

Ms [REDACTED]
Nominated Supervisor
Affinity Education Group Limited
RE: Papilio Early Learning Yarralumla

Email: [REDACTED]

Dear Ms [REDACTED]

Decision to Issue Caution Letter

1. I am a delegate of the ACT Regulatory Authority (the Authority), also known as Children's Education and Care Assurance. The Authority is the regulator of education and care services in the ACT and has the responsibility of monitoring and enforcing compliance with the *Education and Care Services National Law (ACT) (the Law)*, together with receiving and investigating complaints arising under the *Law*.
2. As you are aware, the Authority has recently investigated matters regarding Papilio Early Learning Yarralumla SE-00009805 (the Service), operated by Affinity Education Group Limited, PR-40001112 (the Provider), which engaged suspected offences being contravened.
3. The Authority is satisfied that you as the Nominated Supervisor was not complying with the provisions of the *Law* in respect to this matter. Web addresses to the *Law* and associated *Regulations* are provided for your convenience at the end of this Decision.

Facts

4. On 21 November 2022, the Authority sent you, as the Nominated Supervisor, a Show Cause Notice (the Notice) advising that the Authority had determined there was sufficient evidence to support a case to answer for the Nominated Supervisor regarding suspected offences under the *Law*.
5. The Notice outlined the grounds for issue, relevant evidence supporting suspected contraventions of *Law*, and potential compliance actions being considered if allegations were substantiated. Refer copy of Notice (minus attachments due to size, noting they can be produced on request) at Attachment A.
6. The Notice advised that evidence obtained during the investigation supported allegations of offences under the *Law* as follows:

Allegation One – Sections 165(2) and 167(2) of Law

It is alleged that, on multiple occasions between 29 November 2021 to 21 December 2021, you, as Nominated Supervisor, did not ensure that all children being educated and cared for by the service were adequately supervised at all times that the children were in the care of that service., in contravention of section 165(2) of the *Law*, engaging a further contravention of 167(2) of the *Law*.

Allegation Two – Section 169(3) of Law

It is alleged that, on multiple occasions between 29 November 2021 to 21 December 2021, you as Nominated Supervisor, by not meeting minimum regulated ratio requirements as outlined in *Regulation 123*, has not ensured that adequate staffing arrangements were in place at all times that children were being educated and cared for at the Service, in contravention of section 169(3) of the *Law*.

Allegation Three – Section 167(2) of Law

It is alleged that, on multiple occasions between 29 November 2021 to 21 December 2021, you as Nominated Supervisor, by not ensuring appropriate supports were in place to guide children’s behaviour, did not take every reasonable precaution to protect children being educated and cared for by the service from harm and from any hazard likely to cause injury, in contravention of section 167(2) of the *Law*.

7. On 13 January 2023, it was established that you had not received the Notice due to being on leave and not having access to your emails. As such, a response to the Notice was communicated to you as being expected from you within 14 days from 13 January 2023, being by COB Friday 27 January 2023.
8. On 27 January 2023, you submitted a response with identified attachments of Evidence 1 through 7. Refer copy Response (minus attachments due to size, noting they can be produced on request) at Attachment B

Law

9. Provisions of the *Law* relevant to the investigation engaged the following:

Legislation Relevant to Allegation One and Two

Section 165(2) of the *Law* - Offence to inadequately supervise children

A nominated supervisor 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(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
\$50 000, in any other case.

Section 169(3) of the Law - Offence relating to adequate staffing arrangements

A nominated supervisor of an education and care service must ensure that, whenever children are being educated and cared for by the 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.

Legislation Relevant to Allegation Three

Section 167(2) 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.

Obligations upon Regulatory Authority, Providers and Services

10. The foundation for the Authority's obligations is the *Law*. Section 3 of the *Law* sets out objectives and guiding principles. 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"*.
11. The guiding principles of the National Quality Framework at sections 3(3)(a) and (f) of the *Law* have particular application in this instance, being:
 - (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.*
12. 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.*
13. The *Law* works to protect a particularly vulnerable group in 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*.
14. A key objective 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.
15. The *Law* is predominantly a protective law and the exercise of disciplinary powers in this type of regulatory context is recognised by Courts as not being punitive: *New South Wales Bar Association v Evatt* (1968) 117 CLR 177.

Reasons and Decision

16. The Authority has considered all the information gathered via the investigation, inclusive of your response to the Notice, and is satisfied that, on balance of probabilities, the

allegations of contravention of *Law* are substantiated on the balance of probabilities as specified:

- a. Allegation One – section 165(2) and 167(2) of the *Law* **substantiated**.
 - b. Allegation Two – section 169(3) of the *Law* **substantiated**.
 - c. Allegation Three – section 167(2) of the *Law* **substantiated**.
17. The Authority noted that in your response to the Notice, you admitted to the allegations as detailed, and provided context to certain circumstances that you believe had contributed to the non-compliances occurring.
 18. Regarding Allegations One, Two and Three, a nominated supervisor's obligations under sections 165, 167 and 169 of the *Law* is positively and strongly framed – the nominated supervisor must ensure that adequate supervision and meeting minimum regulated ratio levels are the minimum threshold that must be met to ensure compliance and are viewed as reasonable precautions to be taken to protect children from harm and hazard likely to cause injury or illness.
 19. Furthermore, staffing and supervision levels need to meet the emotional, developmental, and physiological needs of children and educators alike. 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.
 20. Regarding the concerns raised relating to your fitness and propriety as a nominated supervisor, the Authority is satisfied that evidence submitted mitigates these concerns.
 21. Considering the evidence obtained, the level of seriousness of the contraventions, and the mitigating circumstances raised in your response surrounding the environment at the time of the allegations, I have decided that that issuing you a Caution is appropriate and in the best interests of children in making this decision.
 22. This Decision serves a reminder to you as a nominated supervisor of your obligations under the *Law* to ensure that always, staffing and supervision levels need to meet the emotional, developmental, and physiological needs of children at all times.
 23. In addition, this is a reminder that as a Nominated Supervisor, it is imperative to ensure that educators, at all times, are aware of and understand the policies, procedures and expectations of yourself and the Provider in relation to the operation of the Service, and in their roles of educating and caring for children.
 24. Details of this decision will be recorded and may be considered should any further similar non-compliances be identified moving forward regarding your role as a Nominated Supervisor.

Legislation

25. The Education and Care Services National Law applies to you as a Nominated Supervisor and any service you are employed with. 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 is made up of an Act and Regulations which can be viewed at:
 - <http://www.acecqa.gov.au/national-law>, and
 - <http://www.legislation.nsw.gov.au/#/view/regulation/2011/653>
27. Should you have any questions about this Decision please contact Assistant Director Janine Fairburn via email at janine.fairburn@act.gov.au.

Yours Sincerely



Jo Williams
Director Children's Education and Care Assurance
Education and Care Regulation and Support
24 February 2023