

Ms [REDACTED]  
C/O Ms [REDACTED] - Lawyer  
Slater and Gordon Lawyers  
Email: [REDACTED]@slatergordon.com.au

Dear Ms [REDACTED]

**Decision to Propose an Enforceable Undertaking RE: [REDACTED]**

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 a complaint alleging that [REDACTED] inappropriately disciplined children at Charles Weston School – Coombs Preschool Unit SE-40005869 (the Service) operated by ACT Education Directorate PR-00006465 (the Provider) on 25 August 2020.
2. Web addresses to the *Education and Care Services National Law 2010 (ACT)* (the *National Law*) and the *Education and Care Services National Regulations* (the *National Regulations*) are provided for your convenience at the end of this decision.

**Facts**

3. On 14 October 2020, Ms [REDACTED] issued with a Show Cause Notice (the Notice) by the Authority, which advised that on 27 and 28 August 2020, the Authority received two Notifications of Incidents regarding information the Provider had received in regard to Ms [REDACTED] alleged conduct towards children. Refer Notice at Attachment A.
4. The Notifications advised that, on 25 August 2020, Ms [REDACTED] had inappropriately disciplined two children enrolled at the Service, being [REDACTED] (aged 4 years) and [REDACTED] (aged 5 years). Due to the risks posed to children when inappropriately disciplined and interacted with the Authority determined to investigate the allegation.
5. The Notice advised Ms [REDACTED] of the allegations as follows:

**Allegation One**

It is alleged that on 25 August 2020, Ms [REDACTED] inappropriately disciplined a child, known to be [REDACTED] when she aggressively shouted at [REDACTED] “I have told you four times to shut the door!”. The interaction was significant enough to make other children stop what they were doing and make [REDACTED] cry. This being an offence engaging s166(3) of the Law.

### Allegation Two

It is alleged that on 25 August 2020, Ms [REDACTED] inappropriately disciplined a child, known to be [REDACTED] when you grabbed [REDACTED] raised her voice to tell him that he wasn't to come outside without permission, and then pulled [REDACTED] up from a seated position with significant force and pulled him with her to the preschool classroom. The interaction was significant enough to have resulted in [REDACTED] being distraught and crying. This being an offence engaging s166(3) of the Law.

6. The Notice advised that potential compliance actions included an enforceable undertaking or prohibition notice. The Notice referred to and included copies of the evidence relied upon and provided Ms [REDACTED] with an opportunity to respond before any allegations substantiated or compliance action determined.
7. On 21 October 2020, the Authority was contacted by you, advising that you had been engaged and were acting on behalf of Ms [REDACTED] as her legal counsel. An extension for response to the Notice was requested until 4 November 2020 – this was accepted by the Authority.
8. On 29 October 2020, you requested full copies of witness statements for consideration. On 2 November 2020, it was agreed that redacted copies of statements would be provided to Ms [REDACTED] in the interests of procedural fairness.
9. Between 3 November 2020 and 17 November 2020, further correspondence was had between yourself and the Authority, resulting in redacted versions of statements identifying witness interactions in events, and an extension for response to the Notice being afforded until 25 November 2020.
10. On 25 November 2020, a response to the Notice was submitted to the Authority, with error clarification being provided on 26 November 2020. Refer response at [Attachment B](#).

### Law

11. Relevant Legislative Provisions engaged by the Notice and this Decision are as follows:

#### **Section 166(3) of the Law - Offence to use inappropriate discipline**

An educator of an education and care service must ensure that no child being educated and cared for by the service is subjected to—

- (b) any discipline that is unreasonable in the circumstances.

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

\$50 000, in any other case.

#### **Section 184 - Deciding whether to give prohibition notice**

- (1) If the Regulatory Authority gives a show cause notice under section 183 to a person, the Regulatory Authority must have regard to any written submission received from the person within the time stated in the show cause notice before deciding whether to give the person a prohibition notice.

- (2) If the Regulatory Authority decides not to issue a prohibition notice to the person, the Regulatory Authority must give the person notice of the decision.
- (3) The Regulatory Authority may accept an undertaking from a person under section 179A instead of giving a prohibition notice under this Division.

#### **Section 179A - Enforceable undertakings**

- (1) This section applies—
  - (a) if a person has contravened, or if the Regulatory Authority alleges a person has contravened, a provision of this Law; or
  - (b) **in the circumstances set out in section 27(a), 72(a) or 184(3).**
- (2) If subsection (1)(a) applies, the Regulatory Authority may accept a written undertaking from the person, under which the person undertakes to take certain actions, or refrain from taking certain actions, to comply with this Law.
- (3) If subsection (1)(b) applies in relation to the approved provider of an education and care service, the Regulatory Authority may accept a written undertaking from the approved provider, under which the approved provider undertakes to take certain actions, or refrain from taking certain actions in relation to the education and care service.
- (4) If subsection (1)(b) applies in relation to a person other than the approved provider of an education and care service, the Regulatory Authority may accept a written undertaking from the person, under which the person undertakes to take certain actions, or refrain from taking certain actions in relation to an education and care service.
- (5) A person may, with the consent of the Regulatory Authority, withdraw or amend an undertaking.
- (6) The Regulatory Authority may withdraw its acceptance of the undertaking at any time and the undertaking ceases to be in force on that withdrawal.
- (7) The Regulatory Authority may publish on the Regulatory Authority's website an undertaking accepted under this section.

#### **Decision and Reasons**

12. The Authority has considered the Response, which raised the following points:

- a) Ms ████████ denies the allegation.
- b) Ms ████████ says in relation to both allegations:
  - i. The allegations are misconceived, in that the facts as asserted, even if proved, are incapable of constituting an “offence” under section 166(3) of the ACT Law or under any other section of the ACT Law;
  - ii. She has been denied procedural fairness; and
  - iii. In any event, the evidence does not support a finding that either of the allegations is proved;
  - iv. Ms ████████ therefore asks that both allegations be dismissed.

13. I do not agree that Ms [REDACTED] has been denied procedural fairness. Ms [REDACTED] was made aware of allegations and provided with the redacted statements of the witnesses. It is reasonable to state that Ms [REDACTED] would have known who was present on the day that the allegations relate to and Ms [REDACTED] was invited to make representations about the other educators' knowledge and experience or motivations. The Authority further notes that substantial additional time for response to the Notice was provided to Ms [REDACTED]
14. Although Ms [REDACTED] denies the allegations of inappropriate discipline, she confirms that the incidents did take place. In relation to the first Allegation, involving [REDACTED], Ms [REDACTED] states that she had asked [REDACTED] to stop pushing the door, but she had continued to do so, at which point she spoke to [REDACTED] in a firm tone before stating "stop it" or "leave it alone". This action obviously drew the attention of another educator who asked [REDACTED] to come to her.
15. Although there are minor inconsistencies between the accounts of witness A and witness B, their accounts are substantially corroborative, both recalling that [REDACTED] was at the bathroom door and that Ms [REDACTED] shouted at her to stop her from either opening or closing the door.
16. In relation to Allegation 2 involving [REDACTED], Ms [REDACTED] states that in a firm tone told [REDACTED] "You are not in the right place at the right time and you haven't asked to be outside". Ms [REDACTED] then asked [REDACTED] to go inside, but he did not comply. Miss [REDACTED] then describes using a caring C hold to escort [REDACTED] back to the classroom guiding him by his elbow. She recalled [REDACTED] stating "leave me alone" or words to that effect. She also states that she was holding [REDACTED] hand and he was walking behind her, he was upset but came willingly. These actions came to the attention of another educator. Ms [REDACTED] stated that she was using agreed management strategies to address [REDACTED] behavioural challenges, but no evidence was provided to support this statement.
17. In relation to Ms [REDACTED] actions on 25 August 2020, I consider that on the balance of probabilities, there is sufficient corroborative evidence from witnesses that Ms [REDACTED] conduct towards [REDACTED] and [REDACTED] constituted inappropriate discipline, which is an offence under section 166(3) the *Law*. "Discipline" being any strategy employed by an educator with the intention of changing a child's behaviour. Discipline that is inappropriate and/or unreasonable within the meaning of the *Law* includes any form of physical punishment or any behaviour management strategy likely to cause emotional or physical harm to a child, such as yelling, using threatening or humiliating language, isolating, or shaming children, it also includes the use of unnecessary force to redirect children.
18. Considering the entirety of the evidence and submissions, the Authority has determined that the most appropriate course of action is to offer an enforceable undertaking under

section 179A of the *Law*. The proposed enforceable undertaking is attached and marked Attachment C.

19. The proposed enforceable undertaking is carefully formulated to providing Ms [REDACTED] with an opportunity to undergo appropriate training to improve her level of understanding and ability in guiding young children's behaviour. If Ms [REDACTED] declines to sign the enforceable undertaking the Authority will consider alternative enforcement action, including but not limited to the issue of a prohibition notice pursuant to section 182 of the *Law*.
20. If the Enforceable Undertaking is accepted, failure to comply with any of its terms allows the Authority to apply to the relevant tribunal or court for an order under section 181(2) of the *Law* to enforce the undertaking. It is also open to the Authority to withdraw its consent to the Enforceable Undertaking at any time.
21. To accept the undertaking Ms [REDACTED] must sign for the "Person" on Attachment C and return to Authorised Officer Janine Fairburn by close of business 5 January 2021. The undertaking may be returned via email at [janine.fairburn@act.gov.au](mailto:janine.fairburn@act.gov.au) or by post to:

Children's Education and Care Assurance  
Attn: Janine Fairburn  
GPO Box 158, CANBERRA ACT 2601

22. If Ms [REDACTED] elects to return the signed undertaking by post, please advise by email as the Authority has been experiencing some substantial delays in receipt of mail. A countersigned copy will be returned for your records.
23. Please note that if Ms [REDACTED] agrees to enter the enforceable undertaking, it is essential that she sign and return the undertaking within the required time frame. If the signed undertaking is not received within the required timeframe, the Authority may review its decision.

### **Legislation**

24. The *National Law* applies to you as an educator employed within the early education and care sector.
25. The *National 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>.
26. The *National Law* and *National Regulations* can be viewed at:  
<http://www.acecqa.gov.au/national-law,and>  
<http://www.legislation.nsw.gov.au/#/view/regulation/2011/653>

27. If you have any questions in relation to this letter, please contact Authorised Officer Janine Fairburn by email at [janine.fairburn@act.gov.au](mailto:janine.fairburn@act.gov.au).

Yours Sincerely



Clare Brookes  
Senior Director  
Children's Education and Care Assurance  
Early Childhood Policy and Regulation  
ACT Education Directorate

21 December 2020