

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE COMMISSIONER OF HUMAN SERVICES

In the Matter of the Order to Forfeit a  
Fine against the License of Parents in  
Community Action, Inc. (PICA)

**FINDINGS OF FACT,  
CONCLUSIONS AND  
RECOMMENDATION**

The above matter came on for hearing before Administrative Law Judge M. Kevin Snell on February 15, 2012, at the Office of Administrative Hearings, 600 Robert Street North, St. Paul, Minnesota. The OAH record closed upon receipt of the post-hearing briefs of the parties on March 16, 2012.

Matthew D. Schwandt, Assistant Attorney General, St. Paul, Minnesota, appeared on behalf of the Department of Human Services. David L. Shulman, Minneapolis, Minnesota, appeared on behalf of Parents in Community Action, Inc. (Licensee or PICA).

**STATEMENT OF THE ISSUES**

Did Licensee have reason to believe that a child enrolled in its program had been subjected to sexual abuse and fail to report that belief to a common entry point in accordance with the Maltreatment of Minors Act, Minn. Stat. § 626.556, subd. 3(a)?

The Administrative Law Judge concludes that the Licensee received information about a child enrolled in its program that a reasonable person would conclude was sexual abuse of that child and failed to report that information within 24 hours of receipt of that information as required by law and rule, and recommends that the Order to Forfeit a Fine be affirmed.

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

**FINDINGS OF FACT**

1. PICA is a Head Start organization that operates the Glendale Early Childhood Family Development Center at 96 St. Mary's Avenue Southeast, Minneapolis, MN (the Glendale Center). At the Glendale Center PICA provides a comprehensive early childhood education program including child care and preschool,

as well as health and dental care, home visits, family resources, and events and programs for families and their children, including for many immigrant families.<sup>1</sup>

2. PICA's early childhood program operates with 21 staff members and serves 188 children. It operates four classrooms with two teachers in each classroom. PICA also provides: coaches for the teachers; services by visiting nurses; services by visiting psychologists; hearing services; vision services; drivers; and services for children with special needs.<sup>2</sup>

3. PICA also provides "Visiting Advocates." Visiting Advocates visit immigrant families in their homes to: provide resources for parents, including information about events and activities; help prepare children for kindergarten; and recruit.<sup>3</sup>

4. One Visiting Advocate is Ms. Anisa Ali, who works in the Early Head Start Program for children from zero to five years of age. Ms. Ali is fluent in both the English and Somali languages.<sup>4</sup>

### **PICA Child Abuse Reporting Policies and Training**

5. PICA has a formal policy entitled "PICA Child Abuse & Neglect Reporting Policy/Procedure." Mandated reporters that work at the Glendale Center are required to read and sign the policy annually, after the Glendale Center Director, Ms. Audrey Heavens, has personally gone through it with them.<sup>5</sup>

6. The PICA Child Abuse & Neglect Reporting Policy/Procedure provides in relevant part as follows:

*You are a mandated reporter.*

If you know or have reason to believe a child is being . . . sexually abused, you must report the suspected abuse or neglect within 24 hours. (MN Statutes 626.556, subdivision 3.) Failure to report could result in termination from PICA and being charged with a misdemeanor under MN Statutes 626.556, subdivision 6.

Report within 24 hours, to any of the following external agencies:

- Hennepin County Child Protection ((612) 348-3552)
- Department of Human Services, Division of Licensing ((651) 297-4123)

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<sup>1</sup> Testimony of Audrey Heavens, Director of the Glendale Center; Ex. 21.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*; Test. of Anisa Ali.

<sup>4</sup> *Id.*

<sup>5</sup> Ex. 16; Test. of A. Heavens.

- Police Department (911)
- Hennepin County Sheriff (911 or (612) 525-6220)

(MN Statutes 626.556 & MN Rules 9503.0130, Subpart 1 & 9503.0035, Subpart I.D.)

You have the option of reporting anonymously. (MN Statutes 626.556, Subdivision 11.)

Consistent with Head Start Performance Standards 1301.31, PICA has an important role to play in the prevention of child abuse and neglect and to ensure that adequate follow-up occurs. You are strongly encouraged to share the report with your Center Director. If you cannot make the report to your Center Director, then you may share the report with the director of operations or the Executive Director.

At no time will PICA retaliate against an individual that reports in good faith suspected abuse or neglect. (MN Statutes 626.556, Subdivision 4a.)

**I have been given the state and federal laws governing child abuse and neglect reporting. I have read PICA’s child abuse and neglect policy and procedure statement (see above.) I fully understand my legal obligation as a mandated reporter to adhere to these laws and policies.**

\_\_\_\_\_  
**Staff Name Printed**

\_\_\_\_\_  
**Signature**

\_\_\_\_\_<sup>6</sup>  
**Date**

7. Ms. Anisa Ali received Mandated Reporter information on August 26, 2010. She also signed the acknowledgment on the PICA Child Abuse & Neglect Reporting Policy/Procedure on that date.<sup>7</sup>

8. Ms. Fowzia Jama, an early learning teacher, received Mandated Reporter information on August 26, 2010. She also signed the acknowledgment on the PICA Child Abuse & Neglect Reporting Policy/Procedure on that date.<sup>8</sup>

9. Ms. Audrey Heavens received Mandated Reporter information on August 27, 2009, regarding Child Abuse & Neglect Reporting.<sup>9</sup>

<sup>6</sup> Exs. 16, 101-105.

<sup>7</sup> Ex. 102.

<sup>8</sup> Ex. 104.

<sup>9</sup> Ex. 101.

10. PICA also has PICA's "Don't Forget" Rules, which provide as follows:
- Never leave a child alone
  - Never be alone with a child
  - Never fail to report a suspicion that harm has come to a child
  - Never release a child to someone not authorized to take them
  - Never punish a child (i.e. hit, shame, belittle, use food.)

### **A Parent's Report of Sexual Abuse of Her Preschool Child**

11. In November of 2010, Ms. Fowzia Jama noticed that a Somali preschool girl had not attended her class in school between November 9 and November 23, 2010. The absences were unexplained. Absences in the early part of November had been explained by her parents as her being sick with the flu. On November 23, 2010 Ms. Jama called the child's home telephone number and there was no answer. She then called the child's father on his cell phone and he answered.<sup>10</sup>

12. She asked if the girl was OK, because the child had been absent from school for several days. The father stated that she was OK, but she had not been attending school because her mother had some concerns. He asked if Ms. Jama would talk to the girl's mother about the concerns. She agreed to do so.<sup>11</sup>

13. The mother was very upset and relayed an incident involving her four-year-old daughter and the child's brother. The girl and her mother were in the kitchen and the mother had just given the girl some pants to put on. The girl was unclothed. She ran into the living room, spread her legs and asked her little brother to lick her vagina. The mother was stunned and shocked, because that type of behavior is unheard of in Somali culture. Sexual education does not happen with small children and is not openly discussed between parents and children.<sup>12</sup>

14. Somali culture is not very open when it comes to sexuality, especially around children. Educating children about "good touch" and "bad touch" would not occur.<sup>13</sup>

15. The mother gave the girl a time out by sending her to her room. The mother then asked her where she had seen that behavior. The girl replied that she had seen it on television. The mother replied that, "No, you have not seen that on television," and asked her again where she had seen it. The girl then stated that she

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<sup>10</sup> Exs. 8, 13, 119; the conversations summarized in Findings 9 - 23 between PICA staff and the parents were conducted in the Somali language.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*; Test. of A. Ali.

<sup>13</sup> Ex. 9.

had seen it at school from a certain employee (suspected employee “SE”) and that it had occurred in a bathroom when the other children were outside on a playground.<sup>14</sup>

16. Ms. Jama was confused and did not know what to do next because this was her first experience in hearing something of that nature.<sup>15</sup>

17. The child’s mother did not want to return the child to the Glendale Center. She wanted to call the police. The child’s father did not agree. He wanted the child to return to school and “see what happens.”<sup>16</sup>

18. During an early morning training session at the Glendale Center on December 6, 2010, Ms. Jama told Visiting Advocate Ms. Anisa Ali that she wanted to talk to her about something very serious that a parent had told her. Although the child was not assigned to one of the two rooms to which Ms. Ali was assigned as an advocate, Ms. Jama chose Ms. Ali because Ms. Ali had worked at the center longer than the assigned Visiting Advocate. Ms. Jama stated that she didn’t want to say what the mother’s concern was while they were in the building and that “no one can know about this.” She insisted Ms. Ali hear the story directly from the child’s mother. Ms. Ali agreed to visit with the mother at the family’s home. Ms. Jama arranged for the meeting to occur on Wednesday, December 8, 2010.<sup>17</sup>

19. Ms. Ali was uncomfortable with the situation because she believed that the Center Director, Ms. Heavens, should know about everything. Before leaving for the meeting, Ms. Ali told Ms. Heavens that: she was on her way to a meeting with Ms. Jama and a parent at the parent’s home; Ms. Jama was very serious and would not tell her what the parent had told Ms. Jama; that Ms. Jama told her she had to hear the story directly from the mother; and that she would call Ms. Heavens as soon as she knew what the situation was all about. Ms. Ali and Ms. Jama drove separately to the family’s home and met with the girl’s mother.<sup>18</sup>

20. During the meeting the mother of the child repeated to Ms. Ali the events involving her daughter’s behavior and what she had been told. She also stated that: they do not have cable TV; there have been no encounters between her daughter and teenagers or other adults. The mother was convinced that her daughter would not have thought up the sexual behavior herself and that she had to have seen it somewhere.<sup>19</sup>

21. Ms. Ali asked the mother if she had talked about this to Ms. Heavens, the Center Director. She replied that she had not. The mother suggested putting her daughter back in school and see what the teacher does. Ms. Ali disagreed and said

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<sup>14</sup> Ex. 8; Test. of A. Ali.

<sup>15</sup> Ex. 8.

<sup>16</sup> Ex. 9 at DHS 60.

<sup>17</sup> Test. of A. Ali; Ex. 9.

<sup>18</sup> Ex. 9.

<sup>19</sup> *Id.*

that they needed to talk to the director and that she and Ms. Jama are mandated reporters and that they needed to report the situation.<sup>20</sup>

22. After telling Ms. Ali about the incident, the child's mother asked Ms. Ali for a ride to work and Ms. Ali agreed. During the drive Ms. Ali told the mother that: in the future you should talk to the Director right away so we can do an investigation; second, you need to take the child to a physician; you should not talk to neighbors or other people that go to school; and, we are small community and little rumors like this can get huge.<sup>21</sup>

23. After dropping off the child's mother at her place of work, Ms. Ali called Ms. Jama. Ms. Jama did not want to return to PICA and talk to Ms. Heavens. Ms. Ali then called Ms. Heavens and drove to meet with her at the PICA Franklin Center where she told Ms. Heavens about what she had learned. Ms. Heavens then called the child's mother and asked to meet with her. The child's mother said that it wasn't a good time to meet.<sup>22</sup>

24. Ms. Heavens called the child's home, spoke with the child's father and asked him if he had any concerns. He stated that he had no concerns other than he did not want his daughter dropped from school. Ms. Heavens assured him that his daughter would not be dropped from school.<sup>23</sup>

25. On the morning of December 15, 2010, Ms. Heavens was in her office when the child's mother walked by and waved at her. The mother had arrived on the bus with her daughter. Ms. Jama then came into Ms. Heavens' office and stated that the child's mother wanted to talk to Ms. Heavens. The mother first stated that she loved the Head Start program. She then stated that she needed her daughter to be in one of the 9:30 a.m. – 3:00 p.m. classrooms rather than the current 8:00 a.m. – 2:00 p.m. classroom because of the mother's work schedule. The mother works nights and it is difficult for her to get her daughter to the center by 8:00 a.m.<sup>24</sup>

26. The mother then stated that she had some concerns about her daughter exposing her body parts. She explained the early November incident again to Ms. Heavens. Ms. Heavens explained about and offered the services of the center's visiting psychologist. She also explained that she needed to report the incident to the authorities. The girl's mother asked Ms. Heavens not to do so, and asked Ms. Heavens to talk to her husband. Because Ms. Heavens has built a strong relationship with local Somali families, she respected the mother's wishes and waited to talk to the husband.<sup>25</sup>

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<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*; Test. of A. Heavens.

<sup>23</sup> Test. of A. Heavens.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

27. The child was re-assigned to a different room with different teachers. The child was excited and happy to return to school.<sup>26</sup>

28. Ms. Heavens met with the girl's father the evening of December 17, 2010, and brought up the incident involving the girl and her brother and the allegation about SE. He stated that he didn't believe anything happened between his daughter and SE. He named two more children living in the home that the mother had not identified. Ms. Heavens told him that she needed to report the matter now and pulled out a reporting form when he was still present. He did not want Ms. Heavens to report either the incident or the allegation against SE.<sup>27</sup>

29. Ms. Heavens had noticed inconsistencies between the information being provided by the girl's parents. She did not believe the allegation against SE. However, she was unsure what might have happened and she "felt that something was being hidden." After the father left, Ms. Heavens called Hennepin County Child Protection and then called the Department. In each case she reported the child's behavior and the allegation against SE.<sup>28</sup>

### **Department and Law Enforcement Investigations**

30. On December 21, 2010, the Department assigned an investigator.<sup>29</sup> On December 23, 2010, the investigator contacted the Minneapolis Police Department. The police opened a case. On December 28, 2010, the police sergeant assigned to the case told the investigator that, "We need to Cornerhouse this young lady" and "I don't think it happened."<sup>30</sup>

31. The PICA centers were closed between December 24, 2010 and January 3, 2011.<sup>31</sup>

32. On January 3, 2011 the investigating sergeant advised the Department that multi-session Cornerhouse interviews would occur on January 10 and 11, 2011. The first session is designed for the Cornerhouse investigator to get to know the child. The second interview is designed to investigate the allegations.<sup>32</sup>

33. The Department conducted site visits to the Glendale Center on January 6, 2011 and January 24, 2011.<sup>33</sup>

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<sup>26</sup> *Id.*; Ex. 9.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*; Exs. 1, 2.

<sup>29</sup> Ex. 4.

<sup>30</sup> Ex. 6.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> Exs. 7, 12.

34. The Department interviewed: Ms. Heavens by telephone on January 4, 2011; Ms. Fowzia Jama in person on January 6, 2011; Ms. Anisa Ali in person on January 6, 2011; and SE on January 24, 2011.<sup>34</sup>

35. Cornerhouse first interviewed the child on January 10, 2011. The relevant portion of the Evaluation and Results section of the Cornerhouse report states:

During session one [the child] was interviewed using the easel board and anatomical diagrams. [The child] differentiated between genders on the anatomical diagrams, although she did not identify either diagram as representing herself. [The child] named several of the body parts on the female anatomical diagram, including the chest and genital area. A decision was made to end the session after naming the body parts on the female diagram as [the child] indicated she wanted to go and see her mother and father and because she appeared to be disengaging from the interview process.<sup>35</sup>

36. Cornerhouse next interviewed the child on January 11, 2011. The relevant portion of the Evaluation and Results section of the Cornerhouse report states:

[The child] was interviewed using the shape stacker, puzzle, easel board, and anatomical diagrams. [The child] reported she received tickles on her back from a friend and that she did not like the tickles. [The child] did not report receiving other touches she did not like. When asked [the child] did not report receiving touches to her genital area and she did not report telling someone about touches. At one point during the interview when asked if a girl wanted [the child] to touch her genital area, [the child] stated "no" and then stated "yes." [The child] did not respond to follow-up questions and when clarification was later sought [the child] stated no, "my mom said no way." [The child] did not appear to respond to additional follow-up questions. When asked [the child] reported it was not okay to talk about touches.<sup>36</sup>

37. The Cornerhouse team did not recommend a medical exam for the child. The team provided a therapeutic/support resource list to the accompanying caregiver and referred the child for therapeutic/support services.<sup>37</sup>

38. The Department issued its Investigation Memorandum on May 5, 2011, concluding that maltreatment could not be determined; that the facility failed to report the incident in a timely manner as required; and that an order to forfeit a \$200.00 fine would issue.<sup>38</sup>

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<sup>34</sup> Exs. 6, 8, 9, 14.

<sup>35</sup> Ex. 11.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> Ex. 18.

## Procedural Findings

39. On May 5, 2011, the Department issued Licensee its Order to Forfeit a Fine in the amount of \$200.00.<sup>39</sup>

40. Licensee filed a timely appeal from the Order and requested an appeal hearing pursuant to Minn. Stat. § 245A.07.<sup>40</sup>

41. On October 13, 2011, the Department executed a Notice of and Order for Prehearing Conference and Hearing, scheduling a Prehearing Conference on December 2, 2011.

42. A prehearing conference was conducted by an ALJ on December 2, 2011. Pursuant to that Prehearing Conference the parties scheduled a contested case hearing for February 15, 2012.<sup>41</sup>

43. On December 6, 2011, an ALJ issued a Protective Order, which was served upon the parties by mail on that date.<sup>42</sup>

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

## CONCLUSIONS

1. The Administrative Law Judge and the Minnesota Department of Human Services have authority to consider and rule on the issues in this contested case hearing pursuant to Minn. Stat. §§ 14.50 and 245A.08.

2. The Department gave proper notice of the hearing, and all relevant substantive and procedural requirements of law or rule have been fulfilled.

3. Minn. Stat. § 245A.07, subd. 3, allows the Commissioner to suspend or revoke a license, or impose a fine if a license holder fails to comply with the applicable laws or rules. Notice of any such action must be given by certified mail and must state the reasons for the sanction.

## Burden of Proof

4. Under Minn. Stat. § 245A.08, subd. 3, the burden of proof first lies with the Commissioner, who may demonstrate reasonable cause for the action taken by submitting statements, reports, or affidavits to substantiate the allegations that the license holder failed to comply fully with applicable law or rule. If the Commissioner demonstrates that reasonable cause existed, the burden shifts to the license holder to

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<sup>39</sup> Ex. 21.

<sup>40</sup> Notice of and Order for Prehearing Conference and Hearing.

<sup>41</sup> First Prehearing Order, dated December 6, 2011.

<sup>42</sup> *Id.*; Protective Order.

demonstrate by a preponderance of the evidence that she was in full compliance with those laws or rules allegedly violated, at the time that the Commissioner alleges the violations occurred.

### **Statutes and Rules Alleged to be Violated**

5. Minn. R. 9503.0130, regarding reporting of child abuse, provides in relevant part:

Subpart 1. **Abuse; neglect.** The license holder must comply with the reporting requirements for abuse and neglect specified in Minnesota Statutes, section 626.556.

6. Minn. Stat. § 626.556, subd. 1, stating Minnesota public policy on reporting the maltreatment of minors:

The legislature hereby declares that the public policy of this state is to **protect children** whose health or welfare **may be** jeopardized through . . . **sexual abuse**. While it is recognized that most parents want to keep their children safe, sometimes circumstances or conditions interfere with their ability to do so. When this occurs, **families are best served by interventions** that engage their protective capacities and **address immediate safety concerns and ongoing risks of child maltreatment** . . . .

In addition, it is the policy of this state to **require** the reporting of . . . sexual abuse of children in the **home, school, and community settings**; . . . (Emphasis added.)

7. Minn. Stat. § 626.556, subd. 2(a), defining sexual abuse, provides in relevant part:

(d) 'Sexual abuse' means the subjection of a child by a person responsible for the child's care, by a person who has a significant relationship to the child, as defined in section 609.341, or by a person in a position of authority, as defined in section 609.341, subdivision 10, to any act which constitutes a violation of section 609.342 (criminal sexual conduct in the first degree), 609.343 (criminal sexual conduct in the second degree), 609.344 (criminal sexual conduct in the third degree), 609.345 (criminal sexual conduct in the fourth degree), or 609.3451 (criminal sexual conduct in the fifth degree). Sexual abuse also includes any act which involves a minor which constitutes a violation of prostitution offenses under sections 609.321 to 609.324 or 617.246. Sexual abuse includes threatened sexual abuse.

8. Minn. Stat. § 609.3451, regarding criminal sexual conduct in the fifth degree, provides in relevant part:

Subdivision 1. Crime defined. A person is guilty of criminal sexual conduct in the fifth degree:

(1) if the person engages in nonconsensual sexual contact; or

(2) the person engages in masturbation or lewd exhibition of the genitals in the presence of a minor under the age of 16, knowing or having reason to know the minor is present.

. . . Sexual contact also includes the intentional removal or attempted removal of clothing covering the complainant's intimate parts or undergarments, and the nonconsensual touching by the complainant of the actor's intimate parts, effected by the actor, if the action is performed with sexual or aggressive intent.

9. Minn. Stat. § 626.556, subd. 2(a), defining a person responsible for a child's care, provides in relevant part:

(e) 'Person responsible for the child's care' means (1) an individual functioning **within the family unit** and having responsibilities for the care of the child such as a parent, guardian, or other person having similar care responsibilities, or (2) an individual functioning **outside the family unit** and having responsibilities for the care of the child such as a teacher, school administrator, other school employees or agents, or **other lawful custodian of a child** having either full-time or short-term care responsibilities including, but not limited to, **day care**, babysitting whether paid or unpaid, counseling, teaching, and coaching. (Emphasis added.)

10. Minn. Stat. § 626.556, subd. 3, regarding persons mandated to report provides in relevant part:

(a) A person who knows or has reason to believe that a child is being . . . sexually abused, as defined in subdivision 2, or has been . . . sexually abused within the preceding three years, shall immediately report the information to the local welfare agency, police department or the county sheriff if the person is: (1) a professional or professional delegate who is engaged in the practice of . . . child care . . . . (Emphasis added.)

11. Minn. Stat. § 626.556, subd. 3, regarding the definition of immediately provides:

(e) For purposes of this section, 'immediately' means as soon as possible but in no event longer than 24 hours. (Emphasis added.)

## Violations Found

12. The actions and statements of the child suggest that she was subjected to criminal sexual conduct in the fifth degree by another individual in violation of Minn. Stat. § 609.3451.

13. Ms. Fowzia Jama and Ms. Audrey Heavens are persons responsible for the child's care and therefore are mandated to report sexual abuse of the child.

14. On November 23, 2010, Ms. Fowzia Jama had reason to believe that the four-year-old child had been subjected to sexual abuse.

15. On December 8, 2010, Ms. Audrey Heavens, the Director of Licensee's Glendale Center, had reason to believe that the four-year-old child had been subjected to sexual abuse.

16. The Commissioner advanced evidence establishing reasonable cause to believe that Licensee failed to report suspected sexual abuse of a child.

17. Licensee has failed to demonstrate by a preponderance of the evidence that it was in full compliance with Minn. Stat. § 626.556, subd. 3, as alleged by the Department because Ms. Audrey Heavens did not report to a common entry point until December 17, 2010 – more than 24 hours after she had reason to believe that the child had been subjected to sexual abuse.

18. Minn. Stat. § 245A.07, subd. 3(c) , requires the Commissioner to impose fines as follows:

(4) Fines shall be assessed as follows: . . . the license holder shall forfeit \$200 for each occurrence of a violation of law or rule governing matters of health, safety, or supervision . . . . For purposes of this section, 'occurrence' means each violation identified in the commissioner's fine order.

19. Minn. Stat. § 245A.07, subd. 1, requires the Commissioner to 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 those persons in a licensee's program before applying sanctions under Minn. Stat. § 245A.07.

20. After considering: the lack of chronicity of violations of law and rule by Licensee; the nature and severity of the single violation of the law and rule on mandatory reporting of maltreatment of children; the effect of the violation on the health, safety, or rights of children in Licensee's care; the Commissioner ordered that Licensee forfeit the minimum fine required by the statute.

44. These Conclusions are reached for the reasons set forth in the Memorandum below, which is hereby incorporated by reference into these Conclusions.

45. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions, and as Findings any Conclusions that are more appropriately described as Findings.

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

### **RECOMMENDATION**

Based upon these Conclusions, the Administrative Law Judge recommends to the Commissioner of Human Services that the Order to Forfeit a Fine in the amount of \$200.00 be affirmed.

Dated: April 13, 2012

s/M. Kevin Snell  

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M. KEVIN SNELL  
Administrative Law Judge

Reported: Digitally recorded; no transcript prepared.

### **NOTICE**

This report is a recommendation, not a final decision. The Commissioner of Human Services (the Commissioner) will make the final decision after a review of the record. Under Minn. Stat. § 14.61, 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 Lucinda Jesson, Commissioner of Human Services, P.O. Box 64998, St. Paul MN 55155, (651) 431-2907 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 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. 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 imposed.

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

## **MEMORANDUM**

### **Burden of Proof**

The Department has the burden to demonstrate “reasonable cause” for determination that PICA failed to report sexual abuse of a child within the time required by the Child Abuse Reporting Act (CARA). As set forth in statute, “the [Department] may demonstrate reasonable cause for action taken by submitting statements, reports, or affidavits to substantiate the allegations that the license holder failed to comply fully with applicable law or rule.”<sup>43</sup> When such facts are shown that would support a conclusion that a violation occurred, the burden shifts to the license holder to demonstrate compliance with the applicable statute and rules. But if the Department fails to show reasonable cause, the burden does not shift, and the violation must be dismissed.

Contrary to PICA’s arguments, the Department demonstrated reasonable cause for ordering PICA to forfeit a fine because it failed to make a required report within 24 hours. The Department submitted substantial documentary and testimonial evidence that PICA had “reason to believe” on December 8, 2010 that a child had been maltreated. Due to either inaccurate or ineffective training of its staff on the requirements of CARA, PICA failed to report to a common entry point within 24 hours of having “reason to believe” that maltreatment of a child had occurred.<sup>44</sup> As described below, the applicable standard is an objective standard. It is not the subjective standard of whether or not a person responsible for a child’s care actually believes an allegation after conducting an internal investigation.

### **Arguments of the Department**

The Department correctly observes that the applicable standard under Minn. Stat. § 626.556, subd. 3 (a), “reason to believe,” is more than a mere suspicion, but less than actual knowledge and it is the Departments’ duty and responsibility for “assessing or investigating allegations of maltreatment” in licensed child care centers.<sup>45</sup> While it is desirable for licensees to conduct internal investigations for their own purposes, the statute does not permit licensees to substitute their own judgment for those determinations that the law requires that the Department make.

Second, the Department argues that licensees may not make an “independent determination” in determining whether “reason to believe” child abuse has occurred. That argument is incorrect. In making its determination of whether or not it has “reason

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<sup>43</sup> Minn. Stat. § 245A.08, subd. 3.

<sup>44</sup> Conclusions 15-17.

<sup>45</sup> Minn. Stat. § 626.556, subd. c (b).

to believe” that a child has been maltreated, the individual reporter or organizational reporter, like the Department, must make a determination based on reason, not pure speculation.<sup>46</sup> However, that reasoning and review process must occur and be completed within a 24-hour timeframe of the time that the individual or organization has obtained factual allegations that suggest a child has been maltreated. In this case, a reasonable person would conclude that the four-year-old child in question had been subjected to sexual abuse. The allegations were specific as to what the child saw and was asked to do, who the alleged perpetrator was, and where the offense occurred.

Third, the Department correctly argues that it is a licensee’s role in maltreatment matters to first report and then cooperate with the authority or authorities responsible for conducting the independent, official investigation. In this case, the evidence in the record suggests that, after reporting, PICA fully cooperated with the law enforcement and Department investigations.

Finally, the Department argues that the delay of over a week in reporting the allegations may have hindered the ability of the authorities to investigate the allegations. The Administrative Law Judge agrees. This is borne out by the inconclusive results of the Cornerhouse interviews of the four-year-old child. It is unlikely that it will become known how the child learned the explicit sexual behavior that is extremely unusual for any child that age to come up with on her own. Given the child’s family’s native cultural makeup as described in this record, it would be even more unusual for this particular child to come up with the behavior on her own.

### **Arguments of the Licensee**

PICA argues that, as the Department has acknowledged, the level of knowledge required to trigger the mandatory reporting requirements of Minn. Stat. § 626.556, subd. 3(a) is greater than the voluntary reporting elements of Minn. Stat. § 626.556, subd. 3(b). The Administrative Law Judge agrees. However, the Administrative Law Judge does not agree that the information and allegations that Ms. Heavens obtained on December 8, 2010 and Ms. Jama obtained on November 23, 2010, were mere suspicions that the child was maltreated. The Department is not arguing that section 626.556, subd. 3(b) applies in this case.<sup>47</sup>

As previously stated above, the allegations from the child were specific as to what the child saw and was asked to do, who the alleged perpetrator was, and where the offense occurred. This information is specific as to who, what, where, and how the alleged incident occurred. The only information missing is “when” the alleged acts occurred.

PICA also seems to argue that a mandated reporter must actually, personally, and subjectively believe that the allegations are true. This is a misinterpretation of the

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<sup>46</sup> Cf. *In Re Strecker*, 777 N.W.2d 41, 46 (Minn. App. 2010).

<sup>47</sup> PICA’s reliance on *Becker v. Mayo Foundation*, 2010 Minn. App. Unpub. Lexis 92 (Feb 2, 2010) is therefore misplaced.

law. The standard is not whether the mandated reporter actually believes the allegations. The standard is whether or not the mandated reporter has “reason” to believe, as discussed below. The difference is significant.

### Meaning of “Reason to Believe” Abuse Has Occurred

The reporting statute governing day care centers does not specifically define what is meant by the phrase “reason to believe” that a child has been maltreated that triggers mandatory reporting to a common entry point. It is appropriate to look for guidance offered by the Minnesota Supreme Court.

First, in *State v. Grover*, 437 N.W. 60, the Court reviewed the meaning of “reason to believe” in the context of the penalty provision of CARA, Minn. Stat. § 626.556, subd 6, which provides in applicable part:

(a) A person mandated by this section to report who knows or has reason to believe that a child is neglected or physically or sexually abused, as defined in subdivision 2, or has been neglected or physically or sexually abused within the preceding three years, and fails to report is guilty of a misdemeanor.<sup>48</sup>

The Defendant in that case argued that “reason to believe” is a term that is uncertain or susceptible of arbitrary enforcement. The Court disagreed. The Court goes on to observe that

Minnesota’s criminal code provides that “know’ requires only that the actor believes that the specified fact exists.’ (Citation omitted.) Thus, it is apparent that violation of the child abuse reporting statute entails either one of two levels of culpability: A mandated reporter who knows or believes that a child is being or has been abused but fails to report it exhibits the callousness associated with the knowing commission of a criminal act. On the other hand, neither knowing violation nor conscious disregard of substantial risk are requisite to a violation of the reporting act. **A mandated reporter who has reason to know or believe that a child is being or has been abused but fails to recognize it also violates the statute** though the actor’s culpability is merely negligent rather than purposeful, knowing or reckless.<sup>49</sup>

In addition, the Court, in discussing the acquired meaning of “reason to know” in the context of Minn. Stat. § 609.53, the court observes:

If the phrase know or have reason to know or believe is clear, definite, plain and unambiguous enough to provide a standard by which we expect [a criminal] and his ilk to govern their conduct, it seems sufficiently clear

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<sup>48</sup> *Id.* at 62.

<sup>49</sup> *Id.* (Emphasis added.) (Citations omitted.)

and definite to provide a standard for the governance of the conduct of an educator or other professional.<sup>50</sup>

In finding no merit in the defendant's argument that requiring compliance with the statute might somehow interfere with the mandatory reporter's right of free speech by compelling him to espouse a viewpoint with which he may not wish to be associated, the Court held:

Moreover, a professional is free to include in a report that although the report is mandated because the reporter has 'reason to believe' that a child has been abused, the reporter does not hold a personal belief that the child has been physically or sexually abused.<sup>51</sup>

The Administrative Law Judge concludes that "reason to believe" is an objective standard and that PICA failed to follow that standard. Whether or not any individuals at PICA actually believed that SE had committed the acts contained in the child's allegations is irrelevant when they have specific, articulable facts presented to them that would give a reasonable person reason to believe that sexual abuse of a child has occurred.

### **PICA's Policies, Training and Credibility of Witnesses**

PICA's written policy and procedure on mandatory reporting of child abuse is accurate and correct.<sup>52</sup> It sets forth the plain language of the CARA mandatory reporting requirements and provides the common entry point entities and their phone numbers. The policy also encourages, but does not require, that the reporter share the report with the PICA Center Director. In this case, that person is Ms. Audrey Heavens. It is clear from the statute and the PICA policy that the mandatory duty is to report to one the governmental authorities. It is clear on the face of the policy that reporting to PICA is optional.

In spite of these clear directives, the witnesses testifying at the trial were operating under the mistaken assumption that the mandatory duty to report was owed to the PICA center director rather than to a common entry point. The written record indicates that each of the mandated reporters were given "Employee Information" on the reporting requirements. The record does not title this information as "Training" as it does for other training topics.

Ms. Heavens testified that she personally "trains" each employee on an annual basis in the requirements before the employee signs an acknowledgement on the policy. The record in this case suggests that the annual training was either incorrect or ineffective, because the mandated reporters involved in this matter were mistaken about their legal obligation.

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<sup>50</sup> *Id.* at 64.

<sup>51</sup> *Id.* (Citation omitted.)

<sup>52</sup> With the exception of a reference to Minn. R. 9503.0035, which was repealed in 2007.

The PICA witnesses testified that they did not have “reason to believe” that the child had been abused because they never personally believed that SE had committed the act contained in the child’s allegations. The written record and the testimony of the PICA witnesses is clear that this subjective belief was held before any investigation had been conducted by anyone. This preconceived belief exhibits the flaw in their understanding of their duty. One cannot conduct an independent and unbiased investigation when the investigator has prejudged the result.

The testimony of the PICA witnesses on their understanding of the “reason to believe” standard is not credible for multiple reasons. First, in both the written records of their interviews and their answers to questions under cross-examination, the PICA witnesses at all times considered the allegations to be very serious. Second, under cross-examination, the PICA witnesses admitted that, should the allegations against SE be proven true, the child has been seriously harmed. Third, although Ms. Heavens first testified that she does not use independent judgment in determining whether or not to report an allegation, she changed her testimony upon the repeated prodding of counsel. Fourth, under cross-examination Ms. Heavens admitted that she “felt that something was going on” although she believed whatever was going on was outside of PICA. Finally, Ms. Heavens agreed, under cross examination, that as a mandated reporter she is required to report suspected abuse.

## **Conclusion**

For these reasons, the Administrative Law Judge recommends that the Order to Forfeit a Fine be affirmed.

**M. K. S.**