



[REDACTED]
Nominated Supervisor

RE: Papilio Early Learning Barton

Email: [REDACTED]

Dear [REDACTED],

Show Cause Notice – Potential Compliance Action

1. I am a delegate of the ACT Regulatory Authority (the Authority), also known as Children's Education and Care Assurance (CECA).
2. As you are aware, 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* (the *Law*). One of the Authority's roles is to investigate suspected offences under the *Law*.
3. The Authority is currently investigating an allegation which engages suspected offences at Papilio Early Learning Barton SE-00009874 (the Service) operated by Affinity Education Group Limited PR-400001112 (the Provider). Web addresses to the *Law* and the *Education and Care Services National Regulations* (the *Regulations*) are provided for your convenience at the end of this notice.
4. Authorised Officers have now finished obtaining evidence from other sources (unless further lines of enquiry emerge) and the Authority has determined that there is sufficient evidence to support a case for you to answer regarding a suspected offence under the *Law*.
5. However, the Authority's investigation is not complete until you have had an opportunity to respond to the allegation and evidence obtained by the Authority. This is the reason for sending this Show Cause Notice (Notice) to you, as the Nominated Supervisor of the Service. Detailed instructions of how to respond appear at the end of this Notice.
6. If substantiated, the allegations may constitute an offence under section 167 of the *Law*. If, after considering all available evidence, the Authority finds any offence is substantiated (or any combination of them), it will need to consider whether compliance action is required.
7. Where offences under the *Law* are substantiated, the Authority considers many factors when determining appropriate action, the focus being on ensuring future compliance and improved outcomes for children, rather than punishment. Further details regarding potential compliance actions appear at the end of this Notice.

Grounds for issuing Show Cause Notice

8. Evidence obtained during the investigation to date supports offences under the *Law* within the following areas: Protection from harms and hazards.

Facts

9. On 28 August 2023, the Authority received a complaint from a member of the public alleging that an educator at the Service was intoxicated while working with children on 28 August 2023. Refer Attachment A.
10. 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, which engaged suspected offences under section 167(2) of the Law.

Grounds – Protection from harm.

Allegation One

11. 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] to work directly with children while intoxicated by alcohol, engaging a contravention of section 167(2) of the Law.

Legislation Relevant to the Allegation One

12. The following provision of the Law is relevant to the Allegation:

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

Evidence relevant to the Allegation

13. On 25 October 2023 documents were furnished by the Provider, pursuant to a Notice issued under section 215 of the Law (215 Notice), issued on 18 October 2023 and included the following relevant documents:
 - a) Staff Training & Induction Records
 - b) Record of Responsible Person
 - c) Nominated Supervisor Records
 - d) Child Attendance Records

Refer Attachment B - for relevant documents.

- [REDACTED]
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[REDACTED]

19. Relevant extracts from Witness B's statement include:

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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■ [REDACTED]
[REDACTED]

■ [REDACTED]
[REDACTED]
[REDACTED]

■ [REDACTED]

Contraventions supported by evidence.

20. Evidence gathered appears to support that you, as Nominated Supervisor at the Service, did not take reasonable precautions to ensure that children were not being educated and cared for by an intoxicated educator, raising risk of harm and hazard, and giving rise to a contravention of 167(2) of the *Law*.
21. Ensuring that no child is being cared for by an educator who is intoxicated by alcohol or drugs is viewed as being a reasonable precaution to take to protect children from harm likely to cause injury.

Fitness and Propriety as Nominated Supervisor

22. *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.
23. 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.
24. 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*.
25. 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).
26. 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.

27. During the investigation, there is no apparent evidence identifying that you had ensured reasonable precaution to take to ensure children are protected from harm and any hazard, likely to cause injury by allowing an intoxicated person to work directly with children.
28. This evidence raises a concern about your ability to manage and supervise an education and care service.
29. The purpose of this Show Cause Notice is to provide you with an opportunity to respond to the evidence outlined above, and to specifically address the point of your fitness and propriety to be a nominated supervisor.

Potential Compliance Action

30. The Authority reiterates that no decision has been made at this time – this letter is a step in the investigation process. However, procedural fairness requires that the Authority take this opportunity to advise you of potential compliance actions, if any offences are substantiated and/or the Authority finds that you do not meet the fitness and propriety requirements to be a nominated supervisor. Potential compliance actions are under Part 7 of the *Law*, and include:
 - a. Non-statutory action such as a formal caution letter;
 - b. Enforceable undertaking under section 179A of the *Law*; or
 - c. Prohibition from acting in a role as Nominated Supervisor.
31. Relevant legislation for enforceable undertakings and partial prohibition appears below.
32. An enforceable undertaking may include requirements such as undergoing additional training, having a mentor, advising the Authority of any proposed change in employment.
33. A partial prohibition only applies to the role of nominated supervisor and not to the education and care sector as a whole.
34. It may prevent you from being in a role as nominated supervisor if the Authority finds that you are not fit and proper, or it may place conditions on you being in such a role if you are fit and proper but do not possess all the required skills and knowledge.
35. It is not always permanent, and the partial prohibition must be cancelled by the Authority if it is satisfied that there is not a sufficient reason for the it to remain in force.

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.

Section 182(3) - Grounds for issuing a prohibition notice

The Regulatory Authority may give a prohibition notice to a person to –

- (a) Prohibit the person from being 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.

Right of response

- 36. As mentioned previously, this letter is your opportunity to respond to the allegations and evidence set out in this Notice, in addition to the question of fitness and propriety. You may, within 14 days of receiving this Notice, make a written submission for the Authority's consideration in deciding if any offences are substantiated and, if so, whether any compliance action should be taken.
- 37. At Attachment C to this Notice is a '4 Step Guide to Responding to a Show Cause Notice' to assist in the development of your submission. Please direct your written submission via email to [REDACTED] or by post to:

Children's Education and Care Assurance (CECA)
Education Directorate

Attention: Nicole Withers
GPO Box 158, Canberra ACT 2601.

Caution

38. 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*.
39. The *Law* provides, at section 297, for the protection of persons who make protected disclosures from serious detrimental action against reprisal.
40. 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.
41. The *Law* applies to you as a nominated supervisor and to any service you are engaged at. 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>.
42. 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>
43. Should you have any questions about this Show Cause Notice please contact Senior Investigator Nicole Withers at nicole.withers@act.gov.au.

Yours sincerely



Janine Fairburn
Assistant Director
Children's Education and Care Assurance
Education and Care, Regulation and Support

24 January 2024