STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DEPARTMENT OF HEALTH, BOARD OF
PHYSICAL THERAPY PRACTICE,

Petitioner,

vs. Case No. 20-5141PL

BRYAN M. DOWNS, P.T.,

Respondent.
_____/

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on June 1, 2021, via Zoom teleconference, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Christina Arzillo Shideler, Esquire
Caitlin Rebekah Harden, Esquire
Department of Health
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For Respondent: Howard J. Hochman, Esquire
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STATEMENT OF THE ISSUES

The issues are whether Respondent committed the violations alleged in the Second Amended Administrative Complaint ("Administrative

Complaint") and, if so, what is the appropriate disciplinary action to be taken against his license to practice physical therapy.

PRELIMINARY STATEMENT

On October 29, 2020, Petitioner, Department of Health, Board of Physical Therapy Practice ("Department"), filed a two-count Administrative Complaint seeking to impose discipline on the license of Respondent, Bryan M. Downs, P.T. ("Respondent" or "Mr. Downs"). Count I of the Administrative Complaint alleged that Respondent violated section 486.125(1)(k), Florida Statutes (2016),[1] through a violation of section 486.123 (2016), by engaging in sexual misconduct with Patient A.D. Count II of the Administrative Complaint alleged that Respondent violated section 486.125(1)(e) (2016), through a violation of Florida Administrative Code Rule 64B17-6.001(2)(f),[2] by failing to meet that level of care, skill, and treatment which is recognized by a reasonably prudent similar physical therapy practitioner as being acceptable under similar conditions and circumstances.

Respondent timely contested the allegations. On November 23, 2020, the Department referred the case to DOAH for the assignment of an ALJ and the conduct of a formal hearing. The final hearing was initially scheduled for January 26, 2021.

On November 30, 2020, Respondent filed a Motion to Dismiss Count II of the Administrative Complaint. Respondent argued that the same operative facts were the basis of both counts of the Administrative Complaint, and that the Department should not be allowed to pursue a general "standard of care"

[1] Unless otherwise noted, references to the Florida Statutes are to the 2020 edition. It is noted that sections 486.123 and 486.125 have not been amended since the alleged violations occurred in 2016.

[2] Subsection (2)(f) of rule 64B17-6.001 has been unchanged since 2016.

violation when the more specific statute, section 486.123, addresses all of the factual allegations. The parties were given leave to file written argument, necessitating a continuance of the scheduled final hearing. Respondent ultimately filed an Amended Motion to Dismiss on January 11, 2021. A telephonic hearing was held on the motion on January 26, 2021. By Order dated January 27, 2021, the undersigned denied the Amended Motion to Dismiss, with the provison included in the following paragraph:

> … The undersigned agrees with Petitioner that the cases cited by Respondent, *Barr v. Department of Health*, 954 So.2d 668 (Fla. 1st DCA 2007), and *Cadet v. Department of Health*, 255 So.3d 386 (Fla. 4th DCA 2018), do not support the contention that an allegation of a violation of the standard of care is precluded by an allegation of a violation of a more specific statute, even where the same operative facts are cited to support both allegations. However, the undersigned also observed that *Cadet* does appear to stand for the proposition that in such a situation, the allegations must be specific to the statutory standard of care definitions and not merely an allegation of acts unbecoming to a member of the profession.

The Amended Motion to Dismiss also raised issues regarding the composition of, and the deliberations undertaken by, the probable cause panel that approved the Administrative Complaint. The undersigned concluded that it is beyond the jurisdiction of this tribunal to review and pass upon the actions of the probable cause panel, but that Respondent would be given leeway at the final hearing to establish a record sufficient to preserve for appeal his arguments regarding the probable cause panel.

After four continuances, the final hearing was convened and completed on June 1, 2021. At the hearing, the Department presented the testimony of Patient A.D.; and the expert testimony of Joylin Zimmerman, P.T. Both

witnesses also provided rebuttal testimony. The Department's Exhibits 1 through 6 were admitted into evidence; however, only pages 132 through 145 of the Department's Exhibit 2 were admitted.

Respondent testified on his own behalf and testified in surrebuttal. Respondent's Exhibits B, C, F, and G were admitted into evidence. Respondent's Exhibits D and E, the transcripts of the two probable cause hearings in this case, were proffered and will travel with the record in order to preserve Respondent's claims regarding the probable cause panel.

The one-volume Transcript of the final hearing was filed with DOAH on June 21, 2021. By Order dated June 29, 2021, Respondent's motion for an extension of time for the filing of proposed recommended orders was granted. Consistent with the Order granting the extension, the parties filed their Proposed Recommended Orders on July 12, 2021. The Proposed Recommended Orders have been thoroughly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the parties' Pre-hearing Stipulation, the evidence adduced at hearing, and the record as a whole, the following Findings of Fact are made:

1. The Department, through the Board of Physical Therapy Practice ("Board"), is the entity charged with establishing or modifying standards of practice for physical therapists and with the licensure and discipline of physical therapists. §§ 486.025 and 486.031, Fla. Stat.

2. At all times material to the allegations in the Administrative Complaint, Mr. Downs was a licensed physical therapist in the state of Florida, having been issued license number PT 16173 in 1997. Prior to this proceeding, Mr. Downs had never been subject to discipline by the Board.

3. At all times material to the allegations in the Complaint, Mr. Downs had his own physical therapy practice located at 707 West Eau Gallie Boulevard, Melbourne, Florida. Mr. Downs practiced alone, without administrative assistance. He performed his own administrative duties such as scheduling appointments and taking payments from clients.

4. Sole practice appears not to be unusual in the physical therapy profession. The Department's expert witness, Joylin Zimmerman, testified that her practice is also solo, with no receptionist or administrative assistant. Ms. Zimmerman thus practices regularly under similar conditions as Mr. Downs.

5. The lone treatment room in Mr. Downs's office is roughly 20 feet by 24 feet, with one window and a single door. The door opens into a small reception area.

6. Mr. Downs provided physical therapy treatment to Patient A.D., a female, between July 26 and November 17, 2016. Patient A.D. presented with shoulder and elbow pain. Mr. Downs provided treatment to Patient A.D. once or twice per week during the cited period.

7. Mr. Downs is alleged to have committed five acts that violate section 486.123, which prohibits "sexual misconduct" in the practice of physical therapy. The statute defines "sexual misconduct" as the use of the therapist-patient relationship "to induce or attempt to induce the patient to engage, or to engage or attempt to engage the patient, in sexual activity outside the scope of practice or the scope of generally accepted examination or treatment of the patient."

8. The same acts are alleged to be violations of the standard of practice and therefore to constitute a separate violation of section 486.125(1)(e), which provides that a physical therapist is subject to discipline for "[f]ailing to maintain acceptable standards of physical therapy practice as set forth by the board in rules adopted pursuant to this chapter." The Administrative Complaint cites rule 64B17-6.001(2)(f), which requires a physical therapist to

"[p]ractice physical therapy with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physical therapy practitioner as being acceptable under similar conditions and circumstances."

9. The five acts cited in the Administrative Complaint were:

> a. During the course of treating Patient A.D., Respondent referred to a picture on a calendar located in the treatment room as resembling a "flaccid penis."
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> b. During the course of treating Patient A.D., Respondent removed his shirt to demonstrate the mechanics of the shoulder/scapular movement.
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> c. During the course of treatment on November 17, 2016, Patient A.D. laid face up on a table in Respondent's treatment room with the door closed. While Patient A.D. was face up on the table, Respondent kissed Patient A.D. on her forehead.
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> d. Also during the course of treatment on November 17, 2016, while Patient A.D. was face up on the table, Respondent wrapped his arms around Patient A.D. in an embrace.
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> e. After therapy was complete, but before Patient A.D. had exited the room, Respondent stood at the doorway of the room. Respondent opened his arms inviting Patient A.D. for a hug while standing near the door to the treatment room. Patient A.D. hugged Respondent in order to exit the room.

10. Patient A.D., a female, first presented to Mr. Downs at his practice location on July 26, 2016, with shoulder and elbow pain. Mr. Downs provided therapy to Patient A.D. once or twice a week until November 17, 2016, after which she decided to cancel all future appointments.

11. Patient A.D. has been a massage therapist for 30 years and has practiced as a registered nurse. She is knowledgeable about the healthcare field and the human body based on her experience in these professions.

The Flaccid Penis

12. Patient A.D. testified that on the wall of the treatment room was a calendar with photographs of celestial objects such as stars, nebulas, and galaxies. Mr. Downs agreed that he kept such calendars on the wall as an aide to patients while scheduling appointments.

13. Patient A.D. testified that during one therapy session, she was on the treatment table when Mr. Downs asked her what she saw in the picture that was on that month's calendar. She was not sure what he was asking because it just looked like "a space thing," and so she did not answer. Mr. Downs then volunteered that he saw a flaccid penis in it. Only then did she realize that he was asking a "Rorschach ink-blot" sort of question.

14. Patient A.D. said she was shocked and taken aback at what Mr. Downs said. She recalled laughing uncomfortably because there was really no appropriate response. She believed that he must have been trying to be shocking to see how she would react.

15. Patient A.D. testified that this happened again the next month, with Mr. Downs finding a penis in the calendar photographs. By the third month, Patient A.D. answered his question with, "I think it looks like a cat, but let me guess what you see." However, his response this time was not related to a penis. Patient A.D. said this was the last time that Mr. Downs brought up the calendar photographs.

16. Patient A.D. testified that she did not know why she did not just stop coming to Mr. Downs after the penis comments.

17. The Department's expert, Ms. Zimmerman, testified that the "flaccid penis" comment fell below the minimum standards for the practice of physical therapy because such a statement is not within the treatment protocol and is of no benefit to the therapy session. Such statements diminish the professional line between therapist and patient. They reduce the lines of trust and make the patient wonder whether the therapist has more than treatment in mind.

18. For his part, Mr. Downs categorically denied making any comment about the calendar pictures resembling penises. He stated that he never made any sexual innuendos about the calendars and would never do such a thing.

The Shirt Removal

19. Patient A.D. testified that early in her course of treatment, Mr. Downs closed the door to the treatment room and removed his shirt to demonstrate an exercise. Mr. Downs had his back to her so that she could see his shoulder as he showed her the correct technique. Patient A.D. stated that he was no more than a foot or two from her.

20. Patient A.D. testified that Mr. Downs did not ask for her consent and in fact said nothing before he took off his shirt. He did not offer any alternative ways to demonstrate the exercise. She was surprised and found his actions odd, inappropriate, and unprofessional.

21. Patient A.D. testified that Mr. Downs removed his shirt three or four more times during the course of her therapy, all to demonstrate exercises. He never touched her but also never asked for her consent. She was less shocked at the subsequent shirt removals but still thought them unprofessional.

22. Patient A.D. was unsure why she did not tell Mr. Downs to stop removing his shirt. She supposed Mr. Downs believed this was the best way to demonstrate exercises, showing her which muscles to engage. Patient A.D. stated that she has been around personal trainers and has demonstrated exercises in the course of her massage therapy practice but remembers no one else removing their shirt. She thought it was a "quirky, eccentric thing to do." She did not feel threatened by this behavior and continued coming to Mr. Downs for treatment.

23. Ms. Zimmerman opined that Mr. Downs's removing his shirt fell below the standard of practice. She understood that he was demonstrating what a normal mechanical shoulder motion looks like, but stated there are many

other ways to make that demonstration, including anatomy books and videos. Ms. Zimmerman believed that this was another instance of blurring the line between therapist and patient and could introduce uncertainty in the patient's mind as to the therapist's intentions.

24. Mr. Downs testified that he removed his shirt to demonstrate the action of the scapula and surrounding joints. He has a scapula model in his office as well as 2D representations of the body on wall charts. He used the shoulder chart often because it effectively shows the anatomy and mechanics of the shoulder.

25. Mr. Downs testified that he must nonetheless sometimes demonstrate physically to make the patient understand the exercise he is trying to teach them. As he put it, you cannot just tell the patient, "I need you to depress your humeral head" and expect them to understand what you are asking.

26. Mr. Downs testified that for scapular retraction, he had to take off his shirt and show the correct muscle firing. He stated that he always tries to talk the patients through the maneuver first, but that most people have developed poor mechanics and cannot do it correctly. He shows them the correct muscles by demonstration.

27. Mr. Downs testified that he performs this technique with male and female patients. He always asks for permission before removing his shirt and has never had a patient complain about the scapula demonstration.
Mr. Downs stated that he has even had patients ask to record the demonstration for later reference when they perform the exercises at home.

28. Mr. Downs was certain that he asked Patient A.D. for permission the first time he removed his shirt but conceded he may not have asked on subsequent occasions.

29. Mr. Downs emphasized that during the demonstrations, his back is to the patient and he is talking over his shoulder. He estimated that he was standing four to five feet away from Patient A.D., not one to two feet as she

testified. As soon as Patient A.D. appeared to understand the move he was demonstrating, he put his shirt back on.

30. Ms. Zimmerman testified that unless the therapist has the muscle development of a bodybuilder, a physical demonstration from four to five feet away would not do the patient much good. Mr. Downs disagreed, stating that visually seeing a path of the scapula gives the patient a good visual understanding of what he is instructing her to do.

The Events of November 17, 2016

31. Patient A.D. testified that at the start of the November 17, 2016, appointment, Mr. Downs closed the door of the treatment room, which he had never done before unless he was demonstrating an exercise. She thought it strange but assumed Mr. Downs had a reason, such as being aware of something going on in the building that would be distracting.

32. Patient A.D. was positioned face up on the treatment table with her arms at her side. Mr. Downs sat on a rolling chair at the head of the table and began working on her neck. After working the soft tissue of the neck, Mr. Downs stood with his hands under Patient A.D.'s head, moved her head to the right and then brought her head in rotation to the left to mobilize the vertebrae, giving her head a quick push to the left in order to mobilize the cervical facet.

33. Patient A.D. testified that she had her eyes closed as Mr. Downs worked on her neck. Patient A.D. testified that she could feel Mr. Downs's hands come up to the sides of her face, which had never happened. She opened her eyes to see Mr. Downs's face coming down toward her.

34. Patient A.D. stated that she didn't know what was happening. Perhaps Mr. Downs was falling. She pushed into the table and started to raise her hands. Mr. Downs kissed her forehead then stood back up.

35. Patient A.D. said, "What was that?" Mr. Downs said something about being sorry for hurting her and that was his way of apologizing. Patient A.D.

testified that Mr. Downs's statement was untrue, or at least confusing, because she was not experiencing any pain. Further, earlier in the course of treatment, she had experienced severe pain that elicited no sympathetic response from Mr. Downs. She had not expected any such response because she understood the brief pain to be part of the initial phase of the therapy.

36. Patient A.D. testified that she made no movements that would suggest she was in pain. She made no facial expressions. She believed that her reactions of discomfort or pain would have been familiar to Mr. Downs after several months of therapy.

37. Patient A.D. testified that she was confused and shocked. She did not understand what was happening. It felt inappropriate and unprofessional. She stated that she has asked herself why she did not just leave after the kiss. Her only explanation is that she was so shocked that she froze.

38. Patient A.D. testified that after the kiss, Mr. Downs moved on to work on her right arm. When he stood up, he leaned over her and did what she could only describe as "gave me a hug." With Patient A.D. lying face up on the table with her arms at her sides, Mr. Downs leaned down and put his upper body on her. Patient A.D. stated that Mr. Downs did not embrace her behind her back. He just squeezed her, put his weight on her, then stood back up. She testified that it lasted only a moment.

39. Again, Patient A.D. asked Mr. Downs why he did that. Mr. Downs just reiterated that he felt bad for hurting her. She said, "It doesn't hurt. It's fine." She remained on the table, her brain "buzzing with the uncertainty of it, the unfamiliarness of it." Patient A.D. testified that she was trying to make sense of what was happening and could not understand it. The reality was so different from what she expected walking into the treatment room that she was in shock.

40. Patient A.D. testified that Mr. Downs's practice was to start with the neck, then the right arm, then the left arm. After the hug, he moved on to the left arm. She estimated that the session lasted maybe ten more minutes. She

was quiet and hoping Mr. Downs would "get the vibe" that she did not want him to do that again. She hoped that "my quietness and my tension" would convey to Mr. Downs that the situation "was freaking me out."

41. After Mr. Downs finished on her left side, Patient A.D. sat up. She testified that she usually paid Mr. Downs and discussed scheduling the next appointment. On this day, she wanted to pay and leave as quickly as possible. However, the door was closed and Mr. Downs was standing between her and the door, making her even more uncomfortable. Patient A.D. stated that Mr. Downs motioned for her to give him a hug, with his arms open, palms up, leaning in toward her. Patient A.D. stated that this had never happened before. She thought to herself, "Well, if that's what I have to do to get out of here." She gave him a "faraway, kind of quick hug" and scooted toward the door.

42. Mr. Downs put his hand on the doorknob and opened the door a little bit. He was standing close to Patient A.D. She was afraid that he was going to try to kiss her. She kept her head down. Mr. Downs opened the door and Patient A.D. left.

43. Patient A.D. testified that this was the last in-person interaction she ever had with Mr. Downs. A few days later, on November 22, 2016, Patient A.D. initiated a text message conversation with Mr. Downs. She testified that she did so because "I wanted some validation … I wanted like some magic words that he would say to me that would make me feel … like I could trust him again." The text messages read as follows:[3]

> Patient A.D.: So I was thinking about our last appointment time. What was up with the hugging and kissing my forehead while I was on the table? I'm a little slow about these things sometimes. You said you were making up for being mean to me. Were you hitting on me?

[3] The messages are printed verbatim, including Mr. Downs's habit of placing two periods after most sentences.

> Mr. Downs: Hey, [A.D.].. omg, I'm so sorry if I gave you that impression.. it's funny, because after the appointment, I felt like I may have overstepped my bounds and I was going to text you to apologize if you felt offended.. I think I was just feeling bad for hurting you and trying to show compassion, but chose a less than completely professional way of showing it.. I really feel awful about putting you in this situation.. can you forgive me? I totally respect your marriage and mine.
>
> Mr. Downs: Are you really mad at me?
>
> Patient A.D.: I appreciate your acknowledgement and apology. I'm gonna go ahead and cancel my future appointments, though.
>
> Mr. Downs: Omg, [A.D.].. I can't believe you are so upset about this. I'm gutted because I thought we were such good friends and I hate that you think I would take advantage of you like that. I swear there was never any thought on my part to "hit on you." I was truly just trying to show how I hate when I hurt a patient. I thought you understood that. I am really saddened by this.
> Well, obviously I have to respect your decision, but I think you are over reacting to what was really innocent. I'm a professional with a family and business to think of.. I would not risk that with impropriety like you are insinuating.
> I really hope I was able to help you with your shoulder and elbow. Please know that was my only goal in every treatment.

44. Mr. Downs's version of the November 17, 2016, treatment session is consistent with that of Patient A.D. up to and including the kiss on the forehead. Mr. Downs concedes that he kissed Patient A.D. on the forehead and that action was below the standard of care. Mr. Downs testified that in performing a maneuver to mobilize Patient A.D.'s cervical facets, he knew immediately that it was unsuccessful because there was no crack or click as would normally occur. Patient A.D.'s neck muscles tightened and there was a

grimace on her face. He was surprised because Patient A.D.'s therapy had been going well. Mr. Downs stated that he "reflexively, sympathetically" bent down and kissed her forehead. It was "just a little peck," but he regretted it. He acknowledged that it was inappropriate but also stated that it was not planned.

45. The Department argues that Mr. Downs's explanation that he reflexively kissed Patient A.D. out of concern for her apparent pain is discredited by his own admission that he has practiced physical therapy since 1997 and performed tens of thousands of therapy sessions on patients without ever kissing a patient on the forehead during therapy. The Department contends it is implausible that Mr. Downs would instinctively react in such a unique and intimate way to this particular patient's discomfort during a routine procedure, or that he would have such a reaction for the first time after multiple appointments with a patient.

46. In response to the investigation, Mr. Downs submitted a written statement to the Department on December 10, 2018. In the statement, Mr. Downs explicitly stated that he did "not recollect any kiss on her forehead at all." The Department argues that this prior statement undermines Mr. Downs's detailed testimonial explanations as to why he kissed Patient A.D. on the forehead.

47. The Department also introduced emails that Mr. Downs sent and received while employed at Health South, where he worked prior to setting up his solo practice. The emails consisted of flirtatious and sexually explicit exchanges with female co-workers. The record indicates that Health South disciplined Mr. Downs twice in a two-year period for using his work email for improper purposes. The Department contends that this history undermines Mr. Downs's claims to Patient A.D. that he "totally respect[ed] your marriage and mine."

48. Mr. Downs's version of events diverges from that of Patient A.D. after the kiss. He testified that what Patient A.D. perceived as a hug while she lay

face up on the treatment table was part of a complex move to mobilize her thoracic vertebrae. Mr. Downs stated that before attempting to mobilize the thoracic vertebrae he first works on the soft tissue of the thoracic spine. Therefore, he asked Patient A.D. to rotate onto her stomach. He slid up her shirt to reveal the thoracic spine and massaged there. He performed some light mobilization of the ribs, worked on the soft tissue around the scapula, the rotator cuff, and near the cervicothoracic junction where the spine meets the neck. Mr. Downs testified that this soft tissue massage took about five minutes.

49. Patient A.D. testified that she was never laid face down during the November 17, 2016, treatment session.

50. Mr. Downs testified that he next asked Patient A.D. to roll back over onto her back and cross her arms over her chest with one elbow on top of the other. He placed one hand under her, on her thoracic spine, and leaned his chest into her arms, giving a little thrust with his chest to elicit the mobilization of the vertebrae. He performed this maneuver in two different positions, once between her shoulder blades and once a little higher.[4]

51. After performing the mobilization, Mr. Downs asked Patient A.D. to sit up so that he could assess the movement of her neck and thoracic spine. Mr. Downs denied working on Patient A.D.'s left arm because she never referenced the left arm as a source of pain. His contemporaneous progress notes agree that he did not work on Patient A.D.'s left arm. He testified that he next worked on her right shoulder.

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[4] The Department contends that Mr. Downs's testimony at the hearing that he had Patient A.D. cross her elbows over her chest "conveniently" contradicts his deposition testimony, in which he stated that he had Patient A.D. put her hands behind her neck. The Department contends that the deposition testimony makes the "hug" scenario more likely. However, even in his deposition testimony, Mr. Downs stated that he had Patient A.D. hold her elbows up under her chin and that he braced against her elbows to perform the manipulation. In neither version of his testimony did Mr. Downs concede the possibility that he was chest-to-chest with Patient A.D.

52. Mr. Downs denied that he pinned Patient A.D.'s arms to the table. He never leaned over and hugged her. Mr. Downs allowed that she could have misinterpreted the mobilization maneuver as him leaning down and hugging her, but he denied leaning over for a hug.

53. Mr. Downs testified that after working on Patient A.D.'s shoulder and elbow, they spent 20 to 25 minutes doing exercises. Patient A.D. then came to the counter, paid Mr. Downs, and scheduled her next appointment.

54. Mr. Downs conceded that he gave Patient A.D. a hug before she left the treatment room. He testified that he was wondering whether she was upset about the kiss and offered to give her the hug in an attempt to ascertain whether things were okay between them. Mr. Downs denied blocking the door. He was to the side of the door, opening it for Patient A.D. He asked her, "Are we okay?" She leaned in and gave him what Mr. Downs described as a "non-hug hug." She said, "I'm fine" and walked out.

55. Ms. Zimmerman testified that, even crediting Mr. Downs with concern about causing pain to Patient A.D., the kiss to the forehead was outside the scope of practice. Ms. Zimmerman stated that a kiss is not an appropriate therapeutic intervention and would never be appropriate during a therapy session. If the patient indicates pain, the therapist can ask if it bothered her, and, if so, the therapist could do some soft tissue work and/or apply heat to the affected area. The therapist could move on to another body part and come back to the part that incurred the pain.

56. Ms. Zimmerman testified that the kiss severely damaged the patient's trust. At this point, the boundary lines were gone and the patient had no idea what to expect next.

57. Ms. Zimmerman testified that there was no therapeutic significance to the "hug" on the table, if it occurred as described by Patient A.D. Therefore, the hug was outside the scope of practice. Even if Mr. Downs were operating under the guise of performing a thoracic spine mobilization manipulation, the correct application of that manipulation would not involve the therapist's

being chest-to-chest with the patient. He should have been grasping her elbow to get the leverage to perform the manipulation.

58. However, Ms. Zimmerman conceded that if the manipulation had been performed as described by Mr. Downs, with the patient's elbows crossed in front of her, then his actions would not fall below the standard of practice.

59. As to the post-session hug, Ms. Zimmerman stated that a patient and therapist giving each other a hug after treatment would not necessarily be outside the scope of practice. She testified that therapists and patients can develop deep relationships, and that a patient may be having a difficult time due to a death in the family or some other misfortune. Under such circumstances, the therapist might give their patient a hug.

60. The Department argues that Mr. Downs's inappropriate actions during therapy with Patient A.D. are evidence that he lacks good judgment. As a physical therapist, Mr. Downs is required to establish boundaries and trust between himself and his patients. Mr. Downs's lack of boundaries and inability to read nonverbal cues with his patients calls into question whether he is able to maintain professionalism in a solo practice.

61. The Department notes that Mr. Downs's inappropriate conduct during the November 17, 2016, visit with Patient A.D. eroded the trust between him and Patient A.D. Mr. Downs's behavior directly resulted in Patient A.D. cancelling all future appointments, despite meeting her goals and progressing well in therapy up to that date.

62. Patient A.D. testified that her experience with Mr. Downs has caused her to decline necessary medical care due to her lack of trust of members of the healthcare field. Patient A.D. has tremendous anxiety over being in a vulnerable position with healthcare professionals, to the point of having canceled a needed colonoscopy because she suffered a panic attack.

63. There was no indication that Patient A.D. approached this matter with any ulterior motive. She never filed any civil actions or notified law enforcement regarding Mr. Downs's behavior during therapy. She spent a

long time deciding whether she should file a complaint against Mr. Downs because she knew the consequences would affect not only her but Mr. Downs and his family as well. She finally decided to file a complaint in October 2018 because she felt it was the right thing to do and because she felt a duty to prevent Mr. Downs from possibly doing the same thing to other patients.

64. The Department correctly stated that Patient A.D.'s recollection of her physical therapy sessions with Mr. Downs was clear, distinctly remembered, and lacking in confusion. There were no inconsistencies between her written statement initiating the case in October 2018, her deposition on September 10, 2020, or her testimony at the final hearing.

65. The Department contrasts Patient A.D.'s credibility with that of Mr. Downs, whose testimony directly contradicted a prior written statement in which he denied any recollection of a kiss to the forehead.

66. The Department also points out that, in recollecting the events of November 17, 2016, Mr. Downs persistently spoke of things he "would have" done, as if he were describing his general practices with patients rather than specifically recalling the events of that day. However, the undersigned is satisfied that this was simply a verbal tic and that Mr. Downs intended his testimony to convey his specific memories.

Ultimate Findings

The Flaccid Penis

67. The ultimate finding as to whether Mr. Downs made the "flaccid penis" comment depends on an assessment of witness credibility, because Patient A.D. precisely recounted the episode and Mr. Downs flatly denied that it ever occurred.

68. Patient A.D.'s testimony is credited on this point. The oddness and specificity of the story causes the undersigned to doubt that Patient A.D. could have made it up out of whole cloth. Mr. Downs admitted that he used astronomical calendars in his office. He testified that he searched through old

office materials looking for the 2016 calendar in order to see if there was a photograph matching Patient A.D.'s description. It struck the undersigned as anomalous that Mr. Downs would feel the need to find the calendar if the incident never occurred at all and caused the undersigned to wonder what Mr. Downs would have been looking for as he examined the calendar photos.

69. Mr. Downs's behavior in making comments about the calendar photos was at best offputtingly strange and at worst sexually suggestive. His behavior in this instance clearly fell below the minimum standards for the practice of physical therapy. However, this incident is not found to have clearly constituted "sexual misconduct" as defined in section 486.123. It was only after subsequent events that Patient A.D. came to think that the calendar comments might have been intended to gauge her receptivity to sexual activity. At the time, it just struck her as Mr. Downs's weird attempt to shock her.

The Shirt Removal

70. Mr. Downs and Patient A.D. agreed on the basic facts: Mr. Downs removed his shirt to demonstrate an exercise so that Patient A.D. could observe the proper movement of the muscles involved. Patient A.D. described the demonstration as a "quirky, eccentric thing to do," but did not feel threatened and continued coming to Mr. Downs for treatment.

71. Mr. Downs's removing his shirt clearly fell below the standard of practice. As noted by Ms. Zimmerman, there are many other ways to demonstrate a normal mechanical shoulder motion, such as anatomy books, models, and videos. The undersigned agrees with Ms. Zimmerman that this was an instance of blurring the line between therapist and patient in an unnecessary manner. However, the undersigned also finds that there was no evidence that this demonstration was intended to induce Patient A.D. to engage in sexual activity. Mr. Downs's explanation for removing his shirt is

credited as sincere even if his method was not within the standard of practice.

The Events of November 17, 2016

72. As to the kiss on the forehead, there is no dispute that it occurred. Patient A.D. and Mr. Downs agreed as to the sequence of events. Mr. Downs rightly conceded that the kiss was a mistake and fell below the standard of practice. The only issue in controversy is whether the kiss constituted "sexual misconduct" under section 486.123.

73. The undersigned finds, based on all the evidence, that the kiss on the forehead was not clearly and convincingly shown to constitute sexual misconduct. Mr. Downs adamantly denied that there was any sexual intent in the kiss, though his denial is undercut by the fact that in his initial written statement to the Department, Mr. Downs denied that the kiss occurred. It was not unreasonable for Patient A.D. to interpret the kiss as at least an effort by Mr. Downs to assess what he could get away with in terms of sexual advances. However, given the relatively high standard of proof, a lack of corroboration that reduces the analysis to a "he said, she said" scenario, and the necessarily subjective question of whether Mr. Downs intended an "attempt to induce" Patient A.D. to engage in sexual activity, the undersigned is constrained to find that the Department has not met its burden of proving sexual misconduct. Mr. Downs's behavior was odd, overly intimate, and professionally inappropriate, but not clearly intended as sexual. As noted above, the Department did prove by clear and convincing evidence that the kiss was outside the scope of practice and fell below the standard of practice for a physical therapist.

74. As to the asserted "hug" on the treatment table, it is found that the evidence did not clearly and convincingly demonstrate that this constituted either a deviation from the standard of practice or sexual misconduct. Patient A.D. asserted that Mr. Downs bent down and engaged in a chest-to-chest hug.

Mr. Downs credibly testified that he was performing a mobilization of Patient A.D.'s thoracic vertebrae. The treatment technique requires that the therapist brace his trunk against the patient's raised elbows in a way that could be perceived as a hug. Given that Patient A.D. was already somewhat unnerved by the unexpected kiss, it is understandable that she might interpret the technique as a hug.

75. Finally, regarding the hug as Patient A.D. attempted to exit the treatment room at the end of the session, the undersigned finds clear and convincing evidence that Mr. Downs's behavior fell below the standard of practice but not that it constituted sexual misconduct. Mr. Downs improperly placed Patient A.D. in a position where she felt no choice but to accept unwanted physical contact unrelated to her therapy in order to leave the room. However, the evidence is insufficient for a finding that Mr. Downs was attempting to induce Patient A.D. to engage in sexual activity by a brief hug before she left the treatment room.

The Department's Expert

76. Ms. Zimmerman is a reasonably prudent physical therapist who practices regularly under similar conditions as Mr. Downs. The testimony of Ms. Zimmerman was credible and reasonable in describing the standard of care exercised by a reasonably prudent similar physical therapy practitioner. Ms. Zimmerman opined that Mr. Downs fell below the standard of care when he described the photograph as resembling a flaccid penis, when he removed his shirt to demonstrate the shoulder/scapular movement, when he kissed Patient A.D. on the forehead, and when he initiated the hug as Patient A.D. attempted to leave the treatment room. Her testimony is accepted as to the standard of care and her opinion is credited as to Mr. Downs's failure to meet that standard.

77. As noted above, the undersigned credits Mr. Downs's version of events as to the purported "hug" as Patient A.D. lay face up on the treatment table.

Ms. Zimmerman credibly testified that, if the technique was performed as described by Mr. Downs, then his actions were within the standard of care.

CONCLUSIONS OF LAW

78. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat.

79. The Department, through the Board, is the entity charged with establishing or modifying standards of practice for physical therapists and with the licensure and discipline of physical therapists. §§ 486.025 and 486.031, Fla. Stat.

80. This is a proceeding in which Petitioner seeks to discipline Mr. Downs's license to practice physical therapy. Because disciplinary proceedings are considered to be penal in nature, Petitioner is required to prove the allegations in the Administrative Complaint by clear and convincing evidence. *Dep't of Banking & Fin. v. Osborne Stern & Co., Inc.*, 60 So. 2d 932 (Fla. 1996); *Ferris v. Turlington*, 510 So. 2d 292 (Fla. 1987).

81. Clear and convincing evidence "requires more proof than a 'preponderance of the evidence' but less than 'beyond and to the exclusion of a reasonable doubt.'" *In re Graziano*, 696 So. 2d 744, 753 (Fla. 1997). The Florida Supreme Court further enunciated the standard:

> This intermediate level of proof entails both a qualitative and quantitative standard. The evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy.
>
> Clear and convincing evidence requires that the evidence must be found to be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and lacking in confusion as to the facts in issue. The

> evidence must be of such a weight that it produces in the mind of the trier of fact a firm belief or conviction, without hesitancy, as to the truth of the allegations sought to be established.

In re Davey, 645 So. 2d 398, 404 (Fla. 1994) (quoting *Slomowitz v. Walker*, 429 So. 2d 797, 800 (Fla. 4th DCA 1983)). "Although this standard of proof may be met where the evidence is in conflict, it seems to preclude evidence that is ambiguous." *Westinghouse Elec. Corp. v. Shuler Bros.,* 590 So. 2d 989 (Fla. 1st DCA 1991).

82. Section 486.125 is penal in nature and must be strictly construed, with any ambiguity construed against Petitioner. Penal statutes must be construed in terms of their literal meaning, and words used by the Legislature may not be expanded to broaden the application of such statutes. *Beckett v. Dep't of Fin. Servs.*, 982 So. 2d 94, 100 (Fla. 1st DCA 2008); *Latham v. Fla. Comm'n on Ethics,* 694 So. 2d 83 (Fla. 1st DCA 1997).

83. The allegations set forth in the Administrative Complaint are those upon which this proceeding is predicated. *Trevisani v. Dep't of Health*, 908 So. 2d 1108, 1109 (Fla. 1st DCA 2005); *Cottrill v. Dep't of Ins.*, 685 So. 2d 1371, 1372 (Fla. 1st DCA 1996). Due process prohibits Petitioner from taking disciplinary action against a licensee based on matters not specifically alleged in the charging instruments, unless those matters have been tried by consent. *See Shore Vill. Prop. Owner's Ass'n v. Dep't of Envtl. Prot.*, 824 So. 2d 208, 210 (Fla. 4th DCA 2002); *Delk v. Dep't of Prof'l Reg.*, 595 So. 2d 966, 967 (Fla. 5th DCA 1992).

84. Count I of the Administrative Complaint seeks to discipline Mr. Downs on charges that he violated section 486.125(1)(k), which provides that a physical therapist is subject to discipline for violating any provision of chapter 486 or chapter 456, Florida Statutes. The Administrative Complaint alleges that the substantive statute violated was section 486.123, titled "Sexual misconduct in the practice of physical therapy," and which provides:

> The physical therapist-patient relationship is founded on mutual trust. Sexual misconduct in the practice of physical therapy means violation of the physical therapist-patient relationship through which the physical therapist uses that relationship to induce or attempt to induce the patient to engage, or to engage or attempt to engage the patient, in sexual activity outside the scope of practice or the scope of generally accepted examination or treatment of the patient. Sexual misconduct in the practice of physical therapy is prohibited.

85. The Administrative Complaint alleges that Mr. Downs engaged, or attempted to engage, Patient A.D. to engage in sexual activity in one or more of the following ways: by kissing Patient A.D. on the forehead; by embracing Patient A.D. while she was lying face up on a table; and/or by inviting Patient A.D. to hug him, impeding her exit from the room.

86. Based on the above Findings of Fact, it is concluded that the Department has failed to prove by clear and convincing evidence that any or all of the acts alleged constituted sexual misconduct. Mr. Downs's actions were inappropriate, disconcerting, and alienated his patient. Patient A.D.'s suspicions that Mr. Downs was "hitting" on her were entirely understandable. However, the evidence failed to clearly and convincingly demonstrate that Mr. Downs was attempting to induce Patient A.D. to engage in sexual activity outside the scope of practice. It is more consistent with the evidence as a whole to conclude that Mr. Downs used very poor judgment and demonstrated a poorly developed sense of the boundary between therapist and patient.

87. Count II of the Administrative Complaint alleges that Mr. Downs violated section 486.125(1)(e), which subjects a physical therapist to discipline for failing to maintain acceptable standards of physical therapy practice as set forth by the Board in rules adopted pursuant to chapter 486.

88. The Administrative Complaint alleges that the substantive rule violated by Mr. Downs was rule 64B17-6.001(2)(f), which provides:

> (2) Physical Therapy Personnel Responsibilities In General. Physical therapy is a profession involving skilled practice of patient care. The primary concern of the physical therapist and physical therapist assistant is always the safety, well being, and best interest of the patient who must therefore recognize and carry out services consistent with legal rights and personal dignity of the patient. Accordingly, it is the responsibility of all physical therapists and physical therapist assistants to:
>
> * * *
>
> (f) Practice physical therapy with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physical therapy practitioner as being acceptable under similar conditions and circumstances.

89. Ms. Zimmerman is a reasonably prudent physical therapist who practices regularly under similar conditions as Mr. Downs.

90. The Administrative Complaint alleges that Mr. Downs failed to practice physical therapy with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physical therapy practitioner as being acceptable under similar conditions and circumstances in one or more of the following ways: kissing Patient A.D. on the forehead during treatment; hugging Patient A.D. during and/or after treatment; telling Patient A.D. that a picture on the calendar in the treatment room looked like a "flaccid penis;" and/or removing his shirt to demonstrate the mechanics of the shoulder/scapular movement.

91. Based on the above Findings of Fact, it is concluded that the Department has demonstrated by clear and convincing evidence that Mr. Downs failed to practice physical therapy with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physical

therapy practitioner as being acceptable under similar conditions and circumstances. The flaccid penis colloquy, the removal of the shirt to demonstrate an exercise in the treatment room, the kiss on the forehead, and the hug as Patient A.D. attempted to exit the treatment room all fell below the standard of care.

92. Through the credible testimony of Ms. Zimmerman, the Department established that Mr. Downs fell below the standard of care when he described the photograph as resembling a flaccid penis, when he removed his shirt to demonstrate the shoulder/scapular movement, when he kissed Patient A.D. on the forehead, and when he initiated the hug as Patient A.D. attempted to leave the treatment room. For reasons stated in the Findings of Fact above, it is concluded that Mr. Downs performed the thoracic vertebrae mobilization within the standard of care and did not hug Patient A.D. as she lay face up on the treatment table.

93. Section 456.079(1) requires boards within the Department's jurisdiction to adopt "disciplinary guidelines applicable to each ground for disciplinary action which may be imposed by the board." Penalties imposed must be consistent with any disciplinary guidelines prescribed by rule. *See Parrot Heads, Inc. v. Dep't of Bus. & Pro. Reg.*, 741 So. 2d 1231, 1233-34 (Fla. 5th DCA 1999). In compliance with the statutory mandate, the Board has adopted rule 64B17-7.001, which sets forth disciplinary guidelines for violations of chapter 486 and the rules of the Board.

94. Mr. Downs has not previously been subject to discipline by the Board.

95. The range of penalties for a first offense of section 486.125(1)(e) is from a minimum of a $1,000 fine and a letter of concern to a maximum of a $6,000 fine and/or two years of suspension followed by two years of probation. Fla. Admin. Code R. 64B17-7.001(1)(e).

96. Rule 64B17-7.001(2) sets forth the following:

> (2) In determining what action is appropriate, the Board shall first consider what sanctions are

necessary to protect the public or to compensate the patient. The Board shall then consider mitigating or aggravating circumstances in applying a penalty that is outside of the range provided for in the disciplinary guidelines including:

(a) The danger to the public;

(b) The number of distinct charges;

(c) The actual damage, physical or otherwise, to the patient(s);

(d) The length of time since the date of the last violation(s);

(e) The length of time that the licensee has held a license in any jurisdiction;

(f) The deterrent effect of the penalty imposed;

(g) Rehabilitation efforts of the licensee including remorse, restitution, and corrective action(s);

(h) The effect of the penalty on the licensee's livelihood;

(i) Efforts of the licensee to report or stop violations or the failure of the licensee to correct or stop violations; and

(j) The willfulness and/or negligence of the licensee pertaining to any violation.

97. The aggravating factors present in this case are:

a. A moderate level of danger to the public, in that Mr. Downs operates a solo practice and appears to lack a certain level of judgment as to his professional conduct;

b. The number of distinct charges, in that Mr. Downs has been found to have fallen below the standard of care in four separate instances; and

> c. The actual damage to Patient A.D., who credibly testified that she now struggles with trusting her medical practitioners and has canceled a needed colonoscopy because she panicked about being placed in a vulnerable position.

98. The mitigating factor is that Mr. Downs has been licensed since 1997 without any discipline against his license prior to this proceeding.

99. The undersigned concludes that the other listed factors are neutral or inapplicable. Evidence was not presented regarding deterrence or the effect of a penalty on Mr. Downs's livelihood. Mr. Downs showed no remorse and offered no evidence of any other rehabilitation efforts. Finally, this case involved less "willfulness and/or negligence" than Mr. Downs's inability to understand Patient A.D.'s normal reaction to his manifestly inappropriate behavior.

100. It is noted that, aside from the specific failures found above, Mr. Downs's treatment of Patient A.D. was within the scope and standards of practice and appeared to be achieving positive results. It is noted again that this is Mr. Downs's first occasion to be disciplined by the Board. It is hoped that the penalties recommended below will spur Mr. Downs to seek out the necessary therapy and/or education he requires to fully understand the boundary between therapist and patient, and to accept responsibility for the strange and damaging experience he visited upon Patient A.D.

101. It is recommended that the Board impose a fine of $2,000 for each of the four proven instances of Mr. Downs's failure to practice physical therapy with that level of care, skill, and treatment which is recognized by a reasonably prudent similar physical therapy practitioner as being acceptable under similar conditions and circumstances, for a total fine of $8,000. It is further recommended that Mr. Downs be placed on probation for a period of two years.

102. Section 456.072(4) provides that, in addition to any other discipline imposed for violation of a practice act, any board under the Department's

jurisdiction shall assess costs related to the investigation and prosecution of the case. The Board should therefore also assess the costs of the Department's investigation and prosecution of Respondent in this matter.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Health, Board of Physical Therapy Practice, issue a final order: finding that Respondent violated section 486.125(1)(e) through a violation of rule 64B17-6.001(2)(f), as charged in Count II of the Administrative Complaint; imposing a fine of $8,000; placing Respondent's license on probation for a period of two years; and assess the costs of the Department's investigation and prosecution of Respondent.

DONE AND ENTERED this 18th day of August, 2021, in Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 18th day of August, 2021.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.