

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

Email: [REDACTED] [@affinityeducation.com.au](mailto:[REDACTED]@affinityeducation.com.au)

Dear Ms [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. 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*.
2. As you may be aware, the Authority is investigating suspected offences under the *Education and Care Services National Law (ACT) (the Law)* relating to the operation of Papilio Early Learning Yarralumla SE-00009805 (the Service), operated by Affinity Education Group Limited, PR-40001112 (the Provider).
3. 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. The Authority has determined that there is sufficient evidence to support a case to answer for you, as the Nominated Supervisor, regarding suspected offences under the *Law*. However, the Authority’s final determinations will not be made until the Provider has had an opportunity to respond to the allegations and evidence obtained by the Authority.
5. This is the reason for sending this Show Cause Notice (the Notice) to you. Detailed instructions of how to respond appear at the end of this Notice.
6. The Authority is considering compliance action based on suspected contraventions of the *Law* and *Regulations*. If substantiated, the allegations may constitute offences under sections 165(2), 167(2) and 169(3) of the *Law* (or any combination of them).
7. If, after considering all available evidence, the Authority finds any offences are substantiated on the balance of probabilities, it will need to consider whether compliance action is required. All such determinations are made via the Authority’s case management processes, involving a dedicated case management committee.
8. If any 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. Potential compliance actions appear at the end of this Notice.

Grounds for issuing Show Cause Notice

9. The evidence obtained during the investigation support offences under the *Law* within the following areas:
 - a) Failure to ensure all children are adequately supervised at all times;
 - b) Failure to protect children by taking reasonable precautions; and
 - c) Failure to notify certain information to the Authority.

Background to Investigation.

10. On 17 May 2022, the Authority received a direct complaint relating to the operation of the Service, and in particular, allegations of inadequate staffing arrangements and inadequate supervision.
11. Specifically, it was alleged that between 29 November 2021 and 21 December 2021, the Service was not resourced appropriately to support adequate supervision and guide the challenging needs of children's behaviours in the preschool rooms.
12. Furthermore, it was alleged that educators were not provided adequate training and supports to guide specific children's behaviours which contributed to children and educators being placed in risk situations resulting in injury.
13. Due to the risk of children being exposed to harms and hazards if not adequately supervised, or appropriate supports in place to guide behaviour, the Authority determined to investigate.

Allegations:

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*.

Evidence Relevant to the Allegation One and Allegation Two

14. On 16 June 2022, a notice allowable under section 215 of the *Law* (215 Notice) was sent to the Provider requiring information and documentation to be forwarded to the Authority. Refer Attachment A.
15. Some required information was forwarded on 30 June 2022; however, it was noted that the 215 Notice had not been fully complied with. Further correspondence was sent to address this on 30 June 2022, 29 July 2022, and 15 August 2022. A full response complying with the 215 Notice was received by 17 August 2022. Refer copies of relevant correspondence at Attachment B.
16. Utilising child attendance records and working directly with children records, submitted by the Provider in response to the 215 Notice, the Authority undertook an analysis of staffing arrangements between 29 November 2021 and 21 December 2021. Refer Analysis at Attachment C.
17. During the investigation, the Authority obtained numerous witness statements, relevant extracts from which appear below, with personal information redacted where appropriate. Please note that witness statements were obtained utilising powers under section 215 of the *Law*, imposing obligations to attend and provide evidence before the Authority.
18. Relevant extract from Witness A's statement includes the following:

[REDACTED]

[REDACTED]

20. Excerpts from Witness C's evidence include:

[REDACTED]

[REDACTED]

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.

Contravention supported by Allegation One and Two

- 23. Evidence gathered appears to support a contravention of section 165(2) of the *Law*, engaging a further contravention of section 167(2) of said *Law*.
- 24. Evidence gathered appears to support a contravention of section 169(3) of the *Law*, supported by breaches of Regulation 123 and Regulation 122.

Evidence Relevant to the Allegation Three

- 25. In response to the 215 Notice, on 5 July 2022, the Provider submitted behaviour support plans for two children, known to be [REDACTED] and [REDACTED] Refer copies of plans submitted at Attachment D.
- 26. During the investigation, the Authority obtained numerous witness statements, relevant extracts from which appear below, with personal information redacted where appropriate. Please note that witness statements were obtained utilising powers under section 215 of the *Law*, imposing obligations to attend and provide evidence before the Authority.
- 27. Relevant extract from Witness A's statement includes the following:

[REDACTED]

[REDACTED]

28. Excerpts from Witness B's statement include:

[REDACTED]

29. Excerpts from Witness C's evidence include:

[REDACTED]

[REDACTED]

30. Excerpts from Witness D's evidence include:

[REDACTED]

[REDACTED]

31. Excerpts from Witness E's evidence include:

[REDACTED]

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.

Contravention supported by Allegation Three

32. Evidence gathered appears to support a contravention of section 167(2) of the *Law*.

Fitness and Propriety as Nominated Supervisor

33. 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.
34. 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.
35. Nominated supervisors have extensive responsibilities under the *Law*, relating to the broad areas of supervision, staffing, protection from harm and hazards, and educational programs. Specific obligations are contained in both the *Law* and the *Regulations*.
36. 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), and also possess the ability to manage educators and any other staff, service premises and relationships with families.
37. As nominated supervisor during the transition to the current Provider, you were also responsible for the resourcing requirements of the Service to always facilitate the provision of adequate supervision to all children, and support the emotional, developmental and psychological needs of children including those with challenging behaviours.
38. This evidence raises a concern about your ability to manage and supervise an education and care service.
39. 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

40. 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.
41. Relevant legislation for enforceable undertakings and partial prohibition appears below.
42. An enforceable undertaking may include requirements such as undergoing additional training, having a mentor, advising the Authority of any proposed change in employment.

43. A partial prohibition only applies to the role of nominated supervisor within the education and care sector. 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. 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

44. 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.
45. At Attachment E 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 vittorio.colosimo@act.gov.au or by post to

Children's Education and Care Assurance -
Attention Vittorio Colosimo
GPO Box 158, Canberra ACT 2601.

Caution

46. 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*.
47. The *Law* provides, at section 297, for the protection of persons who make protected disclosures from serious detrimental action against reprisal.
48. 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.
49. The *Law* applies to you as a Nominated Supervisor. 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>.
50. 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>
51. Should you have any questions about this Show Cause Notice please contact Senior Investigator Vittorio Colosimo, via email at vittorio.colosimo@act.gov.au.

Yours sincerely



Jo Williams
Director
Children's Education and Care Assurance
Education and Care Regulation and Support
ACT Education Directorate
21 November 2022