



## **DECISION AND REASONS**

This matter was heard by a panel of the Discipline Committee (the “Panel”) of the College of Early Childhood Educators (the “College”) on November 16, 17 and 18, 2020. The hearing proceeded electronically (by videoconference) pursuant to the *Early Childhood Educators Act, 2007* (the “Act”), *the Hearings in Tribunal Proceedings (Temporary Measures) Act, 2020* and the College’s Rules of Procedure of the Discipline Committee and of the Fitness to Practise Committee.

## **PRELIMINARY ORDERS AND JURISDICTION OF THE PANEL**

This matter was ordered by the Panel to be heard together with the matter of *College of Early Childhood Educators v Sophia Phillips* pursuant to section 9.1(1)(a) of the *Statutory Powers and Procedures Act, R.S.O. 1990* and on consent of the Member and Sophia Phillips (“SP”), as indicated in emails between the parties and the Hearings Office (Exhibits 8a and 8b).

The College advised the Panel that the Member’s certificate of registration had been suspended for non-payment of fees, but submitted that the Member is still subject to the jurisdiction of the College for acts of professional misconduct that were committed during the time she held a certificate of registration, in accordance with section 18(3) of the Act. The Panel agrees with this submission.

At the outset, the Panel noted that the hearing was being recorded in the Zoom platform at the direction of the Panel for the hearing record, and ordered that no person shall make any audio or video recording of these proceedings by any other means.

The Panel also ordered a publication ban, pursuant to section 35.1(3) of the Act. The order bans the public disclosure, publication and broadcasting outside of the hearing room, of any names or identifying information of any minor children who may be the subject of evidence in the hearing.

## **MEMBER'S NON-ATTENDANCE AT THE HEARING**

Cathy McLean (the "Member") was not present for the hearing. Counsel for the College provided evidence (Exhibits 1, 2, 3, 4, 5 and 6) establishing that the College had informed the Member of the purpose, date, and time of the hearing and that the Member had been provided with the details required to participate. The Panel was satisfied that the Member had been informed of the purpose, date, time and location of the hearing. Accordingly, the hearing proceeded in the Member's absence, pursuant to subsection 7(3) of the *Statutory Powers and Procedures Act, RSO 1990*.

## **THE ALLEGATIONS**

The allegations against the Member were contained in the Notice of Hearing dated February 4, 2020, (Exhibit 1) which provided as follows:

1. At all material times, Cathy Rae-Ann McLean (the "Member") was a member of the College of Early Childhood Educators working as an early childhood educator at BrightPath Eglinton (the "Centre"), a child care centre in Etobicoke, Ontario.
2. Between approximately May 2016 and July 2016, the Member engaged in a series of inappropriate statements, acts, and/or behaviour in relation to a three-year-old child (the "Child") under her care and supervision including, but not limited to:
  - a) making regular comments inside the classroom that the Child was "gay" or spelling out the word, "g-a-y", with reference to the Child;
  - b) instructing and/or encouraging the Child to expose his penis in the presence of Centre staff and/or other children;
  - c) instructing and/or encouraging the Child to touch his genital area and/or to touch the genital area of other children;
  - d) instructing and/or encouraging the Child to kiss other children on the lips;
  - e) instructing and/or encouraging the Child to lie on top of other children;

- f) asking the Child whether his father would cheat on his mother and/or whether his father would come home with the Member; and/or
  - g) using the word, “fuck”, or otherwise cursing in front of the Children under her supervision.
3. In or around June 2016 or July 2016, the Member showed two of her colleagues a photograph on her phone of a man's penis at the Centre during working hours.
4. On or about July 14, 2016, the Member's employment at the Centre was terminated due to the incident.
5. By engaging in the conduct set out in paragraphs 2-3 above, the Member engaged in professional misconduct as defined in subsection 33(2) of the *Early Childhood Educators Act, 2007*, S.O. 2007, c. 7, Sch. 8, in that:
- a) she verbally abused a child who was under her professional supervision, contrary to *Ontario Regulation 223/08*, subsection 2(3);
  - b) she psychologically and/or emotionally abused a child who was under her professional supervision, contrary to *Ontario Regulation 223/08*, subsection 2(3.2);
  - c) she sexually abused a child who was under her professional supervision, contrary to subsection 1(1) of the *Early Childhood Educators Act, 2007*, S.O. 2007, c. 7, Sch. 8;
  - d) she failed to maintain the standards of the profession contrary to *Ontario Regulation 223/08*, subsection 2(8), in that:
    - i) she failed to provide a nurturing learning environment where children thrived, contrary to Standard I.D of the Standards of Practice;
    - ii) she failed to establish professional and caring relationships with children and/or to respond appropriately to the needs of children, contrary to Standard I.E of the Standards of Practice;

- iii) she failed to ensure that the needs and best interests of the Children remained paramount, contrary to Standard I.F of the Standards of Practice;
- iv) she failed to maintain a safe and healthy learning environment, contrary to Standard III.A.1 of the Standards of Practice;
- v) she failed to support children in developmentally sensitive ways and to provide caring, stimulating, and respectful opportunities for learning and care that are welcoming to children and their families, contrary to Standard III.C.1;
- vi) she failed to know, understand and abide by the legislation, policies and procedures that were relevant to her professional practice and to the care and learning of children under her professional supervision, contrary to Standard IV.A.2 of the College's Standards of Practice;
- vii) she failed to make decisions, resolve challenges and/or provide behaviour guidance in the best interests of the Children under her professional supervision, contrary to Standard IV.B.4 of the Standards of Practice;
- viii) she failed to work collaboratively with colleagues in the workplace to provide a safe, secure, healthy, and inviting environment for children and families, contrary to Standard IV.C.1 of the Standards of Practice;
- ix) she failed to build a climate of trust, honesty, and respect in the workplace, contrary to Standard IV.C.2 of the Standards of Practice;
- x) she conducted herself in a manner that could reasonably be perceived as reflecting negatively on the profession of early childhood education, contrary to Standard IV.E.2 of the Standards of Practice;
- xi) she physically, verbally, psychologically or emotionally abused a child under her professional supervision, contrary to Standard V.A.1 of the Standards of Practice;

- xii) she used her professional position of authority to coerce, improperly influence, harass, abuse, or exploit a child under her professional supervision, contrary to Standard V.A.2 of the Standards of Practice; and/or
  - xiii) she failed to establish and maintain clear and appropriate boundaries with children under her supervision, their families, and in her professional relationships, contrary to Standard V.B of the Standards of Practice;
- e) she acted or failed to act in a manner that, having regard to the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional, contrary to *Ontario Regulation 223/08*, subsection 2(10); and/or
- f) she conducted herself in a manner that is unbecoming a member, contrary to *Ontario Regulation 223/08*, subsection 2(22).

**THE MEMBER’S PLEA**

As the Member was neither present nor represented by counsel, the Panel proceeded on the basis that the Member denied all of the allegations set out in the Notice of Hearing and proceeded to hear the matter as a contested hearing.

**EVIDENCE**

**Documentary Evidence:**

The following documents were entered into evidence at the hearing:

<b>Exhibit #</b>	<b>Description</b>
Exhibit 1	Notice of Hearing and Affidavit of Service (McLean)
Exhibit 2	Letter from Heather Cook to Cathy McLean dated October 9, 2020
Exhibit 3	Email from Heather Cook to Alyssa Armstrong dated August 24, 2020
Exhibit 4	Email from Heather Cook to Carey Blake dated August 24, 2020
Exhibit 5	Email confirming Cathy McLean accessed hearing materials on Nov 13, 2020

Exhibit 6	Email from Cathy McLean to Jill Dougherty dated November 15, 2020
Exhibit 7	Notice of Hearing and Affidavit of Service (Phillips)
Exhibit 8a	Email from Carey Blake to Heather Cook dated January 15, 2020
Exhibit 8b	Email from Cathy McLean to Alyssa Armstrong dated January 20, 2020
Exhibit 9	Letter from Heather Cook to Sophia Phillips dated Oct 9, 2020
Exhibit 10	Floor Plan 5535 Eglinton Ave W., Suite 200
Exhibit 11	Signed statement of Shereen Nadarajah dated July 13, 2016
Exhibit 12	Interview Summaries (excerpt of Pre Hearing Conference Memo of CECE)
Exhibit 13	Email from Marnie Falkiner dated July 18 2016 with notes of Centre investigation timeline
Exhibit 14	Serious Occurrence Report (Phillips) dated July 14, 2016
Exhibit 15	Serious Occurrence Report (McLean) dated July 14, 2016
Exhibit 16	Mandatory Employer Report (Phillips) dated July 20, 2016
Exhibit 17	Mandatory Employer Report (McLean) dated July 20, 2016
Exhibit 18	Email from Carol Caddoo to Marnie Falkiner dated July 14, 2016
Exhibit 19	Termination Letter dated July 14, 2016 to Sophia Phillips
Exhibit 20	Letter from Marnie Falkiner to Cathy McLean dated July 14, 2016 with termination form
Exhibit 21	Employee Verbal Warning Note to File (McLean) dated July 14, 2016
Exhibit 22a	Guiding Child's Behaviour Policy (McLean) dated March 26, 2014
Exhibit 22b	Staff Agreement for Handling Accidents (McLean) dated March 26, 2014
Exhibit 22c	Staff Handbook Agreements (McLean) dated March 31, 2014
Exhibit 22d	Acknowledgement re Workplace Violence (McLean) dated August 15, 2014
Exhibit 22e	Acknowledgement re Staff Handbook (McLean) dated Oct 20, 2014
Exhibit 22f	Policy Agreement (McLean) dated Apr 19, 2016
Exhibit 22g	Day Care Guiding Child's Behaviour (McLean) dated March 9, 2016
Exhibit 23a	Day Care Guiding Child's Behaviour (Phillips) dated Apr 19, 2016
Exhibit 23b	BrightPath Policy Agreement (Phillips) dated April 19, 2016
Exhibit 23c	Policy Handbook Agreement (Phillips) dated June 29, 2016
Exhibit 24	Emails from M. Mutchler July 15 and 22, 2016 with notes of Centre's meeting with staff
Exhibit 25	McLean initial Response dated May 26, 2017

Exhibit 26	McLean additional Response dated Oct 2, 2017
Exhibit 27	Police Reference Check (Phillips) dated January 19, 2016
Exhibit 28	Interview Summary – Sophia Phillips interview with Amy Shillington – dated July 24, 2017

**Evidence of the College:**

Counsel for the College called five witnesses, whose evidence can be summarized as follows:

**Evidence of Shereen Nadarajah (“SN”):**

SN worked as an Early Childhood Assistant at the Centre from November 2009 until December 2019 when she retired for health reasons. In July 2016 SN was working at the Centre in the PS2 classroom working with preschool children aged 2 to 4. SN started work each morning at 7:00 a.m. She worked in the classroom with SP, who would arrive around 8:15 a.m., and Harpreet Chander (“HC”), who started at 9:00 a.m. The morning routine in PS2 started at 7:00 a.m. with snack and then free play at the tables or carpet area until circle time at 9:00 a.m. From 7:00 to 7:30 a.m. SN supervised the children from PS1, PS2 and the kindergarten in the PS2 room. At 7:30 a.m. the PS1 teacher would arrive and take the PS1 children to the PS1 classroom. At 7:45 a.m. the kindergarten went to their class. Diaper change took place at 8:15 a.m. for the children who needed it. SN believed SP normally came in at 8:15 a.m. but she reported not being entirely sure of this.

The Member usually came into PS2 between 8:30 or 8:45 a.m., depending on the number of children that were present, so that the correct ratio of teachers to children was maintained. HC would not be in the classroom during this time because she started at 9:00 a.m.

On the morning of Friday July 8, 2016 in the PS2 classroom, SN got in at 7:00 a.m., SP arrived at 8:15 a.m. and the Member came in to maintain the ratios at 8:30 a.m.

The Child was in the class that morning.

*Incident of July 8, 2016*

SN testified that on the morning of July 8, 2016, SP, the Member and the Child were in the PS2 classroom along with the other children. While SN was doing the diaper changes, the Member was at one of the four tables and SP was at another table and they were facing each other. The four tables were between the washroom and the dramatic and reading areas. The Child was playing and suddenly the Member called him and told him to “go and show Ms. Shereen what you have,” at which point the Child came over, pulled his pants down and wiggled his penis. SN told the Child “We don’t do that,” and he pulled up his pants right away. SN also testified that the Child “has a habit of doing that even when he goes to the washroom” and clarified “that” to mean “wiggling his penis.” The Member and SP laughed at the Child pulling his pants down and wiggling his penis at SN. The Child’s demeanor during this was cheerful – he laughed and then went back to playing.

SN testified that the Member called the Child again and the Member asked the Child to kiss another child on the lips and she asked if the Child would like to lie over the other child. SN did not see whether the Child kissed the other child because of the direction the children were facing and the way the Member and SP were seated at the tables. SN said that SP laughed but only briefly, and did not actively encourage the behaviour.

The Member asked the Child to “touch him over there” but she did not see whether they touched. SN said the Member looked in the direction of the other child’s private area. However, SN conceded that because she was located at the entry to the washroom and the tables blocked her view of the children, she could not clearly see the children, so she could not see at whose private area the Member was looking.

Following the incident, SN reported the incident to her co-worker HC who was the Assistant Director at the Centre at the time. HC also worked half days in the PS2 classroom with SN and SP.

SN also indicated in Exhibit 11 that on July 8 2016 she told the SP that the Member should not be telling the Child to touch other children’s private areas and that SP responded by saying the Member didn’t tell the Child to put his hand in the other Child’s pants, but just asked the Child to touch the outside of his pants. SN also said in her oral testimony that SP said the Member didn’t mean anything by it and the Member really loved the Child and didn’t mean anything bad by it.

### *Incident of July 13, 2016*

SN testified that on the morning of July 13, 2016 about 10 minutes after the Member had returned to her own classroom, SN was in the drama area in one of the corners beside the window. SP was seated between the first and second table with her face turned to see the full classroom and in such a way that SN could see SP's face. SN heard SP say to the Child "Go show Ms. Shereen what you have." The Child walked toward SN but then said his mom said he was not supposed to show his penis and he did not expose himself. SN testified that she told SP she should not be saying these things.

When asked if she could have been mistaken or if the room was too noisy to hear clearly, SN testified that she was very certain that SP said it and that was when the Child said his mother told him he was not supposed to show his penis to anyone.

### *Incidents prior to July 8, 2016*

SN described the Child as friendly, active and smart, with a great vocabulary and speaking skills comparable to a five year-old child. Under cross examination, SN reported that the Child "had a habit" of lying on other children and trying to kiss other children. SN reported that at some point the behaviour had been discussed with the Child's parents, who said that the Child engaged in hugging and wrestling with his father at home and was imitating that behaviour. SN reported that three or four times previously, when the Member and SP had seen the Child behave that way, they would make comments, out of earshot of the Child, that he might be G-A-Y (spelling it out). SN testified that she had not reported the comments about the Child being G-A-Y until she was asked about it by the Centre's Director, Kristine Greaves ("KG"), on July 13, 2016. SN was asked about her signed statement of July 13, 2016 (Exhibit 11). She explained that her written statement was prepared after she was interviewed on July 13, 2016 by KG. Either KG, who had taken notes of the interview, or someone at head office subsequently typed the notes into SN's statement so that SN could sign it. SN said she did not write the statement and she did not make any corrections to the statement that was presented to her, but that she read it and signed it. SN's statement indicated that the comments about the Child being G-A-Y were being made on a regular basis; however, under cross examination SN said that "regular basis" meant a couple of times.

SN testified that prior to July 8, 2016, while the Child was playing outside in the playground, the Member called the Child over and asked the Child if his dad would cheat on his mom with her. The Child said his dad would never cheat on his mom. The Member laughed and the Child went off to play. SN testified that SP was not present at this incident.

SN testified that the Member always had her phone in her pocket. On one occasion, SN observed the Member was showing something to SP on her phone. The Member then showed SN the phone which had a picture of a man's penis. SN reported that both the Member and SP were laughing but that SP did not really get into it and did not ask to see it again. SN conceded that SP may have been laughing out of embarrassment.

SN testified that she saw SP on her phone Skyping in the closet on two occasions. She knew it was a Skype call because she could see the person on the phone because the door to the closet was open.

SN described SP as laughing but as "not really into it" several times during her testimony. SN also said that SP was in the habit of saying "just stop it, just stop" when the Member and SP were engaged in some of the behaviour outlined above. When asked if SP said "stop it" during the incident of July 8, 2016, SN testified that SP did not.

#### **Evidence of Harpreet Chander ("HC"):**

HC testified that she was an RECE and had worked as a teacher, an Assistant Director and a Director at the Centre over her nine years with BrightPath. HC was the Director of the Centre at the time of the hearing. In July 2016, HC was Assistant Director. She taught half days in the PS2 classroom with SN and SP. At that time, HC had been working in the classroom for about a year with SN and for about six months with SP. HC only worked with the Member periodically because the Member helped in PS2 only when HC was not there.

HC testified that on Friday, July 8, 2016, SN came to her while she was helping a child at naptime and reported that during the diaper change routine that morning the Member asked the Child to pull down his pants and show SN his penis. HC continued helping the child she was with at the time. Once the class was in ratio (i.e. there was a sufficient number of staff members

for the number of children, permitting her to leave the classroom), she went to tell the Director about this incident but the Director was busy dealing with a representative of the Ministry. The Ministry representative was there for licensing and HC did not want to interrupt, so HC went on her lunch. HC did not report the incident to her Director after lunch, but could not recall why she did not do so.

HC testified that on Wednesday, July 13, 2016, SN told her that the Member had asked for the Child to be moved to her classroom for ratio. Immediately thereafter, HC realized that she had not reported the July 8, 2016 incident involving the Child, and proceeded to tell her Director about that incident and that she meant to report the prior week's incident but that she forgot to.

When asked why she only reported it after the Member asked for the Child to be moved to her class, HC testified that when SN mentioned the Member had asked for the Child to be moved to her classroom, she was reminded that she had not reported the incident to her Director and subsequently did so. HC confirmed that what she had reported to her Director was information reported to her by SN.

HC testified that after she reported the incident to her Director, she had no further involvement in the matter. When presented with the notes of Marnie Falkner's interview with her dated July 13, 2016 (Exhibit 24), HC testified that she could not remember whether she ever had a chance to review the notes. In her interview with the Centre during its investigation on July 13, 2016, (Exhibit 24) HC was asked if the Member ever had any preference of one child over another and HC responded that she noticed that the Member requested the Child once when splitting the children into small groups. HC testified that she was referring to the request reported to her by SN on July 13, 2016.

HC testified that her relationship with SP was "fine" and that she did not know of any issues or friction between SP and SN or between the Member and SN. HC testified that she did not really have personal relationships with her co-workers. HC testified that she did not see or hear SP make any comments or show any behaviour toward the Child that ever concerned her, including unprofessional behaviour.

## **Evidence of Carol Caddoo (“CC”)**

CC had been the Director of Ontario Operations at BrightPath since 2017. She had worked with the organization for 26 years, as Centre Director from 1994 to 2012 and then Area Manager from 2012 to 2017. At the time of the incident, her responsibilities as Area Manager included providing day to day operational support, enrollment, staffing and parent concerns, among other things, to ten centres in the area. CC was an RECE.

CC testified that she became aware of the incident when she received a call from the Director of the Centre, KG. KG did not give details of the incident but reported that there had been an incident involving the Member and SP and that she needed support. CC arrived at the Centre 20 or 25 minutes later. KG gave her an outline of the concern that HC had reported to her. CC interviewed SN shortly after CC arrived at the Centre. CC then contacted the Director of Human Resources, Marnie Falkiner (“MF”) and gave her an overview. CC, KC and MF interviewed SN. MF and Mary Mulcher, Director of Operations in Alberta (“MM”), conducted interviews with staff over the course of the afternoon and evening. On July 14 or 15, 2016, MF and CC prepared the document entitled Sequence of Events July 13-14 2016 (Exhibit 13). CC believed the notes of the staff interviews conducted by MF and MM were taken by MM. CC confirmed that the notes taken of the interview MM and MF had with SN were consistent with what SN had told her.

CC called the Children’s Aid Society (CAS) because the allegation involved mistreatment of a child and she had a duty to report as required by the College’s Code of Conduct and the Centre’s licensing Policy Manual. CAS called CC back 20 minutes later and advised that the Centre should continue their internal investigation but that CAS would not pursue the incident. CC testified that this surprised her because CAS had investigated incidents CC felt were less serious in the past, but she deferred to their expertise.

CC called the Child’s father to let him know about the concerns of employee misconduct relating to his son, that CAS had been advised and that CAS were not following up. The Child’s mother (the “Mother”) called and made arrangements to come in the following day to speak to CC. When the Mother came in at 10:30 a.m. the following day, the Mother reported to CC that the Child had previously told the Mother that he had been showing his private parts to his friends at school. The Mother said that at the time she had taken it to mean the Child was being silly and exposing himself, but that it now seemed to make sense. At no time did CC tell the Mother

which staff members were involved in the incident. CC testified that the comments from the Mother indicated to her that the Child had said he was told to show his penis and that this corroborated SN's report. This corroboration led CC to conclude that SN's description of events was true.

CC testified that the Member's employment with the Centre was terminated following the Centre's investigation, and that she participated in the decision to terminate the Member's employment. CC stated that the decision was based in part on the fact that the Mother corroborated SN's report that the Child had been exposing himself in class.

**Evidence of Marnie Falkner ("MF"):**

MF testified that she worked at BrightPath as the Director of Human Resources and had held that position for 5½ years. Prior to working at BrightPath, MF had worked for 30 years in various human resources positions including at the senior executive level. Her role included setting human resource policies and procedures for recruitment, terminations, employee relations, communications to employees and human resource investigations.

MF testified that she became aware of the incident involving SP when she was contacted by CC on July 13, 2016. MF received an overview of the incident from CC and then contacted the CEO of BrightPath for guidance. MF testified that MM, Director, Western Operations, was called in to investigate, in order to remove any potential bias from the subsequent investigation. MF testified that MM completed her investigation, and the decision was made to terminate the Member's employment with the Centre. This was done by letter, sent by courier to the Member on July 18, 2016. Thereafter, MF and CC prepared a timeline of events (Exhibit 13) which was then emailed to MM in Alberta. MF confirmed that she and MM conducted the interviews of staff with MM participating by speakerphone and taking notes. MF confirmed that the compilation of the notes provided by MM via email on July 22, 2016 (Exhibit 24) was an accurate reflection of what was said during the interviews with staff.

MF described SP's demeanor during the interview with her as polite and cooperative. SP appeared nervous and seemed to take the matter seriously. MF described SP as not really

talking a lot or questioning during her interview. MF testified that SP's testimony seemed to be consistent with what she was told by SN.

MF described the Member's demeanor during the interview with her as very nervous. MF testified that the Member was not as forthcoming as SP had been, and there were some inconsistencies in her account of events. For example, MF testified that the Member changed her story when asked if she had shown others a picture of a penis on her phone, first indicating that this had taken place in the staffroom but subsequently saying the event had occurred in the parking lot after it was suggested that such conduct in the staffroom would be inappropriate. MF also noted that the Member had called her after her initial interview to report something that she had just thought of: the Child and other children play a game where he "is a monster" and chases the girls, as outlined in the email exchange between CC and MF from the morning of July 14, 2016 (Exhibit 18). MF felt that the Member was putting the onus on the Child, suggesting that he exposed himself on his own initiative and that it was fun and silly and not what they directed him to do.

MF testified that she was not involved in conversations with the parents but was made aware of new information that CC had obtained during CC's conversation with the Mother. The information from the Mother led MF to believe the alleged incidents took place as described. On the basis of this conclusion, the Member and SP were terminated.

MF testified that the Member and SP were aware of and had signed a copy of the Centre's policies and practices. She also confirmed that the Member had been warned in the past about cell phone use during work hours but that this warning did not have a bearing on the decision to terminate the Member in this instance.

On cross-examination, MF confirmed that the decision to terminate the Member's employment was based largely on what SN reported. In addition, there were similarities in SN's reporting of events and what SP told her, although she could not remember without the interview notes what specifically SP had said that was similar. When presented with the notes from the interview with SP (Exhibit 24), which did not appear similar to the report made by SN, MF did not confirm that it was this information that assisted in confirming SN's report. Instead, she replied that she did not think SP was leading the behaviour. Nonetheless, she believed the Child was asked to do

what was alleged by the Member and that SP encouraged it by laughing, and did nothing to challenge or stop it.

MF testified that she did not type or prepare the reporting statement of SN (Exhibit 11).

### **Evidence of the Mother**

The Mother testified that the Child had started in daycare at BrightPath Eglinton immediately following the conclusion of her maternity leave in January 2014. The Child was about 3.5 years old at the time of the incident. His teachers were SN, HC and SP. The Member had been his teacher up until August 2015 and was still someone they (the Mother and Child) saw frequently – at the end of the day, the classes came together so they would often see the Member around with other teachers at pick-up time.

The Mother described the Child when the incident took place as happy, friendly, high energy, exuberant, good-natured and that he liked “being in on the joke”. The Mother said he had average verbal ability, that he could put a sentence together and could make his thoughts and feelings known fairly well. The Child never had a problem transitioning to daycare. He liked his teachers, and his friends. There would be the occasional report of a fall or incident but nothing out of the ordinary.

The Mother testified that about a week before the school contacted her on July 13, 2016, the Child remarked cheerfully that he had pulled his pants down at school. The Mother thought he might have had a toileting accident because it was not unusual for him to come home in backup clothes due to an accident. The Child said to her “No the teacher told me to.” When asked where it happened the Child said it was in the classroom. When she asked him if it was in front of other people and the Child said “yes,” she thought it was odd, but still thought it might have been an accident in the main classroom. At the time she did not think it was malicious. The Mother testified that she told the Child not to do that and that if someone told him to take his pants down in front of other people he was to tell them that his mother told him not to do that. The Child seemed cheerful and thought it was a joke and he was happy to be a part of it. The Mother told the Child it was not something he should do and he just shrugged it off. She believes the Child had been at school on the day that the Child reported this to her because that

would line up with her being home cooking with him and her husband not being there. The Child was not being quizzed – the Child’s statement that he pulled his pants down at school came out of the blue.

The Mother testified that on July 13, 2016, she received a message (voice-mail) at work that the Centre wanted to speak to her or her husband when they picked up the Child. Her husband picked up the Child after school. When the father got home he told the Mother (out of the Child’s hearing) that CC and KG told him that one of the staff had told the Child to expose himself to another staff member. They were never told the staff member’s name. After this the parents talked to the Child. The Mother remembered what the Child had said previously about pulling down his pants. The Mother asked the Child if he remembered telling her about pulling down his pants at school and he responded “yes”. When she asked him why he did that the Child responded “Ms. Cathy told me to.” When the Mother asked the Child what Ms. Cathy said, the Child said “Go show Ms. Shereen what you have.” The Mother testified that she then asked if he did pull down his pants and he said “yes” and that SN said “don’t do that” or something to the effect that she did not approve of the behaviour.

The Mother testified that they did not ask the Child when it happened or if it had happened more than once.

The Mother testified that she called the Centre after speaking to the Child and spoke with CC but was told to come in the following day to discuss it. The Mother testified that no details about which staff members were involved were shared with the parents.

The Mother reported that the Child was examined by a pediatrician for signs of abuse and none were found. The Mother reported that the Child never showed any signs or said anything that would indicate signs of abuse.

The Parents talked about whether they should go to the police. They were very upset and did not want it to happen to anyone else. They did not want to put the Child through interviews and did not want it to be a major issue for their Child. The Mother testified that if they knew all of the allegations at the time of the incident, they probably would have gone to the police.

The Mother reported that she and her husband kept the Child away from the Centre for a week but decided to return him to the Centre’s care because she and her husband were aware that

the people who were involved were no longer working at the Centre. An email had been sent to all the Centre's parents informing them that the Member and SP were not at the Centre anymore, but not why. The Mother said they looked for other child care centres but they figured "the devil you know..." The Mother testified that it really shattered their trust to the point where the Mother considered quitting her job. She and her husband considered how the Centre had handled the incident and noted that the Centre indicated they had talked to all the staff about the duty to report, and were arranging for relevant professional development for staff. The parents decided to bring the Child back and he was happy to be back at school. The Mother did not think there was any sign of lasting impact.

Under cross examination the Mother confirmed that the Child had never said that SP had asked him to expose himself.

#### **Evidence of SP:**

The Member was not present and did not call witnesses. However, the Member's matter and that of SP were heard jointly, and the evidence heard was applicable to each member's case. SP gave evidence in her own defence at the hearing and the Panel relies on SP's testimony in this case.

SP testified that she arrived in Canada in September 2013 to study Early Childhood Education as an international student at Centennial College. At the time of the hearing, SP was awaiting a work permit and had hoped to resume teaching as an ECE following the outcome of this proceeding.

SP gave evidence about the morning routine at the Centre. She stated there were times when she would be in the classroom with the Member and SN to maintain appropriate child to staff ratios prior to HC's arrival at 9:00 a.m. SP also testified that there were instances when SP would not be in the classroom during that time, such as if she needed to sterilize a bottle or put a child's medicine in the fridge.

SP confirmed that the floor plan presented as Exhibit 10 to SN during her testimony is an accurate representation of the layout of Centre at the time of her employment, and that the tables were located in the middle of the PS2 room. However, she disputed the suggestion that the whole classroom could be seen while diapering children because if a child was on the changing table, the staff would be facing into the washroom and not into the classroom. SP confirmed that she has seen others change children in the entrance passageway to the washroom.

SP testified that she never heard the Member say, "Go show Ms. Shereen what you have," and she testified that she herself has never said that herself to the Child.

SP denied ever hearing the Member tell the Child to touch, kiss or lie on another child.

SP recalled seeing the Child pull down his pants on occasions when the Child needed to pee. When that occurred, the Child would be told to pull up his pants, go to the washroom and wash his hands.

SP denied ever hearing the Member ask the Child whether his father would cheat on his mother with the Member, but she testified that SN had told her that she had heard the Member say that. SP testified that the only thing she heard the Member say about the Child's father was that he was handsome.

SP testified that the Member had shown her a picture of a penis on her cell phone one day before the Member's shift had begun. At that time, the Member was in the closet adjacent to the classroom and SP was at the closet doorway to the classroom. SP also testified that SN asked to see what they were looking at on the phone and that the Member also showed SN the picture, after which SN chuckled and said something like it looked small "like a thumb".

SP testified that she heard the Member say the Child may be gay or G-A-Y (emphasizing the words "may be"). However SP insisted that she had never heard the Member say that he was gay or G-A-Y. SP asserted that this distinction is important, because it explains why she had denied hearing the Member say he was gay in her interviews with the College Investigator about the allegation. SP testified that although the Member had said the Child may be gay or G-A-Y, it had not been said in the classroom. Under cross-examination, SP was asked why she had never before said that the comment had been made outside of the classroom, even when she

had been asked “Did you and Cathy talk about this in the classroom.” SP’s response had been that she had never been asked during her interview with MF and MM on July 13, 2016 if the Member’s comment that the Child may be gay or G-A-Y had happened in the classroom.

SP testified that she got along well with SN and confirmed HC’s testimony that there was no friction between SN and SP or SN and the Member.

SP acknowledged that – if the behaviour occurred as alleged – it would constitute misconduct.

### **Evidence of the Member’s Response to the Allegations**

The Member was not present but out of fairness to the Member, the College submitted the Member’s emailed responses to the College’s investigation, which were entered as Exhibits 25 and 26.

In these documents, the Member stated that she had been working in daycare for 11 years and had been reprimanded on only one occasion, and it was because she was on her phone. She stated that her supervisor said she was doing a great job and there was nothing for her to work on.

Regarding the incident of showing the picture of the man’s penis to her colleagues, the Member reported in Exhibit 25 that she was upset because someone randomly sent her a picture of a penis and she showed it to SP in the closet of the classroom. The Member reported that it was SP who called SN over to see the picture and that SN said it looked like a thumb.

Regarding swearing in front of the children, the Member indicated in Exhibit 25 that she never swore in front of children, but that she might have used language that sounded like she was swearing. In Exhibit 26, the Member admitted she may have sworn under her breath but only a few times and there were no children around to hear it.

The Member reported in Exhibit 26 that she thought SN was trying to make her look bad and that it was SN who told her to ask the Child where his penis was because SN said the Child would do something funny or cute. The Member reported that she asked the Child where his

penis was and he pulled down his pants. The Member denied asking the Child to pull down his pants.

In her response to the complaint, the Member described the Child as a “touchy feely boy” and reported that “we had to talk to him about always being on top of other people.” The Member reported that she told the Child that because he was touching himself outside of his pants that he should go wash his hands because no one wants to be touched with “pee pee hands” and he went to wash his hands.

In her letter, the Member denied telling the Child to kiss other children but said she had seen him kiss other children, at which she told him that it was okay to be friendly but to only hug them and to only kiss mom and dad.

The Member stated in her response letter (Exhibit 25) that she taught the Child when he was in the toddler room and she had a great relationship with the Child and his Parents. The Member denied saying that she wanted the Child’s dad to leave his mom for her, but admitted to talking with her colleagues about which dads they thought were good looking.

The Member stated in Exhibit 26 that SN asked her if she thought the Child would turn out gay because of how he is with other children and the Member answered that she did not know and it did not matter. She also said the Child was a very affectionate boy who loved everyone and he just has to be careful with how he is with other people.

## **SUBMISSIONS OF THE PARTIES ON LIABILITY**

### **College Submissions on the Standard of Proof**

The College submitted that in matters of professional discipline the standard of proof is on a balance of probabilities and not the criminal standard of beyond a reasonable doubt. As such, the College must only show that it is more likely than not that the Member committed the professional misconduct as alleged in the Notice of Hearing. The College provided the Supreme Court of Canada decision in *FH v. McDougall*, 2008 SCC 53, as support for the

proposition that proof beyond a reasonable doubt and the presumption of innocence have no bearing on this case because this case is a civil matter and not a criminal matter.

The College also submitted that in civil cases of sexual abuse there is no legal requirement for corroborating evidence. This principle is also found in *FH v. McDougall*, 2008 SCC 53, and it applies in cases such as this one. Despite the absence of the requirement for corroboration, the College also submitted that, there is corroborating evidence: the Mother's testimony of what she was told by the Child supports the evidence provided by SN.

### **College Submissions on the Admissibility of Evidence**

The College submitted that both the Rules of Procedure of the Discipline Committee and the *Statutory Powers and Procedure Act*, R.S.O. 1990, c. S. 22 (SPPA), provide the Panel with the latitude to admit and consider evidence that might not normally be permitted in a criminal proceeding or under the civil rules of evidence, including hearsay evidence such as statements of children to caregivers and parents. The College further provided case law to support the proposition that it is both fair and necessary (*R. v. Khan*, [1990] 2 S.C.R. 531) and in the interest of arriving at the truth (*R. v. Khelawon*, [2006] 2 S.C.R. 787) to admit the Child's "out of court" statements (i.e. statements which were made outside of the hearing). The College further submitted that if the Discipline Committee is not willing to rely on hearsay statements from young children, particularly when they have numerous indicators of reliability (e.g. they occur spontaneously, naturally, without suggestion, are contemporaneous with the events, are provided by a person who has no motive to fabricate, are given by a young person who would not have knowledge of the acts alleged and when there is corroborating evidence)<sup>1</sup> then it will prevent the College from fulfilling its mandate of protecting the children under the care of RECEs.

### **College Submissions on Sexual Abuse: Behaviour or Remarks of a Sexual Nature**

The College contended that the Member engaged in sexual abuse of a child pursuant to section 1(1) of the Act relying on subsection (c) of the definition, which defines sexual abuse to include "behaviour or remarks of a sexual nature by the member towards the child." While the Act does

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<sup>1</sup> David M. Paciocco & Lee Steusser, *The Law of Evidence*, 6th ed. (Toronto: Irwin Law, 2011), at p. 125.

not define what constitutes “behaviour or remarks of a sexual nature,” the test as laid out in case law is an objective one: a behaviour or remark is sexual in nature if in all the circumstances a reasonable observer would regard it as sexual, not whether they were intended to be of a sexual nature (*Ontario College of Teachers v Maloney*, 2018 ONOCT 53 and *College of Early Childhood Educators v Brooke Reid*, 2015 ONCECE 1 (CanLII)). The College further submitted that the statute should be read in accordance with the ordinary meaning and in accordance with the intention of the legislation. The College also asserted that harm need not be shown to establish sexual abuse.

### **College Submissions on the Evidence**

The College submitted that the evidence presented overwhelmingly supports a finding that the Member committed professional misconduct as alleged and that it has met its onus of proving that it is more likely than not that the misconduct as alleged occurred.

The College submitted that the Panel should consider the thoroughly documented timeline of events, which was prepared contemporaneously with the events in question and which was testified to be accurate by both CC and MF, to be both a credible and highly reliable account of the initial investigation. Additionally, the College pointed out that no evidence was presented to refute the accuracy of the timeline.

The College submitted that the Panel should believe the evidence of SN because her recollection of events was detailed and specific, which enhances its credibility. SN clearly described where she was and where others were at the time of the incidents. The College also submitted that SN was a reluctant reporter. She and the Member got along well. The College submitted that SN had nothing to gain by reporting but she felt that it was her duty to do so. The College also submitted that the chronology of events reported by SN and the core of what SN said over time were consistent and this is shown in SN’s signed report (Exhibit 11), the Centre’s notes of their interview with SN (Exhibit 24), SN’s interview with the College’s Investigator (Exhibit 12) and her testimony given during the hearing.

The College submitted that the alignment of SN’s testimony with the Mother’s account of the Child’s account constitutes compelling evidence. SN described the Member saying the phrase “go show Ms. Shereen what you have”. The Mother, without ever speaking with SN or being

given the full details of the allegations or information about the identity of the staff members involved, provided an account of her conversation with the Child about the incident. The Mother reported that the Child said “Ms. Cathy” (referring to the Member) had told him to “go show Ms. Shereen what you have.” The College submitted that neither SN nor the Mother had a reason to make up the story and that their account of events align. Therefore, the testimony of the Mother and the interview statements and testimony of SN should be believed.

The College submitted that the incident which took place on July 13, 2016 must be considered in the context of the incident on July 8, 2016 and the events leading up to the July 8, 2016 incident. These events include comments being made about the Child’s sexual orientation, asking the Child “would your dad cheat on your mom and come home with me,” and showing colleagues a picture of an adult penis to on a cell phone. The College submitted that it was within this sexualized atmosphere that the incidents on July 8 and July 13, 2016 took place. The College submitted that the Child understood the sexual context as indicated by his responses to the direction to “go show Ms. Shereen what you have,” namely, exposing himself to SN on July 8, 2016 and approaching SN but then saying “My mommy told me I’m not supposed to do that” or words to that effect on July 13, 2016.

The College submits that SP’s testimony that the Member’s comments that the Child may be gay or G-A-Y only happened outside of the classroom, is not credible or reliable because the only time SP ever suggested that these comments were said outside of the classroom was during her oral testimony. The College put to SP the fact that at no time during any of SP’s interviews with Centre staff, College staff or in her two replies to the College’s investigation, did SP say that the comments were made outside of the classroom. SP also never clarified the precise location of where these comments had been made, if not in the classroom.

The College submitted that the evidence demonstrates a course of conduct that was clearly sexual. The Member and SP speculated aloud about the Child’s sexual orientation; they then proceeded to encourage him to act in a manner that was consistent with their speculation. In doing this the Member and SP exposed the Child and the other children in the class to these sexualized remarks, sending the message that it is appropriate to single out a small child and speculate about his sexual orientation. This was followed by overt instruction and encouragement by the Member to have the Child expose himself in the classroom in front of other children, with the Member going so far as to instruct the Child to kiss another boy, to touch

another boy's genital area and to lie on another boy while SP laughed and did nothing to stop the behaviour.

The Member was not present and did not make submissions.

## **REASONS FOR DECISION**

### **Credibility of the Witnesses**

The Panel assessed the credibility of each witness by considering their oral testimony and the following credibility factors from the case law:

- a) The extent of the witness's opportunity to observe that to which he or she testified, including whether anything could have interfered with their opportunity to observe what they testified to having observed;
- b) The probability or improbability of the witnesses' stories, including whether each witness's version of events accords with common sense;
- c) Whether the witness's statements were consistent or inconsistent with any other evidence in the case (i.e. that of other witnesses or documents) and if so, the significance of that inconsistency;
- d) Whether the witness was forthright in her evidence;
- e) Whether the witness has an interest in the outcome of the case;
- f) The appearance or demeanour of the witness;
- g) Whether the witness's evidence was contradicted by that of another witness; and
- h) Whether the witness previously gave a statement that was inconsistent with what she said in evidence, and if so, the nature and significance of any inconsistencies.

The Panel made the following assessments as to the witnesses' credibility, including their honesty and the reliability of their evidence:

## **Credibility of SN**

The Panel found the testimony of SN to be largely credible, in that her evidence was truthful and she recounted events as she observed and recalled them, but the Panel had concerns about the reliability of this witness's evidence.

The witness was no longer employed by the Centre at the time of the hearing, and was retired and presumably not seeking employment. She was not ever subject to sanction by the College, as she is not an RECE. SN reported that she did not have any conflicts with any of her coworkers and HC also testified that she did not notice any friction between SN and the Member. The witness's demeanor indicated that she was an amiable person who seemed eager to please and be helpful. She was forthright in her testimony. SN was able to recall the incidents, and her testimony as it relates to the events of July 8, 2016, was consistent with her statement made to the Centre (Exhibit 11) and the notes taken of her interview with MF and MM (Exhibit 24) and it made sense in terms of the daily routine in the classroom. SN was in the classroom at the time the alleged events were said to have taken place and she would have had an opportunity to observe the behaviour of other staff members and children in the classroom. She was able to recall the incidents, and her testimony over time was generally consistent, with the exception of comments regarding the frequency of comments relating to the Child's sexual orientation.

The Panel has some concerns with this witness's testimony regarding the frequency of the comments that were alleged to have been made about the Child's sexual orientation and the nature of SP's involvement in those conversations, but those concerns did not negatively affect the credibility the Panel attached to SN's testimony regarding the events on July 8, 2016. Nor did this concern affect the Panel's assessment that SN's evidence that she heard the Member make comments about the Child's sexual orientation was both credible and reliable.

While the Panel found this witness to be generally credible and forthcoming, the Panel had some concerns about the reliability of her report of the incident on the morning of July 13, 2016. The witness reported to HC that the Member had asked for the Child to be moved to her class that morning for ratio and this is what HC testified triggered her to report the incident that happened on July 8, 2016. But SN did not report to HC that SP had told the Child to expose

himself to her that morning. It seems that it was only after being interviewed by KG, CC, MF and MM that the incident alleged to have occurred between SP and the Child on July 13 was reported. The Panel found it more than likely that -- if SP had asked the Child to "show Ms. Shereen what you have" on July 13 -- the witness would have also reported this incident to HC just a short time after it is alleged to have happened. This led the Panel to question the reliability of SN's evidence regarding SP having asked the Child to expose himself on July 13, 2016. However, that did not affect the Panel's assessment of SN's credibility relating to the events of July 8, 2016.

The Panel also noted that although SN confirmed the accuracy of her statement of July 13, 2016 (Exhibit 11) in her testimony and she testified that she had read and signed it, she also testified that the report was not written by her, but rather by someone else. There is a possibility that the statement presented to her for her signature was drafted in a way that conflated the misconduct on the part of both the Member and SP, leaving it unclear as to what each person said and did. The Panel also found a worrying lack of precision in the timing of events as reported in Exhibit 11: the showing of the penis on the cell phone incident was said to have occurred on Friday (presumably this is Friday July 8 because the statement is dated July 13); the incident alleging that the Member asked the Child to "show Shereen what you have" was said to have happened "one day last week"; and the incident where SN told SP that what the Member said was "not at all alright" was reported to have occurred on the Friday. The timing of the incidents in the witness's testimony was confusing. It seemed to the Panel, based on the witnesses' evidence, that the showing of the penis on the cell phone happened at an indeterminate time, and that the incident of the Member encouraging the child to expose himself to Ms. Shereen and to touch and kiss and lie on another child was said in the testimony to have happened on the Friday. This confusion around the timeline eroded the Panel's confidence that the events took place in the manner described by this witness, but not to the extent that the panel doubts that this Member behaved in the manner that was described. The Panel found this witness to be honest and that even though the Panel found her testimony as to the events that transpired on July 13, 2016 was not sufficiently reliable to persuade the Panel as to what transpired on that day, the Panel found this witness's evidence with respect to the events of July 8, 2016 and prior to that date to be reliable.

SN was in the classroom at the time the alleged events on July 8, 2016 were said to have taken place. As a result, she had the opportunity to observe the behaviour of other staff members and

children in the classroom. SN conceded that she could not clearly see the children during the incidents that were alleged to have taken place on July 8, 2016 because SN was located at the entry to the washroom, and the tables blocked her view of the children. As a result, she acknowledged that she could not see whose private area the Member was looking at or gesturing towards. However, she indicated that she could see the faces of the Member and SP and that she could hear them clearly. Given the floorplan presented in Exhibit 10 and the admission by SP in her testimony that she had seen staff members change children in the entrance way to the washroom, the Panel finds it likely that SN accurately described her positioning between the classroom and washroom and that she could accurately describe the events. The Panel accepted that SN was able to see the Member's face and hear the Member tell the Child to lie on, to kiss and to touch another child and to see the Member make a head gesture. SN reported that she could see and hear SP's response to these actions of the Member and SN has no apparent reason to fabricate this story. Additionally, SN testified that she reported this incident to HC on July 8, 2016, the same day it was alleged to have happened, and HC testified that she received SN's report (as told by SN) that same day. This bolsters the credibility of SN's account of these incidents because she had the opportunity to see them occur and she reported them without prompting and in close proximity to the event, indicating something disturbing had happened on that day.

### **Credibility of HC**

HC was only able to report what she was told by SN, and when it was told to her. When giving her testimony, she seemed straightforward and honest, and acknowledged her own failure to report what SN told her about events of July 8, 2016 right away. The evidence of the timing of her reporting seemed reliable as it was consistent with what other witnesses from the Centre reported.

When asked why she reported the incident of July 8, 2016 on July 13, 2016 and only after the Member asked for the Child to be moved to her class on July 13, 2016 to maintain the appropriate child to teacher ratio, HC testified that she had been in the class but when SN mentioned to her that the Member had asked for the Child to be moved to her classroom on July 13, 2016, that prompted her to report the July 8, 2016 incident. The Panel found this to be a reasonable explanation, and in keeping with common sense. The Panel found the evidence of

the timing of HC's reporting to be reliable as it was consistent with what other witnesses from the Centre reported.

HC testified that her relationship with the Member was "fine" and that she did not know of any issues or friction between the Member and SN or between the Member and SN. The Panel accepts this as reliable testimony. HC testified that she did not really have personal relationships with her co-workers. This suggests to the Panel that she had no personal motive to misrepresent the relationships between her colleagues.

The Panel had no concerns about the credibility of this witness.

### **Credibility of CC**

CC's demeanor was professional and she conveyed concern about the gravity of the situation. The Panel noted her testimony about being surprised when the CAS declined to investigate and that she deferred to CAS expertise even though she said CAS had investigated things in the past that she thought were less serious.

This witness was not able to observe any of the incidents in question, but was able to testify to the interview process that followed and the timing of each person's interview. She also was able to convey information about her conversation with the Mother. Her testimony about her conversation with the Mother was consistent with what the Mother said. The Panel found that this witness's testimony was credible and reliable as it relates to what the Mother said.

Given her position with the Centre, this witness had some interest in making sure the Centre demonstrated it did what it was supposed to do, that proper processes were followed and that the appropriate reporting was made. This witness documented the interview process as it unfolded in conjunction with MF. CC testified that she believed the notes of the staff interviews conducted by MF and MM were taken by MM. This was supported by the evidence given by MF. CC confirmed that the notes taken of the interview MM and MF had with SN were consistent with what SN had told her. The Panel was mindful that CC had some interest in supporting the Centre's decision to terminate the Member because this decision was largely based on her communications with the Mother and her assessment of the information conveyed by the Mother and SN. The Panel found her testimony about what was discussed with the

Mother to be credible and reliable, but did not necessarily accept all of the conclusions CC drew from those conversations. The Panel found that in CC's email to MF dated July 14, 2016 (Exhibit 18), CC showed a lack of impartiality toward the Member and also exhibited some questionable reasoning. For example, MF reported to CC that the Member called her after her initial interview with additional information: SP told the Member that while the Member was out of the room the Child had exposed himself when SP asked him where his penis was. CC's response to MF's email was "She's [the Member] had time to come up with some answers," followed by "[i]f she was out of the room how does [the Member] know what [SP] said?" This indicated to the Panel that CC was somewhat contemptuous of the Member and willing to overlook a key element of what she had been told (i.e. that SP had told the Member these things) to reach an erroneous conclusion, namely that the Member had to be in the room to have been told about what happened in the room. That does not mean the Panel rejected CC's testimony, but it did affect the weight and reliability the Panel gave to CC's conclusions.

### **Credibility of MF**

MF is the human resources person at the organization and so she had an interest in ensuring that the investigation process is seen to have been fair and that the terminations of these employees were justified. As the HR person, however, she was also neutral about the individuals involved, having no direct, day to day contact with them. This witness relied on the notes that were taken during the interviews with staff and she had a role in preparing the timeline and the notes from the interviews. MF was not a witness to the events in question. She was able to testify to the interview process that followed and to the demeanor of the staff members she interviewed during the course of the investigation. This witness was not involved in interviewing or speaking with the parents of the Child.

MF testified that the decision to terminate the Member's employment was based largely on what SN reported. She also indicated that there were similarities in what SP told her, although she could not remember without the interview notes what specifically SP had said that was similar. When presented with the notes from the interview with SP (Exhibit 24), which did not appear similar to the report made by SN, MF did not confirm that it was this information that assisted in confirming SN's report. Instead, she replied that she did not think SP was leading the behaviour, but she believed the Member had asked the Child to do what was alleged and that SP supported it by laughing and not doing anything to stop it. This suggested that MF was trying to

support the Centre's decision to terminate the Member and displayed some interest in the outcome. The Panel took that into account when assessing her evidence, including the timeline and the notes of the interview and even the Statement of SN (Exhibit 11) which MF said would have been prepared by SN. SN testified that either KG, who had taken notes of the interview, or someone at head office subsequently typed the notes into SN's statement so that SN could sign it. SN said she did not write the statement and she did not make any corrections to the statement that was presented to her, but that she read it and signed it. MF testified that SN would have prepared her own statement and that she did not prepare it for her. The Panel found it plausible and not unusual that witness statements prepared in the course of an investigation would be drafted by the person making the statement, as MF testified was the case. However, the Panel preferred SN's evidence on this point, accepting that she could provide a more accurate account of how her statement was prepared, as SN was more likely to remember whether she did or did not prepare a statement. Consequently, the Panel considered the evidence of Centre officials in its context – that it was presented in a manner that put the Centre and its processes in as favourable a light as possible.

This witness also testified that she did not find the Member to be forthcoming and that the Member changed her account of events during her interview and in an email following her interview. The Panel finds this to be a credible assessment. It is also consistent with the Member's failure to attend the hearing.

### **Credibility of the Mother**

The Panel found the Mother to be a credible and reliable witness. She was able to report clearly and cogently on the content and timing of her conversations with the Child and with the Centre's staff. The Mother's testimony was consistent with what CC and MF reported regarding the content and timing of their conversations with her. The evidence the Mother gave about the Child telling her he had pulled down his pants and her own response (suggesting he tell people "my mommy told me not to show my penis," or words to that effect), aligns with SN's report (Exhibit 11) that the Child said "my mom said I'm not supposed to do that." SN and the Mother never spoke to one another about the incident and their statements occurred independently. This consistency appears to confirm that the mother had the conversation with the Child and that it is likely an accurate representation of what was said.

The Panel notes that the Mother does have a particular interest in the outcome of the hearing. The Member is alleged to have committed professional misconduct by sexually abusing her child, among other allegations. Any parent would want someone accused of sexually abusing their child to be held accountable. The Mother even testified that if she and her husband had heard all of the details of the allegations that were mentioned in the hearing, they probably would have gone to the police at the time of the incident. The Panel did not view this interest in the outcome of the hearing as providing reason to discount the Mother's testimony. The Mother indicated that her Child had shown no negative affects resulting from these incidents and she did not present herself as out for vengeance. Her testimony was honest, measured, clear and cogent. She reported that the Child identified the Member by name when asked about who told him to expose his penis, even though the Mother did not know at the time that the Member was alleged to have committed the misconduct. The Panel found the Mother's testimony regarding this to be both credible and reliable.

### **Credibility of SP**

SP was alleged to have been a party to the events and it is undisputed that she was regularly in the classroom with SN and the Member during the morning routine. Accordingly, SP had the opportunity to observe all of the events to which she testified.

As one of parties to this proceeding facing allegations of professional misconduct, SP has a great deal at stake in this hearing and an understandable personal interest in its outcome. As a result, her direct interest in the outcome erodes the Panel's confidence in the reliability of her testimony.

The Panel considered that SP's statements during the Centre's investigation, her subsequent two responses to the College's investigation and her testimony were not entirely consistent. In her statements to the Centre, she said she heard the Member say the Child may be gay or g-a-y (Exhibit 24) but then in her interview with the College's investigators SP denied ever having heard the Member speculating about whether the Child was gay or g-a-y (Exhibit 28). In her oral testimony, SP said the Member never made a statement about the Child being gay in the classroom. In the Panel's view, these statements were inconsistent, and SP's qualifications and explanations for the differences in these statements relied too heavily on an appeal to

semantics: when questioned as to whether the Member said the Child was gay, SP denied this but said the Member said the Child “may be” gay or “g-a-y. Further, under cross-examination, SP was asked why she had never before said that the comment had been made outside of the classroom, even when she was asked “Did you and [the Member] talk about this in the classroom?” SP’s response had been that she had never been asked during her interview with MF and MM on July 13, 2016 if the Member’s comment that the Child may be gay or G-A-Y had happened *in the classroom* [emphasis added]. SP emphasized that the statement was not inappropriate because it was not made in the classroom or in the presence of children, but the first time SP made this clarification was when SP was cross-examined during the hearing. The Panel found these comments to be less than candid, even if not entirely inaccurate. SP’s testimony in response to this line of questioning came across as being less than forthright and led the Panel to doubt its reliability because of the inconsistencies identified as well as SP’s interest in the outcome of the hearing. It also led the Panel to question the reliability of SP’s testimony in other areas where her testimony was not supported by other evidence

However, the Panel did not conclude that everything SP said is unreliable. The Panel found her statement to the Centre’s staff during her initial interview about the comments made about the Child’s sexual orientation credible and reliable in the sense that there had been a conversation. The Panel took from this that it was credible and reliable when SP said that the Member had made comments speculating about the Child’s sexual orientation.

The lack of candor surrounding SP’s testimony about comments being made about the Child being gay or g-a-y, led the Panel to question SP’s testimony in other areas where her testimony was not supported by other evidence, particularly as it related to the events on July 8, 2016. The Panel noted that SP’s evidence that she was not present when the Member is alleged to have encouraged the Child to expose his penis or to touch, kiss and lie on another child on July 8, 2016 was contradicted by other evidence. Specifically, the Member admitted in her written statements during the College’s investigation that she asked the Child where his penis was. The Panel found that this was consistent with SN’s report that the Member asked the Child to expose himself on July 8, 2016.

The Panel also found that SP’s evidence regarding what a person could see if they were changing a child while standing at the entrance to the washroom not to be plausible. This was in response to SN’s detailed evidence regarding her positioning at the entrance to the washroom

and her statement that she was able to see and hear the Member and SP during the course of the alleged events on July 8, 2016. SP confirmed that the floor plan (Exhibit 10) which was presented to SN, HC and SP during their testimony, was an accurate representation of the layout of the Centre at the time of SP's employment, and that the tables were located in the middle of the PS2 room. That was consistent with SN and HC's testimony about the room layout. However, SP disputed the suggestion that the whole classroom could be seen while diapering children, because if a child were on the changing table the staff would be facing into the washroom and not into the classroom. That does not accord with what SN or HC said, and common sense suggests that by turning one's head slightly if positioned in the entranceway between the washroom and the classroom, the classroom (and particularly the tables in the centre of the classroom where the Member and SP were said to be sitting), would be visible. SP also confirmed that she had seen others change children in the entrance passageway to the washroom, which supported SN's evidence that she could see the Member and SP seated at the tables (because if the Member, from a vantage point of inside the classroom, could see someone in that area of the classroom changing a child, then the person changing the child could see the Member). This led the Panel to find SP's evidence regarding the incidents on July 8, 2016 to be unsupported by the evidence of others and therefore less credible than that of other witnesses.

### **Credibility of the Member**

The Member did not give oral evidence as she was not present. The Panel has no basis for assessing the credibility of what she submitted in writing to the College Investigator. However, the Panel noted that the Member admitted to asking the Child to show his penis in two separate emails to the College Investigators. She also admitted to showing her colleagues a man's penis on her cell phone. The Panel has no reason to doubt the reliability of these written statements but does not give much credibility to the Member's explanation for why these events took place because of her self-interest in this matter and the fact that she did not attend the hearing to give evidence.

## **Findings on the Facts**

The Panel must decide whether the alleged behaviour took place and whether the Member committed professional misconduct by behaving in the way that is alleged. Based on the careful consideration of evidence the Panel makes the following findings with respect to the facts alleged in paragraphs 2 and 3 of the Notice of Hearing:

### **Whether the Member made regular comments inside the classroom that the Child was "gay" or spelling out the word, "g-a-y", with reference to the Child;**

The Panel finds that it is more likely than not that the Member made these comments. In her written report and in her interview with the Centre, SN reported that statements were being made about the Child's sexual orientation. SN confirmed this during her testimony in the hearing. She was consistent throughout. In the Member's own admission in her interview with the Centre she said, "the child had tendencies" (Exhibit 24 p. 51). SP reported in her interview with the Centre, (Exhibit 24) "[the Member] said maybe he may be gay". While it is contentious whether these comments were said inside or outside the class, discussing the Child's sexuality would still be inappropriate. SN reported that the Member and SP were spelling out the word, which strongly suggests to the Panel that they were in the proximity of children when they were speaking. The number of times these comments were said was also contentious. Even if SN overstated the number of times this happened, it does not diminish the fact that comments about the Child's sexual orientation were made. SP's less than candid testimony about where the comments were made led the Panel to believe that more likely than not, these comments were made in the classroom.

### **Whether the Member instructed and/or encouraged the Child to expose his penis in the presence of Centre staff and/or other children;**

### **Whether the Member instructed and/or encouraged the Child to touch his genital area and/or to touch the genital area of other children;**

### **Whether the Member instructed and/or encouraged the Child to kiss other children on the lips;**

**Whether the Member instructed and/or encouraged the Child to lie on top of other children;**

The following determinations relate to the above four allegations:

SN testified that on July 8, 2016, she heard the Member tell the Child to “go and show Ms. Shereen what you have.” SN testified that SP was present for this statement, and responded with laughter. SN also testified that immediately thereafter, the Child approached her and exposed his penis to her. SN reported this to HC, who reported it to the Centre’s management. The Member denies having made this statement and SP denies having heard the Member make this statement.

The Panel finds on a balance of probabilities that on July 8, 2016, the Member told the Child “to show Ms. Shereen what you have,” and that SP was present and laughed. The Panel found SN’s evidence regarding the fact that this occurred and the timing of this incident was corroborated by the Mother’s testimony that the Child disclosed that he had pulled down his pants and that he subsequently identified the Member as having told the Child to expose himself to SN to be compelling evidence that this occurred.

Additional evidence on which the Panel relied in making this finding is that the Member admitted on two occasions in her statements to the College Investigator that she did in fact ask the Child about his penis. In both of her responses, in her email of May 26, 2017 and again in her email of October 2, 2017 the Member admits to having asked the Child where his penis was:

Exhibit 25 – Email of Cathy McLean to Ryan Pirtam - May 26, 2017 6:24:40 PM

“It was actually Shireen who told me to ask [the Child] where his penis was and when she told me to ask him I was a little confused as to why she would tell me to ask him that because I had seen it many times when I would change him. She told me that he did something funny so I asked him and he pulled down his pants. I told him to pull up his pants and go wash his hands.

Exhibit 26 – Email of Cathy McLean to Amy Shillington – October 2, 2017 @ 8:00 p.m.

“I also wanted to say that again this all started when Shireen asked me to ask [the Child] where his penis was because they were talking about their body’s that week and when she asked me to ask him I asked her why and she went on to say that he did something cute. Since I had [the Child] in the toddler room with me I changed him all the time so I have seen his penis so you need to ask yourself why would I even bring anything like that up to him if I already had him in my class in the toddler room. It was Shireen that

had asked me to ask him where it was because she said that he did something cute so when I asked him the one time that was when he pulled down his pants and showed us. We all laughed and then that was it. it.”

The Panel took the Member’s statements to be corroborative of the fact that the Member asked the Child about his penis and that the Child pulled down his pants in response. The Panel did not accept the explanations in the Member’s statements above, because they lacked plausibility and were inconsistent with the evidence of SN on this point, which the Panel accepted.

Additionally, MF and CC gave evidence that the Member phoned MF at the Centre after she was initially interviewed, and stated that she remembered the Child playing a game where he was a monster and chased other children, and that SP had told the Member that the Child had exposed himself when SP asked him where his penis was. MF and CC indicated that they found the Member’s statements to be unreliable and an effort to reframe the incident so that it discredited SN and SP and exonerated herself. This assessment was similar to the evidence that MF gave of the Member changing her story about showing the penis on the phone. In that particular case, she initially claimed this incident had occurred in the staffroom; it was only after being confronted about the impropriety of showing it in the Centre that she changed her story to indicate that the incident had occurred in the parking lot. The Panel found that in each of these cases, the Member showed a pattern of taking a kernel of truth that went to the heart of the story (e.g. that she asked the child about his penis; that she showed a man’s penis on her phone; that she told the child to kiss, touch and lie on other children) and built up stories around those facts to absolve her of any wrongdoing (e.g. that it was SN that told her to ask the Child where his penis was; that she showed the penis photo outside of the Centre; that the Child made up a game where he was a monster chasing the other children). That the Member admitted to asking the Child about his penis gave the Panel additional reason to believe that the incident on July 8, 2016 took place. The Panel found SN’s evidence to be much more credible than the statements from the Member, and found it more likely than not that the incident occurred as SN described. The Panel also noted that there was additional supporting evidence that led the Panel to this conclusion, outlined below.

Based on the testimony of SN and HC, the Panel accepted that it would be possible for SN to see and hear the Member and SP when they were seated at the tables in the middle of the room and she was changing children at the entrance to the washroom. SN and HC’ testified

that standard practice in the classroom would be for the person changing diapers to do so in the entranceway between the washroom and classroom and for other staff to position themselves in the classroom where they could see all of the children and where all of their faces would be visible to the other staff. SP herself admitted that she had seen staff members change children in the entrance way to the washroom in the same manner as described by SN. This would have allowed SN to see the Member and SP seated at the tables when the incident on July 8, 2016 occurred. The Panel finds it more likely than not that SN accurately saw and heard the Member direct the child to expose himself and to kiss, touch and lie on other children and to hear and see the Member and SP laugh in relation to this. The Panel did not accept SP's evidence that she did not hear the remark by the Member because it is much more likely that if the Member engaged in this behaviour, she would have done so with SP as an audience rather than out of earshot of the Member, who admitted that she laughed at the Member's remarks and would therefore likely be perceived by the Member to be entertained by her conduct.

This is additionally supported by HC's evidence that SN told HC about that incident (asking the child to expose himself and to touch, kiss and lie on another child) on the morning of July 8, 2016. There was a high level of detail recalled by HC when she testified about SN's reporting the event to her. HC remembered very clearly where she was and what she was doing when SN reported the incident to her. This confirmed to the Panel that what SN told HC was shocking or disturbing enough to etch the event in her memory and further inclined the Panel to find that the events on July 8, 2016 occurred as reported on that day by SN to HC.

The Panel accepted the evidence of SN that the Member encouraged the Child to touch his genital area and the genital area of another Child, to kiss other children and lie on top of other children. SN reported this in the first account of the events and confirmed that she saw this happen in her testimony. The Panel acknowledges that there was only SN's testimony to establish this. However, her detail in recounting this in her interview with the Centre is very specific (Exhibit 24) where she says she heard the Member say "Go kiss him, kiss him on the lips." The Panel finds this level of detail compelling.

The Panel noted that the bulk of SN's testimony was consistent and the Panel found SN's credibility to be high. In her testimony, SN admitted that it was hard to see because the table was in the way. However, SN also reported that she told SP that it was not right for the Member to have said that the Child should touch another child. SN said that SP said that the Member

only told the Child to touch on the outside of his pants (Exhibit 11). When asked if she talked to SP about this, SN said that SP said that the Member was not serious. SP also claimed that the Member really loved the Child and didn't mean anything bad by it; this suggests to the Panel that it is more likely than not that something inappropriate happened.

This constellation of evidence, and the relative lack of credibility that the Panel gave to the Member's statements and to SP's testimony compared to SN's evidence as it related to the events of July 8, 2016, led the Panel to conclude that, on a balance of probabilities, the College established that the Member instructed and/or encouraged the Child: to expose his penis in the presence of Centre staff and/or other children; to touch his genital area and/or touch the genital area of other children; to kiss other children on the lips; and to lie on top of other children.

**Whether the Member asked the Child whether his father would cheat on his mother and/or whether his father would come home with the Member;**

The Member acknowledged in a statement that she said the Mother's husband was handsome, but denied ever saying anything to the Child about the father cheating on the Mother. SP confirmed that the Member said the husband was handsome. If this was said to the Child, it would have been quite alarming and reflect poorly on the character of the Member who said it. Nonetheless, the Panel did not find that there was sufficient evidence to support that this happened as reported. There was no evidence as to when this statement was made, where, or what the Child's response to it was, if any. The Panel is also concerned that this was never reported by SN to anyone prior to being interviewed by the Centre on July 13, 2016, which calls into further question whether the Member made this statement as alleged.

**Whether the Member used the word, "fuck", or otherwise cursing in front of the Children under her supervision.**

The Panel finds that it is more likely than not that the Member cursed in front of children under her supervision. HC testified that the Member swore, but not in the classroom. The Member admitted to swearing under her breath. There is a statement from SN stating that she heard the Member swearing both in the classroom and on the playground (Exhibit 11). SN went on to say

that she heard the Member swear many times, sometimes softly, sometimes when really frustrated, in the classroom and on the playground. SN described her use of that word as a habit. Based on this testimony, the Panel finds it likely that at some point the Member used profane language within hearing of the children under her supervision. SN would have been in a position to observe this and had no reason to report the Member swearing if she did not hear it.

**Whether the Member showed two of her colleagues a photograph on her phone of a man's penis at the Centre during working hours.**

The Panel finds that the Member showed a picture of a man's penis to her co-workers during working hours while she was in the closet adjacent to the classroom and while her colleagues were in the doorway to the closet. The Member admitted that she showed the penis picture (Exhibit 26) even though she changed her story about where she showed it. SP testified that the Member showed it to her and SN testified that the Member showed it to her. There were similar stories from each about what was said about what it looked like. The Panel finds that this incident occurred as alleged.

**Findings on the Allegations of Professional Misconduct**

As a result of the findings on the facts outlined above, the Panel makes the following findings:

On the allegation 5(a) that the Member verbally abused a child who was under her professional supervision, contrary to Ontario Regulation 223/08, subsection 2(3), the Panel finds the Member guilty.

On the allegation 5(b) that the Member psychologically and/or emotionally abused a child who was under her professional supervision, contrary to Ontario Regulation 223/08, subsection 2(3.2), the Panel finds the Member guilty.

On the allegation 5(c) that the Member sexually abused a child who was under her professional supervision, contrary to subsection 1(1) of the Early Childhood Educators Act, 2007, S.O. 2007, c. 7, Sch. 8, the Panel finds the Member guilty.

On the allegation 5(d) that the Member failed to maintain the standards of the profession contrary to Ontario Regulation 223/08, subsection 2(8), the Panel finds the Member guilty, in that:

- i. The Member failed to provide a nurturing learning environment where children thrived, contrary to Standard I.D of the Standards of Practice;
- ii. The Member failed to establish professional and caring relationships with children and/or to respond appropriately to the needs of children, contrary to Standard I.E of the Standards of Practice;
- iii. The Member failed to ensure that the needs and best interests of the children remained paramount, contrary to Standard I.F of the Standards of Practice;
- iv. The Member failed to maintain a safe and healthy learning environment, contrary to Standard III.A.1 of the Standards of Practice;
- v. The Member failed to support children in developmentally sensitive ways and to provide caring, stimulating, and respectful opportunities for learning and care that are welcoming to children and their families, contrary to Standard III.C.1;
- vi. The Member failed to know, understand and abide by the legislation, policies and procedures that were relevant to her professional practice and to the care and learning of children under her professional supervision, contrary to Standard IV.A.2 of the College's Standards of Practice;
- vii. The Member failed to make decisions, resolve challenges and/or provide behaviour guidance in the best interests of the children under her professional supervision, contrary to Standard IV.B.4 of the Standards of Practice;
- viii. The Member failed to work collaboratively with colleagues in the workplace to provide a safe, secure, healthy, and inviting environment for children and families, contrary to Standard IV.C.1 of the Standards of Practice;
- ix. The Member failed to build a climate of trust, honesty, and respect in the workplace, contrary to Standard IV.C.2 of the Standards of Practice;

- x. The Member conducted herself in a manner that could reasonably be perceived as reflecting negatively on the profession of early childhood education, contrary to Standard IV.E.2 of the Standards of Practice;
- xi. The Member verbally, psychologically or emotionally abused a child under her professional supervision, contrary to Standard V.A.1 of the Standards of Practice;
- xii. The Member used her professional position of authority to coerce, improperly influence, harass, abuse, or exploit a child under her professional supervision, contrary to Standard V.A.2 of the Standards of Practice; and
- xiii. The Member failed to establish and maintain clear and appropriate boundaries with children under her supervision, their families, and in her professional relationships, contrary to Standard V.B of the Standards of Practice;

On the allegation 5(e) that the Member acted or failed to act in a manner that, having regard to the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional, contrary to Ontario Regulation 223/08, subsection 2(10), the Panel finds the Member guilty.

On the allegation 5(f) that the Member conducted herself in a manner that is unbecoming a member, contrary to Ontario Regulation 223/08, subsection 2(22), the Panel finds the Member guilty.

## **ANALYSIS**

The Panel finds that the Member is guilty of sexually abusing the Child because the Member gave the Child instructions that were sexual in nature. The Member told the Child to expose himself to another adult. Although she did not use those words, the Member told the Child to “go and show Ms. Shereen what you have.” As demonstrated by the Child’s actions and subsequent disclosure to his Mother, this was understood by the Child to mean that the Child should pull down his pants and show his penis to SN, and the Panel finds it more likely than not that this is what the Member intended. The Member also told the Child to touch his own genital area and the genital area of another child, and to kiss, and to lie on top of another child. All of

these acts are inherently and objectively sexual in nature. Regardless of whether the Child understood the sexual nature of the acts, or whether he was harmed by them or even whether or not they were intended for the sexual gratification of the Member, the finding that the Member instructed the Child to do these things was enough for the Panel to make a finding of misconduct.

The Panel finds that the Member's telling the Child to expose himself in front of staff or other children, instructing the Child to touch his genital area and then touch the genital area of another child, to kiss, and to lie on top of another child, were all a form of verbal abuse. The Member verbally instructed the Child in a way that demeaned the inherent value of the Child by making the Child a prop for the sake of a grossly inappropriate attempt at humour. It was inappropriate and unacceptable and a form of professional misconduct that breached the Act and the Standards of Practice. Speaking in such a manner was not in the Child's interest or needs and, in fact, was detrimental to his dignity and to how he might be perceived by other children in the classroom. Such actions have the potential to create a highly unhealthy environment for the Child and the other children. Standard I.F requires an RECE to ensure that the needs and best interests of children remain paramount; making the Child an object of humour or amusement for his caregivers is a failure to do that.

The Panel also finds that contemplating aloud about the sexual orientation of the Child, potentially in the vicinity of children, to be a form of verbal abuse, in that it exposes the Child to singling out by other children. The Member's interactions with the Child would affect children in her proximity. As CC pointed out in her testimony, "[c]hildren have ears." The impact of speaking about a Child's sexuality could improperly influence the way other children in the class view the Child. It conveys inappropriate judgments about what is "normal" behavior. The Panel was mindful that this has the effect of promoting stereotypes that do not maintain a safe and healthy environment and instead contributes to an unfriendly or damaging learning environment.

Although the Child showed no signs of psychological distress or emotional harm, the Panel does not believe that there could be sexual and verbal abuse of the type found in this matter that does not include psychological or emotional abuse of some kind. Even though the Child's demeanor was said to be cheerful, and his Mother reported that she saw no signs that would indicate psychological or emotional abuse, the Panel finds that the Member used her power of

authority over the child in a manner that was insulting and demeaning and in a manner that could objectively be considered psychologically and emotionally abusive.

The Panel finds that that the Member failed to maintain the standards of the profession as set out in the Standards of Practice. She failed to provide a nurturing environment by making it a sexualized environment and encouraging inappropriate behaviour in front of staff and other children.

The Member used her position of authority to influence the Child to behave in inappropriate ways. The Child trusted her and believed he was in on the joke. The instruction to the Child to show his penis showed a lack of concern for the Child's needs and used him for the sake of a laugh. It was both unprofessional and uncaring and did not ensure that the Child's best interests were paramount.

It was abhorrent for the Member to raise issues of sexuality with children in her care, and to do so in a manner that was completely inappropriate, by telling the Child to kiss, touch and lie on another child. The Member's behaviour showed a lack of sensitivity and support for the Child's developmental needs.

The Member's incredibly bad judgment, which led to her decision to ask the Child to expose himself, kiss, touch and lie on another child, even if the Member only thought this was in jest, was far beyond the standards of what would be considered acceptable practice for an RECE; a finding of misconduct is required.

In addition to these comments and instructions to the Child being inappropriate, the Member put her colleagues in a very unfortunate position where they were forced to choose between reporting her misconduct in accordance with their professional duties and laughing at or ignoring the conduct which exposed them to professional jeopardy. Additionally, the Member was a more senior ECE in a classroom with a less experienced ECE and an Early Childhood Assistant. She used that seniority to co-opt other staff into this inappropriate behaviour.

The Panel finds that the Member must have known that the behaviour was inappropriate because the behaviour was never done while the Assistant Supervisor was present. This conduct did not build a climate of trust, honesty and respect in the workplace and it was a failure to work collaboratively with her colleagues to build a secure, healthy and inviting environment.

The Member clearly violated professional boundaries by speaking about the Child's sexuality, and by instructing the Child to act inappropriately and by showing her colleagues the picture on her phone of a man's penis. This was also a breach of professional standards.

The Member's conduct would reasonably be regarded by members of the profession as disgraceful, dishonourable and unprofessional. It is not conduct that parents or the public would expect from someone responsible for caring for their child. This unconscionable behaviour led the Mother to question whether she should continue working or quit her job and remove the Child from care. This is clearly a detriment to the profession and the public interest and it is clearly conduct that is unbecoming.

### **DECISION ON THE ALLEGATIONS**

After having considered and weighed the evidence presented by the College and the Member, the Panel found, as detailed in the reasons above, that the Member is guilty of professional misconduct in that: she verbally, psychologically/emotionally and sexually abused the Child; she failed to maintain the standards of the profession; she acted or failed to act in a manner that, having regard to the circumstances would reasonably be regarded by members as disgraceful, dishonourable and unprofessional; and she conducted herself in a manner that is unbecoming a member.

**I, Barney Savage, sign this decision and reasons for the decision as Chairperson of this Discipline panel and on behalf of the members of the Discipline panel.**

  
\_\_\_\_\_  
Barney Savage, Chairperson

June 22, 2021  
Date

**NOTICE OF PUBLICATION BAN**

In the matter of College of Early Childhood Educators and Cathy Rae-Ann McLean this is notice that the Discipline Committee ordered that no person shall publish or broadcast the identity of, or any information that could identify, any person who is under 18 years old and is a witness in the hearing, or the subject of evidence in the hearing or under subsection 35.1(3) of the *Early Childhood Educators Act, 2007*.

**DISCIPLINE COMMITTEE  
OF THE COLLEGE OF EARLY CHILDHOOD EDUCATORS**

**PANEL:** Barney Savage, Chairperson  
Geneviève Breton  
CeCil Kim, RECE

**BETWEEN:**

	)	
	)	
COLLEGE OF EARLY	)	Jill Dougherty and Alyssa Armstrong
CHILDHOOD EDUCATORS	)	WeirFoulds LLP
	)	for the College of Early Childhood Educators
	)	
and	)	
	)	
CATHY RAE-ANN MCLEAN	)	Not present and not represented
REGISTRATION # 21715	)	
	)	
	)	Lonny Rosen
	)	Rosen Sunshine LLP
	)	Independent Legal Counsel
	)	
	)	Heard: November 8, 2021

## **PRELIMINARY MATTERS**

This matter was ordered by the Panel to be heard together with the matter of *College of Early Childhood Educators v Sophia Shanae Phillips* on consent of the Member (who was not present at the hearing), and Sophia Shanae Phillips (“SP”), as indicated in emails between the parties and the Hearings Office (Exhibits 8a and 8b to the hearing on liability and Exhibits 1, 7 and 8 to the hearing on penalty).

The hearing with respect to penalty proceeded electronically (by videoconference) pursuant to the *Early Childhood Educators Act, 2007* (the “Act”), *the Hearings in Tribunal Proceedings (Temporary Measures) Act, 2020* and the College’s Rules of Procedure of the Discipline Committee and of the Fitness to Practise Committee.

At the outset, the Panel noted that the hearing was being recorded in the Zoom platform at the direction of the Panel for the hearing record, and ordered that no person shall make any audio or video recording of these proceedings by any other means.

The Panel also ordered a publication ban, pursuant to section 35.1(3) of the Act. The order bans the public disclosure, publication and broadcasting outside of the hearing room, any names or identifying information of any minor children who may be the subject of evidence in the hearing.

## **INTRODUCTION**

By decision dated June 22, 2021, following a contested hearing held on November 16, 17 and 18, 2020, this panel of the Discipline Committee (the “Panel”) found that the Member, Cathy Rae-Ann McLean (the “Member”) was guilty of acts of professional misconduct, in that:

- a. she verbally, psychologically/emotionally and sexually abused a child (the “Child”);
- b. she failed to maintain the standards of the profession;
- c. she acted or failed to act in a manner that, having regard to the circumstances would reasonably be regarded by members as disgraceful, dishonourable and unprofessional; and
- d. she conducted herself in a manner that is unbecoming a member.

On November 8, 2021, the Panel heard evidence and submissions on penalty and costs in respect of both the Member and Sophie Shanae Phillips. The Panel heard submissions from the College of Early Childhood Educators of Ontario (the “College”) and from Ms. Phillips, and received correspondence outlining Ms. McLean’s position on penalty and costs.

**EVIDENCE AND SUBMISSIONS OF THE PARTIES ON PENALTY AND COSTS**

The evidence heard by the Panel was contained in the following exhibits:

<b>EXHIBIT #</b>	<b>Description</b>
EXHIBIT 1	Email from Heather Cook to Ms. McLean and Mr. Blake sent on September 10, 2021 at 11:54 a.m.
EXHIBIT 2	Brief of Correspondence of the College dated October 22, 2021
EXHIBIT 3	Affidavit of Service of Helen Chan sworn October 22, 2021 in McLean Matter
EXHIBIT 4	Affidavit of Sandra Noe (sworn October 21, 2021) in McLean Matter
EXHIBIT 5	Affidavit of Service of Alyssa Armstrong sworn November 2, 2021
EXHIBIT 6A	Email from Ms. Dougherty re McLean email Hearing on November 8, 2021
EXHIBIT 6B	Email from Ms. McLean attaching death certificate
EXHIBIT 6C	Death Certificate Elizabeth Jean McLean
EXHIBIT 7	Email dated November 5, 2021 from Ms. McLean to Ms. Cook re Hearing on November 8, 2021
EXHIBIT 8	Email from Ms. Cook to Ms. McLean and Mr. Blake sent on September 10, 2021 at 11:54 a.m.
EXHIBIT 9	Brief of Correspondence of the College dated October 22, 2021 filed in Phillips matter
EXHIBIT 10	Affidavit of Service of Helen Chan sworn October 22, 2021 in Phillips matter
EXHIBIT 11	Affidavit of Sandra Noe (sworn October 21, 2021) including College bill of costs and invoices in Phillips matter
EXHIBIT 12	Penalty Hearing Documents Brief of Sophia Shanae Phillips
EXHIBIT 13	Affidavit of Purnell Sewell-Blake in Support of Costs sworn October 27, 2021

## Submissions of the College

The College submitted that the Panel should make the following order in respect of the Member:

- a. requiring the Member to appear before the Discipline Committee to be reprimanded;
- b. directing the Registrar to revoke the Member's certificate of registration;
- c. requiring the Member to reimburse the College for funding provided to a person under the program required under section 59.2 of the *Early Childhood Educators Act, 2007* (the "Act");  
and
- d. requiring the Member to pay costs to the College in the amount of \$59,831.48, under s. 33(5) of the Act, within 90 days of the date of this Order.

The College submitted that because the Panel found that the Member sexually abused the Child (within the meaning of section 33.2(2) of the Act), section 33.2(1) of the Act requires the Panel's order to include a reprimand and revocation of the Member's certificate of registration.

The College also submitted that this is an appropriate case in which to order that the Member reimburse the College for funding provided to a person under the program required under section 59.2 of the Act. The College submitted that it is entirely fair and reasonable to provide for the possibility of paying for counselling or therapy with respect to young children who are sexually, verbally, or psychologically abused even if there is no evidence that the child has sought or will seek such counselling or therapy, because the impact of the abuse and the need for counselling or therapy may not arise or become apparent for some time. The College requested that the Member reimburse the College only if funding for therapy is requested and approved under the program required by section 59.2 of the Act, and as prescribed by the regulations.<sup>1</sup>

The College further submitted that this is an appropriate case in which to order costs, and that the costs payable should be in the amount of \$59,831.48. This amount represents half of the hearing costs for four days of hearing, in accordance with Tariff A of the Rules of Procedure of the Discipline Committee ("Tariff A"), plus less than 2/3 of the other legal fees and disbursements incurred by the College in relation to hearing preparation and previous steps in the prosecution, which are not covered by the Tariff. The quantum of costs the College seeks is appropriate in light of the

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<sup>1</sup> Ontario Regulation 440/19 under the Act addresses eligibility requirements for therapy or counselling, while Ontario Regulation 439/10 addresses the amount of funding available and the purposes for which it may be used.

complexity of this case, which entailed a lengthy pre-hearing conference that took place over the course of two separate days and a three-day hearing involving six witnesses. Courts have frequently upheld decisions that have ordered a member to pay 2/3 of a regulator's costs<sup>2</sup>. The College submitted that the rest of the membership should not bear the bulk of the cost involved in holding this Member accountable for her misconduct.

### **Submissions of the Member**

The Member did not attend the penalty hearing. Her position on penalty and costs is set out in Exhibit 6A, and includes the position that the Member:

- a. denies all allegations against her;
- b. will not be paying the College any money;
- c. did not participate in the hearing because she could not afford a lawyer or to take time off work and due to the fact that her grandmother had just passed away and being with her family was more important; and
- d. has no intention of returning to the daycare field.

### **DECISION ON PENALTY AND COSTS**

Having considered the evidence and submissions of the parties, the Panel makes the following order:

1. The Member is required to be reprimanded by the Discipline Committee as outlined in section 33.2(1)(a) of the Act.
2. The Registrar is directed to revoke the Member's Certificate of Registration pursuant to section 33.2(1)(c) of the Act.
3. The Member is required to reimburse the College for funding for therapy or

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<sup>2</sup> See for example *Bayfield v. College of Physiotherapists of Ontario*, 2014 ONSC 6570 (Div. Ct.), at para. 9.

counselling provided under the funding for therapy program required under section 59.2 of the Act, pursuant to section 33(4)(5) of the Act.

4. The Member is required to pay to the College's costs in the amount of \$20,000 within 90 days pursuant to section 33(5)(4) of the Act.

## **REASONS FOR DECISION ON PENALTY AND COSTS**

The Panel carefully considered the submissions of the parties, the requirements of the Act, and the following principles in determining an appropriate penalty for the Member:

- a. the nature of the misconduct and its severity;
- b. the criteria of:
  - i. public protection,
  - ii. maintenance of the reputation and integrity of the profession and public confidence in the College's ability to regulate the profession in the public interest;
  - iii. specific deterrence of the Member, i.e. deterring this Member from engaging in similar conduct again (something that is less important when revocation is mandatory);
  - iv. general deterrence of the profession, i.e. deterring other members of the profession from engaging in similar conduct, and
  - v. the Member's opportunity for rehabilitation, where appropriate (again, something that is not applicable where revocation is mandatory);
- c. the principle of consistency in penalty orders; and
- d. any applicable aggravating and mitigating factors.

Based on these considerations, and for the reasons below, the Panel feels the Order made is fair, properly protects of the public, and weighs the circumstances in this particular case with the principles above, for the reasons outlined below.

## **Revocation and Reprimand**

The Member in this case was found by the Panel to have made comments toward a child that were sexual in nature and that those comments amounted to sexual abuse. The Act requires specific penalties for Members who have been found guilty of professional misconduct involving the sexual abuse of a child. The legislation is clear that both a reprimand and revocation of the Member's registration with the College are required pursuant to section 33.2 of the Act. These requirements protect the public by removing those members who have been found guilty of professional misconduct involving the sexual abuse of a child from the early childhood education profession. By revoking the Member's registration and reprimanding the Member, a clear message is sent to the public that this kind of misconduct will not be tolerated.

In this case, the Member's registration had already been revoked for non-payment of fees. Following the incident, the Member stopped paying her registration dues and so the Member's registration was administratively suspended for non-payment. During the lengthy time that it took this matter to come before the Discipline Committee, the College administratively revoked the Member's registration. Despite this, the Panel orders the revocation of this former Member's registration so that it is noted on the Public Register that the revocation was the result of a disciplinary decision. Additionally, the Panel will deliver a written reprimand to the Member to indicate to the Member, and to the public at large, that this type of misconduct is strongly rebuked.

## **Funding For Therapy**

The Panel also considered the request to order the Member to reimburse the College for any funds paid out to a person eligible under the funding for therapy program that has been established by the College pursuant to section 59.2 of the Act. The Panel felt that it was appropriate to make this order. In similar cases where members have been found guilty of professional misconduct involving the sexual abuse of a child at this College and at other professional regulators, such orders have been made.<sup>3</sup> The Panel considered that although there

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<sup>3</sup> See, e.g., *College of Early Childhood Educators v. Harker*, 2020 ONCECE 4; *College of Early Childhood Educators v. Steven Richard Campbell*, 2020 ONCECE 19.

was no evidence that the Child has sought or will seek funding for counselling or therapy, the effect of abuse on a child is difficult to determine and may not be apparent for some time. The Panel felt that the Member should be held responsible for funding therapy to address any potential emotional damage to the Child and/or the Child's family, should that become necessary in the future.

### **Costs**

The College sought just under \$60,000 in costs. The Panel ordered that the Member pay costs to the College in the amount of \$20,000, for the following reasons:

The Panel considered the Member's written statement that she could not afford to pay anything to the College and that she could not afford a lawyer. The Member did not provide evidence to support either of these statements. Had the Member provided the Panel with bank statements, bills showing her living expenses, or pay stubs that might have supported her statement that she is unable to pay costs or afford a lawyer, the Panel could have taken this information into consideration. There is evidence that the Member was given ample opportunity to engage in the discipline process, both during the liability phase and the penalty phase, but she did not avail herself of those opportunities. If the Member had attended the hearing at any point in time, or being unable to do so, requested that the Panel reschedule the hearing or otherwise permit her to present evidence and make submissions, the Panel would most certainly have considered any evidence or submissions presented by the Member as they related to liability and penalty. That was not the case, and so the Panel can only rely on what is before it.

The College provided evidence in Exhibit 4, which includes a long list of legal fees charged to the College for services relating to bringing this matter before the Discipline Committee. The evidence indicates that the College's overall costs in this matter were \$60,350.73, excluding the hearing costs in accordance with Tariff A. Two-thirds of this amount comprised \$39,831.48. The College also claimed \$20,000 under Tariff A, which amount represented half the cost of attendance at three days of the misconduct hearing, and half the cost of one day of attendance at a penalty hearing. The total amount of costs claimed, including the costs under the tariff, amounts to \$59,831.48.

The Panel considered the effect that such a significant costs award might have on a member's ability and right to access the hearing process. At the same time, the Member was aware that there was a cost consequence to proceeding with a contested hearing. The Member was found to have committed professional misconduct involving sexual abuse of a child. The Membership as a whole should not bear the full cost of bringing this before the discipline Panel. At the outset, it was made clear that the Member could be responsible for costs of \$10,000 or more for each hearing day.

The College argued that members of the profession should not bear the full cost of prosecuting a member found guilty of professional misconduct and we accepted this premise. But, the Panel also considered that this should be balanced against making the process fair and accessible to members of the profession who do not have access to significant resources at their disposal.

There is evidence before the Panel that the Member and Ms. Phillips agreed to a joint hearing to reduce costs. Short of agreeing to a plea, the Member and Ms. Phillips had little control over how the College chose to conduct its prosecution of this matter. There is little evidence that the Member caused excessive delays in the scheduling or investigation of this matter and yet it took a significant time for this to come before the Panel. The Panel acknowledges that it is within the Member's right to have a contested hearing and that the Member is not required to submit any evidence. The burden of proof rests on the College. The Panel is also fully aware of low compensation rates within the profession of early childhood education, and recognizes the impact of a costs award of tens of thousands of dollars on a member of this profession. The Panel is also concerned about the lack of transparency whereby a member would be unable to appreciate how legal fees might accumulate during the process. Indeed, it did not go without notice that the College's Book of Authorities included 47 tabs totaling 917 pages. Fear of accumulating expensive legal fees should not be a deterrent to an RECE's access to justice in the regulatory process.

For those reasons, the Panel orders that the Member pay costs in the amount of \$20,000 to the College. This amount represents her half of the Tariff "A" cost for three days of the misconduct hearing and one day for the penalty hearing.

**I, Barney Savage, sign this decision and reasons for the decision as Chairperson of this Discipline panel and on behalf of the members of the Discipline panel.**



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Barney Savage, Chairperson

February 15, 2022

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Date