

COMMONWEALTH OF PENNSYLVANIA
PROFESSIONAL STANDARDS AND PRACTICES COMMISSION

DEPARTMENT OF EDUCATION,
Petitioner

v.

MARTIN BARACCA,
Respondent

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Docket No. DI-92-08

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SEP 05 1995

Professional Standards and
Practices Commission

DECISION AND PROPOSED FINAL ORDER

Jeffrey Thomsen, Esquire
Hearing Officer

Hearing Dates: February 13, 14, and 15, 1995
March 13 and 14, 1995
April 24, 1995

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INTRODUCTION

This saddening, difficult, and strongly contested disciplinary matter arose in 1992 when Notice of Charges were filed against the Respondent, Martin Baracca ("Respondent") by the Department of Education ("Department") with the Professional Standards and Practices Commission ("Commission"). Following a long series of procedural events, the matter eventually culminated in a six-day hearing resulting in over one thousand pages of testimony, the submission of numerous exhibits, and the presentation by counsel of a number of legal arguments regarding the admission of much of the evidence ultimately offered. Most of the legal and evidentiary issues were addressed by the undersigned hearing officer during the course of the proceedings. A number of these issues were left unresolved until there was a full review of the record and consideration of the briefs of counsel. This decision, therefore, will address not only the hearing officer's findings of fact and conclusions of law drawn from those findings, but also the unresolved legal and evidentiary issues as well as those initially resolved legal and evidentiary determinations for which the parties have requested reconsideration.

BACKGROUND¹

Respondent, a health and physical education teacher at the Interboro High School, was arrested on January 10, 1992 and charged with five counts of indecent assault, one count of corruption of minors, and one count of harassment after allegations were made against him by ██████████, a female student of the high school. Since that date, the Respondent has been suspended from his teaching duties in the Interboro School District. Respondent pled not guilty to the criminal charges, and has asserted throughout these disciplinary proceedings that the allegations made against him are untrue.

On or about March 31, 1992, the Department's Bureau of Teacher Preparation and Certification ("Bureau") received certified documentation from the Delaware County Court of Common Pleas indicating that the Respondent was charged with the above crimes. The Bureau immediately filed a complaint setting forth the allegations of Respondent's arrest and the filing of charges against him. This complaint was received into evidence at the hearing as Joint Exhibit No. 1. See Tr., p. 8.²

1. The matters set forth in this section are either matters of record or are undisputed by the parties.

2. "Tr." refers to the notes of testimony from the six days of hearing held before the undersigned hearing officer.

On April 20, 1992, the Department filed its initial Notice of Charges ("NOC")³ with the Commission alleging that the Respondent had been charged with crimes involving moral turpitude. The Department sought the suspension of Respondent's certification to teach pending the completion of the criminal case against Respondent and/or the Department's own investigation of the matter.

On May 18, 1992, Respondent filed an answer with new matter to the NOC denying the underlying allegations made against him that were the basis of the criminal charges. The Respondent also requested a hearing pursuant to then Section 12-1263 of the Teacher Certification Law, as amended, 24 P.S. § 12-1263.⁴

On or about May 22, 1992, the Interboro School District ("District") filed with the Commission a Petition to Intervene. The Commission ultimately granted the District leave to intervene by letter dated January 31, 1995, after Respondent withdrew his objections to the intervention with the provision that the District take no active role during the hearing itself. The District was thereafter represented during the six days of the hearing.⁵

3. The Notice of Charges filed on March 31, 1992 shall hereafter be referred to as "NOC." The Department's Amended Notice of Charges filed on June 14, 1994 shall hereafter be referred to as "Amended NOC." The Department's Second Amended Notice of Charges filed on January 25, 1995 shall hereafter be referred to as "Second Amended NOC."

4. In 1994, this section was renumbered as 24 P.S. § 2070.13.

5. The District was also represented at the pre-hearing conference held on January 12, 1995.

By letter dated June 2, 1992, the Commission appointed a hearing officer, the first, to preside over this matter. The hearing officer scheduled a pre-hearing conference for September 25, 1992, and a hearing for October 14, 1992. By affidavit dated July 30, 1992, however, Respondent agreed that "[d]uring the pendency of the ... disciplinary charges and criminal charges, I shall not be employed as a teacher, or in any other capacity, by any school or school district within the Commonwealth of Pennsylvania." Second Amended NOC, Paragraph 5; Answer to Second Amended NOC, Paragraph 5. Thereafter, the parties requested the hearing officer to postpone the hearing. The hearing officer agreed to continue the disciplinary action pending the outcome of Respondent's criminal charges.

Respondent's criminal case was set for trial in July, 1992. Prior to the commencement of the trial, however, the district attorney and Respondent addressed before the court the issue of whether the testimony of two other alleged victims -- ██████████ and ██████████ -- was admissible. The court ruled that such testimony was not admissible. The district attorney appealed this ruling, which had the effect of postponing the trial. The undersigned hearing officer is unaware of the results of the district attorney's appeal.

The issue appears to have been rendered moot, however, when the Respondent entered an Accelerated Rehabilitative Disposition Program ("ARD") on June 22, 1993 by agreement of the Respondent and the district attorney. The Respondent

successfully completed the ARD program on June 22, 1993, and the criminal charges against the Respondent were thereafter dismissed.

On June 14, 1994, however, the Department filed its Amended NOC with the Commission seeking the revocation of Respondent's certification to teach based upon allegations of immoral, intemperate, and cruel conduct. The Respondent filed an answer with new matter on July 8, 1994, again denying the allegations.

By letter dated November 8, 1994, the Commission appointed the undersigned hearing officer to resume the duties vacated by the original hearing officer. A pre-hearing conference was scheduled by the hearing officer for December 19, 1994 and later rescheduled for January 12, 1995. Pursuant to the hearing officer's instructions, the parties submitted pre-hearing statements setting forth summaries of proposed evidence and the identification of potential witnesses, exhibits, and issues of law.

At the pre-hearing conference, the hearing officer discovered that the Department was presenting its case against the Respondent based not only upon the allegations of [REDACTED] whose allegations led to the criminal charges against the Respondent, but also upon the allegations of four other students who were allegedly victimized by the Respondent over a period of

years prior to the assaults on ██████████.⁶ The Respondent alleged that this was the first time he became aware that the Department was proceeding against him on allegations made by students other than ██████████. It was determined by the hearing officer that the Department should set forth with particularity in its written charges against Respondent the allegations of the other four alleged victims as it had with respect to ██████████'s allegations. Therefore, the hearing officer directed that the Department file a Second Amended NOC detailing these additional charges. The Department filed its Second Amended NOC on January 25, 1995.

The Respondent answered the Second Amended NOC on January 26, 1995 denying all allegations made against him. The Respondent also filed new matter which alleged, among other things, that the Department was "barred from presenting evidence of any alleged misconduct other than that which relates to [Christina]" based upon "reasons set forth in the Memorandum of Law attached" to the new matter. The Respondent's Memorandum of Law asserted that the Department's plan to proceed with evidence of misconduct against any student other than ██████████ (collectively "Additional Students") was barred by the doctrine of laches.⁷

6. These students are ██████████ (phonetically, "████████"), ██████████, ██████████, and ██████████.

7. It should be noted that no legal conclusion is being made in this summary of background information. A legal argument subsequently arose between the parties concerning the effect and
(continued...)

The Department filed an answer to Respondent's new matter, and the Respondent thereafter filed a Supplemental Memorandum of Law stating that the Department's charges involving the Additional Students was barred by a statute of limitations. The Department filed a responsive memorandum arguing that Respondent had waived any defense under a statute of limitations.

The hearing commenced in this matter on February 13, 1995 at the Delaware County Court House in Media, Pennsylvania. Prior to the opening of the Department's case, legal argument was held before the hearing officer concerning the Respondent's laches and statute of limitations defenses which the Respondent raised against the proposed testimony of the Additional Students. At the conclusion of the argument, and following a recess, the hearing officer ruled that the "statute of limitations" set forth at 24 P.S. § 2070.9(a) did not bar the Department from presenting evidence concerning the Additional Students, but that the laches defense was still very much available to the Respondent with regard to this evidence. Because the laches defense is one which concerns factual findings, however, the hearing officer determined that evidence concerning that defense could be presented by both sides during the course of the hearing with a ruling to be made after all evidence has been received. Therefore, testimony from and concerning the Additional Students was presented during the hearing with the understanding that some

7. (...continued)
extent of Respondent's new matter defenses, which argument will be discussed fully at a later point in this Decision.

or all of this testimony could be excluded under the doctrine of laches. The hearing officer's ruling upon the admissibility of this testimony, in view of the laches defense, shall be made in this Decision.

Testimony was presented before the hearing officer in this matter on February 13, 14, and 15, 1995; March 13 and 14, 1995; and April 24, 1995. The Department offered the testimony of [REDACTED], [REDACTED], [REDACTED], [REDACTED], [REDACTED]'s father, [REDACTED], [REDACTED], [REDACTED]'s sister, [REDACTED]'s mother, the Interboro High School principal at the time of the alleged occurrences, the Superintendent of the school district, and the rebuttal evidence of William. The Respondent offered the testimony of six fellow teachers, the school nurse, the Respondent himself, Detective Herbert King of the Criminal Investigation Division of the Delaware County District Attorney's Office, and eight character witnesses.

Numerous exhibits were also offered into evidence during this time. The hearing officer ruled upon the admissibility of most of these exhibits during the course of the hearing and reserved his ruling on others pending a review of the record and/or applicable law. Those additional rulings shall be set forth in this Decision. Further, issues concerning the admissibility of certain character evidence were raised during the latter part of the proceedings. The Department desires that the hearing officer reconsider his ruling with regard to those

issues. Therefore, this matter will also be addressed once more in this Decision.

At the conclusion of the hearing, a briefing schedule was set, which was later modified to grant both parties brief extensions. Further, the hearing officer entered an order which made corrections to the official transcript which were based upon typographical errors identified principally by the Department and also by the Respondent. The hearing officer's further review of the transcript indicates that the transcript contains yet more errors, but none which have any major or minor impact upon the proceedings or the information set forth in the transcript.

FINDINGS OF FACT

Background

1. The Respondent holds an Instructional II teaching certificate endorsed in Driver Ed-Safe Living issued in February, 1973, and a permanent teaching certificate endorsed in Health and Physical Education issued in September, 1966. Both certificates were issued by the Commonwealth of Pennsylvania, Department of Education. (Second Amended NOC, Paragraph 1; Answer to Second Amended NOC, Paragraph 1.)

2. The Respondent was a health and physical education instructor in the Interboro School District for twenty-eight and one-half years. (Tr. pp. 736, 816, 845-846, 900; Answer to Second Amended NOC, New Matter, Paragraph 1.)

3. The Respondent has been married for thirty-four years to a woman who is herself a second grade teacher in the same school district. Respondent has coached basketball, football, and baseball at the Interboro High School. He also ran the intramural program, taught evening school, and was the head of the physical education department at the high school. He organized the faculty Christmas party at the high school for over thirteen years. He is a member of a local church and is godparent to five children. Respondent and his wife are childless because of a health condition. (Tr. pp. 735-739.)

4. Throughout his tenure as a high school teacher in the Interboro School District, the Respondent has received satisfactory performance ratings. Prior to the instant proceedings, no action was taken to suspend or revoke his teaching certificate. (Stipulation of parties dated March 13, 1995, Paragraph 1.)

5. The Respondent overall enjoyed an excellent reputation in his community. Although Respondent was limited to presenting only eight character witnesses during the hearing, as many as ninety-four individuals were identified by Respondent as available to testify as to his good character and reputation. Further, a large number of people, including students and faculty, signed petitions which were circulated on his behalf following his arrest and suspension of his teaching duties. (Tr. pp. 478, 705-706; Exhibits D-29, D-30, D-31, D-32.)

6. In 1991, during the 1991-92 school year, the Respondent sexually assaulted a high school senior, [REDACTED], on five separate occasions. (Tr. pp. 222-262, 933.)

7. In 1991, during the 1991-92 school year, the Respondent inappropriately touched a high school freshman, [REDACTED], during health class discussions of sexuality. (Tr. pp. 145-158.)

8. During the 1989-90 school year, the Respondent sexually assaulted a high school senior, [REDACTED], in the wrestling room of the high school. (Tr. pp. 173-190.)

9. During the 1988-89 school year, the Respondent sexually assaulted [REDACTED] in the kitchen of the Interboro High School. (Tr. pp. 65-89.)

10. During the 1980-81 school year, the Respondent sexually assaulted [REDACTED] during a "Back-to-School Night" at the Interboro High School. (Tr. pp. 9-22.)

[REDACTED]

Equipment Room Assault No. 1

11. During the Fall term of the 1991-92 school year, [REDACTED] was a student in the Respondent's second period, Tuesday/Thursday physical education class. (Tr. pp. 220, 739; Exhibit D-3.)

12. Sometime before November 1, 1991, while [REDACTED] was playing volleyball during gym class, the Respondent called

██████████ over to him and told her that he needed to talk to her about her gym grades. The Respondent gave ██████████ the keys to the equipment room and told her to go over to the equipment room, which was on the opposite side of the gym from where ██████████ was playing volleyball with her class, and to wait for him there. (Tr. pp. 222-225, 936.)

13. At the time of this incident, the gym was divided into three sections, which could therefore accommodate three different activities at once. The gym was divided in this manner by walls which could retract but which had doors to allow access into the other created sections of the gym. At the time of this incident, ██████████ was playing with her class in the "first" section of the divided gym nearest the weight room. The equipment room was adjacent to the "third" section of the gym on the opposite side, and therefore to access the equipment room from the "first" section of the gym, one would pass through the "middle" and "third" sections of the gym. (Tr. pp. 223-224, 286-287.)

14. ██████████ passed through the "middle" and "third" sections of the gym towards the equipment room and waited for the Respondent there. In the "third" section of the gym, ██████████ saw a fellow student, ██████████, sitting alone wearing "street" as opposed to gym clothes and reading her books. There were no other individuals in the "third" gym. ██████████ asked ██████████ to wait in the third section of the gym because ██████████ felt

nervous. ██████ agreed to wait for ██████. (Tr. pp. 225-226, 288-291, 366-368; Exhibit PDE-8.)

15. The Respondent came into the "third" gym, approached ██████, asked what she was doing, and told her to report to her gym teacher, Mr. Scammuffa, who was conducting his class in the "middle" gym. (Tr. pp. 226-227, 763, and 885).

16. The Respondent entered the equipment room behind ██████, pulling the door to the equipment room partially closed. The Respondent talked to ██████ about her grades, noting that she was failing his gym class, and asked: "What are we going to do to get these grades up?" (Tr. pp. 227, 937.)

17. The Respondent then pulled ██████ over to him and forced his tongue into her mouth. (Tr. pp. 227-228.)

18. ██████ tried to stop the Respondent by backing away. She was frightened and did not scream or yell. (Tr. pp. 228-229.)

19. The Respondent and ██████ were alone in the equipment room for only a couple of minutes. (Tr. p. 229).

20. When ██████ left the equipment room, ██████ was still sitting in the "third" section of the gym. ██████ saw ██████ leave the equipment room visibly upset, but ██████ did not tell her what had transpired at that time or any other time. (Tr. pp. 229-230, 370-372, 376-377.)

21. ██████ did not report this incident because she was frightened, astonished that it occurred, and did not wish to say anything to anyone about it. (Tr. pp. 230-231, 935.)

22. The Respondent confirms that he asked ██████████ to go into the equipment room, that he saw ██████████ and spoke with her, that he discussed ██████████'s grades in the equipment room, and that ██████████ left the room upset, but only as a result of the discussion. Respondent testified that he sent ██████████ to the equipment room only to get a "soft-touch" volleyball, argues that the incident occurred on November 7, 1991 instead of before November 1, 1991, and of course denies that he sexually assaulted ██████████. (Tr. pp. 761-766; Respondent's Proposed Findings of Fact Nos. 38-41.)

23. The hearing officer finds the testimony of ██████████ regarding this incident to be credible and the testimony of the Respondent regarding this incident to be not credible, except of course to the extent that the Respondent agrees that he sent ██████████ to the equipment room, was alone with her there, and confirmed the presence of ██████████ in the "third" gym.

Equipment Room Assault No. 2

24. Approximately two weeks after the Respondent's first assault on ██████████, the Respondent again told ██████████ during her gym class to go to the equipment room. (Tr. pp. 233, 937.)

25. The Respondent lead ██████████ to the equipment room where, once inside, he grabbed her, forcibly kissed her with his tongue, and fondled her buttocks, all against her will. (Tr. pp. 234-235, 937.)

26. ██████████ was alone with the Respondent inside the equipment room for only a couple of minutes. (Tr. p. 236.)

27. ██████████ did not report this attack after it occurred. (Tr. p. 236.)

28. The Respondent denies that this episode occurred in any way, and argues that it could not have occurred because of the unavailability of an opportunity for Respondent to be alone with ██████████ during the applicable time frame. (Tr. pp. 768, 770-771.)

29. The hearing officer finds the testimony of ██████████ to be credible as to this matter, and the testimony of the Respondent to be not credible, and his argument unpersuasive. (See Discussion.)

Weight Room Assault No. 1

30. Around Thanksgiving, 1991, and during ██████████'s gym class, the Respondent again approached ██████████ and told her to go to the weight room adjacent to the "first" section of the gym. (Tr. pp. 237, 937.)

31. Once inside the weight room, the Respondent closed the door and told ██████████ that she was going to fail gym class unless she got her grades up. The Respondent asked ██████████ what they were going to do about the situation. The Respondent then pulled ██████████ to him and began forcing his tongue into her mouth, kissed her mouth and neck, and fondled her buttocks. (Tr. pp. 238-239, 938.)

32. The Respondent then told ██████████ that what had occurred was their secret and that she should not say anything to anyone or else they would both be in trouble. (Tr. p. 238.)

33. ██████████ was alone with the Respondent inside the weight room for approximately two minutes. (Tr. p. 241.)

34. ██████████ did not report this assault after it occurred, because she was afraid she would get into trouble and/or fail gym. (Tr. p. 239.)

35. The Respondent denies that this episode occurred in any way and argues that it could not have occurred at all because of the unavailability of an opportunity for Respondent and ██████████ to be alone during the applicable time frame. (Tr. p. 771.)

36. The hearing officer finds the testimony of ██████████ regarding this incident to be credible and the testimony of Respondent to be not credible and his argument unpersuasive. (See Discussion.)

Health Room Assault

37. Approximately one week following the weight room assault, the Respondent came to ██████████'s study hall and asked Mr. John Trush, ██████████'s study hall teacher, to release ██████████ from study hall so that she could make up a gym class. (Tr. pp. 242, 301-302, 774, 870-872, 875-877, 938, 1080, 1088; Joint Exhibit No. 2.)

38. The Respondent escorted ██████████ upstairs to the health room on the promise that she was going to make up her gym class by helping him staple papers for his health class. (Tr. pp. 243-244, 354, 774.)

39. Once inside the health room, ██████████ began stapling papers for the Respondent's health class. (Tr. pp. 244-245.) The door to the health room was closed. (Tr. p. 246.)

40. The papers that ██████████ was stapling were health class work sheets related to sexuality and sexually transmitted diseases. (Tr. pp. 245, 775-776; Exhibit D-13.)

41. While ██████████ was stapling the health papers, the Respondent engaged ██████████ in a general discussion about her family. Specifically, he asked ██████████ whether her father lived with her, who she lived with at home, whether she got along with her parents, and how close she was with her parents. (Tr. pp. 245, 354.)

42. While ██████████ continued to staple papers, the Respondent opened a health book and showed ██████████ diagrams of a vagina and a penis. (Tr. pp. 244-245.) The Respondent began talking about masturbation and asked ██████████ if she thought women masturbated as much as men. The Respondent also showed ██████████ a graph describing women's sexual responses. (Tr. pp. 245, 355-356, 938.)

43. Also, the Respondent told ██████████ that he had a "Progress Note" concerning her that would be sent to her parents

informing them that ██████████ was failing gym class. (Tr. pp. 244, 246.)

44. The Respondent asked ██████████ what they were going to do about this "Progress Note." (Tr. p. 246.)

45. The Respondent then grabbed ██████████ by the shoulders, pulled her close to him, and forced his tongue into her mouth, kissing her. (Tr. pp. 247, 354-356, 938.)

46. ██████████ pulled away from the Respondent. He stopped kissing her and said to ██████████: "If you keep up the good work, you may get an 'A'." (Tr. p. 247.)

47. The Respondent then handed ██████████ the "Progress Note" and told her that she could tear it up. ██████████ tore up the "Progress Note" and threw it in the trash can. The Respondent then told ██████████ that she could leave the health room. (Tr. pp. 247-249, 938.)

48. ██████████ was alone in the health room with the Respondent for approximately thirty minutes. (Tr. p. 250.)

49. ██████████ did not immediately report this assault. (See Tr. pp. 309-311.)

50. The Respondent testified that he did come to ██████████'s study hall to remove her to make up a gym class by stapling papers for his health class, and that they were alone in the health class room together while she stapled papers. The Respondent denies, however, that he showed her diagrams and graphs from the health text or discussed masturbation or assaulted her. On the contrary, the Respondent testified that

██████████ became a little disconcerted after reading the papers she was stapling and after thumbing through the ninth-grade health text and seeing illustrations of sexual organs, but that she left the room in good spirits because she had completed a gym make-up. (Tr. pp. 774-779.)

51. The hearing officer finds the testimony of ██████████ regarding this incident to be credible and the testimony of the Respondent concerning this incident not to be credible except of course to the extent that the Respondent confirms that he took ██████████ out of study hall to the health class room to staple papers for his health class.

Weight Room Assault No. 2

52. On December 13, 1991, the Respondent sent a note to ██████████'s study hall requesting that ██████████ be excused from study hall so that she could make up a gym class. (Tr. pp. 251, 781.)

53. Mr. Trush, ██████████'s study hall teacher, directed ██████████ to report to the Respondent in the gym for a gym make-up. (Tr. p. 251.)

54. ██████████ entered the gym and asked ██████████, a fellow student who was in the gym, to find the Respondent. (Tr. p. 253.) ██████████ then went into the office, located in the boys' locker room, and told the Respondent that ██████████ was outside in the gym. (Tr. pp. 253, 781.)

55. The Respondent went into the gym, and he instructed ██████████ to go to the weight room. The Respondent accompanied her there. (Tr. p. 254.)

56. The Respondent unlocked the door to the weight room. ██████████ and the Respondent went into the weight room. The Respondent then closed and locked the door from the inside of the room. (Tr. pp. 254, 934.)

57. ██████████ sat down on a weight bench that was near and perpendicular to the door of the weight room. (Tr. p. 254.) ██████████ sat on one side of the weight bench with her knees pointing towards the door of the weight room, her left knee touching the bench. (Tr. pp. 258, 320-323.) ██████████ was looking down at one of her books while the Respondent was inside a smaller room within the weight room for approximately five minutes. (Tr. p. 255.)

58. The Respondent came out of the smaller room, knelt by ██████████ from behind on the same side of the weight bench as she was sitting, and began breathing on her neck. (Tr. pp. 255-257.)

59. The Respondent then grabbed ██████████ by her shoulders to stand her up. ██████████ stood up. The Respondent turned ██████████ towards him, forcibly grabbed her body, and aggressively began kissing her with his tongue. The Respondent grabbed ██████████'s buttocks and tried to remove her jacket. (Tr. pp. 256-257, 259, 934.)

60. The Respondent was sweating as he said to ██████████: "You are getting me all hot and bothered. Do you do this to all your teachers?" (Tr. pp. 256-257.)

61. With his arms around ██████████, the Respondent bent his knees and pushed his pelvic area against ██████████'s pelvic area. (Tr. pp. 256-258, 935.)

62. The Respondent was wearing sweat pants, and ██████████ could feel the Respondent's erect penis through his sweat pants as he pushed against her pelvic area. (Tr. p. 260.)

63. The Respondent was very aggressive throughout this assault. ██████████ was very frightened -- more frightened than she had been during the other assaults. (Tr. p. 259.)

64. ██████████ tried to push the Respondent away from her. (Tr. p. 261.) The Respondent stopped his actions. ██████████ then asked if she could leave. The Respondent replied "Yes; this is our secret, remember." (Tr. p. 261.)

65. ██████████ was alone with the Respondent in the weight room for approximately ten minutes. (Tr. p. 260.)

66. The Respondent testified that he was alone for a period of time with ██████████ in the weight room on December 13, 1991 and agreed that ██████████ came to the gym that morning to make up a gym class. The Respondent testified, however, that he took ██████████ to the weight room for the gym make-up only because she did not have gym clothes with her; that he did not want other students to see him allow a student to make up a class without wearing gym clothes and thus took her to the isolation of

the weight room; that he instructed ██████████ to jump rope in the weight room and then left the weight room; that when he returned to the weight room he found ██████████ jumping rope in a lackadaisical manner; that he became annoyed at her behavior and orally chastised her, indicating that he would extend to her no more "breaks"; and that ██████████ left the weight room angry, sad, and "pouty" as a result. (Tr. pp. 784-787, 914.)

67. The hearing officer finds the testimony of ██████████ regarding this incident to be credible and the testimony of the Respondent regarding this incident not to be credible except to the extent that it confirms that Christina was summoned to the gym to make up a gym class and that the Respondent took ██████████ to the weight room and was alone inside with her there for a period of time.

Events Following the Assault in the Weight Room

68. ██████████ left the weight room by unlatching the lock on the door and then went to the nurse's office. (Tr. p. 261.)

69. ██████████ told an older woman in the nurse's office that she was sick. The nurse gave her some medication but would not allow her to call home. (Tr. p. 262; Exhibit PDE-12.)

70. ██████████ went to the guidance office and asked a woman in there if she could use the telephone to call home. (Tr. p. 263.) The woman allowed ██████████ to use a telephone, and

██████████, thereupon called her sister, ██████████. (Tr. pp. 263, 420-421.)

71. ██████████ asked her sister if she could come home. ██████████ told ██████████ that she should stay at school. ██████████ again told ██████████ that she wanted to come home. ██████████ again said no, but asked if anything was wrong. After questioning ██████████ repeatedly, ██████████ asked ██████████ if a teacher had hurt her. ██████████ said yes. (Tr. pp. 263-264, 420-421.)

72. ██████████ told ██████████ that she would come get her, but ██████████ said that she had her own car at the school. ██████████ told ██████████ to leave school and drive to ██████████'s apartment. (Tr. pp. 264, 421.)

73. ██████████ left school and drove to her sister's apartment, which is approximately five to ten minutes away by car. (Tr. pp. 264, 422.)

74. ██████████ opened her apartment door when ██████████ arrived. ██████████ was crying and ran to ██████████'s bathroom crying and saying that she could still "smell him" on herself. (Tr. pp. 264-265, 403, 423.)

75. ██████████ put powder on her jacket because it smelled like the Respondent, removed her shirt, washed her hands and face, and rinsed out her mouth in an attempt to get the smell of the Respondent off of her. (Tr. pp. 265, 423-424.) ██████████ then gave ██████████ another shirt to wear. (Tr. p. 423. See also Tr. p. 403.)

76. ██████████ continued to cry after she came out of Dawn's bathroom. ██████████ sat on ██████████'s couch curled up in a fetal position and cried. ██████████ was very visibly upset. (Tr. pp. 424-426.)

77. ██████████ asked ██████████ what had happened, and ██████████ replied that a teacher had touched and kissed her and that she could not bear it any longer. (Tr. pp. 265-266, 423-425.)

78. ██████████ told ██████████ that she was going to call their mother. Over ██████████'s objections, ██████████ called their mother, ██████████, who then came over to the apartment. (Tr. pp. 266, 400, 425, 426.)

79. When ██████████ arrived, ██████████ was sitting on the couch "bunched up" in a fetal position and crying. (Tr. p. 400.) ██████████ was visibly emotionally upset and frightened. (Tr. pp. 403-404.)

80. ██████████ told ██████████ and ██████████ that the Respondent had assaulted her. (Tr. pp. 400, 423-424.)

81. ██████████ reported the abuse to her sister because she was frightened of the Respondent and could not take his actions any longer. (Tr. p. 266.)

82. ██████████ called the police after ██████████ stated that she was assaulted by the Respondent. (Tr. pp. 266, 401, 427.)

83. The Glennolden Police responded to the call and came to ██████████'s apartment; but because the assaults occurred at

the Interboro High School, the Glennolden Police called the Prospect Park Police to take the report. (Tr. pp. 266, 402, 428.)

84. The Prospect Park Police arrived, and on that same day, December 13, 1991, ██████████ reported to the Prospect Park Police that the Respondent had sexually assaulted her. (Tr. p. 267.)

85. ██████████ was interviewed by Detective Herbert King of the Criminal Investigation Division of the Delaware County District Attorney's Office ("CID"). (Tr. pp. 334-335, 927-943.)

86. ██████████ told Detective King that the Respondent had sexually assaulted her on five occasions at the times and in the manner set forth in these Findings of Fact. (Tr. pp. 933-938.)

Effect of Abuse on ██████████

87. ██████████ did not return to the Interboro High School for academic instruction after December 13, 1991 because of the incidents involving the Respondent. (Tr. pp. 268-269.)

88. ██████████ was evaluated by a psychiatrist who recommended that she receive homebound instruction. (Tr. pp. 335-336.)

89. ██████████ completed her senior year on homebound instruction and graduated high school. (Tr. pp. 268-269, 331-332, 406, 499.)

90. As a result of the Respondent's assaults upon her, ██████████ had problems sleeping (Tr. pp. 270, 428), and she experienced nightmares (Tr. p. 270), bed-wetting (Tr. pp. 269, 407), fear of being alone, and fear of going out by herself (Tr. pp. 269, 407, 428-429).

91. After making the allegations against the Respondent, ██████████ received "crank" telephone calls at home, and anonymous notes attacking ██████████, and her family were written to school board members and circulated throughout the school and community. (Tr. pp. 344, 347-348.)

Subsequent Action Taken Against the Respondent

92. On Friday, December 20, 1991, the Prospect Park Police notified the Interboro School District that the parents of a female student alleged that a high school teacher sexually harassed their daughter. (Exhibit A to Stipulations of Fact and Testimony dated March 13, 1995 (hereafter "Exhibit A, 3/13/95").)

93. On Friday, January 3, 1992, ██████████ met with Nicholas Cianci, principal of the Interboro High School, and Jack Curtin, assistant principal of the high school, and informed them that a high school teacher had sexually assaulted her daughter, ██████████. (Exhibit A, 3/13/95.)

94. On Tuesday, January 7, 1992, Detective King of the CID met with school district administrators and informed them that the Respondent was the teacher involved in the charges of sexual abuse against ██████████. (Tr. p. 497; Exhibit A,

3/13/95.) Following the meeting with Detective King, Superintendent Edmund Sachetti directed Mr. Cianci to relieve the Respondent of his teaching duties. (Tr. pp. 442, 497; Exhibit A, 3/13/95.)

95. Mr. Cianci waited until the Respondent was apart from his students and then informed the Respondent of the charges made against him. (Tr. p. 442.) Mr. Cianci directed the Respondent to report to the assistant superintendent in the administration building. (Tr. pp. 442, 473.)

96. The Respondent was visibly upset after being informed that a student had made charges against him. (Tr. p. 443.)

97. On Wednesday, January 8, 1992, and Thursday, January 9, 1992, the Respondent reported directly to the assistant superintendent in the school district administration building. (Tr. pp. 498, 820; Exhibit A, 3/13/95.)

98. On Friday, January 10, 1992, the Respondent was arrested and charged with five counts of indecent assault, one count of corruption of minors, and one count of harassment. (Tr. p. 820.) On this date, the Respondent was also suspended from his teaching duties in the Interboro School District. (Tr. p. 516; Exhibit A, 3/13/95.)

99. The criminal case against the Respondent proceeded and resolved in the manner outlined in the "Background" section of this Decision.

██████████

100. During the 1991-92 school year, ██████████ was a freshman at the Interboro High School. (Tr. pp. 146-147.)

101. ██████████ was a student in the Respondent's ninth grade health class. (Tr. p. 147.) The ninth grade health curriculum included materials dealing with sexual education. (Tr. pp. 147, 777, 807, 840.)

102. In September or October, 1991, ██████████ became uncomfortable in the Respondent's health class when the Respondent moved ██████████'s hair aside and rested his hand on her shoulder. (Tr. pp. 147-148, 113, 449.)

103. Material from the health text regarding sexuality was read aloud in class by the students. At times, the boys in the class would laugh and make jokes and comments. (Tr. pp. 147-150, 113.)

104. In January, 1992, ██████████'s father questioned ██████████ about what she was learning about sex education. (Tr. pp. 113, 118, 120, 151.)

105. ██████████ told her father that the Respondent's health class made her nervous because it concerned a "touchy subject." (Tr. pp. 151, 153.)

106. ██████████ also told her father that she was uncomfortable when the Respondent touched her hair and shoulder and that he gave her a funny feeling. (Tr. pp. 153-156.)

107. On the Monday following his conversation with ██████████, ██████████'s father contacted the high school principal,

Mr. Cianci, and made an appointment to meet with Mr. Cianci and the Respondent. (Tr. pp. 113, 449.)

108. ██████████'s father went to the high school on January 10, 1992 to meet with Mr. Cianci and the Respondent. When ██████████'s father arrived, however, he was told that the Respondent had been suspended from his teaching duties. (Tr. pp. 114, 449.)

109. ██████████'s father did, however, meet with Mr. Cianci and an assistant principal to discuss his complaint concerning the Respondent. ██████████'s father told these school officials that the Respondent had inappropriately touched ██████████ during a health class. (Tr. pp. 114, 449.)

110. ██████████'s father also stated that should the Respondent resume his duties, he wanted his daughter removed from the Respondent's health class. (Tr. pp. 450-451.)

111. ██████████ first related her experiences to the Department in August, 1994. (Tr. pp. 125-134, 157, 164.)

112. The Respondent contends that he never inappropriately touched ██████████. (Tr. p. 808.)

113. The hearing officer finds, however, that ██████████'s testimony concerning the episode where the Respondent moved her hair aside and rested his hand on her shoulder to be very credible.

██████████

114. ██████████ is a 1990 graduate of Interboro High School. (Tr. p. 174.)

115. The Respondent was one of ██████████'s high school gym teachers. (Tr. pp. 174-175.)

116. The Respondent would occasionally request that ██████████ write him a "love note" when she did not want to participate in class. Upon submitting a "love note," ██████████ would be excused from participating in her gym class that day. (Tr. pp. 176-177, 206, 209.)

117. The "love notes" consisted of nothing more than sayings such as "Marty, you're so cute (or sexy)." (Tr. pp. 176, 206.)

118. ██████████ was not offended by this process; rather, it was done humorously. (Tr. p. 206.)

119. Near the end of ██████████'s senior year, while ██████████ was making up a gym class after school, the Respondent asked her to help him get jump ropes from the wrestling room which was up the stairs from the gym area. (Tr. pp. 179-180, 184, 210.)

120. The Respondent told ██████████ that if she helped the Respondent get the jump ropes, then she could go home and not have to make up the gym class. (Tr. p. 180.)

121. The Respondent led ██████████ upstairs to the wrestling room. No one else was present in that remote area of the gym. (Tr. pp. 180-183.)

122. The Respondent unlocked the wrestling room door and allowed ██████████ to enter the room in front of him. The wrestling room was to ██████████'s left and an equipment room with a locked door was to ██████████'s right as she stood in the now opened doorway to the wrestling room. (Tr. pp. 180-183, 204.)

123. There are no windows in this area of the gym. (Tr. p. 182; Exhibits PDE-1, PDE-2.)

124. The Respondent opened the locked equipment room door, and they entered the equipment room, which was dark. As ██████████ entered this room, she began to feel for a light switch on the wall. The Respondent then came up behind her, grabbed her, pulled her close to him, fondled or attempted to fondle her breasts, and attempted to kiss her. (Tr. pp. 180-183, 204-205.)

125. ██████████ found the light switch and flipped it on. She pushed through the Respondent's arms, grabbed a jump rope, and ran back down the stairs. (Tr. pp. 180, 205, 213.) ██████████ then ran to the girl's locker room and went home. (Tr. pp. 180, 205.)

126. ██████████ was alone with the Respondent in this wrestling room/equipment room area for only a short time. (Tr. pp. 183, 205.)

127. ██████████ did not report what happened in the wrestling room/equipment room to her parents or any school official. (Tr. pp. 184, 215-216.)

128. ██████████ did, however, tell a friend -- a fellow student -- about the incident on the way home from school the day it occurred. (Tr. pp. 185, 205.)

129. In 1992, ██████████ provided an account of the incident to the Delaware County District Attorney's Office during that office's investigation and prosecution of the aforesaid criminal charges against the Respondent. (Tr. pp. 186-189.)

130. ██████████ first related her experiences to the Department during the summer of 1994. (Tr. pp. 189, 194-199.)

131. The Respondent denied that he acted towards ██████████ in the manner ██████████ described, albeit in a somewhat equivocal manner. (Tr. p. 791; see Discussion.)

132. The hearing officer, however, finds the testimony of ██████████ regarding both the "love notes" and the incident in the wrestling room/equipment room to be credible, and the testimony of Respondent denying these matters not to be credible.

██████████

133. ██████████ is a 1988 graduate of the Interboro High School. While a student at Interboro, ██████████ was involved in the band, the honor society, and the German club, and was the basketball team manager. (Tr. p. 64.) ██████████ is a college graduate and has also recently married. (Tr. pp. 63-64.)

134. The Respondent was ██████████'s high school gym teacher. (Tr. p. 65.)

135. ██████ returned to Interboro High School during her winter break from college in late December, 1988 or early January, 1989. (Tr. pp. 66, 97.)

136. ██████ returned to the school to watch a high school basketball game. Her then-boyfriend was a player on the high school team. (Tr. pp. 66, 69.)

137. The Respondent was working at the game by selling tickets to the game. (Tr. p. 67. See also Tr. pp. 440, 797, 799.)

138. ██████ greeted the Respondent when she saw him selling tickets. The Respondent put his arm around ██████ and gave her a kiss. They talked a few minutes about college and joked about the basketball team and its performance. (Tr. pp. 66-67.)

139. ██████ then went into the bleachers of the gym to watch the game. (Tr. p. 68.)

140. As the game approached half-time break, ██████ went out to the snack bar to get something to eat. (Tr. p. 69.) The Respondent came over to her and started talking to her and other students with her. (Tr. pp. 70, 99.)

141. The Respondent asked ██████ to help him get some things from the kitchen for the basketball team. (Tr. pp. 70-71.)

142. ██████ did not think the request unusual because she was the manager of the basketball team for the previous three

years and was accustomed to getting oranges and water for the team at half-time. (Tr. p. 71.)

143. ██████ and the Respondent went into the kitchen, ██████ going in first with the Respondent closing the doors behind. (Tr. pp. 71-73.)

144. Once inside the kitchen, the Respondent grabbed ██████ and pushed her against the wall with his large stomach. The Respondent also used one of his arms to hold one of ██████'s arms against the wall. (Tr. p. 73.)

145. The Respondent started to kiss ██████. ██████ said "No, no" and "No, please stop and let me go," while trying to push the Respondent away, but his weight rocked back against her. (Tr. pp. 73-74.)

146. As ██████ was pinned between the Respondent and the kitchen wall, the Respondent began fondling her body. The Respondent grabbed ██████'s breasts, buttocks, and crotch. (Tr. pp. 73-75.) The Respondent also forced his tongue into ██████'s mouth. (Tr. p. 74.)

147. While ██████ was still pinned against the wall, the kitchen door suddenly opened, and the Respondent turned around to see who was opening the door. As the Respondent turned, ██████ escaped by ducking out from under his arm. (Tr. p. 75.)

148. The Respondent told ██████ to come back because he still needed to talk to her. ██████ said no, and continued out of the kitchen returning to the gym. (Tr. pp. 75-76, 100.)

149. ██████ was alone in the kitchen with the Respondent for only a short period of time. (Tr. pp. 75, 101.) When ██████ returned to the gym, half-time was still in progress. (Tr. p. 76.)

150. ██████ did not report the attack to any of her friends or her parents. (Tr. pp. 76-78, 102-103.)

151. ██████ desired to forget about what had happened. (Tr. p. 107.)

152. During the summer of 1991, however, ██████ told her then-boyfriend, a police officer, about the Respondent's assault upon her. (Tr. pp. 79, 107.)

153. In 1992, ██████ learned that the Respondent was being charged with sexual misconduct and that the girl who had made the allegations was not being believed. (Tr. pp. 87-88.)

154. ██████ then decided that she wanted to come forward and report what happened to her. (Tr. pp. 82, 88.)

155. In 1992, ██████ provided an account of her experience involving the Respondent with the Delaware County District Attorney's Office as a part of that office's investigation and prosecution of the criminal charges made against the Respondent. (Tr. pp. 78-88.)

156. ██████ first related her experience with the Respondent to the Department during the summer of 1994. (Tr. pp. 89, 90-96.)

157. The Respondent denied that he ever assaulted ██████, albeit in a somewhat equivocal manner, and in fact

testified that he would not have even welcomed her presence following her graduation from high school because of a bitterness that arose, at least on the part of ██████, from an incident which occurred during a trip to Cancun that the Respondent organized for community members in 1988. (Tr. pp. 794-797. See Discussion.)

158. The hearing officer, however, finds the testimony of ██████ regarding the matter of the assault to be credible and the testimony of the Respondent regarding ██████'s bitterness about an incident occurring during the 1988 Cancun trip to be not credible. (See Discussion.)

██████████

159. ██████ is a 1978 graduate of the Interboro High School. (Tr. pp. 9-10.)

160. The Respondent was ██████'s high school gym teacher and a friend of her father's. (Tr. p. 10.) The Respondent signed ██████'s 1977 high school yearbook, wishing her luck with her high school boyfriend, ██████ and writing that "you owe me 15," which ██████ understood to mean that she owed the Respondent fifteen kisses. (Tr. pp. 19, 863-864.)

161. During the fall of 1980, ██████ returned to the Interboro High School to attend a "Back-to-School Night" with her parents, who wanted to attend because ██████'s brother was then in high school. (Tr. p. 11.)

162. Back-to-School Night at Interboro High School was a service the school provided to show parents what courses their children would be taking and where. (Tr. p. 11.)

163. ██████ attended the Back-to-School Night herself so that she could visit some of her former teachers, particularly, Mr. Rigby, Mr. Kennedy, and the Respondent. (Tr. pp. 11-12, 28-30. See also Tr. pp. 975-976.)

164. ██████ sat with her parents in the gym while the Respondent made a presentation to the assembled parents about the current school year's gym activities. (Tr. pp. 12, 30-32.)

165. After the presentation ended and the group of parents left, ██████ stayed behind to visit with the Respondent. (Tr. pp. 12, 34.)

166. ██████ talked with the Respondent while helping him put equipment into the weight room. (Tr. pp. 12-13, 34-36.) The Respondent locked the weight room while he and ██████ were inside the room. (Tr. pp. 13-14.)

167. While in the weight room, ██████ sat on a stationary bicycle and talked with the Respondent about her life, family, job, and break-up with her high school boyfriend. (Tr. pp. 12-13.) The two talked for perhaps thirty to forty-five minutes. (Tr. pp. 12-13, 34-36.)

168. During their conversation, the Respondent asked ██████ to come over to where he was standing on a wrestling mat. (Tr. p. 14.)

169. As [REDACTED] approached the Respondent, he grabbed [REDACTED] and pinned her against him with his arms. (Tr. pp. 14-15.)

170. The Respondent then put his face on [REDACTED]'s neck, began mumbling in her neck, and started to unbutton her shirt. The Respondent's legs were straddling [REDACTED]'s legs with his pelvic area very close to [REDACTED]'s pelvic area. (Tr. pp. 14-15, 42-43.)

171. [REDACTED] struggled, and the Respondent fell to the mat. [REDACTED] unlocked the door and ran from the weight room, crying and buttoning her shirt. (Tr. p. 15.)

172. [REDACTED] composed herself and found her father attending the presentation of one of her brother's other classes. [REDACTED] asked her father for change to call a girlfriend and told her parents that she was leaving the school to go out with this friend. (Tr. pp. 15-16, 45.)

173. [REDACTED] telephoned her friend who picked her up at the school. (Tr. pp. 16, 46.) [REDACTED] tearfully told her friend the details of the Respondent's attack. (Tr. pp. 16-17.)

174. [REDACTED] was very upset and embarrassed about what happened in the weight room and was afraid to tell her parents. (Tr. p. 17.)

175. [REDACTED] did, however, tell her parents about the assault. (Tr. pp. 17, 24.)

176. [REDACTED]'s father was outraged that the Respondent had assaulted his daughter. (Tr. pp. 17-18.) [REDACTED] asked her

father to allow her to handle the situation in her own way. (Tr. p. 18.)

177. Approximately four to six weeks after the assault, ██████ returned to the school to confront the Respondent personally. ██████ knew that the Respondent worked at basketball games, so she went to a game with the intention of confronting the Respondent about the attack. (Tr. pp. 17-18, 47-48, 61.)

178. ██████ confronted the Respondent under a stairwell near the gym. ██████ told the Respondent that her father was very upset and wanted him to stay away from ██████ and her family. The Respondent replied that ██████ was exaggerating and that she took what had happened the wrong way. (Tr. p. 18.)

179. In 1992, ██████ reported her experience with the Respondent to the Delaware County District Attorney's Office after seeing a newspaper account of ██████'s allegations against the Respondent. (Tr. pp. 19-20.)

180. ██████ first related her experience with the Respondent to the Department sometime between Thanksgiving and Christmas, 1994. (Tr. pp. 20, 51-53.)

181. ██████ travelled from her home in Florida to participate in the present disciplinary proceedings because it was important for her to testify concerning her incident with the Respondent. (Tr. p. 22.)

182. The Respondent denies that this incident occurred, and further argues that it could not have occurred because of the normal format of Back-to-School Nights which would

not allow him the time to visit with a former student as described by [REDACTED]. (See Respondent's Proposed Findings of Fact Nos. 144-145.)

183. The hearing officer, however, finds the testimony of [REDACTED] regarding the Respondent's assault upon and her subsequent confrontation of the Respondent to be very credible, and the denial of the Respondent to be not credible.

Other Relevant Facts

184. The Respondent was the team leader of the Health and Physical Education Department of the Interboro High School from 1988 until 1992. (Tr. p. 818.) As team leader, the Respondent was responsible for overseeing the teachers, scheduling, and files in his department and had extra free time from his normal teaching duties. (Tr. pp. 484, 570-571, 818.)

185. [REDACTED], [REDACTED], [REDACTED], [REDACTED], and [REDACTED] never met or talked with one another before these disciplinary proceedings, and at no point did they discuss their testimony with one another. (Tr. pp. 21-22, 89, 157-158, 189-190, 194, 270-271.)

CONCLUSIONS OF LAW

Substantive Issues

1. Section 5 of the Teacher Certification Law provides, in pertinent part, that the Commission shall discipline

any professional educator found guilty of immorality, intemperance, or cruelty. 24 P.S. § 2070.5(a)(11).

2. Immorality is a course of conduct which offends the morals of a community and is a bad example to the youth whose ideals a professional educator has a duty to foster and elevate. 22 Pa. Code § 237.3(a). See also Horosko v. School District of Mount Pleasant Township, 335 Pa. 369, 372, 6 A.2d 866, 868 (1939), cert. denied, 308 U.S. 553.

3. "Morals of a community," for purposes of the above definition, means the morals of the community in which the professional educator is employed. 22 Pa. Code § 237.3(b).

3. Intemperance is a loss of self-control or self-restraint, which may result from excessive conduct. 22 Pa. Code § 237.5. See also Belasco v. Board of Public Education of the School District of Pittsburgh, 87 Pa. Commonwealth Ct. 5, 10, 486 A.2d 538, 541 (1985), aff'd, 510 Pa. 504, 510 A.2d 337 (1986).

4. Cruelty is the intentional, malicious, and unnecessary infliction of physical or psychological pain upon living creatures, particularly human beings; or, as applied to the latter, the wanton, malicious, and unnecessary infliction of pain upon the body, or the feelings and emotions; abusive treatment; inhumanity; outrage. Caffas v. Board of the School Directors of Upper Dauphin Area School District, 23 Pa. Commonwealth Ct. 578, 582, 353 A.2d 898, 900 (1976). See also 22 Pa. Code § 237.7.

5. The Department has the burden of proving a disciplinary case against a professional educator by a preponderance of the evidence. 24 P.S. § 2070.13(c)(2); 22 Pa. Code § 233.13(e)(4)(ii); In re Westley Holmes, II, PSPC Docket No. DI-91-01 (May 26, 1992). See also Samuel J. Lansberry, Inc. v. Pennsylvania Public Utility Commission, 134 Pa. Commonwealth Ct. 218, 578 A.2d 600 (1990), appeal denied, 602 A.2d 863 (1991).

6. The Respondent's sexual assaults on [REDACTED] constitute immorality, intemperance, and cruelty as those terms are used in the Teacher Certification Law.

7. The Respondent's inappropriate touching of [REDACTED] constitutes intemperance as that term is used in the Teacher Certification Law.

8. The Respondent's sexual assault on [REDACTED] constitutes immorality, intemperance, and cruelty as those terms are used in the Teacher Certification Law.

9. The Respondent's sexual assault on [REDACTED] constitutes immorality, intemperance, and cruelty as those terms are used in the Teacher Certification Law.

10. The Respondent's sexual assault on [REDACTED] constitutes immorality, intemperance, and cruelty as those terms are used in the Teacher Certification Law.

11. The appropriate discipline for such conduct is the revocation of the Respondent's teaching certifications.

12. Because of the serious and abusive nature of the Respondent's actions, such discipline should be immediately

imposed to protect the health, safety, and welfare of the students of the Commonwealth. See 24 P.S. § 2070.15(b).

Procedural and Evidentiary Issues

13. The Department's Amended NOC very clearly did not provide the Respondent with adequate notice of the charges against him involving the Additional Students.

14. This lack of proper notice was cured when the Department filed its Second Amended NOC and the Respondent was granted an opportunity to delay the proceedings in order to prepare a defense against the additional charges.

15. The Respondent was therefore not prejudiced with respect to the issue of insufficient notice of the charges made against him based upon the allegations of the Additional Students.

16. "A proceeding to discipline a professional educator shall be initiated by the filing of a complaint with the department [of Education] by any interested party within one year from the date of the occurrence of any alleged action [involving, among other things, immorality, intemperance, or cruelty] or from the date of its discovery. If the alleged action is of a continuing nature, the date of its occurrence is the last date on which the practice occurred." 24 P.S. § 2070.9(a).

17. The Department is an "interested party" as defined by 24 P.S. § 2070.9(a).

18. The actions of the Respondent against the Additional Students and ██████████ constituted a course of conduct, and thus the action was one of a continuing nature which culminated in the assault upon ██████████ on December 13, 1991.

19. The Department did not obtain knowledge of the allegations of the Additional Students until 1994 and within one year of the filing of the Second Amended NOC.

20. The Department is therefore not barred under 24 P.S. § 2070.9(a) from filing charges involving the Additional Students although those charges stem from incidents which occurred more than one year prior to the filing of the Second Amended NOC.

21. This determination does not, however, prohibit the Respondent from asserting a proper laches defense with regard to the charges involving the Additional Students.

22. Laches is an equitable defense that would require the Respondent in this instance to establish that: (1) there was a delay; (2) the delay in taking actions was unjustified or unreasonable; and (3) the delay worked to the prejudice of the Respondent's rights. Leedom v. Thomas, 473 Pa. 193, 373 A.2d 1329 (1977).

23. When asserted against the Commonwealth, the burden of the party asserting the laches defense is especially heavy. Weinberg v. Commonwealth, State Board of Examiners of Public Accountants, 509 Pa. 143, 501 A.2d 239 (1985).

24. The delay of the Additional Students in bringing forth their allegations against the Respondent is not unreasonable under the circumstances.

25. The Respondent has failed to demonstrate actual prejudice because of the delay between the date of the alleged incidents the bringing of formal charges against the Respondent.

26. The Department is estopped from raising objections to the introduction of the Respondent's character evidence.

RULINGS ON ADMISSION OF EXHIBIT EVIDENCE

Numerous exhibits were offered into evidence during the course of the hearing by both parties. On the last day of the hearing, the Respondent requested that his exhibits be moved into evidence. Rulings were made on these motions by the hearing officer after the position of the Department was heard. Rulings on some exhibits were held in abeyance until the hearing officer could make a full review of the record and/or applicable law. Also on the last day of the hearing, the exhibit evidence moved into the record by the Department was reviewed.

This section shall summarize the evidence admitted into the record and make rulings on those items of evidence not ruled upon during the course of the hearing itself.

Respondent's Exhibits

Admitted into evidence during the course of the hearing were Respondent's Exhibits: D-1, D-1A, D-2, D-3, D-4, D-6, D-6A, D-7, D-7A, D-8, D-9, D-10, D-10A, D-11, D-12, D-13, D-15, D-16, D-18, D-19, D-20, D-22, D-25 (as included in the Department's PDE-10), D-26, D-27, D-29, D-30, D-31, D-32, D-33, D-34. Further, from a Stipulation of Facts between the parties dated March 13, 1995 were admitted into evidence Exhibits A, B, and F.

Not ruled upon during the course of the hearing were Respondent's Exhibits D-5, D-14, D-17, D-35, D-36, D-37, and from the March 13, 1995 stipulation: Exhibits D and E. The Respondent subsequently withdrew his motion to place into evidence Exhibit D-37. See Brief of Respondent, p. 18, n. 4.

The hearing officer's rulings on these open matters are as follows:

1) Exhibit D-5, the Student Maintenance Record for [REDACTED] for the school year 1991-92, is ADMITTED. The Department had stipulated to the authenticity of this document on March 13, 1995.

2) Exhibit D-14, a purported Interboro School District Internal Correspondence Re: Homebound Instruction Procedure dated June 27, 1986, is NOT ADMITTED. No evidence was offered concerning the relevance of this document, which is not apparent on its face. Indeed, the document is dated over four years prior to the time [REDACTED] was placed on homebound instruction, and

there is no indication in the record that this document would have been current for the time-frame relevant to this case.

3) Exhibit D-17, a P.E. Class Regulations and Procedures Form, is ADMITTED. This document was identified by a competent witness at Tr. pp. 672-673.

4) Exhibit D-35, a statement of ██████ taken by the CID in 1992, is NOT ADMITTED. This document was offered by the Respondent as a prior inconsistent statement. The hearing officer, however, finds no relevant inconsistency between this statement and ██████'s hearing testimony.

5) Exhibit D-36, a statement of ██████ taken by the CID in 1992, is NOT ADMITTED. This document was offered by the Respondent as a prior inconsistent statement. The hearing officer, however, finds no relevant inconsistency between this statement and ██████'s hearing testimony.

6) Exhibit D of the Stipulations of Fact and Testimony dated March 13, 1995, the notes of ██████'s father, are NOT ADMITTED. These notes are irrelevant or at best merely cumulative of evidence already established.

7) Exhibit E of the Stipulations of Fact and Testimony dated March 13, 1995, the transcript of the preliminary hearing testimony of ██████ in the criminal case, is ADMITTED. This document is in the public record; moreover, ██████ adopted her previous testimony at the hearing. (See Tr. 271-274.)

Department's Exhibits

Admitted into evidence during the course of the hearing were the Department's Exhibits: PDE-1, PDE-2, PDE-3, PDE-4, PDE-5, PDE-6, PDE-7, PDE-8, PDE-11, and PDE-12. Also, the Department and the Respondent stipulated to Paragraphs 1, 2, and 3 of the Stipulation of Facts and Testimony dated March 13, 1995; and the Department stipulated as to authenticity but not admissibility Paragraphs 4, 5, 6, 7, and 8 of that document. Further, received into evidence was Joint Exhibit No. 1; Joint Exhibit No. 2, the Stipulated Testimony of John Trush; and Joint Exhibit No. 3, the Stipulations of Fact received on February 13, 1995.

The Department has requested the hearing officer to reconsider his rulings on the admissibility of the Respondent's exhibits except for those to which the Department had no objection. The hearing officer's review of the record does not yield anything which would require a reversal of those evidentiary rulings. Therefore, the Respondent's Exhibits moved into evidence shall remain in evidence.

DISCUSSION

Substantive Matters

Introduction

Although this case became rife with legal argument and objections to the introduction of evidence, the essential basis

of this case concerns the credibility of the witnesses who testified at the hearing. Although the testimony of the Additional Students was offered by the Department under the shadow of the Respondent's laches defense, the testimony of [REDACTED] and her mother and sister, and [REDACTED] was offered largely without objection. Likewise, the testimony of the Respondent was presented largely without objection. It should be made clear at the outset that the hearing officer found the testimony of [REDACTED] to be very credible and the testimony of the Respondent not to be credible with respect to the alleged assaults made by the Respondent upon [REDACTED]. It should also be made clear that these assaults alone constitute immoral, intemperate, and cruel behavior and justify the disciplinary action recommended by the hearing officer. With these matters in mind, it is evident that the Respondent's vigorous objection to evidence regarding the Additional Students and the Department's objection to a large portion of the Respondent's evidence, although not irrelevant, lose much of their importance.

[REDACTED]

The hearing officer found [REDACTED]'s presentation of the events to be very credibly rendered. This presentation clearly set forth the significant events that a young person might remember after experiencing the degree of trauma involved without the detail of other matters that one might expect of a person who was building a story designed not to collapse.

██████████ remembered what she remembered and did not recall what she could not remember. She did not attempt to fill anything in; and in the end, her story remained credible in the opinion of this hearing officer.

Further, her story has been consistent since she reported it on December 13, 1991, as evidenced by the testimony of Detective King and the transcript of the preliminary hearing on the Respondent's criminal case. The story is also corroborated in important ways by other witnesses. ██████████'s sister and mother testified very credibly concerning the terrified behavior of ██████████ after she arrived at the sister's apartment. Although one might expect family to rally behind one of their own, the hearing officer found no reason to doubt the accounts given by ██████████'s sister and mother. These accounts provided detail that the hearing officer does not believe to be fabricated based upon his observation of the witnesses' demeanor and testimony. This detail supports the conclusion that something very terrible happened to ██████████ on that day. Further, these individuals testified to the behavior of ██████████ following the alleged last assault, which behavior indicated that ██████████ had suffered a significant trauma. The testimony of ██████████, who was not a friend of ██████████, established that the Respondent was alone in the equipment room with ██████████, that ██████████ was nervous prior to entering the equipment room, and that ██████████ was upset when leaving the equipment room. The testimony of William established that ██████████ mentioned to him during the

time frame of the alleged assaults that the Respondent attempted to "make passes" and kiss ██████████ during gym class. (Tr. pp. 1082-1083.) No evidence was presented at the hearing which would indicate that this independent testimony was fabricated.

The Respondent himself admits that he was with ██████████ alone in the equipment room, the health class room, and, on December 13, 1991, the weight room. What is significant of these three occurrences is that the Respondent also acknowledges that there were witnesses which place him with ██████████ on those three occasions at those locations, thus the occurrences could not be denied. As discussed below, the Respondent's renditions of what transpired is not credible to this hearing officer.

The Respondent made a very strong effort during the hearing to prove that ██████████ was motivated to fabricate her allegations and that the assaults could not possibly have happened because of the lack of opportunity. Further, the Respondent attempted to explain why ██████████ would have appeared upset following two of the incidents.

The Respondent attempted to demonstrate that ██████████ was a poor student with a terrible attendance record who was perhaps motivated to bring allegations against the Respondent because she was failing gym. The evidence indeed shows that ██████████ was doing very poorly in some of her classes even before the assaults began. It does not follow, however, that such a student would have the guile to fabricate five episodes of

abuse in the manner that was presented and weave them into circumstances where she could recall witnesses such as [REDACTED] or the people who witnessed the Respondent taking her from study hall to the health room class, as well as the details within the rooms where the events took place. This would practically suggest that [REDACTED] was concocting her scheme prior to the episode on December 13, 1991. It would also suggest that such a student was an actress of incredible talent to have behaved as described in her sister's apartment on December 13, 1991 and thereafter as she experienced effects from the incident. It would also suggest a young woman of astonishing gall or calculation that would carry her performance through to reporting the detailed episodes of abuse to the police. After observing the demeanor of [REDACTED] during the hearing, and after fully reviewing the record, the hearing officer does not believe that [REDACTED] demonstrated the nature or ability or had the motive to fabricate her egregious allegations against the Respondent. With regard to motive, it does not seem credible that [REDACTED] would manufacture her story because she was failing gym or because the Respondent would give her no more "breaks" regarding her gym make-ups. (See Tr. pp. 784-787.)

The Respondent's argument that he did not have the opportunity to be with [REDACTED] during the second and third assaults is based upon the argument that the first episode where the Respondent was alone with [REDACTED] in the equipment room as witnessed by [REDACTED] occurred on November 7, 1991 instead of

before November 1, 1991 as testified to by [REDACTED]. (See Respondent's Proposed Findings of Fact 38-40.) Part of this argument is based on the proposition that on the dates Christina was available for gym prior to November 1, 1991, her class was outside playing touch football rather than inside playing volleyball. This argument is not based on any conclusive evidence, however, but upon climatological evidence which would indicate that it was not too cold, in accordance with the physical education department rules, for the class to abandon its scheduled outside activities for inside activities. This would not take into account, however, the possibility that the field was otherwise in use or in a state not allowing for outside activity. Further, the climatological evidence suggests that the weather was cold and windy on the mornings that Respondent argued class was held outside. See Exhibit D-15. Therefore, absent other evidence which was not offered, the hearing officer cannot conclude that indoor volleyball was not played by [REDACTED]'s class in the weeks before November 1, 1991 when [REDACTED] was in attendance. Moreover, [REDACTED] testified that she believed the episode occurred before November 1, 1991 because she met on November 2, 1991 a person who would later become her boyfriend. The hearing officer finds this testimony to be credible.

The Respondent further makes the argument that the event must have occurred on November 7, 1991 because there was evidence that [REDACTED] was not dressed for gym that day. Both [REDACTED] and the Respondent testified that they spoke with

██████████ who was in "street" as opposed to gym clothes on the date of the equipment room incident. It is possible, however, that ██████████ was not dressed for gym prior to November 1, 1991 and that circumstance was not marked on her gym card. Indeed, the record indicates that ██████████ was late for school on October 22, 1991, which would indicate that she might not be dressed for gym. (See Exhibit D-5.) In fact, the Respondent testified that he spoke to ██████████ about her grades (and to other students about theirs) on October 22, 1991. (Tr. p. 758.)

If the first episode in the equipment room occurred before November 1, 1991, then there was opportunity for the other two episodes to have occurred as described given the attendance of both ██████████ and the Respondent at school in the weeks that followed. See Exhibits D-1 and D-1A.

The Respondent also presented testimony from the school nurse that ██████████ did not appear to be upset when she came to the nurse's office on December 13, 1991 following the last assault. The testimony was not clear, however, that the nurse actually saw ██████████ as opposed to one of the nursing assistants. Further, the nurse prepared memoranda concerning the events of that day in a self-avowed effort to protect her professional reputation when she later heard that she refused to send home a student, ██████████, who was in distress. What is uncontroverted is that ██████████ did go to the nurse's office that morning. (See Exhibit PDE-12.) If she did not exhibit behavior that indicated great distress, that could be explained

by the fact that [REDACTED] may still have been in shock from the episode.

The Respondent also attempts to undercut the credibility of [REDACTED], by arguing that her explanations for not reporting the incidents of abuse sooner are not credible. Those explanations included her fear of failing gym, her fear of the Respondent, and simply the explanation that she did not know why. The hearing officer, however, does find these explanations credible. [REDACTED] was not an adult when these events occurred. She was a high school student dealing with an adult authority figure. The Respondent was also very physically large, and [REDACTED] very slight. That she would not wish to report these incidents because of her perceived fears is therefore understandable. There was also no certainty that the assaults, which were very brief, would continue. Further, the assaults occurred at most within an eight-week period of time. The hearing officer therefore finds that [REDACTED]'s explanations for failing to report the incidents prior to December 13, 1991 credible and in no way damaging to her story.

The Respondent's explanations of what transpired on the three occasions where the Respondent admits to being alone with [REDACTED], on the other hand, do not appear to be credible. In the first instance, the Respondent testified that he sent [REDACTED] to retrieve a "soft-touch" volleyball from the equipment room because of complaints by students that the ball being used was too hard. This explanation of student complaints

about the hardness of the volleyball is unconvincing to the hearing officer. In the second episode, the Respondent testified that [REDACTED] expressed shock over the ninth-grade health class materials involving sexual organs and sexual matters that she came upon. The hearing officer does not find this testimony to be credible. In the third instance, the Respondent testified that [REDACTED] became upset after he chastised her for a lackadaisical gym make-up and stated that she would receive no more breaks from him. This does not explain [REDACTED]'s strongly emotional behavior later that day in her sister's apartment. On the contrary, the hearing officer finds the Respondent's behavior of personally taking [REDACTED] from study hall to make up a gym class not so that she could jump rope or run but to staple health papers, and by personally taking [REDACTED] to the weight room so that others would not see her make up her gym class in street clothes, to be highly suspicious.

Further, none of the Respondent's factual witnesses provided evidence that would establish that the allegations of [REDACTED] are false or that the allegations could not possibly have occurred.

A great deal of testimony and exhibit evidence was introduced concerning [REDACTED]'s allegations. After a full and careful review of this evidence, taking into account the demeanor of the witnesses, and after consideration of the arguments of counsel concerning this evidence, the hearing officer finds that

the Department has proved ██████████'s allegations by a preponderance of the evidence.

The assaults upon ██████████ by the Respondent very clearly meet the definitions of immorality, intemperance, and cruelty as used in the Teacher Certification Law and defined earlier in the Conclusions of Law section of this Decision. That the behavior is immoral and intemperate is self-evident. Indeed, many of the witnesses who testified at the hearing who live or work in and around the Interboro School District gave testimony establishing that such behavior offends the morals of the community. That such behavior is cruel is evidenced by the effect it had on ██████████ as set forth in Findings of Fact 87-90. Further, it is self-evident that such behavior, as practiced by a teacher on a young, frightened student, is patently cruel. Accordingly, the hearing officer recommends that the teaching certification of the Respondent be revoked to protect the health, safety, and welfare of the children of this Commonwealth. An appropriate order is accordingly attached to this Decision.

██████████

The hearing officer found ██████████ and her father to be very credible witnesses. ██████████ testified that the Respondent, during health class, moved aside her hair and rested his hand on her shoulder. This was inappropriate behavior. The hearing officer, however, does not find this behavior on its own to constitute immorality or cruelty as previously defined. It does, however, constitute intemperate behavior as previously defined,

in that it clearly demonstrates a lack of self-control and restraint. Further, it demonstrates a piece of a pattern of inappropriate behavior with female students that was a great deal more egregious with respect to the other students who made allegations against the Respondent.

It is the egregious behavior perpetrated against [REDACTED], [REDACTED], [REDACTED], and [REDACTED] which is the foundation for the hearing officer's recommendation to revoke the Respondent's teaching certification, not this incident.

[REDACTED]

The Respondent attempts to discredit the testimony of [REDACTED] by arguing that she has a bias against him because he opposed her "tripling up" on her gym classes in her senior year of high school because of her past failures of gym. The Respondent testified that he opposed the school district making a special exception for her. In the opinion of the hearing officer, however, this does not credibly explain why a young adult, many years away from high school, would testify under oath concerning such serious allegations some five years after the alleged bias arose. It does not seem credible that this witness would carry a grudge based upon such a small matter for such a long period of time and to such an incredible extent as to fabricate a sexual assault. The demeanor of the witness revealed no such pathology to this hearing officer.

Further, when asked if he had committed the assault upon [REDACTED], the Respondent replied rather equivocally: "I do

not recall that, and I -- No, I do not remember anything of that nature done with that girl, or any girl." (Tr. p. 791.) The hearing officer therefore finds ██████'s testimony regarding the assault to be credible and the Respondent's denial not to be credible.

Moreover, it is reasonable that ██████ would not decide to report the incident except in a proceeding where it could matter a great deal, such as the instant disciplinary matter or the criminal case against the Respondent. It was a single incident that was not repeated.

The hearing officer, however, finds that this behavior, though occurring only once to ██████, to be immoral, intemperate, and cruel and deserving of the discipline recommended.

██████

The Respondent attempts to discredit the testimony of ██████ by demonstrating a bias that she has against him which arose at a group trip to Cancun in 1988. The trip was organized by the Respondent and attended by ██████. ██████ desired to return with a different group, however. According to the Respondent's testimony, the Respondent opposed her doing so and also opposed her plan to make co-ed room arrangements for herself. ██████, however, was able to make arrangements to return with another group and then allegedly said to the Respondent in a sarcastic manner following her triumph: "Thanks, you asshole. Thanks alot for your help." (Tr. pp. 794-797.)

The hearing officer does not find it credible that the witness, then a high school senior, would call her gym teacher or former gym teacher an "asshole," at least under the circumstances alleged. Of greater moment, the hearing officer does not find as credible the argument that this witness -- an adult with a responsible job who has recently married -- would carry a grudge with the Respondent over such a slight matter for approximately seven years and to such an incredible extent as to fabricate a sexual assault and testify about it under oath. As with [REDACTED], this hearing officer discerned no such pathology in [REDACTED]

Further, the Respondent's denial of the alleged assault was again somewhat equivocal: "I do not recall any of that, no." (Tr. p. 797.)

The hearing officer finds [REDACTED]'s testimony regarding the assault to be credible and also her testimony that she only came forward with her story because she read in the newspaper that another student had been assaulted and was not being believed. It is reasonable to the hearing officer that [REDACTED] would not have formally reported the incident until the time that [REDACTED]'s allegations became known.

The assault on [REDACTED] was clearly immoral, intemperate, and cruel and deserving of the discipline recommended.

[REDACTED]

The Respondent has no explanation as to why [REDACTED] would fabricate the allegation that he assaulted her. Instead, the

Respondent attempts to discredit the testimony with evidence that there was no opportunity for the Respondent to attack anyone, should he have even wished to, during a "Back-to-School Night." The hearing officer does not find that this evidence conclusively establishes that the Respondent would not, in 1980, have a period of time during such an event which would allow him to be alone with a former returning student.

Further, the hearing officer finds the testimony of [REDACTED] to be particularly credible by its presentation and recall and based upon the demeanor of the witness. This is only bolstered by the fact that [REDACTED] travelled from her home in Florida for the sole purpose of relating what had happened to her approximately fourteen years ago, again because she became aware of the charges against the Respondent and wanted to come forward. The hearing officer finds it reasonable that [REDACTED] would not formally report this incident until the time the allegations made by [REDACTED] became known.

The assault on [REDACTED] was immoral, intemperate, and cruel and deserving of the discipline recommended.

Procedural and Evidentiary Issues

Sufficiency of Notice:

The threshold procedural issue raised in this matter concerned the adequacy of the Department's Amended NOC. There is no controversy between the parties concerning the notice

regarding ██████████'s allegations. Those allegations were detailed in the original NOC and were set forth again in the Amended and Second Amended NOC. The controversy between the parties arose instead over the allegations of the Additional Students. The Respondent argues that the Department's late raising of these allegations is barred by a statute of limitations and/or the doctrine of laches.⁸ The Department contends that the Respondent had received adequate notice of the additional allegations in its Amended NOC and that the testimony of the Additional Students is barred neither by a statute of limitations or by laches.

The Department argues very strongly in its brief that its Amended NOC sufficiently notified the Respondent of the allegations concerning the Additional Students under the Teacher Certification Law. The hearing officer finds this argument rather unpersuasive, however, in that the Amended NOC set forth not one scrap of information identifying any of the Additional Students or any of their allegations against the Respondent. The Department contends that sufficient information was set forth in its Amended NOC because it alleged that the Respondent acted inappropriately towards "at least one student." (Amended NOC,

8. The Respondent also argues in his brief and Proposed Findings of Fact 15 and 19(e) that the Department's notice of the allegations of the Additional Students set forth in the Second Amended Notice of Charges were inadequate because of lack of specificity. The Respondent, however, did not object to the Second Amended NOC on this basis either orally or in his responsive pleadings and briefs. The issue is therefore waived. Moreover, the Respondent does not specify how the notice of allegations was unspecific.

Paragraph 9.) That information, however, would hardly allow one to prepare a full response let alone a defense at a hearing. The Department also contends that the Amended NOC suggested that disciplinary action may be brought upon other grounds following the Department's further investigation. That may be very well and good, but that does not mean that the Department may prosecute its case based upon information gleaned from its discovery concerning charges not originally stated without properly notifying a respondent that it intends to do so. See Begis v. Industrial Board of the Department of Labor and Industry, 9 Pa. Commonwealth Ct. 558, 308 A.2d 643 (1973) (For notice to be adequate in an administrative proceeding, it must at the very least contain a sufficient listing and explanation of any charges against the "accused" so that he can know against what charges he must defend himself).

This hearing officer has no doubt that if an agency desired to revoke the license to practice law of one of the Department's attorneys, and on the eve of the hearing announced at a conference: "And by the way, we are bringing this case against you not only on the allegations of the only person we identified in our NOC but also based upon the separate allegations of these other individuals," the attorney facing discipline would not be content with the fact that he or she has received "abundant notice of the charges." Brief of Department, p. 21. It is rather fundamental that a respondent receive full and adequate notice of all the charges to be brought against him

at a disciplinary hearing. Begis. The Department's Amended NOC was therefore clearly inadequate in providing notice to the Respondent with respect to the allegations of the Additional Students.⁹

The inadequacy of this notice was cured by two things: the Department filing a Second Amended NOC at the hearing officer's direction which detailed the allegations made by the Additional Students whose testimony was to be offered, and the allowance for the Respondent to postpone the proceedings to more fully prepare a defense against the allegations of the Additional Students, which was granted by the hearing officer. The Respondent, however, declined to postpone the proceedings and instead desired to go forward with the hearing.

Statute of Limitations:

The Respondent's statute of limitations defense is based upon Section 9(a) of the Teacher Certification Law which states:

(a) A proceeding to discipline a professional educator shall be initiated by the filing of a complaint with the department by any interested party within one year from the date of the occurrence of any alleged action specified under section 5(a)(11) [which concerns, among other things, actions brought on charges of immorality, intemperance, and cruelty], or from the date of its discovery. If the alleged action is

9. The suggestion by the Department in its brief that if one were to assume that the charges against the Respondent were true, then the Respondent had as much notice as he needed, is patently outrageous.

of a continuing nature, the date of its occurrence is the last date on which the practice occurred.

24 P.S. § 2070.9(a). The Respondent contends that because the allegations of the Additional Students were not made against him within a year of the occurrence of the actions underlying the allegations, they are barred pursuant to this section.

The Department contends that the Respondent waived his statute of limitations defense by failing to raise this defense in his new matter to the Second Amended NOC, citing the Pennsylvania Rules of Civil Procedure and cases which rely upon those rules. See, e.g., Kyle v. McNamara & Criste, 506 Pa. 631, 487 A.2d 814 (1985); Pa. R.C.P. 1030. This disciplinary matter is not governed under the Rules of Civil Procedure, however; it is governed under applicable provisions of the Pennsylvania Code. Whether the civil procedure law concerning the timing and manner of statute of limitations defenses applies equally to administrative proceedings, however, is an issue that need not be addressed in this proceeding. There is another basis upon which the hearing officer determines that the allegations of the Additional Students are not barred under the provisions of Section 2070.9(a).

Section 2070.9(a) also provides that "[i]f the alleged action is of a continuing nature, the date of its occurrence is the last date on which the practice occurred." The question therefore arises: are the alleged actions perpetrated against the Additional Students separate and distinct incidents or are

they part of a continuing course of conduct on the part of the Respondent. This hearing officer determines that the alleged actions perpetrated against the Additional Students by the Respondent set forth a pattern of behavior that suggests a continuing pattern of abuse culminating in the alleged acts perpetrated against [REDACTED].

This determination is based in part upon a full reading of Section 2070.9 (and not one based upon subsection (a) in isolation), which provides that the Department is charged with making investigations following the initiation of a complaint.¹⁰ Obviously, as in this case, an investigation could reveal other acts of misconduct. To prohibit the Department from acting upon the fruits of its investigation, in the appropriate case, would undercut the statutory purpose set forth in Section 2070.9. In this case it is significant that the investigation revealed not alleged acts of misconduct of a different nature than the ones which were the basis of the Bureau's complaint, such as fraud or theft, but acts of exactly the same nature as those which formed the basis of the complaint. Accordingly, the investigation revealed acts of a continuing nature.

Further, the record is clear that the Department did not discover the allegations of the Additional Students until the latter half of 1994. The Department filed its Second Amended NOC

10. Although the Respondent contends that this matter originally arose under the provisions of Section 2070.5(a)(11) (see Respondent's brief, p. 3), the hearing officer concludes that this matter arose under Section 2070.9(b) (see Background).

within one year of that discovery. Under Section 2070.9(a) an "interested party" has one year from the date of the act or its discovery to file a complaint alleging misconduct. The Department, who is charged with protecting the health, safety, and welfare of school children, may certainly be an interested party under this subsection. See 24 P.S. § 2070.9(d), which limits only the Commission and its members from initiating complaints except under certain circumstances.

Therefore, Section 2070.9(a) of the Teacher Certification Law did not bar the Department, in this instance, from presenting testimony from and concerning the Additional Students.

Laches:

This does not mean, however, that a respondent may not protect himself from stale claims. In this instance, the Respondent raised a laches defense to the testimony of the Additional Students.

Laches is an equitable defense that is available in administrative proceedings as it is in civil proceedings. Weinberg v. Commonwealth, State Board of Examiners of Public Accountants, 509 Pa. 143, 501 A.2d 239 (1985). When asserted against a Commonwealth agency, however, the party raising the laches defense has a particularly heavy burden. Id. Laches is established when the party asserting the defense proves that: (1) there was a delay in taking action; (2) such delay was

unreasonable or unjustifiable; and (3) the delay worked to the prejudice of the party's rights. Leedom v. Thomas, 473 Pa. 193, 373 A.2d 1329 (1977).

In this instance, the Department itself did not delay in taking action after it discovered the allegations of the Additional Students. Well within a year of its discovery of the allegations, the Department set them forth in its Second Amended Notice of Charges. A Commonwealth agency may, however, be charged with undue delay if the accuser herself unjustifiably delayed a reporting of the incident. Lyness v. Commonwealth, State Board of Medicine, 127 Pa. Commonwealth Ct. 225, 561 A.2d 362 (1989), rev'd on other grounds, 605 A.2d 1204 (Pa. 1992).

The Respondent argues that the Additional Students were not justified in bringing their allegations years after the events upon which they were based occurred. In the case of [REDACTED], however, the allegation was reported to the school district within months of the occurrence. In the cases of [REDACTED], [REDACTED], and [REDACTED], the hearing officer finds it reasonable that they would not report a single brief assault by a teacher or former teacher until they became aware of other and more serious allegations against their assailant.

Assuming, however, that the delays in reporting by [REDACTED], [REDACTED], and [REDACTED] are unjustifiable, the Respondent has still not proven laches because he has not established prejudice. The Respondent argues that he was prejudiced by the flawed memories of the victims. The testimony, however, of all of the

Additional Students was very clear and direct, even to the identification of persons they were with at or near the time of the attacks. That these witnesses did not know in many instances the present-day locations of these witnesses does not undercut the power of their memory. Nor is it a basis for the Respondent to argue that he was prejudiced: it is not the duty of witnesses to carry out the Respondent's investigations. The Respondent never requested a postponement to seek these witnesses out, or make an attempt to do so.

The Respondent argues also that he was prejudiced because school records could not be obtained in relation to the "Back-to-School Night" testified to by ██████, because the school no longer kept those records. The Respondent, however, presented a healthy dose of evidence during the proceeding detailing the Back-to-School Night procedure for the Interboro High School and that such procedure remained the same even back in 1980.¹¹ The Respondent does not therefore explain how these records would have been helpful to him.

Further, it is clear from the Respondent's testimony that he had clear recollections of all of the Additional Students. His claims that his memory has eroded to a state that is prejudicial to him with respect to their allegations is therefore not persuasive.

11. This testimony was designed to demonstrate that the Respondent would not have had the time to engage in the activities ██████ described in her testimony because of the ongoing duties during the Back-to-School Night. See Finding of Fact No. 182.

Accordingly, the Respondent has not established a laches defense to any of the allegations of the Additional Students.

Character Evidence:

The Department argues that the hearing officer erred by admitting the testimony of eight character witnesses in support of the Respondent. The hearing officer determined, however, that the Department waived its objection to this evidence and/or was estopped from raising it. This hearing officer has reviewed the matter and finds no basis to change his ruling.

The Respondent identified scores of potential character witnesses during the pre-hearing conference. The Department raised no objection to the Respondent's reliance upon such evidence; rather, the discussion concerning this evidence involved only the consideration of limiting the number of witnesses. The Department only raised its objection to the evidence months later on the eve of the Respondent's presentation of this testimony. The hearing officer determined, and still believes, that this untimely objection, if granted, would have been unfairly prejudicial to the Respondent who has prepared his case on reliance of the limits set forth in the pre-hearing conference.

The Department argues that it may raise a motion before the hearing officer at any time under the General Rules of Administrative Practice and Procedure. Well, of course the

Department may raise a motion at any time. That does not mean that the relief requested in the motion is timely or appropriate. The Department made a motion to exclude character evidence; that motion was denied.

Prior Inconsistent Statements:

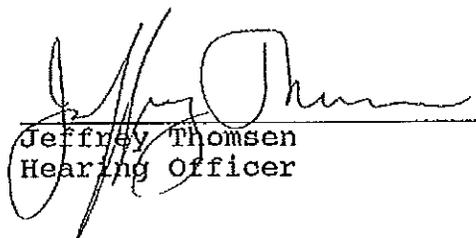
At the conclusion of the hearing, the Respondent moved to admit into evidence purported inconsistent statements of ██████████ (by her preliminary hearing testimony), ██████████, ██████████, and ██████████'s sister. The Respondent withdrew his motion to introduce ██████████'s sister's statement, and the hearing officer admitted ██████████'s preliminary hearing testimony for the reasons set forth earlier in this Decision.

The hearing officer has reviewed the statements of ██████████ and ██████████ and has not found them to be inconsistent with their hearing testimony. Therefore, there is no basis provided by the Respondent for their admission into evidence.

CONCLUSION

This is a very tragic case. The testimony and evidence clearly established that the Respondent is a well-liked teacher, colleague, and member of the community who is active in his environment in many positive ways. He has taught for twenty-eight and one-half years. The evidence, however, also very clearly established that the Respondent acted towards young women for whom he had great responsibilities in a manner that is

profession. The immoral, intemperate, and cruel acts perpetrated by the Respondent against the victims described in this decision warrant an immediate revocation of all teaching certificates issued to him. An appropriate order setting forth this discipline is therefore attached.



Jeffrey Thomsen
Hearing Officer

