

COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss.

Division of Administrative Law Appeals

**Board of Registration in Medicine,
Petitioner**

Docket No: RM-20-0260

v.

**Bernard E. Kreger, M.D.,
Respondent**

Appearance for the Petitioner:

Katelyn Giliberti, Esq.
Patrick Fitzgerald, Esq.
Board of Registration in Medicine
200 Harvard Mill Square, Ste 330
Wakefield, MA 01880

Appearance for the Respondent:

Brian Sullivan, Esq.
Sloane and Walsh, LLP
One Boston Place, 16th floor
Boston, MA 02108

Administrative Magistrate:

Kristin M. Palace, Esq.

SUMMARY OF RECOMMENDED DECISION

The Board of Registration in Medicine (BORIM) summarily suspended the medical license of Bernard Kreger, M.D. after concluding that Dr. Kreger presented a serious threat to public health, safety, and welfare. BORIM based its decision on allegations of sexual misconduct that were said to have occurred in 1982 and 1987. BORIM also alleged that Dr. Kreger had violated various regulations by committing sexual misconduct and by subjecting students to medically unnecessary physical examinations. At the hearing, BORIM failed to prove by a preponderance of the evidence that Dr. Kreger presented a serious threat to public health, safety, and welfare at the time of the summary suspension. BORIM also failed to prove that Dr. Kreger committed any sexual misconduct or that he gave examinations that were medically unnecessary in violation of any standard of care. Discipline against Dr. Kreger is not recommended.

RECOMMENDED DECISION

Procedural History

In August 2018, Harvard University Health Services (HUHS) filed a report with the Board of Registration in Medicine (BORIM) under G.L. c. 112, § 5F. The report notified BORIM of allegations of misconduct in the 1980s that had made been against one of its former physician-employees, Bernard Kreger, M.D.

Following an investigation, BORIM voted on June 11, 2020 to summarily suspend Dr. Kreger's license to practice medicine based on its conclusion that Dr. Kreger presented a serious threat to the public health, safety, or welfare. *See* 243 C.M.R. § 1.03(11)(b). At the same time BORIM issued a Statement of Allegations in which it proposed to discipline Dr. Kreger. The Statement alleged that Dr. Kreger had treated three Harvard students and former members of the Harvard Glee Club (Members A, B, and C) in a manner that fell below the standard of care – specifically, that Dr. Kreger's examinations were medically unnecessary, neglected disrobing or draping practices, and included inappropriate touching and improper and irrelevant questions about the students' sexual histories. BORIM seeks to discipline Dr. Kreger for violations of G.L. c. 112, § 5 and 243 C.M.R. § 1.03(5)(a)3 (competence to practice medicine, including gross misconduct and fraudulent practice); 243 C.M.R. § 1.03(5)(a)11 (violation of any law of the Commonwealth or rule or regulation of BORIM, specifically the American Medical Association Code of Medical Ethics, Opinion 8.14, equating sexual contact with a patient with sexual misconduct in the practice of medicine); 243 C.M.R. § 1.03(5)(a)10 (practicing medicine deceitfully or engaging in deceitful or fraudulent conduct); 243 C.M.R. § 1.03(5)(a)18 (committing misconduct in the practice of medicine); violating an ethical principle (American Medical Association Code of Medical Ethics, Opinion 8.14); and engaging in conduct that may

undermine public confidence in the integrity of the medical profession, citing *Levy v. Bd. of Registration in Medicine*, 378 Mass. 519, 392 N.E.2d 1036 (1979) and *Aronoff v. Bd. of Registration in Medicine*, 420 Mass. 830, 652 N.E.2d 594 (1995). BORIM referred the case to the Division of Administrative Law Appeals (DALA) for a hearing and issued an Order impounding the identity of three witnesses, the former Glee Club members, and designating them Members A, B, and C. Dr. Kreger filed an Answer to the Statement of Allegations.

Following a prehearing conference on June 25, 2020, the parties agreed to consolidate the hearings on the Summary Suspension and the Statement of Allegations. The parties submitted 14 agreed-to exhibits and five disputed exhibits. I held a hearing (Hearing #1) on the consolidated matters on July 10, 13, 14, and 15, 2020. Hearing #1 was held at BORIM's offices, 200 Harvard Mill Square, Suite 330, Wakefield, Massachusetts. The proceedings were conducted in accordance with the Formal Rules of the Standard Adjudicatory Rules of Practice and Procedure, 801 C.M.R. § 1.01, and were transcribed by a stenographer. Exhibits in addition to those that were pre-filed were offered as Hearing #1 progressed. During Hearing #1, I admitted 18 exhibits and excluded two exhibits. BORIM offered the testimony of Robert Bouton, its investigator; Members A and C; and Norman Weinberg, M.D. who was presented as BORIM's expert witness. Member C and Dr. Weinberg testified by video link; Mr. Bouton and Member A appeared in person. Respondent presented the testimony of former Glee Club members Robert Fox, Peter Gregg, M.D., and John Whitlock. Pierre Rouzier, M.D., appeared as Respondent's expert witness, and Dr. Kreger testified on his own behalf. Dr. Gregg, Mr. Whitlock, and Dr. Rouzier testified by telephone; Mr. Fox testified via video link; Dr. Kreger appeared in person. All parties consented to the modes of the testimonies of the various witnesses.

BORIM intended to present the testimony of Member B at Hearing #1. Unfortunately, Member B died unexpectedly two days before Hearing #1 began. BORIM had met with Member B on July 2, 2020 to prepare him to testify. Inspector Bouton attended that meeting and took notes. At Hearing #1, BORIM moved pursuant to G.L. c. 233, § 65 and Mass. G. Evid. § 804 (2020) to permit Mr. Bouton to testify as to the substance of what Member B had said in the July 2, 2020 meeting with BORIM's complaint counsel team. After hearing Mr. Bouton's testimony, I concluded that Member B's statements were made in good faith and upon his personal knowledge and I ruled that Mr. Bouton's testimony was admissible.

Hearing #1 concluded on July 15, 2020, and I set a schedule for filing post-hearing briefs. Shortly thereafter, DALA received and complied with a public records request for the administrative record in this case. The individual requesting the record was a former Glee Club member. Upon reading the record, the individual – now known as Member D – contacted BORIM complaint counsel and offered to speak with them regarding his experiences with Dr. Kreger. Three former classmates of Member D also contacted BORIM.

On September 3, 2020, BORIM moved to re-open the hearing in this matter based on the discovery of new evidence from individuals identified as Members D, E, F, and G. The Respondent filed no opposition. I granted the motion.

BORIM issued an Amended Statement of Allegations against Dr. Kreger on October 8, 2020. The Amended Statement alleged that Dr. Kreger had acted inappropriately in conducting physical examinations of former Glee Club members D and E. BORIM referred the case to DALA for a hearing and issued an Order impounding the identity of the four additional

witnesses, all former Glee Club members, designating them as Members D, E, F, and G.¹ Dr. Kreger filed an Answer to the Amended Statement.²

The parties reconvened for the reopened hearing (Hearing #2) on October 20, 2020 and November 13, 2020. The October 20, 2020 hearing was held at BORIM's offices in Wakefield, Massachusetts. The November 13, 2020 hearing was held using the WebEx platform. A stenographer transcribed the proceedings on both dates. At the October 20, 2020 hearing, BORIM re-offered an exhibit that I had excluded during Hearing #1. I admitted this exhibit into the record as Exhibit 19 after it was authenticated by Witness D. BORIM presented the testimony of former Glee Club members D, E, F, and G. Respondent presented the testimony of former Glee Club members Justin Baca, M.D., Ian Tzeng, and Peter Rogers. Dr. Kreger was recalled and testified on his own behalf. All witnesses testified by video link. All parties consented to the modes of testimony of the various witnesses. Both parties filed post-hearing briefs on January 29, 2021, and the record closed at that time.

Findings of Fact

Based on the pleadings, the testimonial and documentary evidence and reasonable inferences drawn therefrom, and my assessment of the credibility of the witnesses, I make the following findings of fact.

¹ At the hearing, Respondent objected to the use of pseudonyms for Members F and G because the Amended Statement of Allegations alleged no wrongdoing against these two witnesses. I ruled that I had no jurisdiction to review the Impoundment Order. I noted Respondent's objection for the record.

² The Answer to the Amended Statement was filed late, after the conclusion of the testimony in Hearing #2 but before the record closed. BORIM did not object to the late filing. The Standard Adjudicatory Rules of Practice and Procedure provide that a Respondent "shall" file an answer but specify no penalty for the failure to answer within a particular time. 801 C.M.R. § 1.01(6)(d). In this case, although the Respondent eventually filed an answer to the Amended Statement of Allegations, it was unclear if a second answer was required because the initial proceeding had not concluded and I had re-opened the case to take testimony in Hearing #2. All parties proceeded under the assumption that Hearing #2 was a continuation of Hearing #1. Under these circumstances, I accepted the Respondent's late-filed and unobjected-to Answer without imposing any sanction.

Background

1. This case grew out of plans made by the Harvard Glee Club Foundation (Foundation) to honor the contributions of Foundation board member Bernard Kreger, M.D. to the Harvard Glee Club (Glee Club). At the end of the 2016-2017 academic year, Dr. Kreger announced his intention to retire after more than 50 years of active membership in the Glee Club. The Foundation made plans for a celebration it dubbed "Kregerfest" and circulated an announcement of the event to alumni performers in the Fall of 2017. Kregerfest was scheduled for the Spring of 2018 and was planned as a reunion of Glee Club alumni with Dr. Kreger as the guest of honor. Registration for the event opened in late January 2018. (Ex. 2, Testimony of Fox.)
2. On February 6, 2018, Harvard University's Title IX office and Harvard Glee Club Conductor Andrew Clark received an anonymous email³ alleging that Dr. Kreger had cast himself as the Glee Club's physician and engaged in inappropriate behavior during physical examinations, in particular, conducting examinations in a location where there was no running water (the email conceded that Dr. Kreger may have used hand sanitizer), asking questions about students' sexual history, and performing hernia examinations without wearing gloves. The email referenced highly publicized cases of sexual abuse⁴ and implied that Harvard had a similar situation on its hands. (Ex. 15, 19; Testimony of Fox.)
3. In early February, Mr. Clark notified Foundation president Robert Fox that Harvard had received an anonymous email accusing Dr. Kreger of inappropriate interactions with students during tour physicals. Mr. Clark sent a copy of the email to Mr. Fox. Harvard

³ The email was signed "Concerned HGC Alumni." Testimony in this proceeding established that the email was sent by Member D.

⁴ Regarding Harvey Weinstein and Larry Nasser.

University did not contact the Foundation or share any information regarding the complaint. (Testimony of Fox.)

4. Mr. Fox convened the Foundation board's executive committee to discuss the allegations and the planned Kregerfest celebration. The committee was fearful that Harvard would not allow the current Glee Club or its conductor to participate in the planned celebration and that the university might rescind its offer to provide the event with space. In the context of uncertainty, the executive committee decided to postpone the event indefinitely. Following the executive committee's decision, the full board met by conference call. Mr. Fox informed the board of the allegations that had been made and the executive committee's action. The board ratified the executive committee's decision. (Ex. 3, 4; Testimony of Fox.)
5. When the board meeting was over, Mr. Fox received a telephone call from a board member known here as Member A. Member A asked Mr. Fox for the contact information of the office at Harvard that was investigating the allegations. Mr. Fox gave Member A the contact information for Harvard's Title IX coordinator. Member A asked Mr. Fox to keep his phone call confidential. Member A did not tell Mr. Fox why he wanted the contact information, and Mr. Fox did not inquire. Mr. Fox assumed that Member A had information that was relevant to the anonymous email. (Testimony of Fox.)
6. Mr. Fox told Dr. Kreger about the board's decision to cancel Kregerfest. Dr. Kreger did not participate in the discussion or the decision about Kregerfest. Mr. Fox read the anonymous email to Dr. Kreger. Dr. Kreger seemed surprised by what he heard. Mr. Fox did not ask Dr. Kreger about the veracity of the allegations. (Testimony of Fox.)

7. Both Dr. Kreger and Member A were members of the Foundation's board. Dr. Kreger had been a member since 1969 or 1970. Member A joined in 2017 around the time that the board began to plan for Kregerfest. After the board decided to cancel the event, Member A wanted the executive committee to remove Dr. Kreger from the board. The executive committee declined to do so because the allegations were anonymous and unproven. Member A resigned from the Board several months later because he was uncomfortable with Dr. Kreger's continued presence. Dr. Kreger resigned from the Foundation board in June 2020. (Ex. 18; Testimony of Fox, Kreger, Member A.)
8. Member A contacted Harvard's Title IX office shortly after learning about the anonymous email. Member A alleged that he had experiences in 1982 that were like those described in the anonymous email. Member A also claimed that Dr. Kreger had appointed himself as the Glee Club's tour physician. (Ex. 6, Testimony of Member A.)
9. Harvard University's Office for Dispute Resolution investigated the anonymous allegations against Dr. Kreger and interviewed Member A. In that interview, Member A described his experiences with Dr. Kreger. Member A also retracted his claim that Dr. Kreger was a self-appointed tour physician. Member A clarified that he did not know how Dr. Kreger came to be the group's traveling physician. Harvard administratively closed the inquiry after its investigator concluded that there had been no violation of Harvard's sexual harassment policy, because the allegations made by Member A, even if true, had not created an intimidating, hostile, or offensive environment for Member A while he was a student at Harvard. (Ex. 6.)
10. On August 20, 2018, following Harvard's investigation, HUHS filed a report with BORIM under G.L. c. 112, § 5F. HUHS concluded that the allegations against Dr.

Kreger triggered its peer reporting responsibilities because Dr. Kreger had been employed as a physician at Harvard. (Ex. 15.)

11. HUHS's § 5F report described allegations made by anonymous and known former Glee Club members of misconduct by Dr. Kreger during physical examinations. The report stated that HUHS's records confirmed that Dr. Kreger performed physical examinations on some students in 1967, 1973, 1976, 1978, and 1981. The § 5F report explained that Harvard had administratively closed its investigation into one complaint but that it continued to follow up with other possible complainants. The report also noted that Dr. Kreger's personnel file contained no patient complaints. (Ex. 15, Testimony of Bouton.)

BORIM's Investigation

12. BORIM opened an investigation and subpoenaed Dr. Kreger's credentialing file from HUHS and from Boston Medical Center (BMC) where Dr. Kreger has been employed for more than 40 years. The HUHS files contain no complaints of any improper behavior by Dr. Kreger. BMC records reveal no complaints about Dr. Kreger other than those related to minor operational issues such as wait times, scheduling, or the refilling of prescriptions. There are no allegations of misconduct during physical examinations. Dr. Kreger has been named in three medical malpractice claims. These lawsuits involved claims regarding a failure to diagnose a medical condition and were not similar to the allegations made by the former Glee Club members. (Ex. 1, 5.)
13. BORIM also subpoenaed Harvard's investigative file and identified as potential witnesses Member A, Andrew Clark, and Robert Fox. (Ex. 6, Testimony of Bouton.)
14. Harvard's investigative file contained a transcript of the interview with Member A in which Member A alleged that Dr. Kreger had acted inappropriately during a physical

examination in 1982. BORIM contacted Member A but decided not to interview him at that time. (Ex. 6, Testimony of Bouton.)

15. Mr. Bouton contacted and interviewed Andrew Clark. Mr. Clark explained that he was hired as the Glee Club conductor in 2010 and that Dr. Kreger was no longer conducting physicals for the Club at that time. Mr. Clark expressed no surprise that the Club had employed a “team” physician in the past. He confirmed that Dr. Kreger had been a helpful resource to him and to the students when he sang with them, and that Dr. Kreger had served the Club as a piano accompanist. Mr. Clark stated that Dr. Kreger remained affiliated with the Club long after he had ceased conducting physicals for international travel, and that the Club had to hire a new piano accompanist to replace Dr. Kreger when he retired. (Testimony of Bouton.)
16. BORIM tried to contact Robert Fox by email but received no response. Mr. Fox had no memory of receiving any email from BORIM. (Testimony of Bouton, Fox.)
17. In February 2019, Member B contacted BORIM, and BORIM subsequently interviewed him. Member B alleged wrongdoing by Dr. Kreger during a physical examination in 1987. From that interview, BORIM learned of Member C. BORIM interviewed Member C in March 2019. Member C told BORIM that he had undergone an unremarkable physical examination with Dr. Kreger but wanted to support Member B. (Testimony of Bouton, Member C.)
18. BORIM interviewed Dr. Kreger on March 29, 2019 in proceedings that were transcribed by a stenographer. (Ex. 7, Testimony of Bouton.)
19. BORIM hired Norman Weinberg, M.D. sometime between March and December 2019 to provide an expert opinion regarding Dr. Kreger’s conduct. BORIM provided Dr.

Weinberg with interview summaries of Members A and B, the anonymous email that triggered Harvard's Title IX investigation, and the transcript of the Board's interview with Dr. Kreger. BORIM did not provide Dr. Weinberg with a summary of its interviews with Member C or Conductor Clark, or with the records from HUHS or BMC. (Testimony of Weinberg, Bouton.)

20. On April 15, 2020, more than one year after BORIM interviewed Dr. Kreger, Dr.

Weinberg sent his report to BORIM. (Ex. 10, Testimony of Weinberg.)

21. During that 13-month period, Dr. Kreger continued to practice medicine at BMC.

(Testimony of Kreger.)

22. After Mr. Bouton received Dr. Weinberg's report, he drafted an affidavit summarizing the findings of his investigation for BORIM's consideration. (Ex. 16, Testimony of Bouton.)

23. Based on Mr. Bouton's investigation, BORIM voted on June 11, 2020 to summarily suspend Dr. Kreger's license to practice medicine and issued a Statement of Allegations seeking to discipline Dr. Kreger for wrongdoing against Members A and B. (Statement of Allegations.)

24. On October 8, 2020, after being contacted by additional witnesses and interviewing them, BORIM amended its Statement to include additional allegations of wrongdoing against Members D and E. Dr. Kreger filed Answers to both Statements. (Amended Statement of Allegations, Answers.)

The Harvard Glee Club and the Harvard Glee Club Foundation

25. The Harvard Glee Club is a historic and prestigious all-male singing group of Harvard University. It was founded more than 150 years ago and is rich in customs and rituals.

Songs, chants, inside jokes, and other traditions are passed down through the years.

Members are often given nicknames. Its members socialize with each other and travel together. (Testimony of Kreger, Fox, Member A, Member B, Member C, Member D, Member E.)

26. Generally, the Glee Club has 50 to 75 active members and is comprised of mostly undergraduates, although a few graduate students or others affiliated with Harvard are often among its ranks. It is run by the students and overseen by the Office of the Dean of Students. The Club has an undergraduate manager and a graduate manager. The Glee Club performs at various venues, tours domestically several times a year, and tours internationally every few years. International tours range from four to ten weeks. (Ex. 7; Testimony of Kreger, Fox, Member A, Member B, Member C, Member D, Member E, Member G.)

27. Entry into the Glee Club requires an audition. Membership demands a lot of time. The group rehearses three times a week and performs frequently. There are extra rehearsals to prepare for concerts, an off-campus retreat at the beginning of the year, trips to concert destinations, and social events. (Testimony of Member A, Member C, Member D, Member E, Member G, Fox.)

28. The Harvard Glee Club Foundation is a not-for-profit corporation independent of the Harvard Glee Club. The Foundation provides some administrative support and guidance to the Glee Club and its students, promotes alumni engagement, and raises funds to support Glee Club activities. (Testimony of Kreger, Fox, Member A, Member D, Member E, Tzeng.)

Bernard Kreger, M.D.: Education, Training, and Credentials

29. Bernard Kreger, M.D. is a physician who was, until his summary suspension, licensed to practice medicine in Massachusetts. (Testimony of Kreger.)
30. Dr. Kreger attended Harvard College as an undergraduate, entering in 1955 and graduating in 1959. (Ex. 7, Testimony of Kreger.)
31. During his undergraduate years at Harvard, Dr. Kreger participated in the Harvard Glee Club both as a singer and as one of its rehearsal accompanists. He also accompanied the group during some performances. (Testimony of Kreger.)
32. Following his graduation, Dr. Kreger attended what is now known as Case Western Medical School. (Ex. 7, Testimony of Kreger.)
33. While in medical school, Dr. Kreger sang as a member of the Cleveland Orchestra Chorus directed by renowned conductor Robert Shaw. Dr. Kreger also served the Cleveland Orchestra Chorus as a substitute rehearsal piano accompanist. (Ex. 7, Testimony of Kreger.)
34. Following medical school, Dr. Kreger did a year-long residency at Massachusetts Memorial Hospital and then served in the U.S. Army Medical Corps for two years, first in Turkey and then in the United States at the Walter Reed Army Medical Center. While in Turkey, Dr. Kreger cared for a community of U.S. soldiers, advisors, and affiliated academics and their families. At Walter Reed, Dr. Kreger oversaw sick call and emergency services. (Ex. 7, Testimony of Kreger.)
35. In 1966, Dr. Kreger left the Army and returned to work as a resident at Massachusetts Memorial Hospital which had become University Hospital in the intervening time.

University Hospital eventually became Boston Medical Center. (Ex. 7, Testimony of Kreger.)

36. Following his residency, Dr. Kreger spent three years in post-graduate training with the National Institute of Health at Boston University. He studied infectious diseases and epidemiology. Dr. Kreger earned a master's degree in Public Health from Harvard during this course of study. He eventually became a full-time physician at BMC. (Ex. 7, Testimony of Kreger.)
37. Dr. Kreger has been in full-time practice as an internist at BMC since 1971. He is board-certified in internal medicine. (Ex. 7, Testimony of Kreger.)
38. At the time of the acts alleged by the Board, Dr. Kreger was a full-time primary care provider at BMC and a professor of medicine at Boston University Medical School. (Ex. 7; Testimony of Kreger, Bouton.)
39. At the time of his suspension by the Board, Dr. Kreger had continued in both of those positions. Dr. Kreger has published numerous peer-reviewed papers in scientific publications. (Ex. 7; Testimony of Kreger, Bouton.)

The 1967 Glee Club and Radcliffe Chorus "Around the World" Tour

40. In 1966, while serving at Walter Reed, Dr. Kreger received a call from Professor Forbes of Harvard College. Professor Forbes was the conductor of the Glee Club when Dr. Kreger was an undergraduate member. Professor Forbes asked Dr. Kreger if he would travel with the Glee Club and the Radcliffe Chorus as the team physician on an extended "around the world in 80 days" tour during the summer of 1967. Professor Forbes also asked Dr. Kreger to accompany the group on the piano during that trip, and additionally

invited him to participate as a singer. Dr. Kreger accepted the invitation. (Testimony of Kreger.)

41. Dr. Kreger knew that a physician had travelled with the group during the Glee Club's 1961 international tour and that tour participants had been given pre-tour physicals. (Testimony of Kreger.)

42. Dr. Kreger asked to conduct pre-tour physical examinations of all the tour participants because he wanted to get to know the participants, become familiar with their medical histories and issues, ensure their vaccinations were up-to-date, and have first-hand knowledge of their baseline health. (Testimony of Kreger.)

43. HUHS granted Dr. Kreger a temporary appointment so that he could access their facilities. Dr. Kreger conducted comprehensive pre-participation physicals on both the men and the women of the tour. (Ex. 5, Testimony of Kreger.)

44. Dr. Kreger arranged for nurse chaperones to be present for his examination of the women. There were no chaperones present during his examinations of the men. (Ex. 5, 15; Testimony of Kreger.)

45. Dr. Kreger did not perform any internal physical exams on either men or women.

Although internal exams might have been useful to detect sexually transmitted diseases in women, the executive committees of the Glee Club and the Radcliffe Choral Society did not want to require their members to have internal exams. The men's physical examination included an external genital examination. (Testimony of Kreger.)

46. John Whitlock travelled on the 1967 tour as an undergraduate member of the Glee Club. He met Dr. Kreger through the Glee Club. Dr. Kreger was Mr. Whitlock's primary care physician up until 2020 when BORIM suspended Dr. Kreger. (Testimony of Whitlock.)

47. During the 1967 tour, the choral groups travelled to Colorado, Los Angeles, Hawaii, Japan, China, the Philippines, India, Croatia,⁵ and Scotland. Dr. Kreger served as the tour physician. (Testimony of Kreger, Whitlock.)
48. Dr. Kreger learned what medications all the singers routinely took and acquired duplicates so that he had extras on hand. Dr. Kreger researched what would be available locally and brought supplies with him that he thought he might need to serve the student population. The supplies filled several suitcases and included intravenous antibiotics and treatments for diarrhea, nausea, and respiratory allergies. (Testimony of Kreger, Whitlock.)
49. Dr. Kreger also advised the students, prior to the tour, on necessary preventative measures. (Testimony of Whitlock.)
50. Many students experienced significant digestive issues related to unfamiliar food and water while on the tour. Dr. Kreger took care of their medical needs. (Testimony of Whitlock.)
51. Dr. Kreger arranged for the students to take anti-malarial drugs once they arrived in Japan, in anticipation of the conditions they would encounter in the Philippines and India. (Testimony of Kreger, Whitlock.)
52. While on the tour, some students became seriously ill, and Dr. Kreger treated them. In the Philippines, an asthmatic Radcliffe student became sick with a gastrointestinal illness, aspirated, and developed pneumonia. Dr. Kreger administered intravenous antibiotics and steroids and flew with her to a hospital in Manila where she was admitted. She recovered well. Another student became ill with a general malaise and

⁵ The group performed in Dubrovnik which was then part of Yugoslavia.

developed an enlarged lymph node that was not present when Dr. Kreger examined him prior to the tour. Fearing lymphoma, Dr. Kreger arranged for the lymph node to be removed at a university hospital in Manila and had the tissue flown back to the United States for pathology. The node was benign, and the singer was able to complete the tour. Several students became sick with a flu-like illness as the group travelled from India to Israel. Dr. Kreger moved them from their host-family accommodations into a hotel so that he could care for them. One of these students required hospitalization. Dr. Kreger's familiarity with the baseline medical conditions of these students helped him treat them more effectively and efficiently. (Testimony of Kreger, Whitlock.)

The 1973 Glee Club Tour to Europe and the British Isles

53. Dr. Kreger's involvement with the Glee Club ceased after the conclusion of the 1967 tour. He continued his association with Harvard by moonlighting as a physician in HUHS's emergency department for a year or two. (Ex. 7, Testimony of Kreger.)
54. Dr. Kreger resumed his Glee Club membership when he enrolled at the Harvard School of Public Health to earn his master's degree in 1969. (Testimony of Kreger.)
55. In 1970, the graduate manager of the Glee Club resigned to become the president of the Foundation. The Glee Club appointed Dr. Kreger as its graduate manager. Dr. Kreger remained in the position until 1990. (Testimony of Kreger, Fox.)
56. The Glee Club asked Dr. Kreger to serve as its physician during its 1973 tour as he had done in 1967. The Club was traveling to continental Europe and the British Isles. Dr. Kreger was compensated for his services as the Club's physician during the 1973 tour, and for subsequent international tours through the 1980s, with an honorarium. He was also provided with housing and transportation for the tour. (Testimony of Kreger.)

57. Dr. Kreger used his 1967 tour experience as a template for later tours. He performed pre-participation physicals on all participants for the 1973 tour in the same manner as he had done previously. (Testimony of Kreger.)
58. Peter Rogers was an undergraduate member of the Glee Club during his freshman and sophomore years from 1971 to 1973. He travelled with the Club on the 1973 international tour. Mr. Rogers recalled that Dr. Kreger sang with the group, played piano as an accompanist, served as the graduate manager and as a link to the group's past, and attended the international tour as the group's physician. (Testimony of Rogers.)
59. Mr. Rogers testified that he had no memory of being required to have a pre-tour physical, but he would not be surprised if a physical had been required. He stated that he had no recollection of hearing any complaints about physical exams from any other students. He believed that his lack of memory of either the physical or any comments about it indicated that the experience was unremarkable. (Testimony of Rogers.)
60. Mr. Rogers was one of a group of students who rewrote the lyrics of a Harvard football "fight song" to include references to Dr. Kreger. The rewritten song, entitled "Yo Ho," became part of the Glee Club's culture. Mr. Rogers testified that song lyrics were often rewritten by Club members to make them humorous and bawdy. Mr. Rogers's recollection is that the original rewrite referenced Dr. Kreger as the club's coach, but he agreed that it was likely that his original words had been adapted further by other students over the years. He also recalled that Dr. Kreger may have had the nickname of "roach," which he believed was a reference to Dr. Kreger's somewhat diminutive stature. Mr. Rogers was unable to recall all the words to the song, and he had no

memory of any gestures that accompanied his version of the Yo Ho fight song.

(Testimony of Rogers.)

The 1976 and 1981 Collegium Musicum Tours and the 1978 Glee Club Tour to Europe.

61. In 1976 and 1981, Dr. Kreger toured Europe with a mixed choral group known as Harvard's Collegium Musicum. Dr. Kreger gave pre-participation physicals to both men and women who travelled on those tours. As in previous tours, the men's physical included a genital examination. (Ex. 7, Testimony of Kreger.)
62. In 1978, the Glee Club toured Europe. As before, Dr. Kreger conducted pre-participation physicals, served as the tour physician, sang with the group, and played the piano as the Club's accompanist. (Ex. 7, Testimony of Kreger.)
63. During this period, Dr. Kreger began to ask the students questions about their sexual behavior during the pre-tour examinations. The change was initially prompted by his discovery that one of the students had contracted gonorrhea. He also became aware that some of the Glee Club members were sexually active with each other. Because sexually transmitted diseases were on the rise, Dr. Kreger was worried about the communication of these diseases within the group. His concern increased in the early 1980s as AIDS was understood to be sexually transmitted and prevalent among men who had sex with men. During the physical exams, he asked whether the student was sexually active, how many partners the student had had within the last several months, and whether the partners were male, female, or both. (Testimony of Kreger.)
64. In addition to the questions Dr. Kreger asked during the physical examinations about sexual habits, Dr. Kreger also inquired about a student's general medical history and explained to the student what vaccinations the tour required. (Testimony of Kreger.)

65. Physicals with Dr. Kreger were offered to Glee Club members free of charge and were presented as a convenient way to get a physical examination prior to international tours. Although members were not required to have a physical with Dr. Kreger to go on the international tours, he strongly encouraged it. (Testimony of Kreger.)
66. Until 1979, Dr. Kreger moonlighted at HUHS emergency services and so was able to access HUHS facilities and student health records for the physicals. In the 1980s, Dr. Kreger received a series of temporary appointments from HUHS that allowed him the same privileges. (Ex. 5, Testimony of Kreger.)
67. Physicals at HUHS facilities were often scheduled on weekday evenings or during the weekends for the convenience of the students and of Dr. Kreger, who was working full time at BMC. HUHS provided regular care for its students during normal business hours and emergency care for its students 24 hours a day, seven days a week. If an examination was scheduled on a weekend or in the evening after the regular clinic was closed, students entered through the emergency entrance. (Ex. 5, Testimony of Kreger.)

The 1982 Glee Club Tour to Japan and China; Member A

68. In 1982, the Glee Club travelled to Japan, China, and Hong Kong by way of California and Hawaii. The Club spent several days in California for rehearsal before departing for Hawaii. The trip lasted about nine weeks. (Testimony of Kreger, Member A, Gregg.)
69. As he had done for previous tours, Dr. Kreger conducted pre-participation physicals for Glee Club members. As before, the examination included a genital examination. The physicals were conducted at HUHS. Dr. Kreger arranged for the members to receive injections of gamma globulin at HUHS to guard against hepatitis infections. (Ex. 5, 9, 17; Testimony of Kreger, Member A, Gregg.)

70. Dr. Kreger learned that there had been recent deaths from Encephalitis Japonica among American exchange students in China, so he additionally arranged for the members to be vaccinated against this disease when they arrived overseas. The vaccine was not generally available in the United States, so Dr. Kreger used his connections with the U.S. Centers for Disease Control and Prevention to obtain two doses of the vaccine, ten days apart, for each student once they arrived in Tokyo. (Ex. 9, 17; Testimony of Kreger, Member A, Gregg.)
71. Member A attended Harvard from 1979 to 1983 and travelled with the Glee Club on the 1982 tour. Following graduation, Member A pursued a career as a physician focusing on pediatric oncology and palliative care. He now works in an administrative capacity. (Testimony of Member A.)
72. Member A was a member of the Glee Club throughout his undergraduate years and was the manager of the Club during his junior and senior years. As manager, Member A was responsible for the day-to-day operations of the Club, including scheduling and running rehearsals, planning events, and arranging travel for domestic tours. Member A's work was overseen by the Glee Club conductor and by Dr. Kreger, as the Club's graduate manager. Dr. Kreger served as an accompanist and a singer during the four years that Member A was a member of the Glee Club. Member A's responsibilities as manager did not include planning the 1982 tour to Asia. (Testimony of Member A.)
73. When Member A first became the manager of the Club in the academic year 1981/1982, Member A tried to remove Dr. Kreger from his position as graduate manager. Member A petitioned the Dean of Students, the conductor of the Glee Club, and a member of the board of the Foundation to remove Dr. Kreger, but Member A was unsuccessful in his

efforts. Member A also spoke directly to Dr. Kreger about resigning from his role, but Dr. Kreger was unreceptive. (Testimony of Member A.)

74. Member A was bothered that Dr. Kreger was involved with the Glee Club. He thought it was “creepy” and “weird” that an older man was singing and playing with the Club. Member A did not find Dr. Kreger to be a useful resource although he conceded that Dr. Kreger’s knowledge of the Club’s history was helpful in suggesting tour destinations. Member A thought that Dr. Kreger got in the way of accomplishing things and gave advice that was out of step with the needs of contemporary students. Although Member A thought Dr. Kreger had talent as an accompanist, he believed Dr. Kreger could have been easily replaced by students who were equally talented. (Ex. 6, Testimony of Member A.)
75. Member A decided to travel with the Glee Club on the tour to Asia. The international tour manager told the Glee Club that everyone needed to have up-to-date vaccinations and a physical examination for the tour. Dr. Kreger announced to the members that he would conduct physical examinations for the tour. (Testimony of Member A.)
76. Member A believed he needed to have a physical examination to go on the tour, although he understood that he was not required to have a physical with Dr. Kreger. He nevertheless signed up for a physical with Dr. Kreger. (Testimony of Member A.)
77. Member A’s physical examination was scheduled during the day at the HUHS building. The building was open, and people were working there. Member A entered through the main entrance. The examination took place in an exam room on one of the upper floors. The room was lit by fluorescent lights. Only Member A and Dr. Kreger were present for the examination. (Member A.)

78. The exam began with an oral medical history that included questions that Member A regarded as typical along with some he did not expect concerning his sexual history. Those questions included the number of partners he had, their gender, and the frequency of his activity. Member A felt uncomfortable but answered the questions. At the time, Member A had a girlfriend, but he had no concerns that he was infected with a sexually transmitted disease and was not experiencing any genital complications. (Testimony of Member A.)

79. At the beginning of the physical exam, Member A sat fully clothed on the exam table while Dr. Kreger stood beside him and examined his eyes and ears and listened to his heart and lungs. Following the exam of the upper body, Dr. Kreger asked Member A to stand and drop his pants and underwear. Dr. Kreger sat on a stool and examined Member A's penis and testicles. Member A felt that Dr. Kreger was "uncomfortably close" to him. Dr. Kreger held Member A's scrotum in his hand and palpated his penis along its length. Dr. Kreger then checked Member A for a hernia. (Testimony of Member A.)

80. Member A had undergone a hernia repair as a young child and had experienced hernia examinations before. Dr. Kreger's hernia exam was consistent with those past examinations and Member A characterized that exam as appropriate. (Ex. 6, Testimony of Member A.)

81. Member A's perception was that the genital exam took a very long time and was "inappropriately slow" and "creepy-crawly." Member A felt humiliated. Prior to that time, he had never experienced a genital exam. (Exhibit 6, Testimony of Member A.)

82. In adulthood, Member A had epididymitis and, more recently, prostate hypertrophy and a varicocele. These conditions have necessitated multiple genital examinations by urologists. None of those exams involved an examination of the penis. Those examinations were much quicker than the genital examination Dr. Kreger conducted and Member A was always provided with some form of draping. Member A estimated that the recent genital exams took a couple of seconds, whereas the genital examination by Dr. Kreger took three times as long. (Ex. 6, Testimony of Member A.)
83. At the time of his examination with Dr. Kreger, Member A thought the exam was “weird,” but he did not talk about it with anyone and did not think of it again until 2018. (Testimony of Member A.)
84. Member A was also unimpressed with Dr. Kreger’s skills as a physician on tour. Member A recalled that he sprained his ankle in California and Dr. K treated him with an ace bandage wrap, ice, and crutches. Member A found fault with Dr. K’s treatment and says now that the injury should have been x-rayed and immobilized in a boot. (Ex. 6, Testimony of Member A.)
85. Member A recalls his experience on the Asia tour as transformative and remarkable. (Testimony of Member A.)
86. Member A remained manager of the Glee Club for the academic year following the tour and continued to interact with Dr. Kreger on a regular basis. After graduation, he returned to sing with the Glee Club in concerts several times over the intervening years. His experience with the physical examination did not negatively impact the remainder of his time at Harvard. (Ex. 6, Testimony Member A.)

87. In 2014 or 2015, Member A helped the Glee Club arrange a concert in Tampa, Florida where Member A was living at the time. At the concert, Member A was surprised and displeased to discover that Dr. Kreger was still singing with and playing for the Glee Club. (Ex. 6, Testimony of Member A.)
88. Member A did not recall the details of his physical examination with Dr. Kreger until he heard, at the 2018 Foundation board meeting, that Dr. Kreger had been accused of inappropriate behavior by an anonymous complainant. Member A stated that he was immediately and strongly reminded of his genital examination with Dr. Kreger. He became very upset. He now finds the memory of his examination traumatizing and believes that he was fondled by Dr. Kreger. (Testimony of Member A.)
89. Member A also believes that Dr. Kreger's questions about members' sexual history were unnecessary and inappropriate. He testified that in his experience these questions are not typical, even today. However, in his interview with Harvard's Office of Dispute Resolution, Member A conceded that the questions Dr. Kreger asked might have been relevant given the worsening AIDS epidemic and the Club's reputation for attracting gay men. (Ex. 6, Testimony of Member A.)
90. Peter Gregg, M.D., attended Harvard at about the same time as Member A, sang in the Glee Club, and, like Member A, went on to become a pediatrician. Dr. Gregg also traveled with the Glee Club on the 1982 Asia tour. (Testimony of Gregg.)
91. Dr. Gregg had a physical examination with Dr. Kreger prior to the Asia tour. Dr. Gregg recalled that "they were all having physicals" with Dr. Kreger. Dr. Gregg believed that the purpose of the exams was to give Dr. Kreger an understanding of the members'

physical health so he could anticipate any medical problems that might occur on a prolonged tour in a somewhat remote area. (Testimony of Gregg.)

92. Dr. Gregg's examination consisted of what he now thinks of as a comprehensive physical exam. It included a genital exam but not a rectal exam. As he was just 20 years old at the time, he did not have a lot of experience with genital exams. He remembered that Dr. Kreger approached the genital and hernia exam matter-of-factly. Dr. Kreger checked Dr. Gregg's testicles by feeling them between his thumb and fingers and checked the shaft of Dr. Gregg's penis. This was the first time that Dr. Gregg had had such an examination as an adult, but Dr. Gregg did not find the exam to be alarming. The entire genital examination took less than one minute. Although he recalled that Dr. Kreger asked him questions about his history, he had no memory of the specific questions asked. In retrospect, looking back on the examination from his experience as a physician, he recalled nothing about the examination that was inappropriate or unprofessional. (Testimony of Gregg.)

93. During the tour, Dr. Gregg thought of Dr. Kreger as the tour physician for himself and his fellow glee club members. He had no recollection that Dr. Kreger displayed any favoritism towards certain students. (Testimony of Gregg.)

The 1987 Glee Club Tour to the UK, East and West Germany, France, Austria, and Italy;

Members B and C

94. In the summer of 1987, the Glee Club travelled on a 5-6-week tour of the United Kingdom, East and West Germany, France, Austria, and Italy. (Testimony of Fox, Member B.)

95. Robert Fox entered Harvard in 1982 and graduated in 1986. He joined the Glee Club in the fall of 1982. (Testimony of Fox.)
96. Mr. Fox first met Dr. Kreger at Glee Club rehearsals during Mr. Fox's freshman year. Dr. Kreger was a member of the group and served as its graduate manager. In June 1984, Mr. Fox became the manager of the Club and continued in that role until the end of the fall semester in 1985. He managed the group's 1986 spring domestic tour. Mr. Fox graduated in May of 1986. (Testimony of Fox.)
97. After graduation, Mr. Fox took a gap year before attending law school. During that year, he took on the job of international tour manager for the Glee Club's summer 1987 tour to Europe. Although he was not a Harvard student, Mr. Fox continued to sing with the group. (Testimony of Fox.)
98. As the tour manager, Mr. Fox was responsible for overseeing all planning for the tour, including artistic issues, publicity, transportation, housing, and fundraising. About half of the funds to support the trip came from student and family contributions, and the other half came from alumni donations. The alumni donations were handled by the Foundation. Students paid what they could to go on the tour, but no student was denied participation because of lack of funds. Dr. Kreger was a resource for Mr. Fox. Dr. Kreger provided guidance on planning the tour, contacts for finding alumni sponsors for the tour, and ideas for a fundraising campaign. (Testimony of Fox.)
99. Dr. Kreger was the tour physician for the 1987 tour, as he had been for prior Glee Club tours. Dr. Kreger told Mr. Fox that he wanted medical forms filled out for all participants and that physical examinations needed to be conducted to complete the forms. (Testimony of Fox.)

100. Mr. Fox had a physical with Dr. Kreger. He signed up for the physical on a sign-up sheet provided at a Glee Club rehearsal. (Testimony of Fox.)
101. The exam was done at HUHS in the late afternoon and took about 20 minutes. Mr. Fox recalls that it was a basic exam. It included a hernia exam and questions about sexual behavior. He heard no chatter among other students about the exams. (Testimony of Fox.)
102. Mr. Fox served as a graduate advisor to the Glee Club from 2005 to 2016 and in that capacity served as an *ex officio* member of the Foundation's board. In 2016 Mr. Fox became vice president of the Foundation; in 2017 he became president. Mr. Fox currently sits on the Foundation's board as a past president. (Testimony of Fox.)
103. Member B enrolled as a freshman undergraduate student at Harvard in the fall of 1986. He immediately joined the Glee Club. (Testimony of Member B.)⁶
104. Member B became acquainted with Dr. Kreger through the Glee Club. Member B regarded Dr. Kreger as the Club's historian. Member B recalled that Dr. Kreger attended most of the Club's many rehearsals and domestic events. (Testimony of Member B.)
105. The summer prior to his freshman year at Harvard, Member B worked at a technology company. He was required to have a pre-employment physical. Member B stated that when he underwent that examination, it was the most thorough physical exam he had ever had in his young life. That examination included a hernia check. He recalled the examination as clinical and the hernia check as brief. He remembered the doctor made a joke about the hernia exam. There is no evidence that the physical included a genital examination. (Testimony of Member B.)

⁶ All testimony attributed to Member B was presented by Robert Bouton and admitted pursuant to G.L. c. 233, § 65 and Mass. G. Evid § 804 (2020).

106. Member B opted to travel on the summer 1987 tour with the Glee Club. Member B learned from a senior Glee Club member and Robert Fox, the tour manager of the international tour, that a physical examination was required to participate. Member B asked if he could waive the physical because he had had a pre-employment physical the year before. Robert Fox and others told him that "Dr. Kreger does all the physicals." Member B signed up for a physical with Dr. Kreger on a sign-up sheet provided during one of the club's rehearsals. (Testimony of Member B.)

107. The physical took place on a spring evening in 1987 at HUHS's building. Member B recalled that it was dark outside. Dr. Kreger met him at a door other than the main entrance. The building seemed empty. The exam took place in an examining room. No one else was present. The lighting seemed odd to Member B in that the lighting was directly over his head. Dr. Kreger told Member B to strip to his underwear. Dr. Kreger asked Member B a series of questions about his history. The inquiry included questions about his sexual habits. Member B told Dr. Kreger that he was a virgin, and Member B recalled that Dr. Kreger replied that virginity "was the mode of the Glee Club." Dr. Kreger began the physical part of the examination by looking at Member B's upper body, arms, and legs. The exam seemed typical to Member B. Dr. Kreger then told Member B to pull down his underwear. Dr. Kreger used two hands to palpate Member B's scrotum for approximately five to ten seconds. Member B described Dr. Kreger's motions as "tugging." Member B recalled that Dr. Kreger also touched his penis by moving it out of the way, and that this contact occurred for one or two seconds. Member B stated that this examination was different and more thorough than his pre-employment physical and that he felt uncomfortable, but Member B acknowledged that Dr. Kreger

was “careful” and “didn’t cross a line.” The exam in total took between 15 and 20 minutes. Dr. Kreger took notes during the examination. (Testimony of Member B.)

108. After the examination, Member B spoke with other singers about the exam, including Member C. (Testimony of Member B.)

109. After the international tour, Member B left the Glee Club, in part because he wanted to join a different singing group, and in part because he was uncomfortable with Dr. Kreger. (Testimony of Member B.)

110. Member B attended one reunion event five years following his graduation, but after that did not keep in touch with members of the Glee Club. In 2017 he participated in an alumni tour of Asia. When he received the notice for Kregerfest, he was upset. Shortly thereafter, he saw the cancellation notice. After seeing Dr. Kreger in a local restaurant, Member B felt prompted to contact Robert Fox about his experiences with Dr. Kreger in 1987. Mr. Fox referred Member B to Harvard’s Title IX office. (Testimony of Member B, Fox.)

111. Member C entered Harvard University in the fall of 1986 as a transfer student with junior year status. He joined the Glee Club right away. (Testimony of Member C.)

112. Dr. Kreger was one of a few graduate students and former students who were members of the Club. Member C characterized Dr. Kreger as a “regular and faithful participant” in the Glee Club. He believed that Dr. Kreger held the role of graduate manager or alumni liaison. (Testimony of Member C.)

113. Like Member B, Member C decided to travel on the Club’s 1987 tour to Europe. Member C understood he needed a valid passport and a physical examination to participate. He recalled that Dr. Kreger’s services were presented as a convenient way to

get a physical examination. Although Member C has no memory of being told that he could make alternate arrangements, he did not recall being told that he was required to have the physical with Dr. Kreger. Member C signed up for a physical with Dr. Kreger at a time that suited Member C's schedule. (Testimony of Member C.)

114. The exam took place at the HUHS building sometime after regular business hours. Member C checked in with a security guard and made his way to an ordinary examination room on one of the upper floors. The hallway was dark, but the exam room was lighted. Member C experienced Dr. Kreger's exam as professional, thorough, and similar to other physicals he had undergone. He specifically remembered Dr. Kreger listening to his lungs, checking his ears, and palpating his abdomen. Member C also remembered being asked questions about his sexual activity while he was sitting on the table in his underwear. Dr. Kreger asked how many sexual partners Member C had had within a specific time period. Member C asked Dr. Kreger if sexual activity included oral sex, and Dr. Kreger replied that it did and that it also included anal sex. Member C answered the questions. Dr. Kreger performed a hernia check while Member C stood next to the examination table. Dr. Kreger placed his hand near Member C's scrotum and asked him to cough. Member C recalled the examination as typical, except for the sexual history questions which were new to him. (Testimony of Member C.)

The 1998 Glee Club Tour to Australia; Members D and F

115. After 1990, Dr. Kreger was no longer the graduate manager of the Glee Club, but he continued to serve the Club as an accompanist and as its traveling physician. He also continued to sing with the Club. (Testimony of Kreger.)

116. In the summer of 1998, the Harvard Glee Club traveled to Australia by way of Seattle, Washington. While in Australia, the group toured Sydney, Brisbane, and Cairns. (Testimony of Member D.)
117. Member D attended Harvard College as an undergraduate from 1996 to 2000. He also attended Harvard Law School, graduating with his J.D. in 2005. Member D joined the Glee Club in his freshman year and continued as a member throughout his undergraduate years and during his first year and a half of law school. (Testimony of Member D.)
118. Member D met Dr. Kreger through the Glee Club. Dr. Kreger attended most of the Club's rehearsals and events. Dr. Kreger generally travelled with the group to its domestic concerts. Dr. Kreger also attended the off-campus retreat held at the beginning of the year, but unlike the students, Dr. Kreger went home to sleep at night. (Testimony of Member D.)
119. Dr. Kreger did not offer alcohol to any Glee Club member at that retreat or any other, nor did he make any sexual advances. He went to the retreats to fulfill his obligations as the rehearsal accompanist. (Testimony of Kreger.)
120. Member D thought it was strange that Dr. Kreger was singing with the Club because he was so much older than the students. Member D recalled that Dr. Kreger sometimes annoyed the members because Dr. Kreger took the traditions of the Club so seriously. One such point of contention was Dr. Kreger's insistence that the Harvard fight songs be sung a particular way. (Testimony of D.)
121. Member D served as the tour manager for at least one of the Club's domestic trips. The group travelled by bus. Member D remembered that Dr. Kreger sat near the

front of the bus and brought his own maps. As manager, Member D had also brought maps. Member B found Dr. Kreger's use of his own maps unnecessary. (Testimony of Member D.)

122. Member D recalled that Dr. Kreger was known to group members as "the roach," although the members typically called him Bernie. (Testimony of Member D.)

123. In the 1990s, the Glee Club's regular repertoire included the Yo-Ho fight song, whose lyrics had originally been rewritten by Peter Rogers in the 1960s. The lyrics now referred to Dr. Kreger as the Club's "resident M.D." who would "cure whatever ails you," "be it heart attack or hangnail." The students also sang that you would "love his firm approach" and wiggled their fingers or made a cupping gesture with their hands when delivering that line, simulating the palpation of the inguinal canal or the testicles. The song concluded with the declaration that "Bernie's a roach." (Testimony of Member D, Member E, Member F, Member G.)

124. Member D opined that Dr. Kreger was called a roach because just as one cannot get rid of roaches, Dr. Kreger was always around. Member D recalled that some students would click their tongues to simulate roach noises when Dr. Kreger talked and would wiggle their fingers to simulate bugs moving. Member D testified that the Yo-Ho fight song, the clicking noises, and the wiggling fingers were meant to poke fun at Dr. Kreger. (Testimony of Member D.)

125. Member D participated in the Glee Club's 1998 tour to Australia. (Testimony of Member D.)

126. Before the Australia tour, the student tour managers announced during one of the regular rehearsals that physical examinations were required prior to departing. Members

were told they could sign up to get a physical with Dr. Kreger or they could arrange to have the examination with someone else. (Testimony of Member D, Member F.)

127. Member D did not want to have a physical with Dr. Kreger, so he did not sign up for one. Member D knew that he could have arranged to get a physical somewhere else, but he did not do so. He believed that other members, such as his friend Member F, had made alternate arrangements for a physical examination. (Testimony of Member D.)

128. In May or June of 1998, Dr. Kreger approached Member D at a rehearsal and mentioned that Member D had not signed up for a physical exam. Other students were present when Dr. Kreger approached Member D. Member D agreed to have a physical with Dr. Kreger because he felt pressure to do so. (Testimony of Member D.)

129. Member D was very anxious about the examination and particularly did not want to answer questions about his sexual habits or disclose his long history of depression and the medications he was taking for that condition. (Testimony of Member D.)

130. Because Dr. Kreger no longer had an appointment with HUHS, Dr. Kreger conducted the physicals that year in Holden Chapel, a building on the Harvard Campus. (Testimony of Kreger.)

131. At that time, Holden Chapel served as the administrative offices for the Glee Club and two other choral groups. Holden Chapel consisted of a foyer between the front door and the inner door and one large room further inside. The large room was rectangular with windows that extended the full height of the walls. The windows were covered with banners and other paraphernalia so that one could not see in or out of the windows at ground level. The upper windows admitted ambient light. It was an untidy space furnished with old desks, a couch, and a small refrigerator. At one end of the room was a

raised dais, and a large, solid conference table stood upon it. Behind the dais, a set of three or four steps led down to an exit that was rarely used. At that time there was no bathroom or running water in Holden Chapel. The space was sometimes used for parties or social gatherings. (Testimony of Member D, Member F, Tzeng.)

132. Dr. Kreger used alcohol-based hand sanitizer when he conducted physical examinations in Holden Chapel because there was no running water there. The large conference table was suitable for use as an examining table. Dr. Kreger placed a cloth cover on the table to enhance comfort. (Testimony of Kreger.)

133. Member D had seen students lined up outside Holden Chapel waiting for their physicals with Dr. Kreger. When Member D arrived for his physical there was no line, but another student was present to guard the door from the outside to ensure privacy. (Testimony of Member D.)

134. During his exam, Member D and Dr. Kreger were alone in Holden Chapel. Member D sat down at the conference table on the dais with Dr. Kreger. Dr. Kreger asked Member D questions about his medical history, including what medications he was taking. Dr. Kreger methodically took notes on an index card. Member D answered the questions and revealed that he was taking medication for depression. Dr. Kreger also asked Member D about his sexual partners. When Member D revealed that he had no sexual partners, Dr. Kreger commented that this was the "ultimate in safe sex." Member D believed that Dr. Kreger was mocking him. (Testimony of Member D.)

135. Dr. Kreger had a blanket or a sleeping bag that he unrolled on the table for Member D to sit on. Member D remained fully clothed. Dr. Kreger listened to Member D's heart and lungs with a stethoscope, took his blood pressure, and checked his eyes,

ears, nose, and throat. Member D does not recall whether Dr. Kreger palpated his abdomen. When he finished this part of the physical examination, Dr. Kreger told member D that it was time for the hernia check. Dr. Kreger directed Member D to stand one or two stairs down in the well on the short flight of steps leading to the rear door of Holden Chapel, and asked him to take down his shorts and underwear. Dr. Kreger leaned down, placed two fingers on the underside of Member D's scrotum, and asked him to turn his head in each direction and cough. Member D recalled that Dr. Kreger used one hand to perform the examination, touched his scrotum for perhaps 30 seconds, and touched no other part of Member D's genitals. Member D estimated that the part of the exam that took place on the steps lasted perhaps two minutes, and that the entire physical exam took 20 to 30 minutes. Member D recalled thinking that the exam did not seem as thorough as sports physicals that he had experienced. In some of those pre-participation physicals, the examining physician had "tugged on" or pulled his testicles away from his body, and Dr. Kreger did not do that. During the exam, Dr. Kreger did not attempt to sexually arouse Member D, nor did he make any sexual remarks to Member D. (Testimony of Member D.)

136. Member D testified that he enjoyed visiting Australia. He had very few memories of Dr. Kreger on the tour. In retrospect, he now believes that the trip was a negative experience that was tainted by his physical examination with Dr. Kreger. (Testimony of Member D.)

137. After graduation, Member D remained in touch with the group and attended reunions and a gala with his wife. (Testimony of Member D.)

138. Member D is angry that the physical examinations were officially sanctioned. His memories of his exam with Dr. Kreger have been bothersome. Member D testified that the examination made him uncomfortable, and he found it unsettling. He stated that the experience was detrimental to his time at college and interfered with his ability to form healthy relationships. He discussed the event with his therapist after he left school. Member D did not report his concerns to anyone because he did not want to “rock the boat,” and he was worried what impact his reporting might have on the morale and finances of Glee Club. He stated did not want his actions to affect whatever monetary gift he assumed Dr. Kreger would make to the Club. Member D conceded he had never heard that Dr. Kreger ever threatened to withhold money from the Glee Club for any reason. (Testimony of Member D.)

139. In 2017, Member D received a notice that the Glee Club was planning “Kregerfest,” a celebration in honor of Dr. Kreger’s retirement from the Glee Club. Member D became angry. After speaking with friends, including Member F, Member D created an anonymous email that he sent to the Glee Club’s conductor and Harvard’s Title IX office complaining of Dr. Kreger’s conduct. Member D later spoke anonymously to Harvard’s Title IX office. Although Member D’s email claimed to represent several students’ experiences and opinions, in fact Member D based the content of the email primarily on his personal experience. Member D received editing help from his friends, including Member F, and Member F considered himself to be one of the anonymous senders. Member D stated in his email that the physical examination made him uncomfortable, and that he felt unable to challenge the requirement to have a physical at the time. (Ex. 19; Testimony of Member D, Member F.)

140. Member F attended Harvard University from 1994 to 2002, earning a bachelor's degree, a law degree, and a master's degree during that time. He was a member of the Glee Club for all eight years and at one point served the Club as its assistant manager and then as its manager. (Testimony of Member F.)
141. Member F knew Dr. Kreger as a member of the Glee Club. Member F believed that Dr. Kreger's role involved relating to Glee Club alumni, singing with the Club, and serving as its rehearsal accompanist. Member F had a cordial relationship with Dr. Kreger. (Testimony of Member F.)
142. Member F travelled with the Club in 1998 to Australia as an undergraduate student, and in 2002 to Scandinavia as a graduate student. (Testimony of Member F.)
143. Prior to the Australian tour, Member F decided that he did not want to have a physical examination with Dr. Kreger because Member F thought the examinations were unnecessary. He also believed that undergoing a physical with Dr. Kreger was inappropriate because he did not have a doctor-patient relationship with him. Consequently, Member F ignored the instruction of the tour managers and did not get a physical examination with any doctor. No one asked him why he had not gotten a physical, and he was allowed to go on the tour. He enjoyed his experience in Australia. Member F remained active in Glee Club alumni activities after his graduation. He has attended many of the Club's concerts. (Testimony of Member F.)
144. Justin Baca, M.D. attended Harvard from 1997 to 2001. He was a member of the Glee Club for his four years as an undergraduate and travelled with the Club on the 1998 Australian tour. Dr. Baca did not recall whether pre-tour physical examinations were required or merely encouraged, but he felt the need to get one done. He remembered that

he had an examination with his primary care physician but could not recall if he also had one with Dr. Kreger. He did remember complying with the requirement to turn in medical forms prior to departure on the tour. (Testimony of Baca.)

145. Dr. Baca testified that he remembered that members of the Glee Club had general discussions about the physical exams that were needed for the tours, but he did not recall the specifics of those discussions. (Testimony of Baca.)

146. Just prior to the Australian tour, Dr. Baca became sick with what was later diagnosed as mononucleosis. Dr. Baca credited Dr. Kreger with assisting him so that he was able to go on the tour. Dr. Kreger accompanied Dr. Baca to an urgent care facility to be tested and helped him get medicine while they were on the first leg of their tour in the Pacific Northwest. Once overseas, Dr. Kreger checked on Dr. Baca daily, and spoke with Dr. Baca's parents to provide reassurance. (Testimony of Baca.)

147. Ian Tzeng attended Harvard from 1994 to 1998 as an undergraduate and from 2003 to 2005 as a graduate student. Mr. Tzeng was a member of the Glee Club for all four of his undergraduate years. He served as club manager for the 1996 calendar year, and as club president for the 1998 academic year. He also served in 1998 as the financial manager for the Australian tour. (Testimony of Tzeng.)

148. Mr. Tzeng met Dr. Kreger through the Glee Club. Because of the age difference between Dr. Kreger and the undergraduates, Mr. Tzeng recalled that many students asked why Dr. Kreger was a member. Mr. Tzeng stated that Dr. Kreger's role made sense to him once it was explained. He noted that some undergraduates did not like Dr. Kreger and questioned his function with the Club. Mr. Tzeng testified that the complaints about Dr. Kreger centered on his age and his personality, which some

students found annoying. Mr. Tzeng stated that he had never heard any claims that Dr. Kreger was involved in any form of sexual abuse or misconduct. (Testimony of Tzeng.)

149. In the spring of his freshman year, Mr. Tzeng learned many of the Harvard fight songs, including the Yo Ho song with its adaptation about Dr. Kreger. He said he never heard any explanation for why Dr. Kreger was referred to as a roach. Mr. Tzeng assumed it may have been because roaches were around forever. He also had no settled idea of what the "firm approach" line was referencing and did not think of it as relating to the required physical examinations. (Testimony of Tzeng.)

150. As one of the managers of the Australian tour, Mr. Tzeng told the Glee Club members that everyone had to get a physical examination prior to the tour to confirm that they were in good health. He did not find the history of requiring exams unusual because he had often been required to have a physical when he participated in tours with other musical groups. (Testimony of Tzeng.)

151. Some students did not want to have an examination with Dr. Kreger. There was no requirement that students use Dr. Kreger as their physician. Students could visit their own primary care physician or get a physical from HUHS. (Testimony of Tzeng.)

152. The process of getting a physical, turning in information about the physical, and confirming good health was somewhat informal. Tzeng admitted that he was unfamiliar with medical privacy rules at that time. He remembered that the tour managers made sure to get confirmations from everyone that each participant was in good health. Mr. Tzeng stated that students could confirm orally that they had gotten a physical and were in good health, but that the tour managers sought to have written confirmation of good health from everyone. (Testimony of Tzeng.)

153. Dr. Kreger had a form that he asked members to have filled out if members had their physicals with doctors other than Dr. Kreger. Unlike Mr. Tzeng, Dr. Kreger understood that the forms contained confidential medical information, and he took custody of them. (Testimony of Kreger.)
154. No student would have been denied the opportunity to participate in the tour because they did not get a physical. (Testimony of Tzeng.)
155. Similarly, no student was denied a chance to participate in the Australian tour for financial reasons. Although there was a recommended student contribution, about one-quarter to one-third of the students paid no money, and their trips were funded by the Glee Club through moneys that the Club received from the Foundation, grants, donations from various sources, and revenue earned from concerts. (Testimony of Tzeng.)
156. Mr. Tzeng had a pre-tour physical with Dr. Kreger that took place in Holden Chapel. He remembers nothing unusual about it. (Testimony of Tzeng.)
157. Mr. Tzeng remained affiliated with the Glee Club through the Foundation after he graduated. He served on the Foundation's board from 1999 through 2015, and again from 2018 or 2019 to the present time. He currently serves as its treasurer.
158. During his first period of service with the Foundation, Mr. Tzeng was not aware of any complaints concerning Dr. Kreger. The complaints did not arise until after the publication of the plans for Kregerfest. (Testimony of Tzeng.)
159. Dr. Kreger had been Mr. Tzeng's personal physician since college until Dr. Kreger's license was summarily suspended by the Board. (Testimony of Tzeng.)

The 2002 Glee Club Tour to Scandinavia and Russia; Members E and G

160. In the summer of 2002, the Glee Club toured Norway, Sweden, Finland, Denmark, and St. Petersburg, Russia. (Testimony of Member E, Member F, Member G.)
161. Member G attended Harvard College from 1999 to 2003 and was a member of the Harvard Glee Club throughout his undergraduate years. Member G knew Dr. Kreger as the group's accompanist and liaison with the Foundation. (Testimony of Member G.)
162. Dr. Kreger attended most of the group's rehearsals. (Testimony of Member G, Member E.)
163. During his freshman year, Member G volunteered to be the tour manager for the international tour scheduled for 2002. He worked for two years to plan the trip. As tour manager, Member G had a great deal of authority in organizing the trip. He chose Scandinavia as a destination after Dr. Kreger suggested northern Europe. Member G set the itinerary and made all the arrangements for lodging, meals, social events, and outings. (Testimony of Member G.)
164. Older alumni members told Member G that Dr. Kreger would probably ask to be the tour physician and that his role had always included collecting medical histories from, and giving physicals to, members. A short while later Dr. Kreger did ask Member G, but Member G was noncommittal in his response. (Testimony of Member G.)
165. Member G did not want Dr. Kreger to be the tour physician. He thought that mixing the roles of accompanist/member with group physician was inappropriate. Member G knew that other Harvard choral and arts groups did not have a club physician, and he did not think that the Glee Club needed to have one. Member G also did not think that physical examinations were necessary prior to the international tour.

He was aware there was good medical care available in Scandinavia. Finally, Member G believed that each member should decide for himself whether to engage the services of a physician, and that a physical examination should not be a requirement or expectation for participating in the tour. Member G decided that physicals would not be required for the 2002 tour. (Testimony of Member G.)

166. Several months after Dr. Kreger inquired about serving as the tour physician, Member G announced at a Glee Club rehearsal that physicals would not be required, but members could get a physical if they wished with their primary care physician and submit medical information to Dr. Kreger. (Testimony of Member F, Member G.)

167. Member G made the announcement at a general rehearsal because he wanted to make sure that everyone -- including the conductor, the assistant conductor, and Dr. Kreger -- knew about his decision. He did not tell Dr. Kreger in advance of the decision he had made, and he had not spoken to Dr. Kreger about the matter since their initial conversation months earlier. (Testimony of Member G.)

168. When Member G made the announcement, Dr. Kreger was seated at the piano, Dr. Kreger shook his head but said nothing. (Testimony of Member G.)

169. Dr. Kreger was surprised and embarrassed by Member G's announcement. Dr. Kreger had assumed that he would continue to be the tour physician for the 2002 tour. He considered himself the tour physician because he had been hired in that capacity in 1967 and had continued to fill the role for more than 30 years. Previous international tours had always included a pre-tour physical examination, and Dr. Kreger expected that the model would continue. When he had spoken with Member G about serving as the tour physician, Member G had given no indication that there would be a change.

Consequently, he had no advance warning when Member G made the announcement at a general rehearsal of the Club. (Testimony of Kreger.)

170. Following the announcement, Dr. Kreger spoke with the executive committee of the Glee Club, a body comprised entirely of undergraduate members. Dr. Kreger tried to convince the executive committee that pre-tour physicals were valuable and necessary to ensure everyone's safety, but he was not successful. After the Glee Club made the decision to discontinue physical examinations, Dr. Kreger did not lobby to reinstate the practice. (Testimony of Kreger.)

171. At the rehearsal following Member G's announcement, Dr. Kreger politely greeted Member G and made no comment about Member G's announcement. Dr. Kreger never spoke to Member G about Dr. Kreger's conversation with the Glee Club Executive Committee. Member G suffered no negative consequences for his decision to discontinue the physicals. (Testimony of Member G.)

172. Neither Member F nor Member G had a pre-tour physical in advance of the 2002 tour. Member G learned in the summer of 2002 that some Glee Club members had decided to have physical examinations with Dr. Kreger even though they were not required. Those members did not submit any medical information to Member G in his role as tour manager. (Testimony of Member G.)

173. Member E attended Harvard University from 1999 to 2006, earning both his bachelor's and law degree. He joined the Glee Club in his freshman year and was a member of the Club from 1999 to 2004. (Testimony of Member E.)

174. Member E became the group's assistant manager partway through his freshman year and the manager of the group midway through his sophomore year. He served as

the group's manager for one year. Member E understood that Dr. Kreger was the resident physician, tour physician, and accompanist. He believed Dr. Kreger to be on the alumni board and to be a major donor to the group. (Testimony of Member E.)

175. Member E remembered, contrary to Member G's and Dr. Kreger's testimony, that Member G announced at a rehearsal that physicals would be required for the 2002 tour. He understood Member G to say that members could choose where to get their physicals. Member E believed that if he wanted to go to Scandinavia, he would have to get a physical. (Testimony of Member E.)

176. He had heard from upper classmen that physicals were required, and he had inferred as much from the alternate lyrics to the Yo Ho fight song that referenced Dr. Kreger. Member E had also heard from other students that Dr. Kreger asked questions about sexual behavior. (Testimony of Member E.)

177. Member E decided to have a physical with Dr. Kreger because it was the easiest thing to do. He does not recall how he arranged it. The physical took place in Holden Chapel during the day. (Testimony of Member E.)

178. Holden Chapel had undergone an extensive renovation in 1999, and thereafter it served as rehearsal space for the choral groups. It still consisted of one large room, but a bathroom with running water had been installed off the foyer. The principal room was outfitted with desks, whiteboards, and a grand piano. There were blinds on the windows. (Testimony of Member E, Member F, Member G.).

179. The large conference table formerly in Holden Chapel had been removed, and the grand piano now was the only surface big enough to function as an examining table. Dr.

Kreger laid a cloth on top of the grand piano to make the surface more comfortable.

(Testimony of Kreger.)

180. Member E did not recall if there was anyone else present at Holden Chapel for his physical other than himself and Dr. Kreger. Member E was nervous, especially about answering questions about his sexual behavior. When Member E entered the room, the blinds were drawn, and the piano was pulled out into the middle of the room. The top to the piano was down and had a cloth cover over it. (Testimony of Member E.)

181. Member E recalls very little about the examination. At some point, Dr. Kreger told him to take down his pants and underwear and sit on the piano. Dr. Kreger's manner was matter of fact. Dr. Kreger stood in front of him and palpated Member E's scrotum with his hand. Member E recalled that Dr. Kreger squeezed one of his testicles a little hard and that he was sore afterwards. Member E did not recall if Dr. Kreger examined his penis. The genital exam took no more than one minute and elicited no strong emotion from Member E although he experienced some physical discomfort. Member E had no memory of the rest of the examination. He thought the examination did not last longer than ten minutes. Member E testified that Dr. Kreger did not try to sexually arouse himself or Member E during the examination. (Testimony of Member E.)

182. Members E, F and G all had a great experience on the 2002 tour. (Testimony of Member E, Member F, Member G.)

183. Dr. Kreger travelled with the Club on the 2002 tour and served as the accompanist for most of the rehearsals and concerts. (Testimony of Member G.)

184. During the tour, Dr. Kreger generally kept to himself. He sat in a Finnish sauna with some of the Glee Club members and their Finnish hosts, but Dr. Kreger exhibited no inappropriate behavior. (Testimony of Member E.)
185. Dr. Kreger provided medical attention to a student who fell and injured himself in Finland. He treated a couple of members with sprained ankles, and he tended to a member whose Crohn's disease flared while on tour. In St. Petersburg, the group relied on the services of a hotel physician when a member twisted his ankle. (Testimony of Member E, Member G, Kreger.)
186. The next international tour occurred in 2005. Member G briefed the incoming tour manager on Member G's decision not to require tour physicals. Thereafter, physicals were not required. (Testimony of Member G.)
187. Member G remained active as an alumnus of the Glee Club. He has not had contact with Dr. Kreger in many years. (Testimony of Member G.)
188. Member E also remained active as a Glee Club alumnus and attended concerts and visited Harvard for events. He received the save-the-date announcement for Kregerfest and later the cancellation notice. Over time, Member E did not think much about the physical examination he had with Dr. Kreger, and he was not troubled by his memories. Recently, after hearing about the complaints, he began to wonder about the appropriateness of the physical examinations. He now believes that they should not have happened. He thinks that he would have made a different decision and seen a physician not connected with the Club had he not been so swept up with following the Glee Club's traditions. (Testimony of Member E.)

Dr. Kreger's Rationale for Pre-Tour Physicals

189. Dr. Kreger offered physicals to members prior to international tours only. He felt no need to perform examinations for domestic tours because students would have insurance coverage for those trips, there was good medical care available, and there was no language barrier. On international tours, the Glee Club travelled to remote destinations where English was not widely spoken. The tours lasted weeks or months. Thirty or forty years ago, medical care overseas was often unpredictable, not always readily available, and not in keeping with the standards of the United States, especially in more remote areas. (Testimony of Kreger.)

190. As the tour physician, Dr. Kreger believed it was his responsibility to keep the members healthy. He knew there were members with chronic medical conditions. It was important to understand the students' medical status prior to extended overseas travel so that he would be prepared if any illness or other emergency arose. Members who carried heavy luggage could aggravate a hernia and require surgery. Members with allergies could be triggered by staying in a host home with pets. Dr. Kreger believed that giving comprehensive physical examinations to students was necessary. He brought his notes from the physical examinations with him and shredded them at the end of each tour. (Ex. 7, Testimony of Kreger.)

191. Some members chose to have physicals done by their primary care physicians. Dr. Kreger would accept findings from other physicians. Dr. Kreger preferred to do the examinations himself so that he had greater familiarity with each member's health status. (Testimony of Kreger.)

192. If a tour date was approaching and Dr. Kreger had not received a completed medical form from a member, he would encourage that member to have a physical with him or with someone else so they could turn in the completed form prior to the tour. Dr. Kreger's goal was to have medical information for each member prior to the trip.
(Testimony of Kreger.)

193. Dr. Kreger estimated that he gave physical exams to as many as 500 Glee Club members over the years. He believes that he was better equipped to care for the sick students on each tour because he was familiar with their baseline physical conditions and their pre-existing medical issues. (Testimony of Kreger.)

194. By the late 1990s, as medical care improved around the world and English became a predominant language in medical facilities worldwide, Dr. Kreger was able to travel with fewer medical supplies for the group and less concern about the standard of care in other countries. Despite this, he believed that the physical examinations were still valuable and disagreed with the Glee Club's decision to discontinue them.
(Testimony of Kreger.)

195. Prior to the 2002 Scandinavian tour, Dr. Kreger never heard anyone say that pre-tour physicals were unnecessary, and no one from the Glee Club's executive committee or the Foundation ever expressed any concern to him about the examinations. Likewise, Dr. Kreger never heard any complaints about his physical examinations. Occasionally, a student would express discomfort when he palpated an abdomen, but no one ever told him that his examination made them uncomfortable or that the examination seemed sexual in nature. (Testimony of Kreger.)

196. Dr. Kreger denied that he ever attempted to sexually arouse any Glee Club member -- including Members A, B, C, D, and E -- during a physical examination, that he was sexually aroused himself, or that he arranged for the physical examinations to provide himself with an opportunity to handle the genitalia of young men. (Testimony of Kreger.)

Subsequent Domestic and International Tours

197. After the Glee Club made the decision to no longer require physicals, Dr. Kreger stopped examining Glee Club members prior to international tours. (Testimony of Kreger.)
198. Dr. Kreger continued to serve as the Club's tour physician and the Glee Club never asked him to step down from this position. On domestic trips, he responded to members with medical issues and would typically be called on for assistance two or three times. During international tours, Dr. Kreger continued to consider himself the "go to" person for medical care and wanted to have adequate information about the members so he could meet their health needs. He still encouraged students to submit medical information to him in advance of each tour. Dr. Kreger kept a master list of members and their medical issues. He also reminded members to get the medications they needed prior to the tour and would keep extra supplies for members in case they lost their own. Tour managers made sure that members knew where Dr. Kreger was staying so they could reach him if something was "acutely urgent." He functioned as a first responder, treating acute symptoms of illness or injury, or assisting in obtaining needed medication. The Club typically identified a prescribing physician locally who Dr. Kreger could contact to write a prescription or to get a referral to an urgent care facility. Dr. Kreger

continued to bring basic medical equipment -- a stethoscope, otoscope, flashlight, ace bandages -- with him on the later tours. (Testimony of Kreger.)

199. Dr. Kreger sang and played with the Glee Club through the 2016-2017 academic year. He traveled with the Club to Taiwan, Korea, and Japan in 2017. During that tour, Dr. Kreger tended to a couple of members who contracted norovirus in Korea. The Glee Club hired an accompanist for the 2017 tour and Dr. Kreger functioned as his back up. (Testimony of Kreger.)

Dr. Kreger's Support for the Glee Club

200. Dr. Kreger testified that the Glee Club has been very important to him over many years. Each year, he dedicated between 200-300 hours to the Club. Dr. Kreger has always loved music and enjoyed the opportunity to sing and play. He has never married, has no children, and considers the Glee Club to be his second family. (Testimony of Kreger.)
201. Dr. Kreger donated small amounts of money to the Foundation in the first twenty years following his graduation. As his career advanced, his giving increased. In the 1990s he donated \$300-\$400 annually and in 1999 he started a fund to commission men's choral music for the Glee Club. He gave a \$2500 challenge grant to the Foundation every year thereafter for that fund. Sometime after the year 2000, Dr. Kreger's donations increased to \$10,000 per year; they remain at this level. (Testimony of Kreger, Tzeng.)
202. Dr. Kreger has never threatened to withhold financial support from, or reduce his contributions to, the Glee Club Foundation for any reason. Dr. Kreger did not scale back his financial contributions after the Glee Club made the decision to eliminate pre-tour

physicals. After the Foundation cancelled Kregerfest, Dr. Kreger's contributions remained unchanged. (Testimony of Kreger, Tzeng, Fox.)

203. Dr. Kreger is not the Foundation's only significant donor. There are many wealthy individuals and corporations that donate to the Foundation. (Testimony of Tzeng.)

Access to the Administrative Record of Hearing #1 by Witnesses D, E, F, and G

204. Members D, E, F, and G did not participate in Hearing #1 and were not named by BORIM as witnesses for that proceeding because BORIM did not then know their identities. After the conclusion of the testimony in Hearing #1 and after the transcript had been filed with DALA, Member D filed a public records request for the administrative record in this case. Upon receiving it, Member D read the record and forwarded it to other former Glee Club members, including Member F. Member D also sent messages to Member F commenting on the transcript. These messages are not in the record. Member F skimmed the documents and read enough to learn that all the testimony in Hearing #1 came from members who participated in the Glee Club prior to Member F's time at Harvard. Member F testified that he did not read Dr. Kreger's testimony or the testimony of the expert witnesses. (Testimony of Member D, Testimony of Member F.)

205. Members D and F proactively contacted BORIM and offered to speak with BORIM's complaint counsel. Member F contacted Members E and G. Member F's communications with Members E and G are not in the record. Member F denied discussing recollections of events concerning Dr. Kreger with Members E and G. Member G was also contacted by Member E encouraging Member G to contact BORIM.

That communication is not in the record. There is no evidence that Members E or G received a copy of the administrative record obtained by Member D. (Testimony of Member E, Member F, Member G.)

Standard of Care

206. Norman Weinberg, M.D. testified as BORIM's expert witness. Dr. Weinberg practiced as a primary care physician until he retired in 2015. He is board certified in internal medicine, a member of the Massachusetts Medical Society, and a fellow of the American College of Physicians. Dr. Weinberg began his practice in 1979. Over time, as his patient population aged, Dr. Weinberg became focused on geriatric medicine. He also developed an interest in quality improvement measures. His work in this area involved reviewing cases at hospitals for quality control and improvement. He has lectured and written on this topic. Dr. Weinberg currently reviews manuscripts for the Journal of the American Geriatrics Society and the International Journal for Quality in Health Care. He also reviews cases for BORIM as an expert witness. (Ex. 10, Testimony of Weinberg.)

207. BORIM sent Dr. Weinberg materials to evaluate in this case. Dr. Weinberg assumed he had been provided with all the information in BORIM's possession that was relevant to his evaluation of Dr. Kreger's conduct. He was unaware that BORIM had not provided him with the interview summaries of Member C or Andrew Clark, or the credentialing files from HUHS or Boston Medical Center. Dr. Weinberg reviewed only documents relating to the complaints of Members A and B, the transcript of BORIM's interview with Dr. Kreger, and the anonymous email from Member D. (Testimony of Weinberg.)

208. Dr. Weinberg believed that the principal issue in this case is whether Dr. Kreger engaged in sexual misbehavior towards Members A or B. (Ex.10, Testimony of Weinberg.)
209. Dr. Weinberg concluded that the way Member A described his encounter with Dr. Kreger was evidence of sexual misconduct. Dr. Weinberg placed great weight on Member A's recounting that the examination was "creepy-crawly" and his later belief that he had been fondled. Dr. Weinberg discounted Member A's statement that the exam had no effect on him while at Harvard, opining that the "detailed flashback memory" was indicative of impact. (Ex. 10, Testimony of Weinberg.)
210. Dr. Weinberg justified his reliance on Member A's perception of the examination by citing a source that discusses consensual sexual relationships between doctors and patients. Dr. Weinberg quoted the article for the principle that the significance of a physician's conduct should not be viewed from the doctor's perspective but rather from the patient's point of view. On cross examination, Dr. Weinberg confirmed that the quoted sentence was found in a paragraph concluding that a patient may be more vulnerable to the social advances of a doctor who once provided her with medical care because the patient may view that original care with deep gratitude when the doctor may have long forgotten about it. The article focused on the patient's perception of the significance of the past medical care, not the current contact. Dr. Weinberg insisted that the quote stood on its own for the principle he espoused and did not need to be contextualized. (Ex. 10, Testimony of Weinberg.)
211. Dr. Weinberg also concluded that Dr. Kreger had conducted his entire examination of Member A while seated on a stool at "nose to genital height." Dr. Kreger

had not done so. (*See Finding 79.*) Dr. Weinberg's erroneous conclusion led him to question how Dr. Kreger could have examined Member A's ears, eyes, throat, lungs, and heart from such a position and to infer an improper purpose to the examination. (Ex. 10, Testimony of Weinberg.)

212. Dr. Weinberg concluded that Member B's exam also bore hallmarks of sexual misconduct, citing the lack of draping and Member B's recounting that Dr. Kreger "tugged" on his testicles. He thought it unnecessary, and therefore suspicious, that Member B was required to have a complete physical when he had undergone a pre-employment physical the year before. Dr. Weinberg acknowledged, on cross-examination, that the standard of care in the 1980s for young men included a complete physical examination every year. (Ex. 10, Testimony of Weinberg.)

213. Dr. Weinberg thought it was questionable that Dr. Kreger conducted physicals at off hours, in locations other than a standard examination room, and without others present. He cited these as environmental factors that contribute to wrongdoing by physicians. (Ex. 10.)

214. Dr. Weinberg opined that Dr. Kreger's misbehavior could be inferred by the fact that these physicals were, in his opinion, unnecessary. According to Dr. Weinberg, a physical examination that included a genital examination was medically unnecessary as a preparticipation physical for an international singing tour. Dr. Weinberg based his opinion on the literature he consulted and on his own experience as a primary care physician. (Testimony of Weinberg.)

215. Dr. Weinberg was unable to locate any literature discussing the necessity or scope of preparticipation physicals for extended international travel. The sources he found

discussed sports physicals only, and all those articles were written recently, after 2004.

(Ex. 10, Testimony of Weinberg.)

216. Dr. Weinberg conducted many preparticipation evaluations as a physician, especially in the earlier years of his practice. He testified that the preparticipation physicals he conducted were limited and focused on the elements of the student's health that might be impacted by the activity. He thus did not consider it necessary to administer a comprehensive physical examination for participation in sports or preceding international travel. Dr. Weinberg did consider it appropriate to palpate testicles for a sports exam, and he agreed that it would be appropriate to check for hernias before international trips because the traveler would be carrying luggage. Dr. Weinberg did not believe that examination of the penis and scrotum would be appropriate in a pre-tour physical unless a student mentioned a problem. Based on his experience, he testified that the genital examinations of Members A and B were medically unnecessary. He conceded, however, that there were other physicians who believed that a comprehensive physical examination should be performed. (Testimony of Weinberg.)

217. Dr. Weinberg did not opine on whether it was medically unnecessary for Dr. Kreger to inquire about the sexual histories of Member A or B. He testified that he failed to see how questions related to sexual activity were relevant, even though he agreed both that college students are typically sexually active, and that the medical community understood by 1981 that AIDS was sexually transmitted. (Testimony of Weinberg.)

218. Dr. Weinberg concluded that Dr. Kreger had violated the applicable standard of care because, in his opinion, there was no need for a genital examination of Member A

or B prior to an international singing tour. Dr. Weinberg offered no testimony concerning Member C. (Ex. 10, Testimony of Weinberg.)

219. Dr. Weinberg was not recalled for Hearing #2 and offered no testimony on the physical examinations that Dr. Kreger administered to Members D or E.

220. Pierre Rouzier, M.D. testified as an expert witness on Dr. Kreger's behalf. Dr. Rouzier began his career practicing family medicine and has been active in the field of sports medicine since the 1980s. In 1992, he became Assistant Director of the Family Practice Residency program at St. Mary's Medical Center in Grand Junction, Colorado and taught family medicine and sports medicine there. Presently, Dr. Rouzier is the Director of Athletic Medicine and Head Team Physician at the University of Massachusetts/Amherst. He also maintains a full-time clinical practice in family, primary care, and sports medicine. The bulk of his patient population are students 18-25 years old, but he also has patients among the faculty and staff who range to about 80 years in age. He is board certified in family medicine and has the added qualification of a certificate in sports medicine. He is a member of the American Medical Society for sports medicine, the American Academy of Family Physicians, and the Massachusetts Academy of Family Physicians. He is a fellow of the American College of Sports Medicine. He has published several articles on topics related to sports medicine. (Ex. 12, Testimony of Rouzier.)

221. As the head team physician at UMass/Amherst, Dr. Rouzier oversees and conducts annual preparticipation physicals for the university's athletes. These preparticipation physicals entail a comprehensive physical examination, including a full history. Athletes are asked questions about their medical, mental health, and sexual

histories. The physical itself is "head to toe" and includes, for men, a hernia and genital examination. Dr. Rouzier also provides physicals for patients starting new jobs or embarking on overseas travel. (Testimony of Rouzier.)

222. Dr. Rouzier testified that in his experience preparticipation physicals are often done in settings other than a doctor's office (such as a training room, a scout camp, or "wherever you can get them done"), and there is nothing unusual about performing these physicals during weekends or evenings to accommodate everyone's schedules. Dr. Rouzier stated unequivocally that a third-party presence is not typical and is not the standard of care when a male doctor conducts a genital examination of a male patient. In Dr. Rouzier's experience, preparticipation physicals are scheduled for 30 minutes, but can be accomplished more quickly if time is short. (Testimony of Rouzier.)

223. Standard forms for sports preparticipation physical examinations now exist and are helpful as a guideline to practitioners who do not frequently administer sports exams. These forms can change from year to year. They can provide some evidence of the standard of care when an examination was performed but are not definitive. Dr. Rouzier compared a sports preparticipation physical exam form published in 2010 with one published in 2019. He noted that while the earlier form included a check box for a genital examination for males, the later form did not. He did not conclude from this omission that today's standard of care for sports physicals omits a genital examination for men. (Ex. 13, 14; Testimony of Rouzier.)

224. Dr. Rouzier was not aware of any standardized forms related to international travel, but he testified that various programs have their own forms. Some forms -- such as those for study abroad programs -- are more focused on mental health issues. Others -

- like the forms used by the Peace Corps -- are detailed and more thorough than the forms used for sports physicals. (Testimony of Rouzier.)

225. Dr. Rouzier testified that it was consistent with the standard of care in the 1980s to approach a preparticipation physical as a comprehensive physical examination and it remains so today. The purpose of a comprehensive physical examination is to discover anything that could place a patient at risk health-wise. At all times, Dr. Rouzier stated, it is "always appropriate to be thorough and ... probably never appropriate to be not thorough ... you can get away with it, but you might miss something." (Testimony of Rouzier.)

226. Dr. Rouzier opined that it was appropriate for Dr. Kreger to perform comprehensive physical examinations, including genital examinations, as preparticipation physicals for Glee Club members prior to international tours in the 1980s. He further opined that it was appropriate for those examinations to include questions about members' sexual activity, including the number and gender of partners, and for Dr. Kreger to tell a member, in response to a question, that sexual activity could include anal sex. (Testimony of Rouzier.)

227. Setting aside the question of whether a preparticipation physical should be a comprehensive physical examination, Drs. Weinberg, Rouzier, and Kreger all agreed on the components of a comprehensive physical for a male patient, and they agreed that the standard of care for this examination has not changed since the 1980s. The examination includes questions about family health history to flag possible genetic risks and behavior questions to identify risky habits. Questions are asked about drug use and sexual habits, including numbers of partners and whether those partners are male or female. Questions

about a patient's sexual history have been part of the standard of care for a comprehensive physical examination since the 1980s when AIDS became a public health crisis. The answers to these questions inform the doctor's approach to the genital exam. The examination includes a review of all the major systems of the body, beginning with the head and working down through the body. (Testimony of Rouzier, Weinberg, Kreger.)

228. Drs. Weinberg, Rouzier, and Kreger also agreed on the method for a male hernia and genital examination. The hernia exam involves placing a finger or fingers alongside the testicles and asking the patient to bear down or cough while the doctor feels for a lump or a bulge protruding into the inguinal canal. An examination of the scrotum and testicles involves a visual inspection of the scrotum and palpation of the testicles to feel for tumors, irregularities, and differences in size. Palpation of the testicles generally takes 10 to 15 seconds. Examination of the penis is largely visual to look for lesions, but the foreskin may be retracted if it is present, and a doctor may palpate the penis to look for induration, tenderness, or discharge, especially if he has any concern that a patient might be at risk for a sexually transmitted disease. (Testimony of Rouzier, Weinberg, Kreger.)

229. Neither Dr. Weinberg nor Dr. Rouzier testified that the standard of care required a doctor to wear gloves during a male genital examination, although Dr. Weinberg stated that he typically wore gloves during these examinations. Dr. Kreger testified that use of gloves for external examinations was not part of his training, and that there is no policy or protocol in place at BMC requiring the use of gloves while conducting a male genital examination. (Testimony of Weinberg, Rouzier, Kreger.)

Discussion

BORIM has the authority to revoke, suspend, or cancel any physician's license to practice medicine in Massachusetts or to otherwise discipline a physician upon a showing of misconduct and after a hearing held in accordance with G.L. c. 30A, G.L. c. 112, §§ 5, 61. BORIM may summarily suspend a physician's license to practice medicine without first holding a hearing on the merits if it determines, based on affidavits and documentary evidence, that a licensee is an immediate and serious threat or may be a serious threat to public health, safety, and welfare. 243 C.M.R. § 1.03(11)(a), (b).⁷ If BORIM issues a summary suspension, it must provide a hearing on the necessity of summary action within seven days of the suspension. 243 C.M.R. § 1.03(11). A summary suspension is temporary and persists only until a final hearing is held on the merits of BORIM's allegations of misconduct. *Id.* BORIM has the burden of proving, by a preponderance of evidence, both that it had a proper basis for summarily suspending a physician's license and that the physician committed the misconduct it alleges in its Statement of Allegations. *Randall v. Massachusetts Bd. of Registration in Medicine*, No. SJ-2014-0475 (Mass. Sup. Jud. Ct., Cordy, J., June 9, 2015); *Craven v. State Ethics Committee*, 390 Mass. 191, 454 N.E.2d 471 (1983); *see also Bd. of Registration in Medicine v. Pham*, Docket No. RM-17-1003, Recommended Decision on Summary Suspension (Div. of Admin. L. App., Sept. 6, 2019).

After reviewing and weighing the evidence in this case, including assessing the credibility of the witnesses, I have concluded that the Board has not met its burden of proving by

⁷ If BORIM finds that the physician poses an immediate and serious threat, the Board may immediately suspend the license. If BORIM finds that a physician "may be a serious threat," BORIM may suspend the license but may first provide the physician an opportunity to file evidence in opposition for its consideration. 243 C.M.R. § 1.03(11)(a), (b).

a preponderance of the evidence either that it had a proper basis for summarily suspending Dr. Kreger or that the allegations it advances in its Statement of Allegations are true.

I. Summary Suspension

On June 11, 2020, BORIM determined that Dr. Kreger posed a serious threat to public health, safety, and welfare and summarily suspended him from the practice of medicine pursuant to 243 C.M.R. § 1.03(11)(b).

BORIM first learned of the allegations against Dr. Kreger when it received the report from Harvard on August 20, 2018. For the next seven months, BORIM collected documents and interviewed potential witnesses. It conducted its final interview, that of Dr. Kreger, on March 29, 2019. At the close of its factual investigation in March 2019, BORIM had uncovered allegations of misconduct from two former Glee Club members. The misconduct alleged was not overtly sexual, and the allegations were uncorroborated by any documentary evidence. The incidents allegedly occurred in 1982 and 1987. BORIM had learned that Dr. Kreger had no opportunity to repeat the misconduct, if it had in fact occurred, because the current conductor of the Glee Club told BORIM that Dr. Kreger was no longer giving physical examinations to Glee Club members and had not done so since before the conductor was hired in 2010. It had also learned that at least one other individual, similarly situated to the two complainants, had a different perception of his experience with Dr. Kreger. There was no hint of any complaints of sexual impropriety in records subpoenaed from BMC where Dr. Kreger had been employed for more than 40 years. In sum, at the time of the summary suspension in June 2020, the freshest complaint BORIM had to consider was 32 years old.⁸

⁸ On June 11, 2020, the date of the Summary Suspension, BORIM had only the cases of Members A, B, and C before it. It did not learn of Members D or E until after the close of Hearing #1.

At the hearing, BORIM put forward no evidence to support the necessity of a summary suspension: no evidence was adduced at hearing to indicate that BORIM had any reason to conclude that Dr. Kreger may have posed a current, serious threat to the public at the time of the suspension. The Board's entire case for summary suspension rested on two uncorroborated allegations of misconduct committed more than 30 years previously under circumstances unlikely to be repeated. There was no evidence of any misconduct since that time.⁹ Under these facts, summary suspension was unwarranted.

BORIM's relaxed timetable in moving to summarily suspend Dr. Kreger's license supports my conclusion. BORIM retained Dr. Weinberg as its expert at the close of BORIM's factual investigation. Neither Mr. Bouton nor Dr. Weinberg would say when BORIM hired Dr. Weinberg. Both witnesses testified only that it was sometime between April and December 2019. I found their inability to be more specific surprising. Dr. Weinberg did not provide BORIM with his report until April 15, 2020. BORIM finally acted to summarily suspend Dr. Kreger on June 11, 2020. At that point, nearly 15 months had passed since BORIM had gathered all the facts that it would use as the basis of its action, and nearly two years had elapsed since it had received the initial report of potential misconduct from Harvard. Dr. Kreger continued to practice at BMC during this time. Had BORIM truly perceived Dr. Kreger as a serious threat to public health, safety, and welfare, it would be reasonable to expect that BORIM would have acted more expeditiously to summarily suspend Dr. Kreger or explain its delay.

⁹ BORIM did not amend its Summary Suspension to include allegations concerning Members D or E. That said, had BORIM considered those cases, the most recent allegations would have been 22 years old and 18 years old, respectively. While more recent than 32 years, decades-old complaints can hardly be viewed as evidence of a current, serious threat.

Considering the complete lack of evidence in the record that Dr. Kreger posed a current, serious threat to public health, safety, and welfare when his medical license was summarily suspended, I conclude that BORIM's action was not warranted.

II. Statement of Allegations

A. Allegations of Sexual Misconduct

BORIM charges that Dr. Kreger engaged in sexual misconduct by inappropriately touching and examining Glee Club members at Harvard University. The conduct, if proven, would constitute gross misconduct in the practice of medicine, violate the prohibition of engaging a patient in sexual activity as stated in American Medical Association's Code of Medical Ethics, and demonstrate deceit or fraud in the practice of medicine in contravention of G.L. c. 112, § 5 and 243 C.M.R. §§ 1.03(5)(a)3, 1.03(5)(a)10, 1.03(5)(a)11, and 1.03(5)(a)18. Violations of these statutory and regulatory sections form the basis for discipline by BORIM. G.L. c. 112, §§ 5, 61. BORIM may also discipline a physician for engaging in conduct that undermines public confidence in the integrity of the medical profession. *Levy v. Bd. of Registration in Medicine*, 378 Mass. 519, 392 N.E.2d 1036 (1979); *Aronoff v. Bd. of Registration in Medicine*, 420 Mass. 830, 652 N.E.2d 594 (1995).

i. The Physical Examinations

Although the record is voluminous, the actual allegations of sexual misconduct are few. BORIM alleges misconduct concerning Members A, B, C, D, and E. Four of these former Glee Club members (Members A, B, D, E) testified to one instance each of conduct by Dr. Kreger that they believed to be inappropriate. One former Glee Club member (Member C) testified to the one experience cited by BORIM that Member C himself found to be unremarkable.

Taking each account at face value, the evidence showed that during comprehensive physical examinations of Members A, B, C, D, and E, Dr. Kreger engaged in the following behavior:

- Asked Member A about his sexual behavior, including the number of partners he had, their gender, and the frequency of his activity. Looked at Member A's penis and palpated it along its entire length, examined Member A's scrotum by looking at it and palpating it, and performed a hernia check by placing his finger or fingers on the inguinal canal and asking Member A to cough or bear down. The examination of the penis and the scrotum lasted less than 30 seconds. The hernia examination was brief.
- Asked Member B about his sexual behavior, touched Member B's scrotum with two hands for five to ten seconds (a motion that Member B characterized as "tugging"),¹⁰ and touched Member B's penis for one to two seconds to move it out of the way.
- Asked Member C about his sexual behavior and responded, when Member C asked if sexual activity included oral sex, that sexual activity included both oral and anal sex. Checked Member C for a hernia by touching him in the area near his scrotum and asking him to cough.
- Asked Member D about his sexual partners and performed a hernia check by placing two fingers on the underside of Member D's scrotum and asking him to turn his head to each direction and cough. Dr. Kreger touched Member D's scrotum for no more than 30 seconds and touched no other part of Member D's genitals.

¹⁰ Because of Member B's untimely death, there was no opportunity to clarify what Member B meant by the word "tugging" and there is no way to know whether he was describing testicle palpation or some other motion that may or may not have had a legitimate medical purpose. It is interesting that Member D testified that he perceived that other doctors' hernia exams involved "tugging," something that Member D said Dr. Kreger did not do during Member D's physical examination. Member B's unclarified statement that his examination involved "tugging" is not reliable evidence of inappropriate behavior by Dr. Kreger.

- Palpated Member E's scrotum with his hand in a manner that caused some soreness afterwards in one of Member E's testicles. The scrotal exam took no more than one minute.

No witness testified that Dr. Kreger made any attempt to sexually arouse him, and no witness testified that Dr. Kreger became sexually aroused. Dr. Kreger denied that he performed physical examinations on Glee Club members for his sexual gratification, and I found him credible on this point. There is no evidence in the record to the contrary.

The expert testimony established that the genital and hernia examinations performed by Dr. Kreger as described by Members A, B, C, D, and E¹¹ were consistent with the standard of care applicable to those examinations both at the time the exams took place and now. Drs. Rouzier and Weinberg agreed that a physical examination of a male patient includes a hernia examination and a genital examination. They concurred that the hernia examination requires a doctor to place a finger or fingers alongside the scrotum where he can feel the inguinal canal and to ask a patient to cough or bear down to see if a lump protrudes into the canal. The doctors also agreed that the genital examination involves a visual inspection of the scrotum and the penis to look for lesions or other abnormalities, and palpation of the testicles to check for tumors, irregularities, or differences in size. Typically, palpation of the testicles takes around 15 seconds. Although Drs. Rouzier and Weinberg testified that examination of the penis is largely visual, they both stated that there are circumstances in which a physician may palpate the penis to check for masses, tenderness, or discharge, especially if there is a concern that a patient may be at risk for a sexually transmitted disease.

¹¹ Members F and G never underwent a physical examination with Dr. Kreger.

Members A, C, and D described a hernia examination that was consistent with the expert witnesses' descriptions of how hernia examinations should be conducted. Members B and E were not asked about -- and did not specifically describe -- a hernia examination.¹²

Members A, B, D, and E described genital examinations that were consistent with Dr. Rouzier's and Dr. Weinberg's explanation of the proper way these examinations should be conducted.¹³ All four stated that Dr. Kreger touched or palpated their scrotums. Only Member A described a manual examination of his penis. Member B stated that Dr. Kreger moved Member B's penis aside, presumably to inspect the scrotum. Their estimates of the time that Dr. Kreger took to perform the genital examinations ranged from 20 seconds to one minute, although it was unclear from the testimony of Members D and E if their estimates combined the time it took to complete the genital examination with the hernia examination.

I do not find it indicative of sexual misconduct by Dr. Kreger that Member A's physical examination included a manual inspection of his penis when the examinations of Members B, D, and E did not. Drs. Rouzier and Weinberg testified that the decision to palpate the penis is based upon a patient's history and a physician's concern for the patient's risk of sexually transmitted disease. Members B and D both told Dr. Kreger that they were not sexually active, effectively eliminating the possibility of a sexually transmitted disease in these men. Member A testified that he had a girlfriend at the time but did not reveal what he told Dr. Kreger about his sexual activity except to say that he answered Dr. Kreger's questions. Member A's medical records are not in evidence, but we know from his testimony that he had a hernia as a young child and, as an adult, experienced an inflammation in his testicles and enlargement of his scrotal veins and

¹² In his testimony, Member E described a genital examination but called it a hernia examination. Member E is a lawyer, not a doctor, and cannot be presumed to know the difference between the two. I do not credit Member E's characterization of his genital examination as a hernia examination.

¹³ Member C did not testify to a genital examination.

prostate. Member A's examination also took place in 1982, when AIDS was on the rise and newly understood to be transmitted by sexual contact. It is certainly plausible that Dr. Kreger evaluated Member A's history and physical condition, considered his risk of a sexually transmitted disease in the context of the AIDS epidemic, and concluded that a physical examination of the penis was warranted. Dr. Gregg, who also had a physical examination with Dr. Kreger in 1982, testified that Dr. Kreger likewise checked the shaft of his penis. BORIM offered no evidence that Dr. Kreger's decision to examine Member A's penis was driven by an improper motive and there is no evidence to conclude that the examination was prompted by anything other than clinical considerations. Indeed, Dr. Kreger's decision not to manually examine the penises of the individuals who were sexually inactive suggests that Dr. Kreger's choices were medically based. Finally, the examination described by Member A -- divorced from Member A's subjective description of it -- is consistent with the expert testimony of how a penile examination should be done.

Dr. Kreger also asked Members A, B, C, and D questions about their sexual behavior -- specifically, how many partners they had had, their gender, and the frequency of contact. He clarified for Member C that sexual activity included various types of sexual contact. Although Member E did not testify that Dr. Kreger asked him questions about his sexual behavior, he stated that he had heard that Dr. Kreger routinely included these questions and I infer from his testimony that Dr. Kreger did so during Member E's examination. Dr. Rouzier and Dr. Weinberg agreed that inquiring about a patient's sexual history, including numbers of partners, gender, and frequency of contact, was standard practice for a comprehensive physical examination by the 1980s and remains so today.

Accordingly, there was nothing unusual about Dr. Kreger asking Members A, B, C, D, and E about their sexual history or clarifying what behaviors were at issue in the context of a comprehensive physical examination. In fact, asking these questions was consistent with the standard of care for a comprehensive physical examination at the time. BORIM offered no evidence that Dr. Kreger engaged in sexual misconduct when he asked Members A, B, C, D, and E about their sexual histories or when he clarified the question for Member C during the physical examinations.

ii. Emotional Reactions of Members to the Examinations

In reaching the conclusion that the examinations performed by Dr. Kreger on Members A, B, C, D, and E were consistent with the standard of care, I have considered the emotional reactions that Dr. Kreger's examinations provoked in some of the Glee Club members. While I do not doubt that these members experienced these feelings, I do not find their reactions to be evidence of any misbehavior on Dr. Kreger's part.

Member A reported that at the time of the examination he was uncomfortable answering questions regarding his sexual history. He also stated he felt humiliated by the genital examination. Member B stated that he was uncomfortable during the genital portion of the examination. Likewise, Member D testified that he was uncomfortable during the genital examination and that he took offense, after revealing that he was not sexually active, when Dr. Kreger observed that being celibate was the ultimate in safe sex. Member C recalled his experience with Dr. Kreger as unremarkable and reported no emotional reaction. Member E remembered that he was nervous prior to the examination but had no strong feelings during or after it. It is not surprising that young men would be uncomfortable answering questions about their sexual experiences, nor is it remarkable that they would feel uneasy, embarrassed, or even

humiliated during their first genital examination. It is also not surprising that a remark made by a physician during such a sensitive moment might be misinterpreted. Although it is possible that Dr. Kreger was mocking Member D when he observed that celibacy was the ultimate in safe sex, it is equally plausible that Dr. Kreger was attempting to normalize Member D's situation and make him feel more comfortable.

Dr. Weinberg's report to BORIM concluded that the unease Members A and B felt during their examinations should be considered evidence of wrongdoing. To support his opinion, he cited an article that examined consensual sexual relationships between patients and doctors. Dr. Weinberg quoted the article for the proposition that the significance of a doctor's conduct should be viewed from the perspective of the patient, not from the perspective of the doctor. Dr. Weinberg decontextualized this quote and distorted its meaning. The quote addresses the possible vulnerability of patients in romantic relationships with their current or former doctors and does not stand for the proposition that findings of sexual misconduct should be based on a patient's feelings about a medical encounter. (See Finding 210.) Dr. Weinberg cited no other basis for his conclusion that it was proper to rely on how Member A and B felt about their examinations to conclude that sexual misconduct had occurred.¹⁴

BORIM did not establish that Dr. Weinberg possessed any knowledge, education, skill, training, or experience in evaluating sexual abuse claims. There was no evidence that Dr. Weinberg possessed the necessary expertise to know whether it is appropriate to infer sexual abuse from the words used by an alleged victim to describe their feelings about an examination, and accordingly I give no weight to his opinion that the emotional reactions of Members A and B to their examinations were evidence of sexual misconduct.

¹⁴ Dr. Weinberg did not evaluate the allegations concerning Members C, D or E. (See Findings 207, 208, 218, and 219.)

Other than Dr. Weinberg's opinion testimony and report, BORIM produced no evidence that the feelings reported by Members A, B, D, and E of nervousness, embarrassment, anxiety, and similar emotions prior to or during their examinations were evidence of sexual misconduct by Dr. Kreger. The testimonies of Members A, B, D, and E regarding their emotional reactions were completely subjective. Their opinions that something was amiss were uncorroborated by any other evidence, including evidence of a relationship or attempt to establish one, evidence of arousal, or variation from the components of a standard physical examination. I conclude BORIM has not proven that the feelings expressed by Members A, B, D, and E are evidence of any sexual misconduct by Dr. Kreger.

iii. Member A's "Flashback" Memory

Dr. Weinberg also opined that the manner in which Member A remembered his examination with Dr. Kreger was evidence of abuse. Dr. Weinberg believed that Member A's use of intense descriptors (e.g., that the examination of Member A's penis was "creepy crawly," that Dr. Kreger had "fondled" him) and Member A's experience of a detailed "flashback memory" indicated misconduct by Dr. Kreger. Dr. Weinberg also discounted Member A's statement that the examination had no effect on him at the time. He stated that Member A's current strong memory is evidence that Member A was impacted by the experience at the time it occurred, even though Member A denied that impact.

BORIM did not establish that Dr. Weinberg had any knowledge, skill, education, experience, or training in understanding or evaluating memory, whether flashback, recovered, or otherwise. Additionally, Dr. Weinberg did not testify, nor did the evidence show, that his opinion of the medical significance of memories such as Member A described was "the product of reliable principles and methods" or that he reliably applied whatever principles and methods he

used to the facts of this case. *See* Mass. G. Evid. § 702(b), (c) (2021). Accordingly, I give no weight to Dr. Weinberg's opinion that Member A's later, intense memory of his examination with Dr. Kreger was reliable or that the evocative words Member A used to describe his later memory was evidence that Dr. Kreger sexually abused Member A.

Other than Dr. Weinberg's testimony and report, BORIM produced no evidence that Member A's current, emotionally laden memory is evidence of sexual misconduct by Dr. Kreger. I conclude BORIM has not proven that the quality or type of Member A's memory is evidence of any sexual misconduct.

iv. Bias in Dr. Weinberg's Evaluation

Overall, Dr. Weinberg's entire evaluation of the materials BORIM provided to him is problematic and demonstrates a bias toward reaching a particular conclusion. First, Dr. Weinberg came to the factually unsupported conclusion that Dr. Kreger sat on a stool for the entirety of Member A's examination, thus conducting the physical at "nose to genital height." Rather than analyze if this conclusion was supported by any evidence, Dr. Weinberg instead wondered how Dr. Kreger could possibly listen to Member A's lungs and heart and examine Member A's ears, eyes, nose, and throat when he remained seated. When asked about this conclusion during the hearing, Dr. Weinberg maintained his assumption about Dr. Kreger's physical position during Member A's examination. Although neither Dr. Weinberg nor Mr. Bouton made clear precisely what materials BORIM provided to Dr. Weinberg for his review, all the evidence in the record indicates that Dr. Kreger examined Member A's upper body in the usual fashion: by standing next to him.

Second, Dr. Weinberg took the puzzling position that the appropriateness of a physician's conduct during a medical encounter should be judged by how the patient felt about the

encounter. This standard is unworkable and belies real-world experience. The record lacks any evidence that Dr. Weinberg's testimony judging Dr. Kreger's conduct by this yardstick is "the product of reliable principles and methods." *See* Mass. G. Evidence § 702(c) (2021). Many medical procedures, properly conducted, cause discomfort or may produce feelings of distress or embarrassment. Physicians who properly perform their medical duties cannot be found to have violated a standard of care solely on the strength of a patient's perception of discomfort.

Finally, Dr. Weinberg was not afforded the opportunity to review the entire record that BORIM had at its disposal. It is possible that Dr. Weinberg might have reached a different conclusion had he been provided with the statements of Patient C and Conductor Andrew Clark, or the credentialing files of HUHS or Boston Medical Center.

v. Bias of Members A and D

As I have noted above, even if I completely credit the accounts of Members A, B, D, and E, the examinations they describe are consistent with the standard of care despite their opinions that something inappropriate occurred. Those opinions must be seen in the context of the animus that some of the witnesses harbored for Dr. Kreger.

By his own admission, Member A considered Dr. Kreger "creepy" and "weird" because Dr. Kreger was still involved in the Glee Club many years after his student days were over. Member A thought Dr. Kreger was too old to relate to the students and hindered decision-making by the students. He denigrated Dr. Kreger's skills both as a musician and as a doctor. Member A was hard pressed to find any value in Dr. Kreger's contributions to the Glee Club. He even tried to remove Dr. Kreger from his position as graduate manager and went so far as to petition two different Harvard faculty members and one Foundation board member for that purpose.

Member A's view of Dr. Kreger predated his physical examination by Dr. Kreger. After the complained-of physical examination, Member A continued to engage with the Glee Club and with Dr. Kreger for another academic year until Member A graduated. As Member A testified, the physical examination did not hamper his Glee Club activities. In fact, he did not think about the physical examination again for 36 years. Nevertheless, Member A's distaste for Dr. Kreger remained and resurfaced when Member A discovered at a Florida concert that Dr. Kreger was still singing with the Glee Club. Although Member A may now genuinely believe that he was abused by Dr. Kreger, I conclude, based on Member A's testimony and demeanor, that Member A's longstanding dislike of Dr. Kreger combined with the passage of time to color his memory of the events that transpired many years ago.

Member D likewise held ill-feelings toward Dr. Kreger. Like Member A, Member D thought Dr. Kreger's continued involvement with the Glee Club was strange. Member D found Dr. Kreger annoying and saw him as a nuisance and as someone the Club could not cast off. Despite his opinion of Dr. Kreger and his reluctance to undergo a physical because he did not want to disclose his history of depression, Member D decided to have his physical examination performed by Dr. Kreger. There was no evidence that Dr. Kreger pressured Member D to sign up for a physical, other than Member D's testimony that he felt pressured. Member D testified that Dr. Kreger approached him in a public place in the presence of other people, commented that he did not have a physical on file, and encouraged him to sign up. It is not surprising that Member D was uncomfortable undergoing a physical that he wanted to avoid. Further, I cannot conclude that the emotional difficulties that Member D ascribes to his physical examination were caused by that examination. It is certainly possible that Member D would remember the examination with resentment and attribute later emotional problems to it, but Member D's opinion does not

establish causation. BORIM offered no expert testimony that would support Member D's claim that the physical examination had a detrimental effect on his college years or interfered with his ability to connect with others later in life.

Additionally, Member D's testimony came after he requested the administrative record and read it. I did not find Member D credible when he testified that he did not read the transcripts after he received them. Member F, Member D's friend, testified that Member D forwarded the record to him and sent text messages commenting on the transcript. Member D's testimony concerning the lingering effects he attributed to Dr. Kreger's physical examination neatly echoed Harvard's conclusion that Member A experienced no such effect. On this detail, Member D's testimony appeared tailor-made to establish a point not carried at Hearing #1. I conclude that Member D's testimony was shaped – perhaps unconsciously -- by his anger at and dislike of Dr. Kreger as well as by his reading of the prior testimony in this case.

vi. Other Circumstantial Factors as Evidence of Misconduct

Finally, I did not find the circumstantial factors that Dr. Weinberg identified as suspicious to be indicative of sexual misconduct. Dr. Weinberg cited the hours and locations of the physicals and the lack of a chaperone during the physical examinations of male Glee Club members as hallmarks of wrongdoing. But Dr. Rouzier testified convincingly that preparticipation physicals of students are often conducted at locations and times convenient for the student and the provider, and that it has never been the standard of care to require a third-party chaperone for a genital examination of a male patient by a male doctor.

Dr. Weinberg also testified that the lack of draping “raised an eyebrow” for him, but he did not testify that this violated any standard of care. Similarly, Dr. Weinberg noted that he generally wore gloves when conducting a genital examination, but he made no claim that this

was a generally accepted practice. Dr. Kreger testified that wearing gloves for external examinations was not part of his training and was not standard practice at BMC.

Dr. Weinberg additionally questioned the need to conduct an examination of Member B because Member B had had a pre-employment physical the year before. But there was no evidence that Dr. Kreger had access to the results of that physical, what the physical entailed other than a hernia examination, or even that the physical had been conducted within the preceding 12 months. Given that an annual physical was the standard of care in the 1980s, repeating a physical one year later would have been appropriate.

BORIM has not proven that the circumstantial factors cited by Dr. Weinberg are evidence of sexual misconduct by Dr. Kreger.

vii. Conclusion

It bears emphasizing that Dr. Weinberg never testified that the way Dr. Kreger administered the genital examinations of Members A and B was improper and never considered any evidence or offered any opinion at all regarding the examinations of Members C, D, or E. Dr. Weinberg made assumptions of misconduct based on the feelings expressed by Members A and B and the descriptors they used, Member A's statements about a "flashback" memory, and other factors such as the time and location of the examinations and the lack of chaperones and draping. Yet, Dr. Weinberg did not testify that anything Dr. Kreger physically did violated any standard of care. His central theme was that Dr. Kreger should never have performed the examinations and, consequently, because the examinations were unnecessary, sexual abuse must have occurred.

I conclude, based on the evidence, that the genital and hernia examinations Dr. Kreger conducted of Members A, B, C, D, and E, and the questions Dr. Kreger asked regarding their

sexual histories, were consistent with the standard of care applicable to male comprehensive physical examinations when those examinations occurred. There is no evidence that Dr. Kreger engaged in sexual misconduct while performing the comprehensive physical examinations of Members A, B, C, D, or E.

BORIM has not established by a preponderance of the evidence any sexual misconduct by Dr. Kreger and thus has not proven any related violation by Dr. Kreger of G. L. c. 112, § 5; 243 C.M.R. § 1.03(5)(a)3 (competence to practice medicine, including gross misconduct and fraudulent practice); 243 C.M.R. § 1.03(5)(a)11 or American Medical Association Code of Medical Ethics Opinion 8.14 (violating a law, rule, regulation, or ethical principle); 243 C.M.R. § 1.03(5)(a)10 (practicing medicine deceitfully or engaging in deceitful or fraudulent conduct); or 243 C.M.R. § 1.03(5)(a)18 (committing misconduct in the practice of medicine). BORIM has also failed to prove that Dr. Kreger engaged in sexual misconduct and, in so doing, acted in a way that would undermine public confidence in the integrity of the medical profession. *See Levy v. Bd. of Registration in Medicine*, 378 Mass. 519, 392 N.E.2d 1036 (1979)

B. Allegations of Medically Unnecessary Physical Examinations

In its opening statement and closing brief, BORIM advanced its theory that Dr. Kreger's association with the Glee Club was predatory and that his activities of singing, accompanying, and serving as the group's traveling physician were merely a pretext to provide him with access to young, vulnerable men for sexual reasons. Throughout, there was a steady drumbeat of insinuations that had nothing to do with the medical care that Dr. Kreger provided to Glee Club members and everything to do with judgments concerning Dr. Kreger's age, choice of activities, and associations. BORIM points out that Dr. Kreger continued to rehearse and travel with the Glee Club even though he was significantly older – and eventually, decades older – than the

student members, the majority of whom were undergraduates. It suggested, without basis, that Dr. Kreger insinuated himself into the group as a self-appointed tour physician, had favorites among the group whom he presumably groomed, fraternized with the students inappropriately, supplied students with alcohol, and used his financial contributions to the Glee Club to buy the silence of those who suspected his nefarious activities. BORIM also attached great significance to the sophomoric lyrics and accompanying puerile hand gestures of the Club's version of the Yo Ho Harvard fight song.

There was no evidence whatsoever that Dr. Kreger singled out students for special treatment, associated with Glee Club members in an age-inappropriate manner, or ever supplied anyone with alcohol. The evidence at hearing established that Dr. Kreger did not appoint himself as the Glee Club's doctor; instead, he was asked by the Club to become its tour physician. The claim that Dr. Kreger had nominated himself as physician may have originated with Member A, but Member A retracted that statement during his formal interview with Harvard's Office of Dispute Resolution, and BORIM knew this prior to issuing its Statement of Allegations. Regarding Dr. Kreger's financial contributions to the Glee Club, Mr. Tzeng and Mr. Fox testified that Dr. Kreger's giving, although generous in later years, was not singular. They agreed that Dr. Kreger had never asked for silence on anything in exchange for his donations, and that he had never threatened to withhold his support. Dr. Kreger testified to these same points. BORIM produced no evidence that Dr. Kreger ever tried to wield financial influence over the Club to protect himself. Finally, the bespoke version of the Yo Ho fight song must be seen for what it was: bawdy humor by young men making light of topics considered somewhat embarrassing. The idea that the song was a code of some kind intended to warn of or memorialize the occurrence of inappropriate conduct by Dr. Kreger strains credulity to its breaking point.

With no proof of any of its accusations of fraternizing, manipulation, threats, or bribery, BORIM hung its hat on the theory that the physical examinations provided by Dr. Kreger to Members A and B were medically unnecessary and, by extension, a means of providing him with opportunity to look at and touch young men's genitals. I have already examined the evidence concerning sexual misconduct and have concluded that BORIM did not establish, by a preponderance of the evidence, that Dr. Kreger engaged in any sexual misconduct whatsoever. That leaves only the charge that Dr. Kreger provided medically unnecessary physical examinations.

BORIM argues that Dr. Kreger violated a standard of care by administering comprehensive physical examinations to Glee Club members because a more limited examination would have served the purpose for which the exams were offered. It is doubtful that this case would have been brought but for the allegations of sexual misconduct. It is hard to imagine BORIM threatening to discipline Dr. Kreger because it thought it medically unnecessary for Dr. Kreger to examine the eyes or ears of Glee Club members. Nevertheless, BORIM has presented this charge as independent of the other.

BORIM provided its expert, Dr. Weinberg, with materials concerning only Members A and B. Dr. Weinberg's analysis concerning the necessity for comprehensive physical examinations for Members A and B -- absent concerns of sexual misconduct -- was somewhat equivocal. He testified that the crux of the matter was whether Dr. Kreger engaged in sexual misconduct with Members A and B. With this focus, Dr. Weinberg considered what the purpose of the preparticipation physical might be. Presumably, this was because he believed that the physical examinations were pretextual. It was not clear from Dr. Weinberg's report or from his

testimony whether he would have found fault with Dr. Kreger's methods in the absence of any allegation of sexual misbehavior.

There is no evidence that Dr. Weinberg has any particularized education, knowledge, skill, experience, or training -- beyond his general medical training and practice -- on the subject of when preparticipation physicals for young people should be required or what the parameters of those examinations should be. No showing was made by BORIM that Dr. Weinberg's expertise in quality control and improvement qualified him as an expert in preparticipation physicals. Dr. Weinberg's knowledge on this topic stems principally from his experience as a primary care physician who administered preparticipation physicals for many years before his practice transitioned to primarily geriatric medicine. Dr. Weinberg also consulted the medical literature for opinions on the proper scope of preparticipation physicals. He was unable to find any articles that discussed what elements should be included in a physical examination for individuals embarking on extended international travel. All the literature on preparticipation physicals focused on sports physicals, and none of the sources considered and cited by Dr. Weinberg predated 2005.

Because none of the medical literature considered by Dr. Weinberg addressed preparticipation physicals for international travel, and because none of the literature addressed standards in place during the time of Dr. Kreger's examinations of Glee Club members, Dr. Weinberg's opinion is properly based only on what his own practice had been from 1979 to the early 2000s. He testified that the preparticipation physicals he conducted were limited and focused on the elements of the student's health that might be impacted by the activity. He thus did not consider it necessary to administer a comprehensive physical examination for either sports physicals or those preceding international travel. Nowhere in his testimony did Dr.

Weinberg appear to consider the duration of an international trip, the destination, or the availability of medical care as factors in deciding whether to conduct a comprehensive physical examination. He opined that a focused examination was appropriate for preparticipation physicals and that the genital examinations of Members A and B were thus medically unnecessary, but he noted that other physicians believed a comprehensive examination should be done. Dr. Weinberg did not opine as to whether it was medically unnecessary for Dr. Kreger to inquire about Member A or B's sexual history, although he testified that he personally saw no reason to ask those questions prior to international travel.

Dr. Rouzier has considerably more education, knowledge, experience, and training than Dr. Weinberg in the realm of preparticipation physicals. In addition to his experience in family practice, Dr. Rouzier specializes in sports medicine and has been active in that field since the 1980s. As the Director of Athletic Medicine and Head Team Physician at the University of Massachusetts/Amherst, his patients are primarily students ages 18 to 25. Dr. Rouzier oversees all preparticipation sports physicals at the University. The University requires annual comprehensive physical examinations for its athletes. For men, these physicals include a hernia examination, a genital examination, and questions about sexual history. Dr. Rouzier also provides physical examinations for students travelling internationally. Dr. Rouzier opined that it was appropriate and consistent with the standard of care for Dr. Kreger to administer a comprehensive physical examination to students prior to embarking on international travel in the 1980s. I credit Dr. Rouzier's opinion on this point because Dr. Rouzier's education, knowledge, experience, and training in administering preparticipation physicals is considerable deeper and broader than that of Dr. Weinberg.

Dr. Kreger's testimony and that of many of the witnesses who participated in the international tours demonstrated that Dr. Kreger's pre-trip protocols were sensible given the destinations to which the group travelled, and the length of time members were on tour. It is undisputed that Dr. Kreger's familiarity with the medical history and conditions of the Glee Club members benefitted those who fell ill while overseas. Further, Dr. Kreger's decisions must be viewed through a historical lens. Worldwide medical care, communication technology, and accessibility were quite different 35 years ago. By 2002, when the Glee Club decided to eliminate the pre-tour physical requirement, much had changed. As Dr. Kreger testified, over the years medical care improved worldwide, and English became the dominant language in medical circles. It is more likely than not that Dr. Kreger continued the practice of providing comprehensive physicals for as long as he did because the Glee Club had operated this way for 50 years, and he believed that his services were beneficial. Although it does not matter for the purposes of this case whose decision it was to discontinue the physicals, BORIM made much of Dr. Kreger's testimony from Hearing #1 that he recalled the decision as his own. Member G's testimony in Hearing #2 established that Member G made the decision and the Club's executive committee declined to override that call. When recalled to testify, Dr. Kreger remembered the details of his embarrassment at Member G's public announcement. It is impossible to say whether Dr. Kreger's memory softened the details of that day over the intervening 18 years, or whether Dr. Kreger consciously preferred and presented a face-saving narrative in his initial testimony. I have considered both possibilities and have concluded that even if the latter is true, it does not impact my judgment of Dr. Kreger's credibility on other points.

I conclude, based on all the evidence, that BORIM has not met its burden of proving that Dr. Kreger provided medically unnecessary treatment and violated a standard of care by

providing comprehensive physical examinations to Members A and B that included questions about sexual history, a genital examination, and a hernia examination.

BORIM did not seek Dr. Weinberg's opinion regarding physical examinations given to Members C, D, or E and Dr. Weinberg offered no testimony regarding these witnesses. BORIM has thus not proved that Dr. Kreger violated a standard of care by providing comprehensive physical examinations to Members C, D, or E. *See Arthurs v. Board of Registration in Medicine*, 383 Mass. 299, 418 N.E.2d 1236 (1981).

Conclusion

BORIM has not proved that Dr. Kreger presented a serious threat to the public health, safety, or welfare at the time BORIM issued its summary suspension. There was no evidence to support BORIM's position.

BORIM has not proved that Dr. Kreger engaged in sexual misconduct during physical examinations of Glee Club members A, B, C, D, or E in violation of G.L. c. 112, § 5 and 243 C.M.R. §§ 1.03(5)(a)3, 1.03(5)(a)10, 1.03(5)(a)11, or 1.03(5)(a)18, or in violation of the prohibition of engaging in conduct that may undermine public confidence in the integrity of the medical profession. *See Levy and Aronoff*.

BORIM has not proved that Dr. Kreger provided medically unnecessary physical examinations or violated a standard of care by providing comprehensive physical examinations to Glee Club Members A, B, C, D, or E in violation of G.L. c. 112, § 5 and 243 C.M.R. §§ 1.03(5)(a)3, 1.03(5)(a)10, 1.03(5)(a)11, or 1.03(5)(a)18, or in violation of the prohibition of engaging in conduct that may undermine public confidence in the integrity of the medical profession. *See Levy and Aronoff*.

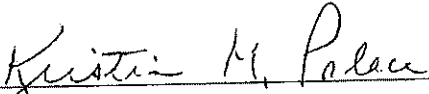
Mitigating Factors

Because I have concluded that BORIM has not proved that Dr. Kreger committed any offense, there is no wrongdoing against which mitigating factors need to be balanced. Accordingly, I make no findings of mitigating factors.

Recommendation

I recommend that BORIM impose no discipline upon Bernard Kreger, M.D. BORIM has not proved any of the allegations of wrongdoing set forth in its Statement of Allegations or its Amended Statement of Allegations. I further recommend that BORIM immediately vacate the summary suspension of Dr. Kreger's medical license.

DIVISION OF ADMINISTRATIVE LAW APPEALS



Kristin M. Palace
Administrative Magistrate

APR 5 2021