

NOTICE OF PUBLICATION BAN

In the matter of College of Early Childhood Educators and Sophia Shanae Phillips 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 -)
)
SOPHIA SHANAE PHILLIPS) Carey O. Blake
REGISTRATION # 57246) Carey O. Blake Paralegal Services
) for the Member
)
)
)
) Lonny Rosen,
) Rosen Sunshine LLP
) Independent Legal Counsel
)
) Heard: November 16, 17, 18, 2020

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 Cathy Rae-Ann McLean*, on consent of the Member and Cathy Rae-Ann McLean (“CM”) (who was not present at the hearing), as indicated in emails between the parties and the Hearings Office (Exhibits 8a and 8b). The Member raised concerns regarding proceeding with the joint hearing, but only after the conclusion of the oral evidence and after receiving the closing written submissions of the College. Since no objection was made to proceeding with the joint hearing at the outset of the hearing, the Panel proceeded with the hearing based on the consent of the parties, and pursuant to section 9.1(1)(a) of the *Statutory Powers and Procedures Act*, R.S.O. 1990.

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, any names or identifying information of any minor children who may be the subject of evidence in the hearing.

THE ALLEGATIONS

The allegations against the Member were contained in the Notice of Hearing dated February 4, 2020, (Exhibit 7) which provided as follows:

1. At all material times, Sophia Shanae Phillips (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) encouraging and/or laughing at another staff's, CM's, inappropriate statements, acts, and/or behaviour towards the Child, which included:
 - i) CM making regular comments inside the classroom that the Child was "gay" or spelling out the word, "g-a-y-", with reference to the Child;
 - ii) CM instructing and/or encouraging the Child to expose his penis in the presence of Centre staff and/or other children;
 - iii) CM instructing and/or encouraging the Child to touch his genital area and/or to touch the genital area of other children;
 - iv) CM instructing and/or encouraging the Child to kiss other children on the lips;
 - v) CM instructing and/or encouraging the Child to lay on top of other children; and/or
 - vi) CM asking the Child whether his father would cheat on his mother and/or whether his father would come home with CM.

3. Between approximately June 2016 and July 2016, the Member used her cellphone to "Skype" while she was responsible for supervising children under her care.
4. On or about July 14, 2016, the Member's employment at the Centre was terminated.
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 failed to supervise adequately a person who was under her professional supervision, contrary to *Ontario Regulation 223/08*, subsection 2(2);
 - b) she verbally abused a child who was under her professional supervision, contrary to *Ontario Regulation 223/08*, subsection 2(3);
 - c) she psychologically and/or emotionally abused a child who was under her professional supervision, contrary to *Ontario Regulation 223/08*, subsection 2(3.2);
 - d) 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;
 - e) 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;

- f) 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
- g) she conducted herself in a manner that is unbecoming a member, contrary to *Ontario Regulation 223/08*, subsection 2(22).

THE MEMBER'S PLEA

The Member pleaded not guilty to all of the allegations set out in the Notice of Hearing, and the matter proceeded as a contested hearing.

EVIDENCE

Documentary Evidence

The following documents were entered into evidence at the hearing:

Exhibit #	Description
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 October 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 Mary Mutchler dated July 15 and 22, 2016 with notes of Centre's meetings 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

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 the Member, who would arrive around 8:15 a.m., and with 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 the Member normally came in at 8:15 a.m., but she reported not being entirely sure of this.

CM usually came into PS2 between 8:30 and 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., the Member arrived at 8:15 a.m. and CM 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, while she was doing the diaper changes, the Member, CM and the Child were in the PS2 classroom along with the other children. CM was at one of the four tables and the Member 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 CM 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.” CM and the Member 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 CM called the Child again and CM 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 CM and the Member were seated at the tables. SN said that the Member laughed, but only briefly, and did not actively encourage the behaviour.

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

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 the Member.

SN also indicated in Exhibit 11 that on July 8, 2016 she told the Member that CM should not be telling the Child to touch other children's private areas and the Member responded by saying CM 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 the Member said that CM 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 CM had returned to her own classroom, SN was in the drama area in one of the corners beside the window. The Member 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 the Member's face. SN heard the Member 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 the Member 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 the Member 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 CM and the Member 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 had been 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, CM 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. CM laughed and the Child went off to play. SN testified that the Member was not present at this incident.

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

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

Evidence of Harpreet Chander (“HC”):

HC testified that she was a Registered Early Childhood Educator (RECE) and had worked as a teacher, an Assistant Director and a Director at the Centre over her nine years with BrightPath Kids Corp. (“BrightPath”, the operator of the Centre). HC was the Director of the Centre at the time of the hearing. In July 2016, HC was Assistant Director of the Centre. She taught half days in the PS2 classroom with SN and the Member. At that time, HC had been working in the classroom for about a year with SN and for about six months with the Member. HC only worked with CM periodically, because CM 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 CM 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 CM 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 incident the previous week but that she forgot to.

When asked why she only reported it after CM asked for the Child to be moved to her class, HC testified that when SN mentioned CM 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 HC 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 CM ever had any preference of one child over another and HC responded that she noticed that CM 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 the Member was "fine" and that she did not know of any issues or friction between the Member and SN or between CM 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 the Member 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 as 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 10 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 CM and the Member 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 stated that she 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 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. According to CC, the Child did not tell the Mother that the Member told him to show himself to anyone.

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 the Member 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 the Member’s demeanor during the interview with her as polite and cooperative. The Member appeared nervous and seemed to take the matter seriously. MF described the Member as not really talking a lot or questioning during her interview. MF testified that the Member’s testimony seemed to be consistent with what she was told by SN.

MF described CM’s demeanor during the interview with her as very nervous. MF testified that CM was not as forthcoming as the Member had been, and there were some inconsistencies in her account of events. For example, MF testified that CM 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 CM 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 CM 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 CM were terminated.

MF testified that CM and the Member were aware of and had signed a copy of the Centre's policies and practices. She also confirmed that CM 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 CM 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 the Member told her, although she could not remember without the interview notes what specifically the Member had said that was similar. When presented with the notes from the interview with the Member (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 the Member was leading the behaviour. Nonetheless, she believed the Child was asked to do what was alleged and that the Member encouraged this behaviour 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 the Member. CM had been his teacher up until August 2015 and was still someone they (the Mother and the Child) saw

frequently – at the end of the day, the classes came together so they would often see CM around with other teachers at pick-up time.

The Mother described the Child as he was 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 CM and the Member were not at the Centre anymore, but not why. The Mother said they looked for other child care centres but they decided to return the Child to the Centre, reasoning “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 it was the Member that had asked him to expose himself.

Evidence of the Member:

The Member was the sole witness called to give evidence on behalf of the Member. Her evidence is summarized below:

The Member testified that she came to Canada in September 2013 to study Early Childhood Education as an international student at Centennial College, for which she paid a total of approximately \$28,000. The Member completed the program in April 2015 and graduated with a Diploma in Early Childhood Education in June 2015. After receiving her work permit, the Member applied for and obtained employment with the Centre in December 2015. At the time of the alleged incidents, the Member had been working at the Centre for about seven months. After her termination from the Centre in July 2016, the Member worked for a time in a banking call centre. The Member had a daughter who was being cared for by her parents. The Member's mother died suddenly in 2018, requiring the Member to return to her home to care for her daughter. The Member returned to Canada with her daughter, but was not able to work because her work permit had expired. At the time of the hearing, the Member was awaiting a work permit and had hoped to resume teaching as an ECE following the outcome of this proceeding.

The Member gave evidence about the morning routine at the Centre. She stated that there were times when she would be in the classroom with CM and SN to maintain appropriate child to staff ratios prior to HC's arrival at 9:00 a.m. The Member also testified that there were instances when she 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.

The Member confirmed that the floor plan presented as Exhibit 10 to SN during her testimony was 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. The Member confirmed that she had seen others change children in the entrance passageway to the washroom.

The Member testified that she never heard CM say “Go show Ms. Shereen what you have,” and that she herself had never said that to the Child.

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

The Member 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.

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

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

The Member testified that she heard CM say the Child “may be gay” or G-A-Y (emphasizing the “may be”). However the Member insisted that she had never heard CM say that he was gay or G-A-Y. The Member asserted that this distinction is important, because it explains why she had denied hearing CM say he was gay in her interviews with the College Investigator about the allegation. The Member testified that although CM had said the Child may be gay or G-A-Y, it had not been said in the classroom. Under cross-examination, the Member 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.” The Member’s response had been that she had never been asked during her interview with MF and MM on July 13, 2016 if CM’s comment that the Child may be gay or G-A-Y had happened in the classroom.

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

The Member acknowledged that the behaviour alleged – if it had occurred as alleged – would constitute misconduct.

SUBMISSIONS OF THE PARTIES ON LIABILITY

Submissions of the College

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 in this case, 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 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)¹, 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 that definition, which defines sexual abuse to include “behaviour or remarks of a sexual nature by the member towards the child.” While the Act does 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

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

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 had a positive relationship. 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 report of the Child's account of the incident constitutes compelling evidence. SN described CM 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 CM) 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 accounts 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 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 submitted that the Child failed to identify the Member when speaking with his Mother on the evening of July 13, 2016 (the same day the incident was alleged to have occurred), but argued that this is understandable because the Child was being asked about the previous incident he had reported to the Mother. It is also significant that the Child had not actually exposed himself that day when the Member asked him to “go show Ms. Shereen what you have.” The evidence of the Mother suggested that the parents were not aware of multiple incidents or the timing of the incidents. Consequently they did not think to ask follow up questions of the Child about how many times he was asked to expose himself and whether other teachers were involved.

The College submitted that the Member’s testimony that CM’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 the Member ever suggested that these comments were said outside of the classroom was during her oral testimony. The College put to the Member the fact that at no time during any of the Member’s interviews with Centre staff, College staff or in her two replies to the College’s investigation, did the Member say that the comments were made outside of the classroom. She 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 CM 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 CM 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 and CM to have the Child expose himself in the classroom in front of other children, with CM 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. The Member laughed and did nothing to stop the behaviour.

The College submitted that even if the Member only stood by and allowed CM to encourage the Child to expose himself, or listened to CM call the Child gay or G-A-Y, without stopping the behaviour and supporting the Child, it would still amount to professional misconduct. The Member had a positive duty to challenge the misconduct of others.

Submissions of the Member

Member's Submissions on the Standard of Proof

The Member acknowledged that the civil standard of proof is the standard that the College must meet. However, the Member submitted that the College has not proven the allegations of professional misconduct on a balance of probabilities. The Member also suggested that a lack of corroborating eye witness evidence in this case should be viewed negatively by the Panel. The Member acknowledged that the leading case on this issue, *FH v. McDougall*, established the principle that corroborating evidence is not necessary to make a finding in cases of sexual abuse, but asserted that the case should be distinguished for two reasons: first, the time between the conduct and the hearing in *FH v. McDougall* was much longer than in this case; and second, the conduct at issue in the *McDougall* case was much more egregious than in the present case, and the principle that sexual abuse often happens in private does not apply in this case since the alleged events were said to have happened in the classroom with eye witnesses present.

Member's Submissions on the Admissibility of Evidence

The Member accepted that the Panel is permitted to allow hearsay evidence under the Rules of Procedure and the *SPPA*, but asked the Panel to consider how much weight to give such hearsay evidence. The Member also submitted that the repetition of evidence reported by one person to another does not constitute corroborative evidence and that evidence is not made stronger by, nor should additional weight be given to it because of, such repetition.

Member's Submissions on Sexual Abuse: Behaviour or Remarks of a Sexual Nature

The Member submitted that the allegation of sexual abuse cannot be supported because the remarks or behaviour were not "towards" the Child. The Member relied on the meaning of the word "towards" to submit that in order to establish sexual abuse, the remarks have to be made "to" as opposed to "about" a child, and must have caused harm to the Child. The Member submitted that the case law presented by the College was not relevant to this instance because the comments made in cases cited by the College were made directly to the victims. Another

important distinguishing factor that the Member submitted should be relied on is that the Member is not alleged to have mentioned a single body part.

Member's Submissions on the Evidence

The Member submitted that she did not report the comment about CM being gay or G-A-Y because it did not happen in the classroom or within earshot of the Child or any other child. Since it was not a statement of fact or a statement in the presence of the Child she did not think it was a serious statement.

The Member submitted that the failure of the Member to clarify the precise location where CM said the Child "may be gay" does not mean it did not happen outside of the classroom, and argues further that there were ample opportunities for that incident to have occurred outside of the classroom.

The Member submitted that she never heard or saw the alleged incident of CM asking the Child to "go show Ms. Shereen what you have", or to kiss, touch or lie on another child. She submitted that it is possible that she was not in the room at the time this took place or that CM was communicating in a non-verbal way that the Member was not aware of, as it was suggested in SN's testimony that CM used her eyes to gesture the instruction to touch the other child. The Member also submitted it is not improbable that CM may have been alone with the Child and points to the evidence of staff dividing the children between the rooms for ratio purposes.

The Member submitted that SN's testimony that she saw the Member laugh when CM instructed the Child to "go show Ms. Shereen what you have", or to kiss, touch or lie on another child SN should not be believed because she could not have seen the full classroom from her position while diapering children in the washroom. In her testimony, SN admitted that she could not see clearly because of the height of the children and because of the way the Member and CM were seated at the tables. The Member also submitted that SN's testimony should not be believed because of a discrepancy between her statement and her testimony: in her signed statement, SN said the Member laughed at comments made by CM, yet she agreed under examination that the Member only smiled in embarrassment.

The Member submitted that SN's testimony was inconsistent. In SN's written statement she reported that CM and the Member were making comments in the classroom that they thought

the Child was gay “on a regular basis” but in SN’s testimony she stated that the comments were made “three or four times.” This is again contradicted in SN’s interview with the College on March 28, 2018 which indicates the comments about the Child being gay occurred over several months.

The Member admitted that CM showed both the Member and SN a picture of a man’s penis on her cellphone and her response was one of embarrassment. The Member submits that while she should have reported the incident, neither did SN. The Member also submits that hearing comments about whether the Child may be gay and being shown a picture of a penis is very different from making comments about a child’s sexual orientation or having a conversation about pornography, and the Member did neither of the latter. The Member submitted that this incident involving the picture of the penis happened briefly and unexpectedly, in the closet of the classroom, and that the children did not see it. The incidents involving the comments about the Child’s sexual orientation were also not made in the classroom. The Member submitted that because of this, these incidents do not rise to the level of professional misconduct.

In her written submissions, the Member raised a theory on the motives of SN, HC and CC to discredit their evidence. Out of fairness to the witnesses, the opposing party and the Panel, the Panel did not consider that submission because it was not presented to the witnesses during the course of the hearing, thereby denying the witnesses the opportunity to address the proposition and denying opposing counsel the opportunity to test or otherwise rebut this theory.

The Member submitted that HC’s evidence was not corroboration of anything since she did not see the Member or CM do any of the things SN alleges. The Member adds that despite HC’s daily presence in the PS2 class with the Member and SN, she never saw professional misconduct on the part of the Member.

The Member submitted that because the Child had a habit of pulling down his pants, it is not surprising that the Mother would have corroborating evidence about the behaviour or that the Mother told him not to do that. The Member submitted that the College is assuming that because the Child’s mother told the Child not to pull down his pants and because SN heard the Child say on July 13, 2016 “my Mommy told me not to,” then the Child must have been told by the Member to pull down his pants on that day. The Member submitted that this is not evidence of who, if anyone, told the Child on July 13, 2016, to pull down his pants. Additionally, the

Member submitted that since the Child did not say anything about the Member telling him to pull down his pants on July 13, 2016, even when being asked that very day about pulling down his pants, the Child never mentioned the incident nor did he mention the Member's name. The Member submitted that this is evidence that either the incident did not take place or the Member was not involved.

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 some of her evidence.

The witness was no longer employed by the Centre at the time of the hearing, and was retired and presumably will not be seeking employment. She was not ever subject to sanction by the College, as she is not an RECE. She seemed to genuinely like the Member and reported that they got along and worked well together. 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 over time was generally consistent, with the exception of her statements regarding the frequency of comments relating to the Child's sexual orientation and the nature of the Member's involvement, which we will discuss below. SN's testimony and her statement to the Centre (Exhibit 11) were consistent in terms of the details of the events. There was a high level of detail, which made sense in terms of the daily routine in the classroom. SN has no apparent reason to make up the allegations against the Member. Despite this, the Panel has some reservations about the reliability of some aspects of this witness's testimony in part because of a concern about plausibility and the timing of her reporting of the July 13, 2016 incident, and in part because of a lack of supporting evidence on some of the allegations.

SN was in the classroom at the time the alleged events are 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 CM was looking at or gesturing towards. However, she indicated that she could see the faces of the Member and CM and that she could hear them clearly. Given the floor plan presented in Exhibit 10 and the admission by the Member 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 found it credible that SN was able to see the Member's face and hear CM tell the Child to lie on, to kiss and to touch another child and to see CM make a head gesture. SN reported that she could see and hear the Member's response to these actions by CM and she has no apparent reason to fabricate this story. Additionally, SN reported this incident to HC spontaneously on the same day it was alleged to have happened, on July 8, 2016, which was confirmed by HC in her testimony. 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.

The Panel was concerned that SN may have reached conclusions about the Member's involvement in the incidents that were overstated. For example, she seemed to paint CM and the Member as friendly co-conspirators in her report on July 13, 2016, but retreated to some degree from that description at two separate times in her testimony, when she characterized the Member's laugh as one of embarrassment and when she indicated that the Member was "not really into it." She also testified that the Member had a habit of saying "just stop it, just stop" when CM and the Member were engaged in some of the behaviour outlined. However she also testified that the Member did not say "stop it, just stop" during the incident where CM was alleged to have told the child to expose himself and kiss, touch and lie on another child on July 8, 2016.

Additionally, SN's signed statement of July 13, 2016 (Exhibit 11) said 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". In her interview with the Centre (Exhibit 24), SN reported that the comments had been made for about a month and that the Member

and CM spelled out the word g-a-y. In her statement (Exhibit 11) this was said to have been occurring in the classroom (implying that it was said in a place where children could hear) but in her testimony, the witness indicated this was taking place out of earshot of the children. These inconsistencies were considered by the Panel and they led the Panel to require corroboration in order to be persuaded of the veracity of this allegation.

The Panel also noted that, although SN confirmed the accuracy of her Report 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 written by someone else. The Panel had some concerns that the statement presented to SN for her signature was drafted in a way that conflated the misconduct on the part of both the Member and CM, 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 was in reference to Friday July 8, 2016 because the statement is dated July 13); the incident alleging CM to have asked the Child to “show Shereen what you have” was said to have happened “one day last week”; and the incident where SN told the Member that what CM 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 incident of CM encouraging the Child to expose himself to SN and to touch and kiss and lie on another child happened on the Friday (July 8, 2016) but it could not be determined when the showing of the penis on the cell phone happened. This confusion around the timeline eroded the Panel’s confidence in aspects of this witness’s evidence.

While the Panel found this witness to be generally credible and forthcoming regarding the events alleged to have occurred between CM and the Child on July 8, 2016 and the Member’s response, the Panel had some concerns about the reliability of her report of the incident on the morning of July 13, 2016. SN testified that on July 13, 2016 about 10 minutes after CM returned to her classroom, she heard the Member tell the Child to “show Ms. Shereen what you have.” 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 the Member told the Child to “show Ms. Shereen what you have” and that was when the Child said his mother told him he was not supposed to show his penis to anyone. However, the Panel could not logically reconcile SN’s failure to tell HC about that incident on July 13, 2016 when reporting to HC that CM had asked for the Child to be

moved to her room for ratio. If the Member did what was alleged at the time alleged, the Panel believes that SN would have told HC about it. She did not. SN only reported to HC that CM had asked for the Child to be moved to CM's class that morning for ratio, and this is what triggered HC to report the incident that happened on July 8, 2016 (according to HC's testimony). But SN did not report to HC that the Member had told the Child to expose himself to her that morning of July 13, 2016. It seems that it was only after being interviewed by KG, CC, MF and MM that the incident alleged to have occurred between the Member and the Child on July 13 was reported. The Panel found it more than likely that if the Member had asked the Child to "show Ms. Shereen what you have" on July 13, then the witness would have also reported this incident to HC just a short time after it was alleged to have happened. The implausibility of this sequence of events led the Panel to apply extra scrutiny to the reliability of this portion of the witness's testimony.

Credibility of HC

The witness 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 right away what SN told her about events of July 8, 2016. When asked why she only reported it after CM asked for the Child to be moved to her class on July 13, 2016, HC testified that she had been in the class but when SN mentioned that CM 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 CM 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 communication 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 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 CM and also exhibited some questionable reasoning. For example, MF reported to CC that CM called her after her initial interview with additional information: that the Member told CM *that while CM was out of the room* the Child had exposed himself when the Member asked him where his penis was. CC's response to MF's email was "She's had time to come up with some answers", followed by "[i]f she was out of the room how does she know what [the Member] said?" This indicated to the Panel that CC was somewhat contemptuous of CM and willing to overlook a key element of what she had been told (i.e. that the Member had *told* this to CM) to reach an erroneous conclusion namely, suggesting that CM had to be in the room to have been told about what happened in the room. That does

not mean the Panel rejected CCs testimony but it did affect the weight and reliability the Panel gave to CC's conclusions.

Credibility of MF

MF was the human resources lead for the company which operated the Centre, and so she had an interest in ensuring that the investigation process was seen to be fair and that the terminations of these employees were justified. As the HR person, however, she was also neutral about the individuals involved, having had 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. MF 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 between what SN reported and what the Member told her, which allowed her to make a connection, although she could not remember without the interview notes what specifically the Member had said that was similar to what SN reported. When presented with the notes from her interview with the Member (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 that the Member was leading the behaviour, but rather that CM asked the Child to do what was alleged and that the Member 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 the 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.

MF testified that the Member was more forthcoming and concerned during her interview than CM was, and the Panel finds this to be credible and reliable based on other evidence that is consistent with that assessment, such as comments by SN and HC about the Member and CM.

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 were made 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 CM as having told him to expose himself, even though the Mother did not know at the time that CM was alleged to have been involved in the incident that had been reported to her by Centre staff. She testified that the Child did not mention the Member. The Panel found the Mother's testimony to be both credible and reliable.

Credibility of the Member

The Member was alleged to have participated in the events in question and it is undisputed that she was regularly in the classroom with SN and CM during the morning routine. Accordingly, the Member had the opportunity to observe all of the events to which she testified.

As she is facing allegations of professional misconduct, the Member 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 veracity and reliability of her testimony.

The Panel considered that the Member'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 on July 13, 2016, she said she heard CM say the Child may be gay or g-a-y (Exhibit 24), but then in her interview with the College's investigators she denied ever having heard CM speculating about whether the Child was gay or g-a-y (Exhibit 28). In her oral testimony, the Member stated that CM had made that statement but never said it in the classroom. In the Panel's view, these statements were inconsistent, and the Member's qualifications and explanations for the differences in these statements relied too heavily on an appeal to semantics: when questioned as to whether CM said the Child was gay, she denied this but said CM said the Child "may be" gay or "g-a-y. Further, under cross-examination, the Member 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 [CM] talk about this in the classroom." The Member's response had been that she had never been asked during her interview with MF and MM on July 13, 2016 if CM's comment that the Child may be gay or G-A-Y had happened *in* the classroom [emphasis added]. The Member 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 she made this clarification was when she was cross-examined during

the hearing. The Panel found these comments to be less than candid, even if not entirely inaccurate. The Member'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 her interest in the outcome of the hearing. It also led the Panel to question the reliability of the Member's testimony in other areas where her testimony was not supported by other evidence.

The Member's evidence that she was not present when CM encouraged the Child to expose himself or to touch, kiss and lie on another child on July 8, 2016 was inconsistent with other evidence in the hearing. First, SN's evidence was that the Member was present and laughing during this incident. Additionally, CM admitted in her written statements during the College's investigation (Exhibits 25 and 26) that she asked the Child where his penis was. This was consistent with SN's report that CM asked the Child to expose himself on July 8, 2016.

The Panel also found that the Member'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 CM during the course of the alleged events on July 8, 2016. The Member confirmed that the floor plan (Exhibit 10) which was presented to SN, HC and the Member during their testimony, was an accurate representation of the layout of the Centre at the time of her 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, the Member 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 CM were said to be sitting), would be visible. The Member 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 CM and the Member 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 the Member'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.

The Panel accepted that the Member was being truthful when she said that she did not tell the Child "to show Ms. Shereen what you have", because this statement is consistent with other evidence. The fact that SN did not report to HC that the Member told the Child to do this on July 13, 2016 supports that this event did not happen as suggested. The fact that the Mother never indicated that the Child mentioned this incident, even when asked about exposing himself that very evening, also supports the Member's statement. The fact that the Child never named the Member in the context of exposing himself supports the Member's statement that this did not happen that day as testified by SN.

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 found that on a balance of probabilities the Member did not make comments on a regular basis inside the classroom to the effect that the Child was gay or that she spelled out the word "g-a-y" with reference to the Child.

The evidence was not clear or convincing as to how many times it was said and the Panel could not determine from the evidence whether the Member was merely present when the comments were uttered by CM in a conversation with her or if both CM and the Member were saying that the Child was gay. The Member acknowledged that she was party to a conversation where the Child's sexual orientation was discussed by CM. It is clear to the Panel that the Member was present when these comments were made by her colleague.

The Panel also finds that the statement was made inside the classroom or in an environment where children might hear, due to the fact that the word ‘gay’ was being spelled out. The Panel notes that there would be no other reason to spell out the word ‘gay’ if two staff members were speaking in a location out of earshot of children. Further, this was clearly not a private conversation between the Member and CM, given that it was heard by SN, and this further supports the likelihood that this was a conversation held in the classroom and which children could have overheard.

SN’s statement says both CM and the Member made comments spelling out G-A-Y. SN reported that the Member and CM were spelling out the word, which strongly suggests to the Panel that they were in the proximity of children when they were speaking or at least in environments where children might hear.

However, the Panel finds it more likely that SN heard conversations that the Member was a party to and – in the course of interviews with Centre staff on July 13, 2016 – overstated the nature of the conversations and the Member’s involvement in them (i.e. by suggesting that the Member made the statements herself or actively engaged in such discussions, when it is more likely that the Member was simply present when CM made such statements), as well as how frequently they occurred. This is because SN repeatedly recharacterized the nature of the Member’s involvement in some of the alleged incidents: stating in her evidence in chief that the Member was an active participant (saying “they said it three or four times”, referring to the Member and CM), then saying the Member was “not really into it” when SN was cross-examined. Indeed, even MF and CC recharacterized the Member’s role in the alleged misconduct, initially reporting her as actively participating but then conceding that the Member was not the instigator but that she just failed to challenge the misconduct of CM. SN did not deem the behaviour significant enough to report it prior to being interviewed by the Centre. The Panel does not doubt that the conversation took place but was not persuaded as to the Member’s active role in it.

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

SN testified that on July 8, 2016, she heard CM tell the Child to “go and show Ms. Shereen what you have” and that the Member was present for and laughed at this direction. 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. CM denies having made this statement and the Member denies having heard CM make this statement.

The Panel finds on a balance of probabilities that on July 8, 2016, CM told the Child "to show Ms. Shereen what you have" and the Member was present and laughed. The Panel found that SN's evidence regarding the fact that this occurred and the confirmation of the timing of this incident, which was corroborated by HC's evidence that SN had reported it to her and the Mother's testimony that the Child disclosed that he had pulled down his pants and that he subsequently identified CM as the person who 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 CM 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 CM 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."

The Panel took CM's statements to be corroborative of the fact that CM asked the Child about his penis and that the Child pulled down his pants in response. The Panel did not accept the

explanations in CMs 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 CM 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 the Member had told CM that the Child had exposed himself when the Member asked him where his penis was. MF and CC indicated that they found CM's statements to be unreliable and an effort to reframe the incident so that it discredited SN and the Member and exonerated herself. This assessment was similar to the evidence that MF gave of CM 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, CM 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 creating 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 CM admitted to asking the Child about his penis, led the Panel 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 CM (who did not attend the hearing) which were introduced into evidence, 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 CM and the Member 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. The Member 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 CM and the Member 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 CM direct the child to expose himself and hear and see the Member laugh. The Panel did not accept the Member's evidence that she did not hear the remark by CM if in fact it was made because it is much more likely that if CM engaged in this behaviour, she would have done so with the Member as an audience rather than out of earshot of the Member, who admitted that she laughed at CM's remarks and would therefore likely be perceived by CM 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.

SN also testified that the Member gave the Child a similar direction on July 13, 2016, and that in response to this, the Child approached SN but then did not expose himself, saying something to the effect of his mother told him not to do so. The Panel was not persuaded that the College established that this occurred for the following reasons:

SN and HC testified that it was CM's request to have the Child moved over to her room on July 13, 2016 that triggered SN to re-raise her concerns about CM with HC. This is what subsequently prompted HC to report the incident that had occurred a few days earlier. If the Member really had asked the Child to expose himself that very same morning, in the identical manner that CM did five days earlier, the Panel finds it very likely that SN would have reported this incident to HC. But SN did not report to HC that the Member 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 the Member and the Child on July 13, 2016 was reported. The Panel found it likely that - if the Member had asked the Child to "show Ms. Shereen what you have" on July 13, 2016 - the witness would have also reported that incident to HC. This led the Panel to question whether this Member committed the misconduct on July 13, 2016, as alleged. The Panel questioned why SN did not mention to HC that the Member told the Child to "show Ms. Shereen what you have" that morning. There was

no explanation of why she did not mention it in the evidence. The Panel considered the possibility that SN did not report it because the Child did not proceed to expose himself on July 13 2016, but found that this was not consistent with SN's evidence that she found this direction to the Child troubling and "not at all okay". . The Panel found that, had the Member said exactly the same thing to the Child on July 13, 2016 that SN found troubling when CM said it the previous week, the Panel believes she would have mentioned it to HC, regardless of what the Child's response to it was.

Also, when questioned by the Mother that evening, the Child did not mention the Member.

The Mother testified that she had asked the Child "to remember when you told me you pulled down your pants at school" as a prompt for more information from the Child on the evening of July 13, 2016. The Child was reported to have said, "yes". Then, when asked why he pulled down his pants, he reported that "Ms. Cathy told me to" (referring to CM). The College submitted that the fact that the Child did not mention the Member's name could be explained by the fact that he a) did not expose himself on July 13, 2016 and b) he was not asked about the incident of July 13, 2016 but rather the incident that was alleged to have occurred earlier. The Panel found that the Child would be more likely to have mentioned the incident that occurred that morning if it had happened, especially after having the conversation earlier with the Mother. If the Member had asked the Child that same day to expose himself – and if the Mother asked that same evening about exposing himself, in whatever context – the Panel finds that he would have been prompted to report the July 13, 2016 incident at that time, and finds that the fact that he did not leads the Panel to question whether it occurred as described by SN. The Panel further finds that if the Child had responded exactly as instructed by his Mother, this would have increased the likelihood that he would report the incident and his response to it to his mother. The Child was reported to have well developed verbal skills by his teachers, and could easily have reported that a similar incident had happened that day. But that was not the testimony of the Mother. The Child was merely reported to have said that CM told him to do it.

Much was made of SN's July 13, 2016 statements that, after the Member allegedly asked the Child to "show Ms. Shereen what you have," the Child started toward SN but then said "I'm not supposed to do that." (Exhibit 24) or "[m]y mom said I'm not supposed to show my penis to anyone." (Exhibit 11) This was cited by the College as corroborating evidence that the Child must have been asked to expose himself because it aligns with the Mother's earlier

conversation in which she told him to tell people his mother told him not show his penis. In their interviews with the Centre on July 13, 2016, SN, CM and the Member all reported that the Child had a tendency to put his hands down his pants, or pull on his penis, or pull down his pants when he had to pee. Each of these witnesses reported that the Child was told not to do that. The Panel finds that it is as likely as not that on July 13, 2016, when the Child is reported to have said “I’m not supposed to do that,” it could have been a reaction to any number of scenarios. The Panel did not accept SN’s evidence that this occurred because the Panel did not have enough confidence in the assertions of SN’s statement without the support of other evidence, to make a finding that this happened. SN’s testimony was generally imprecise on the timing of events, and the Panel finds it just as likely that the Child might have said “I’m not supposed to do that” at any time between the Mother telling him not to on July 8, 2016 and the investigation on July 13, 2016, and that this could have been in reaction to any number of cues, including his own tendency to pull at or touch his penis when he had to pee.

The Panel notes that it relied on SN’s testimony for certain aspects of its conclusions, but rejected SN’s testimony regarding the alleged statement of the Member to the Child “to show Ms. Shereen what you have” on July 13, 2016. While the Panel rejected some aspects of SN’s evidence, the Panel did not find her to be untruthful. As stated above, we considered SN’s testimony to be generally credible and fair. However, the Panel found SN’s evidence as to what happened on July 13, 2016 to be unreliable because it was implausible that SN observed this incident on the morning of July 13, 2016 and did not convey it to HC that same morning. This is an important distinction from the events alleged on July 8, 2016, which was corroborated by the Mother’s testimony. In the absence of corroboration of the events alleged to have occurred on July 13, 2016, the Panel was not convinced on a balance of probabilities that the event occurred as reported.

The Panel also questioned the conclusion of CC and MF regarding this allegation, particularly in light of the email between CC and MF (Exhibit 18) relaying CM’s additional information that suggested that the Member had asked the Child about his penis. MF’s email reported that her conversation with CM occurred on the evening of July 13, 2016 and that CM reported that she had been told by the Member about the Child exposing himself “last week”. The Panel concluded that this narrative may have influenced the conversation CC had with the Mother on the morning of July 14, 2016. The timeline, based on CC’s evidence, was as follows: First CC received an email from MF advising that, according to CM, the Member told CM that she (the

Member) asked the Child where his penis was and he exposed himself, and that they were worried he would think it was a game. CC then had the conversation with the Mother about the Child exposing himself and how the Mother told the Child he was not supposed to do that. CC may have been influenced by comments about the Member in CM's conversation with MF that was relayed to her in MF's email (Exhibit 18), and concluded that the Member really did ask the Child, when in all likelihood she did not do this as alleged.

The fact that the human resources remedy for both RECEs in this case was termination, led the Panel to believe that the use of the identical remedy served to conflate the Member's involvement in behaviour that was clearly conducted by CM but not by the Member. By contrast, the Panel was aware of the need to consider the distinctions in the roles played by CM and the Member.

Based on all of the above, the Panel therefore did not conclude, on a balance of probabilities, that the Member told the Child to expose himself to SN on July 13, 2016.

Whether the Member encouraged and/or laughed at another staff's, CM's, inappropriate statements, acts, and/or behaviour towards the Child, which included

- i) CM making regular comments inside the classroom that the Child was "gay" or spelling out the word, "g-a-y-", with reference to the Child;
- ii) CM instructing and/or encouraging the Child to expose his penis in the presence of Centre staff and/or other children;
- iii) CM instructing and/or encouraging the Child to touch his genital area and/or to touch the genital area of other children;
- iv) CM instructing and/or encouraging the Child to kiss other children on the lips;
- v) CM instructing and/or encouraging the Child to lay on top of other children; and/or
- vi) CM asking the Child whether his father would cheat on his mother and/or whether his father would come home with CM.

The Panel finds it more likely than not that CM engaged in the conduct alleged in subparagraphs i) through v) and that the Member laughed at and/or encouraged this conduct. The Panel did not find that the conduct alleged in subparagraph vi) occurred.

Regarding allegations i) to v), the Panel's findings that it is more likely than not that CM engaged in the behaviour alleged, and that the Member laughed or chuckled at such behaviour are based on the evidence of SN, statements by CM admitted into evidence, and admissions by the Member. In particular, the Member admitted that she was a party to at least one conversation with CM where the Child's sexual orientation was discussed, and SN testified that the word gay was being spelled out, indicating to the Panel that the conversation was within earshot of the children. Additionally, CM's two statements to the College investigators confirmed that she had asked the Child where his penis was and that he then exposed himself, and the Member admitted to having laughed, albeit in discomfort or embarrassment. The Panel did not find that the Member sought to encourage CM's behaviour but found that the fact of her laughing, whether uncomfortably or not, had the effect of encouraging CM's behaviour. The evidence of SN was clear that the Member was present and laughed or chuckled, albeit possibly out of embarrassment, when CM encouraged the Child to engage in inappropriate behaviour of a sexual nature, namely exposing his penis, kissing, touching and lying on other children. That the Member would have been present is more likely than not considering the daily morning routine, as described by the Member, SN and HC in their testimony of what normally occurred during the morning routine. The Panel accepted as fact the testimony of SN that CM engaged in the behavior listed in sections i) to v) and that the Member was present and laughed or chuckled as described by SN in her testimony, which was supported by the fact that she reported this to HC on the morning of July 8, 2016 and for all of the other reasons outlined in the section above.

Regarding allegation vi), the Panel is not convinced that the Member was present when CM is alleged to have asked the Child whether his father would cheat on his mother and/or whether his father would come home with CM. SN said this happened in the playground and SN did not say the Member was there at the time. The Member testified that she had never heard the comment but that she had only ever heard CM say the father was handsome. The issue here is whether the Member laughed at and/or encouraged an inappropriate comment said to the Child about his father's fidelity to his mother. The Panel finds that the evidence does not support that

the Member encouraged or laughed at such a comment because the Panel does not believe on a balance of probabilities that the Member was present when and if it was said.

Between approximately June 2016 and July 2016, the Member used her cellphone to "Skype" while she was responsible for supervising children under her care

The Panel finds that SN's evidence regarding the timing and location of SN seeing the Member on her phone is not clear or convincing. The Member testified that she used her phone when she was not supervising children while on breaks, during lunch and before and after work. The Member said she was in the closet on Skype before her shift started. SN also gave evidence that CM had shown the picture of the penis on her cellphone to her colleagues before her shift started and while she was in the closet. The Panel is inclined to accept that, given the unreliability of timing in SN's testimony and the fact that SN started her shift at 7:00 a.m., she is likely to have seen the Member using her cellphone to Skype but it is unclear to the Panel that this occurred at a time when she was responsible for supervising children. The Member was never shown to have been disciplined by the Centre for cell phone use, unlike her colleague, CM, and the Panel takes this to indicate that the Centre and its staff were mindful of appropriate cell phone use. The Panel found that the evidence does not support that the Member was using Skype when she was responsible for supervising children.

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 failed to supervise adequately a person who was under her professional supervision, contrary to Ontario Regulation 223/08, subsection 2(2), the Panel finds the Member guilty.

On the allegation 5(b) 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 not guilty.

On the allegation 5(c) 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 not guilty.

On the allegation 5(d) 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 not guilty.

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

- 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; and
- xi) 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 failed to maintain the standards of the profession, contrary to Ontario Regulation 223/08, subsection 2(8) the Panel found the Member not guilty in the following two ways alleged by the College:

- xii) The Member did not physically, verbally, psychologically or emotionally abuse a child under her professional supervision, contrary to Standard V.A.1 of the Standards of Practice; and
- xiii) The Member did not use 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.

With respect to allegation 5(f), 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.

With respect to allegation 5(g), 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 Member is guilty of allegation 5(a) in the Notice of Hearing, failing to supervise adequately a person who was under her professional supervision. The Member is also guilty of professional misconduct alleged in allegation 5(e) of the Notice of Hearing, in that she failed to uphold the standards of the profession, and specifically standards I.D., I.E., I.F, III.A.1, III.C.1, IV.A.2, IV.B.4, IV.C.1, IV.C.2, IV.E.2 and V.B. These standards are meant to make the environment in which children are supervised, safe, nurturing, caring, developmentally appropriate and trusted by children and their families. A failure to maintain the environment to the appropriate standard is therefore a failure to supervise adequately. The conduct which resulted in the Member engaging in the acts of professional misconduct and breaching the standards of the profession outlined above is as follows:

The Panel found that the Member was present for and heard CM tell the child to “go and show Ms. Shereen what you’ve got” on July 8, 2016, and either laughed or otherwise encouraged this conduct. The Member also laughed at or otherwise encouraged CM’s conduct towards the Child, including telling the Child to expose himself, and to touch another child’s genital area, and to kiss and lie on another child. The Member heard these comments and laughed. She failed to appreciate the seriousness of her colleague’s inappropriate behaviour, and failed to challenge behaviour that was entirely inappropriate and unprofessional. The Panel finds that in failing to challenge her colleague’s behaviour, she allowed the environment to fall below the Standards in the following ways:

- i) The Member failed to provide a nurturing learning environment where children thrived, contrary to Standard I.D of the Standards of Practice. By doing nothing to condemn or discourage her colleague’s inappropriate behavior, but rather by laughing at it, she allowed CM to contaminate the environment with sexual overtones which is not conducive to a nurturing learning environment;
- 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, because the Member allowed the Child to be used as a

- tool for humour and laughed when the Child was used as a prop for the amusement of his caregivers. In allowing this, the Member showed a lack of care and a disturbing lack of professionalism.
- 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, because in laughing at the Child being told to expose himself in the classroom, the Member tacitly condoned this behaviour. Such conduct on the part of the Member 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. In the Panel's view, that had the effect of poisoning the environment. Standard I.F requires an RECE to ensure that the needs and best interests of children remain paramount, and making the Child an object of humour or amusement for his caregivers is a failure to do that.
 - iv) The Member failed to maintain a safe and healthy learning environment, contrary to Standard III.A.1 of the Standards of Practice because, by failing to discourage her colleague's misconduct (i.e. by failing to discourage discussions about the Child's sexual orientation (e.g. that the Child maybe gay), and by failing to condemn and discourage requests made by her colleague for the Child to expose himself and kiss, touch and lie on another child (in response to the Child's so called "tendencies"), the Member was a party to (or at least tacitly condoned) 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 environment. In failing to challenge CM's comments, the Member demonstrated a lack of understanding of this, which was a failure to maintain a safe and healthy learning environment.
 - 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, by allowing the environment to be contaminated with developmentally inappropriate sexual innuendo which the Child would be developmentally unequipped to understand. This had the potential of having a negative impact on the Child's understanding and development.

Additionally, allowing the Child to be used as the object for CM and the Member's amusement demonstrated a significant lack of care and respect towards the Child.

- 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. This was demonstrated by the Member's failure to report her colleague's inappropriate behavior to the Centre and by her allowing her colleague to continue to engage in inappropriate behavior, which was a failure to maintain the environment to an appropriate standard. Had the Member challenged CM's initial inappropriate comments about the Child, the Panel believes that further misconduct might have been avoided.

- 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, in choosing to go along with her colleague's misconduct and laughing at it, rather than taking steps to discourage or stop it. The Member failed to make it clear to the Child that this was not a game and was not appropriate. That was a poor decision and one that did not solve a problem or provide the Child with behaviour guidance that was in the best interests of the Child or the other children in her care.

- 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, by not speaking up and making it clear to her colleague CM that what she was doing was not in the interests of the Child's needs or his healthy development.

- 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, by dismissing SN's concerns when SN told her that what CM did (i.e. telling a child to touch another child's genital area) was "not at all alright" but rather made excuses for the behavior (i.e. that CM didn't mean anything by it and had only told the Child to touch the other Child over his pants). Rather than telling CM that it was inappropriate to show a

picture of a penis on her phone, she laughed or chuckled, which did not support the fostering of respectful relationships within the workplace. The Panel finds it inappropriate to show graphic photos in the workplace because doing so can erode the respect and trust between colleagues.

- 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, by not doing everything in her professional capacity to uphold the Standards. The expectation of RECEs to uphold the Standards is higher than for non-RECEs when it comes to supervising children. Failing to work collaboratively to provide a safe, secure, healthy and inviting environment and failing to build trust, honesty and respect in the workplace and failing to correct her colleague to maintain a safe learning environment leaves the environment below what is reasonably expected. These failings call into question the ability of an RECE to maintain a professional environment and has the consequence of reflecting negatively on the profession as a whole.
- xi) 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, in that she allowed the Child to feel he was “a part of the joke”, by laughing at her colleague’s direction to the Child to “go show Ms. Shereen what you have” and by laughing when the Child exposed himself to SN. This was a violation of a clear and appropriate boundary. It was a boundary that was certainly clear to the Mother when she told the Child that he should not show his penis to anyone after the Child told her about the incident on July 8, 2016. It was a boundary that was also clear to SN, who told the Child that it was not appropriate behavior to expose himself. Neither the Mother nor SN are RECEs but they recognized that instructing a child to expose himself was a clear violation of appropriate boundaries. The RECEs in the room should also have recognized this. The Member’s failure to do so was a breach of this Standard.

In failing to uphold these standards by laughing when her colleague told the Child to expose himself to another staff member, by laughing when her colleague told the Child to touch, kiss and lie on another child, and by doing nothing to make it clear to both the Child and her colleague that this behaviour was inappropriate and unacceptable, the Member acted in a manner that, having regard to the circumstances, would reasonably be regarded by members as disgraceful, dishonourable or unprofessional. The Member also conducted herself in a manner that is unbecoming a member.

The College alleged that the Member engaged in verbal, psychological and/or emotional, and sexual abuse of a child by: making or encouraging CM to make statements to the effect that the Child was gay or g-a-y; telling the Child to expose himself to SN; and by telling the Child to kiss or lie on top of other children. The Panel found that the College did not prove, on a balance of probabilities, that the Member engaged in this conduct. While the Panel accepted that the Member laughed at and failed to address CM's statements in this regard, it was not persuaded that the act of laughing supported the allegations in paragraphs 5(b), 5(c) 5(d), 5(e)(xi) and 5(e)(xii) of the Notice of Hearing. The Panel therefore finds that the Member is not guilty of verbally, psychologically, emotionally, and sexually abusing a child. As outlined above the Panel is not convinced that the Member's role in the conversation about the Child's sexuality rose to the level of misconduct on those counts. The Panel was also not convinced that the Member told the Child to "show Ms. Shereen what you have" or words to that effect in the way it was reported.

As a consequence, the Panel did not find that the Member failed to uphold the Standards of Practise as alleged in paragraphs 5(e)(xi) and 5(e)(xii) of the Notice of Hearing on a balance of probabilities. The Panel also found that the College did not establish to the requisite standard that the Member verbally, psychologically, emotionally or sexually abused a child under her professional supervision or that she used her position of authority to coerce, improperly influence, harass, abuse or exploit a child under her professional supervision. The Panel found that CM verbally, psychologically, emotionally and sexually abused the Child by making inappropriate comments of a sexual nature about and toward the Child. However, the Panel found that the Member's laughing at her colleague's professional misconduct in this regard did not, in and of itself, rise to a breach of those two standards by the Member, but that it did breach eleven other standards as detailed in the reasons above.

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 Sophia Shanae Phillips 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)	
)	
)	
SOPHIA SHANAE PHILLIPS)	Carey O. Blake,
REGISTRATION # 57246)	Carey O. Blake Paralegal Services
)	For the Member
)	
)	
)	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 Cathy Rae-Ann McLean*, on consent of the Member and Cathy Rae-Ann McLean (“CM”) (who was not present at the hearing), 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, Sophia Shanae Phillips (the “Member”) was guilty of acts of professional misconduct, in that she:

- a. failed to supervise adequately a person who was under her professional supervision;
 - b. failed to maintain the standards of the profession;
 - c. 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. 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 Cathy Rae-Ann McLean. The Panel heard submissions from the College of Early Childhood Educators of Ontario (the “College”) and from the Member’s representative, and received correspondence outlining Ms. McLean’s position on penalty and costs.

EVIDENCE AND SUBMISSIONS OF THE PARTIES ON PENALTY AND COSTS

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

EXHIBIT #	Description
EXHIBIT 1	Email from Heather Cook to Ms. McLean and Mr. Blake sent on September 10, 2021 at 11:54 am
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 am
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; and
- c. requiring the Member to pay costs to the College fixed in the amount of \$38,175.39, to be paid within five (5) years of the date of the order, to be paid in the amount of \$7,635.08 annually, unless the Director approves, in writing, a different payment schedule.

Under section 33(4) of the Act, the Panel has the authority to order a reprimand and revocation of the Member's certificate of registration.

The College submitted that this is an appropriate case in which to order revocation because of the seriousness of the Member's misconduct, the need to deter similar conduct in the future, and the need to preserve the public's confidence in the College, in accordance with its mandate to protect the public interest.

The College submitted that the Discipline Committee found that the Member encouraged, condoned, failed to intervene to prevent, and failed to report the verbal, psychological, emotional and sexual abuse of a child under her supervision. In doing so, the Member was found to have breached numerous College standards, failed to supervise adequately a child who was under her professional supervision and acted or failed to act in a manner that would reasonably be regarded by members as disgraceful, dishonourable or unprofessional. In short, the Member's misconduct was very serious, undermined public confidence in the profession and placed a Child at risk.

The College noted that the Panel's finding that the Member did not herself sexually abuse the Child does not preclude revocation, or make that penalty inappropriate. Revocation is not restricted only to cases of sexual abuse, or cases where the conduct qualifies as the most egregious imaginable. The criminal principle that the most severe penalty is reserved for the most egregious conduct does not apply in professional discipline proceedings. Rather, the focus in professional discipline proceedings is on protection of the public, which is the overriding

consideration that informs the imposition of penalties for professional misconduct. That consideration supports the penalty of revocation in the present case.

It was the College's position that the Discipline Committee's findings justify the penalty of revocation because the Member did not take responsibility for protecting the Child (or other children in the class) from abuse at the hands of her colleague, Ms. McLean. Although the Member was aware of Ms. McLean's conduct, she not only failed to intervene or report it, she condoned and encouraged Ms. McLean's misconduct, enabling it to continue unchecked. Moreover, the Member did not take any responsibility for her failure to protect the Child. When confronted about her actions and her role in failing to come to the aid of the Child, the Member repeatedly denied that the conduct had occurred, denied that she was aware of it and deflected blame onto others. In short, she abdicated her professional obligations and showed no insight into the seriousness of her misconduct.

In light of the Panel's findings of misconduct, the College submitted that the only order that will sufficiently protect the public is the revocation of the Member's certificate of registration, accompanied by a reprimand.

The College noted that if the Member's certificate of registration is revoked, she will be entitled to apply for reinstatement after 12 months. In practical terms, such a revocation is akin to a 12-month suspension, except that in the case of a suspension, the member is entitled to be automatically reinstated once the suspension is served, whereas a member who has been revoked must apply to the Discipline Committee to be reinstated. In other words, revocation places the onus on the Member to demonstrate to the Discipline Committee that she is suitable to return to practise.

The College further submitted that this is an appropriate case in which to order costs, and that costs should be payable by the Member in the amount \$38,175.39. This amount represents less than half 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 1/4 of the actual legal fees and disbursements incurred by the College. The College's costs position recognized that success was divided, in that while the Member was found guilty of much of the misconduct alleged in the Notice

of Hearing, she was not found guilty of sexual abuse. For this reason, the College sought only 1/4 compensation for the legal costs incurred.

The College submitted that the amount of the costs requested is appropriate, considering the 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. The College submitted that courts have frequently upheld decisions that have ordered a member to pay 2/3 of a regulator's costs and that the rest of the membership should not bear the bulk of the cost involved in holding this Member accountable for her serious misconduct.

Submissions of the Member

The Member submitted

- a. The Member should not be given any penalty;
- b. No costs should be awarded against the Member; and
- c. The College should be directed to pay Ms. Phillips' costs in the amount of \$5,620.00 plus costs of the penalty hearing for their unsuccessfully prosecuting Ms. Phillips.

The Member submitted that she successfully defended herself against the allegations of abuse, including verbally, psychologically/emotionally and sexually abusing a child under her supervision and that the charges she was found liable for were ancillary to these abuse charges. The Member could not in good conscience agree to plead guilty to the abuse allegations but may well have pled guilty to the charges of misconduct for which she was found guilty, had that been an option. That was not an option, and so the Member vigorously contested all of the allegations. The Member submitted that the Panel should consider the relative success and the seriousness of the allegations for which the Member was found not guilty and award the Member costs for defending herself against those allegations of abuse.

The Member submitted that despite her vigorous and successful defence, she modelled economy in obtaining legal representation. She hired a licensed paralegal to defend her, at a substantial cost savings, compared to hiring a lawyer. The Member contrasted her approach with the far more significant cost of the College's prosecution. The Member submitted that the College called

five witnesses where the Member called only herself. The Member submitted that not all of the witnesses who called were needed, they did not all provide a material contribution, and some of the witnesses were not prepared adequately, with at least one having technical difficulties that required her to return the following day. The Member argued that the College used too many lawyers, having two in attendance at the hearing, and others who worked on the file, whereas the Member had a single representative.

The Member submitted that the costs requested by the College were unreasonable and cited the dissenting decision in the Divisional Court's decision in *Reid v. College of Chiropractors of Ontario*¹ to support these submissions.

The Member submitted that, given the grievous nature of the allegations against her, and in particular that she sexually abused a child under her supervision, the Member had no alternative but to vigorously contest and defend herself. The Member might have accepted the offer of a plea agreement if the allegations had been only those for which she was ultimately found liable.

Decision on Penalty and Costs

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

1. The Member is to receive a reprimand by this Panel of the Discipline Committee.
2. The Registrar is directed to suspend the Member's certificate of registration for a period of 4 months. The suspension will take effect from the date the Member reinstates her registration and will run without interruption as long as the College has not otherwise prohibited the Member from practising or suspended the Member for any other reason.
3. The Registrar is directed to impose the following terms, conditions and limitations on the Member's certificate of registration:

¹ 2016 ONSC 1041.

Coursework

- a. Prior to the Member commencing or resuming employment as a Registered Early Childhood Educator (“RECE”) or engaging in the practice of early childhood education, as defined in section 2 of the Act, the Member must successfully complete, with a minimum passing grade of 70% (or to the satisfaction of the Director of Professional Regulation (the “Director”) if a grade is not assigned) and at her own expense, a course or courses that cover the topics of professionalism, professional judgment, the duty to report and preventing sexual abuse (subject to the Director’s pre-approval).

Mentorship

- b. Prior to the Member commencing or resuming employment as a RECE or engaging in the practice of early childhood education, as defined in section 2 of the Act, the Member, at her own expense, will arrange a mentoring relationship with a Mentor, who:
 - i. is an RECE in good standing with the College,
 - ii. is employed in a supervisory position,
 - iii. has never been found guilty of professional misconduct and/or incompetence by the Discipline Committee of the College,
 - iv. is not currently found to be incapacitated by the Fitness to Practise Committee of the College,
 - v. is not currently the subject of allegations referred to the Discipline Committee or the Fitness to Practise Committee of the College, and
 - vi. is pre-approved by the Director. In order to pre-approve the Mentor, the Member will provide the Director with all requested information, including (but not limited to) the name, registration number, telephone number, address and résumé of the Mentor.

For clarity, once the suspension in section 2 above ends, the Member can commence or resume employment as an RECE after arranging a mentorship relationship with a pre-approved Mentor.

- c. Within 14 days of commencing or resuming employment as an RECE, the Member will ensure that the Director is notified of the name, address and telephone number of all employers.
- d. The Member will provide the Mentor with a copy of the following documents within 14 days of being notified that the Mentor has been approved by the Director, or within 14 days after the release of such documents, whichever is earliest:
 - i. the Panel's Order,
 - ii. the Panel's written reprimand of the Member
 - iii. the Panel's Decision and Reasons on liability, and
 - iv. the Panel's Decision and Reasons on penalty (contained in this document).
- e. The Member will meet with the Mentor at least every 2 weeks after the Mentor has been approved by the Director to discuss the following subjects:
 - i. review of the College's Code of Ethics and Standards of Practice,
 - ii. the acts or omissions by the Member, which resulted in the Discipline Committee finding the Member guilty of professional misconduct,
 - iii. the potential consequences of the misconduct to the parents/children affected, and to the Member's colleagues, profession and self,
 - iv. strategies for preventing the misconduct from recurring, and
 - v. the Member's daily practice and any issues that arise, to ensure that she is meeting the College's Standards of Practice (without disclosing personal or identifying information about any of the children under the Member's care, or clients of her employer(s)).

- f. After a minimum of 5 sessions, the Member can seek the Director's permission to stop participating in the mentorship sessions by providing the Director with a report by the Mentor that sets out the following:
 - i. the dates the Member attended the sessions with the Mentor,
 - ii. that the Mentor received a copy of the documents referred to in paragraph 3(d),
 - iii. that the Mentor reviewed the documents set out in paragraph 3(d) and discussed the subjects set out in paragraph 3(e) with the Member, and
 - iv. the Mentor's assessment of the Member's insight into her behaviour.

Other

- g. The College may require proof of compliance with any of the terms in this Order at any time.
- h. All documents delivered by the Member to the College or the Mentor will be delivered by email, registered mail or courier, and the Member will retain proof of delivery.

Costs

4. The Member is required to pay costs to the College in the amount fixed at \$6,600, to be paid within 3 years of the date of this Order.

DECISION AND REASONS ON PENALTY AND COSTS

The Panel carefully considered the submissions of the parties, including 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;
 - 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;
- 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 order imposed is fair, properly protects of the public, and weighs the circumstances in this particular case with the principles above. The Panel's reasons for each element of the penalty and the costs is outlined below.

Reprimand

A reprimand is warranted in this case. In its decision of June 22, 2021, the Panel expressed its strong condemnation of the Member's lack of regard for the Child's welfare and her lack of action in protecting the Child against the potential negative effects of her colleague's misconduct. The reprimand will remind the Member of the gravity of her misconduct and serve as a deterrent to future misconduct on the part of the Member and on other members of this profession.

Suspension

The Member engaged in serious misconduct that is deserving of a significant sanction. However, the Panel was of the view that the Member is not beyond rehabilitation and that a suspension, rather than revocation, was warranted in this case. When deciding on the Member's penalty, the Panel considered the Member's lack of experience, her status as a new immigrant and the influence of her more experienced and established colleague on the Member's conduct in this

case. Specifically, the Panel recognized that the Member may unfortunately have failed to fulfil her own professional obligations in relation to Ms. McLean's conduct as a result of having taken her lead from Ms. McLean. Discipline Panels of this regulator have routinely ordered suspensions of between four and seven months, and in some rare cases revocation, in cases of inadequate supervision and substandard professional judgment. The College presented several cases involving inadequate supervision where suspensions tended to the higher end of six and seven months² and where revocation was ordered³. The Panel did not find the circumstances in those cases to be similar to this case. In the case where revocation was ordered, the Member was considered ungovernable due to her lack of engagement with the discipline process. That was not the case in this matter and should not be applied in this case. The Member in this case has been engaged throughout this process and has cooperated throughout the hearing process. The Panel considered that the Member has not been practicing the profession for a significant time while this matter proceeded through the discipline process and reduced the suspension as a result. In light of the aggravating and mitigating factors and the nature of the conduct in this case (which differed from that of all of the cases presented to the Panel), the Panel considered a four month suspension to be appropriate.

Coursework

The Panel has ordered that the Member undergo additional professional coursework at her own cost prior to resuming employment as an RECE. This will protect the public by ensuring that the Member fully understands her professional and ethical obligations as an RECE and the standards of the profession. It will also deter the Member from repeating her mistakes and rehabilitate the Member's understanding of her professional obligations and her practice as an RECE.

Mentorship

The Member has been ordered to enter into a mentoring relationship with an RECE in good standing. This will protect the public by ensuring that the Member has the support of a good role model when she returns to practice. It will aid in her rehabilitation and will protect the public by

² Including *College of Early Childhood Educators vs Rebecca Ann Wardaugh*, 2019 ONCECE 19 and *College of Early Childhood Educators vs Jenny Ng-Nakatani*, 2019 ONCECE 17.

³ Including *College of Early Childhood Educators v. Carrie ChunJuan Tan*,

ensuring that she has internalized the teachings of her coursework. The mentorship is a condition of the Member's registration and will be noted on the Public Register.

Costs

The Member has been ordered to pay costs in the amount of \$6,600. The Panel reached this amount by considering two factors: the tariff amount for the costs of the hearing; and the relative success of the parties. With respect to the costs of the hearing, the Discipline Committee Rules provide a tariff amount of \$10,000 per day. Four days were required to hear this matter, and the College proposed and the Panel agreed that this tariff amount should be shared equally between the Member and Ms. McLean, based on their consent to a joint hearing. With respect to the relative success of the parties, based on the fact that the Member was found guilty of some of the allegations made against her by the College, but not the sexual abuse allegation, the Panel considered the Member to have been approximately 33% successful in her defence. The approximate assessment of 33% is based on both the percentage of allegations of which the Member was found guilty, with a greater weight attached to the sexual abuse allegation, since this allegation is distinguished in both legislation and general understanding as being particularly serious. The Panel felt that while this was an appropriate case to order that the Member pay costs to the College, it did not agree with the submissions of the College as to the amount. The Panel noted that the resources available to members of the profession through their work as RECEs are modest. The Panel also, to a significant extent, accepted the assertions of the Member that she modelled economy in offering her own defence against a very serious allegation.

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. 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 Member was found to have committed professional misconduct. The membership as a whole should not bear the full cost of bringing this before the discipline Panel. 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 was concerned about the lack of transparency whereby a member would

be unable to appreciate, or for the Member to see, how legal fees might accumulate during the process outside of hearing days.

The Panel also considered the Member's request that the College pay for the Member's costs of defending herself. The Panel considered that it had the authority to order that the College pay costs to the Member only if it believed that the commencement of the proceeding was unwarranted⁴, which was not the case. There were serious flaws in the Member's conduct which warranted a hearing and sanction.

The costs that the Panel has ordered strikes a balance between the Member's misconduct and her relative success in defending herself against the bulk of the allegations and the manner in which she conducted her defense.

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

February 15, 2022

Date

⁴ Subsection 33(5)9 of the Act.