon which the state criminal conviction was based, *i.e.,* a departure from the standard of care in the profession causing the death of a patient, the Board concludes that this conviction, too, was a crime of moral turpitude. Even if Applicant's conviction is viewed in terms of unprofessional conduct, her crime involved acts done knowingly contrary to justice, honesty and good morals in the manner in which she deceived Kimberly and discouraged her from seeking necessary medical care.

Disposition

In finding the two causes that may be the basis for a denial of Applicant's application, the Board must consider the appropriate disposition of this application. This is not merely a question of whether she may inappropriately or incorrectly perform a massage therapy modality. The standards of professional conduct for massage therapists extend beyond the massage therapist's ability to use her hands to apply pressure to the skin and muscles. Massage therapists are also required to base decisions and actions on behalf of a client on sound ethical reasoning and current principles of practice. 49 Pa. Code §20.42(a)(3). Massage therapists shall also "[p]rovide treatment only where there is an expectation that it will be advantageous to the client," 49 Pa. Code §20.42(a)(4), and "[r]efer to an appropriate health care professional indicated in the interest of the client," 49 Pa. Code §20.42(a)(5).

In light of these ethical duties owed by a massage therapist to a client, the real possibility that a violation of those duties may result in another tragedy, and Applicant's failure to offer credible, persuasive evidence that she has acknowledged her very real defects of character and corrected her life, the Board will refuse to issue a license to practice massage therapy.

Accordingly, the Board issues the following order:[2]

---

[2] This Corrected Adjudication has been issued at the request of Applicant to correct typographical errors at page 12, Fiudings of Fact ¶63 and page 37 of the Discussion, to delete the word "West" before the word "Virginia" to conform to the record testimony on pages 162-163, 166. The Board's denial of the application by order of December 11, 2012 remains in effect. Therefore, the final order attached to this Corrected Final Adjudication is retroactively effective to December 11, 2012.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS
BEFORE THE STATE BOARD OF MASSAGE THERAPY

In the matter of the Application for Licensure as a Massage Therapist of Joanne M. Gallagher	:	**Docket No.**	**0585-72-12**
	:	**File No.**	**12-72-01827**

FINAL ORDER

AND NOW, this 2nd day of January 2013, upon consideration of the evidence of the hearing in the above captioned matter the Board **DENIES** the Application for Licensure as a Massage Therapist of Joanne M. Gallagher.

This order shall be effective retroactively to date of the original Final Adjudication and Order entered in this matter, December 11, 2012.

BY THE BOARD:

BUREAU OF PROFESSIONAL & OCCUPATIONAL AFFAIRS

KATIE TRUE
COMMISSIONER

STATE BOARD OF MASSAGE THERAPY

ROBERT C. JANTSCH, L.M.T.
CHAIRPERSON

Applicant's Attorneys:

April L. McClaine, Esquire
Art Health Law
200 N. Third Street, Suite 12-B
Harrisburg, PA 17101

Walter T. Grabowski, Esquire
Brady & Grabowski, PC
61 North Washington Street
Wilkes-Barre, PA 18701

Prosecuting Attorney: Bridget Guilfoyle, Esquire

Board Counsel: Christopher K. McNally, Esquire

Date of Mailing: January 2, 2013