MINNESOTA
MDH
DEPARTMENT OF HEALTH

Protecting, maintaining and improving the health of all Minnesotans

September 30, 2010

Ms. Wendy Joan Mack
[redacted]

RE: MDH File Number: OTC08009

Dear Ms. Mack:

Your letter dated September 22, 2010, by which you requested the removal of the condition from your occupational therapy license, has been received and reviewed. With that letter, you enclosed the certificates of completion for 12 continuing education credits; six each in the areas of privacy laws and provision of services to vulnerable individuals. It is further noted that you completed installment payments on your civil penalty on May 21, 2010. Therefore, you have completed the requirements of the condition as set forth by the Stipulation and Consent Order, made effective on April 21, 2009, and the condition is hereby removed from your license.

Thank you for your cooperation in this matter. I may be reached at (651)201-3727, if you have any questions.

Sincerely,

Tom Hiendlmayr

Tom Hiendlmayr, JD
Director
Health Occupations Program
Minnesota Department of Health
PO Box 64882
Saint Paul, MN 55164-0882

Copy: Kimberly Ruberg, Credentialing Unit, Health Occupations Program

Eff. 04/21/09
OTC-08009

BEFORE THE MINNESOTA
DEPARTMENT OF HEALTH
HEALTH OCCUPATIONS PROGRAM

In the Matter of Wendy Joan Mack
Occupational Therapy Practitioner

STIPULATION AND CONSENT ORDER

IT IS HEREBY STIPULATED AND AGREED by Wendy Joan Mack, (hereinafter "Practitioner"), and the Minnesota Department of Health (hereinafter "Department"), and that without trial or adjudication of any issue of fact or law herein:

Except as otherwise specified herein, this Stipulation and Consent Order (hereinafter "Stipulation"), investigative reports, and related documents shall constitute the entire record herein upon which this Stipulation is based and shall be filed with the Department. This Stipulation is public data pursuant to the Minnesota Government Data Practices Act, Minnesota Statutes, Chapter 13 ("MGDPA"). All other data comprising the record shall not be considered a part of this Stipulation and shall maintain the data classifications to which they are entitled under the MGDPA.

LEGAL AUTHORITY

1. The Department has statutory authority to discipline Occupational Therapy Practitioners under Minnesota Statutes, section 148.6448. The types of disciplinary action the Department may impose include refusal to grant or renew licensure; imposition of conditions; revocation or suspension of licensure; any reasonable lesser action including, but not limited to, reprimand or restriction on licensure; or any action authorized by statute. Pursuant to Minnesota Statutes, section 13.41, disciplinary actions are public data.

2. Pursuant to Minnesota Statutes, section 148.6448, subdivision 1(3), the Department may take disciplinary action against a practitioner for performance of occupational therapy services in an incompetent manner or in a manner that falls below the community standard of care.

3. Pursuant to Minnesota Statutes, section 148.6448, subdivision 1(5), the Department may take disciplinary action against a practitioner for violations of sections 148.6401 to 148.6450.

4. Pursuant to Minnesota Statutes, section 148.6403, subdivision 1, a practitioner must be licensed as an occupational therapist to provide occupational therapy services.

5. Pursuant to Minnesota Statutes, section 148.6403, subdivision, 2, a practitioner must be licensed as an occupational therapist to use the phrase "occupational therapist" or the initials "OT" or to indicate or imply that the person is licensed by the state as an occupational therapist.

6. Pursuant to Minnesota Statutes, section 148.6448, subdivision 1(12), the Department may take disciplinary action against a practitioner who has engaged in dishonest, unethical, or unprofessional conduct in connection with the practice of occupational therapy that is likely to deceive, defraud, or harm the public.

7. Pursuant to Minnesota Statutes, section 148.6448, subdivision 1(13), the Department may take disciplinary action against a practitioner for a demonstration of willful or careless disregard for the health, welfare, or safety of a client.

FACTS

The Department alleges and Practitioner unconditionally admits for the purposes of these and any future disciplinary proceedings the following:

1. Practitioner was initially OT credentialed from 1997 to 2003, when she allowed her license to lapse. Practitioner's license was renewed on October 18, 2007.

2. On October 3, 2007, a written complaint was received on behalf of an elderly nursing home resident (hereinafter "Resident"), which alleged that on September 21, 2007, in the Complainant's presence, Practitioner entered the Resident's room, made "rude and unprofessional remarks"; with "no evaluation" said the Resident "would not be going home"; and accused the Complainant of having a "much more vested interest" than "just a POA (power of attorney)." When the Complainant asked for the Practitioner's full name and supervisor's name, the Practitioner refused. The Complainant claimed the Practitioner relied on information from an older chart, stated the Resident could not live independently because she did not know how to use a microwave, and tested the Resident's arm strength by lifting and dropping her arm. The Complainant noted the Resident did not know how to operate a microwave because she did not own one. The Complainant thereafter determined the Practitioner's license had expired in 2003.

3. On October 15, 2007, the Department's Office of Health Facility Compliance (OFHC) received complaint information from the Resident's nursing home administrator. The administrator was notified of the Practitioner's "rude behavior" on September 24, 2007, and met with the Practitioner the following day, at which time she claimed the Complainant "insisted" on doing the Resident's hair while the Practitioner conducted an OT evaluation and answered all questioned posed to the Resident. The Practitioner admitted to the administrator that she had referred to the Resident as "vulnerable", did not feel the Resident should go home, and thought the Resident was drinking too much. The Practitioner claimed she told the Complainant that he would not be able to participate

in the Resident's future OT sessions. The administrator advised that he intended to cite the Practitioner for the incident, but on September 27, 2007, recommended termination after it was determined she was not licensed. The administrator noted the Practitioner had been employed since August 1, 2007, and signed facility paperwork with the protected title "OTR/L". The Practitioner's termination was completed on October 3, 2007.

4. Review of the Practitioner's Credentialing file revealed the following:

A. By letter dated May 4, 2007, in response to a telephone query, the Practitioner was provided with the requirements for renewal after a four-year lapse, instructed to choose an application method, and told to call staff with any questions.

B. By letter dated July 5, 2007, the Practitioner notified Credentialing staff that she intended to satisfy the requirements to renew her OT license and had completed the University of Minnesota refresher course during the period from June 18, 2007, to June 26, 2007.

C. On July 12, 2007, Credentialing staff received Practitioner's application for renewal of her license, dated July 9, 2007, and a copy of the Practitioner's certificate of completion for the refresher course, dated June 26, 2007.

D. By letter dated July 24, 2007, Credentialing staff acknowledged receipt of the Practitioner's application and noted that her application could not be processed because she also needed to submit 24 hours of continuing education. Credentialing staff noted the refresher course did not satisfy that requirement.

E. By letter dated August 6, 2006 [sic], the Practitioner requested a continuing education waiver, based on financial hardship. The Practitioner claimed that while taking the refresher course, she asked an instructor if it would satisfy the

continuing education requirement and was told "yes". The Practitioner stated she had already closed her child care business, which she claimed was her family's sole source of income, and did not have any source of income. By letter dated August 21, 2007, the Practitioner was informed that her circumstances did not constitute "extreme hardship" as defined in statute.

F. By letter dated October 6, 2007, the Practitioner submitted the required 24 hours of continuing education.

G. On October 18, 2007, Practitioner's license was renewed with an expiration date of February 28, 2009. The renewal letter contained the following caveat language, "We are approving your renewal at this time, however, please be advised that the current matter with the Investigations and Enforcement Unit is pending and the issuance of this renewal will not affect that investigation."

5. By letter dated November 9, 2007, the Practitioner claimed she spoke directly to the Resident but that her interaction with the Resident was limited because of the presence of the Complainant. Practitioner denied she said the Resident was not going to go home, but instead indicated the Resident may not be safe living alone. Practitioner stated she started working on August 1, 2007, and did so prior to licensure because she "...was experiencing financial hardship, and a lot of pressure to evaluate patients..." and that she "...was afraid to tell my boss about the 'snafu' I had encountered [regarding continuing education]." Practitioner claimed she "felt I was capable of doing the work well, but knew that my renewal was still pending."

6. By letter dated January 16, 2008, the Practitioner's employer advised Practitioner was employed from August 1, 2007, to September 27, 2007, during which time she earned net

wages in the amount of $6,386.16, used the title "Occupational Therapist", and signed documentation with the initials "OTRL". The employer noted the Practitioner was terminated for "intentional violation of rules and regulations, intentional violation of policies and procedures, and falsifying information and records." The employer acknowledged receipt of a complaint on September 24, 2007, concerning the Practitioner's performance; however, the Practitioner was terminated "due to other serious violations" prior to a warning being issued.

7. Practitioner's file was presented to the Competency Review Committee (CRC) of the OT Advisory Council on two different occasions. The first time was on February 22, 2008, at which time CRC members stated they were disturbed by the Practitioner's misrepresentation of her licensure status to her employer and the resulting Medicare fraud, which they indicated would have been well-covered by the refresher course taken in preparation for renewal. CRC members further advised that the Practitioner violated HIPAA privacy regulations and should not have discussed any aspect of the Resident's care with the Complainant. CRC members stated the Practitioner should have asked the Complainant to leave the Resident's room and if he refused, she should have discontinued the evaluation and notified the director of nursing, charge nurse, or social services. Regarding the Practitioner testing the Resident's arm strength by dropping her arm, CRC members advised that should not have been done because of the possibility of physical harm to the Resident. Finally, CRC members noted that the Practitioner's use of old chart information was wrong and the only time a practitioner should use existing chart information is in the event a chart follows a patient from the hospital to the nursing facility.

8. By letter dated March 24, 2008, Practitioner clarified that immediately upon entering the Resident's room, Practitioner asked the Complainant to leave the Resident's room, but he did not and stated he would finish combing out the Resident's hair. In response to a question as to her understanding of the HIPAA privacy law, the Practitioner stated, "Patients have the right to have medical information kept confidential. Under some circumstances medical information may be shared with certain entities. For example, family members or personal representatives or for medical public health, or administrative purposes."

9. By letter dated May 5, 2008, I&E staff forwarded to Practitioner a Stipulation and Consent Order by which Practitioner's license was to be made conditional and Practitioner was required to complete continuing education, pay a civil penalty, refrain from any same or similar behavior, and have her supervisor submit quarterly performance evaluations.

10. By letter dated June 3, 2008, Practitioner returned all copies of the Stipulation and Consent Order, signed. Practitioner stated she felt uncomfortable signing the Stipulation and Consent Order because "several of the facts regarding my interaction with the patient are not true." Practitioner further stated she was not in a position to hire an attorney and have a hearing.

11. By letter dated June 17, 2008, I&E staff provided Practitioner with a copy of the facts portion of the Stipulation and Consent Order and requested Practitioner provide a list of all facts she believed were incorrect, along with her explanation of why each was in error. Practitioner's response was due by July 17, 2008.

12. By letter dated July 21, 2008, Practitioner stated she objected to Facts 2 and 3 of the Stipulation and Consent Order. Regarding the allegation that she made rude and unprofessional remarks to the Resident, Practitioner stated "I always address my clients in a kind and professional manner." Practitioner explained that she entered the Resident's room, introduced herself, and asked to provide an OT evaluation. Practitioner advised the Complainant answered for the Resident and said Practitioner should go ahead, but that he was going to continue fixing the Resident's hair. Practitioner stated that, in retrospect, she wished she had said she would return later, but was prevented by her schedule. Practitioner further objected to the Complainant's claim that Practitioner did not perform an OT evaluation. Practitioner explained that she completed a standard OT evaluation, including a manual muscle test. Practitioner further denied making a statement that the Resident would not be going home and explained that she would not make such a statement because discharge decisions are made by the patient's physician, with input from the family and staff. Practitioner also denied making a statement that the Complainant had a more vested interest than "just a POA" and stated she did not know what the Complainant meant by that statement. Regarding her refusal to provide her full name to the Complainant, Practitioner stated she did not provide the information because the Complainant asked her in a threatening manner and she was told at staff meetings not to provide that information for safety reasons. Regarding the Complainant's allegation that she relied on old chart information, Practitioner stated it was standard practice to review previous therapists' documentation. Regarding the Complainant's allegation that Practitioner said the Resident could not live independently because the Resident did not know how to use a microwave, the Practitioner advised the Complainant told Practitioner

that the Resident could not use a microwave because she had an old model with a dial. Practitioner noted that a patient's ability to use a microwave was not determinative of independent living and is only a small part of a comprehensive safety evaluation used to determine whether a patient would be safe living alone.

13. By letter dated July 25, 2008, I&E staff asked Practitioner to provide additional explanation. In a response dated October 12, 2008, Practitioner provided a detailed explanation of the manual muscle test as follows: "...a standard evaluation procedure conducted during a PT or OT evaluation, at the discretion of the therapist, typically when muscle weakness is suspected." Practitioner explained, "The therapist would ask the patient to move an extremity through its usual range of motion. If the patient is able to do this, the therapist would apply manual resistance in the direction opposite the movement, and ask the patient to resist." To administer the test, the therapist adjusts the technique "...according to the patient's abilities." Practitioner advised that the Resident at issue "...was not able to move her arm through full range of motion and she had pain in the shoulder." For that reason, Practitioner "...did not apply resistance but rather assisted her to raise her arm as far up as possible within the pain free range of motion, and asked her to hold it there if she could." Practitioner was unable to recall names of any staff present during her interactions with the Complainant. Practitioner further explained her reactions to the Complainant by explaining that his facial expression was angry; he was "loud and shouting"; he pointed at her, and was "in my face"; and when she suggested they go someplace else to talk over the situation, the Complainant said he was going to report her.

14. Practitioner's file was presented to the Competency Review Committee (CRC) of the OT Advisory Council for the second time on January 23, 2009. Based on the information

previously presented and Practitioner's response to additional questioning, CRC members concluded that her description of the manual muscle testing procedure is appropriate and correct and for that reason, it was suggested that quarterly supervisor reports would be unnecessary. Related to the Complainant's continued presence during Practitioner's evaluation of the Resident, CRC members stressed that Practitioner's personal style probably played a major role in her failure to make the Complainant leave the room. It was noted that any patient would be distracted by a hairdresser's presence during an evaluation. Evaluations should be done on a one-to-one basis and no one should be allowed to provide answers on behalf of the patient being evaluated. It was concluded that Practitioner would benefit from in-depth continuing education specifically related to the areas of HIPAA and vulnerable adults, which are two main "hot-topic" areas in occupational therapy.

15. On February 4, 2009, a representative of the University of Minnesota advised that during the OT Refresher Course, HIPAA is only mentioned in passing during a section related to legal issues, since it is the responsibility of each facility to properly train their employees about privacy issues.

ORDER

1. Upon this Stipulation, and without any further notice of proceedings, the Division Director hereby ORDERS:

   A. Practitioner must successfully complete continuing education as follows:

      i. Six contact hours regarding state and federal privacy laws; and

      ii. Six contact hours regarding the provision of OT services to vulnerable individuals;

B. The continuing education required above in 1(C)(i) through 1(C)(iii):

i. Must be completed in addition to the Practitioner's statutorily-required continuing education credits;

ii. Must be documented by submission of course information, including but not limited to the course and provider names, course content, dates, and number of credits;

iii. Must be submitted directly to I&E staff, as designated, for approval of course content prior to registration and taking of the course;

iv. Must provide the original certificate of completion for each course taken; and

v. Must be completed and all documentation submitted to I&E staff no later than February 28, 2011;

C. Practitioner's license will be conditional until proof of completion of the continuing education is received and approved by MDH staff;

D. Failure to submit proof of successful completion of continuing education by February 28, 2011, will result in the denial of future renewal licensure applications;

E. Practitioner must pay a civil penalty in the amount of $983, representing the economic advantage received by the Practitioner during her period of unlicensed practice and to reimburse the Department for its investigation;

F. Practitioner must not be the subject of any allegation of same or similar behavior as outlined in this Stipulation and Consent Order. In the event a complaint is

received, the Practitioner's right to provide occupational therapy services may be revoked.

G. Practitioner must request **in writing** that the condition be lifted from her license. Practitioner's written request:

i. Must be addressed to: I&E Staff, Health Occupations Program, Minnesota Department of Health, PO Box 64882, Saint Paul, MN 55164-0882; or any other Departmental staff as designated by the Health Occupations Program; and

ii. May be submitted in conjunction with Practitioner's 2011 renewal application.

2. Regarding the civil penalty described in 1(E) above, the penalty may be referred to the Minnesota Collection Enterprise (MCE) in the Minnesota Department of Revenue, or other source for collection, if Practitioner misses a monthly payment by 14 calendar days after the deadline. When this Stipulation for a penalty becomes public and the Department refers the matter to MCE, MCE is authorized by Minnesota Statutes, section 6D.17, to obtain a judgment against Practitioner without further notice or additional proceedings.

3. This Stipulation shall not in any way or manner limit or affect the authority of the Department to proceed against Practitioner by initiating a contested-case hearing or by other appropriate means, based on any act, conduct, or admission of the Practitioner which justifies disciplinary action and occurred either before or after the date of this Stipulation and which is not directly related to specific acts and circumstances set forth herein.

4. In the event the Division Director in her discretion does not approve this settlement or a lesser remedy than specified herein, this Stipulation shall be of no evidentiary value and shall not be relied upon or used for any purpose by either party. If this should occur and thereafter an administrative contested case is initiated pursuant to Minnesota Statutes Chapter 14 and Minnesota Statutes, Section 148.6448, Practitioner agrees to assert no claim that the Division Director was disqualified due to the review and consideration of this Stipulation or any records relating hereto.

5. This Stipulation shall not in any way or manner limit or affect the authority of the Department to proceed against Practitioner by initiating a contested-case hearing or by other appropriate means on the basis of any act, conduct, or omission of Practitioner, *justifying* action which occurred after or before the date of this Stipulation and which is not directly related to the specific facts and circumstances as set forth herein.

6. This Stipulation contains the entire agreement between the Department and the Practitioner, there being no other agreement of any kind, verbal or otherwise, which varies this Stipulation. Practitioner understands that this agreement is subject to the Division Director's approval. If the Division Director either approves the Stipulation or makes changes acceptable to the Practitioner, the Division Director will issue the Stipulation. Upon this Stipulation and all other evidence made available to the Division Director, once the Division Director has approved it, the Division Director may issue the Stipulation to Practitioner at any time without further notice.

7. A copy of this Stipulation, when issued by the Division Director, shall be served by first class mail on Practitioner, at 213 First Avenue SE, Aitkin, MN 56431. Service via first class mail shall be considered as personal service upon Practitioner, at which time this

Stipulation shall become effective. Any appropriate federal or state court shall, upon application of the Director, enter an order of enforcement of any or all of the terms of this Stipulation

CONSENT

Practitioner hereby acknowledges that she has read understood, and agreed to this Stipulation and has freely and voluntarily signed it.

Dated: 3-15-, 2009

Wendy Joan Mack
Practitioner

Dated: 4/14/09, 20__

Tom Hiendlmayr
Director, Health Occupations Program

Upon consideration of this Stipulation and all the files, records, and proceedings herein by the Division Director, **IT IS HEREBY ORDERED** that the terms of this Stipulation are adopted and implemented by the Division Director on this 8th day of April, 20 09

STATE OF MINNESOTA
DEPARTMENT OF HEALTH

Darcy Miner, Director
Division of Compliance Monitoring