OAH 21-1800-37862

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF HUMAN SERVICES

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| In the Matter of the Appeal by Primrose School of Arden Hills and Shoreview of the Order of License Revocation | **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** |

This matter came before Administrative Law Judge Kimberly Middendorf for an evidentiary hearing on February 2 and 3, 2022. The record closed on February 3, 2022, at the conclusion of the hearing.

R.J. Detrick, Assistant Attorney General, appeared on behalf of the Minnesota Department of Human Services (Department). Eric Anderson, Anderson Defense, appeared on behalf of Appellant Primrose School of Arden Hills and Shoreview (Primrose).

## STATEMENT OF THE ISSUES

1. Did Primrose fail to comply with background study requirements, in violation of Minn. Stat. §§ 245C.02, subd. 6a(a)(8) and (b), and 245C.03, subd. 1(a)(8) (2020)?

2. Did Primrose knowingly withhold or provide false or misleading information to the Department, in violation of Minn. Stat. § 245A.07, subd. 3(a)(3) (2020)?

3. Should the Department's Order of Revocation be affirmed?

## SUMMARY OF RECOMMENDATION

The Administrative Law Judge concludes that Primrose did not fail to comply with background study requirements when it accommodated a parent's request for her child to receive behavioral therapy from her therapist in the facility. Further, the Department failed to establish reasonable cause to believe Primrose knowingly provide false or misleading information to the Department. Even if the Department had established the alleged violations, the sanction of license revocation is far too severe under the facts of this matter. The Administrative Law Judge respectfully recommends that the Department's Order of Revocation be **RESCINDED**.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

## FINDINGS OF FACT

1. Appellant is a licensed childcare facility that has been licensed since 2019.[1] Appellant is owned by Saleem Karmaliani (Karmaliani), the owner of five Primrose school sites in Minnesota.[2] Karmaliani also serves as the authorized agent for Primrose.[3] Karmaliani's schools serve about 800 children and employ between 180 and 200 employees.[4] Up to 200 children attend the Arden Hills and Shoreview facility.[5] Before Primrose, Karmaliani worked for the Department for approximately 15 years.[6]

2. At the time of the events at issue, Child A was a 6-year-old girl with special needs. Lin Wang, Child A's mother, enrolled her as recommended by the Lovass Institute for Early Intervention (Lovass Institute) and documented in Child A's Individualized Child Care Program Plan (ICCPP).[7] The Lovass Institute recommended Primrose because it accommodates mental health treatment, unlike many childcare facilities.[8] Child A began attending Primrose on June 22, 2021.[9]

3. On June 23, 2021, Child A's mother emailed Primrose's Director, Tarah Hauger (Hauger), requesting Primrose accommodate Child A and permit her to receive behavioral therapy during naptime.[10] Specifically, Child A's mother stated: "[Child A] never takes nap, I was wondering if we can use one of your emptying [sic] classroom[s] and have her work with therapist during rest time."[11] Hauger agreed and maintained a written record of the request.[12]

4. The Lovass Institute and its therapeutic services were not affiliated with Primrose, although the services were provided onsite at the Primrose school.[13] The Lovass Institute therapy services provided to Child A were funded separately and paid directly to the Lovass Institute by Child A's parents.[14]

5. On June 29, 2021, Sara Delaney (Delaney), a senior licensor for the Department, conducted a review of Primrose's program and facilities through the "early and often" program.[15] The early and often program is a set of quarterly reviews during a licensed childcare center's first year to provide information and ensure compliance with Department regulations.[16] Because of changes in site visit procedures due to the COVID-

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[1] Testimony (Test.) of Sara Delaney.
[2] Test. of Saleem Karmaliani.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] Test. of S. Karmaliani; Test. of Lin Wang; *see also* test of Eric Larsson.
[8] Test. of E. Larsson; Test. of S. Karmaliani.
[9] Test. of S. Karmaliani.
[10] Test. of S. Karmaliani; Test. of L. Wang.
[11] Ex. 105.
[12] Ex. 105; Test. of S. Karmaliani; *see also* Test. of Elizabeth Aadland.
[13] Test. of S. Karmaliani; Test. of E. Larsson.
[14] Ex. 4 at DHS 16.
[15] Test. of S. Delaney.
[16] *Id.*

19 pandemic, Primrose was still reviewed under the early and often program despite being licensed for nearly two years.[17]

6. During the visit, Delaney was guided through the facility by Hauger.[18] Karmaliani was not present because Delaney arrived early.[19] As is normal practice for a site review, Delaney kept a checklist of the facility's compliance with Department regulations.[20]

7. On the second floor, there are two adjacent classrooms, referred to as the Pre-K and Pre-K 2 rooms. Child A's regular classroom was the Pre-K room.[21]

8. While viewing the Pre-K 2 classroom, Delaney observed Child A with her behavioral therapist, later identified as Sarah Lommel (Lommel).[22] Child A met with her therapist in an empty classroom (the Pre-K 2 room), immediately adjacent to her regular classroom, which was staffed at the time Child A received this service.[23] Delaney believed no one was in the classroom except Child A and Lommel.[24]

9. At some point during Delaney's inspection, Primrose teacher Aarin Ledford went into the Pre-K 2 room while Child A and Lommel were working together.[25]

10. Ledford was not assigned to the Pre-K 2 room for the purpose of supervising Lommel and Child A but entered the room to gather materials.[26]

11. Child A was not signed out of Primrose's program while receiving mental health services from her therapist in the Pre-K 2 room.[27] Karmaliani believed that signing a child out who remains in the building could be unsafe in the event of a fire or other emergency. He also considered that signing a child out under those circumstances could result in a denial of insurance coverage for any claims occurring within the premises.[28]

12. Lommel had no unsupervised access to other children in care at Primrose while she was providing therapy to Child A.[29]

13. Delaney inquired about Child A receiving therapy in the Pre-K 2 classroom with Lommel. Hauger explained that Child A's mother had specifically requested that the Lovass Institute be able to provide therapy to Child A at Primrose during quiet time when

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[17] *Id.*
[18] *Id.*
[19] Test. of S. Karmaliani.
[20] Ex. 4
[21] Test. of S. Karmaliani; Ex. 13.
[22] Ex. 4; Test. of S. Delaney.
[23] Test. of S. Karmaliani; Test. of S. Delaney.
[24] Test. of S. Delaney.
[25] Test. of S. Karmaliani; Ex. 13 at DHS 275.
[26] Ex. 13 at DHS 275; Test. of S. Karmaliani.
[27] Test. of S. Karmaliani; Test. of S. Delaney.
[28] Test. of S. Karmaliani.
[29] Ex. 13.

the adjacent classroom was not in use.[30] Hauger, however, could not at that time locate the June 21, 2021, email from Child A's mother while Delaney was on site.[31] In addition, Hauger could not share Child A's ICCPP because HIPAA requirements for release of mental health information requires parental consent, which she did not have.[32]

14. Delaney conducted an exit interview with Karmaliani and Hauger on July 1, 2021.[33]

15. Delaney informed them that they had a "great program" but that she would be issuing a corrective order for several items. Delaney told them that one of the items was for violating background study requirements. She explained that an outside agency's personnel cannot be alone with a child and asked Hauger to remind her which room was "the room they were in by themselves."[34]

16. Hauger replied that it was the Pre-K 2 room. Karmaliani stated several times that Ledford "happened to be" in the room "at that time." Delaney did not clarify what Karmaliani meant by "at that time" – whether it meant for the duration of Lommel's service or merely the period during which Delaney was observing the classroom.[35]

17. Hauger reminded Delaney that Hauger had mentioned to Delaney during the review that "Ledford was in the room sitting cross-legged on the floor." Delaney did not recall the comment. Karmaliani admitted that Ledford was not assigned to supervise Child A and Lommel.[36]

18. Delaney never asked whether a Primrose staff person was present in the room for the duration of the one-on-one session. At the same time, Karmaliani did not claim that Ledford was present in the Pre-K 2 room for the duration of Lommel's one-on-one session with Child A.[37]

19. Nonetheless, Delaney interpreted Karmaliani's comment about Lommel being in the room "at the time" as a false and misleading statement meant to conceal the fact that no Primrose staff member was present in the classroom with Child A and Lommel for the entire duration of Lommel's visit on June 29, 2021.[38]

20. At the exit interview on July 1, 2021, Karmaliani informed Delaney that Child A's parents had given consent so that he could now share Child A's ICCPP, which documented the parents' permission for Lommel's services, but Delaney refused.[39] According to Delaney:

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[30] *See* Ex. 105; Ex 13; *see also* Test. of S. Karmaliani, Test. of S. Delaney.
[31] Ex. 105; Test. of S. Karmaliani; Test. of L. Wang.
[32] Ex. 13 at DHS 276; Test. of S. Karmaliani.
[33] Ex. 13 at DHS 276; Test. of S. Karmaliani; Test. of S. Delaney.
[34] Ex. 13 at DHS 276.
[35] *Id.*
[36] Ex. 13 at DHS 276; *see also* Test. of S. Karmaliani.
[37] Ex. 13 at DHS 276.
[38] Test. of S. Delaney.
[39] Ex. 13 at DHS 276; *see* Test. of S. Karmaliani *and* Test. of S. Delaney.

> Part of our DHS reviews are that you allow us access to all files when we are onsite [. . . . ] because as you can imagine, and I'm not saying you would do this, you know things can be fabricated after our visits or created after our visits.[40]

21. Delaney then told Karmaliani she "did not need to see" the ICCPP or treatment plan for Child A because what she had asked for was "parental permission" and if Child A had been "signed out."[41]

22. Karmaliani volunteered to provide video from the hallway on the second floor. He informed Delaney that the footage "could show when the child and the provider entered and when the [Primrose] teacher [. . . .] entered and how long the teacher remained in that classroom during the duration." Karmaliani asked Delaney, "Do you remember what time you were observing so I can focus on those times?"[42]

23. After the exit interview, Karmaliani contacted his information technology (IT) department and requested the video.[43] Karmaliani was sent four separate videos of varying lengths of the hallway on the day of Delaney's licensing visit.[44] Karmaliani was told by IT that the cameras are only activated by motion, and that the gaps between videos were caused by the cameras being turned off.[45]

24. Later that same day, Karmaliani emailed all of the video provided by Primrose's IT to Delaney.[46] In his email, Karmaliani stated, "As discussed here's what our consultant provided of what was captured showing that one of our teachers [Ledford] was present at the time of your observation of the classroom[.]" Karmaliani did not state that Ledford was present in the Pre-K 2 classroom for the duration of Lommel's services with Child A.[47]

25. The videos show that Ledford entered the Pre-K 2 classroom prior to Delaney passing the classroom and exited the room after Delaney passed. The videos did not show Child A or Lommel entering or exiting the Pre-K 2 classroom. The videos show that Child A and Lommel were alone for some period of time in the Pre-K 2 classroom.[48]

26. Delaney wanted video for the duration of Lommel and Child A's session but did not indicate in any way to Karmaliani that the videos he produced were insufficient. Nor did Delaney otherwise follow up with Karmaliani to determine whether more video was available.[49]

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[40] Ex. 13 at DHS 276.
[41] *Id.*
[42] Ex. 13 at DHS 276.
[43] Test. of S. Karmaliani.
[44] *Id.*; Ex. 14.
[45] Test. of S. Karmaliani.
[46] Test. of S. Karmaliani; Ex. 5.
[47] Test. of S. Karmaliani; Ex. 5.
[48] Ex. 14
[49] Test. of S. Karmaliani; *see also* Test. of S. Delaney.

27. Delaney erroneously considered Lommel to be Primrose's "contractor."[50]

28. During her testimony, Delaney refused to acknowledge the email from Wang was parental consent for Child A to receive services from her mental health provider at the facility.[51] However, Delaney's supervisor admitted that the email did constitute written permission.[52]

29. At some point before Karmaliani sent the videos to Delaney, Delaney told Karmaliani something to the effect that "people like you" have a reason to lie.[53] Karmaliani interpreted Delaney's comments as racially motivated and an attack on his business. Karmaliani made a complaint to Delaney's supervisor, Elizabeth Aadland (Aadland), who apologized to Karmaliani.[54]

30. Delaney's comments offended Karmaliani, which motivated him to try to disprove Delaney's claim that no one but Child A and Lommel were in the Pre-K 2 classroom at the time of her observation. His statements during the July 1, 2021, exit interview and in his email transmitting the hallway videos were intended to prove that Ledford was in the classroom when Delaney observed it, not to mislead Delaney to believe that Ledford was present throughout Lommel's session on June 29, 2021.[55]

31. The Department concluded that Lommel's visit with Child A on June 29, 2021, violated background study requirements, and that Karmaliani had submitted false and misleading statements and video with the intention of deceiving the Department into believing that Child A was never left alone with Lommel. The Department further concluded that Lommel had "unsupervised physical access" to Child A on "two to three" other occasions.[56]

32. Based upon Delaney's view of the evidence from the July 1, 2021, exit interview and the videos Karmaliani provided, the Department opened an investigation into whether Karmaliani knowingly provided false and misleading information about Child A's receipt of her therapist's services on the Primrose premises.[57]

33. Delaney interviewed Lommel and Ledford, both of whom indicated that Ledford was in the room for part, but not all, of Child A's behavioral therapy session.[58] Delaney considered this information to contradict what Karmaliani said previously and concluded that he had knowingly made false or misleading statements intended to deceive her. As a result, Delaney recommended Primrose's license be revoked.[59]

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[50] Ex. 13 at DHS 276.
[51] Test. of S. Delaney.
[52] Test. of E. Aadland.
[53] Test. of S. Karmaliani; *see also* Test. of E. Aadland.
[54] Test. of S. Karmaliani; Test. of E. Aadland.
[55] Test. of S. Karmaliani; Ex. 5; Ex. 13.
[56] Ex. 1; *see* Test. of E. Aadland.
[57] Test. of S. Delaney; Test. of E. Aadland; *see also* Ex. 13 at DHS 277.
[58] Test. of S. Delaney; Ex. 13 at DHS 275, 279.
[59] Test. of S. Delaney; Ex. 13 at DHS 277.

34. Based upon those conclusions, the Department issued an order revoking Primrose's license on September 15, 2021.[60]

35. In determining that revocation was warranted, the Department did not consider the impact of closing a "great program" on the children attending Primrose and their families. It also did not consider the qualifications of any of the Primrose personnel.[61]

Based on these Findings of Fact, the Administrative Law Judge makes the following:

## CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner have jurisdiction to consider this matter pursuant to Minn. Stat. §§ 14.50, 245A.07, .08 (2020).

2. The Department has complied with all procedural requirements of law and rule.

3. Primrose timely appealed the Order of Revocation.

4. The Department must demonstrate that reasonable cause exists to substantiate its allegations that Primrose failed to comply fully with applicable law or rule. If the Department meets its burden, the burden of proof shifts to Primrose to show by a preponderance of the evidence that it was in full compliance with the laws or rules that the Department alleges it violated.[62]

5. The phrase "reasonable cause exists to believe" found in Minn. Stat. § 245A.07, subd. 2a, requires the existence of circumstances sufficient to warrant a cautious person to reasonably believe the license holder violated the cited provisions of law.[63] This standard is synonymous with the standard of probable cause in criminal cases.[64]

6. A "preponderance of the evidence" means that the ultimate facts must be established by a greater weight of the evidence.[65] "It must be of a greater or more convincing effect and . . . lead you to believe that it is more likely that the claim . . . is true than . . . not true."[66]

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[60] Ex. 1; Test. of E. Aadland; Test. of S. Delaney.
[61] Ex. 1.
[62] *See* Minn. Stat. § 245A.08, subd. 3(a).
[63] *In re Temporary Immediate Suspension of Family Child Care License of Strecker*, 777 N.W.2d 41, 46 (Minn. Ct. App. 2010).
[64] *Id.*; *see e.g. State v. Childs*, 269 N.W.2d 25, 27 (Minn. 1978) (defining probable cause as "circumstances sufficiently strong in themselves to warrant a cautious [person] in believing the accused to be guilty").
[65] 4 Minnesota Practice, CIV JIG 14.15 (2020).
[66] *State v. Wahlberg*, 296 N.W.2d 408, 418 (Minn. 1980).

## A. Background Study

7. Pursuant to Minn. Stat. § 245C.03, subd. 1(a)(8), a background study must be completed for a "child care background study subject" who meets the definition set forth in Minn. Stat. § 245C.02, subd. 6a (2020).

8. A "child care background study subject" is "an individual who is *affiliated* with a licensed child care center,"[67] and who is:

> [a] volunteer, contractor, prospective employee, or other individual who has unsupervised physical access to a child served by a program and who is not under supervision by an individual listed in clause (1) or (5), regardless of whether the individual provides program services.[68]

9. "Affiliated" means to be "closely associated with another typically in a dependent or subordinate position."[69]

10. The Department failed to establish reasonable cause to believe that Child A's mental health provider is "affiliated" with Primrose within the meaning of Minn. Stat. § 245C.02, subd. 6a. A preponderance of the evidence establishes that Lommel is not "affiliated" with Primrose.

11. Under Minn. Stat. § 245C.02, subd. 8 (2020), "continuous, direct supervision" means "an individual is within sight or hearing of the program's supervising individual to the extent that the program's supervising individual is capable at all times of intervening to protect the health and safety of the persons served by the program."

12. The Department established that Child A was not within sight of a Primrose staff member at all times, but it presented no evidence to support reasonable cause to believe that the teacher in the classroom adjacent to the Pre-K 2 room could not hear Child A or intervene if necessary to protect Child A's health and safety. Thus, there is no reasonable cause to believe that Child A was not under "continuous, direct supervision" by Primrose staff while she worked with her behavioral therapist in an adjacent classroom.

13. The Department has thus failed to establish reasonable cause to believe that Child A's behavioral therapist is a "child care background study subject" as defined by Minn. Stat. § 245C.02, subd. 6a.

14. Because Lommel was not a "child care background study subject," the Department failed to establish reasonable cause to believe that Primrose violated background study requirements.

15. Under Minn. Stat. § 245C.02, subd. 6a(b), a background study is not required for a "child care background study subject" if: (1) the child receiving outside services is signed out of the child care program for the duration that the services are

[67] Minn. Stat. 245C.02, subd. 6a(a) (emphasis added).
[68] Minn. Stat. 245C.02, subd. 6a(a)(8).
[69] https://www.merriam-webster.com/dictionary/affiliated.

provided; (2) the licensed child care center has obtained advanced written permission from the parent authorizing the child to receive the services, which is maintained in the child's record; (3) the licensed child care center maintains documentation on site that identifies the individual service provider and the services being provided; and (4) the licensed child care center ensures that the service provider does not have unsupervised access to a child not receiving the provider's services.

16. The Department established reasonable cause to believe that Child A was not signed out of the childcare program. Primrose established, by a preponderance of the evidence, that it had advanced written permission from Child A's parent; that it maintained documentation on site identifying the service provider and services being provided in Child A's ICCPP; and, that Lommel did not have unsupervised access to any other child at Primrose.

17. If Lommel is a "child care background study subject," the Department established that Primrose technically failed to comply with background study requirements by not signing Child A out of the childcare program.

### B. False or Misleading Statements

18. Knowingly withholding relevant information from or giving false or misleading information to the commissioner during an investigation or regarding compliance with applicable laws or rules is grounds for a license sanction, including revocation.[70]

19. A "false statement" is an "untrue statement knowingly made with the intent to mislead."[71]

20. Technical words and phrases of Minnesota statutes are construed according to their special meaning.[72]

21. The phrase "false or misleading" is a legal term of art that is used to differentiate an inaccurate, vague or ambiguous statement from an "untrue statement that is knowingly made with the intent to mislead."[73]

22. The Department failed to establish reasonable cause to believe that Primrose knowingly provided false or misleading information to the Department.

### C. License Sanctions

23. The Commissioner may revoke a license if a licensee fails to comply with applicable laws or rules.[74]

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[70] Minn. Stat. § 245A.07, subd. 3(a)(3).
[71] Black's Law Dictionary, 619 (7h Ed. 1999).
[72] Minn. Stat. § 645.08 (2020).
[73] *See* Minn. Stat. § 245A.07, subd. 3(a)(3).
[74] Minn. Stat. § 245A.07, subd. 1(a)(1).

24. Minn. Stat. § 245A.04, subd. 6 (2020), states:

> Before issuing, denying, suspending, revoking, or making conditional a license the commissioner shall evaluate information gathered under this section. The commissioner's evaluation shall consider facts, conditions, or circumstances concerning the program's operation, the well-being of persons served by the program, available consumer evaluations of the program, and information about the qualifications of the personnel employed by the applicant or license holder.

25. When applying sanctions, the Commissioner must consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program.[75]

26. Because the Department failed to establish that Primrose violated any laws or rules by accommodating a parent's request to use an empty classroom for provision of behavioral therapy, and because Karmaliani did not provide false or misleading information to the Department, there are no grounds to sanction Primrose.

Based upon these Conclusions of Law, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

## RECOMMENDATION

The Administrative Law Judge respectfully recommends that the correction order and the revocation be **RESCINDED**.

Dated: April 12, 2022

KIMBERLY MIDDENDORF
Administrative Law Judge

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[75] *Id.* at subd. 1(a).

## NOTICE

This Report is a recommendation, not a final decision. The Commissioner of the Department of Human Services (Commissioner) will make the final decision after a review of the record. Under Minn. Stat. § 14.61 (2020), the Commissioner shall not make a final decision until this Report has been made available to the parties for at least ten calendar days. The parties may file exceptions to this Report and the Commissioner must consider the exceptions in making a final decision. Parties should contact Administrative Law Office staff at DHS_AdminLaw@state.mn.us to learn the procedure for filing exceptions or presenting argument.

The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and Administrative Law Judge of the date the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a (2020). In order to comply with this statute, the Commissioner must then return the record to the Administrative Law Judge within ten working days to allow the Judge to determine the discipline to be imposed.

Under Minn. Stat. § 14.62, subd. 1 (2020), the Commissioner is required to serve a final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

## MEMORANDUM

No one operating what the Department has described as a "great program" that serves up to 200 children should be facing the loss of licensure for accommodating a child's special needs. Nor should a licensee be penalized for attempting to prove his licensor was mistaken. But that is what happened here.

The Department seeks to revoke Primrose's license because its licensor determined that Karmaliani attempted to deceive her about the commission of a background study violation. Primrose adamantly refutes the Department's position and does not believe sanctions are warranted merely because it allowed Child A and her therapist to use an empty classroom as requested by the child's mother.

When construing a statute, words and phrases must be construed according to rules of grammar and according to their common and approved usage.[76] The Department takes the position that any service provider allowed entrance to a childcare center must have a Department childcare background study or meet the requirements of the exception set forth in Minn. Stat. § 245C.02, subd. 6a(b). Minn. Stat. § 245C.02, subd. 6a, is not quite so broad.

Under Minn. Stat. § 245C.02, subd. 6a, the service provider must be "affiliated" with the childcare center. Affiliated means closely associated with another, typically in a dependent or subordinate position. Granting a mother's request that the therapist she engaged be allowed to work with her child in an empty classroom does not form a close association between the therapist and the childcare center. This is readily distinguishable from the mischief the legislature was surely aiming to address – a situation where a childcare center brings in service providers or volunteers who will have unsupervised access to children in care.

More importantly, the Department is mistaken about what constitutes unsupervised access. The Department equates unsupervised access with the absence of a staff person physically present in the room. Throughout the record, the Department makes much of the fact that for part of the time, no Primrose staff person was physically present in the Pre-K 2 classroom. However, the standard is not simply whether a child was alone in a room with someone not employed by the license holder. Unsupervised access means the child was not within sight *or hearing* of a staff person, who would be *unable to intervene* if necessary. To prove that access was unsupervised, the Department must present some evidence affirmatively establishing not only that an employee was not in the room, but also that the child could not be heard and that an employee could not have intervened. Here, the Department established only that a Primrose staff person was not in the same classroom with Child A for the entirety of services. This is insufficient to establish that Primrose did not supervise Child A.

Should the Commissioner disagree and take a broader view of the statutory requirements in question, this may be the least egregious background study violation possible. The services were described in Child A's ICCPP. Child A's mother specifically

[76] Minn. Stat. § 645.08, subd. 1.

made this request. Her teacher was next door. The service provider is a licensed mental health professional. No other children were permitted to be alone with the therapist. But for the fact that Child A was not technically "signed out" of the childcare program, there would have been no background study violation, no follow-up investigation, and no revocation. Compliance assistance would have been a far more reasonable response to address this situation.

While there may arguably be a minor, technical background study violation here, the same cannot be said with respect to the claims of false and misleading statements. Technical words and phrases of Minnesota Statutes are construed according to their special meaning.[77] The phrase "false or misleading" is a legal term of art that is used to differentiate an inaccurate or ambiguous statement from an "untrue statement that is knowingly made with the intent to mislead."[78] Inaccurate information is not, in and of itself, an untrue statement knowingly made with the intent to mislead. The phrase, "false or misleading information," as contained in Minnesota Statutes, like the definition of "false statement" in Black's Law Dictionary, calls for something more than a mistake or discrepancy. It requires an act intended to mislead or deceive.

The Department's contentions that Karmaliani lied to Delaney about Ledford's presence in the room with Child A are not supported by a reasonable review of the evidence. No one Delaney interviewed, including Karmaliani, ever said Ledford was present throughout Child A's session with Lommel. Indeed, at the start of the July 1, 2021 exit interview, Karmaliani and Haugen admitted that Child A was alone with Lommel for part of the visit. None of the statements Karmaliani made later in this same conversation can be reasonably interpreted as attempting to mislead Delaney into believing something contrary to what was freely acknowledged at the start.

Furthermore, Hauger's account is more credible than Delaney's. Hauger's recall of Delaney's visit was better than Delaney's during the exit interview. In her testimony, Delaney denied that Hauger pointed out Ledford's presence while the two observed the Pre-K 2 classroom. However, Hauger reminded Delaney of this fact during the July 1, 2021, exit interview, which Delaney did not then deny. The fact that Ledford was present at that time is corroborated by the Department's interviews with Ledford, Lommel, and Hauger, and by the video evidence submitted by Karmaliani.

Moreover, the evidence as a whole is consistent with Karmaliani's explanation that he was frustrated with, and offended by, Delaney, which motivated him to prove Delaney mistaken in her belief that Ledford was never in the room. The videos establish that Ledford was in Pre-K 2 room for part of the June 29, 2021 visit. Karmaliani's email transmitting the videos to Delaney makes abundantly clear that his claim that Ledford was in the room was limited to the time of Delaney's observation. Delaney may have wanted video depicting the duration of Lommel's visit, but there is no evidence that such video exists. And even if such video did exist, it can only be considered false and misleading as to evidencing a claim that neither Karmaliani nor any of his staff made – that a Primrose staff person was present for the duration of the services. Delaney's misunderstandings of

[77] Minn. Stat. § 645.08, subd. 1.
[78] Black's Law Dictionary, 619 (7th Ed. 1999).

what Karmaliani was trying to convey to her and her assumptions about Karmaliani's intent are not evidence and are not reasonable.

Here, there is only a conclusory assertion by the Department of the intent to mislead. Nothing in the July 1, 2021 exit interview, the email and attached videos, or the August 10, 2021 exit interview constitutes a knowingly false or misleading statement. Karmaliani admitted Ledford's presence was happenstance at the start of the exit interview. He frequently referred to the time period The Department must do more than establish that it was provided ambiguous information in response to vague or confusing questions.

The Department also may not establish something was knowingly withheld with the intent to mislead, as it alleges with respect to the hallway videos, merely by complaining it did not get all it asked for. It should go without saying that in the first instance, something cannot be withheld if it does not exist. In any event, the videos Karmaliani submitted clearly establish that Ledford was not in the classroom for the duration of Lommel's services. This cannot be reasonably interpreted as attempting to mislead the Department into believing the contrary.

The Department did not demonstrate that Karmaliani knowingly made an untrue statement with the intent to mislead. He testified credibly that he did not knowingly make an untrue statement with the intent to mislead. He admitted facts that were not favorable to him, during the inspection, investigation, and hearing, such as acknowledging that Child A was not signed out. Delaney, on the other hand, refused to admit facts that were obviously true and even conceded by her supervisor, including her dogged refusal to acknowledge that Wang's email to Hauger constituted Wang's consent for her daughter to work with her own service provider at rest time.

Finally, the Department failed to establish that any sanction is warranted here, even assuming that Lommel was a childcare background study subject and that Child A was not within hearing of her teacher in the adjacent room – neither of which were established by the Department. At most, the only requirement of Minn. Stat. § 245C.02, subd. 6a(b) that was not met was to sign out Child A. Child A was not harmed by being allowed to work with her behavioral therapist. It is difficult to conceive of how the particular circumstances of this case could result in harm. Primrose has already changed its practice to include signing children out. A punitive response such as that proposed by the Department can only serve to discourage childcare centers from facilitating therapeutic services. Revocation will accomplish nothing but to deprive parents and up to 200 children access to a "great program."

Accordingly, the Administrative Law Judge respectfully urges the Commissioner to rescind the correction order and revocation.

**K. J. M.**