ORIGINAL

BEFORE THE BOARD OF PSYCHOLOGIST EXAMINERS

STATE OF IDAHO

In the Matter of the License of:	)	
	)	Case No. PSY-2005-2
DALE L. SCHMALJOHN,	)	
License No. PSY-99,	)	**STIPULATION AND**
	)	**CONSENT ORDER**
Respondent.	)	
	)	

PSY\Schmaljohn\P5147SGA.DOC

WHEREAS, information having been received by the Idaho State Board of Psychologist Examiners (hereinafter the "Board") which constitutes sufficient grounds for the initiation of an administrative action against Dale L. Schmaljohn (hereinafter "Respondent"); and

WHEREAS, the parties mutually agree to compromise and settle the matter pending administrative Board action in an expeditious manner without any admission or adjudicated findings; now, therefore,

IT IS HEREBY STIPULATED AND AGREED between the undersigned parties that this matter shall be settled and resolved upon the following terms:

A.

1. The Board may regulate the practice of psychology in the State of Idaho in accordance with title 54, chapter 23, Idaho Code.

2. Respondent Dale L. Schmaljohn is a licensee of the Idaho State Board of Psychologist Examiners and holds License No. PSY-99 to practice psychology in the State of Idaho. Respondent has practiced as a licensed psychologist since May 18, 1976. In December 2004, for reasons unrelated to the pending administrative action, Respondent ceased active practice and retired from the practice of psychology.

3. Respondent's license is subject to the provisions of title 54, chapter 23, Idaho Code, and the rules of the Board promulgated at IDAPA 24.12.01, *et seq.* Pursuant

to Idaho Code § 54-2309(e), the Board may take disciplinary action against any licensed psychologist found to have violated the ethical standards of the American Psychological Association ("APA").

Factual Background

4. On or about February 22, 2002, 83-year-old Lydia Tate executed a Durable Power of Attorney and a Durable Power of Attorney for Health Care naming her daughters, Janelle Nelson and JoAnn Willis, as her attorneys-in-fact.

5. In approximately July 2002, Mrs. Tate suffered a stroke. According to Barbara Hills, M.D., Mrs. Tate's neurologist at the time, Mrs. Tate "had significant impairment in cognitive ability and was not able to make appropriate judgments and decisions regarding medical issues, nor personal or financial decisions and was, at that time, in need of a guardianship." On or about August 14, 2002, Mrs. Tate assumed residence in Holly Nursing and Rehabilitation Center located in Caldwell, Idaho.

6. On or about August 16, 2002, Mrs. Tate's physician, Randall Hutchings, M.D., determined that Mrs. Tate had "post-infarct dementia which impairs her cognitive abilities" and that "she cannot make competent decisions about her health care or finances." On or about August 16, 2002, Dr. Hutchings signed a Statement Regarding Patient's Capability to Manage Benefits for the U.S. Railroad Retirement Board stating that Mrs. Tate was not able to manage benefit payments in her best interest and that she was not expected to recover sufficiently to handle benefit payments in her best interest.

7. On or about August 30, 2002, Mrs. Tate's son, Robert Tate, contacted Respondent concerning a competency evaluation of Mrs. Tate. At the time, none of the documents referenced in paragraphs 4, 5, and 6 were public records, and Mr. Tate did not advise Respondent about the information contained in paragraphs 4, 5, and 6.

8. On September 10, 2002, Respondent met with Mrs. Tate at the Holly Nursing and Rehabilitation Center and discussed with her the purpose of his visit. Respondent conducted a competency evaluation of Mrs. Tate and, as part of his

evaluation, Respondent utilized interview questions from two psychometric testing instruments, a Mini-Mental State Examination ("MMSE") and a Mini-Mental State Examination Extended Form (partial administration).

9. Following the evaluation, Respondent prepared a typed report that summarized his interview with Mrs. Tate and that included Mrs. Tate's responses and his evaluation activities. Under the heading "Impressions," Respondent's report provides:

> After spending approximately an hour with Ms. Tate, this psychologist felt that she was competent to make judgments regarding her estate or other personal business matters.

10. Respondent believes that Mrs. Tate informed him that her children were fighting over her estate. Based on the information he received from Mrs. Tate, Respondent believed she was aware that he was conducting a competency evaluation for the purpose of her possibly changing her will. Mrs. Tate did not advise Respondent that Mrs. Tate's daughters had power of attorney. Respondent did not obtain permission from either of the daughters before conducting the competency evaluation. Since the evaluation, Respondent has had no further communication with Mrs. Tate.

11. On September 10, 2002, after Respondent conducted his competency evaluation, Mrs. Tate executed a Durable Power of Attorney and a Durable Power of Attorney for Health Care naming Mr. Tate as her attorney-in-fact. Mrs. Tate also executed numerous deeds and other documents transferring funds and/or property from her estate to Mr. Tate and to various entities in which Mr. Tate held an ownership or controlling interest. Respondent was unaware that Mrs. Tate executed such documents.

12. After Respondent completed the written competency evaluation, Mr. Tate requested a copy of the evaluation. Respondent informed Mr. Tate that he needed a release of information from Mrs. Tate before he could give Mr. Tate a copy of the evaluation. Mr. Tate provided Respondent's office with copies of the September 10, 2002, Durable Power of Attorney and Durable Power of Attorney for Health Care, which

named Mr. Tate as Mrs. Tate's attorney-in-fact. In reliance on the authenticity of these instruments, Respondent's office provided Mr. Tate with a copy of the evaluation. Respondent did not have any further communication with Mr. Tate after Respondent's office provided Mr. Tate with a copy of Respondent's evaluation.

13. Nothing in the record shows that Respondent or Mr. Tate submitted the Competency Evaluation in any legal proceeding

14. On or about September 27, 2002, an assessment was conducted on Mrs. Tate by Scott P. Hoopes, M.D., who found that Mrs. Tate was "not competent to manage her own affairs by reason of dementia." Respondent was unaware of Dr. Hoopes' assessment.

15. On or about September 27, 2002, Ms. Willis and Ms. Nelson filed an emergency petition for appointment as co-guardians of Mrs. Tate and co-conservators of Mrs. Tate's estate, and a temporary order granting the emergency petition was issued that same date pending a full evidentiary hearing. Respondent was unaware of the proceeding and never testified or provided evidence at any of Mrs. Tate's judicial proceedings.

16. On or about October 22, 2002, a neuropsychological evaluation was conducted on Mrs. Tate by Clay Ward, Ph.D., a licensed psychologist, who found that Mrs. Tate "was not competent to make informed decisions because of her cognitive deficits and severe memory impairments." Respondent was unaware of Dr. Ward's evaluation.

17. On or about March 25, 2003, Mrs. Tate's children entered into a confidential settlement agreement resolving their disagreement concerning Mrs. Tate's guardianship. Respondent was unaware of any negotiations between the children and never received information about their settlement.

Allegations Concerning Respondent's Evaluation

18. In scoring the MMSE, Respondent made two significant scoring errors; specifically, on the Attention and Calculation section, he gave Mrs. Tate 4 points where 2

points would have been warranted according to the scoring criteria specified in the test. In addition, Respondent's file did not contain any evidence to support the score for the writing sample or copying sections. These items could have potentially resulted in a score that would have been below the mean for Mrs. Tate, indicating dementia concerns. Respondent's scoring of the MMSE violated APA Ethical Principles of Psychologists and Code of Conduct (1992) (effective 12/1/92 to 6/1/03) (hereinafter "APA Ethical Standard") 1.04(a).

19. In administering the extended MMSE, Respondent used selected items. However, Mrs. Tate recalled a limited amount of information and was confabulatory, and if the scoring criteria had been utilized, Mrs. Tate would have demonstrated poor performance on mental status testing, particularly as it related to the items of new learning. Respondent's administration of the extended MMSE violated APA Ethical Standard 1.04(a).

20. Respondent's evaluation of Mrs. Tate was conducted at the request of and paid for by a third party (Mrs. Tate's son). However, prior to his evaluation of Mrs. Tate, Respondent failed to clarify with Mrs. Tate and her son Respondent's role, failed to clarify the probable uses of the information obtained, and failed to clarify the extent of confidentiality, in violation of APA Ethical Standard 1.21(a).

21. Although Respondent obtained Mrs. Tate's oral consent to the evaluation, Respondent failed to provide Mrs. Tate an appropriate explanation for the evaluation, failed to discuss with Mrs. Tate the purpose and potential consequences of the evaluation, and failed to obtain appropriate permission from Mrs. Tate's attorneys-in-fact, in violation of APA Ethical Standard 4.02(c).

22. Respondent failed to discuss with Mrs. Tate, to the extent feasible, the relevant limits of confidentiality and the foreseeable uses of the information generated by his evaluation of Mrs. Tate, in violation of APA Ethical Standards 5.01(a) and (b).

23. Respondent failed to obtain collateral information regarding Mrs. Tate, such as reviewing Mrs. Tate's current medications, reviewing Mrs. Tate's current medical records regarding any medical condition that could have affected her functioning, or obtaining information from unbiased collateral other sources, in violation of APA Ethical Standards 7.02(a) and (b).

24. The above-stated allegations, if proven, would constitute a violation of the laws and rules governing the practice of psychology, specifically Idaho Code §§ 54-2309(e). Violations of this law would further constitute grounds for disciplinary action against Respondent's license to practice psychology in the State of Idaho.

25. Respondent disputes these allegations and denies any violation of the laws and rules governing the practice of psychology. In support of his position, Respondent submits with this Stipulation the report of Michael J. Eisenbeiss, Ph.D., an Idaho licensed psychologist.

26. To avoid the expense and disruptions of a formal disciplinary action to adjudicate the allegations and without admitting to any of the allegations, Respondent agrees to the discipline set forth in Section C below.

B.

I, Dale L. Schmaljohn, by affixing my signature hereto, acknowledge that:

1. I have read the allegations pending before the Board, as stated above in section A. I further understand that these allegations, if proven, constitute cause for disciplinary action upon my license to practice psychology in the State of Idaho.

2. I understand that I have the right to a full and complete hearing; the right to confront and cross-examine witnesses; the right to present evidence or to call witnesses, or to so testify myself; the right to reconsideration; the right to appeal; and all rights accorded by the Administrative Procedure Act of the State of Idaho and the laws and

rules governing the practice of psychology in the State of Idaho. Nonetheless, for the reasons and with the understandings stated herein, I freely and voluntarily waive these rights in order to enter into this Stipulation as a resolution of the pending allegations.

3. I understand that in signing this Stipulation I am enabling the Board to impose disciplinary action without further process.

C.

Based upon the foregoing Stipulation, it is agreed that the Board may issue a decision and order upon this Stipulation whereby:

1. Respondent shall pay investigative costs and attorney fees in the amount of Two Thousand Five Hundred and No/100 Dollars ($2,500.00) within thirty (30) days of the entry of the Board's Order.

2. Within one (1) year of the date of entry of the Board's Order, Respondent shall:

a. Read the following: (i) the American Psychological Association's "Guidelines for the Evaluation of Dementia and Age-Related Cognitive Decline" (December 1998) (located at http://www.apa.org/practice/dementia.html), and (ii) "Evaluating Competencies: Forensic Assessments and Instruments, Second Edition" by Thomas Grisso (2003).

b. Satisfactorily complete a continuing education course in geriatric mental health assessment with prior approval by the Board. After completion of the course, Respondent shall provide certificates of completion or transcripts, whichever is appropriate, to the Board. The continuing education shall be in addition to any continuing education hours required to maintain licensure.

c. Based upon the reading and coursework described in paragraphs (2)(a) and (b) above, Respondent shall prepare and present to the Board a paper demonstrating that he understands the protocols for conducting evaluations for the elderly. The paper shall be between 5 and 15 pages, typewritten, on 8½ by 11-inch paper.

The lines shall be double-spaced, with type no smaller than 12-point Times New Roman, and margins shall be no less than 1 inch. Any additional source material may be used in preparing the paper and must be cited in the paper.

3. Respondent shall comply with all state, federal and local laws, rules and regulations governing the practice of psychology in the State of Idaho.

4. For a period of one year following the date of entry of the Board's Order:

a. Respondent shall inform the Board in writing of any resumption of his therapy or counseling practice or change of place of practice or place of business within 15 days of such resumption or change.

b. In the event Respondent should leave Idaho to practice outside of the state, Respondent must provide prompt written notification to the Board of the dates of departure, address of intended residence or place of business, and indicate whether Respondent intends to return to Idaho. Periods of time spent outside Idaho will not excuse Respondent's compliance with the terms of this Stipulation.

c. Respondent shall fully cooperate with any inquiry conducted by the Board and its agents, and submit any documents relevant to his practice within a reasonable time after a request is made for such documents or information.

d. Respondent shall make all files, records, correspondence or other documents relevant to his practice available immediately upon the demand of any member of the Board's staff or its authorized agents.

5. All costs associated with compliance with the terms of this Stipulation are the sole responsibility of Respondent.

6. The violation of any of the terms of this Stipulation by Respondent will warrant further Board action. The Board therefore retains jurisdiction over this proceeding until all matters are finally resolved as set forth in this Stipulation.

D.

1. It is hereby agreed between the parties that this Stipulation shall be presented to the Board with a recommendation for approval from the Deputy Attorney General responsible for prosecution before the Board at the next regularly scheduled meeting of the Board.

2. Respondent understands that the Board is free to accept, modify with Respondent's approval, or reject this Stipulation, and if rejected by the Board, a formal complaint may be filed against Respondent. Respondent hereby agrees to waive any right Respondent may have to challenge the impartiality of the Board to hear the disciplinary complaint if, after review by the Board, this Stipulation is rejected.

3. If the Stipulation is not accepted by the Board, it shall be regarded as null and void and shall not constitute evidence at any subsequent disciplinary hearing.

4. The Consent Order shall not become effective until it has been approved by a majority of the Board and endorsed by a representative member of the Board.

5. Any failure on the part of Respondent to timely and completely comply with any term or condition herein shall be deemed a default.

6. Any default of this Stipulation and Consent Order shall be considered a violation of Idaho Code § 54-2309. If Respondent violates or fails to comply with this Stipulation and Consent Order, the Board may impose additional discipline pursuant to the following procedure:

a. The Chief of the Bureau of Occupational Licenses shall schedule a hearing before the Board. Within twenty-one (21) days after the notice of hearing and charges is served, Respondent shall submit a response to the allegations. If Respondent does not submit a timely response to the Board, the allegations will be deemed admitted.

b. At the hearing before the Board upon default, the Board and Respondent may submit affidavits made on personal knowledge and argument based upon the record in support of their positions. Unless otherwise ordered by the Board, the

evidentiary record before the Board shall be limited to such affidavits and this Stipulation and Consent Order. Respondent waives a hearing before the Board on the facts and substantive matters related to the violations described in Section A, and waives discovery, cross-examination of adverse witnesses, and other procedures governing administrative hearings or civil trials.

c. At the hearing, the Board will determine whether to impose additional disciplinary action, which may include conditions or limitations upon Respondent's practice or suspension or revocation of Respondent's license.

7. The Board shall have the right to make full disclosure of this Stipulation and Consent Order to any state, agency or individual requesting information subject to any applicable provisions of the Idaho Public Records Act, title 9, chapter 3, Idaho Code.

8. This Stipulation and Consent Order contains the entire agreement between the parties, and Respondent is not relying on any other agreement or representation of any kind, verbal or otherwise.

I have read the above Stipulation fully and have had the opportunity to discuss it with legal counsel. I understand that by its terms I will be waiving certain rights accorded me under Idaho law. I understand that the Board may approve this Stipulation as proposed, approve it subject to specified changes, or reject it. I understand that, if approved as proposed, the Board will issue an Order on this Stipulation according to the aforementioned terms, and I hereby agree to the above Stipulation for settlement. I understand that if the Board approves this Stipulation subject to changes, and the changes are acceptable to me, the Stipulation will take effect and an order modifying the terms of the Stipulation will be issued. If the changes are unacceptable to me or the Board rejects this Stipulation, it will be of no effect.

DATED this 17 day of June, 2005.

Dale L. Schmaljohn Ed.D.

Dale L. Schmaljohn
Respondent

I concur in this Stipulation this 20th day of June, 2005.

MAUK & BURGOYNE

By _____
William L. Mauk
Of Attorneys for Respondent

I concur in this Stipulation this 24th day of June, 2005.

STATE OF IDAHO
OFFICE OF THE ATTORNEY GENERAL

By _____
Stephanie N. Guyon
Deputy Attorney General

ORDER

Pursuant to Idaho Code § 54-2305, the foregoing is adopted as the decision of the Board of Psychologist Examiners in this matter and shall be effective on the 25th day of August, 2005. **IT IS SO ORDERED.**

IDAHO STATE BOARD
OF PSYCHOLOGIST EXAMINERS

By _____
~~Anne M. Nelson~~, Chair
DENNIS J. WOODY,

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of August, 2005, I caused to be served a true and correct copy of the foregoing by the following method to:

Dale L. Schmaljohn 1411 N. 24th Street Boise, ID 83702	☒ U.S. Mail ☐ Hand Delivery ☒ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: _____ ☐ Statehouse Mail
William L. Mauk MAUK & BURGOYNE P.O. Box 1743 Boise, ID 83701-1743	☒ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: _____ ☐ Statehouse Mail
Stephanie N. Guyon Deputy Attorney General P.O. Box 83720 Boise, ID 83720-0010	☐ U.S. Mail ☐ Hand Delivery ☐ Certified Mail, Return Receipt Requested ☐ Overnight Mail ☐ Facsimile: _____ ☒ Statehouse Mail

Rayola Jacobsen

Rayola Jacobsen, Chief
Bureau of Occupational Licenses

Individual & Group Therapy
For Adults & Children
Marriage & Family Therapy
Psychological Evaluations
Parent-Teacher Training

MICHAEL J. EISENBEISS, Ph.D.
BOISE PSYCHOLOGICAL SERVICES
331 N. ALLUMBAUGH ST.
BOISE, IDAHO 83704
(208) 376-3546

Divorce Adjustment Counseling
Vocational Testing
Educational Testing
Dyslexia
A.D.H.D.
Learning Differences

ALLEGATIONS CONCERNING DALE SCHMALJOHN, ED.D.

1.04 **Boundaries of Competence**

As a School Psychologist he has conducted numerous evaluations on students with mental retardation, neurological difficulties, cognitive problems and other mental health disorders.

In his private practice and as a psychologist with Business Psychology Associates he has conducted hundreds of evaluations for Social Security Disability. His evaluations were reviewed by psychological and medical consultants contracted by the Eligibility Determinations Unit.

He has conducted evaluations for State of Idaho Vocational Rehabilitation Unit.

The evaluations for Social Security Disability and Vocational Rehabilitation included the assessment of memory, dementias, cognitive functions, and other mental health disorders.

He has evaluated adolescents and adults with developmental disorders including neurological impairment at Hope House and other private agencies.

Dr. Schmaljohn was competent to provide psychological testing for Mrs. Tate to determine her competency to make decisions for herself.

Dr. Schmaljohn did make a scoring mistake of the Mini-Mental State Examination (MMSE). His examination included more that just the MMSE. He interviewed her. He observed her. He used some items from the Extended Form of the MMSE.

I don't know of any psychologists that have never made a scoring error. I know I have made some. But again Dr. Schmaljohn was not just relying on scores.

In reviewing the MMSE and the Extended Form of the MMSE she did well on the following: **Orientation, immediate recall, and language.**

On the Extended Form of the MMSE she showed normal **remote memory, recent memory, praxis (gesture), abstract reasoning, and fluency.** She was able to follow directions and commands and to read. Although no hard copies were available Dr. Schmaljohn found she could write down her ideas and could copy designs.

A psychiatrist will make a diagnosis just from an interview and observations. Dr. Schmaljohn's examination included an interview and observations and testing results.

Dr. Muriel Lerzak, neuropsychologist, discusses in her publication **Neurological Assessment (3rd addition, 1995, page 4)** the need for psychologists in conducting an evaluation to have a balance between the qualitative (interviews, observations) and the actuarial methods (test scores).

1.21 **Third-Party Requests for Services**

It is not uncommon for another person to pay for the evaluation of a patient. Mrs. Tate told Dr. Schmaljohn that her kids were fighting over her estate. She told Dr. Schmaljohn that she wanted the way it was in February. She said a couple of her girls felt she was giving her son Robert too much money. She said "the girls did not like the will that daddy and I made." She stated further "the girls felt Daddy favored Ed."

Dr. Schmaljohn's report stated that Mrs. Tate was aware that he was there to check her mental state as part of changing her will. She could have asked Dr. Schmaljohn to leave if she didn't want him there.

No information was released to Robert Tate until he had a Durable Power of Attorney. Since he did have a power of attorney no release of information was needed from Mrs. Tate and no confidentiality was broken.

4.02 **Informed Consent to do Therapy**

Dr. Schmaljohn was not doing therapy. He was doing psychological testing. There were no interventions recommended by Dr. Schmaljohn.

5.01 **Discussing the Limits of Confidentiality**

There was no confidentiality broken. He did not discuss Mrs. Tate evaluation with anyone including Robert Tate until Robert Tate presented a Power of Attorney at which time the report was released to him.

7.02 **Forensic Assessments**

I don't see Dr. Schmaljohn's evaluation as a forensic evaluation. He was doing a competency evaluation for Mrs. Tate and her son Robert. He was not ordered to do an evaluation by the court or even an attorney. He was not asked to evaluate for incapacity. He was asked if she was capable of making decisions regarding her estate or other personal business matters.

Michael J. Eisenbeiss, Ph.D.
Licensed Psychologist
Member of the National Academy of Neuropsychology (American Psychological Association)