



ACT

Government

Education and Training

Corrs Chambers Westgarth
Solicitors

Email: [REDACTED]

Your Ref: NM/GA/CORR4394-9158663

Dear Ms [REDACTED]

Decision to Issue Administrative Letter

1. As you are aware, Authorised Officers from the ACT Regulatory Authority (the Authority), also known as Children's Education and Care Assurance, recently conducted an investigation into suspected offences at Papilio Early Learning Bruce SE-00009848 (the Service) operated by Affinity Education Group Limited PR-40001112 (the Provider).
2. The suspected offences related to inadequate supervision and staffing arrangements, failure to take reasonable precautions to protect children from harm and hazards and failure to take reasonable steps to ensure that working directly with children records were accurate, on 6 July 2020.
3. Web addresses for the *Education and Care Services National Law Act (ACT)* (the *Law*) and the *Education and Care Services National Regulations 2011* (the *Regulations*) are provided for your convenience at the end of this letter.

Background

4. On 7 July 2020, the Authority received notification from the Provider of an incident which took place in the Preschool yard at approximately 3:40pm on 6 July 2020 where a child ([REDACTED] aged 3) was face down on the tan bark with a child sitting on his head. Various documents were included with the notification and further documents were obtained as part of the Authority's initial assessment process.
5. Due to the documents provided indicating a reasonable suspicion of offences of inadequate staffing, inadequate supervision and failure to take reasonable precautions to protect children from harm and hazards, the Authority commenced an investigation into suspected offences under the *Law*.

6. Throughout the course of the investigation, the Authority obtained further evidence, including documentation and witness statements obtained under section 215 of the *Law*.
7. Such evidence suggested two allegations that supported offences under the *Law* as follows:
 - a. Allegation One was that, on 6 July 2020, the Provider failed to ensure adequate staffing at all times during which children were being educated and cared for at the Service, in contravention of section 169(1) of the *Law*, engaging further contraventions of sections 165(1) and 167(2) of the *Law*.
 - b. Allegation Two was that the Provider failed to take reasonable steps to ensure that working directly with children records on 6 July were accurate, in contravention of Regulation 177(2).
8. On 22 October 2020, the Authority issued the Provider with a Show Cause Notice (SCN). Refer Attachment A for the SCN. Due to size, attachments to the SCN have not been included with this Administrative Letter.
9. On 2 November 2020, the Provider's solicitors requested copies of statements referred to in the SCN. On 3 November 2020, the Authority provided a copy of a statement of [REDACTED] and a redacted statement of Witness B to Allegation Two.
10. On 5 November 2020, the Provider's solicitors forwarded to the Authority a response to the SCN (Response). Refer Attachment B for the Response.
11. In the Response, the Provider submitted that the SCN was misleading and defective because Witness A for Allegation Two was [REDACTED] (who was referred to by name in Allegation One). The Authority is conscious of the vulnerability of educators when giving evidence, despite the inclusion of section 297 of the *Law*, and will protect the identity of witnesses wherever possible. Given that [REDACTED] was the only educator supervising the Preschool children at the time of the incident, it was not possible to de-identify her evidence regarding Allegation One. However, it was possible to de-identify her evidence regarding Allegation Two. In any event, any possible effect on procedural fairness was removed by provision of [REDACTED] statement on 5 November 2020.
12. The Provider also submitted that Allegation Two should be withdrawn because copies of the working directly with children records obtained under section 215 were not included with the SCN. The Authority points out that a copy of the working directly with children records was included in Attachment B and the records produced to the Authority by the Provider under section 215 were exactly the same. Additionally, procedural fairness does

not require provision of a copy of documents which were themselves produced under notice by the Provider.

Allegation One – Inadequate Staffing, Supervision and Protection from Harm

13. It is alleged that, that, on 6 July 2020, the Provider failed to ensure adequate staffing at all times during which children were being educated and cared for at the Service, in contravention of section 169(1) of the *Law*, engaging further contraventions of sections 165(1) and 167(2) of the *Law*.

Allegation One – Relevant Legislation

14. Provisions of the *Law* relevant to Allegation One are:

Section 165(1) of the *Law* - Offence to inadequately supervise children

The approved provider of an education and care service must ensure that all children being educated and cared for by the service are adequately supervised at all times that the children are in the care of that service.

Penalty: \$10 000, in the case of an individual
 \$50 000, in any other case.

Section 167(1) of the *Law* - Offence relating to protection of children from harm and hazards

The approved provider of an education and care service must ensure that every reasonable precaution is taken to protect children being educated and care for by the service from harm and from any hazard likely to cause injury.

Penalty: \$10 000, in the case of an individual
 \$50 000, in any other case.

Section 169(1) of the *Law* - Offence relating to staffing arrangements

An approved provider of an education and care service must ensure that, whenever children are being educated and cared for by a service, the relevant number of educators educating and caring for the children is no less than the number prescribed for this purpose.

Penalty: \$10 000, in the case of an individual
 \$50 000, in any other case.

Regulation 123(1) –Educator to child ratios – centre-based services

The minimum number of educators required to educate and care for children at a centre-based service is to be calculated in accordance with the following ratios -

- a) For children from birth to 24 months of age – 1 educator to 4 children;

- b) For children over 24 months and less than 36 months of age – 1 educator to 5 children;
- c) For children aged 36 months of age or over (not including children over preschool age) – 1 educator to 11 children;
- d) For children over preschool age in a jurisdiction, the relevant ratio (if any) set out in Chapter 7 for that jurisdiction.

Regulation 122 –Educators must be working directly with children to be included in ratios

An educator cannot be included in calculating the educator to child ratio of a centre-based service unless the educator is working directly with children at the service.

Regulation 13 – Meaning of *working directly with children*

For the purpose of these Regulations a person is working directly with children at a given time if at that time the person –

- a) Is physically present with the children; and
- b) Is directly engaged in providing education and care to the children.

Allegation One – Evidence and Submissions

15. Evidence gathered relevant to Allegation One consisted of:
 - a. documentation produced by the Provider as part of the initial assessment process and under section 215 of the *Law*, including incident reports, working directly with children records and child attendance records;
 - b. witness statements obtained under section 215 of the *Law*.
16. A ratio analysis was carried out using working directly with children records and child attendance records, which indicated two educators (██████████ and ██████████) were signed in as working directly with Preschool children at the time of the incident. However, incident reports and an email produced by the Provider with the initial assessment and again under section 215 stated that ██████████ was in the kitchen washing dishes and that 19 children were in the group at the time of the incident.
17. That documentation also indicated that ██████████ was engaged in rubbish removal whilst being signed in as working directly with children.
18. The Provider submits that a contravention of section 169(1), being failure to ensure adequate staffing does not automatically mean that supervision is inadequate and that a provider has failed to take reasonable precautions to protect children from harm and from hazards likely to cause injury.

19. The Authority's position is that ensuring adequate staffing is a minimum requirement in order to ensure adequate supervision of children and is a reasonable precaution to protect children from harm and hazards likely to cause injury. As well as meeting minimum prescribed staffing levels, adequate supervision requires educators to be observing and engaging with children and guiding behaviour if required. In this instance, [REDACTED] may have been in a position to observe or hear the Preschool children as submitted, but that does not meet the definition of working directly with children in Regulation 13, as she is neither physically present with them, nor engaged in providing education and care.
20. The Provider also submits that the evidence does not support there being fewer than two educators working directly with 18-19 children in the Preschool room and states that the documents produced by the Provider under section 215 did not include any incident reports (referring to Attachment A to [REDACTED] Statements).
21. The Authority points out that the incident reports were produced by the Provider both as part of initial assessment and as part of the section 215 response, in the enrolment file of the child concerned. Additionally, the Authority is not restricted to only considering evidence obtained under section 215. Section 215 of the *Law* is a power to obtain relevant evidence from *specified persons* and is not always used.
22. In any event, all documents obtained under initial notification were produced again by the Provider under section 215. The Authority notes that it is an offence under section 295 of the *Law* to give false or misleading information or documents to the Authority, and proceeds on the basis that any documentation given to it by the Provider is credible.
23. The Provider further submits that there would have been other educators in the area but not signed into the Preschool room. On the documentation produced by the Provider, the only educators in Preschool outdoor play area other than [REDACTED] were [REDACTED] and another trainee, [REDACTED] who were doing the bins at the time and not working directly with children. The Provider did not produce any evidence to support that submission.
24. The Provider noted that [REDACTED] did not give evidence. As the Provider would be aware, [REDACTED] was in hospital for an extended period, and was not in a position to give evidence, despite being contacted. Given that documents produced by the Provider stated that [REDACTED] was inside washing dishes, it was determined unnecessary to obtain her evidence.
25. It is further noted that no evidence was produced by the Provider to refute the allegations.

Allegation One – Authority’s Finding

26. For the reasons outlined above, the Authority is satisfied that the following contraventions of the *Law* have been substantiated on the balance of probabilities:
- a. Failing to ensure adequate staffing at all times children were being educated and cared for by the Service on 6 July 2020, in contravention of section 169(1);
 - b. Failing to ensure adequate supervision of children being educated and cared for by the Service at all times on 6 July 2020, in contravention of section 165(1) of the *Law*; and
 - c. Failing to take reasonable precautions to protect children being educated and cared for by the Service from harm and from any hazard likely to cause injury, on 6 July 2020, in contravention of section 167(1) of the *Law*.

Allegation Two – Inaccurate Records

27. It is alleged that the Provider failed to take reasonable steps to ensure that working directly with children records on 6 July 2020 were accurate, in contravention of Regulation 177(2)

Allegation Two – Relevant Legislation

Regulation 177 – Prescribed enrolment and other documents to be kept by approved provider

- (1) For the purposes of section 175(1) of the *Law*, the following documents are prescribed in relation to each education and care service operated by the approved provider –
- (h) in the case of a centre-based service, a record of educators working directly with children as set out in regulation 151.
- (2) The approved provider of the education and care service must take reasonable steps to ensure the documents referred to in subregulation (1) are accurate.
Penalty: \$2000.

Regulation 151 – Record of educators working directly with children

The approved provider of a centre-based service must keep a record of educators working directly with children that includes the following information:

- (a) The name of each educator who works directly with children being educated and cared for by the service;
- (b) The hours that each educator works directly with children being educated and cared for by the service.

Allegation Two – Evidence and Submissions

28. Evidence relevant to Allegation Two included of working directly with children records, obtained as part of the initial assessment and again under section 215. Inaccuracies on the face of the records were noted on the Ratio Analysis attached to the SCN.
29. As well as those inaccuracies, evidence obtained indicated that educators were signed in as working directly with children when engaged in other activities. Witness evidence confirmed that educators did not sign out when engaging in other tasks, with one saying they do not sign out if they are still in the room, and one saying they do not sign out for tasks such as doing bins, laundry, vacuuming and mopping.
30. The Provider alleged a lack of procedural fairness in that the specific working directly with children records produced under section 215 were not attached to the SCN. As stated above, working directly with children records were contained in Attachment B to the SCN. The working directly with children records provided under section 215 were identical and produced by the Provider in any event.
31. The Authority is aware that educators make inadvertent errors in working directly with children records. The Provider has stated that it does not accept the evidence that educators were engaged in other tasks whilst being signed in. The Authority notes that the Provider's own documents, produced in the notification and under section 215 refer to educators being engaged in other activities at the time of the incident. As stated above, given that it is an offence to provide false or misleading information to the Authority, the Authority proceeds on the basis that information and documents from a Provider are credible.
32. The Provider had not identified inaccuracies in working directly with children records when producing them to the Authority under section 215. Given that the documents were inaccurate on their face, as well as educators being signed in as working directly with children when engaged in other activities, it was reasonable for the Provider to have been aware of this before providing them to the Authority.

Allegation Two – Authority's Finding

33. For the reasons outlined above, the Authority is satisfied that the following contravention of the *Regulations* is substantiated on the balance of probabilities:
 - a. the Provider failed to take reasonable steps to ensure that working directly with children records on 6 July 2020 were accurate, in contravention of Regulation 177(2)

Reasons

34. For the reasons outlined above, the Authority finds contraventions of sections 165(1), 167(1) and 169(1) of the *Law* and Regulation 177(2) have been substantiated. It is therefore necessary that the Authority consider what, if any, compliance action is required in order to ensure the health, safety and wellbeing of children is protected.

Obligations upon Regulatory Authority, Providers and Services

35. The starting point for the Authority is the *Law*. Section 3 of the *Law* sets out objectives and guiding principles of the *Law*. Relevant to this decision is the objective at section 3(2)(a), namely

'To ensure the safety, health and wellbeing of children attending education and care services; ...'

36. There are two relevant guiding principles at sections 3(3)(a) and (f), namely:

- (a) that the rights and best interests of the child are paramount; ...
- (f) that best practice is expected in the provision of education and care services.

37. Section 260 of the *Law* sets out the functions of the Regulatory Authority, which includes:

- (c) to monitor and enforce compliance with this Law;
- (d) to receive and investigate complaints arising under this Law.

38. The *Law* works to protect a particularly vulnerable part of our society — children — when they are in the care of people other than their parents or guardians. The *Law* authorises providers and services to participate in a regulated environment and requires those participants to comply with the *Law*.

39. A key object of the *Law* is to protect children in the context of education and care services. The Authority looks to exercise its powers to emphasise and require best practice, as the *Law* requires, which is also inherently in the best interests of children.

40. The *Law* outlines a range of statutory actions which may be taken by the Authority in response to non-compliance, for example fines or compliance notices through to suspension of your service approval and/or prosecution. Many of these options allow the Authority to publish details of non-compliance.

Decision

41. Considering the evidence, the objectives and guiding principles of the *Law*, the compliance history of the Service, and the steps taken by the Provider to ensure future compliance, the Authority has decided to issue this Letter rather than statutory compliance actions.
42. In the Response, the Provider referred on page 12 to several strategies used to ensure compliance but has not provided evidence of implementation of those strategies. Those strategies are:
 - a. Reviewed supervision charges and a lanyard system;
 - b. A process whereby room registers are checked;
 - c. A new procedure for signing out when not working directly with children;
 - d. Tree trimming to ensure visibility;
 - e. Engagement of an additional educator to support a preschool child with high needs;
 - f. Specific time allocated for cleaning;
 - g. Enforcement of expectations to [REDACTED] and Ms [REDACTED]
 - h. Further training for Ms [REDACTED] and Ms [REDACTED]
 - i. Recruitment of a Quality Advisor.
43. The Authority requires the Provider to produce evidence demonstrating the above strategies by close of business on Monday 11 January 2021. Additional time has been provided in consideration for the time of year.
44. This Letter is also to remind the Provider of its obligation to ensure minimum ratio levels are met at all times when children are being educated and cared for and that, for educators to be counted in ratio, they must be working directly with children, which requires them to be physically present with the children and directly engaged in providing education and care to those children. Meeting prescribed ratio requirements is a minimum standard required to ensure that supervision is adequate and is a reasonable precaution to protect children from harm and from hazards likely to cause injury.
45. Furthermore, this Letter is to advise the Provider that the Regulatory Authority will be monitoring more strictly how the Service is being operated, and that any further non-compliances may result in stronger enforcement measures being actioned by the Regulatory Authority.

46. The substantiated breaches of sections 165(1), 167(1), 169(1) and Regulation 177(2) have been recorded on the Service file and may be taken into account by the Authority when considering any further applications for service approvals in the ACT.

Legislation

47. The *Law* is applied in the ACT by the *Education and Care Services National Law (ACT) Act 2011* <http://www.legislation.act.gov.au/a/2011-42/default.asp>.
48. The *Law* and *Regulations* can be viewed at:
- <http://www.acecqa.gov.au/national-law>, and
 - <http://www.legislation.nsw.gov.au/#/view/regulation/2011/653>
49. If you have any questions in relation to this letter, please contact Authorised Officer Tanya Masterman on (02) 6205 2012 or by email at tanya.masterman@act.gov.au.

Yours sincerely



Clare Brookes
Senior Director
Early Childhood Policy and Regulation
ACT Education Directorate

15 December 2020