



[REDACTED]

Person with Management and Control

BMA Belconnen Pty Ltd ATF BMA Belconnen Unit Trust

RE: Bright Minds Academy Belconnen

Email: [REDACTED]

Dear [REDACTED]

Decision to Issue Compliance Notice

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 suspected offences at Bright Minds Academy Belconnen SE-40012576 (the Service), operated by BMC Belconnen Pty Ltd ATF BMA Belconnen Unit Trust PR-40013290 (the Provider), which engaged suspected offences being contravened.
3. The Regulatory Authority is satisfied that the Provider 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 12 April 2022, the Authority sent the Provider a Show Cause Notice (the Notice) advising the Provider that the Authority had determined that there was sufficient evidence to support a case to answer for the Provider 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:

First Set of Grounds – Educator-Child Interactions

Allegation One – Inappropriate Discipline and Harms

It is alleged that, at approximately 8:35am on 10 November 2021, the Provider failed to ensure that no child being educated and cared for was subjected to discipline that was unreasonable in the circumstances, in that [REDACTED] yelled at [REDACTED] and shut him in the bathroom, in response to aggressive behaviour, including lashing out physically at another child, in contravention of section 166(1) of the *Law*, engaging an additional offence under section 167(1) of the *Law*.

Second Set of Grounds – Supervision and Protection from Harm

Allegation Two – Sections 165, 167 of the Law

It is alleged that, during November 2021, the Provider has failed to ensure adequate inclusion support capacity in Adventurers and Explorers rooms. Resulting in failure to ensure adequate supervision of all children being educated and cared for, in contravention of section 165(1) of the *Law* and failure to take every reasonable precaution to protect children from harm and from hazards likely to cause injury, in contravention of section 167(1) of the *Law*.

Third Set of Grounds – Notification Requirements

Allegation Three – Failure to Notify

It is alleged that the Provider failed to notify the Regulatory Authority that [REDACTED] had ceased to be employed or engaged by the Service within the prescribed time of seven days, in contravention of section 173(2)(b) of the *Law*.

7. On 3 May 2022, the Provider submitted to the Authority, via multiple emails, a response to the Notice with attached supportive evidence. Refer a copy of the response (minus attachments due to size, noting they can be produced again on request) at Attachment B.
8. Evidence submitted by the Provider as part of the Response included:
 - a) Copy of new employee orientation and orientation template;
 - b) [REDACTED] induction records and Record of conversation for 10 November 2021;
 - c) BeYou email, Seek Ad history, Randstad Invoices and copies of 8x texts relating to staffing absences and arrangements;
 - d) Evidence of Inclusion Support requests, approvals and emails;
 - e) Request for educators email;
 - f) October 2021 and February 2022 budget record samples;
 - g) Resources spreadsheet, reimbursement form template, resources email;

- h) Training and Development policy, training calendar template and emails relating to training/training approval;
- i) Area Manager Seek Ad, ██████'s Position Description and Area Manager Daily Visit Checklist; and
- j) Notifications reference Guide

Law

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

Legislation Relevant to Allegation One

Section 166(1) of the *Law* – Offence to use inappropriate discipline

The approved provider of an education and care service must ensure that no child being educated and cared for by the service is subjected to-

- (a) Any form of corporal punishment; or
- (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 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

Legislation Relevant to Allegation Two

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, and the 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.

Legislation Relevant to Allegation Three

Section 173(2)(b) of the Law – Offence to fail to notify certain circumstances to Regulatory Authority

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

- (b) if a nominated supervisor of an approved education and care service -
 - (i) ceases to be employed or engaged by the service; or
 - (ii) is removed from the role of nominated supervisor; or
 - (iii) withdraws consent to the nomination.

Penalty: \$4000, in the case of an individual.
\$20 000, in any other case.

(4) A notice under subsection (1) or (2) must –

- (a) be in writing; and
- (b) include any prescribed information.

(5) A notice under subsection (2) must be provided within the relevant prescribed time to the Regulatory Authority that granted the service approval for the education and care service to which the notice relates.

Regulation 174 – Time to notify certain circumstances to Regulatory Authority

- (2) For the purpose of section 173(5) of the Law, a notice must be provided:
 - (b) in any other case, within 7 days of the relevant event or within 7 days of the approved provider becoming aware of the relevant event.

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 supplied by the Provider, inclusive of the response to the Notice, and is satisfied that, on balance of probabilities, all allegations are substantiated, being in contravention of sections 166(1), 165(1), 167(1) and 173(2)(b) of the *Law*.
17. In relation to substantiated contraventions of section 166 of the *Law*, the Authority is satisfied that:
 - a. On 10 November 2021, an enrolled child at the Service, known to be [REDACTED], was yelled at and isolated by an educator in response to aggressive behaviour, including lashing out physically at another child. The educator made admissions to this occurring, therefore supporting the offence under the *Law*. It is noted that, in the Response, the Provider stated that [REDACTED] was not shut in the bathroom, as he could access the outside area via the external bathroom door, but he was prevented from entering the room;
 - b. Furthermore, the Provider has stated in their response that they accept that [REDACTED] was inappropriately disciplined on 10 November 2021, however, the Authority notes that the Provider has denied liability under the *Law* for the offence due to:
 - i. Provider's Induction Process
 - ii. Performance management of educator
 - iii. Registration with BeYou to provide resources to the Nominated Supervisor to give to staff on management strategies and educator wellbeing
 - iv. Advised the Nominated Supervisor to employ staff using inclusion support funding received in October 2021 and advertised for positions to meet needs
18. Unreasonable discipline includes physical punishment or any behaviour management strategy likely to cause physical and/or psychological harm to a child. Smacking, pulling,

yelling and threatening a child are the most common forms of conduct viewed as inappropriate discipline.

19. However, inappropriate discipline can be more subtle and include other forms of physical or psychological forms of coercion. Rough handling of children is a disciplinary issue when it is in a context that is intended to shape a child's behaviour. Likewise, harmful physical or psychological techniques to shape children's responses are also inappropriate discipline, including certain forms of restrictive practice.
20. It should be noted that confining a child to a room or area in these circumstances also constitutes a restrictive practice under section 7 of the *Senior Practitioner's Act 2018*.
21. The obligations on a provider regarding inappropriate discipline are positive and strict, as indicated by the words "must ensure", rather than a requirement to take reasonable steps or precautions to ensure.
22. In relation to allegation two, the Authority is satisfied that, during November 2021, the Provider failed to ensure adequate inclusion support capacity in Adventurers and Explorers rooms. This resulted in a failure to ensure adequate supervision of all children being educated and cared for, in contravention of section 165(1). This also forms the basis of a failure to take every reasonable precaution to protect children from harm and from hazards likely to cause injury, in contravention of section 167(1).
23. It is noted that in the Response, the Provider denied the offence and submitted that:
 - a. The payroll budget allowed for minimum ratio, two float educators as well as inclusion support educators. The Authority notes that float educators are required for break covers (two may not be sufficient for that), and the budget provided was for October, not November, which is the relevant period;
 - b. The Provider paid above award wages to retain staff and were consistently advertising for new staff. The Authority notes that paying above award wages is commonplace in Canberra, due to workforce and economic factors;
 - c. It was the Nominated Supervisor's responsibility to organise team members. The Authority notes that, although the Nominated Supervisor does have responsibility for ensuring staffing and supervision are adequate, it also is the Provider's legal responsibility which cannot be abrogated;
 - d. The Provider encouraged access to inclusion support programs;
 - e. It was identified in June 2021 that the Service required assistance with inclusion support and the Area Manager and Operations Manager assisted staff to apply for funding. The Authority notes that, whilst it is a positive step to make arrangements to access support funding for eligible children, those children must be adequately supported in the meantime, whilst funding is awaited. Information submitted by the Provider showed twelve children as requiring inclusion support. In ██████'s

case, the support plan submitted was minimal in detail of strategies to avoid initial escalation as well as effective response strategies;

- f. The Provider did not request educators to spend their own funds on resources and a reimbursement form was submitted. The provider pointed to a resource budget of \$1000-\$2000 for each quarter and \$115,000 had been spent on resources, incursions and supplies. The Authority notes that much of this was due to set-up costs. The Provider states there were no unmet requests for resources prior to December 2021. The Authority notes that all witnesses interviewed gave evidence under section 215 that the Service was under-resourced, and they had to provide their own resources for children's experiences, one of them having spent significant funds. It is further noted that, after being advised of this, the Provider instructed in April 2022 that any exiting educators were not to take any resources with them, with no exception for resources purchased by educators;
 - g. The Provider states it was the Nominated Supervisor's responsibility to arrange training and development for educators in accordance with the policy submitted with the Response. The Provider writes that training requests were approved with evidence submitted regarding child protection. The Authority is aware that COVID-19 affected face-to-face training, but online options were available;
 - h. The Provider submits that daily support was provided remotely by the Area Manager and Operations Manager and that the Nominated Supervisor was employed to manage the Service independently with minimal supervision from management. The Provider also submits that no concerns were raised when [REDACTED] met with the Nominated Supervisor on 5 July 2021 and 27 October 2021. The Provider also states that COVID-19 border closures created obstacles to face-to-face management. It was further submitted that support needs of the Service were assessed in late 2021 and an advertisement placed for a second Area Manager, and that monthly audits were put in place to improve monitoring.
24. The Authority agrees that the Provider has taken significant steps to address issues at the Service with closer involvement of management staff. However, evidence obtained shows that there were, at minimum, seven children with additional needs, possibly as many as twelve, in the Adventurers and Explorers rooms. Some children experienced significant disability, requiring 1:1 support at times. It is the Provider's responsibility to ensure that the Service has the capacity to meet the developmental needs of all children enrolled at the service. All children must have adequate supervision at all times, and this supervision is a key precaution to protect children from harm and hazards.
25. The Regulatory Authority agrees that the impact of COVID-19 has been an extremely challenging time for all involved in the ECEC sector. The impact of COVID-19 does not set aside the Provider's responsibility to ensure that any child enrolled in a Service will be appropriately supported based on their individual needs, which may change over time. The evidence obtained by the Authority shows that educators were overwhelmed and

stressed, needed more staff to educate and care for the specific children in their rooms. Staff were not adequately supported in their roles. Educators are a Provider's most important asset in providing quality education and care for children.

26. In relation to substantiated contraventions of section 173(2)(b) of the *Law*, the Authority is satisfied that:
- a. the Provider failed to notify the Regulatory Authority that [REDACTED] [REDACTED] had ceased to be employed or engaged by the Service within the prescribed time of seven days.
 - b. Admissions noted in the Provider's response to the Notice of acknowledged non-compliance with section 173(2)(b) *Law* further supports the Authority's substantiation of non-compliance.
27. Considering the evidence obtained and the level of seriousness of the contraventions, I have decided that that issuing a Compliance Notice is appropriate and in the best interests of children. In making this decision, I take into consideration the Service's previous compliance history.
28. The Authority is empowered to issue a compliance notice under section 177 of the *Law*:

Section 177 of the *Law*– Compliance notices

- (1) This section applies if the Regulatory Authority is satisfied that an education and care service is not complying with any provision of this *Law*.
 - (2) The Regulatory Authority may give the approved provider a notice (a ***compliance notice***) requiring the approved provider to take the steps specified in the notice to comply with that provision.
 - (3) An approved provider must comply with a compliance notice under subsection (2) within the period (being not less than 14 days) specified in the notice.
Penalty: \$6 000, in the case of an individual
\$30 000, in any other case.
29. The Compliance Notice is Attachment C to this decision letter. You are required to take steps directed in the Notice to comply with the relevant provisions.
30. You must produce evidence of the steps required by **the times indicated for each step within the Notice at Attachment C.**

Review Rights

31. A decision to issue a compliance notice is a ***reviewable decision*** as defined in Section 190 of the *Law*. Under section 191 of the *Law*, you may apply for an internal review of this decision. Any application must be lodged within 14 days after you are notified of the decision (or, if not notified, within 14 days after becoming aware of the decision).

32. An application for review may be made by completing the form AR01 Application for Internal Review of Reviewable Decision which can be obtained from the ACECQA website.

Legislation

33. The Education and Care Services National Law applies to you as an approved provider and any service you operate. 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>.
34. 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>
35. Should you have any questions about this Decision or Compliance Notice please contact Authorised Officer 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
ACT Education Directorate

27 June 2022