



Ms [REDACTED]
RE: Papilio Early Learning Barton

Email: [REDACTED]

Dear Ms [REDACTED]

DECISION TO ISSUE PROHIBITION NOTICE – NOMINATED SUPERVISOR ONLY

1. As a delegate of the ACT Regulatory Authority (the Authority), also known as Children’s Education and Care Assurance (CECA), I am satisfied that there may be an unacceptable risk of harm to a child or children if you were allowed to act as a Nominated Supervisor in an education and care setting.
2. The Authority has investigated allegations which engages suspected offences at Papilio Early Learning Barton SE-00009874 (the Service) operated by Affinity Education Group Limited PR-400001112 (the Provider).
3. Web addresses to the *Education and Care Services National Law Act (ACT)* (the *Law*) and the *Education and Care Services National Regulations* (the *Regulations*) are provided for your convenience at the end of this Decision.

Facts

4. On 28 August 2023, the Authority received a complaint alleging that a staff member was intoxicated while working with children at Papilio Early Learning Barton on 28 August 2023. Refer [Attachment A](#).
5. Due to the risk of harms and hazards likely to cause injury if children are being educated and cared for by educators who are under the influence of drugs or alcohol, the Authority determined to investigate the matter.
6. At the time that the incident occurred you were Nominated Supervisor at Papilio Early Learning Barton. A nominated consent form shows that you had commenced this role from 14 April 2023.
7. On 24 January 2024, the Authority issued you with a Show Cause Notice (the Notice). The Notice included evidence being relied on by the Authority for decision making and advice as to proposed compliance actions being considered if the allegation, and engaged offence under the *Law*, were substantiated. Refer [Attachment B](#) for a copy of the Notice (minus attachments).
8. The allegation put to you in the Notice was as follows:

Allegation

On 28 August 2023, you, as the Nominated Supervisor, failed to ensure that every reasonable precaution was taken to ensure that children being educated and cared for by the service were free from harm or any hazard likely to cause injury by allowing educator, [REDACTED] [REDACTED] to work directly with children while intoxicated by alcohol, engaging a contravention of section 167(2) of the *Law*.

9. As of the date of this letter, we have not received a response to the Show Cause Notice issued to you.

Law

10. The evidence obtained during the Authority's enquiries into the matter, and as provided to you via the Notice, engages the following sections of the *Law*:

Section 167(2) of the *Law* - Offence relating to protection of children from harm and hazards

A Nominated Supervisor 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

Section 182 of the *Law* – Grounds for issuing prohibition notice

- (1) The Regulatory Authority may give a prohibition notice to a person who is in any way involved in the provision of an education and care service if it considers that there may be an unacceptable risk of harm to a child or children if the person were allowed-
 - (a) To remain on the education the education and care service premises; or
 - (b) To provide education and care to children.
- (2) For the purpose of subsection (1), a person may be involved in the provision of an approved education and care service as any of the following-
 - (a) An approved provider;
 - (b) A nominated supervisor;
 - (c) An educator;
 - (d) A family day care educator;
 - (e) An employee;
 - (f) A contractor;
 - (g) a volunteer;
 - (h) a person who was formerly a person referred to in paragraphs (a) to (g) in relation to the approved education and care service -

or in any other capacity

- (3) The Regulatory Authority may give a prohibition notice to a person to—
- (a) prohibit the person from being nominated as a nominated supervisor if the Regulatory Authority considers the person is not a fit and proper person to be nominated as a nominated supervisor of a service; or
 - (b) impose one or more conditions on the nomination of the person as a nominated supervisor that the Regulatory Authority considers appropriate, if the Regulatory Authority considers the person is a fit and proper person to be nominated as a nominated supervisor of a service subject to those conditions.

Section 183 of the Law – Show cause notice to be given before prohibition notice

- (1) Before giving a person a prohibition notice, the Regulatory Authority must give the person a notice (a *show cause notice*) –
- (a) stating that the Regulatory Authority proposes to give the person a prohibition notice; and
 - (b) stating the reasons for the proposed prohibition; and
 - (c) inviting the person to make a written submission to the Regulatory Authority, within a stated time of at least 14 days, about the proposed prohibition.
- (2) Subsection (1) does not apply if the Regulatory Authority is satisfied it is necessary, in the interests of the safety, health or wellbeing of a child or children, to immediately issue a prohibition notice to the person.

Fitness and Propriety as Nominated Supervisor

11. *Regulation* 117C provides some guidance on minimum requirements for a nominated supervisor, being that they must:
- a. be over 18 years of age;
 - b. have adequate knowledge and understanding of the provision of education and care to children; and
 - c. have the ability to effectively supervise and manage an education and care service.
12. The concept of fitness and propriety is not fixed. It is dependent on context and requirements of the particular position and may change over time to meet social and political expectations. At minimum, fitness and propriety includes honesty, knowledge, and ability.
13. Nominated supervisors have extensive responsibilities under the *Law*, relating to the broad areas of supervision, staffing, protection of children from harm and hazards, and educational programs, with specific obligations contained in both the *Law* and the *Regulations*.

14. Accordingly, to be a fit and proper person to be appointed as nominated supervisor, the person must be honest, have a deep knowledge and understanding of the National Quality Framework (including compliance responsibilities).
15. The nominated supervisor must also possess the ability to manage educators and any other staff, service premises, relationships with families and respond to children with medical and/or behavioural needs.
16. During the investigation, there is evidence identifying that you failed to ensure every reasonable precaution is taken to ensure children are protected from harm and any hazard, likely to cause injury by allowing an intoxicated person to work directly with children.
17. This evidence substantiates, on the balance of probabilities that you do not have the ability to manage and supervise an education and care service.

Obligations upon Regulatory Authority

18. 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; ...’
19. The relevant guiding principle at sections 3(3)(a) namely:
 - a.) that the rights and best interests of the child is paramount; . . .
20. 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.
21. 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*.
22. 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.
23. The *Law* is predominantly a protective law and the exercise of powers in this type of regulatory context is recognised by Courts as not being punitive. In the case of *New South Wales Bar Association v Evatt* [\[1968\] HCA 20](#) the High Court set out in clear terms that action to enforce professional standards is protective.

Reasons

24. Having considered all available evidence and the likelihood of risk to children, the Authority is satisfied that there may be an unacceptable risk of harm to a child or children if you were allowed to provide education and care to children in the capacity of Nominated Supervisor.
25. The Authority is satisfied, and supported by witness accounts outlining your actions when advised that an educator was unconscious, and likely intoxicated in a bathroom on 28 August 2023, as nominated supervisor you did not take all reasonable precautions to protect children, in contravention of section 167(2) of the Law.
26. Evidence was provided that supported you left the Service with the knowledge that one of the educators was in an unwell and concerning condition. Rather than attend to the matter and provide leadership to the remaining staff until medical attention could be ascertained at the very least, raises concerns as to your ability to manage the day-to-day operations of an education and care service. Furthermore, it is highly concerning that rather than remain at the service, you chose to leave without checking in on the situation and leave a trainee unsupervised with infants.
27. A Nominated Supervisor's obligation under section 167(2) of the Law is positively and strongly framed— a nominated supervisor must ensure that all reasonable precautions are taken to protect children from harm and hazard likely to cause injury.
28. A reasonable precaution to take to protect children from harm likely to cause injury in compliance with s167 of the Law is ensuring that educators are not under the influence when working with children, along with regular monitoring and mentoring of educator practice. Furthermore a clear understanding and awareness of expectations set out in policy and procedure and ensuring that these are being implemented within a service would be a reasonable precaution.
29. People and entities that choose to participate in regulated activities have a legal responsibility and an obligation to accept the consequences of that responsibility. In this case, as a Nominated Supervisor, you chose and consented to participating in the education and care of children and have a responsibility to comply with the standard of care under the Law.
30. I am satisfied that on the balance of probabilities, there is reasonable, reliable, and credible evidence to substantiate the allegation, which further supports my determination that there may be an unacceptable risk of harm to a child or children if you are allowed to be a Nominated Supervisor in the provision of education and care.
31. Considering the evidence and information available, and the objectives and guiding principles of the Law, the Authority has decided to issue you a Prohibition Notice, pursuant to sections 182 and 183(3) of the Law, to come into effect on the date of this Decision.

32. This notice prohibits you from working as a Nominated Supervisor in an education and care service. Please refer a copy of the Prohibition Notice at Attachment C.
33. The Authority may consider a cancellation of the Prohibition Notice in the future based on an application that provides information as set out in Section 186 of the *Law* and *Regulation* 189.
34. Section 186 of the *Law* permits a person for whom the prohibition notice is in force to apply to the Regulatory Authority to cancel the notice.

Section 186 of the Law - Cancellation of prohibition notice

- (1) If the Regulatory Authority is satisfied there is not a sufficient reason for a prohibition notice to remain in force for a person, the regulatory Authority must cancel the prohibition notice and give the person notice of the cancellation.
- (2) A person may for whom a prohibition notice is in force may apply to the Regulatory Authority to cancel the notice.
- (3) The applicant must-
 - (a) be in writing; and
 - (b) include the prescribed information; and
 - (c) be signed by the person.
- (4) The person may state in the application anything the person considers relevant to the Regulatory Authority's decision about whether there would be an unacceptable risk of harm to children if the person were-
 - (a) To remain at the education and care service premises; or
 - (b) To provide education and care to the children.
- (5) The application may include a statement setting out any changes in the person's circumstances since the prohibition notice was given or since any previous application under this section that would warrant the cancellation of the notice.

Regulation 189 Application to cancel prohibition notice

For the purpose of section 186(3) (b) of the *Law*, the following information is prescribed-

- (a) the applicant's name;
- (b) contact details for the applicant, including an address for service of the decision;
- (c) a statement setting out the grounds for the application to cancel the prohibition notice.

Note- Section 186(4) and (5) of the *Law* set out additional statements that may be included in the application

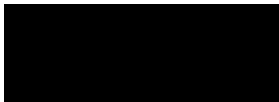
Review rights

35. In accordance with section 192 of the *Law* a decision to give prohibition notice is a reviewable decision for external review. A person who is the subject of a reviewable decision for an external review may apply to the relevant tribunal or court for a review of the

decision. For the ACT this is the ACT Civil and Administrative Tribunal. Such application must be made within 30 days after the day on which you receive the prohibition notice.

36. The *Law* applies to you when working in any capacity within the children's education and care sector. 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>
37. The *Law* and *Regulations* may be viewed at: <http://www.acecqa.gov.au/national-law>, and <http://www.legislation.nsw.gov.au/#/view/regulation/2011/653>
38. Should you have any questions about this Prohibition Notice please contact Authorised Officer, Nicole Withers via email at nicole.withers@act.gov.au.

Yours Sincerely



Jo Williams
Director – Regulatory Operations
Education and Care Regulation and Support

1 May 2024