

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

Email: [REDACTED]

Dear Mr [REDACTED]

Show Cause Notice – Proposed Compliance Action

1. Authorised Officers from the ACT Regulatory Authority (the Authority), also known as Children's Education and Care Assurance, have recently investigated a suspected instance of inadequate staffing and supervision leading to injury of a child on 6 July 2020 at Papilio Early Learning Bruce SE-00009848 (the Service), operated by Affinity Education Group Limited PR-40001112 (the Provider).
2. Web addresses to the *Education and Care Services National Law (ACT)* (the Law) and the *Education and Care Services National Regulations* (the Regulations) are provided for your convenience at the end of this notice.

Grounds for Show Cause Notice

3. I am considering compliance action based on suspected contraventions of the Law indicated by evidence gathered during the investigation. Potential compliance actions include but are not limited to a Compliance Notice pursuant to sections 55 or 177 of the Law respectively.
4. There are two grounds for issuing this show cause notice, being staffing and supervision, and failure to take reasonable steps to ensure prescribed records are accurate.

Facts

5. On 7 July 2020, the Authority received a notification from the Provider regarding 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. The notification stated that there were 19 children aged 3-6 years with two educators.
6. Further documents were included with the notification, including:
 - a. Risk Assessment and Management Plan;
 - b. Email from [REDACTED] parent dated 7 July 2020;
 - c. Email from educator regarding the incident;

- d. Incident Report – [REDACTED]
- e. Incident Report – [REDACTED].

Refer Attachment A for a copy of the Initial Notification documents.

- 7. Between 8 and 16 July 2020, as part of the initial assessment process, further enquiries were made to obtain prescribed records.

Refer Attachment B for a copy of email exchanges and relevant documents obtained. Documents provided in error for the wrong date are not attached.

- 8. Due to the documents in Attachments A and B supporting a reasonable suspicion of offences under the *Law*, the Authority determined to carry out an investigation.
- 9. During the course of the investigation, the Authority obtained further documents from the Provider under section 215 of the *Law*, together with witness statements, relevant excerpts of which are included in this Notice.

Allegation One – Inadequate Supervision

- 10. It is alleged 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(1) of the *Law*.

Allegation One - Relevant Legislation

The following provisions of the *Law* and *Regulations* are relevant to Allegation One:

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) and (2) –Educator to child ratio-centre – based service

(1) 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;
- (a) for children over 24 months and less than 36 months of age—1 educator to 5 children;
- (b) for children aged 36 months of age or over (not including children over preschool age)—1 educator to 11 children;
- (c) for children over preschool age, 1 educator to 15 children.

(2) If children being educated and cared for at a centre-based service are of mixed ages the minimum number of educators for the children must meet the requirements of subregulation (1) at all times.

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.

Evidence relevant to Allegation One

- 11. On 28 July 2020, a notice allowable under section 215 of the *Law* was issued to the Provider requiring production of relevant documents to the Authority by 4 August 2020. Documents were produced by the Provider within the required time.
- 12. Documents included child attendance records and working directly with children records for 6 July 2020. Ratio analysis was carried out using those records and documents in Attachments A and B, as noted within Attachment C.

Refer Attachment C – Ratio Analysis

- 13. The Ratio Analysis indicated that, at the time of the incident, the Service was inadequately staffed under the roof. Initial documentation provided indicated that, at the time of the incident, within the Preschool Room one educator was supervising 19 children. Children's

attendance records noted 18 children present in the Preschool room at the time of the incident (3:40pm). It may be the case that a child was transitioning, although the Nominated Supervisor stated in her email of 9 July 2020 8:56am (see Attachment B) that no children were doing room transitions.

- 14. ocuments provided initially, and again under section 215, recorded two educators (being) signed in as working directly with children. However, evidence (including that provided in Attachment A) indicated that they were engaged in other activities at the time of the incident, so Regulation 122 does not permit them to be included within ratio. Additionally, evidence indicates that [REDACTED] was taping up a broken glass door whilst attempting to supervise either 18 or 19 children.
- 15. Relevant excerpts of [REDACTED] statement are:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

■ [REDACTED]
[REDACTED]
[REDACTED]

■ [REDACTED]
[REDACTED]
[REDACTED]

Contraventions supported by Allegation One

16. Evidence gathered in relation to Allegation One appears to support the following contraventions of the *Law* by the Provider:
- a. Failure to ensure adequate staffing at all times children were being educated and cared for by the Service, in contravention of section 169(1);
 - b. Failure to adequately supervise children at all times children were being educated and cared for by the Service, in contravention of section 165(1); and
 - c. Failure to ensure that every reasonable precaution was taken to protect children from harm and from hazards likely to cause injury, in contravention of section 167(1).

Allegation Two – Inaccurate Prescribed Records

17. 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.

Evidence Relevant to Allegation Two

18. During the course of the investigation, working directly with children records were obtained under section 215 of the *Law*. Those records contained inaccuracies on their face as noted on Attachment C.
19. During the course of the investigation, the Authority obtained statements from witnesses. Relevant extracts from Witness A's statement are:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

20. Relevant extracts from Witness B's statement are:

- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

[REDACTED]

■ [REDACTED]

[REDACTED]

■ [REDACTED]

[REDACTED]

Contravention Supported by Allegation Two

21. The evidence obtained by the Authority supports a contravention of Regulation 177(2), in that the Provider produced working directly with children records under section 215 which were inaccurate on their face and witness evidence indicates that educators are recorded as working directly with children when engaged in other tasks such as cleaning.

Potential Compliance Actions

22. The Authority is proposing compliance action under Part 3 or Part 7 of the *Law*, should the Authority find that any or both of Allegations One and Two are substantiated on the balance of probabilities. Potential compliance actions include:
- a. Amendment of service approval under section 55 of the *Law* to impose an appropriate condition;
 - b. A Compliance Notice under section 177 of the *Law*;
 - c. Non-statutory action.

Right of response

23. The Provider has a right to respond to the allegations set out in this notice. The Provider may, within 14 days of receiving this letter, make a written submission for the Authority's consideration in deciding if a compliance action should be taken.
24. At Attachment D to this Notice is a '4 Step Guide to Responding to a Show Cause Notice' to assist in the development of the Provider's submission.
25. Please direct the Provider's written submission via email to Senior Investigator Tanya Masterman at tanya.masterman@act.gov.au or by post to:

Tanya Masterman
Senior Investigator
Children's Education and Care Assurance
GPO Box 158
CANBERRA ACT 2601

Caution

26. I am informing you that the excerpts of statements of witness taken for the purpose of the Authority's investigation are included in the interests of procedural fairness. The statements taken during the investigation are protected disclosures under section 296 of the *Law*.
27. The *Law* provides, at section 297, for the protection of persons who make protected disclosures from serious detrimental action against reprisal.
28. Please also be aware that it is an offence under section 295 of the *Law* to provide the Authority with false or misleading information or documents.

Legislation

29. The *Education and Care Services National Law Act (ACT)* (the *Law*) applies to the Provider and to any service it operates.
30. 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>.
31. 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>
32. Should you have any questions about this Show Cause Notice please contact Tanya Masterman by telephone on (02) 6205 2012 or email to tanya.masterman@act.gov.au.

Yours sincerely,



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

22 October 2020