

Mr [REDACTED]
Person with Management or Control
Affinity Education Group Limited

Email: [REDACTED]

Dear [REDACTED]

Decision to Issue Administrative Action

1. As you are aware, Authorised Officers from the ACT Regulatory Authority (the Authority), also known as Children's Education and Care Assurance, recently investigated allegations raised via a complaint received by the Authority and relating to the operation of Papilio Early Learning Barton SE-00009847 (the Service) operated by Affinity Education Group Limited PR-40001112 (the Provider).
2. The complaint raised allegations of inadequate supervision and failures to protect children which resulting in an enrolled toddler child exiting the Service into a carpark unwitnessed on 22 November 2021.
3. The Authority is satisfied that the Provider has not complied with provisions of the *Education and Care Services National Law Act (ACT)* (the *Law*) in this instance. Web addresses for the *Law* and the *Regulations* are provided for your convenience at the end of this decision.

Facts

4. On 6 December 2021, the Authority received a direct complaint alleging that on 22 November 2021 a toddler child, known to be [REDACTED] (aged 2yrs), ran out of the Service's gate and into the adjoining carpark. It was further alleged that a parent returned the child to the educators.
5. Further, on 6 December 2021, a check of the ACECQA NQAITS portal revealed no such incident had been notified to the Authority by the Provider. Due to the associated risks to children who are not adequately supervised, especially within vicinity of a carpark, the Authority determined to investigate.
6. On 9 December 2021, a notice, allowable under section 215 of the *Law* (215 Notice), was issued upon the Provider. On 17 December 2021, the Provider furnished documents in compliance with the 215 Notice, with clarification of some documentation provided 20 December 2021. Refer relevant correspondence at Attachment A.

7. Documents submitted by the Provider on 17 December 2021 included:
- a) Staff records, contact details and copies of WWVP registrations;
 - b) Child attendance and educator working directly with children (WDWC) records;
 - c) Supervision and incident handling policy and procedures;
 - d) An incident report for incident occurring 22 November 2021 and involving [REDACTED] – Refer [Attachment B](#);
 - e) An emailed complaint dated 24 November 2021 raising allegations of a child running into the Services carpark, unseen by educators, and being returned by the complainant – Refer [Attachment C](#).
8. An analysis of child attendance and educator WDWC records for 22 November 2021 was undertaken by the Authority. The analysis indicated that minimum regulated ratio levels were not being always met during the day, specifically between 12:30pm and 6pm. Refer copy of analysis at [Attachment D](#).
9. On 1 February 2022, a secondary 215 Notice was issued upon the Provider. On 8 February 2022, the Provider furnished documents in compliance with the 215 Notice. Refer relevant correspondence at [Attachment E](#).
10. Documents submitted by the Provider on 8 February 2022 included:
- a) Relevant risk assessments and supervision plans in place on 22 November 2021 – refer [Attachment F](#);
 - b) Records relevant to the Provider’s management of the incident involving [REDACTED] occurring 22 November 2021. Refer Compliance response template detailing documents submitted at [Attachment G](#).

Law

11. Provisions of the *Law* relevant to the investigation are:

Section 165(1) of *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 174 of *Law* - Offence to fail to notify certain information to Regulatory Authority

(2) An approved provider must notify the Regulatory Authority of the following information in relation to an approved education and care service operated by the approved provider—

- (a) any serious incident at the approved education and care service;
- (b) any complaints alleging—
 - (i) that a serious incident has occurred or is occurring while a child was or is being educated and cared for by the approved education and care service;
 - or
 - (ii) that this *Law* has been contravened;
- (c) information in respect of any other prescribed matters.

Penalty: \$4 000, in the case of an individual
\$20 000, in any other case.

(4) A notice under subsection (2) must be in writing and be provided within the relevant prescribed time to—

- (a) the Regulatory Authority that granted the service approval for the education and care service to which the notice relates

Regulation 176(2)(a)(ii) – Time to notify certain information to Regulatory Authority

(2) For the purposes of section 174(4) of the *Law*, a notice must be provided—

- (a) in the case of a notice under section 174(2)(a)—
 - (ii) in the case of any other serious incident, within 24 hours of the incident or the time that the person becomes aware of the incident.
- (b) in case of a notice under section 174(2)(b) or a notice of a matter referred to in regulation 175(2)(b), within 24 hours of the complaint or incident.

Regulation 12(e)(i)– meaning of *serious incident*

For the purposes of the definition of serious incident in section 5(1) of the *Law*, the following is prescribed as a serious incident-

- (e) any circumstance where a child being educated and cared for by an education and care service - appears to be missing or cannot be accounted for.

Reasons

12. After carefully considering evidence gathered throughout the investigation, the Authority finds contraventions of sections 165(1), 167(1) and s174(2) and (4) of the *Law* against the Provider have been substantiated in this instance.
13. In relation to section 165 of the *Law*, the Authority is satisfied, on the balance of probabilities, that the Provider has not ensured adequate supervision at all times, which resulted in [REDACTED] being able to exit the gate and head into a carpark, unnoticed by educators. The very nature of the incident, admissions within the Provider's incident report and management of matter, and

along with findings of the analysis of ratios suspected to have not been met at the time of the incident supports the contravention being determined.

14. Furthermore, the Authority is satisfied that the Provider, by not ensuring adequate supervision of a toddler, in what is viewed by the Authority as a high-risk environment, being a carpark, has not ensured all reasonable precautions have been taken to protect children, specifically [REDACTED] in this instance, from harm and hazard likely to cause injury, engaging the substantiated offence under section 167(1) of the *Law*.
15. The indicated lack of consideration to ensuring adequate supervision around drop off and pick up points near the carpark within risk assessments, specifically the covid risk assessment – noting changes for drop off and pick up of children to occur outdoors at the gate rather than indoors further supports the offence as substantiated.
16. In relation to section 174 of the *Law*, the Authority is satisfied, on the balance of probabilities, that the Provider has failed to notify the Authority of a serious incident that occurred while a child was being educate and care for by the Service on 22 November 2021, within the regulated prescribed timeframe of 24 hours.
17. The very nature of the incident, and corroborating documentation submitted by the Provider confirming that [REDACTED] was not accounted for when exiting the gate into the carpark, supports the incident as falling within scope of the definition of a serious incident, yet was not notified to the Authority, therefore engaging an offence under sections 174(2) and (4) of the *Law*.
18. Furthermore, the Authority is satisfied that the Provider did not notify of a complaint raised 24 November 2021 via email, by the parent who did see the child run into the carpark and subsequently returned the child to educators. The email alleged a serious incident (by definition) had occurred and that the parent had serious concerns about the safety assurances for children in the environment of the carpark. The lack of notification to the Authority of the complaint engages a further offence of sections 174(2) and (4) of the *Law*.
19. The Authority also notes that it appears an incident report was not generated, or [REDACTED] father advised of the incident until 10 December 2021, details as reflected in the Incident report submitted to the Authority in response to the 215 Notice issued 9 December 2021.
20. 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 mitigate risk of a similar incident, the Authority has decided to issue this administrative action rather than statutory compliance actions.
21. In information submitted by the Provider, it is noted that the following actions were undertaken to mitigate risk of a similar incident included:
 - a) Educators were reminded of their need to ensure adequate supervision and take preventative actions by closing the gate when speaking to parents – outlined in

- submitted file note dated 25 November 2021 and signed and acknowledged by educators on 25 and 26 November 2021.
- b) The incident was discussed with the educator responsible for supervision at the gate, and supervision training/ refresher engaged.
 - c) Advice via the Incident report that facilities team contacted to enquire about a double gate being installed.
22. In relation to substantiated offences engaged by the Provider under sections 165 and 167 of the *Law*, the Authority requests the Provider to submit the following evidence to support risk mitigation actions have been undertaken:
- a) Risk assessments have been reviewed to take into consideration children being able to exit the gate into the carpark unnoticed, and what steps to mitigate this from occurring;
 - b) Responsible persons and Nominated Supervisor are aware of and understand the expectations in relation to allocation of staff to ensure that adequate supervision is maintained at all times, especially in higher risk settings; and
 - c) Outcome of enquiries with facilities team relating to a double gate being installed.
23. In relation to substantiated offences engaged by the Provider under section 174 of the *Law*, the Authority requests the Provider to:
- a) Notify the serious incident and complaint via ACECQA NQAITS portal; and
 - b) submit evidence to support future compliance with notification to the Authority of incidents and complaints, and that all staff delegated to ensure matters are reported are aware of and understand the expectations of the Provider, and of the *Law* and *Regulations*.
24. Requested information outlined in paragraphs 22 and 23 can be submitted to Assistant Director, Janine Fairburn at Janine.fairburn@act.gov.au. The Authority requests this to occur within 14 days of receipt of this decision.
25. This Decision is issued to remind the Provider, that always, staffing and supervision levels need to meet the emotional, developmental, and physiological needs of children at all times. These staffing and supervision levels may need to be adapted to be above minimum regulated ratio levels to protect children from harm and hazard likely to cause injury – both physically and psychologically.
26. This Decision will be recorded on the Service's file and may be considered in any future applications for approvals, amendments or waivers. It may also be considered in determining the action to be taken, should further breaches of the *Law* or associated *Regulations* be found.

Legislation

27. 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>.
28. 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>

29. If you have any questions in relation to this Decision, please contact Assistant Director, Janine Fairburn, by email at Janine.fairburn@act.gov.au.

Yours sincerely

A black rectangular box redacting the signature of Jo Williams.

Jo Williams
Director
Children's Education and Care Assurance
Education and Care, Regulation and Support
ACT Education Directorate

10 March 2022